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When Migration Policy Becomes Persecution: An Analysis of ICE Practices and the Trump Administration's Migration Policies in Light of Human Rights and Crimes Against Humanity.

Quando a Política Migratória se Torna Perseguição: Uma Análise das Práticas do ICE e das Políticas Migratórias da Administração Trump à Luz dos Direitos Humanos e dos Crimes contra a Humanidade.

Cuando la política migratoria se convierte en persecución: un análisis de las prácticas de ICE y de las políticas migratorias de la administración Trump a la luz de los derechos humanos y de los crímenes contra la humanidad.

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Abstract: This article investigates the extent to which migration policy acts, especially those carried out by U.S. Immigration and Customs Enforcement (ICE) during the Trump administration (2017–2021), may exceed the legitimate scope of state sovereignty and amount to human rights violations, xenophobic practices, or, in an extreme scenario, crimes against humanity. The objective is to analyze, as a case study, detention and removal practices, operations in communities and workplaces, and impacts related to family separation, combining institutional evidence with legal and constitutional parameters. A qualitative and documentary methodology is adopted, with triangulation among normative and institutional sources (Homeland Security Act; DHS/ICE/OIG), aggregate data on custody and removals, and an analysis of precedents in the common law system, with emphasis on the ratio decidendi of *Trump v. Hawaii*, *Zadvydas v. Davis*, *Boumediene v. Bush*, and *INS v. Chadha*. The theoretical framework integrates the limits of sovereignty established in the UN Charter, the Rome Statute (Article 7), and the concepts of persecution, discrimination, and xenophobia as verifiable analytical hypotheses. The results indicate a persistent tension between deference to the Executive and due process safeguards, with signs of risks of structural discrimination and weakening judicial oversight in a context of intensified migration control measures. It concludes that the characterization of crimes against humanity should not be presumed. However, the empirical and legal evidence support the need for rigorous scrutiny and a reasoned assessment of potentially relevant violations and elements of persecution **in cases of severe deprivation of rights based on group identity.**

Keywords: migration policy; human rights; crimes against humanity; xenophobia; common law.

1. Introduction

Contemporary migration policy has become one of the most sensitive fields of tension between state sovereignty—understood as the authority to define criteria for the entry, stay, and removal of non-nationals—and the international human rights protection framework, which imposes substantive and procedural limits on the exercise of that authority. This tension intensifies when migration control measures take on an expansive character and produce significant effects on freedom, family unity, equality, and access to judicial protection, shifting the debate from a strictly administrative level to the core of the rule of law.

In the United States, particularly during the Donald Trump administration (2017–2021), policies formulated within the Department of Homeland Security (DHS) and enforced by U.S.

Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

Immigration and Customs Enforcement (ICE) intensified legal and political controversies over the limits of state power in migration matters. Measures associated with increased detentions, intensified deportations, family separation, and expanded immigration enforcement operations—including in communities and workplaces—began to be discussed not only as public policy choices but also as practices potentially in tension with fundamental guarantees and international normative standards.

Within this scenario, the following research problem is formulated: to what extent can acts of migration policy, especially those enforced by ICE during the Trump administration, exceed the legitimate scope of state sovereignty and constitute violations of human rights, xenophobic practices, or, in a limiting hypothesis, crimes against humanity?

Investigating this question requires attention to the specifics of the U.S. legal system, structured within the common law tradition, in which *stare decisis* accords centrality to precedent and, consequently, to the Supreme Court's role in defining the limits of executive power, including in migration matters. In this arrangement, case law does not operate merely as an illustration of applicable law but as a decisive criterion for interpretation and institutional constraint, which is why precedents must be part of the study's analytical framework.

In light of this, the objective of this article is to examine migration enforcement practices from 2017 to 2021 as a case study, drawing on international law, international criminal law, and comparative constitutional law. To this end, a qualitative and documentary approach is adopted, based on the analysis of normative and institutional sources and the systematic review of relevant Supreme Court precedents, to assess the domestic and international legal limits governing state action. The relevance of this study lies in offering an analytical framework capable of rigorously distinguishing migration measures grounded in objective legal criteria from practices that may be incompatible with the protection of fundamental rights, the principle of non-discrimination, and, in theory, with categories of international criminal law that require careful and well-substantiated evaluation.

2. Theoretical Framework

2.1 Limits of State Sovereignty

State sovereignty, traditionally understood as supreme authority within a given territory, is not exercised in a normative vacuum in contemporary international law. The post-World War II legal order, institutionalized through the Charter of the United Nations, has come to bind the



Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

exercise of state power to minimum standards of international coexistence and the protection of the human person, notably through the affirmation of purposes related to cooperation, peace, and the promotion of respect for fundamental rights. In this sense, sovereignty remains a basis of competence for regulating migration flows, but it no longer operates as a clause of immunity. Migration policies constitute a legitimate expression of state power; however, they must be conceived and implemented within external legal limits, especially those derived from international human rights obligations, which prohibit discrimination, restrict arbitrariness, and require procedural safeguards that protect human dignity.

2.2 Crimes Against Humanity (Rome Statute, Art. 7)

The Rome Statute defines crimes against humanity as specific acts committed within the context of a widespread or systematic attack directed against a civilian population. The structure of Article 7 is decisive because it shifts the focus from isolated unlawfulness to a contextual pattern, requiring a connection between individual acts and a broader framework of violence or institutionalized oppression. Among the acts relevant to the present debate are persecution on political, racial, or national grounds, deportation or forcible transfer of population, and imprisonment or other severe deprivation of liberty in violation of fundamental rules.

The characterization of this crime, therefore, requires not only the material occurrence of certain acts, but also contextual and subjective elements, with particular emphasis on intent and on the systematic or widespread nature of the attack. These criteria function as doctrinal filters that prevent the automatic equating of restrictive state policies with international criminality, requiring the demonstration of a pattern, a direction against a civilian population, and a link between the conduct and an underlying policy or practice.

2.3 Persecution, Discrimination, and Xenophobia

A conceptual analysis of persecution, discrimination, and xenophobia is essential to assess when migration measures move beyond the realm of administrative choices and begin to produce deprivation of rights based on group identity.

Persecution, in an international legal sense, corresponds to the severe deprivation of fundamental rights, contrary to international law, carried out on discriminatory grounds linked to the identity of the targeted group. This identity element is central because it distinguishes persecution from generalized, non-targeted violations, requiring a nexus between the conduct and

Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

the individual's real or perceived membership in a protected group. Discrimination, in turn, refers to unjustified unequal treatment, whether by purpose or effect, when it establishes normative or practical hierarchies among individuals or groups without an objective and proportional basis. Xenophobia, although often described as a social phenomenon, becomes legally relevant when it translates into state practices of exclusion or restriction of rights based on foreign status, nationality, or ethnic origin, functioning as a vector of selectivity and institutional stigmatization.

Taken together, these concepts make it possible to construct an analytical framework to distinguish migration policies grounded in verifiable and non-arbitrary criteria from practices that, by operating based on identity and producing severe deprivation of rights, approach the realm of human rights violations and, in a limiting hypothesis, persecution as a form of crime against humanity.

2.4 Multilateralism and International Responsibility

Multilateralism plays a structuring role by providing normative and institutional mechanisms to contain state abuses, especially when human rights violations take on a repeated or structural character. International responsibility arises from the breach of obligations assumed by the State and does not conceptually depend on the conduct also being classified as an international crime.

In other words, public policies may generate international responsibility for wrongful acts, including when they constitute systematic violations of rights, even if they do not reach the threshold of criminal typification established in the Rome Statute. This distinction is methodologically relevant: it preserves analytical precision by separating the regime of state responsibility—focused on unlawfulness and reparation—from the international criminal regime—focused on individual attribution and conditioned upon stricter requirements of context, gravity, and subjective element. Thus, multilateralism operates as a normative horizon that limits sovereignty while also clarifying the conditions under which migration policies may be legally scrutinized at the international level.

3. Methodology

This study adopts a qualitative and documentary research approach, with a case study design centered on migration enforcement practices within the DHS/ICE during the Trump administration (2017–2021). The methodological strategy combines legal-normative analysis, with emphasis on international law and constitutional law, institutional analysis focused on administrative structure and competences, and jurisprudential analysis guided by precedents from the common law system



as an interpretative criterion.

3.1 Sources and Corpus

The documentary corpus consists of an institutional and normative basis, encompassing the Homeland Security Act of 2002 and official DHS/ICE documents that describe the agency's structure, mission, and routines. It also includes an institutional empirical basis comprising ICE public reports and statistics, especially ERO reports, as well as institutional oversight documents, such as those issued by the DHS OIG, to identify patterns of custody, removal, and governance failures relevant to rights. Finally, it incorporates a jurisprudential basis made up of selected Supreme Court precedents, specifically *Trump v. Hawaii*, *Zadvydas v. Davis*, *Boumediene v. Bush*, and *INS v. Chadha*, and their holdings, understood as *ratio decidendi*, used as parameters to test constitutional limits, the scope of deference to the Executive, and the requirements of judicial review.

3.2 Analytical Procedures

The analysis is carried out in three stages. The first consists of normative and conceptual reconstruction through the operationalization of sovereignty, discrimination, xenophobia, and crimes against humanity, with an emphasis on persecution under Article 7 of the Rome Statute as an analytical category. The second stage corresponds to empirical-institutional mapping, identifying recurring practices, such as detention, removal, family separation, and operations, based on official and oversight documents, with attention to scale, repetition, and safeguard mechanisms. The third stage involves legal testing through precedent, by confronting the described practices with legal criteria drawn from the Supreme Court's holdings, distinguishing *ratio decidendi* from *obiter dictum*, to avoid overly expansive inferences and preserve interpretative rigor.

3.3 Delimitations and Limitations of the Study

The following limitations should be understood as necessary delimitations and methodological choices compatible with a qualitative case study, rather than as weaknesses of the argument. The geographic and institutional scope, restricted to the United States and the DHS/ICE axis, allows for greater depth regarding common law, separation of powers, and enforcement routines, but limits the generalization of findings to other legal-political contexts; for this reason,

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

the results should be read as situated inferences, dependent on the U.S. constitutional and bureaucratic framework.

The absence of comparative analysis, by not contrasting migration policies with those of other countries, means that the study does not aim to establish rankings, global typologies, or “best practices,” which limits its ability to distinguish what is specific to the U.S. model—such as the dynamics of the plenary power doctrine and the federal structure—from what may represent a broader trend in migration securitization policies. This is compounded by limitations in the available empirical data and granularity: public statistics, such as removals, ADP, and aggregated indicators, as well as institutional reports, provide evidence of scale and patterns but do not always permit fine-grained inferences about causality, selectivity, and disaggregated impacts across groups. Moreover, critical information—such as operational microdata, internal screening criteria, or standardized metrics on detention duration by profile—may be inaccessible, incomplete, or inconsistent over time.

Additionally, there is reliance on documentary and institutional sources. The choice to use official documents, such as those from DHS/ICE/OIG and judicial decisions, enhances traceability and verifiability, but may capture reality through specific administrative lenses. As a result, informal practices, lived experiences of affected communities, and local implementation dynamics may not be fully reflected, particularly in cases of underreporting, data gaps, or discrepancies between declared policy and actual practice.

Finally, the interpretation of judicial precedents involves its own limitations. While precedent-based analysis is indispensable in common law systems, it carries manageable risks, such as extrapolating the scope of a holding to distinct factual contexts, treating dicta as binding rules, overlooking variations among federal circuits and subsequent jurisprudential developments, or underestimating the role of statutory interpretation and administrative deference in migration matters. To mitigate these risks, this article prioritizes *ratio decidendi*. It situates each precedent within its proper domain of application, distinguishing between border admission and interior enforcement and detention, as well as between judicial review and separation of powers.

Regarding the effects of these delimitations on the results, these choices collectively mean that the findings are more robust in identifying normative and constitutional tensions and in testing, at a plausibility level, hypotheses of structural discrimination based on documented patterns. However, by design, they are less suited to establishing strong causal links between rhetoric and micro-level operational decisions or to sustaining international criminal qualifications without broader evidentiary investigation.

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

For future research, I recommend conducting comparative studies—for example, among the United States, the European Union, Canada, and Australia—on the limits of sovereignty and patterns of detention and removal. It is also recommended to deepen empirical analysis using more robust data, such as microdata, additional audits, interviews, and mixed methods, to test for selectivity and disaggregated impacts. Finally, expanding the jurisprudential corpus to include decisions from Courts of Appeals and District Courts on detention, due process, profiling, family separation, and access to habeas corpus would help map variations and trends in judicial oversight of enforcement.

4. Results and Discussion

This section articulates institutional and empirical evidence, drawn from reports, public statistics, and oversight documents, with the normative and jurisprudential parameters of the U.S. legal system discussed in the previous sections. The purpose is not to presume the international criminal qualification of migration policies, but rather to test hypotheses regarding the legal limits of state action: to what extent certain administrative practices may violate rights, whether there are indications of structural discrimination, including under the hypothesis of legally operative xenophobia, and whether such patterns could, in theory, approximate contextual requirements associated with crimes against humanity, notably widespreadness, systematicity, and gravity.

4.1 Institutional Arrangement and Operational Capacities: What the Data Suggest

Within the DHS, ICE operates primarily through Enforcement and Removal Operations (ERO), which is responsible for administrative detentions and removals. Public data from the period provides information on scale and custody capacity as relevant analytical variables. In terms of removal volume, official information released by ERO indicates approximately 256,086 removals in fiscal year (FY) 2018 and 267,258 removals in fiscal year (FY) 2019. Within the same timeframe, custody capacity increased: ERO reported an Average Daily Population (ADP) of 50,165 individuals in fiscal year (FY) 2019, reflecting growth over the previous year.

These figures are relevant for two reasons. First, they signal the administrative density of migration policy enforcement. Second, they serve as a basis for evaluating recurring patterns, the scale of measures, and potential externalities, such as pressure on due process, access to legal defense, and conditions of custody. From an analytical standpoint, scale is not synonymous with unlawfulness. Nevertheless, it is pertinent for testing hypotheses of systematicity, since policies and routines that are replicable and sustained by budgetary support, targets, and chains of command may

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

produce structural effects, including discriminatory ones, when selection criteria and safeguard mechanisms prove insufficient.

4.2 Immigration Detention: Between Administration and Deprivation of Liberty (*Zadvydas v. Davis*)

Immigration detention is formally administrative but materially constitutes a deprivation of liberty, thereby shifting the debate to the core of due process. The precedent *Zadvydas v. Davis* is decisive because it limits post-final removal-order detention by requiring a realistic prospect of removal and treating six months as a presumptively reasonable period.

Relevant empirical evidence includes the increase in ADP—such as the figure of 50,165 in fiscal year (FY) 2019—and the intensification of control measures, which suggest systemic pressure on the capacity to individualize decisions and ensure effective review.

From a legal-empirical perspective, three dimensions become examinable: the duration and reviewability of custody, in order to assess the extent to which increased detention correlates with prolonged custody and fragile administrative and judicial review mechanisms; the rationality of individualized risk, to determine whether custody results from individualized assessments—such as risk of flight or danger—or begins to function as a tool of general deterrence and incapacitation; and the distribution of impacts, seeking to identify whether certain communities or nationalities are more frequently subjected to prolonged detention or harsher conditions.

From a legal standpoint, the hypothesis of rights violations is strengthened when, in a large-scale context, safeguards are eroded, including the absence of robust individualized assessment, difficulties in accessing justice, and barriers to effective contestation. Even without asserting an international crime, this set of factors supports the argument that certain administrative practices may exceed the legitimate application of immigration law and approach arbitrary deprivation of liberty.

4.3 Deportations and Removals: Objective Criteria versus Structural Selectivity (*Trump v. Hawaii*)

Removals in fiscal years (FY) 2018 and 2019—approximately 256,000 and 267,000, respectively—demonstrate administrative intensity. In terms of common law and deference, *Trump v. Hawaii* is often invoked to support a broad margin of executive authority in matters of admission and security. However, the scope of this reasoning is limited when policy shifts from entry control

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

to internal procedures that affect liberty, family unity, and access to the judiciary.

The legal-empirical analysis must distinguish between two scenarios. On the one hand, there are legitimate objective criteria on which removals are based—such as a final order—and on reasoned decisions, accompanied by minimum guarantees and a real possibility of contestation. On the other hand, there is problematic structural selectivity, in which decisions to approach, detain, and remove are heavily mediated by identity proxies, such as language, appearance, and presumed origin, or in which safeguards are applied unevenly, producing disproportionate effects across groups.

Scale thus functions as a risk amplifier. When hundreds of thousands of decisions are processed under intensified conditions, small asymmetries in screening may translate into patterns of impact and, in some cases, structural discrimination.

4.4 Family Separation: Institutional Evidence of Failures and Severity of Impact

Family separation is empirically relevant for its simultaneous high severity of harm, direct impact on children and family unity, predictable effects, and institutionally documented governance failures. Oversight reports from DHS have indicated separations, systemic difficulties in tracking, and limitations in validating the total number of separations and reunifications, as well as records of separations at ports of entry under circumstances not aligned with the publicly stated restricted justifications, revealing inconsistencies between institutional discourse and administrative practice.

Analytically, family separation is significant both for the gravity of its impact on fundamental rights and for its institutional character. It constitutes a measure with the potential to severely restrict family life, psychological integrity, and procedural guarantees, especially when reunification occurs incompletely, belatedly, or without adequate structure. Moreover, the recurrence of the pattern and the presence of failures in record-keeping, tracking, and coordination reinforce its dimension of institutional systematicity.

The recurrence of failures in the mechanisms of record-keeping, tracking, and coordination does not appear to be an isolated event but rather an indication of structural dysfunction. In this context, the predictability of effects assumes decisive analytical importance: even if separation is not formally stated as a policy objective, the repetition of its outcomes and the foreseeability of its impacts allow for questioning whether serious institutional negligence exists, particularly when effective corrective measures are absent.

This predictability, combined with the repetition of identified patterns, challenges the distinction between collateral effects and structural consequences of state action. When repeated

Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

practices consistently result in the deprivation of rights directed at an identifiable group, space emerges for a cautious analysis in light of the category of persecution under Article 7 of the Rome Statute. Without asserting the existence of a crime against humanity, the combination of gravity, repetition, and potentially discriminatory targeting allows, at least on an analytical level, for examining the compatibility of such practices with international protection standards—especially when the identity of the affected group becomes a relevant factor in the distribution of impacts.

On the jurisprudential axis, the issue is directly connected to the requirement of effective judicial review. The opacity resulting from tracking failures and inconsistencies in institutional records undermines adequate judicial oversight, weakening central instruments such as habeas corpus and due process guarantees.

At this point, reference to *Boumediene v. Bush* should be understood not by factual similarity between cases, but by the structural function of habeas corpus as a mechanism of judicial control over state custody. In that decision, the Supreme Court held that individuals under the effective control of the State have the right to access the judiciary to challenge the legality of their detention, and that formal, geographic, or administrative obstacles cannot restrict such access.

The connection to family separation practices emerges when one observes that tracking failures, inconsistencies in records, and institutional fragmentation hinder the precise identification of individuals' locations and legal status while in state custody. Under such conditions, the exercise of judicial review becomes concretely limited—not by formal prohibition, but by the practical impossibility of accessing the information necessary to bring a claim before the courts.

Thus, the issue does not lie in the suspension of habeas corpus, but in the erosion of its effectiveness. When it is not possible to clearly determine where an individual is, under whose authority they are held, or what measures have been taken regarding their custody, the legal instrument loses functionality. This reduces the capacity for judicial review and expands the scope of state action without adequate oversight.

Accordingly, in light of *Boumediene v. Bush*, the institutional opacity associated with family separation practices may be understood as a factor that weakens judicial control. The precedent establishes that the State cannot structure its actions in a way that renders access to the judiciary unfeasible, even indirectly. Therefore, difficulties in tracking and a lack of transparency are not merely administrative failures but relevant factors in assessing the sufficiency of due process guarantees and the compatibility of the practices analyzed with constitutional standards.

4.5 ICE Operations in Workplaces and Communities: Examples, Effects, and Inferences

Empirical literature and widely documented reports indicate that ICE operations occurred in community settings and workplaces, with aggregated impacts on family networks and local economies. For this study, these episodes are relevant because they allow for the identification of operational regularities that, when reproduced, may generate disproportionate and potentially discriminatory effects.

During the period, large-scale operations in commercial establishments are frequently mentioned, including actions involving dozens of stores from the same chain, with arrests and labor audits. There are also records of operations in industrial or food-processing plants, with hundreds of detentions in a single event, resulting in children temporarily left without caregivers and the mobilization of local assistance networks. In addition, operations in specific communities are documented, with concentrated impacts on predominant national or ethnic groups in those localities.

These episodes allow for the examination of three analytical dimensions: generalization and repetition, when operations follow a replicable design with a similar logic of approach, screening, and custody, giving the policy contours of operational systematicity; disproportionate effect, since interventions in sectors and neighborhoods with a specific migrant composition may predictably produce greater impact on certain groups—this does not automatically equate to discrimination, but requires demonstrating that the criteria used are objective and do not function as identity proxies; and the quality of safeguards, as severe community impacts—including family separations, widespread fear, and reduced access to public services—operate as markers of potential indirect rights violations, particularly when associated with obstacles to effective review.

4.5.1 Systematicity, Widespreadness, and Gravity: How Data Enters the Legal Test

The relationship between empirical data and criminal law criteria must be approached with caution. Still, numbers and examples allow for a structured assessment. Systematicity can be examined through the growth of custody, the high annual volume of removals, and the replication of operations across multiple contexts—elements that suggest a consistent administrative pattern. Widespreadness is assessed by the scale of annual removals and the execution of large-impact operations, which expand the measures' social reach. Gravity can be measured by the combination of prolonged detention, family separation, and barriers to judicial review—factors that increase the risk of rights violations.

These three criteria are not, by themselves, sufficient to establish crimes against humanity. However, they are useful for empirically situating the debate. The greater the scale and the more repeated the patterns, the greater the need for safeguards and the greater the relevance of examining selectivity and intent.

4.5.2 Integration with Common Law: Why *Chadha* and *Boumediene* Matter in Empirical Analysis

Empirical evidence also informs the institutional dimension. *INS v. Chadha* reinforces that policies affecting rights require a legal basis and constitutionally adequate procedures. Systemic failures in tracking and governance, such as those identified in audits, heighten concerns about accountability. *Boumediene v. Bush* serves as a reminder that legality in constitutional systems requires a real possibility of challenge and review. This element becomes critical when the administrative scale tends to produce opacity and asymmetries in access.

4.5.3 Subjective Element as a Criminal-Law Hypothesis: Discriminatory Intent, Group Identity, and Evidentiary Nexus

The category of xenophobia is often treated as a sociological phenomenon, associated with hostility toward foreigners. However, in International Criminal Law, its relevance depends on a juridical-dogmatic reconstruction. Xenophobia becomes relevant insofar as it may operate as discriminatory intent and as a criterion for selection based on group identity, contributing to the characterization of persecution as a crime against humanity under Article 7 of the Rome Statute, without methodologically presuming the existence of the crime.

(a) Subjective Element in Crimes Against Humanity and the Specificity of Persecution

Under the Rome Statute, crimes against humanity require that the perpetrator act with knowledge of the attack—that is, with awareness that their conduct is part of a widespread or systematic attack against a civilian population, as established in Article 7. In cases of persecution, as provided for in Article 7, typification requires an additional element: the intentional and severe deprivation of fundamental rights, contrary to international law, based on group identity.

The subjective element thus requires, simultaneously, discriminatory intent and an identity nexus. Discriminatory intent, as a directed *mens rea*, presupposes that the severe deprivation of rights was imposed because of—or at least in connection with—the identity of the targeted group,

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

including nationality, ethnic origin, regional origin, associated religion, or the condition of being a foreigner as a social and legal marker, pursuant to Article 7 and the *Elements of Crimes*. The identity nexus requires that identity function as a criterion of selection, explicitly or implicitly, going beyond an incidental factor and explaining both the choice of victims and the gravity and recurrence of the observed pattern.

Within this framework, xenophobia operates as a hypothesis of discriminatory *mens rea*, understood as a state of hostility that is institutionalized or politically mobilized. This state is translated into policy design and administrative execution oriented toward restricting the rights of a group identified as foreign or “foreignized.”

(b) Xenophobia as a Legally Relevant Category: Discrimination by Nationality, Ethnic Origin, and Foreigner Status

Xenophobia becomes legally relevant when it manifests as discrimination in categories recognized under international law. This occurs in discrimination based on nationality or regional origin, when targets are selected, prioritized, or approached in ways that disproportionately affect certain nationalities or regions without an objective and proportional criterion related to individual risk. It also arises in discrimination based on ethnic origin, or ethnic proxies, when markers such as appearance, phenotype, or assumptions about ethnic belonging function as triggers for approach, detention, or referral for removal.

It may also manifest as exclusion based on foreigner status, when being a foreigner ceases to function as a neutral administrative category—such as migration status—and instead becomes a justification for the severe denial of rights, including access to effective review, dignified conditions of custody, and family unity, in a selective and stigmatizing manner.

It is important to emphasize that International Law does not prohibit all distinctions between citizens and non-citizens. Distinctions may be admissible when objective, proportional, non-arbitrary, and oriented toward a legitimate aim. Criminal-law relevance emerges when such distinctions become instruments of exclusion and severe deprivation of rights, marked by identity.

(c) From Political Discourse to Administrative Practice: Chain of Inference and Verifiable Patterns

The demonstration of the subjective element cannot rest on impressions alone. It requires a chain of inference connecting political discourse—composed of statements and institutional rhetoric—to norms, directives, and administrative incentives—such as orders, priorities, targets, memoranda, and training—and to observable operational patterns, including criteria for approach,

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

target selection, geographic distribution of operations, detention rates and duration, and access to procedural guarantees.

Within this framework, political discourse may have probative relevance in two controlled hypotheses. First, it may function as contextual evidence that a particular group identity has been publicly framed as a threat, deviation, or undesirable, thereby increasing the plausibility that subsequent practices were guided by discriminatory bias. Second, it may indicate institutional directionality when it can be shown that rhetoric translated into commands, priorities, and consistent practices, such as changes in operational criteria, targets, and the expansion of operations focused on specific communities.

Rhetoric alone does not prove persecution. The decisive step is demonstrating its materialization in discriminatory administrative practices involving severe deprivation of rights.

(d) Indicators of Structural Discrimination: Linguistic and Phenotypic Proxies as Selection Criteria

The literature on structural discrimination and the U.S. debate on profiling identifies criteria that, although not formally naming a nationality or ethnicity, function as proxies of identity. For this reason, they are relevant for testing the hypothesis of legally operative xenophobia. These include language use, such as Spanish, and linguistic variations, when the approach is motivated by the language spoken, code-switching, or assumptions associated with specific communities. They also include accent and linguistic characteristics when selection is based on regional accent, pronunciation, or fluency as markers of foreignness.

Additionally, ethnic appearance—phenotypic traits or perceived belonging to a particular group—and presumed nationality or regional origin are relevant when unverified inferences based on stereotypes guide approaches, document checks, and custody decisions.

From a legal standpoint, such criteria are relevant because they may demonstrate identity-based selection, even when not explicitly stated, repeated patterns associated with structural character, and potential discriminatory intent when linked to severe deprivation of rights. For evidentiary purposes, analysis should seek evidence such as internal reports, audits, robust statistical patterns, consistent testimonies, and correlations between approach criteria and detention and removal decisions.

(e) Contribution of These Elements to the Characterization of Persecution

Persecution, as a crime against humanity, requires severe deprivation of fundamental rights based on group identity. In this perspective, the hypothesis of xenophobia gains legal density when

Ano VII, v.1 2026 | **submissão: 01/05/2026** | **aceito: 04/05/2026** | **publicação: 07/05/2026**

deprivation is grave and identifiable, such as prolonged detention without adequate safeguards, family separation without guarantees and traceability, systematic barriers to effective judicial review, and conditions of custody incompatible with minimum standards.

This density increases when the identity nexus is demonstrable—that is, when targets are selected or treated substantially more harshly due to nationality, ethnic origin, language, appearance, or foreign status as a stigmatizing marker. This is combined with the need for inferable discriminatory intent based on the evidentiary set, integrating rhetoric, directives, and operational configuration. It is also required that the conduct be situated within the context of Article 7, with knowledge that it forms part of a widespread or systematic attack against a civilian population pursuant to state policy, which imposes a particularly high evidentiary threshold.

In other words, xenophobic markers may contribute to fulfilling the subjective element of persecution, but only when integrated into an evidentiary framework demonstrating severe deprivation, identity-based selection, intent, and contextual elements of the attack.

(f) Differentiation: Legitimate Objective Criteria vs. Potentially Discriminatory Practices

The analysis must carefully distinguish between two types of state rationality. The first involves legitimate migration policies based on objective criteria, in which actions are grounded in verifiable legal status—such as a final removal order—identifiable documentary violations, demonstrable individual risk, and reasoned decisions with the possibility of review, applied in a non-arbitrary manner and with minimum guarantees.

The second involves potentially discriminatory practices, in which group identity—such as nationality, ethnicity, language, appearance, or foreigner status—functions as a trigger or shortcut for approach, detention, and harsher treatment. In these cases, procedural guarantees may be reduced, or the severity of deprivation increased, without proportional individual justification.

This distinction is crucial to avoid two symmetrical errors: treating every restrictive policy as persecution, and normalizing discrimination under the label of administrative enforcement of migration law.

(g) Methodological Caution and Standard of Proof

In this study, xenophobia is used as an analytical hypothesis to examine possible discriminatory intent and identity-based selection, without leading to automatic conclusions. The consistency of the inference depends on the convergence of verifiable evidence—documentary, statistical, and testimonial—as well as on demonstrating a nexus between discourse, institutional directives, and observable operational patterns.

4.6 Crimes Against Humanity: Possibilities and Limits of Classification

In light of Article 7 of the Rome Statute, classifying migration practices as crimes against humanity would require the cumulative demonstration of a widespread or systematic attack against a civilian population, a state or organizational policy guiding that attack, and, in the case of persecution, the intentional and severe deprivation of fundamental rights based on group identity, in addition to a contextual nexus and subjective elements as defined in the *Elements of Crimes*.

Critical Synthesis: Empirical Evidence and Legal Framework

Empirical data on scale—such as high annual removal figures and increased custody and ADP levels—together with examples of operations and family separations, support the plausibility of systematic administrative patterns and of significant gravity in certain impacts.

Nevertheless, transforming this observation into the attribution of crimes against humanity requires qualitatively different evidence, particularly regarding the existence of an “attack” within the meaning of Article 7, its orientation by state policy, and the robust demonstration of discriminatory intent and severe deprivation of rights based on identity.

Accordingly, the article identifies constitutional tensions and risks of rights violations as its most immediate conclusion, while maintaining international criminal classification as an analytical hypothesis to be tested through more in-depth evidentiary investigation.

Final Considerations

The final considerations revisit the proposed research problem, namely: to what extent acts of migration policy—especially those carried out by ICE during the Trump administration (2017–2021)—may exceed the legitimate scope of state sovereignty and constitute human rights violations, xenophobic practices, or, in a limiting hypothesis, crimes against humanity. The analysis developed throughout the article supports the view that migration policies, although situated at the core of sovereign competences, are not exercised without legal limits and may, under certain circumstances, exceed their substantive and procedural boundaries, thereby producing relevant violations under international human rights law.

In the case examined, a context of expansion of executive power in the conduct of migration policy was observed, accompanied by administrative practices displaying characteristics of

Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

systematicity—whether due to scale, repetition of operational dynamics, or the recurrence of severe impacts on fundamental rights. At the same time, Supreme Court jurisprudence, used as an analytical criterion within the common law system, reveals a structural tension between deference to the Executive—particularly in domains related to admission and security—and the preservation of constitutional limits concerning due process, effective judicial review, and protection against arbitrary deprivation of liberty.

Within this framework, habeas corpus emerges as an essential institutional safeguard to prevent state custody from becoming opaque or immune to review, reaffirming that democratic legality depends not only on the formal existence of control mechanisms but also on their practical effectiveness.

At the same time, the study does not support an automatic conclusion that crimes against humanity have occurred. International criminal classification requires particularly demanding contextual and subjective elements, including widespreadness or systematicity in the specific legal sense of Article 7, a nexus with state policy, and a robust demonstration of severe deprivation of rights based on group identity in cases of persecution. Nevertheless, the set of elements examined—especially when articulated with the analytical hypothesis of structural discrimination and with the discussion of xenophobia as a potential vector of institutional selectivity—justifies the need for deeper, methodologically rigorous legal investigation capable of distinguishing legitimate migration policies grounded in objective criteria from practices that, by their design and execution, may represent undue restrictions on fundamental rights or severe deprivation of rights along identity lines.

Thus, the article reinforces that state sovereignty is not absolute, that the common law system may function as a mechanism for constraining executive power—albeit with limitations inherent to traditional zones of deference—and that international law remains a central reference of legitimacy, serving as a normative parameter for evaluating the exercise of state power in migration matters.

Finally, the research highlights the importance of the scientific method and critical analysis in drawing responsible inferences, especially when dealing with categories of international criminal law. The integration of theory, practice, and jurisprudence proved essential to avoid premature conclusions and to accurately situate the tensions between sovereignty, human rights, and institutional controls. As limitations, the study acknowledges its geographic and institutional focus on the United States and the DHS/ICE framework, the absence of systematic comparison with other countries, the reliance on aggregated data and public documentary sources, and the inherent cautions in interpreting precedents within a system marked by factual distinctions and varying degrees of deference to the Executive. Future research may deepen the debate through comparative studies,



Ano VII, v.1 2026 | submissão: 01/05/2026 | aceito: 04/05/2026 | publicação: 07/05/2026

expansion of the jurisprudential corpus in lower federal courts, and stronger empirical foundations with more granular data and complementary methodological strategies, in order to more robustly test patterns of selectivity, disaggregated impacts, and concrete conditions of access to judicial review and due process in contexts of intensified migration policy.