

**ESSENTIAL MEASURES OR DISCRIMINATORY POLICIES?
THE BORDER CLOSURE DURING THE COVID-19 PANDEMIC IN
BRAZIL**

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ABSTRACT

Since the COVID-19 Pandemic started, the Brazilian government published around 40 Decrees regulating the closure of borders supposedly in order to prevent contagion. However, the measures adopted were controversial, since that while entering by air was never prohibited, land borders were strictly closed with no exceptions to Venezuelans. In this sense, it is important to understand: what were the legislative measures adopted in Brazil during the pandemic to impede migration and refuge in the borders? Did these measures actually aim at preventing COVID-19 or had another goal? Did Brazil comply with national and international legislations and standards? In this thesis, I adopt a qualitative analysis to read legislative texts embedded in the current Brazilian socio-political context. First, I unfold Brazilian Migration and Refuge Laws, and some challenges of implementation; secondly, I explain the content of the decrees adopted by the federal government during the years of 2020 and 2021, and their impacts; finally, I analyse international standards, with a special focus in the Inter-American System of Human Rights, to finally conclude with the violations perpetrated by Brazil in a national and international level in the migration and refuge field. Backlashes have been clearly occurring even before the pandemic, but the crisis scenario was the perfect excuse for militarization of the borders and selective entrance.

Keywords: COVID-19; Pandemic; Decrees; Venezuelans; Brazil; Migration; Refuge; standards; Inter-American System of Human Rights; militarization; selective entrance.

RESUMO

Desde o início da Pandemia de COVID-19, o governo brasileiro publicou cerca de 40 portarias regulamentando o fechamento de fronteiras supostamente para evitar contágio. Entretanto, as medidas adotadas foram controversas, já que, embora a entrada por via aérea nunca tenha sido proibida, as fronteiras terrestres foram estritamente fechadas, sem exceções para as pessoas venezuelanas. Neste sentido, é importante entender: quais foram as medidas legislativas adotadas no Brasil durante a pandemia para impedir a migração e o refúgio nas fronteiras? Essas medidas realmente visavam prevenir contra o COVID-19 ou tinham outro objetivo? O Brasil cumpriu com as legislações e estándares nacionais e internacionais? Nesta tese, eu adoto um método qualitativo para analisar textos legislativos inseridos no atual contexto sócio-político brasileiro. Primeiramente, explico as leis brasileiras de migração e refúgio, e alguns desafios de implementação; em seguida, explico o conteúdo das portarias adotadas pelo governo federal durante os anos de 2020 e 2021 e seus impactos; finalmente, analiso as normas internacionais, com especial enfoque no Sistema Interamericano de Direitos Humanos, para finalmente concluir com as violações perpetradas pelo Brasil a nível nacional e internacional no campo da migração e refúgio. Os retrocessos têm claramente ocorrido mesmo antes da pandemia, mas o cenário de crise foi a desculpa perfeita para a militarização das fronteiras e a entrada seletiva.

Palavras-chave: Pandemia; COVID-19; Decretos; Venezuelanos; Brasil; Migração; Refúgio; Normas; Sistema Interamericano de Direitos Humanos; militarização; entrada seletiva.

ACKNOWLEDGEMENTS

Being in Central European University (CEU) brought me way more than an academic experience, but also a lot of personal knowledge and growth. I would like to thank CEU for providing me a scholarship and, therefore, making this experience possible. Without those funds, I could not be able to learn this much from such an enriching program and environment.

Secondly – but not less important at all – I would like to thank my family, especially my parents (Ana Rosa and Helencar) for supporting me, financially and psychologically, to move to Vienna. It was a huge step to come to a country with a totally different language, culture and history than what I am used to being from Latin America. Austria also welcomed me, but I did face challenges in a lot of spheres. In all moments, from the happiest ones to the most challenging ones, my parents were there for me, even being an ocean apart. Without feeling that I have this strong base with me, it would be hard to be by myself in this totally different world that I am experiencing. Tio Gerson, Tia Nana, Jotinha, Mari and Vó Maria also follow my paths and show me support, remembering me who I am and where I came from.

My friends from CEU were the ones to make this journey the most unforgettable and worth it. Special thanks to Katarina, Marielle, Jasmin, Kruthika, Saumya, Bela, Anna, Ian and Saara. Also special thanks to friends that were not in my program, but they made my life in Vienna fulfilled. I consider them my family here: Meenakshi, Harsh and Verena. Definitely, home is not a place, it is the people you are with. I love you all, and I cannot imagine my life here without you.

CEU provided me with excellent teachers. I would like to highlight that it was a huge loss to not have professor (and my former supervisor) Oswaldo Ruiz-Chiriboga anymore; wherever you are, just know that you made a difference in student's lives, and you were an inspiration for all of us. My current supervisor, Eszter Polgari, was also really supportive and easy to reach. Thanks for embracing my thesis topic and giving me meaningful insights for this final product. Also special thanks to professors Mathias, Inga, Boldizsar, Marie-Pierre and Maria-Jose.

This last year was really special, and the union of my family basis, the amazing friendships I made here and this nice but really intense LL.M program in Human Rights gave me tools for my next academic and professional steps, and also turned me into a better human being.

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LIST OF ABBREVIATIONS

ACHR – American Convention on Human Rights

ANVISA – *Agência Nacional de Vigilância Sanitária* [National Health Surveillance Agency]

CONARE – *Comitê Nacional para os Refugiados* [National Committee for Refugees]

DPU – *Defensoria Pública da União* [Federal Public Defender's Office]

ECLAC – United Nations Economic Commission for Latin America and the Caribbean

ESCR – Economic, Social, Cultural and Environmental Rights

IACHR – Inter-American Commission on Human Rights

IACtHR – Inter-American Court of Human Rights

IASHR – Inter-American System of Human Rights

ICCPR – International Covenant on Civil and Political Rights

IOM – International Organization for Migration

MPF – *Ministério Público Federal* [Federal Public Prosecutor's Office]

OC – Inter-American Court of Human Rights Advisory Opinion

OAS – Organization of American States

SUS – *Sistema Único de Saúde* [Unified Health System]

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

UNICEF – United Nations International Children's Emergency Fund

WHO – World Health Organization

INTRODUCTION

Since March 2020, the world has been facing a multifaceted crisis generated by a growing and mutating virus - SARS-CoV-2. The COVID-19 pandemic affected not only healthcare systems, but also economies, education, politics, food production, and many others spheres. According to the previous German chancellor Angela Merkel, the pandemic has been the greatest challenge since the Second World War; from an American perspective, the impact of the crisis reminded of the 9/11 attacks and the 2008 financial crisis. The sanitary, political and economic effects of this virus outbreak are transformative and long-lasting, demanding resilience, reinvention and international cooperation.

The pandemic has also a differentiated impact in countries and peoples. It is clear that countries from the Global South faced more challenges and backlashes when dealing with the crisis. Moreover, vulnerable peoples, for example, the elderly, afro-descendants, women, migrants and refugees, indigenous peoples, and children were the ones having burdens other than the health during these times, facing issues such as domestic violence, evictions, prejudice, and other factors that brought complex impacts.

Latin America suffered deep consequences from this pandemic scenario, that will remain for decades. When the virus reached this region, it already found a very fragile social, economic and political context, considering it is the most unequal and violent region in the world.¹ Poverty and extreme poverty constitute a historical problem for Latin American countries: approximately 37% of the region's population lives in poverty and 16% in extreme poverty.² The pandemic clearly has aggravated and exacerbated these numbers – according to the World Bank,

¹Flavia Piovesan, "Latin American Ius constitutionale commune in Human Rights and the Inter-American System: perspectives and challenges", *Direito e Práx.*, Rio de Janeiro, Vol. 8, N. 2, 2017, p. 1356-1388, <https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/viewFile/28029/20617>, p. 1384.

²ECLAC, "COVID-19 and the socio-economic crisis in Latin America" ECLAC Magazine No. 132 Special Edition, 2020, https://www.cepal.org/sites/default/files/publication/files/46838/RVE132_es.pdf, p. 42.

in 2020 the pandemic pushed more than 20 million people into vulnerability or poverty in Latin America and the Caribbean.³ Likewise, the UN Special Rapporteur on Contemporary Forms of Slavery analysed how increasing poverty and unemployment caused by the COVID-19 health crisis pushed people into exploitative employment in informal or illegal economic sectors, which increases their vulnerability to forced labour, child labour or other slavery-like practices. Regarding this, it is important to notice that approximately 54.5% of the people in Latin America are in the informal labor market, and nine out of every ten workers in poverty are in the informal sector.⁴

In this regard, vulnerable and poor groups, such as migrants and refugees, were the ones most affected by this crisis. According to the UN Secretary General Antonio Guterres, “(we) see the disproportionate effects on certain communities, the rise of hate speech, the targeting of vulnerable groups, and the risks of heavy-handed security responses undermining the health response”.⁵ Specially in Latin America, the arrival of the virus indeed affected everyone, independently of the origin, race, gender, or social class; however, the consequences were different according to a group’s peculiarities and needs.

In Brazil, there is a clear pattern of discrimination against vulnerable groups such as afro-descendants, women, indigenous peoples, migrants and refugees, and LGBTQIA+, and since the beginning of Bolsonaro’s government in 2018, the level of intolerance, racism and xenophobia increased as never seen before. Jair Bolsonaro, with his constant hate speeches,⁶ promotes polarization, hate and violence, affecting democracy and institutions’ autonomy. In fact, the pandemic also led to a democratic setback in an already flawed Brazilian democracy, since

³ World Bank, “The Gradual Rise and Rapid Decline of the Middle Class in Latin America and the Caribbean”, 2021, <https://openknowledge.worldbank.org/handle/10986/35834>, p. 18.

⁴ *Ibid.*

⁵ Michelle Nichols, “U.N. chief warns against repressive measures amid coronavirus crisis”, 2020, <https://www.reuters.com/article/us-health-coronavirus-un-rights/u-n-chief-warns-against-repressive-measures-amid-coronavirus-crisis-idUSKCN2250D2>.

⁶ Valdete Souto Severo, “Jair Bolsonaro brings hate speech as the official speech of Presidency”, Carta Capital, 2019, <https://www.cartacapital.com.br/opiniao/jair-bolsonaro-traz-discurso-de-odio-como-fala-oficial-da-presidencia/>.

that the government has adopted disproportionate and authoritarian measures using the virus as an excuse for politics not related to the dealing with the health emergency.

Considering this context and the importance of understanding which measures were really necessary and which had an ideological intention from the Brazilian government in the migration field, I aim to investigate: what were the measures adopted in Brazil during the years of 2020 and 2021 to impede migration and refuge in the borders? Did these measures actually aim at fighting against the virus or had another goal? Did Brazil comply with national and international legislations and standards in this process?

To address the questions above, this thesis analyses the policies and legal instruments adopted by the Brazilian government during the pandemic (specifically during the years of 2020 and 2021), to understand their relationship with a proper dealing with the crisis. I will approach the decisions taken with regard to migrants and refugees, considering they were one of the most affected populations during the pandemic, due to the closure of borders and disproportionate measures against migration. Before considering the measures adopted, I will provide an overview of Brazilian Migration and Refuge Laws and Governance, and some contradictory policies implemented even before COVID-19's outbreak; moreover, at the regional level, I will present some of the Inter-American Human Rights System standards related to migration that Brazil should be following, and the clear backlashes that occurred during this timeframe. After analyzing the context behind the measures taken and the commitments made at an international and regional level, it will be possible to answer if Brazil's government response to contain the virus – in the field of migration – was necessary or discriminatory.

1. MIGRATION IN BRAZIL: LAW AND POLITICS

1.1 Context and Definitions: Who is Under Threat?

Human mobility is recognized as a multifaceted phenomenon that includes economic, social, political, and environmental dimensions⁷, and can occur voluntarily or forcibly.⁸ Migration unfolds in different spaces and times,⁹ and the facet explored in this study is the international migration. For that to occur, obviously a nation-state border has to be crossed, although it is not that straightforward, considering that the crossing can be transitory, permanent, or involves returns from time to time¹⁰. The rights of people in mobility - migrants, refugees, stateless persons, displaced persons, etc. - are enshrined in various human rights instruments at the regional and global level, imposing on States the duty to respect, protect, and guarantee their rights on an equal footing with nationals, under the principle of non-discrimination.¹¹

⁷According to the IACHR, "Human mobility comprises international migration and internal migration. International migration involves the crossing by a person or group of persons of an internationally recognized state border of their country of origin, for the purpose of settling for a period of time or permanently in another country of which they are not a national; while internal migration occurs when a person or group of persons move from one place to another of the country of which they are a national, to settle there for a period of time or permanently". IACHR, "Human Mobility Inter-American Standards", OEA/Ser.L/V/II, Doc. 46-15, 2015, <http://www.oas.org/es/cidh/informes/pdfs/movilidadhumana.pdf>, p. 11.

⁸Different manifestations of violence, persecution, armed conflicts, criminalization, poverty, discrimination, inequality, political, economic, social or cultural factors, environmental factors, natural disasters and climate change.

⁹Gunnar Malmberg, "Time and Space in International Migration", in T. Hammar, G. Brochmann, K. Tamas, T. Faist (eds.), "International Migration, Immobility and Development. Multidisciplinary Perspectives", Oxford: Berg, 1997, p. 21-48.

¹⁰Russell King, "Theories and Typologies of Migration: an Overview and a Primer", Willy Brandt Series of Working Papers in International Migration and Ethnic Relations 3/12, Malmö Institute for Studies of Migration, Diversity and Welfare (MIM), 2012, p. 7.

¹¹The principle of non-discrimination is established in Article 2 of the Universal Declaration of Human Rights, but it is also a cross-cutting issue of concern present in diverse other international human rights instruments, such as Articles 2 and 26 of the International Covenant on Civil and Political Rights, 1966; Article 2(2) of the International Covenant on Economic, Social, Cultural and Environmental Rights, 1966; Article 2 of the Convention on the Rights of the Child, 1989; Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990; Article 5 of the International Convention on the Rights of Persons with Disabilities, 2006; among others. Two of the major UN Human Rights treaties provide explicit principles to prohibit discrimination and promote equality: International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (race) and Convention on the Elimination of All Forms of Discrimination against Women, 1979 (gender). Regional instruments contemplate this principle as well, such as the American Declaration (Article 2) and the American Convention on Human Rights (Articles 2, 3 and 24).

In this regard, it is important to conceptualize the ones affected by the discriminatory policies adopted in Brazil. For the present study, migration can be defined as any movement of population to a state or within a state, regardless of the motive. It includes asylum-seekers, displaced persons, economic migrants, among many others.¹² It is also worth noting that migrants often face interrelated forms of discrimination (depending on national origin, immigration status, factors such as age, gender, racial/ethnic background, poverty or extreme poverty,¹³ political opinion, etc). Vulnerability indeed increases when more than one factor is involved.¹⁴

In this thesis, I will approach both migrants and refugees, since that they were highly affected by the Brazilian policies and normative issued during the pandemic. As will be seen, the legislation adopted under the emergency state brought consequences to both groups, although they are subjected to different legal systems. Moreover, conceptualizing migration is challenging in many different ways, and unlike birth and death (which are unambiguous events), migration can occur in various moments during a lifetime.

Although the meanings are complex and multifaceted, we will consider migrants as any person who has decided to move;¹⁵ refugees, more than being defined as moving individuals, fall into the category of forced or impelled migration, due to a breakdown in relations between the people and the State.¹⁶ According to a sociological definition, refugees can be defined as involuntary international migrants; in this sense, migrants can be distinguished as moving due to

¹² IOM, International Migration Law, Glossary regarding Migration, N. 7, 2006, https://publications.iom.int/system/files/pdf/iml_7_sp.pdf.

¹³ IACHR, "Human Mobility Inter-American Standards", *op.cit.*

¹⁴ According to Manuel Góngora Mera, "that double - or multiple - discrimination in which the grounds of discrimination operate concurrently and simultaneously, resulting in: either an effect greater than the sum of the various forms of discrimination; or a new form of discrimination that operates as a result of the discriminations suffered", my translation. Manuel Góngora Mera, "Right to health and interseccional discrimination: a judicial perspective of Latin-American experiences", 2013, *in* Tratado de derecho a la salud, Clérico, Laura y Aldao, Martín et al. (eds.), Abeledo Perrot, Buenos Aires, 133-159. P. 137.

¹⁵ Emma Haddad, "The Refugee in International Society Between Sovereigns", CUP, Cambridge, 2008, Chapter 2: Who is (not) a refugee? P. 27.

¹⁶ The 1951 Convention describes "refugee" as any person who: Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

a hope for a better life, while refugees are trying to rebuild the life they have lost.¹⁷ However, it's important to reinforce that this distinction between voluntary and involuntary migration can be complex and blurry, since that also voluntary migration can be heavily influenced by external forces that the person moving has been left with little choice beyond leaving his or her country.

In Brazil, according to data from the United Nations Migration Organization's Migration Data Portal, there is around 1.1 million international migrants, however, this number can double or triple considering the people who do not have documentation and, therefore, are not registered. In addition, data from the Brazil's Ministry of Justice indicates by the end of 2021, more than 54,000 requests for refugee status were approved, out of over 40,000 were Venezuelans. Nonetheless, there is no official and centralized body responsible for collecting this data, so it is still very difficult to know how many migrants actually reside in Brazil.

In the past years, the topic of migration has been very debated and there is a lot of concern regarding Brazilian policies in this field, mainly due to the recent flow of Venezuelan immigrants and refugees,¹⁸ or due to the changes in the legislation. Migration and refuge have indeed been in Brazil's agenda, being a matter of dispute between political ideologies, and following a trend seen in some countries of the Global North.

1.2 Brazilian Migration and Refuge Laws and Challenges of Implementation

In November 2017, a new federal law regarding migration (Law No. 13,445/2017 or Migration Law) was enacted, substituting the Foreigner Act. The law consisted of a historical struggle of organized civil society in order to change the regulation dating from 1980, from the

¹⁷ Danièle Joly, "Odyssean and Rubicon Refugees: Toward a Typology of Refugees in the Land of 'Exile', *International Migration* 40, 2002, 6.

¹⁸ It is estimated that since 2015 more than 5.200.000 people have left Venezuela. The main receiving countries were Brazil, Chile, Colombia, Ecuador and Peru. See: OEA, "Situation of Venezuelans who have returned and seek to return to their country in the context of Covid-19", 2020, http://www.oas.org/documents/spa/press/OEA_Retornados-Venezolanos_ESP.pdf.

times of the Brazilian military dictatorship, when migration was interpreted as a matter of national security; furthermore, it had a strict economic objective, providing labour only when it benefitted the national economy. The 2017 law, unlike the previous one, was conceived under a notably humanitarian perspective, whereby the recognition of the rights of immigrants was considered fundamental.

Therefore, this law represents a paradigm shift due to its human rights approach. The main advances include: the guarantee of a specific temporary visa for humanitarian reasons; the permission for document regularization inside Brazil (without the need to obtain a visa at a consulate outside the country), and, finally, the elimination of the prohibition on migrants from joining political movements and unions.

By its turn, the Regulatory Decree No. 9,199/2017,¹⁹ published shortly after the Migration law came into effect, was hardly criticized by the civil society and academia, primarily because it limits access to rights and the regularization process, overstepping the decree only regulatory role, and also because the civil society was consulted little during the preparation of the document. According to Elaine Dumas, "(t)he regulating decree was seen as the main obstacle to the effectiveness of recognition because it did not allow the law to be applied in accordance with the guiding spirit of protecting the human rights of immigrants (...) such an instrument proved to be an updated copy of the revoked law [Foreigner Act], which was based primarily on the principle of national security and economic utilitarianism, curtailing the rights of immigrants to the detriment of the interests of the nation".²⁰

¹⁹ In Brazil, the Regulatory Decree ("Decreto Regulamentar"), stipulated in article 84, IV and VI of the Brazilian Federal Constitution of 1988, is a normative act issued by the president of the Republic, and it means "explaining or detailing a law". Thus, the regulatory decree serves to ensure the faithful execution of a law that already existed, i.e., it only details how the law should be applied.

²⁰ Elaine Dumas, "Humanitarian Reception as a State instrument for the recognition of the immigrant as a subject of rights", 2020, Thesis (PhD in Law), University of São Paulo Faculty of Law, São Paulo, p. 149.

Other backlashes occurred in Brazil after the publication of the Migration Law. It is worth mentioning that in 2019, the Brazilian government issued decrees²¹ that authorized summary deportation and also the arrest of migrants. These decrees (“Portaria 666/19, substituted by “Portaria 770/19”²²) have a vague language, allowing the barring of entry, repatriation, and summary deportation to "dangerous persons" or "who have committed acts contrary to the principles and objectives set forth in the Federal Constitution",²³ and these reasons are not dimensioned or parameterized. This gave a wide margin of discretion to police authorities to punish migrants.

According to Eduardo Domenech, it also reflects a trend that was also already underway in the migration governance in South America, through what the author calls a "migration policy of control with a human face", which has generated a wide acceptance of the expulsion measures - a hidden, denied, disguised political practice - among different actors and sectors of society".²⁴ Brazil, in this sense, has also aligned with extreme right-wing governments, such as Donald Trump's in the United States, and has adopted the security discourse in the field of migration, including with the support of the Brazilian embassy to deport undocumented people abroad.²⁵

Nonetheless, the Migration Law, in addition to establishing as a principle the prohibition of collective deportation and expulsion practices (Article 3, XXII²⁶), clarifies (Article 61,

²¹ Decree (“Portaria” in portuguese) is an administrative act issued by any public authority that contains instructions on the enforcement of laws or regulations, recommendations, rules on the execution of a service, nominations, dismissals, punishments or any other measures in its authority.

²² After great pressure from civil society and a lawsuit questioning the constitutionality of this law, the Minister of Justice at the time, Sérgio Moro, replaced Portaria 666, known for establishing the summary deportation of foreigners, with a new text - the new Portaria 770 modified some points of the previous text. There was a change in the deadline for suspected migrants to present their defense, from 48 hours to 5 days; but, despite some changes, the text of the new Portaria still carries a high degree of subjectivity, leaving the decision of whether or not someone will remain in the country in the hands of the police authority, and the change in the deadline is not enough to guarantee the right to a full defense. In practice, deportation continued to be summary.

²³ Portaria 770/2019, Art. 1º, <https://www.in.gov.br/en/web/dou/-/portaria-n-770-de-11-de-outubro-de-2019-221565769>.

²⁴ Eduardo Domenech, “The control of the ‘non-desired’ immigration: expulsion and expulsability in South America”, *Ciência e Cultura*, v.67, Issue 2, pp. 25-29. P. 28.

²⁵ Karina Quintanilha, “Networks and Crossroads: Policies of precarious migrant status and social struggles beyond the data”. *Journal: Migrant Conexión*, CDHIC, 2020.

²⁶ Art. 3, XXII: “Brazilian migration policy is governed by the following principles and guidelines (...) XXII: repudiation of collective expulsion or deportation practices”.

paragraph 1²⁷) that collective is when a person's irregular migratory situation or act is not individualized. In this sense, according to Article 50²⁸ of the Migration Law, States must notify migrants in person in order to regularize their situation within 60 days; moreover, the deportation, repatriation or expulsion process that the person might go through must guarantee the right to appeal and follow a due legal process, and this procedure cannot occur if there is any threat to life or personal integrity (Article 62). The 2019 decrees mentioned above, with which the Brazilian government created flexible deportation processes, contradicts Brazilian laws, and also the Constitution and international commitments assumed by the country through treaties²⁹.

Moreover, it is important to highlight that the 2017 Migration Law, in its article 3, points out principles that should guide migration governance in Brazil, among them:

I - universality, indivisibility and interdependence of human rights;

(...)

IV - non-discrimination on the basis of the criteria or procedures by which the person was admitted to national territory;

(...)

IX - equal treatment and opportunities for migrants and their families;

(...)

XI - equal and free access of the migrant to social services, programs, and benefits, public goods, education, full public legal assistance, work, housing, banking services, and social security;

²⁷ Migration Law, art. 61, paragraph 1: "There will be no collective repatriation, deportation or expulsion.

Paragraph 1: Repatriation, deportation or collective expulsion is understood as one that does not individualize the irregular migratory situation of each person".

²⁸ *Ibid.*, art. 50, paragraph 1: "The deportation shall be preceded by a personal notification to the deportee, which expressly contains the irregularities found and the period for regularization of not less than 60 (sixty) days, that can be extended, for an equal period, by reasoned order and upon the person's commitment to keep her address information up to date".

²⁹ This was shared in the submission made for the UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, in order to provide information about pushback practices happening in Brazil during the pandemic. I represented the organization "CDHIC" when submitting the information. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/JointSubmissionConectas.pdf>.

(...)

XVII - full protection and attention to the best interests of migrant children and adolescents.

Article 4 of the Migration Law, by its turn, stipulates that

Art. 4. The migrant is guaranteed in the national territory, in conditions of equality with nationals, the inviolability of the right to life, liberty, equality, safety and property, as well as are assured: I - civil, social, cultural and economic rights and freedoms; (...) VIII - access to public health services, social assistance, and social security, as provided by law, without discrimination on the basis of nationality or migratory status; (...) § 1 The rights and guarantees provided for in this law will be exercised in compliance with the provisions of the Federal Constitution, regardless of migratory status, subject to the provisions of § 4 of this article, and do not exclude others arising from treaty to which Brazil is a party.

Therefore, any national policy or legislation affecting migrants, independently of being implemented in a moment of crisis or not, must follow the principles and guidelines established by the Migration Law and the Brazilian Constitution. No legal instrument hierarchically below the law, like a decree, can contradict those provisions that were debated for years and elaborated with the participation of civil society, and going through proper procedures in the Legislative branch. Once a decree or policy does not provide full implementation of rights such as *non-refoulement*, due process, or access to economic, social, cultural and environmental rights in equal basis as to a national, there is a violation of human rights of the migrants inside Brazil's jurisdiction.

Regarding refugees, Brazil adopted in 1997 the Refuge Law (Federal Law n. 9,474/1997),³⁰ which brought some advances – for example, the law provides that authorities based on the borders must be transparent and provide all the necessary information to the asylum-seekers, not allowing immediate deportation or any measure that involves a country where there is a risk in the right to life or freedom. Other important Articles of the Refuge Law are Article 8, which establishes the principle of non-criminalization in cases of irregular entry, and Article 9, which describes the procedure that the authorities should adopt when in first contact with the asylum-seeker, for example prepare a declaration with all the circumstances related to the country's situation.

The most important innovation was that the law adopted a further than the Geneva Convention definition of a refugee: it also considers the context when people are forced to leave their country due to a serious and widespread violation of human rights (Article 1, III), and in this context there is a simplification in the refugee status' recognition procedure. This is the case of Venezuelans, since that the country was recognized as being in a situation of a serious widespread of human rights violations in 2019 by the Government Committee responsible for reviewing and deciding all asylum claims in Brazil, "CONARE", so there was indeed a simplification of the refugee status procedure.³¹ During the period from 2011 to 2020, CONARE applied this reasoning to 93,7% of the total cases of refugee status recognition, and 92,8% were Venezuelans.³²

By applying the Migration Law in combination with the Refuge Law, the Brazilian State adopted a very progressive migratory normative model, with various forms of residences authorization to manage the receiving of non-nationals and also bringing the obligation of

³⁰ Law n. 9.474/1997, http://www.planalto.gov.br/ccivil_03/leis/L9474.htm.

³¹ Submission sent to the UN Special Rapporteur Felipe González mentioned above, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/JointSubmissionConectas.pdf>, p. 3.

³² Ministry of Justice and National Committee for Refugees, "Refuge in numbers". 6 edition, 2021, https://www.acnur.org/portugues/wp-content/uploads/2021/06/Refugio_em_Numeros_6a_edicao.pdf.

document regularization as a governance guideline for the Public Administration (Art. 3, V). In addition to specific forms of regularization for ordinary situations such as family reunion, health treatment, work, and study, the Migration Law established the possibility of particular residence permits, in general, or individual character. As seen above, nationals of Venezuela can seek the refugee status as a type of residence permit and are guaranteed a residence permit in provisional form until CONARE's consideration. Like holders of definitive residence authorization, persons in the condition of requesting recognition of the status of refugee have regular migration status (Art. 21 of Law 9.474/97). The procedure, in this case, is even more favourable, and the request can be made with whatever documents the person has.

For this reason, during the past years Brazil has not faced many issues related to the situation of migrants in irregular migratory situations, the so called "undocumented migrants".³³ However, this is not an unprecedented phenomenon, given the existence of contingents of people who have had refugee requests denied definitively, without the possibility of refuge, or even who have suffered compulsory withdrawal measures, especially expulsion, and are still in the national territory. As we will see, with the closure of the land border for more than a year with express provision for "disqualification of refugee requests" and "immediate deportation", the latter without guaranteeing due legal process, the volume of undocumented people has increased exponentially, with several impacts on the guarantee of economic and social rights.

1.3 An Important National Policy: “Operação Acolhida”

³³ According to the Inter-American Court OC n. 18/2003, migratory status is the “Legal status of a migrant, in accordance with the domestic legislation of the State of employment”, and undocumented migrant worker or migrant worker in an irregular situation is “A person who is not authorized to enter, stay and engage in a remunerated activity in the State of employment, pursuant to the law of the State and international agreements to which that State is a party and who, despite this, engages in the said activity”, OC 18/03, “Juridical Condition and Rights of Undocumented Migrants”, 2003, [https://www.refworld.org/cases,IACRTHR,4f59d1352.htmlGeneral%20Comment%20No.%2015%20\(The%20position%20of%20aliens%20under%20the%20Covenant](https://www.refworld.org/cases,IACRTHR,4f59d1352.htmlGeneral%20Comment%20No.%2015%20(The%20position%20of%20aliens%20under%20the%20Covenant), par 69.

In the theme of the Venezuelan flow of migrants, it is worth mentioning the Operation Welcome (“Operação Acolhida”), which consists of a humanitarian task force executed by the Brazilian Government - specifically the Armed Forces – as a response to the large migration flow coming from the border between Brazil and Venezuela (in the State of Roraima). The Operation was established in 2018,³⁴ and aims to promote border management and "ordering",³⁵ as well as reduce social pressure in Roraima by creating reception spaces for migrants. In this sense, they have established partnerships with international organizations, such as the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Children's Fund (UNICEF), as well as with local and other international organizations.

Although the Operation Welcome generates advances in the humanitarian reception of Venezuelans, benefiting people by providing social assistance and internalizations of Venezuelans from Roraima to other parts of Brazil, there are several critiques and lack of transparency regarding human rights’ protection of these people in general. For example, the leading role of the Armed Forces in these actions is questionable, which leads one to understand that the migration issue remains in the realm of securitization-militarization. Furthermore, there are several doubts about the destination of refugees in the internalization process, since they are often taken to cities or regions that have no conditions to provide appropriate support, and as a result end up, for example, being subjected to slave labor without proper supervision of the national authorities.³⁶

³⁴ Through the Provisory Measure n. 820, 218, <https://www.congressonacional.leg.br/materias/medidas-provisorias/-/mpv/132234>.

³⁵ Federal Government, “Operation Welcome”, <https://www.gov.br/casacivil/pt-br/acolhida/sobre-a-operacao-acolhida-2>.

³⁶ Some companies were found subjecting migrants that were interiorized by Operation Welcome to slavery work conditions, by not providing food, water and shelter. For example, big beer companies as Ambev and Heineken are under investigation by not monitoring the work conditions imposed on migrants that worked to their partner transporters. See: Gil Alessi, “Ambev and Heineken are fined for slave labour of Venezuelan immigrants in São Paulo”, El País, 2021, <https://brasil.elpais.com/brasil/2021-05-17/ambey-e-heineken-sao-autuadas-por-trabalho-escravo-de-imigrantes-venezuelanos-em-sao-paulo.html>.

Therefore, although the Migration Law and the Refuge Law in Brazil are considered by many activists, researchers and civil society organizations to be progressive pieces of legislations with regard to immigrant rights when compared to the protectionist policies advocated by other countries, many migrants and refugees in Brazil have been for years in a situation of extreme vulnerability and without state support, facing extreme poverty and working in conditions analogous to slavery. There is also the difficulty of integration, considering the lack of support in learning Portuguese, in addition to obstacles in access to housing, education, document regularization, and the formal labor market, among many other problems faced. Added to this there are several forms of discrimination, in addition to racism and xenophobia, which are very present in the Brazilian society and government nowadays.

The Portaria 666/19, followed by Portaria 770/19, are examples that show that since 2019 the Brazilian Government has implemented illegal and discriminatory policies against migrants and refugees; as it will be analysed in the following chapter, it seems that the pandemic is only an excuse for the continuation of these measures, using the virus to implement a discriminatory approach against migrants.

2. COVID-19 AND BRAZIL'S RESPONSE FOR MIGRANTS AND REFUGEES

2.1 Decrees issued during the Pandemic

Brazil was one of the countries most affected by the COVID-19 pandemic, where more than 650,000 people have died because of the virus. If the challenge of coping with the pandemic were not enough, some responses to the public health crisis by the Brazilian government and public bodies have not been inclusive, did not follow international standards impacts and led to a weakening in the protection of fundamental rights and guarantees, especially for the most vulnerable groups in society.

When it comes to migrants and refugees, there are several points that demand attention, especially: (i) the illegal, disproportionate and discriminatory measures to restrict entry into the country; (ii) social conditions and vulnerabilities; (iii) regularization procedures; (iv) access to Emergency Federal Income Support; (v) lack of information on nationality in the records of infections and deaths from COVID-19.

Since COVID-19 was declared a pandemic in March 2020 by the World Health Organization (WHO), around 40 decrees have been published to regulate the closing of borders by the Brazilian federal government, under the justification of impeding the spread of the virus.³⁷ The decrees were contrary to Migration and Refugee Brazilian laws, since that the sanctions stipulated in case of non-compliance were the suspension of asylum requests, immediate deportation or repatriation, and criminal, civil and administrative liability of migrants. The data is

³⁷ The last decree up to the present moment, "Portaria n. 670/2022", still establishes (Article 16) as consequences of violating the rules of entrance: (i) civil, administrative and criminal liability; (ii) immediate repatriation or deportation; (iii) ineligibility for refugee request. My translation, http://www.planalto.gov.br/CCIVIL_03/Portaria/PRT/Portaria-670-22-cc.htm#art24.

shocking: according to a famous Brazilian media survey, 2,901 people were deported in 2020, which represents an increase of 5,708% compared to 2019.³⁸ Sanctions like these are illegal and disproportionate, as they do not guarantee the right to defense and due process of law,³⁹ and they violate the principle of non-criminalization of migration.⁴⁰ Moreover, the suspension of asylum requests violates the principle of *non-refoulement*.

The decrees continued to be renewed without changing its terms and not considering the practical impacts they caused. Despite constant manifestations by the civil society during 2020 and 2021, the provisions for the disqualification of refuge and immediate deportation were not excluded, putting the life and freedom of refuge seekers in danger. In cases of need for international protection, border authorities should adopt other health measures to prevent the spread of the virus without disrespecting the rights of refugees, following the positions of the World Health Organization (WHO) in its report “Preparedness, prevention and control of coronavirus disease (COVID-19) for refugees and migrants in non-camp settings”.⁴¹

There was no guarantee of the right to a full defence and no opportunity to appeal in civil and administrative processes. The provision for criminal accountability contradicts the principle of non-criminalization of migration, according to Article 3, item III, of the Migration Law.

In fact, the closure of borders in Brazil was contradictory and questionable since the beginning of the pandemic. All the land borders were closed, impeding the entry of people of

³⁸ Viviane Sousa and Isabela Leite, “Deportations of foreigners increase 5.708% in Brazil in 2020”, GloboNews and G1, 2021, http://www.planalto.gov.br/CCIVIL_03/Portaria/PRT/Portaria-670-22-cc.htm#art24.

³⁹ These measures infringe the administrative proceeding of compulsory removal provided for in Chapter V of Law 13,445/2017, the Brazilian Migration Law.

⁴⁰ Article 3, item III, of Law 13,445/2017.

⁴¹ According to this document, “All states have an obligation to protect and promote the right to health for all people on their territory, without discrimination, and this includes refugees and migrants. This refers to the right to access health-care services, such as testing, diagnostics, care and treatment and referral as well as prevention and health promotion-related activities for COVID-19. Refugees and migrants regardless of their legal status are entitled to this and other universal human rights. Moreover, they should not be scapegoated, stigmatized or otherwise targeted with specific, discriminatory measures.” WHO, “Preparedness, prevention and control of coronavirus disease (COVID-19) for refugees and migrants in non-camp settings”, Interim Guidance, 2020, P. 1-2.

specific nationalities from countries that share a border with Brazil in South America – the borders crossed by migrants and refugees with social needs. By its turn, people coming by air (usually from the Global North, as investors or tourists) had no strict entry restrictions - in fact, they did not even have to test negative for COVID-19 or quarantine. In October 2020, the land border with Paraguay was opened and also generated a polemic, since Paraguay is a relevant economic partner of Brazil. Therefore, civil society advocates argued that the opening was exclusively based on economic interests, while migrants in vulnerable situations entering through other borders received sanctions and threats.

Another serious problem with the decrees were the explicit discrimination against Venezuelans, considering that they did not extend to these people the exceptions available for those coming from other countries - for example, the entry of people from other countries who had (i) a permanent or temporary residence permit in Brazil, (ii) a National Migration Identity Card or (iii) the ones with family ties. It was made impossible for Venezuelans to enter Brazil, with no exceptions; this in itself is a serious and contradictory measure, because in addition to treatment that is unequal and incompatible with constitutional principles, the Brazilian government, as analysed above, has recognized that there is a humanitarian crisis and serious and widespread human rights violations in Venezuela.⁴² Despite the argument that the measures follow the recommendation of the National Health Surveillance Agency (ANVISA), an investigation by journalists and civil society demonstrated that, according to technical notes from the Agency itself, unequal treatment of Venezuelan people was never recommended as a necessary measure to fight the COVID-19.⁴³

⁴² Submission sent to the UN Special Rapporteur Felipe González mentioned above, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/JointSubmissionConectas.pdf>, p. 3.

⁴³ Patrícia Campos Mello, “Brazil impedes Venezuelans at the border based on non-existent Anvisa guidance”, *Folha de S. Paulo*, 2021, https://www1.folha.uol.com.br/mundo/2021/02/brasil-barra-venezuelanos-na-fronteira-com-base-em-orientacao-inexistente-da-anvisa.shtml?utm_source=whatsapp&utm_medium=social&utm_campaign=compwa.

Regarding the Venezuelan flow during the pandemic, the Organization of American States (OAS) in its report "Situation of Venezuelan returnees and those seeking to return to their country in the context of COVID-19", shows that approximately 105,000 Venezuelan migrants and refugees returned to Venezuela from Colombia, and 6,000 returned from Brazil during the pandemic. Considering this mass return, the Venezuelan government established unreasonable restrictions on the number of people who could re-enter each day, which led to an increase in the flow of people on "trochas," which generates a series of risks. Furthermore, this reaction from the Venezuelan government has automatically generated more stigmatization and criminalization of the returnees, to the point of accusing them as "biological weapons" and "bioterrorists", in addition to ordering their criminal prosecution,⁴⁴ completely violating the right of every person to return to their country of origin.

In this context, the discriminatory measures against people coming from Venezuela contradicted the recognition of the situation of serious and widespread violation of human rights in Venezuela, a criterion that obliges the recognition of Venezuelans seeking international protection as refugees in Brazil, according to art. 1, item III, of the Refuge Law. The existence of Operação Acolhida is one more demonstration that the Brazilian government recognizes a humanitarian crisis in Venezuela, making even more inhumane the occasional discrimination against people from that country.

Moreover, according to the report on the mission of the DPU in the State of Roraima, Operation Welcome determined discriminatory measures between documented and undocumented migrants as a criterion for access to social assistance and health services, as can be seen in item 2.3, p. 12:

The Operação Acolhida in Boa Vista also does not provide assistance to those who entered after the border was closed, except for occasional assistance in

⁴⁴ ACHR, Article 22.5.

delicate health cases and family unification of undocumented children and adolescents. This order from the Operation Command extends to the International Agencies that have reported a great discomfort with this posture since the Migration Law does not prevent access to public services for those undocumented people. It is even common to use the expression "illegal" when dealing with undocumented migrants.⁴⁵

Thus, there is evidence regarding the non-provision of public health and social assistance services for undocumented migrants, at least in the cases that come within the scope of Operação Acolhida. In this regard, given the significant allocation of public resources and the public recognition of the emergency character of the task force in question, as well as the absence of any normative prevision that excludes undocumented people, all services must be provided without discrimination due to their migratory status.

The main consequence of the border closure and other measures adopted by the Brazilian government during the pandemic was the increase in the number of undocumented migrants. The restrictions generated the circulation of migrants through unregulated passages, in the form of trails or "trochas," what promoted illegal migration and increased vulnerability of the people involved. Over the months, it was generated a stock of thousands of migrants in irregular migratory situations, who did not submit to the migratory control of entry before the Federal Police.⁴⁶ By not having a regular status, after the start of the pandemic migrants were deprived of accessing basic social rights, such as social security, health, legal work, emergency income, housing, among others, and the federal police in charge of the documentation processes mainly acted with xenophobia, imposing fines and threats of deportation.

⁴⁵ Federal Public Defender's Office (DPU), Technical Note N.9, *op.cit.*, my translation. P.3.

⁴⁶ *Ibid.*

2.2 Fear, Violence and Undocumentation

The decrees published since March 2020 raised a lot of concern and more discrepancies between nationals and non-nationals. Worldwide, entry and exit restrictions were necessary as a way to contain the spread of the coronavirus; however, the measures adopted by the Brazilian federal government were disproportionate and violated minimum guarantees of human rights and the right to seek refuge, not following international human rights standards and legislation. Despite the government's frequent claims that the decrees followed sanitary recommendations to contain the spread of the virus, there was flexibility in entering by air much earlier than by land or water. If there was an evaluation that it was possible to gradually open the borders, the entry exceptions should prioritize people in need of humanitarian aid and seeking refuge, and not tourists or investors, as was done in Brazil.

There was a provision in the decrees allowing the entry of migrants authorized by the Brazilian government for humanitarian reasons, and there was also the authorization to carry out cross-border humanitarian actions previously authorized by the local health authorities. In practice, however, the provisions did not have any effect, as they were very general and did not contain any concrete obligations. Thus, sanctions prevailed in the case of unauthorized entry, such as civil, administrative and criminal liability, immediate deportation and repatriation, and denial of refugee status. There was a selective entry of immigrants, in addition to an exacerbated increase in the militarization of borders, which promoted fear, xenophobia, and violence.

In this regard, some factual examples may be highlighted. On April 2020, the Civil Guard from Roraima carried out a forced removal of more than 100 Venezuelan migrants without a judicial order from a settlement called Clamor do Rio. The police even used a backhoe to demolish their accommodation.⁴⁷ The justification given by the municipal government was to

⁴⁷ Roraima Newspaper, "Municipal Guard removes 30 immigrant families from a settlement on the banks of the Branco river", 2020, <https://globoplay.globo.com/v/8515992/>.

avoid gatherings and remove settlements from environmentally protected areas, but no plans were made to provide alternative or even temporary shelter for the families, among which there were children, adolescents and people in the risk group for COVID-19, dispersing them into the city in the midst of a pandemic. Some of these migrants formed another settlement called “Clamor do Rio 2” in the forest with appalling sanitary conditions, no access to water and sanitation, and living in fear of another violent action by the police. Further forced removals or evictions occurred in diverse locations in Brazil, under the excuse of avoiding gatherings during the pandemic, and without a plan to provide subsequent shelter.⁴⁸

During 2020 and 2021, migrants were in a tense situation in the border between Peru and Brazil, in the State of Acre. One occasion was in August 2020, when 14 people (including women and children) were waiting for several weeks to be admitted into the Brazilian territory. Being deprived of shelter, food and water, they were only waiting without responses, and finally their entrance was permitted after the Federal Public Defender’s Office (“DPU”) made an official request to the Ministry of Justice.⁴⁹ In this same period, 18 people, mainly Venezuelans, were summarily deported – they were just left in a bridge at the border - after being interviewed by the Brazilian Federal Police.⁵⁰ Migrants in this border experienced a limbo situation where they could not migrate or ask for refuge in neither of the countries, living in a precarious situation without food, shelter, and taking baths in a river. Only after a lawsuit was filed, they had the right to (re)access the Brazilian territory.⁵¹

⁴⁸ See, for example: “Eviction during the pandemic in Vila das Belezas (CCBE/Morro do Pullman)”. São Paulo: Coleta Filmes, 2020, <https://www.youtube.com/watch?v=qbZrEQeZvk0>; Polyana Girardi, “Diocese criticizes Boa Vista City Hall for removing families from an occupation near Rio Branco”, G1, 2020, <https://g1.globo.com/rr/roraima/noticia/2020/08/19/diocese-critica-prefeitura-de-boja-vista-por-retirar-familias-de-ocupacao-proxima-ao-rio-branco.ghtml>.

⁴⁹ Federal Public Defender’s Office, “Federal Public Defender’s Office guarantees entry of Venezuelans in Brazil for humanitarian reasons”, 2020, <https://www.dpu.def.br/noticias-acre/58214-dpu-garante-ingresso-de-venezuelanos-no-brasil-por-questoes-humanitarias>.

⁵⁰ Aline Nascimento, “In Acre, around 40 immigrants were deported by Federal Police since the beginning of quarantine”. G1, 2020, <https://g1.globo.com/ac/acre/noticia/2020/08/13/no-ac-cerca-de-40-imigrantes-foram-deportados-pela-pf-desde-o-inicio-da-quarentena.ghtml>.

⁵¹ Flávia Mantovani, “Justice releases entry of Venezuelans who spent weeks trapped in bridge between Brazil and Peru”, Folha de S. Paulo, 2020, <https://www1.folha.uol.com.br/mundo/2020/08/justica-libera-entrada-de-venezuelanos-que-ficaramsemanas-presos-em-ponte-entre-brasil-e-peru.shtml>.

Another paradigmatic case at this border was in February 2021, when a group of at least 500 migrants wanted to leave Brazil through the border in Peru, but they were not allowed neither by Peru's nor by Brazil's government. Then, they needed to camp on a bridge, and in a moment of desperation to enter Peru, they passed through the barrier imposed by the Peruvian police and were treated with gun shots and tear gases, being eventually detained.⁵² The Brazilian government, in that occasion, also used the National Public Security Force to prevent entry. This measure also shows that Brazil and Peru are part of a broader logic of perpetuation of forced mobility, a tactic used by European countries and the U.S. to contain migratory flows before they actually reach their borders.

Furthermore, the “Warao” indigenous peoples from Venezuela also suffered deep consequences from the border's closure decrees. During January 2021, “Warao” people, including children, were threatened to be deported because they entered Brazil through the trochas after walking 18 days. DPU filed a lawsuit to stop this inhumane collective deportation to occur,⁵³ and the judge ruled that collective deportation against indigenous peoples is contrary to the Brazilian migration legal framework, Brazilian Constitution and international treaties that Brazil is party.

Regarding Operação Acolhida, the Brazilian Army was acting violently in the borders against undocumented migrants, leaving them in a situation of extreme vulnerability. DPU, in its official visit to the Operation's facility, reported that the Army was not providing social assistance to migrants and refuge seekers during the pandemic. Furthermore, there was evidence that the army was impeding international and civil society organizations to assist them, with the excuse of the COVID-19 pandemic.⁵⁴ We see, then, that there was an intention to not welcome or assist

⁵² Alcinete Gadelha and Tácia Muniz, “more than 400 migrants who were camping for 3 days on the bridge at AC invade the peruvian side”, G1, 2021, <https://g1.globo.com/ac/acre/noticia/2021/02/16/mais-de-400-imigrantes-que-estavam-acampados-ha-3-dias-em-ponte-no-ac-invadem-lado-peruano.ghtml>.

⁵³ G1, “RR Justice orders Venezuelan children to be sheltered even with a closed border”, 2021, <https://g1.globo.com/rr/roraima/noticia/2021/01/09/justica-de-rr-ordena-que-criancas-venezuelanas-sejam-acolhidas-mesmo-com-fronteira-fechada.ghtml>.

⁵⁴ DPU, “Technical Note n. 9 - DPGU/SGAI DPGU/GTMR DPGU”, available in the Administrative Process n. 08038.068679/2020-71.

the ones entering during these times, and if before the pandemic the Army were obliged by law to receive refugees, after the decrees there was a criminalization of those entering by land, considering them also as biological weapons, and possible virus carriers (with a clear racial bias).

Although the borders were closed, the migratory flows did not stop; actually, migrants and refugees were going through alternative and dangerous routes. The increase of pushback practices by the Brazilian government, specially by the Armed Forces, have impacted those crossing borders, leaving them without access to humanitarian aid and a due legal process. Indeed, refugee seekers were denied of individual measures and evaluation of their concrete context, so they faced undocumented, xenophobia and labour exploitation. In this context, without documents, people from diverse nationalities could not be sheltered and were living on the streets, since that some shelters from the Operation Welcome were only allowing regular migrants.

2.3 Labour Informality, Economic Losses and no Healthcare System

With no documents, there are other innumerable challenges faced by the migrant population in Brazil. The majority of these peoples are in the informal market, where work is unstable and labor rights are scarce, and the majority of the migrant and refugee population used to make their living until the start of the pandemic primarily as street vendors. After the outbreak of COVID-19 and the suspension of services deemed non-essential, these workers saw their income reduced to zero and their precarious and vulnerable situation worsen. Meanwhile, many of those employed in the formal job market had their salaries cut, or they were dismissed during the pandemic.

To assist the ones losing jobs and income, Brazil provided the Emergency Income Support, a federal benefit authorized in April 2020, in the amount of R\$600 (approx. \$115) per

month to low-income people⁵⁵ after the crisis started. Considering the obstacles to regularization, migrants could not register to receive the benefit, or suffered denials with vague grounds, for example: “there are indications that you do not meet the criteria to receive the Emergency Income Support”.⁵⁶ Moreover, the process happened online, and not all migrants and refugees had access to internet to send the documents, so there was a clear failure to access the service online. In this sense, many migrants were not able to receive the federal benefit due to the barriers encountered at the various stages of the process, although according to the Migration Law, not having migration documents should not be a reason for obstructing access to rights, in this case, the right to the Emergency Income Support.

Finally, another relevant problematic faced was the lack of information on infections and deaths from COVID-19 of migrants and refugees. SUS (Brazil’s public healthcare system) did not track data regarding nationality and/or immigration status of infected people, what has prevented an analysis and monitoring of the disease’s impact on the migrant population in the country. Brazil’s government, in this regard, failed to recognize the existence of specific healthcare needs for migrants and refugees on account of their cultural differences and their social vulnerability, not guaranteeing the principles of equality and social inclusion that underpin the SUS, since that the lack of data on the “nationality” variable prevents the elaboration of important correlations to inform public policies and actions on healthcare specifically for the migrant and refugee population.

The discrimination on the basis of migratory status for access to basic rights, such as health and social assistance, could lead to international accountability of the Brazilian State, for example, before the Inter-American System of Human Rights, due to sufficient evidence of

⁵⁵ The main criteria for receiving the benefit was not being employed in the formal job market and having an average monthly income equivalent to no more than half the minimum wage per person and three times the minimum wage per family (R\$3,135 - roughly 580 dollars for the whole family).

⁵⁶ While working in the Center for Human Rights and Migrant Citizenship (CDHIC), we attended a lot of migrants that showed this justification of denial from the Federal Government.

violation of the basic precepts of the American Convention and the regional minimum standards for the theme, as will be analyzed in the following chapter.

3. INTERNATIONAL STANDARDS AND BRAZIL'S COMPLIANCE

There are, concurrently and complementarily to the global protection system of human rights - led by the United Nations (UN) - the regional protection systems, namely: the European, the Inter-American, and the African. Each one has its own specificities to meet the local demands and peculiarities, considering that a reduced number of States, with similar characteristics, makes it easier to achieve political consensus and cooperation.⁵⁷

Both in the global and regional level, the prohibition of discrimination plays a central role in the protection of human rights of migrants. The widely ratified human rights treaties, although they do not define migrants' rights specifically, prohibit discrimination⁵⁸ (in general, permit only proportionate and reasonable differences in treatment), which can be considered – at least when it comes to racial discrimination - a *jus cogens* norm.⁵⁹ Article 2 of the Universal Declaration of Human Rights (UDHR) expresses the non-discrimination principle, but grounds such as “nationality” is not specifically listed.⁶⁰

The International Covenant on Civil and Political Rights (ICCPR) is especially important because it protects rights affected by measures that generate migrant control, it addresses discrimination in a more detailed way and points out non-derogable rights that all human beings possess at all times. Moreover, the Human Rights Committee's General Comment No. 15

⁵⁷ Rhona Smith, “Textbook on International Human Rights”, Oxford: Oxford University Press, 2003.

⁵⁸ The non-discrimination norm is notable also for being in the United Nations Charter: art. 1(3) includes among the purposes of the UN “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”; Art. 55 c brings the commitment of the UN to promote non-discrimination.

⁵⁹ International Court of Justice, Case regarding Barcelona Traction, Light and Power Company, 1970 ICJ Reports 33-34; W. McKean, Equality and Discrimination in International Law, 1983, p. 283.

⁶⁰ According to Article 2, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. However, usually national origin is associated to ethnic origin, rather than foreign nationality.

provides guidance on the “position of aliens under the Covenant.”⁶¹ A State Party of the ICCPR⁶² must ensure the rights of this Covenant to “all the individuals within its territory and subject to its jurisdiction” (Article 2(1)). Therefore, it shall be applied – in an equal manner to non-nationals - the following ones: (i) absolute rights, in an equal basis to nationals, such as the right to life (Article 6), the prohibition on torture or cruel, inhuman or degrading treatment or punishment (Article 7), prohibition on slavery, servitude and forced or compulsory labor (Article 8), freedom of thought, conscience and religion (Article 18); (ii) Rights which selective denial would never be reasonable or proportionate, such as the right to leave the country (Article 12 (2)), equality before the law and fair trial rights (Article 14), the right of minorities to culture, religion and language (Article 27), among others.

The ICCPR also prohibits arbitrary state actions, and distinctions between nationals and non-nationals must be justified on grounds such as national security or public order, if carried out proportionally. In this sense, the prohibition of arbitrary arrest or detention (Article 9) is applicable to everyone that is within the jurisdiction of the State, and the right to judicial proceedings to challenge the lawfulness of detention applies to all and is non-derogable.⁶³ There are some rights restricted to citizens, such as the right to vote (Article 25), but also there are some provisions of special importance to protect migrants: Article 13 on expulsion,⁶⁴ right to an interpreter in criminal proceedings (Article 14 (3) (f)), right to recognition as a person (Article 16).

⁶¹ Human Rights Committee, “General Comment No. 15 (The position of aliens under the Covenant)”, 1986, <https://www.refworld.org/pdfid/45139acfc.pdf>.

⁶² Brazil ratified the ICCPR in 24 January 1992: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=24&Lang=EN.

⁶³ Human Rights Committee, “General Comment No. 29 (Derogations during a State of Emergency)”, 2001, <https://www.refworld.org/docid/453883fd1f.html>, para. 16.

⁶⁴ Article 13: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

In summary, migrants are entitled with civil rights as much as citizens, especially regarding security of the person and a fair process. The non-derogable rights demand equality, and measures against migration must not be violent. There is a strong link between xenophobia, racism and human rights violations, so there is the challenge for States to carry on measures that meet human rights standards. When migrants are part of ethnic and racial minorities, they are entitled to protection against discrimination on those grounds.⁶⁵

3.1 Inter-American System of Human Rights: Regional Migration Governance Before and During the Pandemic

Latin America is a peculiar and complex region, considering its history of dictatorships, deep inequality, conservative movements, and high rates of violence against vulnerable groups such as women, afro-descendants, indigenous peoples and migrants. The Inter-American System of Human Rights (IASHR) was created in order to promote an *Ius Commune* in the region, so Member States must take efforts to achieve peace and justice, promote their solidarity and intensify their collaboration among each other.⁶⁶ There are goals to be pursued in the regional level to seek for economic, social and cultural development, to diminish the high levels of poverty and generate democratic development and inclusion of all peoples in the continent.⁶⁷

⁶⁵ Alexander Aleinikoff and Vincent Chetail, “Migration and International Legal Norms”, T.M.C Asser Press, The Hague, 2003.

⁶⁶ See Charter of the Organization of American States, Article 1, <https://www.cidh.oas.org/basicos/portugues/q.Carta.OEA.htm>.

⁶⁷ According to Article 2 of the Charter, these are the purposes of the Organization of American States: (a) To strengthen the peace and security of the continent; (b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention; (c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; (d) To provide for common action on the part of those States in the event of aggression; (e) To seek the solution of political, juridical, and economic problems that may arise among them; (f) To promote, by cooperative action, their economic, social, and cultural development; (g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and (h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

The American Convention on Human Rights (ACHR) – also known as Pact of San Jose da Costa Rica –, which entered into force on July 18, 1978, establishes this aspiration for a cooperation among the American States, and sets up the functions and procedures assigned to the two competent bodies of the system: the Inter-American Commission on Human Rights (IACHR, or “the Commission”) and the Inter-American Court of Human Rights (IACtHR or “the Court”). Therefore, the IASHR, influenced by the European Regional System of Human Rights, has a biphasic procedure.⁶⁸

The IACHR and the IACtHR monitor compliance with the commitments established by the State Parties to the ACHR; the Commission is overall responsible for receiving and analysing individual petitions on human rights violations, investigating in loco particular cases or the general situation of States, publishes press releases to give visibility to multiple facts of concern that occurred in the Americas, prepares annual, thematic, and country reports to address violations, evaluates progress in the implementation of human rights in States, does meetings with vulnerable populations, holds public hearings with States, civil society and victims, propose the adoption of measures to governments to avoid serious irreparable harm, and send cases to the Court, when it is necessary.

The Court, by its turn, has an advisory jurisdiction, in matters relating to the interpretation or application of the ACHR,⁶⁹ and a contentious jurisdiction where, through seven judges, it analyses the cases sent by the Commission or State Parties. In order to promote and protect human rights and guarantee the *Ius Commune* in the Latin American region, as well as comply with the cooperative goals agreed among the Parties, the States must follow both the advisory recommendations and the judgement of the Court regarding a specific case.⁷⁰ Specially

⁶⁸ It should be noted that, before the adoption of Protocol 11, the European system also had a two-phase procedure.

⁶⁹ ACHR, Articles 62 and 64.

⁷⁰ According to the Conventionality Control doctrine adopted by the IASHR, judges and other public authorities of any State Party of the American Convention have an international obligation of interpreting its judgements, national rules and politics in consonance not only with the Convention, but also with the Inter-American *corpus iuris* in general (what includes the Advisory Opinions, the rulings and other guidelines issued by the IACtHR). I recommend as

the States that recognized the jurisdiction of the Court,⁷¹ both the Advisory Opinions⁷² and the rulings should be binding.

In the field of migration and refuge, the Inter-American System identified several aspects of concern that demand specific policies from the States, mainly to promote regularization and the social inclusion, education policies, and policies against discrimination, racism, xenophobia and violence (especially at borders). It is worth mentioning the "Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking" (Resolution No. 04/19), in which there are 80 principles seeking to guide authorities when developing legislation, policies, programs and decisions when it concerns migration and refuge.

The document presents fundamental guidelines that must be applied to migrants and refugees, for example, right to life, personal integrity, right to recognition as a person before the law, presumption of innocence; principles encouraging a regular migratory status, making it clear that States must take appropriate measures to guarantee that an irregular situation does not persist, in order to avoid precarious workplace conditions and other consequences that being irregular may bring; it emphasizes the necessity of States to coordinate and cooperate on international migration, in order to ensure access to justice across borders. In this sense, States must create legal mechanisms and agreements among themselves to guarantee fundamental rights

sources to understand better the Conventionality Control: Eduardo Ferrer, Mac-Gregor, "The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*", *In*: Armin von Bogdandy; Eduardo Ferrer Mac-Gregor; Mariela Morales Antoniazzi; Flávia Piovesan (coord.), "Transformative Constitutionalism in Latin America". New York: Oxford University Press, 2017, p. 321; Flávia Piovesan, "Conventionality Control, Human Rights and Dialogues between Jurisdictions", *In*: "Conventionality Control: a Latin-American context", Brasília: Gazeta Jurídica, 2013. p. 115-147; Valerio de Oliveira Mazzuoli, "General Theory of the Conventionality Control in the Brazilian Legal Framework", *Revista de Informação Legislativa*, vol. 46, n. 181, p. 113-133, jan.-mar. de 2009. P. 114.

⁷¹ According to Article 62 of the ACHR, "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention". Brazil did recognize the jurisdiction of the Court as binding. Corte IDH, "ABC de la Corte Interamericana de Derechos Humanos", Preguntas frecuentes, 2018, <https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH.pdf>, p. 6.

⁷² Through the Advisory Opinions (OC), the IACtHR analyses: (a) the compatibility of domestic norms with the Convention; (b) the interpretation of the Convention or other treaties concerning the protection of human rights; and (c) the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States. Once a State accepted the Court's jurisdiction, they should consider the OCs as binding. Corte IDH, "ABC de la Corte Interamericana de Derechos Humanos", *op.cit.*, p. 11.

and also respond effectively to violence migrants and refugees might suffer when crossing borders. Principles such as *non-refoulement*, the prohibition of collective expulsion or guarantees in deportation procedures are also presented by the document. Women and children are specially highlighted due to additional scenarios of violence and discrimination.

In the context of the COVID-19 pandemic, the IACHR prepared the Resolution no. 01/2020 on "Pandemic and Human Rights in the Americas", establishing guidelines in order that States protect and promote fully human rights during the fighting with the virus. There is a specific section for migrants, refugee and asylum seekers, stateless persons, internally displaced persons, and victims of human trafficking, which requires States to expose people in mobility as little as possible to situations of contagion, prohibiting, for example, detentions and avoiding mass expulsions and deportations.⁷³

Moreover, these guidelines reinforce that States should cooperate and exchange information in order to promote logistical support and prevention measures, so international migrants have access to services, programs and policies during the COVID-19 pandemic. The Inter-American System, therefore, has argued in the pandemic scenario that it is the States' responsibility to refrain from imposing measures that prevent or intimidate the access of people in mobility to services, programs, and policies to address the pandemic, such as immigration control actions or repression in hospitals or shelters.⁷⁴

Similarly, IACHR Resolution No. 4/2020,⁷⁵ also published in the context of the pandemic, addressed the human rights approach by requiring States to refrain from stigmatizing or discriminating against people who may have had contact with the virus, but migrants and

⁷³ IACHR, "Inter-American Principles on the Human Rights of All Migrant, Refugee, Stateless and Trafficking Victims", <https://www.oas.org/es/cidh/informes/pdfs/Principios%20DDHH%20migrantes%20-%20ES.pdf>, 2019, Paras. 58 a 62.

⁷⁴ IACHR, "Inter-American Principles on the Human Rights of All Migrant, Refugee, Stateless and Trafficking Victims", *op.cit.*, para. 18-19.

⁷⁵ CDH UCAB, "The drama of returnees: from revictimization to criminalization", 2020, http://w2.ucab.edu.ve/tl_files/CDH/Lineastematicas/El%20drama%20de%20los%20retornados%20fin.Pdf.

refugees have experienced various situations of stigma simply because they needed to migrate. A clear example in South America is that, during the health crisis, the closure of borders with Venezuela directly impacted the flow of people who wished to leave their country, given the economic crisis already existing and exacerbated by the pandemic and the consequent loss of jobs.

Finally, in April 2021, the IACHR published the Resolution No. 01/2021 entitled "The Vaccines against COVID-19 in the Context of Inter-American Human Rights Obligations". The essentiality of ensuring access to the vaccine for all migrants is highlighted, and it is essential to have data on access to vaccination by this population. According to the Resolution,

15. States must ensure that information and campaigns about vaccines, especially about priority populations, steps, and progressive access to vaccination, actively prevent xenophobia, stigmatization, and other forms of discourse that promote hatred, violence, or blame people, groups, and populations of migrants, refugees, stateless persons, or in other contexts of human mobility.

(...)

18. States should safeguard personal data and information contained in medical records, including biographic and biometric information collected by medical services and other procedures related to vaccination. In addition, they should provide safeguards to protect the personal data of migrants, refugees and other persons in the context of human mobility, taking into account the risks of using this information for migration control purposes.

However, what we see in the Latin American region is a difficulty experienced by migrants in accessing health systems. In practice, undocumented migrants could not access emergency services. Along the same lines, migrants in an irregular situation have not been

included in the vaccination plan against COVID-19, despite the proposals made by civil society to promote the inclusion of this population in the vaccination plan.⁷⁶

Within the Inter-American Court of Human Rights, several precedents, both in its contentious and advisory jurisdiction, address the facets of international mobility. For example, there are standards related to undocumented migrants,⁷⁷ the right to nationality,⁷⁸ due process of law,⁷⁹ consular assistance,⁸⁰ the right of refuge seekers,⁸¹ the right to equality and non-discrimination against migrants,⁸² including children.⁸³ In short, international jurisprudence and treaties do not guarantee an immigrant's right to free entry (except for refugee applicants). Still, States must promote the right to equality for migrants, regardless of their immigration status, and ensure the rights to rebottle proceedings, full defence, access to justice, and due process of law, as will be discussed with great detail through Inter-American standards and case-law.

In this sense, the Inter-American standards highlight that all migrants have the right to due process before courts or other authorities. According to the IACHR, “States must adopt all measures that may serve to avoid unnecessary delays in administrative and judicial proceedings, so as not to unduly prolong the suffering caused by remembering events that happened and to promote appropriate handling of the risk of re-traumatization as a result of those proceedings”.⁸⁴

⁷⁶ Centro de Estudios Derecho, Justicia y Sociedad – Dejusticia, “A National Vaccination Plan Vaccination with a human rights approach”, 2021,

<https://www.dejusticia.org/un-plan-nacional-de-vacunacion-con-enfoque-en-derechos-humanos/>.

⁷⁷ IACtHR, “Advisory Opinion concerning the rights of undocumented migrants (OC-18/03)”, 2003, https://www.corteidh.or.cr/docs/opiniones/seriea_18_esp.pdf.

⁷⁸ IACtHR, “Case of the Girls Yean and Bosico Vs. the Dominican Republic”. Sentence issued on September 8, 2005, https://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf.

⁷⁹ ACtHR, “Case of Vélez Loor v. Panama”. Sentence issued on November 23, 2010, https://www.corteidh.or.cr/docs/casos/articulos/seriec_218_esp2.pdf.

⁸⁰ IACtHR. “Advisory Opinion on the right to information about consular assistance in relation to due process guarantees (OC-16/99)”, 1999. https://www.corteidh.or.cr/docs/opiniones/seriea_16_esp.pdf.

⁸¹ IACtHR. OC-18/03, Op.Cit.

⁸² IACtHR, “Case of Nadege Dorzema or others Vs. the Dominican Republic”, sentence issued on August 24, 2012, https://www.corteidh.or.cr/docs/casos/articulos/seriec_251_por.pdf.

⁸³ IACtHR. “Advisory Opinion concerning migrant children (OC-21/014)”, 2014, https://www.corteidh.or.cr/docs/opiniones/seriea_21_por.pdf.

⁸⁴ IACHR, “Inter-American Principles on the Human Rights of All Migrant, Refugee, Stateless and Trafficking Victims”, *op.cit.*, p. 18.

Migration processes must ensure, at least, the following guarantees: (i) migration control functions, such as request and review documentation, must be clearly defined by law; (ii) the authorities in charge of these processes must be independent, competent and impartial, and be transparent when providing information regarding legal status and migrant's rights; (iii) personal data must be protected, and it must be provided a detailed notification about the proceeding in which they are party; (iv) right to be represented by a qualified lawyer or public defendant, to be heard by a judge and to analyse the legality of a detention, when it occurs; (v) right to have assistance of a translator or interpreter, receive consular assistance, assistance from international organizations (in case of refugees, UNHCR specially), and be notified regarding legal procedures. There is, moreover, the necessity of migration process to not bring disproportionate penalties on account of entry, presence or migration status.⁸⁵

Immediate deportation violates the migratory due process of law, as established by the Inter-American standards. It is worth mentioning that there is a possibility of a State deporting irregular migrants according to international human rights law, however, the violation occurs in the "immediate" nature of the deportation.⁸⁶ Article 8.1 of the ACHR makes clear the prohibition of immediate deportation since the migrant has the right to be heard, with due guarantees and within a fair process and reasonable time.⁸⁷ There is also a violation of article 25 of the American Convention, which deals with judicial protection.⁸⁸ The IACHR report "Human Mobility Inter-American Standards" specifically addresses due process guarantees in migration control, among

⁸⁵ *Ibid.*, p. 19.

⁸⁶ Lila García, "Standards of the Inter-American Human Rights System on guarantees of due process in immigration control", in *Estudios de Derecho*, vol. 77, n° 169, 2020, p. 119-144.

⁸⁷ ACHR, Article 8.1: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature".

⁸⁸ ACHR, Article 25: "1. Everyone has the right to simple and prompt recourse, or any Other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. To develop the possibilities of judicial remedy; and c. To ensure that the competente authorities shall enforce such remedies when granted.

them, the right to receive a detailed prior notice of the procedure, the right to be brought before a competent judge in case of detention or retention, the right to be heard without delay, the right to have reasonable time to prepare one's defence and to meet with one's counsel, the right to have the immigration procedure reviewed impartially by a competent body, the right to have a translator/interpreter, the right to appeal the decision, the right to consular assistance, among others.⁸⁹

Moreover, according to the jurisprudence of the Inter-American Court, migrants have the right of access to justice to have full protection and on equal terms as any national.⁹⁰ Persons in a context of mobility, including the undocumented, have (i) the right to full defence and (ii) to due process, even in cases where detention and possible compulsory departure through expulsion or deportation are discussed.⁹¹ There is the right of the migrant to demand that the sources of information and evidence of his involvement with the alleged facts be presented so that the appeal can be properly exercised.

An emblematic case that portrays the importance of safeguarding these rights for undocumented people, especially children, is the case of the girls "Yean and Bosicos", daughters of undocumented Haitian parents who lived in the Dominican Republic. The family was prevented from accessing several essential services, such as education and healthcare. The Dominican Republic was condemned by the IACtHR, which ordered reparations to the affected parties and reaffirmed the State's obligation to guarantee essential public services to any person residing in its territory, regardless of their documentation status. In this line, in its Advisory Opinion no. 18/2003, the Inter-American Court of Human Rights states that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise

⁸⁹ IACHR, "Human mobility. Inter-American Standards", OEA/Ser.L/V/II, Doc. 46/15, 2015, p. 152-159.

⁹⁰ IACtHR, "Advisory Opinion on the Legal Status and Rights of Undocumented Migrants", *Op.Cit.*, pars. 121 e 122.

⁹¹ IACtHR, "Case of Vélez Loor v. Panama". Sentence issued on November 23, 2010, https://www.corteidh.or.cr/docs/casos/articulos/seriec_218_esp2.pdf. Par. 143.

of human rights " and any differential treatment "must be reasonable, objective and aimed at achieving a legitimate goal".⁹²

In the refuge field, it has also been reiterated by the Inter-American bodies the unconditional human right to request refuge, according to art. XX-VII of the American Declaration of the Rights and Duties of Man and article 22.7 of the ACHR. The jurisprudence of the IACtHR has also evidenced this right repeatedly, such as in the case "Pacheco Tineo Family v. Plurinational State of Bolivia" and the Advisory Opinion No. 25 of 2018, addressing the institution of asylum and its recognition as an unconditional human right.⁹³ The jurisprudence makes it explicit that the receiving State may not, under any circumstances, return the applicant to a territory in which they may suffer the risk of persecution.

Indeed, the principle of non-return ("prohibition of *non-refoulement*") is applicable to any migrant. According to the Inter-American Court, the duty to protect asylum seekers or refugees is an *erga omnes* obligation and internationally binding on States,⁹⁴ prohibiting states from sending (whether through expulsion, deportation, or any other similar mechanism) an individual to another state where their life, safety, or freedom is threatened as a result of (i) persecution or threat of persecution (ii) widespread violence; or (iii) massive human rights violations, in addition to (iv) a State that the person would be under risk of being tortured or any other cruel, inhuman or degrading treatment.⁹⁵

It is worth mentioning the importance of the particular context of migrant children and adolescents and the need for their protection as advocated by the Inter-American System.⁹⁶ It was

⁹² IACtHR, "Advisory Opinion No. 18 of 2003 (OC-18/03)", https://www.refworld.org/cases/IACRTHR_4f59d1352.html.

⁹³ IACtHR, "Case Familia Pacheco Tineo Vs. plurinational State of Bolivia", Sentence issued on November 25, 2013, https://www.corteidh.or.cr/corteidh/docs/casos/articulos/resumen_272_esp.pdf.

⁹⁴ IACtHR, "Advisory Opinion No. 25 of 2018 (OC-25/18) on the institute of asylum and its recognition as a human right", https://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf.

⁹⁵ IACtHR, "Advisory Opinion on Migrant Children (OC-21/014)", 2014, Op.Cit. Also, see more about this theme in André de Carvalho Ramos, "Human Rights Course", 7th ed., São Paulo: Saraiva, 2020, especially p. 456 et seq.

⁹⁶ ACHR, article 19: "Every minor child has the right to the measures of protection required by his condition as a minor in the part of his Family, Society, and the state". Moreover, the Protocol of San Salvador determines, in its article 16, that " Every child, whatever his parentage, has the right to the protection that his status as a minor

stated that it is necessary to establish specific parameters and protection for this population, considering many undocumented children and adolescents who are unaccompanied by their guardians or separated from their parents, being in a situation of extreme vulnerability. To deal with this issue, the Inter-American Court of Human Rights issued Advisory Opinion No. 21/14 to address the rights of these doubly vulnerable people: the age factor is added to the situation of mobility, so States have to consider the specificities of this group in their regularization and inclusion policies. According to this document,

170. In sum, the Court understands that migrant children, and in particular, those in irregular migratory situations who find themselves in a situation of greater vulnerability, require from the receiving State an action specifically oriented toward the priority protection of their rights, which must be defined according to the particular circumstances of each concrete case, that is, whether they are with their family, separated or unaccompanied, and attending to their best interest. To this end, states, in compliance with their international obligations in this area, must develop and incorporate into their domestic law a set of non-custodial measures to be ordered and applied while migration processes are underway, with a view, as a priority, to the comprehensive protection of the rights of the child, according to the characteristics described, with strict respect for their human rights and the principle of legality.⁹⁷

From the analysis of this material provided by the Inter-American system, it is clear that there are many guidelines that must be followed by States when developing public policies on migration, which should be used by Brazil and other countries in the region nationally and to fill

requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system”.

⁹⁷ IACtHR, “Advisory Opinion on Migrant Children (OC-21/014)”, 2014, *Op.Cit.*, para. 170.

the gaps that exist in the area. As a first step, it is necessary to draft national legislation in the migration and refugee field in line with international human rights standards on the subject, including general principles and international human rights soft law, which several Latin American countries have, in fact, done. However, migration legislation and migration-related rights provided in Constitutions and Laws are not enough, as seen in Brazil, where other legislations with an inferior status than a law were prevalent and imposing obstacles in the full effectiveness of the law and even the Constitution themselves. The pandemic scenario has also highlighted gaps in the protection and promotion of rights, making it essential to build public policies focused on human rights to make them effective.

The *Ius Commune*, based on the dialogical relationship between states to improve their internal laws and aiming to gradually incorporate international standards on human rights becomes an instrument in the enforcement of these Inter-American standards on migration. The internal legislation on migration will become more effective if it aligns with the international commitments undertaken.

Therefore, based on the international guidelines for the migrant and refugee population, Brazil must coordinate the various governmental instances, promoting a dialogue between federal, state, and municipal authorities, as well as international organizations and civil society. It is necessary to value and disseminate these standards to inform about migratory conditions faced by the migrant population so that, armed with this information, all instances of public bodies are articulated regarding the rights and the reality of these peoples, knowing the commitments made internationally. Dialogue becomes essential to ensure the rights of migrants and refugees, and there should always be a disaggregated perspective of factors such as age, gender, sexual orientation, ethnicity, among others.

3.2 Violations Perpetrated by Brazil in the National and Regional Level

It is clear that Brazil has violated national and international standards by applying disproportionate and illogical measures during the COVID-19 pandemic.

In the national level, to access economic and social rights, the situation of national and non-national people is identical, so it does not matter whether they have a regular or irregular migratory situation (not submitted to migratory control of entry or with expired documents/absence of documents); Article 5 of the Brazilian Federal Constitution states that "Everyone is equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, safety and property, under the following terms(. ..)". Articles 3 and 4 of the Migration Law, as demonstrated above, also highlights the equal access of migrants to public social services, such as health and social security, as well as civil rights in conditions of equality with nationals.

In the regional level, both the Inter-American Commission and the Inter-American Court of Human Rights have expressed the universal character of the principle of non-discrimination, which includes undocumented migrants and their access to the benefits of public health and social assistance services in the same way as migrants in a regular situation or Brazilian nationals. Besides what the Court argued in Advisory Opinion no. 18/2003 with specific attention to the labor rights of undocumented migrants, the Commission made clear that:⁹⁸

186. Both the Commission and the Court have pointed out that the right to equality and non-discrimination constitutes the "central and fundamental axis" of the inter-American human rights system. The right to equality before the law and the obligation not to discriminate against any person constitute the basic foundation of the inter-American human rights system.

(...)

⁹⁸ IACHR, "Human Mobility Inter-American Standards", *op.cit.*, my translation.

187. Likewise, the Commission has articulated the two conceptions of the right to equality and nondiscrimination: 1) the prohibition of arbitrary difference of treatment, understood as difference of treatment, distinction, exclusion, restriction, or preference; and 2) the obligation to create conditions of real equality for groups that have been historically excluded and are at greater risk of being discriminated against.

(...)

189. In referring to the legal status and rights of migrants in an irregular situation, the Inter-American Court reaffirmed in its Advisory Opinion 18/03 the principle of equality and non-discrimination in relation to migrants. The Court established that "the regular [migratory] situation of a person in a State is not a necessary condition for that State to respect and guarantee the principle of equality and non-discrimination, since, as already mentioned, this principle is fundamental and all States must guarantee it to their citizens and to any foreign person in their territory. (...)

190. Through OC-18/03, the Court established that States may not discriminate based on a person's migratory status, but different treatment could be applied between nationals and foreigners, or between persons in different migratory categories, as long as the objectives and treatments comply with certain standards. The Court reiterated that not all different legal treatment necessarily constitutes discrimination, since there are certain *de facto* inequalities that can be converted into inequalities of legal treatment.

Still, it is evident that the effects of the COVID-19 pandemic on the enforcement and guarantee of basic human rights by States would not escape the attention of the Inter-American Commission, which in its Resolution No. 01/2020 brought the following conclusions:

C. RESOLUTORY PART

(...) the Inter-American Commission on Human Rights makes the following recommendations to the governments of the member states: (...) 3. Guide its actions in accordance with the following general principles and obligations:

b. The duty to guarantee human rights requires States to protect human rights by meeting the particular protection needs of individuals and that this obligation involves the duty of States to organize the entire government apparatus and, in general, all structures through which the exercise of public power is manifested, in such a way that they are capable of legally ensuring the free and full exercise of human rights.

c. The duty to respect human rights includes the notion of restricting the exercise of State power, that is, it requires that any organ or official of the State or of a public institution refrain from violating human rights.

d. Given the current circumstances of the COVID-19 pandemic, which constitute a situation of real risk, States must adopt immediate and diligent measures to prevent the occurrence of violations of the right to health, personal integrity, and life. Such measures should be directed, as a matter of priority, to preventing contagion and providing adequate medical treatment to persons in need of it.

e. The goal of all policies and measures adopted should be based on a human rights approach that includes the universality and inalienability, indivisibility, interdependence and interrelation of all human rights; equality and non-discrimination; a gender, diversity and intersectionality perspective; inclusiveness; accountability; respect for the rule of law; and the strengthening of cooperation among States. (...)

4. Ensure that measures adopted to address the pandemic and its consequences incorporate as a priority the content of the human right to health and its basic and social determinants, which are related to the content of other human rights, such as life and personal integrity, and other ESCER, such as access to safe

drinking water, access to nutritious food, access to means of cleaning, adequate housing, community cooperation, mental health support and integration of public health services, as well as responses to violence prevention and care, ensuring effective social protection, including, inter alia, the provision of subsidies, basic income or other economic support measures. (...)

8. Ensure equitable distribution of and access to health facilities, goods and services, whether public or private, without any discrimination, ensuring attention to people with COVID-19 and groups disproportionately affected by the pandemic, as well as people with pre-existing diseases that make them especially vulnerable to the virus. The scarcity of resources does not justify direct, indirect, multiple or intersectional acts of discrimination.

As observed in national and international norms and standards, migrants and refugees, while in Brazilian territory, have basic rights for the guarantee of a dignified life, including the right to be part of social welfare measures and programs, regardless of their migratory condition or situation. The decrees issued during the pandemic in Brazil have generated a situation of undocumentation and irregularity, preventing access to these rights - despite the fact that they are stipulated in the Constitution, the Migration Law and in the international law regardless of migratory status.

Even if the entry occurs irregularly, i.e., outside the parameters of the requirements demanded by the normative in force, the Brazilian State should provide migrants access to services and guarantees brought by the 1988 Constitution and Migration and Refuge Law, as well as following all international and regional treaties and guidelines for the protection of migrants and refugees, to which Brazil is a party. Violations and exclusion occurred since March 2020, generating a bigger gap between nationals and non-nationals.

The measures adopted by Jair Bolsonaro's government followed a pattern that has nothing to do with containing the spread of the virus, since that using legislative tools with a

political intention of barring the ones not interesting for Brazil's economy was seen since the beginning of the government; the consequences of the decrees, by its turn, was not impeding the increasing number of deaths and cases caused by COVID-19, but in the opposite sense, the measures increased the number of people in the streets, agglomeration in the borders, and did not commit with preventive measures recommended worldwide by WHO, the OAS and other UN bodies. Indeed, the measures adopted had an ideological, selective and discriminatory bias, and did not follow the principle of *non-refoulment*, the obligation to guarantee basic social needs, and the necessity to promote extra protection to over vulnerable migrant groups, such as children, women and indigenous peoples.

CONCLUSION: ESSENTIAL MEASURES OR DISCRIMINATORY POLICIES?

Brazil is a continental country and it borders ten countries in South America. The challenges faced by government institutions and civil society are prior to the coronavirus pandemic but are more profound in the current context due to the closure of borders. Even though there are problems in all the extension of the land border, the area with bigger social tension and vulnerability for migrants is the north of the country, especially in the border with Venezuela due to its territorial isolation, the intensification of the migration flow and the discrimination and xenophobia against Venezuelan nationals.

Since 2017, the Brazilian legal system has been characterized by its protective and progressive way of treating non-nationals in its territory. With the new Migration Law, the advances of the 1988 Constitution are also consolidated in the field of migration. It is also recognized that the migration phenomenon is natural and beneficial to Brazil as a destination and host country. Thus, the previous paradigm of treating the non-national as a foreigner who does not belong to the country and must be punished was abandoned, and it was adopted a perspective based on human rights, whereby the migrant has fundamental rights and should not receive discriminatory treatment or treatment outside the boundaries of due legal process.

The year of 2020 began with the biggest health emergency in centuries. Based on the need to adopt exceptional and temporary measures to fight the Coronavirus, Brazil closed its borders to people seeking humanitarian protection by issuing decrees that imposed restrictions on non-nationals. This closure had as the main consequence the dangerous entry by land through alternative paths, where migrants and refuge seekers found themselves in an even more vulnerable situation, considering the absence of social protection in the country of arrival. Moreover, the resistance to allow regularization and the suspension of refuge procedures established in those decrees generated undocumented and stigmatization. As reported in this thesis, threats of

deportation following migrants and refuge seekers were seen not only on the northern border, but all along Brazilian borders with other South American countries.

Although exceptional measures were necessary to fight against COVID-19, the restrictions imposed by Brazil were unreasonable - for example, by permitting entry by air without restrictive measures and continuing to keep land borders completely closed. The rigidity of the decrees promoted concrete effects that increased the risk to people and groups in situations of extreme vulnerability. In addition, the regulations did not provide reasonable exceptions and placed more discretionary power in the hands of the Federal Police and the Army at the borders, without following the recommendations stipulated internationally by the Inter-American Human Rights System.

Despite the regulations, the circulation of migrants through unregulated crossings ("trochas") was not stopped, with situations promoting the exploitation of migration and increased vulnerability of the people involved; it generated, throughout 2020 and 2021, a contingent of thousands of people in irregular migratory situations, who could not regularize their status and were subject to collective deportations and other forms of violence. Thus, the decrees brought obstacles to regularization and impeded access to public services, even under Operação Acolhida.

In contradiction to international standards and norms, as well as the Brazilian Federal Constitution and the Migration and Refugee Law, vulnerable groups were left even more behind and without any protection, increasing inequality between nationals and non-nationals, since the absence of documentation impeded in practice access to public services, access to income distribution programs (such as emergency assistance), and the search for formal employment. Although the Migration Law authorizes access to public services for undocumented migrants, the absence of migration procedures generates uncertainty about the possibility of access, making this group marginalized from state protection.

Regarding the principles of equality and non-discrimination, the Advisory Opinion no. 18/03 of the Inter-American Court of Human Rights states that the States Party cannot subordinate or condition the observance of the principle of equality before the law and of non-discrimination to the achievement of the objectives of their public policies, including those related to migration, and any action or omission in this regard is incompatible with international human rights standards.

Brazil, by issuing notably discriminatory decrees (with specific and additional restrictions on Venezuelan nationals), has demonstrated a strong ideological bias by the federal government, supposedly grounded on technical and sanitary criteria. These restrictions generated normative abuses, with unconstitutional penalties for non-compliance: "disqualification of refugee request", the provision of "immediate deportation" and criminal, civil and administrative liability. It is worth noting that these measures were implemented for over 24 months, even though there is no provision in the national migratory legislation for punishments of this nature, characterizing a situation of disrespect for the due legal process.

The advances in the pandemic situation generated more flexibility in border control, but discretionary acts by police authorities still predominated, and the feeling of legal insecurity for undocumented and irregular migrants remained. Moreover, the restrictions on access to the country by land and waterways for any nationality, as well as the penalties mentioned above, have been maintained, thus perpetuating the violations of the refuge institute by creating obstacles to formal access to the request for international protection.

Despite the pandemic emergency worldwide, the measures adopted in Brazil were insufficient, imprecise, and discriminatory. They indeed prove the trend seen since 2019 of disinterest or repudiation of the migration issue by the federal government, symbolized by the withdrawal from the Global Compact for Migration; the management of the migration issue in the country goes against what is idealized by the Global Compact for Safe, Orderly and Regular Migration. What we observe in Brazil is precisely the disorganization in the service provided to

immigrants by the Federal Police, the irregularity (of documents and processes) at incalculable levels, and the insecurity at the borders for those who try to enter the country and have faced various impediments and legal barriers.

The reading of the decrees and the positions of the federal government in relation to migrants, especially Venezuelans, allows us to identify a political and not a health treatment of the cause, characterized by controversial border restrictions, stigma around illegality, and the absence of proposals that contribute to the regularization of migrants. Without a doubt, it was convenient for Jair Bolsonaro's government to use infra-legal instruments, such as decrees, to adopt migration containment policies with the justification of confronting the pandemic, but which in reality limit access to the country for vulnerable migrants, but do not exempt themselves from permitting and stimulating access to migrants considered "welcome".

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