

PROTECTION OF FORCED MIGRANTS WITH IRREGULAR STATUS DURING THE PANDEMIC GENERATED BY COVID-19: AN ANALYSIS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON MIGRANTS' RIGHTS

*A PROTEÇÃO DE MIGRANTES FORÇADOS EM SITUAÇÃO IRREGULAR DURANTE A
PANDEMIA GERADA PELA COVID-19: UMA ANÁLISE DA CORTE INTERAMERICANA
DE DIREITOS HUMANOS SOBRE OS DIREITOS DOS MIGRANTES*

*LA PROTECCIÓN DE MIGRANTES FORZADOS EN SITUACIÓN IRREGULAR
DURANTE LA PANDEMIA GENERADA POR LA COVID-19: UN ANÁLISIS DE LA
CORTE INTERAMERICANA DE DERECHOS HUMANOS SOBRE LOS DERECHOS DE
LOS MIGRANTES*

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Eveline Vieira Brigido¹

Fabiola Wust Zibetti²

Abstract: This article analyzes the protection of forced migrants with irregular status, in times of a pandemic, based upon an analogy with cases of the Inter-American Court of Human Rights on migrants' rights. First, this article analyzes the relationship between the migration crisis and the health crisis. Next, it studies the vulnerability and legal protection of forced migrants, according to international and regional legal documents and the decisions of the Inter-American Court of Human Rights. These documents and decisions are then interpreted, seeking to understand the protection of migrants in times of pandemic. This article concludes that forced migrants with irregular status have the same rights as nationals and migrants with regular status during the pandemic period, but that the difficulty lies in the realization of such rights.

Keywords: Covid-19; Forced migrant; Irregular migrant; Inter-American Court of Human Rights; Pandemic.

1 Doctor of Political Sciences from Universidade Federal do Rio Grande do Sul. Master in International Law from Universidade Federal de Santa Catarina. Professor of the International Relations Course of the ESPM. *Email:* ebrigido@espm.com

2 Professor of the Instituto de Estudios Internacionales, of Universidad de Chile. Guest Lecturer at Universidade de Passo Fundo (UPF) (Brazil), member of the permanent teaching staff of the Postgraduate Program *Stricto Sensu* – Master of Law, of UPF. Doctor of International law from the Faculty of Law of Universidade de São Paulo (USP), in the Postgraduate Program in Law of Universidade Federal de Santa Catarina (UFSC) and Postdoctorate from the Centro Ibero-Americano (CIBA), linked to the Instituto de Relações Internacionais of USP. Master in Law, Area of International Relations, from UFSC. Specialist in Corporate Law from UFSC. Diplomas in Industrial Property, Copyright, and Economic Analysis of Law, from Universidade de Buenos Aires. *Email:* fabiola.wust@uchile.cl

Resumo: Este artigo tem como objetivo analisar a proteção dos migrantes irregulares forçados em tempos de pandemia, baseado em uma analogia com casos da Corte Interamericana de Direitos Humanos sobre os direitos dos migrantes. Em primeiro lugar, verifica-se a relação entre a crise migratória e a crise da saúde. Em seguida, estudam-se a vulnerabilidade e a proteção jurídica do migrante forçado de acordo com os documentos jurídicos internacionais e regionais e as decisões da Corte Interamericana de Direitos Humanos. Posteriormente, esses documentos e decisões são interpretados para se chegar à compreensão da proteção dos migrantes em tempos de pandemia. Conclui-se que os migrantes irregulares forçados têm os mesmos direitos que os nacionais e os migrantes regulares no que diz respeito ao período de pandemia, mas a dificuldade reside na realização de tais direitos.

Palavras-chave: Covid-19; Migrante forçado; Migrante irregular; Corte Interamericana de Direitos Humanos; Pandemia.

Resumen: Este artículo tiene como objetivo analizar la protección de los migrantes irregulares forzados en tiempos de pandemia, fundamentado en una analogía con casos de la Corte Interamericana de Derechos Humanos sobre los derechos de los migrantes. En primer lugar, se verifica la relación entre la crisis migratoria y la crisis de la salud. Enseguida, se estudian la vulnerabilidad y la protección jurídica del migrante forzado de acuerdo con los documentos jurídicos internacionales y regionales y las decisiones de la Corte Interamericana de Derechos Humanos. Posteriormente, estos documentos y decisiones son interpretados para llegar a la comprensión de la protección de los migrantes en tiempos de pandemia. Se concluye que los migrantes irregulares forzados tienen los mismos derechos que los nacionales y los migrantes regulares, con respecto al período de pandemia, sin embargo la dificultad reside en la realización de tales derechos.

Palabras clave: Covid-19; Migrante forzado; Migrante irregular; Corte Interamericana de Derechos Humanos; Pandemia.

INTRODUCTION

The international community is currently facing the worst migration crisis since World War II. Millions of people have left their homes to seek protection in other countries. According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2019 there were 30.2 million refugees and asylum seekers³. But the real figure is much higher, as many of these migrants continue to have irregular status due to a fear of deportation. There are two types of forced migrants: (1) forced migrants with regular status, who are given refugee status or other legal protection and (2) forced migrants with irregular status⁴. Both types of migrant are in vulnerable situations, but the situation is undoubtedly worse for the second group.

To makes matters worse, we are facing a pandemic caused by Covid-19. The coronavirus has reached all five continents, and many countries are facing serious health crises, in addition to economic and political ones. If the new virus is a problem for people living in their usual places of

3 UNHCR. **Data**. Available at: <https://www.unhcr.org/data.html>. Accessed: 19 July 2020.

4 On the relationship of internal migration and refugee, see: BRIGIDO, E., ZIBETTI, F., PILAU SOBRINHO, L. Internal displacement in the current migratory crisis. *Revista Justiça do Direito*, 31(3), 2017, 705-726. <https://doi.org/10.5335/rjd.v31i3.7653>. BRIGIDO, E. V.; ZIBETTI, F.W.; PILAU SOBRINHO, L. The protection of internally displaced persons by international migration law. *Revista do Direito (UNISC)*, v. 1, p. 186-204, 2018. BRIGIDO, E., ZIBETTI, F., PILAU SOBRINHO, L. The impact of internal displacement on the refugee migration crisis. *Revista Justiça do Direito*, 33(3), 2019, 245-274. <https://doi.org/10.5335/rjd.v33i3.10647>

residence, how much more serious it is for those who are forced migrants. These people often have no family nearby, no job (or only informal work) and no savings in the bank.

Various countries are having to deal with migration, alongside health and economic crises. Some governments have created financial support programs for the poorest sectors of their populations, and many include immigrants in these programs. But the problem is irregular immigrants; because they have irregular status, and are undocumented, they find it more difficult to access social welfare benefits. And when it comes to health, they are unlikely to seek out the public health services for fear of deportation. But that is a threat not only for themselves; these individuals can become a source of the spread of the virus, affecting the whole population. One continent that is currently facing a serious migratory crisis is Latin America, especially South America, due to internal problems in Venezuela. By the end of 2019 there was over three million forced Venezuelan migrants, the vast majority of whom fled to the other countries of South America. However, these figures do not represent the whole reality because they only represent the data published by local governments, the UNHCR and the International Organization for Migration (IOM). But the UNHCR itself estimates that 60% of Venezuelan migrants have irregular status. To further aggravate the situation in Latin America, Covid-19 has spread very quickly, causing many deaths. Brazil alone has, at the time of writing this article (July 2020), the second highest number of cases and deaths worldwide.

Faced with such a complex situation, this research analyzes the protection of forced migrants with irregular status during these times of pandemic, starting with an analogy with cases of the Inter-American Court of Human Rights on migrants' rights. This essay is divided into three sections. First, it looks at the relationship between the migration crisis and the health crisis, Next, it studies the vulnerability and legal protection of forced migrants in light of international and regional legal documents and the decisions of the Inter-American Court of Human Rights. These documents and decisions are then interpreted, in order to understand the protection of migrants in these times of pandemic. This is a qualitative and exploratory study that analyzes international and regional documents and treaties and, in particular, the jurisprudence and advisory opinions of the Inter-American Court of Human Rights, which was the first international court to rule on the legal status and rights of irregular migrants.

1. "THE CRISIS WITHIN THE CRISIS": FORCED MIGRANTS AND COVID-19

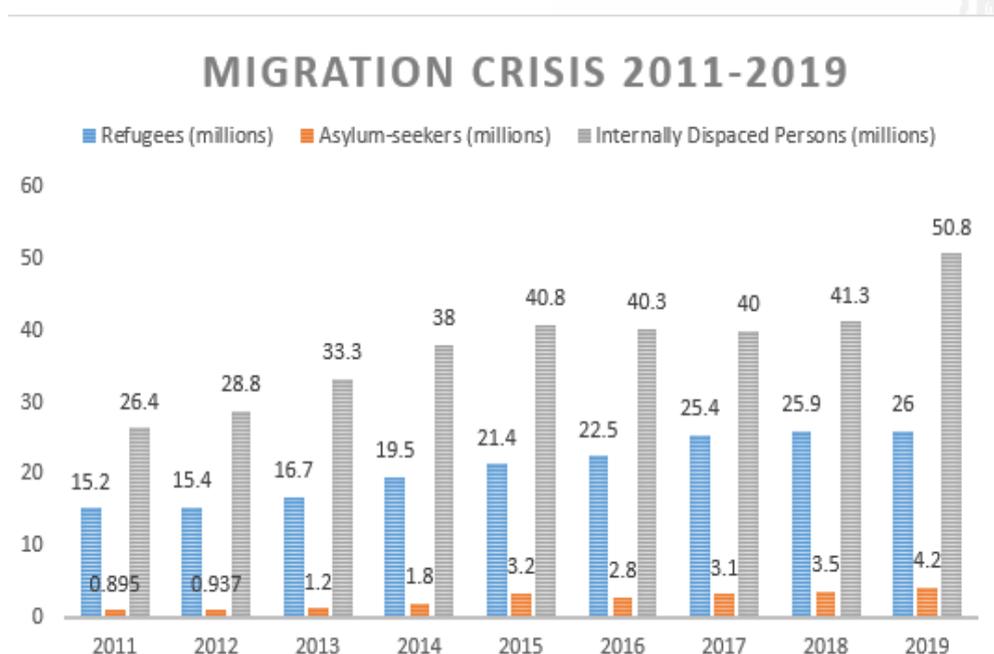
Migration is an age-old phenomenon in the history of mankind. The reasons for migration are the most diverse; it can be voluntary or forced. There are those who migrate voluntarily, to work, study, join with family members, or for other reasons. There are also cases where have no desire to

migrate, but are forced to do so, as in cases of war, serious human rights violations, persecution, and environmental disasters. Today's migrations are very complex and occur for a wide range of reasons, or even a combination of reasons.

Unfortunately, the number of forced migrants is increasing each year, and the world is now experiencing an unprecedented crisis. Armed conflicts that began in 2011/2012, such as the war in Syria, have forced people to abandon their homes. The Syrian conflict was just one of many, adding to the already large flows of refugees and internally displaced persons, such as those coming from Afghanistan and Iraq⁵. And we must not forget the various conflicts in on the African continent, such as those in the Central African Republic, the Democratic Republic of Congo, Sudan, South Sudan, Mali, and Somalia. From 2016, Myanmar and Venezuela were added to the list of countries with serious migration crises. Nevertheless, Venezuelans are not included in the official UNHCR data, as some of them were received by countries in the region through other legal alternatives, permitted by the region's legal systems, and many are still in an irregular situation. Even so, the UNHCR estimates that there were about 3.6 million forced Venezuelan migrants in 2019.⁶

In order to show the evolution of the current migration crisis, see the chart below, which does not include Venezuelans in the total data:

Chart 1 – Current migration crisis Source: prepared by the author based on UNHCR (2020a) data.



Source: prepared by the author based on UNHCR (2020a) data.

5 See BRIGIDO, E., ZIBETTI, F., PILAU SOBRINHO, L. The impact of internal displacement on the refugee migration crisis. *Revista Justiça do Direito*, 33(3), 2019, 245-274. <https://doi.org/10.5335/rjd.v33i3.10647>

6 UNHCR. **Data**. 2020a. Available at: <https://www.unhcr.org/data.html>. Accessed: 19 July 2020.

It can be seen, therefore, that the flow of forced migrants has practically doubled in the last eight years, with emphasis on the high increase of internally displaced persons between 2018 and 2019. And that the current migration crisis is occurring at both domestic and international levels, with the largest flow of migrants still at national level. One of the factors that increases international migratory flow is the increase in internal flow. In the past, the majority of refugees were internally displaced persons, and this indicates that there is a high chance of an increase in refugees in the coming years.

Amidst this serious migration crisis, a health crisis has emerged that has exacerbated the already precarious situation that many refugees and asylum seekers are in. For these displaced persons, access to the health system is limited; sanitary conditions are lacking, and social distancing is practically impossible.

Among the challenges faced by refugees, we can mention, for example: a) overcrowded refugee camps, with no space to implement social distancing; b) countries that do not have the resources to provide aid to large numbers of refugees; c) difficulties in accessing public health; d) exhaustion of the health system in host countries; e) perilous sea crossings, with overcrowded boats in poor condition. According BUHEJI et al⁷:

the refugees' risk of contracting and transmitting the virus might be more than that of the local populations because they live in very tight, heavily-populated areas, besides what was mentioned earlier, that over 80% of these refugees and displaced people are hosted in low to middle-income countries, which have weaker health, water and sanitation systems.

According to UNHCR⁸, international refugee law remains in force even in exceptional situations like the one we are experiencing today. The agency even affirms that it is especially in this situation that the rights provided for must be guaranteed, since no one will be safe until the entire world population is safe.

UNHCR⁹ further states that there are regions where economic tension and xenophobia are perceived to aggravate the situation of forced migrants in relation to health systems and social protection programs. However, there are countries that have stepped up their inclusion programs, as they recognize that combating covid-19 will only be effective if all are protected.

7 BUHEJI, Mohamed; MAVRIC, Bartola; BEKA, Godfred; YEIN, Tulika. **Alleviation of Refugees COVID-19 Pandemic Risks-A Framework for Uncertainty Mitigation**. International Business Research; Vol. 13, N. 7, 2020, p.71. Available at: <<http://www.ccsenet.org/journal/index.php/ibr/article/view/0/43066>>. Accessed: 01 July 2020.

8 UNHCR. **The role of the Global Compact on Refugees in the international response to the COVID-19 pandemic**. 04 June 2020. 2020b. Available at: <<https://reliefweb.int/report/world/role-global-compact-refugees-international-response-covid-19-pandemic>>. Accessed: 10 July 2020.

9 UNHCR. **The role of the Global Compact on Refugees in the international response to the COVID-19 pandemic**. 04 June 2020. 2020b.

Inclusion is vital for health, social protection, welfare, and solutions (e.g. education and planning for return to school). It also helps to contain the virus and mitigate its wider impacts. As the virus can affect people of any nationality or status, broad-based inclusion efforts are the only way to contain its spread effectively and protect the health of refugees and host communities¹⁰.

The pandemic has had a strong impact on countries' economies, severely affecting the refugees' livelihoods. The vast majority cannot be unemployed and are still subject to housing conditions that do not allow for correct social distancing. And the situation is even worse for those who are in an irregular situation, unable to claim their most basic rights due to the risk of deportation.

To analyze how these rights could be protected, it is necessary to study the vulnerability and legal protection of regular and irregular forced migrants, and to analyze the key points involved in the protection of irregular migrants in these times of pandemic.

2. VULNERABILITY AND LEGAL PROTECTION OF INTERNATIONAL FORCED MIGRANTS

As above mentioned, it is very difficult to make a clear distinction between the different types of migrants. In any case, it is important to adopt some concepts for the purpose of developing this article. The 1951 Refugee Convention and the 1967 Protocol define who can apply for asylum, and the basic treatment and rights of these persons. According to the Convention and the Protocol, any person who is suffering persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and is outside the country of his nationality, may apply for asylum¹¹.

Thus, the Convention does not provide protection for many forced migrants, as any reason other than those listed above will not be considered for the purposes of applying for asylum. Three important documents were adopted at the regional level: the Bangkok Principles in 1966¹², the African Convention in 1969¹³ and de Cartagena Declaration in 1984¹⁴, expanding the concept of refugee and the reasons for which asylum could be applied.

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- 10 UNHCR. **The role of the Global Compact on Refugees in the international response to the COVID-19 pandemic**. 04 June 2020. 2020b. p. 2.
- 11 UNHCR. Convention and Protocol relating to the Status of Refugees. 2010. Available at: <<https://www.unhcr.org/3b66c2aa10>>. Accessed: 10 July 2020.
- 12 ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION. **Bangkok Principles on the Status and Treatment of Refugees**. 2001. Available at: <<https://www.refworld.org/docid/3de5f2d52.html>>. Accessed: 30 June 2020.
- 13 ORGANIZATION OF AFRICAN UNION. **OAU convention governing the specific aspects of refugees problems in Africa**. 10 Sept. 1969. Available at: <<http://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>>. Accessed: 10 July 2020.
- 14 DECLARAÇÃO DE CARTAGENA. 22 Nov. 1984. Available at: <https://www.acnur.org/fileadmin/Documentos/portugueses/BD_Legal/Instrumentos_Internacionais/Declaracao_de_Cartagena.pdf>. Accessed: 25 June 2020.

The European Asylum System was also created within the framework of the European Union in 2000¹⁵ and, recently, a new soft law international document was created: the Global Compact for Safe, Orderly and Regular Migration in 2018¹⁶. One year later, the Inter-American Commission on Human Rights¹⁷ created the Inter-American Principles on the Human Rights of All Migrant Persons, Refugees, Asylum Seekers, Stateless Persons and Victims of Trafficking in Persons in the Americas. As this study focuses on the inter-American system, emphasis will be placed on that system.

The Cartagena Declaration provides for an expansion of the term refugee, including situations of generalized violence, serious human rights violations, internal conflicts, or other circumstances that disturb the public order.¹⁸ The Inter-American Court of Human Rights observes, in its advisory opinion on the rights of children in the context of migration, that “this criterion reflects a tendency to strengthen in the region a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident”.¹⁹ And, in 2019, the Inter-American Commission on Human Rights²⁰ approved the Inter-American Principles, further expanding the protection given to different types of migrants. It should also be noted that the concept of persons in need of protection generates a lot of discussion, as in the case of forced environmental migrants. This work does not intend to study these concepts. therefore, two categories of international forced migrants will be considered: (1) those who are entitled to asylum according to the refugee Statute and the Cartagena Declaration, and (2) those who, in theory, are not entitled to receive asylum, but who should be given some kind of legal protection, in accordance with the Inter-American Principles.

Forced migrants are in a vulnerable situation compared to non-migrants. First, they have abandoned their homes, personal property and jobs, and often, separated from their families. They now have to live in a foreign country with different languages and cultures, dealing with xenophobic reactions and different situations. According to Advisory Opinion no. 18 of the Inter-American Court of Human Rights²¹ “Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with

15 TAMPERE EUROPEAN COUNCIL. Oct. 1999. Available at: <https://www.europarl.europa.eu/summits/tam_en.htm>. Accessed: 25 July 2020.

16 UNITED NATIONS. **Global Compact for Safe, Orderly and Regular Migration** (A/RES/73/195). Resolution adopted by the General Assembly on 19 December 2018. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195. Accessed: 10 June 2020.

17 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Res. 04/19. 07 Dec. 2019. Available at: <<https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>>. Accessed: 30 June 2020.

18 DECLARAÇÃO DE CARTAGENA. 22 Mov. 1984.

19 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-21/14. 19 ago 2014b, p. 32. Available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf>. Accessed: 25 June 2020.

20 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Res. 04/19. 07 Dec. 2019. Available at: <<https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>>. Accessed: 30 June 2020.

21 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-18/03. 17 set. 2003. P. 101. Available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf>. Accessed: 25 jun 2020.

impunity". The Opinion also points out that the condition of vulnerability varies between States, and *de jure* situations may occur, i.e. in cases where the national legislation provides for a distinction between nationals and foreigners, or *de facto*, when there are structural inequalities. In the trial of Nadege Dorzema et al v. Dominican Republic²², the Court goes further, stating that irregular migrants constitute a group in a special situation of vulnerability, as they are more exposed to violations of their rights.

The condition of vulnerability of the migrant has also been highlighted by the UN General Assembly²³, which mentions, as factors that generate vulnerability, the fact that the forced migrant lives in another state, with a different language, economic and social difficulties, and difficulties returning to their countries of origin, especially irregular migrants. They also face xenophobia, racism and other forms of inhumane treatment, particularly women and children.

Due to all these dangers, many forced migrants seek to regularize their situation, through asylum or other forms of international protection. Unfortunately, there are those who fear deportation because they do not know whether they are entitled to asylum or other protection. Many irregular migrants are in a precarious financial situation, without access to paid legal assistance, or else they are afraid to seek free legal assistance and run the risk of deportation due to a lack of papers, for example. Although the right to seek for asylum or other international protection is an individual human right, many do not have access to this information, and therefore remain as irregular migrants.

In relation to the protection of forced international migrants, the basic principle is that of non-refoulement, that is, no refugee or asylum seeker can be sent to a country where his or her life or freedom is threatened. The Inter-American Court reinforces this principle in the judgment in the Familia Pacheco Tineo v. Bolivia, in which it states that "[...] the prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum".²⁴ According to the Court, people applying for asylum cannot be rejected at the border or expelled from the country without an analysis of their request. In cases of return, the country must ensure that the asylum seeker will have access to a fair international protection process in the country to which he/she is being sent. And the Court goes further, in its Advisory Opinion 25/18, in which it states that the principle of non-refoulement, within the scope of the American Convention on Human Rights, has a greater scope than that applied under International Refugee Law, since no foreigner can be returned to a country where his life, security or freedom are

22 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Nadege Dorzema et al. v. Dominican Republic. 24 out. 2012. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_251_ing.pdf>. Accessed: 25 jun 2020.

23 UNITED NATIONS GENERAL ASSEMBLY. A/RES/54/166. 24 Feb. 2000. Available at: <https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/54/A_RES_54_166_en.pdf>. Accessed: 27 jun 2020.

24 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of The Pacheco Tineo Family v. Plurinational State of Bolivia. 25 Nov. 2013, p. 49. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf>. Accessed: 25 June 2020.

threatened.²⁵ Furthermore, the Court notes that foreigners who are not refugees or asylum seekers, but whose life or freedom is threatened, are also protected according to article 22.8 of American Convention on Human Rights²⁶.

However, this does not mean that States cannot act in cases of migrants who fail to comply with their domestic legal systems. When enforcing national law, they must respect human rights. And the fact of whether the migrant is regular or irregular should not be an aggravating condition²⁷. According to the advisory opinion of Inter-American Court 18/03, “[...] the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person’s migratory status.”²⁸

In the case of immigration policies, the Inter-American Court recognizes that the States have the discretion to determine their own policies, and may establish whatever mechanism they consider necessary to control the entry and exit of people from their territory. However, these policies must respect established human rights standards²⁹.

However, the question arises of whether irregular migrants are supported by the Refugee Statute and the Cartagena Declaration. The Inter-American Court has already noted that a

[...] person is a refugee as soon as he meets the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee, but declares him to be one.³⁰

If irregular migrants comply with the requirements set out in the Statute or the Cartagena Declaration, they are entitled to the protection considered in these documents, even if they have not applied for asylum. On the other hand, irregular migrants who do not meet the requirements, in principle, would not be entitled.

The Court asserts that States may differentiate in their treatment of regular and irregular migrants, provided that such treatment is reasonable and does not violate human rights³¹. Although

25 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-25/18. 20 may 2020. Available at: <<https://www.refworld.org/cases,IACRTHR,5c87ec454.html>>. Accessed: 25 June 2020.

26 ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights**. Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Accessed: 20 may 2020.

27 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of The Pacheco Tineo Family v. Plurinational State of Bolivia. 25 Nov. 2013. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf>. Accessed: 25 June 2020.

28 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-18/03. 17 set. 2003, p. 100. Available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf>. Accessed: 25 June 2020.

29 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Vélez Loo v. Panama. 23 Nov. 2010. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_218_ing.pdf>. Accessed: 25 June 2020.

30 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of The Pacheco Tineo Family v. Plurinational State of Bolivia. 25 Nov. 2013, par. 145, p. 47. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf>. Accessed: 25 June 2020.

31 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Expelled Dominicans And Haitians v. Dominican Republic. 28 ago 2014. Available at: <https://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf>. Accessed: 25 jun 2020.

the human rights of both groups of migrants must be protected, only the first group would have the specific protections guaranteed by the refugee institute, unless national legislation allows it. But, as already mentioned, the principle of non-refoulement applies to all foreigners whose lives or freedom are threatened, in addition to other legal means of international protection, such as the humanitarian visa for example.

In view of these observations, it is important to analyze how these rights of forced international migrants are in times of pandemic, especially the one we currently live with Covid-19.

3. PROTECTION OF IRREGULAR FORCED MIGRANTS DURING THE PANDEMIC

Although we have seen other pandemics in the past, the one we are now facing, due to Covid-19, has led to an unprecedented crisis in the recent history of mankind. According to the vice President of the Inter-American Court of Human Rights, "This means that States must take positive actions that cannot - nor should not - be orthodox, but that should always privilege human rights."³² (translation ours)

As explained in the previous section, there is no doubt concerning the migrant's right to protection in relation to the health of irregular migrants. The Inter-American Court of Human Rights, on April 9, 2020, through an official Declaration, stated that the right to life and health must be guaranteed to all persons under the jurisdiction of the State, without any type of discrimination. In particular, it mentions the most vulnerable groups, among them refugees and migrants³³. In fact, the issue of medical assistance to irregular migrants had already been discussed in the case *Nadège Dorzema et al v. Dominican Republic*, in which the Court emphasized that medical care in emergency situations must be accessible to irregular migrants³⁴. But there are some points that must be discussed:

Access by the irregular migrant to the public health system and the risk of deportation:

Although irregular migrants have a right to access health care, they may avoid seeking assistance for fear of deportation.

First of all, it is important to remember the principle of non-refoulement, reinforced in principle 6 of the Inter-American Principles, and that is guaranteed to all foreigners whose lives or freedom are threatened. Therefore, there should be no deportation or expulsion of irregular forced migrants.

32 FREIRE, Leoncio Patricio Pazmiño. **Derecho a la salud y Covid-19: una lectura en clave de derechos humanos: indivisibles, interdependientes y no regresivos**. 15 May 2020, p.2. Available at: <<http://www.corteidh.or.cr/tablas/alerta/noticias/Derecho%20a%20la%20salud%20y%20Covid%2019-PPF.pdf>>. Accessed: 27 June 2020.

33 INTER-AMERICAN COURT OF HUMAN RIGHTS. **Covid-19 and Human Rights**: the problems and challenges must be addressed from a human rights perspective and with respect for international obligations. 09 abr. 2020. Available at: <http://www.corteidh.or.cr/docs/comunicados/cp_27_2020_eng.pdf>. Accessed: 25 June 2020.

34 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of *Nadège Dorzema et al. v. Dominican Republic*. 24 Oct. 2012.

In the current context of the pandemic, due to which many States have closed their borders, it is necessary to continue guaranteeing the existence of mechanisms to analyze asylum applications. Likewise, those protected by human rights or international refugee law (principle of non-refoulement) cannot be expelled³⁵.

In Advisory Opinion 21/14 the Court states that the deportation or expulsion of a migrant in need of health care could be considered a violation of human rights.

[...] this Court has already emphasized the direct and immediate connection that exists between the rights to life and to personal integrity in the area of human health care. Thus, it could be considered that the expulsion or return of a person violates international obligations, depending on the particular circumstances of the specific person, such as in cases in which this measures would result in harming or a serious deterioration in the person's health or, even, when it could lead to her or his death. In order to evaluate a possible violation of the Convention or the Declaration, the status of the health or the type of ailment that the person suffers would have to be taken into account, as well as the health care available in the country of origin and the physical and financial accessibility to this, among other aspects. The European Court of Human Rights, the Human Rights Committee, and the Inter-American Commission on Human Rights have all understood this to be so³⁶.

An analogy can also be made with the sentence handed down in the *Cuscul Pivaral v. Guatemala* case, in which the Court noted that the State must adopt measures for those who are in a situation of vulnerability³⁷. Although this case was not specific to a pandemic situation, it can be understood, by analogy, that the State should find ways to protect and assist irregular forced migrants.

It can be seen, therefore, that in theory, an irregular migrant should not be returned to their place of origin during the Covid-19 pandemic. Also, the State should find ways to provide adequate assistance. The vice President of the Inter-American Court of Human Right asserts that "[...] the principle of non-discrimination includes a positive obligation: 'to create conditions of real equality before groups that have been historically excluded or that are at greater risk of being discriminated against'."³⁸

In accordance with principle 35 of the Inter-American principles,

States must guarantee the right to confidentiality, which entails prohibiting notification and sharing of information related to the migration status of patients or their parents with migration authorities, as well as the carrying out migration control operations in hospitals or their vicinity³⁹.

35 MAX PLANT INSTITUTE. Covid-19 y el Derecho a la Salud. Abr. 2020. P. 15. Available at: <<http://www.corteidh.or.cr/sitios/libros/todos/docs/infografia-covid.pdf>>. Accessed: 27 June 2020.

36 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Expelled Dominicans And Haitians v. Dominican Republic. 28 ago 2014. para 229. Available at: <https://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf>. Accessed: 25 June 2020.

37 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Cuscul Pivaral et al. v. Guatemala. 23 ago. 2018. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_359_ing.pdf>. Accessed: 25 June 2020.

38 FREIRE, Leoncio Patricio Pazmiño. **Derecho a la salud y Covid-19: una lectura en clave de derechos humanos: indivisibles, interdependientes y no regressivos**. 15 May 2020, p.5. Available at: <<http://www.corteidh.or.cr/tablas/alerta/noticias/Derecho%20a%20la%20salud%20y%20Covid%2019-PPF.pdf>>. Accessed: 27 June 2020.

39 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Res. 04/19. 07 Dec. 2019. Pp. 13-14.

This principle was again emphasized in the resolution of the Inter-American Commission on the measures that States must take during the pandemic:

Refrain from taking measures that may hinder, intimidate or discourage people who are in a migrant situation from having access to programs, services and policies to respond to the COVID-19 pandemic, such as migrant controls or repression around hospitals or shelters, and the sharing of information between hospital services and law enforcement migration authorities⁴⁰.

Therefore, States should refrain from using means to detain migrants, or any other measure that increases the risk of spreading the coronavirus.

Access by irregular migrants to financial aid programs

In this case, the situation does not involve health. The pandemic generated by Covid-19 also brought an economic crisis and, consequently, unemployment.

Irregular forced migrants are already usual living in informal situations, and as such, are more vulnerable than the general population. The pandemic exacerbated these situations, making it more difficult to get a job, even informal or casual labor.

Governments, in general, have created emergency support programs to provide financial assistance for the neediest sectors of the population. These programs often include regular migrants and refugees, but they do not normally include irregular migrants. In principle, the government is not aware of these people, and they are unlikely to come forward to ask for help due to fear of deportation or expulsion.

The Inter-American Court, in its Advisory Opinion 18/03, noted that the regularity of a migrant is not a condition for the State to respect and guarantee the principle of equality and non-discrimination. And it goes further, emphasizing the following:

We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and nondiscrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants⁴¹.

40 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Pandemic and Human Rights in the Americas. Res. 1/20. 10 Apr. 2020. para 59, p. 16.

41 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-18/03. 17 Sep. 2003. para 118 and 119, p. 102-103.

It emphasizes that States cannot based the principle of equality and non-discrimination on the aims of their public policies. It also states that “the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights”⁴². This position was reaffirmed in principle 12 of the Inter-American principles.

In the Declaration of April 9, 2020, the Court points out that economic and social rights must be guaranteed to all persons who are under the jurisdiction of the State, especially those in situations of vulnerability. It also notes that due to the need for social isolation, and the impact it generates on personal and family finances, the State must seek ways to provide food, medicines and other basic necessities to those people who cannot afford them.

a) Access of irregular forced migrants to basic means of care and hygiene

Another serious problem in relation to forced migrants is the difficulty of access to adequate sanitation i.e. places with water and hygiene products, and that allow for social distancing. In fact, in many Latin American countries this problem is not exclusive to forced migrants. Unfortunately, there is a lot of social inequality in these countries and a large part of the national population also has no access to them. In any case, as the focus of this article is on migrants, that will be the focus of the discussion.

Principles 38 and 62 of the Inter-American Principles provide that the right to adequate housing including shelter from the elements, sanitary and washing facilities, and a place to store and cook food.

Every migrant has the right to adequate housing: (i) availability of services, materials, facilities and infrastructure, including permanent access to natural and common resources, drinking water, energy for cooking, heating and lighting, sanitary and washing facilities, food storage, waste disposal, drainage and emergency services; and (2) habitability, in the sense of providing adequate space to its occupants and protecting them from cold, humidity, heat, rain, wind or other health threats, from structural risks and from disease vectors.

The purpose of humanitarian assistance is to save lives, alleviate suffering, and maintain the human dignity of all migrants, regardless of their migration status. This includes, in particular, the rights to life, health, personal integrity, water and sanitation, adequate housing, food and nutrition⁴³.

It is particularly important that this care is guaranteed to forced migrants, otherwise they are at serious risk of contamination and, consequently, may increase the spread of the virus. In other words, not only will the immigrants’ health be harmed, but also the health of the national population.

42 INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-18/03. 17 set. 2003, para 134, pp.106-107.

43 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Inter-American Principles on the Human Rights of All Migrants , Refugees, Stateless Persons and Victims of Human Trafficking. Res. 04/19. 07 Dec. 2019. para 38 and 62, p. 14 and 23.

a) Increased xenophobic feelings

In addition to all these issues, the Court in its Declaration of April 9, 2020, expressed great concern about the increase in xenophobic and racist feelings and notes that public bodies should be alert to movements of this nature, and avoid inciting violence.

In summary, based on a reading of the aforementioned cases and advisory opinions, it can be stated that although countries may treat regular and irregular forced migrants differently, with regard to basic rights, protection must be equally guaranteed to all. Drawing an analogy of these judgments and advisory opinions in conjunction with the Court's statement of April 9, 2020, it can be affirmed that the rights mentioned above should be guaranteed for irregular migrants during periods of pandemic. In relation to medical assistance, for example, there should be no risk of deportation or expulsion during the period of the pandemic, and no other penalty, for irregular immigrants seeking medical services. The discussion should be on the period after the pandemic. But to guarantee effective access to health, there should also be no such risk. Ideally, the government should create a program to regularize irregular migrants through the institute of refuge, humanitarian visa or other legal protection. This provision is legally supported by Principle 5 which foresees that States must promote regular migration.

Regarding financial aid programs, irregular migrants are also be covered by such programs, but it is understood that regularizing these persons would be necessary, since the State, in theory, is not aware of these migrants.

Access to basic means of care and hygiene could be assured through programs that distributed hygiene and food supplies specifically to forced migrants. Such measures could be run in conjunction with programs for the needy population. It should be emphasized that to guarantee the aforementioned rights, it would be necessary to make the aid programs widely known. That is, to guarantee such rights, it is necessary to guarantee the right to information. "It is necessary for States to guarantee to the entire population, especially for people in situations of poverty and/or vulnerability, information about the current situation of the pandemic and the health services at their disposal."⁴⁴ (translation ours)

It could be argued that a program involving these aspects would have a strong economic impact. But we are already in an economic crisis, and if the health crisis is not contained, the impacts on the economy will be even worse. If irregular forced migrants do not receive due attention, they could become a source of the spread of the virus, not to mention the serious damage to their physical and

44 MAX PLANT INSTITUTE. Covid-19 y el Derecho a la Salud. Abr. 2020. P. 13.

mental health, which goes against the main human right; the right to life. The issue of xenophobia is a little more complex. Public campaigns would be needed to explain, to the population, the importance and duty to welcome forced migrants. According to principle 13: "States should take all positive, reasonable measures necessary to prevent, eliminate, and reverse or change discriminatory situations that perpetuate stigma, prejudice, practices of intolerance and criminalization against persons on the basis of their migration status [...]".⁴⁵ This principle was reinforced in resolution 01/20, on the pandemic in the American continent. The problem is that some governments have a xenophobic migration policy, which undermines all the other points mentioned above, as such States have no interest in assisting any type of migrant.

CONCLUSION

The occurrence of a pandemic alongside a migratory crisis can be extremely dangerous. While States and International Organizations are working hard to promote social isolation, the large flow of forced migrants is moving in the opposite direction. It is therefore for States to manage the situation of migrants, especially irregular migrants. There is no point imposing quarantine or social distancing measures for regularized nationals and foreigners if irregular migrants remain without access to health, food, hygiene, and financial aid programs.

In fact, irregular forced migrants could ask for support, but they do not for fear of deportation. It is necessary, therefore, for governments to adopt measures to regularize these people, either through legal refuge, or other legal means such as the humanitarian visa or temporary residence permit. In times of pandemic, in particular, closed borders and canceled flights make deportation more difficult. But the main aspect is that a person cannot be returned to a country where their life or freedom is threatened. Finally, there is the question of closure of borders: what should be do with migrants who arrive asking for refuge? In accordance with the principle of non-refoulement, and drawing an analogy with the decisions of the Inter-American Court of Human Rights, countries would have to receive these people, and analyze their requests.

In theory, all rights are guaranteed. The problem to be faced is on a daily basis. The rise of far-right governments has made it difficult for various migrants to enter, which goes contrary to the provisions of international treaties, as well as fostering xenophobic feelings in the national population. In times of globalization and international cooperation, promoting extreme nationalism is counter-productive. And this may, perhaps, be one of the consequences of the current pandemic: restrictions on the movement of people.

⁴⁵ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Res. 04/19. 07 Dec. 2019. P. 8.

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