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INCORPORATING A HUMAN RIGHTS-BASED APPROACH TO IRREGULAR MIGRATION

A CHILEAN CASE STUDY

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Thesis submitted for the degree of
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ABSTRACT

This thesis examines whether the domestic incorporation of human rights could support an effective solution to irregular migration. It stems from the recognition that the human rights-based approach to irregular migration is to open diverse and accessible pathways for regular migration. It also identifies a gap in the literature concerning the construction of these pathways to regular migration. Therefore, it uses the methodology of legal and doctrinal analysis to analyse part of the human rights framework protecting the entry of migrants and the obligations emanating from it. It also considers policy arguments and data obtained my civil society organisation. Specifically, it analyses the extent to which the principle of non-discrimination and the principle of non-refoulement protect the entry of migrants into a country that is not their country of origin. The analysis is focused on the interaction of human rights law at three different levels, namely the international level, the regional level and the domestic level. Particularly, it observes the Inter-American Human Rights System, which presents a number of distinctive features discussed in later chapters, and focuses on Chile as a case study.

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CHAPTER I

INTRODUCTION

1.1. INTRODUCTION

This thesis examines whether the domestic incorporation of human rights could support an effective solution to irregular migration. It stems from the recognition such incorporation reflects a human rights-based approach to irregular migration, characterised by four core elements:[1] firstly, it is based on the core international human rights law treaties; secondly, it identifies 'duty bearers and rights-holders'; thirdly, it is focused on the vulnerable population; and fourth, it includes the voice of the civil society, through participation and empowerment.[2] When interpreting this approach in their migration policies, states have declared that a key response to irregular migration lies in 'opening more diverse and accessible pathways for regular migration'.[3] However, this thesis identifies a gap in the literature concerning how such regular migration pathways are constructed from a human rights perspective.

By recognising irregular migrants as an extremely vulnerable population, the thesis uses the methodology of legal and doctrinal analysis to engage with the first two elements of the human rights-based approach. It examines the human rights framework protecting the entry of migrants as well as the obligations emanating from this framework. In addition, the thesis draws on policy arguments and data produced by civil society organisations, thereby incorporating civil society perspectives into the analysis.
Specifically, the thesis responds to two central research questions. First, it examines the extent to which the incorporation of the principle of non-discrimination and the principle of non-refoulement could contribute to opening regular migration pathways in Chile. This

[1] Ibid, UN Network on Migration, *Implementing the Global Compact for Safe, Orderly and Regular Migration. Guidance for governments and stakeholders* (April 2023) 32.
[2] UN OHCHR, *DRAFT. Global Forum on Migration and Development*; UN Network on Migration, *Implementing the Global Compact for Safe, Orderly and Regular Migration* 32.
[3] UNGA, *Making Migration Work for All. Report of the Secretary-General* UN Doc A/72/643 (12 December 2017) para 37. Similarly, UNGA, *Human Rights of Migrants. Report of the Special Rapporteur on the Human Rights of Migrants* UN Doc A/71/285 (4 August 2016) para 21.

analysis is focused on the interaction of human rights law at three levels: international, regional and domestic. Secondly, the thesis seeks to identify the contributions of the Inter-American Human Rights System to the construction of a human rights-based approach to addressing irregular migration.

1.1.1. Context

There exists an asymmetrical tension between migration and human rights law, by which state sovereignty is ensured over a human right to immigrate.[4] The right to freedom of movement, declared in Article 13 of the Universal Declaration of Human Rights (UDHR)[5] and codified in international and regional human rights treaties,[6] contains a normative lacuna.[7] It recognises only two of the three elements of human mobility, namely, the right of everyone to leave any country, including their own, and the right of everyone to return to their country.[8] However, none of these instruments recognise 'the third aspect of mobility', which is the right to immigrate.[9] While most scholars understand that this right would entail being allowed to enter another country,[10] it is also regarded as a right not to

[4] Athanasia Georgopoulou and others, 'Chapter 5. Putting Things into Perspective: The Added Value of the ICPMW's Substantive Provisions' in Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017) 133; Laurie Berg, 'At the Border and between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law' (2007) 8 *Melb J Intl* L 1, 15; E Tendayi Achiume, 'The Fatal Flaw in International Law for Migration Commentaries' (2017–18) 56 *Colum J Transnat'l L* 257, 258; Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 149; Vincent Chetail, 'The Transnational Movement of Persons under General International Law - Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 11.

[5] *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) [UDHR]

[6] *International Convention on the Protection of the Rights of All Migrant Workers and Their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 [ICRMW] art. 8; *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 22; *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR] art 12.

[7] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 400.

[8] Acosta, *The National versus the Foreigner* 149.

[9] ibid.

[10] ibid; Georgopoulou and others, 'Putting things into Perspective' 133.

be prevented from entering.[11] Others include being able to reside in a country different from one's own.[12]

States have the authority to regulate who enters and stays in their territories.[13] This authority is born from the power to exercise immigration control, understood by relevant literature as one of the threshold elements of the legal principle of territorial sovereignty.[14] This is confirmed by the Human Rights Committee (HR Committee)[15] in General Comment No. 15.[16] Moreover, Article 79 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) prescribes that immigration control is a 'right' by stating 'nothing in this present convention shall affect the right of each state party to establish criteria governing the admission of migrant workers and members of their families'.[17] Immigration control is also recognised as an expression of territorial sovereignty in the IAHR system.[18]

Irregular migration increases the tension between sovereignty and the human rights of migrants.[19] According to Article 5 (b) of the ICRMW, migrants are considered in an irregular situation if they are not authorized to enter, stay or engage in a remunerated

[11] David Miller, 'Is There a Human Right to Immigrate?' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press 2016) 14.
[12] Kieran Oberman, 'Immigration as a Human Right' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press 2016) 34.
[13] T Alexander Alienkoff, 'International Legal Norms and Migration: A Report' in T Alexander Alienkoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 3.
[14] Linda S Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737, 742; Chetail, *International Migration Law* 49; Acosta, *The National versus the Foreigner* 749; Alienkoff, 'International Legal Norms and Migration' 3; Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law* (2011) 79.
[15] Which is the body of independent experts that monitors the implementation of the ICCPR by its State parties. See OHCHR, 'Human Rights Committee' (1969–2019) <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed 16 August 2019.
[16] By stating, 'The Covenant does not recognize the right of aliens to enter or reside in the territory of a state party. It is in principle a matter for the state to decide who it will admit to its territory'. UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* adopted 11 April 1986, UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 5.
[17] ICRMW, art 79
[18] Inter-American Commission on Human Rights, *Human Mobility. Inter-American Standards* (31 December 2015) OEA/Ser.L/V/II.Doc.46/15 paras. 5, 6. *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) [Advisory Opinion OC-18/03] para 169.
[19] Saskia Sassen, *Loosing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 2015) 64; Berg 'At the Border and between the Cracks' 15.

activity in the state of employment pursuant to the law of that state and to international agreements to which it is a party.[20] Therefore, the presence of migrants in an irregular situation demonstrates the failure of states to exercise immigration control.[21] As affirmed by Saskia Sassen, 'their mere existence signifies an erosion of sovereignty'.[22] Thus, irregular migration is at the centre of the debates regarding human mobility on a global scale.[23]

Insufficient legal pathways to migrate contribute to the existence of irregular migration.[24] It is the law that creates irregular migration.[25] It continues to exist not simply because of the increase in the number of people migrating but because of the unprecedented amount of domestic legislation regulating migration that can eventually be infringed.[26] Based on security concerns,[27] states tend to combat irregular migration by applying stricter immigration control, at their borders and in visa permitting schemes.[28] However,

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[20] ICRMW art. 5 (b).

[21] Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Migration Law and Migration* (Edward Elgar 2014) 77; Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants' 737, 742; Acosta, *The National versus the Foreigner* 121; Catherine Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law* (Cambridge University Press 2008) 2.

[22] Sassen, *Loosing Control?* 64.

[23] Diego Acosta, 'Undocumented or Irregular Migrant Workers under the Model International Mobility Convention: Rights and Regularization Commentaries' (2017–18) Colum J Transnat'l L 274; Nicholas De Genova and Nathalie Peutz, 'Introduction' in Nicholas de Genova and Nathalie Peutz (eds), *The deportation regime: Sovereignty, Space and the Freedom of Movement* (Duke University Press 2010) 1; UNGA, *Making migration work for all*; Bosniak 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants' 738.

[24] IOM, *Issue Brief # 6. Irregular Migration and Regular Pathways, Including Decent Work, Labour Mobility, Recognition of Skills and Qualifications and Other Relevant Measures* (no date) 2; UNGA, *Making migration work for all* para 34; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility* UN Doc A/HRC/35/25 (28 April 2017) paras 28 - 31, 44.

[25] Dauvergne, 'Irregular Migration, state sovereignty and the rule of law' 76–77; Similarly, Acosta, 'Undocumented or Irregular Migrant Workers' 276; De Genova and Peutz, 'Introduction' 1.

[26] Dauvergne, 'Irregular Migration, state sovereignty and the rule of law' 77. The Secretary General for the UN adds a third factor, based on labour demand, by affirming that 'the incidence of labour migration is increased in countries where there is demand for labour that domestic workers cannot satisfy, but insufficient legal pathways for foreign workers to meet the demand' in UNGA, *Making migration work for all* para 34.

[27] IOM, *Issue Brief # 6. Irregular Migration and Regular Pathways* 1; UNGA, *Making migration work for all* para. 42.

[28] Laura Bartolini and others, *Exploring the Links Between Enhancing Regular Pathways and Discouraging Irregular Migration* (2019) 1 <https://publications.iom.int/books/exploring-links-between-enhancing-regular-pathways-and-discouraging-irregular-migration-0> accessed 25 June 2025; UNCMW, *General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families* UN Doc CMW/C/CG/2 (28 August 2013) para 2; UNGA, *Making migration work for all* para 4; Inter-American Commission on Human Rights, *Human Mobility* para 14.

these measures are not effective, as will be demonstrated throughout this thesis.[29] When the control is enhanced at the borders, migrants seek different paths of entry, often created by migrant smuggling networks.[30] When the control is enhanced on visa permitting schemes, migrants enter the country with whatever visa they receive and then simply become irregular workers or overstayers.[31] Studies carried out by those who are more proximate to the reality of migrants conclude that 'attempts to combat illegality only generate more illegality'.[32] In addition, irregular migrants are vulnerable to suffering a broad range of human rights violations, which makes their migration process extremely dangerous and insecure.[33] Thus, it is urgent to tackle irregular migration from its origins.[34]

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[29] Ruben Andersson, *Illegality, Inc. Clandestine Migration and the Business of Bordering Europe* (University of California Press 2014) 271; UN Human Rights Council, *Progress Report of the Human Rights Council Advisory Committee on the Global Issue of Unaccompanied Migrant Children and Adolescents and Human Rights- Study of the Human Rights Council Advisory Committee* UN Doc A/HRC33/53 (2 August 2016) para 26; UNGA, *Making migration work for all* para 4 (c).

[30] Bartolini and others, *Exploring the Links* 1; UNGA, *Making migration work for all* paras 10, 32; Joseph Chamie, 'Understanding Unauthorized Migration', *Inter Press Service* (New York, 15 November 2016) <http://www.ipsnews.net/2016/11/understanding-unauthorized-migration/> accessed 23 August 2019.

[31] Bartolini and others, *Exploring the Links* 1; UNGA, *Making migration work for all* paras 10, 32; Chamie 'Understanding Unauthorized Migration'.

[32] Andersson, *Illegality, Inc* 273; Similarly, UNGA, *Making migration work for all* para. 4 (c); Sassen, *Loosing Control?* 79; Beth Lyon, 'Detention of Migrants: Harsher Policies, Increasing International Law Protection' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 173-174.

[33] IOM, *World Migration Report 2018* (IOM 2017) 1; IOM, *Issue Brief # 6. Irregular Migration and Regular Pathways* 1; UN Department of Economic and Social Affairs (Population Division), *International Migration Policies: Government Views and Priorities* UN Doc ST/ESA/SER.A/342 (2013) 91; UN CMW, *Day of General Discussion on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families. Background Note Prepared by the Secretariat* UN Doc CMW/C/15/CRP (19 September 2019) 1; UN CESCR, *The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights. Advanced Version* UN Doc E/C.12/2017/1 (24 February 2017) paras 11 - 16; UN CEDAW, *General Recommendation No. 26 on Women Migrant Workers* Un Doc C/2009/wp.1/R (5 December 2008) para 22; UN Human Rights Council, *Progress report of the Human Rights Council Advisory Committee on the global issue of unaccompanied migrant children and adolescents and human rights- Study of the Human Rights Council Advisory Committee* UN Doc A/HRC/33/53 (16 August 2016) paras 26, 27. UN OHCHR, *Human Rights of Migrants. Commission on Human Rights* Commission on Human Rights Resolution 1999/44 (27 April 1999), Preamble. UN OHCHR, *DRAFT. Global Forum on Migration and Development. Addressing Irregular Migration Through a Human Rights Based Approach* (1 December 2011); Inter-American Commission on Human Rights, *Human Mobility* para 15; UNGA, *The Impact of Migration on Migrant Women and Girls: A Gender Perspective. Repport of the Special Rapporteur on the Human Rights of Migrants* UN Doc A/HRC/41/38 (15 April 2019); Advisory Opinion OC-18/03, para 14; *Case of Pacheco Tineo Family v Plurinational State of Bolivia*, Inter-American Court of Human Rights Series C No 272 (Judgment of 25 November 2013) para 128; Ruth Rubio-Marín, 'Introduction: Human Rights and the Citizen/Non-Citizen Distinction Revisited' in Ruth Rubio-Marín (ed) *Human Rights and Immigration* (Oxford University Press 2014) 15–18; Carolina Stefoni, 'Panorama de La Migración Internacional En América Del Sur' (2017) 19–20 <https://igualdad.cepal.org/es/digital-library/panorama-de-la-migracion-internacional-en-america-del-sur> accessed 25 June 2025.

[34] IOM, *Issue Brief # 6. Irregular Migration and Regular Pathways* 1.

In both the international and the Inter-American human rights systems, irregular migration is a thematic priority.[35] The pathway proposed for addressing irregular migration is the application of a 'human rights-based approach', which, as outlined in section 1.1 above, this thesis structures around four core dimensions.[36] First, it is grounded in binding international human rights law; secondly, it frames states as duty bearers and migrants as rights-holders; thirdly, it focuses on migrants as individuals and groups in situations of vulnerability; and finally, it incorporates the participation and empowerment of civil society.[37]

Based on these elements, this thesis understands a human rights-based approach to migration as a normative and legal framework grounded in binding human rights obligations, rather than as mere principles and policy tools. Such an approach is built upon a positivist understanding of human rights law, according to which individuals remain the primary subjects of protection and states the primary subjects of legal obligations. From one perspective, human rights norms operate as limits on the exercise of sovereign discretion, including in the field of migration control. From a deeper perspective, however, human rights also function as a framework that enables states to manage complex situations involving vulnerable populations more effectively, including through the facilitation of regular migration pathways. Ultimately, such a framework serves as a tool for promoting social stability within their jurisdictions and beyond. Within a human rights-based framework for regular migration, migration policies are therefore not treated as politically neutral or purely discretionary, but as legally regulated areas in which human rights standards shape both the scope and the limits of state action.

In the context of human mobility, migrants are recognised as right-holders, no matter their migration status.[38] From a human rights-based approach to migration, the actions

[35] UN OHCHR, *DRAFT. Global Forum on Migration and Development. Addressing Irregular Migration Through a Human Rights Based Approach*.
[36] Ibid, UN Network on Migration, *Implementing the Global Compact for Safe, Orderly and Regular Migration. Guidance for governments and stakeholders* (April 2023) 32.
[37] UN OHCHR, *DRAFT. Global Forum on Migration and Development*; UN Network on Migration, *Implementing the Global Compact for Safe, Orderly and Regular Migration* 32.
[38] Ibid

of states to combat irregular migration cannot violate the human rights of migrants.[39] As such, sovereignty is not an absolute principle, it is limited by human rights law[40] and international migration law.[41] Even though immigration control is one of the thresholds of sovereignty, one of the characteristics of this principle is that this threshold is 'itself contestable'.[42] As a consequence, strict immigration control that regards migrants as a threat to national security falls outside a human rights-based approach.[43]

Human rights law and international migration law aim to strike a balance between the sovereign power of states to exercise immigration control and the human rights of migrants.[44] According to Article 69 of the ICRMW, states shall consider the possibility of regularising the situation of irregular migrants,[45] but this is not an imperative provision. Article 35 of the ICRWM asserts that recognising the rights of irregular migrants does not mean regularising their situation.[46] The balance appears to be inclined more towards sovereignty than to creating pathways for regular migration.[47] Additionally, because no

[39] Inter-American Commission on Human Rights, *Human Mobility*, para 6.
[40] Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants', 743; Chetail, *International Migration Law*, 6; Sassen, *Loosing Control? Sovereignty in an Age of Globalization* 70, 72, 77.
[41] Chetail defines International Migration Law as 'the set of international rules and principles governing the movement of persons between states and the legal status of migrants within host countries. It is meant to gather all relevant international legal norms that apply to individuals who are leaving their own country, entering another one and/or staying therein [...]'. The sources of International Migration Law are Customary International law, Treaty Law and Soft Law and they gather rules from several branches of international law, being Human Rights Law one of them. Chetail, *International Migration Law*, 7.
[42] Besson 'Sovereignty', 80.
[43] Inter-American Commission on Human Rights, *Human Mobility*, para 6; UNGA, *Making migration work for all* para 43; UN CMW, *General Comment No. 1 on Migrant Domestic Workers* UN Doc CMW/C/GC/1 (23 February 2011) para 52.
[44] UN CMW, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* UN Doc CMW/C/CG/2 (28 August 2013) para 13; International Labour Conference, *(87th Session) Report III (Part 1B), 'Migrant Workers'* ILC.87/III(1B) (June 1999) para 24.
[45] ICRMW art 69 para 2.
[46] UN CMW, *General Comment No. 2*, para 15; ICRMW art 35. 'Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI of the present Convention'.
[47] On a more critical view, de Genova affirms: 'If the freedom of movement has remained utterly beleaguered, its persistent and pernicious regulation has nevertheless become an ever-greater preoccupation of these states in the retrenchment of their spatial jurisdictions. This ever-increasing attempt to control human mobility tends to be promoted, in fact, as nothing less than a putative manifestation of these states' ("national") sovereign power', in Nicholas de Genova, 'The Deportation Regime' in Nicholas and Putz Nathalie (eds), *The Deportation Regime Sovereignty Space and the Freedom of Movement* (Duke University Press 2010) 33–34.

human right to immigrate exists, states have no direct human rights obligation to regularise migrants in an irregular situation.[48]

International and regional human rights treaty bodies have interpreted that 'regularisation is the most effective measure to address the extreme vulnerability of [irregular migrants]'.[49] The HR Committee has mentioned examples in which migrants may enjoy the protection of the International Covenant on Civil and Political Rights (ICCPR)[50] in relation to their entry or residence, namely considerations of non-discrimination, prohibition of inhuman treatment, and respect for family life. Despite their 'soft law' nature, the outcomes documents of the treaty bodies are legally relevant.[51] Human rights treaties 'are living instruments, which makes evolutionary interpretation necessary'.[52] A progressive trend is identified in the Global Compact for Safe Orderly and Regular Migration.[53] States declared that they aimed to reduce the incidence and negative impact of irregular migration by enhancing the availability and

[48] Lori A Nessel, 'Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Migration Law and Migration* (Edward Elgar 2014) 337; As affirmed by Acosta, 'a true right to migrate goes hand in hand with a right to reside'. Acosta, *The National versus the Foreigner* 132 158.

[49] UN CMW, *General Comment No. 2* para 16; UN CMW, *General Comment No 1* para 52; Stefoni, 'Panorama de la Migración Internacional en América del Sur' 19.

[50] ICCPR.

[51] Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 639; Gerald Staberock, 'Human Rights, Domestic Implementation', *Max Planck Encyclopedia of Public International Law* (2011) para 11. Kasey McCall-Smith has further developed the legal relevance of the interpretations provided by international treaty bodies and international organisations. See, Kasey McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte and others (eds), *Tracing the role of Soft Law in Human Rights* (Oxford University Press 2016) 28; Kasey McCall-Smith, 'Treaty Bodies: Choreographing the Customary Prohibition against Torture' (2019) 21 International Community Law Review 344.
Moreover, the International Court of Justice declared that the interpretations of the Committee 'should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'. It added, 'The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, judgment) [2010] ICJ Rep 639 para 66.

[52] McCall-Smith, 'Interpreting International Human Rights Standards' 28.

[53] Chetail, *International Migration Law* 402; UNGA, *Global Compact for Safe, Orderly and Regular Migration* UN Doc A/RES/73/195 (11 January 2019) [Global Compact for Migration] para 11.

flexibility of pathways for regular migration.[54] The Sustainable Development Goal No. 10 contains a similar target.[55]

1.1.2. Literature gap and original contribution

Scholarly debates on irregular migration and human rights are found across a range of disciplines within the social sciences. Despite their disciplinary diversity, these debates are commonly structured around persistent tensions between state sovereignty, migration control and the protection of human rights. Across these approaches, a shared concern emerges regarding the limits of state authority when regulating migration.

By developing the idea of incorporating a human rights-based approach to address irregular migration, this thesis seeks to contribute to these debates and to fill a doctrinal gap that has not been directly addressed in the existing scholarship. While migration literature has examined parts of the central issues addressed in this introduction and in the subsequent chapters of the thesis, it has not done so in an integrated manner. In particular, there remains a lack of research analysing from an international, Inter-American and national legal perspective, the implications of specific human rights protections for migrants at the point of entry into a country that is not theirs, and the extent to which such protections contribute to opening regular migration pathways.

Against this broader scholarly background, this section outlines the main contours of these debates and identifies the doctrinal gap to which this thesis responds. It then turns to specific strands of the literature and the contributions of individual scholars in order to situate the thesis within these debates. The discussion of the literature follows the same conceptual order as the legal analysis developed earlier in the introduction,

[54] See, Global Compact for Migration, Objective 5: Enhance availability and flexibility of pathways for regular migration para 21.
[55] Target 10.7 reads: 'Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies', in UNGA, Transforming our World: The 2030 Agenda for Sustainable Development UN Doc A/RES/70/1 (2015) Goal 10. Reduce Inequality within and among countries.

ensuring coherence between the framing of legal concepts and the engagement with existing scholarship.

A first key strand of the literature addresses the relationship between sovereignty and irregular migration. Scholars across different areas of the social sciences, including Thomas, García, Dauvergne, Noll, Nessel, Bosniak, Chetail, and Battistellla, conceptualise this relationship as a tension between sovereignty and irregular migration often framing it as a shortcoming of the human rights law system.[56] Within more critical approaches, Noll characterises these shortcomings as structural, but does not propose a concrete legal solution.[57] Other scholars, including Stefoni, Achiume and Thomas, argue that international migration law and human rights law are fragmented,[58] proposing to rethink the concept of sovereignty and revisit the law.[59] An example of efforts to do the latter is the Model International Mobility Convention,[60] a framework elaborated by a

[56] Chantal Thomas, 'Conceptualizing International Migration Law. Remarks by Chantal Tomas' (2016) Washington: Cambridge University Press <https://www.proquest.com/conference-papers-proceedings/conceptualizing-international-migration-law/docview/1903401329/se-2.>; Lila García, 'Migrations, the State and a Policy of the Human Right to Migrate: Towards a New Era in Latin America?' (2016) 88 Colombia Internacional 107; Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge University Press 2016) 117–23; Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants' (2010) 12(2) European Journal of Migration and Law 241, 245; Chetail, *International Migration Law* 400; Nessel, 'Human Dignity or State Sovereignty? 332; Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants'; Graziano Battistella, 'Migration and Human Rights: The Uneasy but Essential Relationship' in Ryszard Cholewinski and others (eds), *Migration and Human Rights* (Cambridge University Press 2009) 66.

[57] In this regard, Nolls affirms 'if the undocumented migrants claim their human rights (…) [she does] no less than to contract herself into submission' Noll, 'Why Human Rights Fail to Protect Undocumented Migrants' 272; Similarly, Galina Cornelisse, 'Immigration Detention and the Territoriality of Universal Rights' in Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime Sovereignty Space and the Freedom of Movement* (Duke University Press 2010) 119–20 She argues 'questions of access to, and enjoyment of, human rights remain territorially determined. In addition, human rights discourse has not developed a way to address violations of human dignity that occur as a result of the state's exercise of its territorial sovereignty'.

[58] Stefoni, 'Panorama de la Migración Internacional en América del Sur' 19; Thomas, 'Conceptualizing international migration law' 205; Achiume, 'The Fatal Flaw in International Law for Migration Commentaries' 259; Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty' (2013) 14 Melb J Int'l L 392; Jaya Ramji-Nogales, 'Migration Emergencies' (2016–17) 68 Hastings LJ 609.

[59] Thomas, 'Conceptualizing international migration law' 206; Achiume 'The Fatal Flaw in International Law for Migration Commentaries'.

[60] Columbia University, 'Model International Mobility Convention' (no date) <https://mobilityconvention.columbia.edu/> accessed 13 September 2019; Acosta, 'Undocumented or Irregular Migrant Workers.'

commission of academics and policy experts in the field of human mobility, which recognises rights for individuals crossing state borders, irrespective of their motives.[61]

A related line of debate within the social sciences, situates irregular migration within broader processes of globalisation, particularly in relation to the threats that these processes pose to state sovereignty.[62] Within this strand, Sassen regards human rights law as a limit to immigration control,[63] while Dauvergne emphasises, that the effectiveness of such limits still depends on a court where to claim them.[64] Responding to these concerns, legal scholars, such a Chetail, Nessel and Bosniak, highlight the limited reception of International Migration Law at the domestic level.[65] Nevertheless, they argue that the current relationship between migration and sovereignty is not irremediable[66] and that the authority of the state to regulate admission must be in due accordance with international law.[67]

Against this background, a group of legal scholars engages with migration through a rights-based approach, shifting the focus from abstract tensions surrounding sovereignty to the concrete contribution that such an approach may offer to states. By 2010, Taran argued that state treatment and regulation of migrants should be advanced

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[61] Columbia University, 'Model International Mobility Convention.'

[62] Dauvergne, *The New Politics of Immigration and the End of Settler Societies*; Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Modern Law Review 588; Dauvergne, *Making people illegal*; Dauvergne, 'Irregular Migration, state sovereignty and the rule of law'; Sassen, *Loosing Control? Sovereignty in an Age of Globalization*; Chantal Thomas, 'Undocumented Migrant Workers in a Fragmented International Order Symposium: Multilateralism and Global Law: Evolving Conceptions of International Law and Governance' (2010) Md J Int'l L 187; Patrick A Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization' in Ryszard Cholewinksi and others (eds), *Migration and Human Rights: The UN Convention on Migrant Workers' Rights* (Cambridge University Press 2009); Stephen Castles, 'Why Migration Policies Fail' (2004) 27 Ethnic and Racial Studies 205, 210–12.

[63] Sassen, *Loosing Control? Sovereignty in an Age of Globalization*.

[64] Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' 611, 612.

[65] Chetail, *International Migration Law* 400–02; Regarding admission, similarly Nessel 'Human Dignity or State Sovereignty?; Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants'.

[66] Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vittoria to Vattel.' (2017) 27 The European Journal of International Law 901 922.

[67] Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28 Geo Immigr LJ 225 246; Similarly, Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants' 743.

towards a rights-based approach.[68] He conceptualised this approach as standards-based and firmly rooted in international law, mainly in ILO Conventions Nos 97 and 143 and the ICRMW. [69] Central to his approach is the recognition of migrants as rights-holders, irrespective of their migration status, rather than merely as workers. [70] Taran further emphasised the need for effective enforcement and institutional mechanisms in order to render these rights meaningful in practice. [71]

Taran's positivist approach, grounded in the rule of law and explicit legislation, distances itself from broader perspectives, demonstrating that the protection of migrants requires more than 'dispersed campaigns'. [72] As discussed further below, this approach can be situated within a strand of legal scholarship focused on the rights to which migrants are entitled in countries of destination, but which does not explicitly connect these rights to their potential contribution to opening regular migration pathways. Establishing such a connection is a central to the aims of this thesis.

Building on a human rights-based understanding of migration, former UN Special Rapporteur on the human rights of migrants, François Crépeau, advances a shift in the framing of migration governance.[73] He argues that, rather than seeking to prohibit migrations flows, states should facilitate them and proposes that this be achieved through the development of a 'long term, sustainable, human rights-based strategic mobility and diversity policy vision'.[74] In line with civil society studies discussed above, Crépeau maintains that restrictive admission policies are not only ineffective, but actively contribute to irregular migration by forcing migrants into dangerous migration routes.[75]

[68] Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization'.
[69] Ibid, 154.
[70] Ibid, 163.
[71] Ibid, 159.
[72] Ibid, 166.
[73] François Crépeau, 'Towards a Mobile and Diverse World: Facilitating Mobility as a Central Objective of the Global Compact on Migration' 30 International Journal of Refugee Law 650.
[74] Ibid, 651
[75] Ibid, 653.

A key distinguishing feature of this approach is that, alongside a critical appraisal of discretionary state sovereignty, Crépeau advances a more collaborative account in which human rights law operates not merely as a limit on state power, but as a tool capable of advancing state's legitimate interest in maintaining safe, regular and orderly migration, which, in turn, is aligned with the Agenda for Sustainable Development.[76] This thesis speaks directly to this doctrinal approach. By analysing specific human rights obligations that may facilitate regular migration, it seeks not only to contribute to this strand of the literature but to advance it by identifying concrete rights arising at the point of entry.

A different response to irregular migration has been the advocacy for the existence of a comprehensive human right to migrate, a position that has been discussed by political philosophers, as discussed earlier in this introduction. Latin American scholars have engaged critically with these positions and have examined the recognition of such a right in national constitutions. In a recent publication on the human right to migrate in Latin America, Chilean authors Feddersen, Rodríguez and Pascual classify the relevant positions into three groups.[77] First, an 'open borders' group, led by Carens, according to which the state lacks legitimacy for differentiating between citizens. Within this group, there is also Ceriani's position which argues that it would be inconsistent to recognise a right to leave a country without recognising a right to enter another country. A second group, led by Blake and Miller, argues that rights do not exist in a vacuum, and they acquire meaning when applied in domestic jurisdictions. They criticise the theoretical positions that impose a duty on states to allow entry. Feddersen, Rodríguez and Pascual engage with a third and intermediate position, led by Song, according to which there is both, autonomy from the state to determine migration laws, and moral limits to these laws. To the question of 'is migration a human right?', they respond with Jaramillo and Santi's position, who argue that there is no legal enshrinement of a human right to migrate, but an asymmetry between the departure of a country and the entrance to another one. They say that 'immigration is a right limited by the conditions imposed by

[76] Ibid, 651.
[77] Mayra Feddersen, Tomas Pascual and Macarena Rodriguez Atero, 'The Human Right to Immigrate in the Latinamerican Legal System' (2022) 49 Revista Chilena de Derecho 43, 46–49.

the state of reception'.[78] Then, they unravel the legal meaning of the 'human right to migrate' in nineteen Latin American countries and conclude that, despite being codified in eight of those countries, such a 'right' does not create a right of entry but rather procedural guarantees for when the state adopts admission decisions in the borders.[79]

Despite the protection that human rights law grants to migrants concerning their entry or residence, there remains a lack of research concerning the implications of these protections for both duty-bearers (states) and right-holders (migrants). This research gap is particularly evident at the domestic level. As observed by Feddersen, Rodriguez and Pascual 'there is a lack of a clear pattern in terms of access to a country'.[80] Their analysis therefore focuses on the justifications states invoke to exclude migrants, rather than on the human rights obligations that may require states to protect migrants' entry.

As noted above, when legal scholars analyse migration from a human-rights-based approach, most studies focus their on migration policy and on the rights to which migrants are entitled in the countries of destination.[81] Only a limited number of scholars relate the human rights of migrants with obligations to allow entry or stay,[82] such as the

[78] Ibid 49.
[79] Ibid 64.
[80] ibid 58.
[81] Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization'; G Bertinetto, 'International Regulations on Illegal Migration' (1983) 21 International Migration 189; Shauna Olney and Ryszard Cholewinski, 'Migrant Workers and the Right to Non-Discrimination and Equality' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability* (Oxford University Press 2014) 274–76; Bernard Ryan and Virginia Mantouvalou, 'The Labour and Social Rights of Migrants in International Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014); David Weissbrodt, 'The Protection of Non-Citizens in International Human Rights Law' in *International Migration Law Developing Paradigms and Key Challenges* (TMC Asser Press 2007) 229–30; Ryszard Cholewinksi, 'The Rights of Migrant Workers' in *International Migration Law Developing Paradigms and Key Challenges* (TMC Asser Press 2007) 263–65; Joan Fitzpatrick, 'The Human Rights of Migrants' in T Alexander Alienkoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003); Richard B Lillich, *The Human Rights of Alliens in Contemprary International Law* (Manchester University Press 1984); Michael Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers' (1990) 28 International Migration 133.
[82] Chetail, *International Migration Law* 92–163; Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford University Press 1978) 91–195; Berg, 'At the Border and between the Cracks 337; Acosta, *The National versus the Foreigner* 135–39.

right to family life[83] and the principle of non-refoulement.[84] Nevertheless, their nature and scope of application are still contested.[85] In addition, much of this literature is focused on the Global North. Amongst the relatively few scholars analysing irregular migration in the context of South America,[86] García argues in favour of a 'policy of the right to migrate',[87] while Acosta identifies that the reaction of South America in facing irregular migrants is regularisation.[88] He argues that, if interpreted correctly, this is a 'far-reaching development', that 'goes beyond the international framework, which does not provide for any right to regularisation'.[89] More recently, researchers from the Migration Policy Institute mapped the regular pathways that states in the Americas have applied in response to regional migration pressures.[90] Although they identified an expansion of such pathways, they conclude that governments have not been able to manage

[83] David Fisher and others, 'Chapter 6. Migration and Security in International Law' in *Migration and International Legal Norms* (TMC Asser Press 2003) 100; UN Human Rights Committee, *General Comment 15 para* 5; Chetail, *International Migration Law*124; Acosta, *The National versus the Foreigner* 135.

[84] Fisher and others, 'Chapter 6. Migration and Security in International Law' 105; Chetail, *International Migration Law* 119; Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' 596. In this regard, Catherine Dauverge affirms 'The non-refoulement provision translates into an effective right to remain in a host state', 596.

[85] For instance, Kasey McCall-Smith argues that even though the principle of non-refoulement is not yet recognised as customary international law, the interpretations of treaty bodies are leading to this interpretation. On the contrary, Vincent Chetail studies the principle of non-refoulement as a right to admission emanating from customary international law. McCall-Smith, 'Treaty bodies' 362; Chetail, *International Migration Law* 120.

[86] Acosta, *The National versus the Foreigner*; García, 'Migrations, the State and a Policy of the Human Right to Migrate; Pablo Ceriani Cernadas, 'Lights and Shadows in Latin American Migration Legislation' (2011) 233 Nueva Sociedad 19; Pablo Ceriani Cernadas, 'Language as a Migration Policy Tool' (2016) 16 <https://sur.conectas.org/wp-content/uploads/2016/09/8-sur-23-ingles-pablo-ceriani-cernadas.pdf> accessed 25 June 2025; Simone Cecchini and Jorge Martínez Pizarro, 'International migration in Latin America and the Caribbean: a development and rights perspective' (2023) CEPAL <https://repositorio.cepal.org/server/api/core/bitstreams/4124169a-d6db-4a62-9280-34517e2c8a57/content> accessed 25 June 2025; Delfina Lawson and Macarena Rodríguez, 'El debido proceso en los procedimientos de expulsión administrative de inmigrantes: situación actual y alternativas' (Due process in administrative deportation proceedings of immigrants: Current situation and alternatives) in Tomás Vial Solar (ed), *Annual Report on Human Rights in Chile 2016* (2016) <https://derechoshumanos.udp.cl/publicacion/el-debido-proceso-en-los-procedimientos-de-expulsion-administrativa-de-inmigrantes-situacion-actual-y-alternativas/> accessed 25 June 2025; Diego Acosta and others, 'The new Chilean Government and its shifting attitudes on migration governance' (*MPC Blog*, 3 May 2018) <https://blogs.eui.eu/migrationpolicycentre/new-chilean-government-shifting-attitudes-migration-governance/> accessed 16 September 2019.

[87] García, 'Migrations, the State and a Policy of the Human Right to Migrate' 130. Author's translation from Spanish: *política del derecho a migrar*.

[88] Acosta, *The National versus the Foreigner* 123.

[89] ibid 132.

[90] María Jesús Mora, Ariel G Ruiz Soto and Andrew Selee, 'Building on Regular Pathways to Address Migration Pressures in the Americas' (IOM, MPI 2024) <https://www.migrationpolicy.org/sites/default/files/publications/mpi-iom_regular-pathways-americas-2024-final.pdf> accessed 25 June 2025.

migration pressures effectively. This is evident from the high levels of irregular movements observed in these countries, including Chile.[91]

Despite the growing body of scholarchip diagnosing the complexities of irregular migration in Latin America, there are no studies focused on examining concrete human rights from which duties to allow entry and stay would emanate. Such an approach would contribute to enabling regular pathways within the Inter-American system, and more particularly, in the Chilean context.

The original contribution of this thesis is to examine how existing human rights obligations limit the ways in which states are able to control their borders. Rather than arguing that a distinct human right to migrate exists, this thesis seeks to demonstrate that current international and regional human rights law could facilitate more regular migration paths if implemented into domestic law. By analysing human rights law, it seeks to identify the extent to which the principle of non-discrimination and the principle of non-refoulement create duties on states to allow the entry of non-citizens. Focusing on the right to entry and narrowing the analysis to these two principles represents a first step towards enabling regular migration pathways, which would also require a recognition of a right to stay. The thesis applies this framework to the case of Chile, specifically examining the impact of the principle of non-discrimination in specific entry requirements applied only to nationals of Venezuela and Haiti. Additionally, it assesses Chile's decision to exclude the principle of non-refoulement into its migration legislation.

Thus, this thesis responds to the following two central research questions. Firstly, it examines the extent to which the incorporation of the principle of non-discrimination and the principle of non-refoulement could contribute to opening regular migration pathways in Chile. The analysis is focused on the interaction of human rights law at three different levels, namely the international level, the regional level and the domestic level. Secondly, the thesis aims to identify the contributions of the Inter-American Human

[91] ibid 1.

Rights System in the construction of a human rights-based approach to address irregular migration.

1.1.3. Why the Inter-American Human Rights system?

Several compelling reasons exist to analyse regular migration pathways from an Inter-American human rights perspective. Firstly, Inter-American Human Rights Law applies to Chile. The Inter-American Human Rights system monitors, promotes and protects human rights within the 35 member states of the Organisation of American States (OAS), Chile being one of them. It formally began with the approval of the American Declaration of the Rights and Duties of Man in 1948, which included Chile as one of the signatory countries. Furthermore, Chile is one of the 24 OAS countries that have ratified the American Convention on Human Rights, which grants jurisdiction to the Inter-American Court of Human Rights (IAHR Court), one of the two main organs of the Inter-American Human Rights system. Inter-American human rights are also promoted and protected by the Inter-American Commission on Human Rights (IAHR Commission), created by the OAS in 1959.

Secondly, both the IAHR Court and the IAHR Commission already occupy a relevant role in broadening the scope of application of the human rights of migrants. Evidence of its relevance is found in emblematic IAHR Court rulings, such as those related to nationality issues,[92] the rights of irregular migrant workers[93] and the protection of procedural guarantees.[94] For example, in the *Advisory Opinion OC-18/03*, the IAHR Court, concluded for the first time that the principles of non-discrimination and the right to equality applied to irregular migrants.[95] This interpretation was later incorporated in the case *Vélez Loor*

[92] *Case of the Yean and Bosico Children v Dominican Republic*, Judgment Inter-American Court of Human Rights Series C No 130 (8 September 2005)
[93] See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights, OC-21/14 (19 August 2014)
[94] See *Case of Vélez Loor v Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-American Court of Human Rights, Series C No 218 (23 November 2010) [*Case of Vélez Loor v Panama*]
[95] Chetail, 'The Human Rights of Migrants in General International Law' 253; Ryan and Mantouvalou, 'The Labour and Social Rights of Migrants in International Law' 209–10; Berg, 'At the Border and between the

v. Panama,[96] and included as a point of departure in the interpretations of international human rights treaty bodies in the context of migration. Migration scholars have also acknowledged the role of the IAHR Court in advancing the human rights of migrants.[97] The thesis aims to contribute to this literature by analysing selected IAHR Court decisions related to migration control. Here, the thesis will identify the extent to which the Court's rulings limit the power of states to control migration and protect migrants' entry to a destination country. Then, the thesis will compare these interpretations to similar ones developed in the international human rights system.

The Inter-American Human Rights System system's progressive trend in protecting migrants' rights is also evidenced in the guidance provided by the IAHR Commission. The thesis will also show how the recently published InterAmerican Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking (Inter-American Principles) offer the broadest protection when it comes to safeguarding both the principle of non-discrimination and the principle of non-refoulement at the borders.

Thirdly, member states of the Inter-American human rights system face extraordinary migration pressures. There is an increasing intraregional migration, mainly triggered by domestic social and political conflicts such as the cases of Venezuela and Haiti.[98] Furthermore, the current average of international migrants living in the Global South is surpassing the pace of the increase of international migrants living in the Global North.[99] Within this context, Latin-American states, including Chile, have formally demonstrated

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Cracks' 29; Advisory Opinion OC-18/03, para. 110; David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008) 69.

[96] *Case of Vélez Loor v Panamá*; UN OHCHR, *Migration, Human Rights and Governance. Handbook for Parlamentarians No. 24* UN Doc. HR/PUB/15/3 (2015) 49,

[97] See in this line, Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP) 2015.

[98] See, Global Conflict Tracker, 'Instability in Haiti, Global Conflict Tracker' (2024) <https://www.cfr.org/global-conflict-tracker/conflict/instability-haiti> accessed 25 June 2025; and Global Conflict Tracker 'Venezuela Crisis, Global Conflict Tracker' (2024) <https://www.cfr.org/global-conflict-tracker/conflict/instability-venezuela> accessed 25 June 2025.

[99] While the former grew at an average rate of 3,2 percent, the latter declined to 1,6 percent. UN Department of Economic and Social Affairs (Population Division), 'International Migration Report 2017' (December 2017) 1; Chetail, *International Migration Law* 3.

interest and willingness to open regular pathways to migration. As previously mentioned, among the responses to current migration pressures in Latin America are the creation of regular migration pathways and, in some countries, the codification of a human right to migrate.[100] Furthermore, regularisation and a 'human right to migrate' are mentioned in regional forums, such as UNASUR[101] and the South American Conference for Migration.[102] Even though this is considered an aspirational right, its mere existence contributes towards the advancement of creating paths for regular migration, particularly because it is 'a possible aid in judicial interpretations'.[103] Given the direct influence that the IAHR system has on Latin-American states, this thesis seeks to identify to what extent protection at entry is part of the responses and solutions that the IAHR system is giving against this high-pressured migratory scenario.

1.1.4. Why Chile as a case study?

It is at the domestic level where the tensions between the principle of territorial sovereignty and human rights are solved.[104] This thesis aims to examine how some of these tensions are reflected in current migration realities and addressed by the New Chilean Migration Law.

Chile is particularly illustrative as a laboratory for examining the effectiveness of incorporating human rights that protect migrants' entry into a country. As a country of

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[100] At least eight Latin American legislations codify a 'human right to migrate' For example, in the case of Ecuador, Article 40 of its Constitution begins by stating 'individuals are recognised as having a right to migrate. No human being shall be identified or considered as illegal due to their migration status'. Political Constitution of the Republic of Ecuador (2008). For a deeper analysis, see Mayra Feddersen, Tomas Pascual and Macarena Rodriguez Atero, 'The Human Right to Immigrate in the Latinamerican Legal System' (2022) 49 Revista Chilena de Derecho 43 56.

[101] UNASUR, 'Objetivos Específicos' (2019) para 11 <http://www.unasursg.org/es/objetivos-especificos> accessed 26 September 2019.

[102] Which is a regional consultative process on migration, composed by 12 South American member states (including Chile) and 1 Observer State (Mexico). IOM, 'South American Conference for Migration (SACM)' (February 2015) <https://www.iom.int/south-american-conference-migration-sacm> accessed 15 September 2019. *South American Plan for Human Development of Migrations, Context and Perspectives (2010)* <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Plan-Sudamericano-de-Desarrollo-Humano-de-las-Migraciones-PSDHM-2010.pdf> 16-17; Buenos Aires Declaration (2013) https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Declaracion-de-Buenos-Aires-2013.pdf p 3.

[103] Acosta, *The National versus the Foreigner* 171.

[104] Besson 'Sovereignty' 50.

destination situated in the Global South, Chile challenges the classic Global South – Global North binary that traditionally associates developed states as countries of destination for migrants. This positioning allows for a critical assessment of the extent to which human rights law can facilitate regular migration pathways outside the context of the Global North. Chile currently embodies a key contradiction: on the one hand, in line with several Global South states, it has enacted migration legislation that incorporates human rights language and principles; on the other hand, it has reproduced practices commonly associated with Global North migration control, notably by reinforcing discretionary state authority and externalising border control through consular visa requirements.

This context also enables an assessment of the scholarly propositions analysed in the preceding sections of this introduction, namely that migration law does not merely respond to irregularity but can actively contribute to its production. Furthermore, it allows for an examination of how the migration framework developed within the IAHR system challenges both these propositions and the Global South-Global North binary.

Chile is considered an example of the tensions between territorial sovereignty and the human rights of migrants in Latin America.[105] It is the country with the highest increase in the number of immigrants in Latin America.[106] Its migrant population is mainly intraregional and caused by the socio-economic pressures of countries in crisis, such as Haiti and Venezuela. Furthermore, Chile is the third Latin-American country with the highest number of intraregional migration.[107] Its migration flows have increased exponentially since the country returned to democracy in 1990, in both regular and

[105] Cernadas, 'Lights and Shadows in Latin American Migration Legislation' 75, 77; Acosta and others, 'The new Chilean Government and its shifting attitudes on migration governance.'

[106] As will be further explained in Chapter II, at the end of 2021, the Chilean National Statistics Institute and the National Migration Service estimated 1.482.390 foreigners residing in the country, corresponding to 7.5% of the Chilean population, and an increase of 14.1% since the estimations of 2018. Instituto Nacional de Estadísticas and Servicio Nacional de Migraciones, 'Informe de resultados de la estimación de personas extranjeras residentes en Chile al 31 de diciembre de 2021' (Gobierno de Chile 2022) 7 <https://www.ine.gob.cl/docs/default-source/demografia-y-migracion/publicaciones-y-anuarios/migración-internacional/estimación-población-extranjera-en-chile-2018/estimación-población-extranjera-en-chile-2021-resultados.pdf?sfvrsn=d4fd5706_6> accessed 29 June 2023.

[107] Statista, 'Intraregional migration in Latin America. Statistics and facts' (2024) 5 <https://www.statista.com/topics/9065/intraregional-migration-in-latin-america/#statisticChapter>

irregular migration. Thus, irregular migration is at the centre of the Chilean debate concerning migration issues.[108] Additionally, Chile is a party to all the international and regional human rights treaties protecting the human rights of migrants.[109]

Along with the shift in migration flows, Chile is transitioning towards new migration laws and policies. The migration legislation that regulates the entry and residence of migrants in Chile was recently modified. Law No. 21.325 of 2021 (2021 Migration Law), the new Chilean migration law derogated from the old Decree Law 1.094 of 1975, enacted during Pinochet's dictatorship and known as Latin America's oldest migration law.[110] Decree Law 1.094 of 1975 was built under the national security doctrine and regarded migrants

[108] Catalina Batarce, 'The situation of migrants in Chile reaches the Inter-American Commission on Human Rights' (Pauta, 1 May 2019) <https://www.pauta.cl/cronica/situacion-de-migrantes-chile-llega-a-la-comision-interamericana-ddhh> accessed 27 September 2019; Acosta and others, 'The new Chilean Government and its shifting attitudes on migration governance'; Claudio Fuentes Maureira and others, '3,000 children awaiting their nationality. The need for collective remedies to resolve individual violations of rights.' in Lidia Casas and others (eds), *Annual Review of Public Law* (Ediciones Universidad Diego Portales 2016); ADN, 'Nicolás Espejo and Family Reunification of Migrants: "Even if There Are Crimes, the Child Has Rights"' (25 September 2019) <https://www.adnradio.cl/noticias/sociedad/nicolas-espejo-y-reunificacion-familiar-de-migrantes-aunque-haya-delitos-el-nino-tiene-derechos/20190925/nota/3957702.aspx>accessed 27 September 2019

[109] International Convention for the Protection of Migrant Workers and Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Signed on 24 September 1993 and ratified on 21 March 2005; Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Signed on 26 January 1990 and ratified on 13 August 1990; Optional Protocol Convention of the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222, signed on 15 November 2001 and ratified on 31 July 2003; Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227, signed on 28 June 2000 and ratified on 6 February 2003; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, signed on 17 July 1980 and ratified on 7 August 1989; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, signed on 30 March 2007 and ratified on 29 July 2008; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, signed on 3 October 1966 and ratified on 20 October 1971; Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, signed on 23 September 1987 and ratified on 30 September 1988; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 2002, entered into force 22 June 2006) 2375 UNTS 237, signed on 6 January 2005 and ratified on 12 December 2008; International Covenant of Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, signed on 16 September 1969 and ratified on 10 February 1972

[110] Jaime Bassa Mercado and Fernanda Torres Villarrubia, 'Challenges for the Chilean legal system owing to sustained growth of migratory flows' (2015) 13 Constitutional Studies 103 106; Francisca Vargas Rivas and Martín Canessa Zamora, 'Derechos de las personas migrantes y refugiadas: La desprotección colectiva' in Francisca Vargas Rivas (ed), *Annual Report on Human Rights in Chile 2021* (Ediciones Universidad Diego Portales 2021) 331 (Rights of Migrants and Refugees: Collective Lack of Protection).

as a foreign menace to the state.[111] 2021 Migration Law incorporated human rights language, including the principle of non-discrimination as a limit to the right of states to control the entry of migrants[112] and a 'complementary protection' to ensure that migrants are not returned to a country where they face inhuman or degrading treatment.[113] Despite the increasing number of studies analysing 2021 Migration Law from a human rights perspective,[114] there are no studies examining its effects in facilitating regular migration pathways. This thesis aims to fill this research gap.

Furthermore, the transition of Chile's migratory context coincides with a change in its government and, therefore, in Chile's migration policy. The right-wing government of Sebastián Piñera (2018 – 2022) was followed by the left-wing government of Gabriel Boric (2022 – to date). The former's migration policy was based on the slogan 'organise the house' (*ordenar la casa*) and focused on immediate measures restricting entry to nationals of Haiti and Venezuela. The result was an exponential increase in irregular

[111] Mayra Federsen Martínez, 'The Persistence of the Security Paradigm in the Regulation of Entry Requirements in the Chilean Immigration Law' (2022) 12 Oñati Socio-Legal Series 287 298.

[112] Article 3 para 3 of the 2021 Migration Law prescribes: 'All foreigners applying for entry or a residence permit in the country shall be assured the application of a rational and fair procedure for the approval or rejection of their application, which shall be carried out under non-discriminatory admission criteria.' Additionally, Article 13 para 3 prescribes: 'All foreigners who apply for entry or residence permits in the country shall be guaranteed the application of a rational and fair procedure for the approval or rejection of their application, which shall be carried out on the basis of non-discriminatory admission criteria'.

[113] Article 10 of the 2021 Migration Law prescribes: 'Foreign asylum seekers who are not granted refugee status may be granted complementary protection ex officio or upon request by the authority established in Law No. 20,430, in accordance with the requirements and visas established for such purposes by the National Migration and Foreign Affairs Policy, which shall also establish the grounds for cessation of said complementary protection.
No foreign national holding complementary protection may be expelled or returned to a country where their right to life, physical integrity, or personal freedom would be at risk of being violated on the basis of their race or ethnicity, nationality, religion or belief, social condition, ideology or political opinion, sexual orientation, or gender identity.
The benefits of this provision may not be invoked by a foreign national who has been convicted of a crime or misdemeanour in Chile; or regarding whom there are well-founded reasons to believe that they have committed a crime against peace, a war crime, or any other crime against humanity as defined in an international instrument ratified by Chile; or who has performed acts contrary to the principles and purposes of the United Nations Charter; or who is considered, for well-founded reasons, to be a danger to the security of the country where they are located'.

[114] See, María Ignacia Sandoval Gallardo, 'Migration regulations in Chile: some comments from a rights perspective regarding ESCR' (2023) Iuris Dictio 20; Isaac Ravetllat Ballesté, 'Migrant children and adolescents in Chile. Critical comments on the Migration and Foreign Affairs Law' (2022) Mexican Yearbook of International Law 647; Liliana Galdámez Zelada and others, 'Constitution, Equality and Migration: The Minimal Development of the Chilean Legal System in Protection Against Discrimination of Migrant Groups' (2022) 20 Constitutional Studies 41.

migration. President Boric's government aims to manage irregular migration by combining security and administrative measures. However, the restrictions on entry introduced during President Piñera's government are still in force. Even though irregular migration flows have decreased in the past year, numbers remain high.[115] Critics have remained quieter than with President Piñera, but there are concerns about the place given to human rights in these new perspectives.

A significant number of cases concerning irregular migration have been brought to domestic courts, mainly by civil society organisations.[116] Regarding non-discrimination, the Chilean Constitutional Court disputed entry restrictions for Haitian nationals.[117] The case of the principle of non-refoulement has been invoked by higher courts that challenge restrictive decisions adopted by migratory authorities.[118] Even though it is possible to find studies concerning these cases,[119] none of them are focused on their contribution towards advancing human rights duties to allow entry.

Finally, the tensions identified in Chile between migration control and the human rights of migrants make it a perfect case study for analysing the application of duties to entry at

[115] SJM, 'Anuario Estadístico de Movilidad Humana En Chile 2023' (2024) 20 <https://sjmchile.org/wp-content/uploads/2024/06/Anuario-2023.pdf> accessed 30 September 2024.

[116] For example, *Breyner Junior Possu Rivas c. Ministerio del Interior y Seguridad Pública*, Appeals Court of Concepción, Amparo-261-2018 (31 December 2018); *Jose Yasiris Martir c. Intendencia Regional de Arica y Parinacota*, Appeals Court of Concepción, Amparo-68-2018 (21 March 2018).

[117] Requirement of unconstitutionality presented by a group of H. Deputies, regarding Supreme Decree No. 776, of April 9, 2018, of the Ministry of Interior and Public Security, which establishes tourist consular visa for Haitian nationals, published in the Official Gazette on April 17, 2018, Constitutional Court of Chile, No. 4757-18-CDS, (19 July 2018).

[118] For example, *Leonorada Pujols Rosario v. Intendencia de la Región de Arica y Parinacota*, Chilean Supreme Court, Criminal-11650-2017 (7 April 2017); *Patricia Ruiz Chang v. Policía de Investigaciones de Chile*, Chilean Supreme Court, Criminal-22824-2015 (6 November 2015); *David Lino Rivera v. Policia de Investigaciones de Chile*, Chilean Supreme Court, Criminal-5163-2015 (16 April 2015).

[119] Lawson and Rodriguez, 'Due process in administrative deportation proceedings'; Miriam Lorena Henríquez Viñas, 'El habeas corpus contra las expulsiones ilegales y arbitrarias de migrantes' (2018) Revista de Derecho Aplicado LLM UC (Habeas corpus against arbitrary and ilegal expulsión of migrants); Miriam Lorena Henríquez Viñas, 'El hermetismo de la jurisdicción constitucional chilena a propósito del control de convencionalidad' (2018) Vniversitas 80 (Hermetism of the jurisdiction of the Chilean Constitution in the conventionality control); Regina Ingrid Díaz Tolosa, 'Ingreso y permanencia de las personas migrantes en Chile: Compatibilidad de la normativa chilena con los estándares internacionales.' (2016) 14 Estudios constitucionales 179 (Entry and stay of migrants in Chile: Compatibility of the Chilean normative with international standards); Nicolás Rojas Pedemonte and José Tomás Vicuña Undurraga, *Migración y trabajo: estudio y propuestas para la inclusión sociolaboral de migrantes en Arica* (2015) < https://bibliotecadigital.indh.cl/items/78f40bd3-c41b-4dbd-ac5e-0ed187545e6e> accessed 25 June 2025 (Migration and labour: study and proposals for socio-labour inclusion of migrants in Arica).

the domestic level. Analysing Chile can also shed light on the challenges and opportunities of incorporating the human rights of migrants in a Global South and developing country with scarce resources for managing its migration flows and promoting, protecting, and respecting its human rights commitments.

While TWAIL and decolonial perspectives could be drawn upon on to analyse Chile's migration challenges and the role that both the international and the IAHR systems play within them, this thesis adopts a different analytical approach. Rather than situating the analysis within critical legal studies, the thesis develops a doctrinal and positivist account of human rights and migration law. This methodological choice is partly informed by the author's professional background and experience. As a former migration lawyer who led a migration and refugee legal clinic in Chile, the limitations and possibilities of invoking human rights law against discretionary state power were encountered repeatedly in everyday litigation. In that context, human rights law often constituted the primary legal guarantee available to migrants in situations of vulnerability, particularly to prevent exclusion.

The origins of the thesis' central argument, that human rights law can contribute to opening regular migration pathways, are grounded in this professional experience. Moreover, the thesis seeks to situate Chile as an ordinary subject of international law within the contemporary legal order, rather than as an exception or a peripheral case.

1.1.5. Structure.

Five related questions are identified to address this thesis's two central research questions, shaping its structure.

The thesis begins with **Chapter II** by presenting the facts, namely, the Chilean case, and asking to what extent the Chilean migration law contributes to creating irregular migration. The analysis will be made within a timeframe of 10 years, from 2013 to 2023.

Therefore, the chapter first analyses the context of Chilean migration within said timeframe. Consequently, it focuses on specific entry restrictions applied in 2018 and explains how they are related to an increase in irregular entries. The chapter continues to analyse how these entry restrictions are currently maintained despite a change in the Chilean migration law. Then, the chapter identifies topics discussed in domestic Courts related to entry restrictions and narrows its selection to two of them: the application of the principle of non-discrimination and the respect of the principle of nonrefoulement. The subsidiary research question guiding Chapter II relates to the first central question, as it demonstrates how restrictive migration legislation contributes to irregular migration status. In doing so, it lays the factual and legal context necessary to assess whether incorporating human rights law, specifically the principles of non-discrimination and of non-refoulement, could contribute to opening regular migration pathways in Chile. Additionally, by framing the analysis within a specific domestic context, the Chapter identifies the applicable international and Inter-American human rights instruments, thereby situating the subsequent analysis relevant the thesis' second central research question related to the contributions of the Inter-American human rights system.

As mentioned earlier, the right of states to control migration is limited by human rights law. Thus, the Chilean right to control migration is not only ruled by domestic legislation. It is also bound to international human rights obligations that limit this power. Because both central research questions of this thesis aim to determine if human rights law can contribute to opening regular migration pathways, chapters Three to Five analyse the role of international human rights law role in this regard.

To this end, the subsidiary research question guiding **Chapter III** asks whether the relationship between the legal principle of territorial sovereignty and irregular migration is born and sustained by structural shortcomings in international law regulating migration. The chapter begins by analysing the tensions between the legal principle of territorial sovereignty, the exercise of migration control and the concept of irregular

migration. Then, the chapter analyses the 'International Charter of Migrant Workers',[120] which contains the International Labour Organisation (ILO) Convention (No. 97) concerning migration for employment (Revised) of 1949,[121]Convention (No. 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975 (ILO C143)[122] and the International Convention for the Protection of Migrant Workers and their Families (ICRMW)[123]. The analysis focuses on how these instruments seek to establish and maintain a legal balance between state sovereignty and the rights of migrants. Although it illustrates how state sovereignty prevails over the admission and exclusion of migrants, the chapter also identifies initial steps towards building human rights-based pathways to regular migration.

Hence, the subsidiary research question addressed in this chapter relates to both central research questions. It contributes to the first by clarifying the structural shortcomings within international law that affect the creation of regular migration pathways. Furthermore, it serves as a starting point for analysing the extent to which developments in the human rights law system following ILO C97 and C143 have advanced the protection of regular migration pathways. The analysis also contributes to understanding how these standards influence the balance contained in the ICRMW between the principle of national sovereignty and the human rights of migrants. Additionally, the subsidiary research question contributes to the second research question by situating the subsequent analysis of the Inter-American human rights system within the broader international legal framework governing migration. This, in turn, allows for the identification of the specific contributions of this regional system to building a human rights-based approach to regular migration.

[120] Vincent Chetail, *International Migration Law* 200; Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization' 154.
[121] *Convention (No 97) concerning migration for employment (Revised)* (adopted 1949, entered into force 22 January 1952) 120 UNTS 71 (ILO C97)
[122] *Convention (No 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975* (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 323 (ILO C143).
[123] ICRMW

Having established a starting point for building a human-rights-based approach to regular migration pathways, the thesis then focuses on human rights duties. To this end, the subsidiary research question guiding **Chapter IV** asks whether international and Inter-American human rights law contain obligations to allow entry of migrants in a country other than their own. It aims to do so by analysing the evolutionary interpretation that institutions from the human rights system have made regarding the admission and exclusion of migrants. As mentioned in the initial section of this introduction, the lack of pathways to a regular migration status has links to both entry and stay in the country of destination, therefore, the chapter begins by exploring the human rights law regulating the entry and stay of migrants in a country other than their own.

Then, it explores the evolutionary interpretations of these laws. It first analyses the interpretations of the International human rights system, followed by interpretations of the Inter-American human rights system. The analysis will include human rights instruments to which Chile is a party, along with the human rights evolutionary interpretations within both the International and Inter-American human rights systems. This will also allow an assessment of how these systems interact. Despite observing migrants' rights, the analysis aims to go beyond the rights recognised in the ICRMW, because the state's obligation under the ICRMW 'must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party'.[124] Chapter IV concludes by identifying three specific situations that, according to the interpretations across both international and regional human rights systems, would provide human rights protection for migrants entering and staying in a country other than their own. The cases involve the principle of non-discrimination, the prohibition against torture and the right to family life.

The subsidiary research question guiding Chapter IV relates to both central questions. By identifying the content and scope of human rights obligations relevant to migrants' entry and stay, it contributes to responding to the first by establishing whether such duties exist and the extent to which they limit the right of states to control migration.

[124] CMW, *General Comment No. 2* para 7.

These duties are later assessed in the Chilean context. Additionally, the chapter contributes to the second central research question by examining, through evolutionary interpretation, the role of the Inter-American human rights system in shaping a human rights-based approach to regular migration.

Consequently, the thesis narrows the study to the situations of the principle of non-discrimination and the prohibition against torture, from which the principle of non-refoulement emanates. Aiming to determine what these human rights protections mean at the international, Inter-American and Chilean levels, and if they contribute to creating regular pathways to migration, the sub question guiding these two chapters is: To what extent does Chile incorporate a right to enter emanating from the prohibition of discrimination and the principle of non-refoulement? **Chapter V** focuses its analysis on the principle of non-discrimination, while **Chapter VI** focuses on the principle of non-refoulement. In both cases, the chapters first establish the international and Inter-American standards applicable to entry restrictions. Then they apply these standards to the case of Chile. For the case of non-discrimination, the study is narrowed to assess the legality of Consular Visas for nationals of Haiti and Venezuela. For the case of non-refoulement, the study is narrowed to assess Chile's decision to include a 'complementary protection' in its 2021 Migration Law instead of codifying the principle of non-refoulement.

By applying international and Inter-American standards to concrete Chilean entry restrictions, Chapters V and VI directly address the thesis' first central research question. They also relate to the second central research question by applying the Inter-American standards, alongside the international ones, to test the extent to which these standards meaningfully limit state authority to admit migrants. Additionally the thesis demonstrates how the Inter-American human rights system contributes, in practice, to shaping a human rights-based approach to regular migration.

Finally, **Chapter VII** closes the discussion and reflects on how the international, Inter-American and domestic levels of human rights laws interact in the creation of human rights-based pathways to regular migration.

In summary, this thesis motivates the question of whether the incorporation of duties of entry emanating from the principle of non-discrimination and the principle of non-refoulement can contribute to an advancement in the construction of human rights-based paths to regular migration. By using an Inter-American human rights approach, it will be possible to analyse its potential role in this advancement. By analysing the specific case of Chile, it will be possible to analyse the effectiveness of the identified duties.

CHAPTER II

MIGRATION IN CHILE. ENTRY RESTRICTIONS AND IRREGULARITY[1]

2.1. Introduction

Chile offers a useful case study of the tensions between territorial sovereignty and the human rights of migrants in Latin America. Chile is a party to all of the international and regional treaty instruments protecting the human rights of migrants.[2] Within the Chilean legal order, ratified human rights treaties acquire constitutional status.[3]

Article 5 paragraph 2 of the Chilean Constitution serves as a gateway for incorporating international human rights law into the domestic legal framework. This provision explicitly states that 'the exercise of sovereignty recognises as a limitation the respect

[1] An extensive part of this research was included in a Report presented by the author at the CMW Second Periodic Report of Chile. See Report for the CMW on the 2018 Migratory Reform Immediate Measures and prevention of irregular migration in Chile. (April 2020) The <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1381&Lang=en>, accessed 22 June 2025. The report is also annexed to this thesis.

[2] *International Convention for the Protection of Migrant Workers and Their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Signed on 24 September 1993 and ratified on 21 March 2005; *Convention on the Rights of the Child*, (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Signed on 26 January 1990 and ratified on 13 August 1990; *Optional Protocol Convention of the Rights of the Child on the involvement of children in armed conflict* (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222, signed on 15 November 2001 and ratified on 31 July 2003; *Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography* (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227, signed on 28 June 2000 and ratified on 6 February 2003; *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, signed on 17 July 1980 and ratified on 7 August 1989; *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, signed on 30 March 2007 and ratified on 29 July 2008; *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, signed on 3 October 1966 and ratified on 20 October 1971; *Convention Against Torture* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, signed on 23 September 1987 and ratified on 30 September 1988; *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 2002, entered into force 22 June 2006) 2375 UNTS 237, signed on 6 January 2005 and ratified on 12 December 2008; *International Covenant of Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, signed on 16 September 1969 and ratified on 10 February 1972.

[3] Ximena Fuentes Torrijo and Diego Pérez Farías, 'El efecto directo del Derecho Internacional en el Derecho Chileno' (2018) 25 (2) Revista de Derecho Universidad Católica del Norte 119 (The direct effect of International Law in the Chilean legal system).

for essential rights emanating from human nature' and affirms the 'duty of all state organs to respect and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force'. This constitutional mechanism has been understood by scholars as creating a 'block of constitutionality' (in Spanish, '*bloque de constitucionalidad*'),[4] through which international human rights treaties hold constitutional status in the Chilean legal system. This framework offers a robust legal foundation for the protection of vulnerable groups, including irregular migrants. In decisions like Role No. 2273-12-INA (2013), the Chilean Constitutional Court has confirmed that the rights guaranteed by ratified international human rights instruments apply to all persons regardless of their migration status.

Nonetheless, despite the formal incorporation of human rights standards into domestic law, Chile has seen a significant rise in irregular migration as opposed to the regular migration that incorporation of such rights should support. This chapter seeks to contextualise Chilean migration realities and explore the extent to which Chilean migration law has contributed to irregular migration. By focusing on specific visa requirements imposed on nationals of Venezuela and Haiti, this chapter argues that overly restrictive entry measures have played a role in increasing irregular migration.

The visa requirements were established in the context of the Chilean Migration Reform of 2018 (2018 Migration Reform),[5] which was presented as the new migration policy in April 2018 during the second government of President Sebastián Piñera. It contained two parts, the first being the Migration Bill and the second being the implementation of administrative measures with immediate effect.[6] The latter included the creation of new visa requirements, an extraordinary regularisation process, and guidelines for speeding

[4] See, Constanza Nunez Donald, 'Bloque de constitucionalidad y control de convencionalidad en Chile: avances jurisprudenciales', (2015) 11 Anuario de Derechos Humanos 157-169. (Constitutionality block and the conventionality control in Chile: case law improvements).

[5] Ministerio del Interior y Seguridad Pública, 'Minuta: Reforma migratoria y política nacional de migraciones y extranjería' (2018) <https://cdn.digital.gob.cl/filer_public/b0/09/b0099d94-2ac5-44b9-9421-5f8f37cf4fc5/nueva_ley_de_migracion.pdf> accessed 30 October 2020 (Minute: Migration reform and national policy on migration and foreigners) [2018 Migration Reform].

[6] Namely (1) Elimination of the possibility of requesting a temporary visa for employment purposes; (2) Creation of a temporary opportunity visa; (3) Creation of a Temporary Visa for International Orientation; (4) Creation of a Temporary Visa for National Orientation; (5) Installation of a Consular Visa for tourism for nationals of Haiti and Venezuela; (6) Installation of Humanitarian Family Reunification Visa for Haitian nationals; (7) Installation of Democratic Responsibility Visa for Venezuelan nationals; (8) Speeding up permits procedures; (9) Extraordinary Regularisation Process.

up permit procedures. The 2018 Migration Reform included two groups of visa requirements that impacted the entry of migrants. The first group was a consular visa for tourism (CVT) installed for Haitian nationals. Subsequently, after announcing the reform, the government added a new CVT for Venezuelan nationals. The second group was the humanitarian visas, which included a Democratic Responsibility Visa (DRV) for Venezuelan nationals and a Family Reunification Visa for Haitian nationals.

Although not explicitly defined, CVTs are codified within Chile's migration law. For this analysis, the thesis understands CVTs as entry permits that nationals of specific countries must obtain from the Chilean consulate in their country of origin before travelling to Chile on a transitory basis. Similarly, the humanitarian visas introduced in the 2018 Migration Reform functioned as entry permits available to nationals of certain countries. To obtain these visas, applicants were required to demonstrate that they were experiencing specific humanitarian circumstances. If approved, these individuals were granted temporary residence permits.

This chapter will demonstrate that irregular migration increased following the implementation of the 2018 Migration Reform, reflecting Sassen's affirmation that 'it is the law that creates irregular migration',[7] and Crépeau's ideas that relate restrictive admission policies with ineffective migration management and an increase to irregular migration. The chapter begins by examining Chile as a destination country for Latin-American migrants. It first focuses on regular migration, identifying the main groups arriving and remaining in Chile. It then narrows its focus to Venezuelan and Haitian nationals, defining them under international law concepts of refugee and migrant workers. Section 2.2 also explains why the thesis will focus its analysis on identifying regular migration pathways through human rights law and international migration law rather than through refugee law. In addition, this section examines irregular migration trends in Chile, explaining how these trends grew after the 2018 Migration Reform. Section 2.3 explores the relevant Chilean legislation and migration policy. Section 2.4 focuses on the entry restrictions introduced by the 2018 Migration Reform, particularly

[7] Saskia Sassen, *Sovereignty in the age of globalization* (Columbia University Press 2015).

the CVTs to Haitian and Venezuelan citizens as well as the humanitarian visas. This section shows that, despite adopting human rights language, the 2018 Migration Reform effectively closed regular migration pathways for Venezuelans and Haitians. Section 2.5 offers the chapter's conclusions and a starting point for the consecutive chapters of this thesis.

2.2. Chile as a country of destination for Latin-American migrants.

2.2.1 Brief overview and regular migration figures.

Following the return to democracy in 1990, Chile emerged as an appealing destination in the Global South, particularly for migrants from other Latin American countries.[8] To date, immigration flows in Chile have continued to rise since 2006. The current decade is characterised by an exponential increase in migratory patterns, leading to a profound transformation in the country's migration dynamics.[9]

Migration figures became precise only after the Chilean government published estimations, including those related to irregular migration, in 2018. Scholars have

[8] Cristián Doña-Reveco, 'Chile's welcoming approach to immigrants cools as numbers rise' (*migrationpolicy.org*, 17 May 2022) 1 <https://www.migrationpolicy.org/article/chile-immigrants-rising-numbers> accessed 2 October 2024; Maria Emilia Tijoux and Constanza Ambiado, 'Ser paciente haitiano/a en Chile y vivir el racismo en centros de la red pública de salud', (2023) 40 Interdisciplinaria 363, 364 (Being a Haitian patient in Chile and experiencing racism in centers of the public health network); Cristián Doña Reveco and Brendan Mullan, 'Migration policy and development in Chile' (2014) 52 International Migration 1, 1; Miriam Henriquez-Viñas, 'La Corte Suprema Chilena y la protección de la libertad personal de los migrantes: un estudio jurisprudencial' (2022) 19 Jurídicas 263, 265. (The Chilean Supreme Court and the protection of migrants' personal freedom: Case-law study)

[9] Jaime Bassa Mercado and Fernanda Torres Villarrubia, 'Desafíos para el ordenamiento jurídico chileno ante el crecimiento sostenido de los flujos migratorios' (2015) 13 Estudios constitucionales 103, 105 (Challenges for the Chilean legal system owing to sustained growth of migratory flows); Alexis Moncada Miranda, Comentario de Jurisprudencia. Expulsión de extranjeros. Recurso de reclamación. Interés superior del niño. Principio del libre desarrollo de la personalidad. Principio de proporcionalidad de las sanciones. Revista de Derecho, Universidad de Concepción, 244 (2018) 261 (Case-law commentary. Expulsion of foreigners. Appeal claim. Best interest of the child. Principle of free development of personality. Principle of proportionality of sanctions); Miriam Henriquez-Viñas, The Chilean Supreme Court and the protection of migrants' personal freedom: A jurisprudential study, 265; Delfina Lawson and Macarena Rodriguez, 'El debido proceso en los procedimientos de expulsion administrativa de inmigrantes: situación actual y alternativas' in Tomás Vial Solar (ed), *Anuario Derechos Humanos 2016* (2016) 222 <http://derecho.udp.cl/wp-content/uploads/2016/11/Lawson-y-Rodriguez-Debido-Proceso-en-Expulsion-Migrantes-Final.pdf> accessed 22 June 2025 (Due process in administrative expulsion procedures of immigrants: current situation and alternatives).

identified the exponential increase of immigration in Chile by analysing shifts in migration flows observed since 2012. Bassa Mercado and Torres Villarrubias identified in 2015 that temporary residence permits tripled from 2003 to 2013, and permanent residence permits doubled during the same period.[10] In 2016, Lawson and Rodríguez observed that by the end of 2015, Chile had 410.000 migrants legally residing in the country, corresponding to an increase of 123% from the census of 2002.[11] When including irregular entries and temporary residence permits, Lawson and Rodríguez estimated that by the end of 2016, there were more than 500.000 migrants in the country.[12] In 2018, the Chilean government made official estimations, including the results from the Census of 2017, the visas granted in Chile and overseas, the registers from the Chilean Investigation Police (PDI) and the deaths registered in Chile.[13] These estimations counted 1.299.432 migrants residing in the country.[14]

Migration numbers vary, depending on the institution that makes the estimations. According to the last IOM World Migration Report of 2022, Chile had 1.65 million migrants in 2021, corresponding to 8.6% of the population.[15] The figure surpasses the percentage of migrants worldwide, which in 2022 reached 3.60%.[16] To offer a timeline for understanding the growth of the migrant population in Chile, the IOM also estimated that the 1995 migration in Chile corresponded to 1% of the population.[17] In 2010, the

[10] Bassa Mercado and Torres Villarrubia, 'Challenges for the Chilean legal system owing to sustained growth of migratory flows' 105.
[11] Lawson and Rodriguez, 'Due process in administrative expulsion', 222.
[12] ibid.
[13] Instituto Nacional de Estadísticas y Servicio Nacional de Migraciones, Estimación de personas extranjeras 6 <https://www.ine.gob.cl/docs/default-source/demografia-y-migracion/publicaciones-y-anuarios/migración-internacional/estimación-población-extranjera-en-chile-2018/estimación-población-extranjera-en-chile-2021-síntesis.pdf?sfvrsn=6d04859c_5> accessed 29 June 2023. (Estimation of foreign persons)
[14] Instituto Nacional de Estadísticas y Servicio Nacional de Migraciones, 'Informe de resultados de la estimación de personas extranjeras residentes en Chile al 31 de diciembre de 2021' (2022) 7<https://www.ine.gob.cl/docs/default-source/demografia-y-migracion/publicaciones-y-anuarios/migración-internacional/estimación-población-extranjera-en-chile-2018/estimación-población-extranjera-en-chile-2021-resultados.pdf?sfvrsn=d4fd5706_6> accessed 29 June 2023. (Results report of the estimation of foreign persons residing in Chile as of 31 December 2021)
[15] IOM, *Interactive World Migration Report 2022* <https://www.iom.int/wmr/interactive> accessed 29 June 2023.
[16] ibid.
[17] As pointed out by Tijoux and Ambiado. See Tijoux and Ambiado, 'Being a Haitian parent in Chile' 365.

percentage increased to 2.2%; in 2015, it grew to 3,6%; in 2019, it increased to 5%.[18] Concerning Chilean statistics, at the end of 2021, the Chilean National Statistics Institute and the National Migration Service estimated 1.482.390 foreigners residing in the country, corresponding to 7.5% of the Chilean population[19] and an increase of 14.1% since the estimations of 2018.[20] Furthermore, the last Chilean census of 2017 counted 746.465 migrants, corresponding to 4.3% of the Chilean population and an increase of 66% from the previous census of 2009.[21]

Despite the divergence in numbers, all of the estimations made by different statistical resources reflect the exponential growth of the migrant population in Chile.[22] The rapid increase in migration flows has been 'accompanied by growing public anxiety'.[23] Violence and xenophobia towards migrants have shaped newspaper covers, the public debate, and even public demonstrations.[24] In 2021, these protests led to the destruction of migrant camps on the Chilean northern border, to which the UN and the IAHR Commission expressed their concern.[25] Therefore, managing migration flows and the associated narrative of the migratory phenomenon in Chile is currently a central challenge.

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[18] As pointed out by Tijoux and Ambiado. See ibid.

[19] Instituto Nacional de Estadísticas y Servicio Nacional de Migraciones, 'Estimation of Foreign Persons' 7.

[20] ibid.

[21] Instituto Nacional de Estadísticas, 'Síntesis de resultados. Censo 2017' 9 < https://www.ine.gob.cl/docs/default-source/censo-de-poblacion-y-vivienda/publicaciones-y-anuarios/2017/publicación-de-resultados/sintesis-de-resultados-censo2017.pdf?sfvrsn=1b2dfb06_6> accessed 11 June 2023. (Summary of results. 2017 Census)

[22] Our World in Data, 'Migration, refugee and asylum data explorer' (*Our World in Data*, 2020) <https://ourworldindata.org/explorers/migration> accessed 29 June 2023.

[23] Doña-Reveco, 'Chile's Welcoming Approach to Immigrants Cools as Numbers Rise'.

[24] Fernanda Paúl,'La gran mayoría de Chile no comparte la violencia xenofóbica y racista del grupo que quemó las pertenencias de los migrantes' BBC News Mundo (27 September 2021) https://www.bbc.com/mundo/noticias-america-latina-58711170 accessed 8 October 2024 (The vast majority of Chile does not share the xenophobic and racist violence of the group that burned the migrants' belongings); Vanessa González, 'Entre discursos de odio, xenofobia y rechazo cultural' (Diario UChile, 6 March 2024) https://radio.uchile.cl/2024/03/06/entre-discursos-de-odio-xenofobia-y-rechazo-cultural/ accessed 8 October 2024 (Between hate speech, xenophobia and cultural rejection).

[25] IAHR Commission, 'The IACHR condemns violent and xenophobic acts against Venezuelan migrants in Iquique, Chile' (5 October 2021) <https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2021/263.asp> accessed 8 October 2024; UN, 'Venezuelans in Chile, Ayotzinapa, Taliban... Monday's news' (27 September 2021) <https://news.un.org/es/story/2021/09/1497512> accessed 8 October 2024.

Chile's current migration flow is mainly intraregional and aligns with Latin America's migration pressures.[26] The three main groups of migrants currently arriving in Chile are Venezuelans, Peruvians and Haitians.[27] The percentage of these groups among the rest of the migrant population has remained stable since the first estimations in 2018 and will be discussed in the following paragraph.[28]

The largest group of migrants in Chile consists of Venezuelan nationals, who comprise approximately 30% of the country's migrant population.[29] The ongoing socio-political crisis in the Bolivarian Republic of Venezuela has led to one of the most significant diasporas in modern history.[30] The majority of Venezuelan migrants relocate within Latin America, with Chile ranking as the third or fourth largest recipient of Venezuelan migrants in the Americas over the past five years.[31]

Various international and Inter-American institutions have investigated and reported the crisis in Venezuela. In 2019, the UN Human Rights Council established an Independent International Fact-Finding Mission to investigate alleged human rights violations and abuses in the country,[32] whose mandate has been renewed three times.[33] The mission

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[26] For a detailed analysis of distribution of migrant population in the Chilean regions, see Luis Eduardo Thayer, 'Causas y consecuencias de la irregularidad migratoria' in Nicolas Rojas Pedemonte and José Tomás Vicuña S.J. (eds), *Migración en Chile. Evidencias y mitos de una nueva realidad*. (LOM Ediciones 2019) 299–307 (Causes and consequences of migration irregularity).

[27] Instituto Nacional de Estadísticas, 'Estimation of Foreign Persons' 7.

[28] Servicio Nacional de Migraciones, 'Estimaciones de extrajeros' (*SERMIG*, 2023) <https://serviciomigraciones.cl/estudios-migratorios/estimaciones-de-extranjeros/> accessed 11 July 2023. (Foreigners projections)

[29] Instituto Nacional de Estadísticas y Servicio Nacional de Migraciones, 'Estimation of Foreign Persons' 7.

[30] UNHCR, 'Venezuela Situation' (2023) <https://reporting.unhcr.org/operational/situations/venezuela-situation> accessed 29 June 2023; Sandro Pirovino and Elissaios Papyrakis, 'Understanding the Global Patterns of Venezuelan Migration: Determinants of an Expanding Diaspora' (2023) 10 Development Studies Research <https://www.tandfonline.com/doi/epdf/10.1080/21665095.2022.2147561?needAccess=true&role=button> accessed 27 June 2023.

[31] Luciana Gandini and Andrew Selee, 'Betting on Legality. Latin American and Caribbean Responses to the Venezuelan Displacement Crisis' 4 <https://www.migrationpolicy.org/sites/default/files/publications/mpi-venezuelans-legal-status-2023_eng_final.pdf> accessed 20 June 2023; Statista, 'Intraregional migration in Latin America' (2024) 13 <https://www.statista.com/study/106033/intraregional-migration-in-latin-america/> accessed 8 October 2024.

[32] UNHRC, *Resolution adopted by the Human Rights Council on 27 September 2019. 42/45. Situation of Human Rights in the Bolivarian Republic of Venezuela* UN Doc A/HRC/Res/42/45 (8 October 2019).

[33] UNHRC, *Resolution adopted by the Human Rights Council on 6 October 2020. 45/20. Situation of human rights in the Bolivarian Republic of Venezuela* UN Doc A/HRC/RES/45/20 (13 October 2020); UNHRC,

has repeatedly reported gross human rights violations in Venezuela since 2014, including 'extrajudicial executions, enforced disappearances, arbitrary detention, torture and other cruel, inhuman or degrading treatment, including those involving sexual and gender-based violence'.[34] According to its latest report, the migration crisis has only worsened after the presidential election of 28 July 2024, by concluding 'the state reactivated and intensified the harshest and most violent mechanism of its repressive apparatus'.[35] Similarly, in 2019, the IAHR Commission installed a special mechanism for monitoring Venezuela (MESEVE, from the Spanish *Mecanismo Especial de Seguimiento para Venezuela*),[36] which has continually reported human rights violations against the government opposition and a lack of respect for democracy and the rule of law.[37]

The second largest group of migrants in Chile are Peruvian nationals, who represent 16.6% of the migrant population.[38] Migration from Peru to Chile has remained steady since their first arrival in 1992,[39] and they remained between the first and the second most significant number of foreigners before the diaspora of Venezuelan nationals.[40] Three key points should be noted: (1) The first groups of Peruvian migrants arrived in Chile during the 1990s, fleeing from the socio-political crisis that Peru faced during the

Resolution adopted by the Human Rights Council. Situation of the human rights in the Bolivarian Republic of Venezuela.

[34] UNHRC, 'Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela' (2024) <https://www.ohchr.org/en/hr-bodies/hrc/ffmv/index> accessed 8 October 2024.

[35] UNHRC, '*Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela* UN Doc A/HRC/57/57 (17 September 2024) para 117.

[36] IAHR Commission, Mecanismo Especial de Seguimiento para Venezuela (MESEVE) <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/meseve/default.asp> accessed 8 October 2024. (Venezuela follow-up special mechanism)

[37] IAHR Commission and OAS, *Institucionalidad Democrática, Estado de Derecho y Derechos Humanos En Venezuela* OAS Doc OEA/Ser.L/V/II' (31 December 2017) ('Democratic Institutionality, rule of law and human rights in Venezuela); IAHR Commission, *Resolución 2/18. Migración Forzada de Personas Venezolanas (2 March 2018)* https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-2-18-es.pdf accessed 8 October 2024 (Resolution 2/18. Forced Migration of Venezuelan Persons); IAHR Commission, *Personas Refugiadas y Migrantes Provenientes de Venezuela* OAS Doc OEA/Ser.L/V/II (20 July 2023) (Refugees and Migrants from Venezuela); IAHR Commission, *Capitulo IV. B, Venezuela* (2023) <https://www.oas.org/es/cidh/docs/anual/2023/capitulos/IA2023_Cap_4B_Venezuela_SPA.PDF accessed 8 October 2024>, (Chapter IV.b. Venezuela).

[38] National Institute of Statistics and National Migration Service, 'Estimation of Foreign Persons' 7.

[39] José Carlos Luque Brazán, 'Asociaciones políticas de inmigrantes peruanos y la "Lima Chica" en Santiago de Chile' 2007) 4 International migrations 121, 129–130.(Political associations of Peruvian immigrants and the "Little Lima" in Santiago de Chile).

[40] In the Chilean Census of 2002, Peruvians were the second largest number of migrants, after Argentina nationals.

Fujimori regime; (2) During this time, Peruvians migrated to several destinations around the world, Chile being the fourth most popular destination country, and (3) Peruvian migration was the first influx of migrants that Chile received after returning to democracy.[41] The first and second points bear similarities to the current Venezuelan migration context. Despite the significant number of Peruvian nationals residing in Chile, no entry restrictions are currently imposed on them. The limited literature addressing the differential treatment between Peruvian, Venezuelan and Haitian nationals suggest that sociological and anthropological factors may play a role.[42] Peruvian nationals are often perceived as more culturally aligned with Chilean traditions and thus more likely to integrate into the 'Chilean identity'.[43]

The third group of migrants residing in Chile is Haitian nationals, corresponding to 12.2% of the migrant population.[44] Chile was considered in 2020 the third top country receiving Haitians in the Americas, preceded by the Dominican Republic and the United States.[45] Haitian migration is driven by a broad range of factors, from environmental disasters to heightened insecurity and poverty. [46] In 2010, the capital of Haiti, Port-au-Prince, was struck by a devastating earthquake that killed about 220,000 people, left thousands permanently injured, and 1,5 million people homeless.[47] Then, in 2016, Haiti was impacted by Hurricane Matthew, which affected about 2 million people.[48] Currently,

[41] José Carlos Luque Brazán, 'Political associations of Peruvian immigrants and the Little Lima' 130–131.
[42]Daniel Bello Arellano, 'Del rechazo a la aceptación: la nacionalidad como rasgo de diferenciación de los inmigrantes en el discurso de opinión en Chile (2017-2019), Revista Pueblos y Fronteras Digital' 18, 1–36. (From rejection to acceptance: nationality as a trait of differentiation of immigrants in opinion discourse in Chile (2017-2019))
[43] Roberto González, David Sirlopú and Thomas Kessler, 'Prejudice among Peruvians and Chileans as a Function of Identity, Intergroup Contact, Acculturation Preferences, and Intergroup Emotions' (2010) 66 Journal of Social Issues 803.
[44] Instituto Nacional de Estadísticas y Servicio Nacional de Migraciones, 'Estimation of Foreign Persons' 7.
[45] Caitlyn Yates, 'Haitian Migration through the Americas: A Decade in the Making' (*migrationpolicy.org*, 27 September 2021) <https://www.migrationpolicy.org/article/haitian-migration-through-americas> accessed 2 October 2024.
[46] ibid; OHCHR, 'Haiti: Soaring number of displaced desperately need protection and aid priority, UN experts urge' <https://www.ohchr.org/en/press-releases/2024/06/haiti-soaring-number-displaced-desperately-need-protection-and-aid-priority> accessed 7 October 2024.
[47] UN News, 'UN marks anniversary of devastating 2010 Haiti earthquake' (12 January 2022) <https://news.un.org/en/story/2022/01/1109632> accessed 7 October 2024.
[48] World Bank, 'Rapidly Assessing the Impact of Hurricane Matthew in Haiti' (2017) <https://www.worldbank.org/en/results/2017/10/20/rapidly-assessing-the-impact-of-hurricane-matthew-in-haiti> accessed 7 October 2024.

Haiti faces escalating gang violence and political instability, forcing over half a million people to be internally displaced.[49] After the 2010 earthquake, Haitians preferred Brazil as their destination, which received an estimated 85,000 people.[50] Following the Brazilian economic crisis, Chile became Haitians' preferred South American destination between 2015 and 2017.[51] Racism, exclusion, and anti-black and anti-immigrant discrimination are the main topics identified by Chilean and Latin American scholars studying Haitian migration.[52] Indeed, in 2019, a survey of immigrants in Chile demonstrated that almost half of the Haitian population experienced or felt discriminated against while living in Chile.[53]

The 2018 Migration Reform targeted Venezuelan and Haitian nationals specifically. As will be elaborated in subsequent sections of this chapter, the reform imposed new visa requirements that restricted their entry into Chile. Both groups share a common context of crisis in their home countries, a situation that does not currently apply to Peruvian nationals. The rationale for not imposing similar entry restrictions on Peruvians and other Latin American nationalities falls outside the scope of this thesis.

From an international law perspective, Venezuelan and Haitian nationals migrating to Chile may qualify both as refugees and migrant workers. Viewed through the human rights-based approach developed in this thesis, the regular movement of these groups entails that states must facilitate their migration by granting them access to the country to request asylum and making the asylum procedures accessible.[54] It also means expanding regular, safe and accessible migration pathways through a progressive

[49] OHCHR, 'Haiti: Soaring number of displaced desperately need protection and aid priority' , UN Experts Urge'; IAHR Commission, 'IACHR Condemns Escalating Violence and Attacks by Armed Groups in Haiti'.
[50] Yates, 'Haitian Migration through the Americas: A decade in the making'.
[51] Nicolas Rojas Pedemonte, José Koechling and Miguel Yaksic Sj, 'Introducción' in Nicolás Rojas Pedemonte and José Koechlin (eds), *Migración Haitiana hacia el Sur Andino* (2017) https://jesuitas.lat/biblioteca/documentos-cpal-social/cpal-social/migracion-haitiana-hacia-el-sur-andino accessed 11 July 2023. (Introduction).
[52] Tijoux and Ambiado, Being a Haitian patient in Chile and experiencing racism in centers of the public health network; Emilia Tijoux, 'No soy racista pero', in Nicolás Rojas Pedemonte and José Tomás Vicuña (eds), *Migración en Chile. Evidencias y mitos de una nueva realidad*. (LOM Ediciones 2019) (I'm not racist but); Yates, 'Haitian Migration through the Americas: A decade in the aking'.
[53] Yates, 'Haitian Migration through the Americas: A decade in the making'.
[54] IAHR Commission, *Resolution 2/18. Forced Migration of Venezuelan Persons* paras 1, 3.

expansion and liberalisation of visas and creating regimes that facilitate easy access to visas.[55] Such an approach is consistent with the position advanced by François Crépeau, who has argued that 'states already know that facilitation is a much better solution than prohibition, and they have committed to facilitating mobility in several instruments'.[56]

Although Chile chose not to sign the Global Compact for Migration when the 2018 Migration Reform was implemented, it actively participated in the negotiations that led to the New York Declaration, which uses similar language to the Global Compact for Migration. Moreover, Chile is a signatory to the SDGs, further reinforcing its commitments to facilitate regular migration. The following subsections will define the categories of refugee and migrant workers, while demonstrating how Venezuelans and Haitians migrating to Chile fit within them. It will also demonstrate how Chile's legislation and practice is turning into obstructing their regular migration pathways rather than facilitating them.

2.2.2. Refugees

Venezuelans and Haitians migrating to Chile may qualify for refugee protection under international refugee law. Chile is a party to the 1951 Refugee Convention and its 1967 Protocol. The criteria for qualifying as a refugee are outlined in Article 1 of the 1951 Refugee Convention, as amended by the 1967 Protocol relating to the status of refugees. According to this provision, a 'refugee' is defined as any person who:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is 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.

[55] IAHR Commission*, Resolution 2/18. Forced Migration of Venezuelan Persons*.
[56] François Crépeau, 'Towards a Mobile and Diverse World: Facilitating Mobility as a Central Objective of the Global Compact on Migration' 30 International Journal of Refugee Law 650, 651.

In Latin America, the criteria for recognising refugees have been expanded. In the third conclusion of the 1984 Cartagena Declaration on Refugees (Cartagena Declaration), states agreed to include as refugees 'persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.[57] Although the Cartagena Declaration is a non-binding instrument,[58] the IAHR Court has acknowledged its legal significance. In its *Advisory Opinion on the rights and guarantees of children in the context of migration and/or in need of international protection*, the Court recognised that under the 'progressive development of international law', the obligations under the right to seek and receive asylum apply to individuals who meet the requirements of the Cartagena Declaration.[59] Additionally, the Court identified a regional trend in Latin America toward adopting this broader definition of refugee, which incorporates the criteria from the Refugee Convention, its 1967 Protocol, and the Cartagena Declaration.[60]

The regional trend is supported by the domestic legislation of 19 Latin American countries, including Chile, which holds a particularly relevant position regarding the Cartagena Declaration.[61] In 2024, the Cartagena Declaration marked its fortieth anniversary. Every decade, the signatory states renew their commitments to the Declaration, and the last decade's process entitled 'Cartagena +40' was hosted by Chile.[62]

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[57] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. 1984.

[58] UNHCR, *Memorias del Trigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados* <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=568cf8f64> accessed 6 April 2023; UNHCR, 'The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984' (2016) 18 International Journal of Refugee Law 252.

[59] Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection Advisory Opinion OC-21/14*, para. 79.

[60] Ibid para 77

[61] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, para 77. For a critical view on the Cartagena Declaration, see José H Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance' (2019) 38 Refugee Survey Quarterly 341.

[62] MINREL, *Proceso de Cartagena +40*, <https://minrel.gob.cl/proceso-de-cartagena-40> accessed 14 October 2024.

Determining a refugee status is inherently a case-specific process. Nonetheless, the humanitarian crisis currently facing Venezuelan nationals strongly indicates that a significant portion of this population may require refugee protection. Both, the UNHCR and the IAHR Commission have repeatedly urged states to 'allow Venezuelans access to their territory and provide them with proper protection standards of treatment'.[63] The IAHR Commission further called upon states to grant *prima facie* refugee protection in situations of mass displacement.[64] Moreover, local and international NGOS, including the Jesuit Migrants Service and Amnesty International, have echoed these calls, advocating for the recognition of Venezuelans as refugees.[65]

Concerning Haitian nationals, the UNHCR has stated that survivors of violence in Haiti may qualify for international protection.[66] Similarly, the IAHR Commission has affirmed that states must ensure Haitians are granted access to their territories so that their claims for protection can be duly assessed.[67] The Commission has also urged states to consider extending refugee status to Haitians, either under the definition provided by the 1951 Refugee Convention or in accordance with the broader criteria set out in the Cartagena Declaration.[68] Amnesty International has echoed this recommendation.[69]

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[63] UNHCR, *Majority Fleeing Venezuela in Need of Refugee Protection* (*UNHCR*, 21 May 2019) <https://www.unhcr.org/news/briefing-notes/majority-fleeing-venezuela-need-refugee-protection-unhcr> accessed 9 October 2024; IAHR Commission, *Resolution 2/18. Forced Migration of Venezuelan Persons* (2 March 2018) para 1; IAHR Commission, *Refugees and Migrants from Venezuela* (20 July 2023) OAS Doc OEA/Ser.L/V/II' 187–202.

[64] IAHR Commission, *Resolution 2/18. Forced Migration of Venezuelan Persons* (2 March 2018) para 2; IAHR Commission, *Refugees and Migrants from Venezuela* (20 July 2023) OAS Doc OEA/Ser.L/V/II, para 188.

[65] Amnesty International, "No One Wants to Live in the Hiding": Lack of Protection for Venezuelan Refugees in Chile. (2022) <https://www.amnesty.org/en/wp-content/uploads/2023/03/AMR2264372023ENGLISH.pdf> accessed 15 October 2024; Waleska Ureta Cañas, Francisca Vargas and Macarena Rodríguez Atero, 'Protección de Venezolanos' (*SJM*, 1 August 2024) <https://sjmchile.org/opinion/proteccion-de-venezolanos/> accessed 15 October 2024.(Venezuelans protection)

[66] UNHCR, *Haitian Claims* (*UNHCR US*, 2024) <https://www.unhcr.org/us/what-we-do/u-s-asylum-resources/haitian-claims> accessed 9 October 2024.

[67] IAHR Commission and OAS, *Resolution 2/2021: Protection of Haitians in Human Mobility: Inter-American Solidarity*. para 21 <https://www.oas.org/en/iachr/decisions/pdf/2021/Res-2-21-en.pdf> accessed 15 October 2024.

[68] ibid 24.

[69] Amnesty International, 'States Must End Racist Treatment of Haitian Asylum Seekers' (*Amnesty International*, 20 June 2023) <https://www.amnesty.org/en/latest/news/2023/06/end-racist-treatment-haitian-asylum-seekers/> accessed 15 October 2024.

Chilean refugee law incorporates both definitions of a refugee in Article 2 of Law 20.430. While paragraph 1 reflects the definition set out in the 1951 Refugee Convention, paragraph 2 includes the broader protections outlined in the Cartagena Declaration.[70] Chile has, on numerous occasions, acknowledged the generalised situation of violence in Venezuela, and is publicly aware of the security risks present in Haiti. Nevertheless, recent legislation and state practice have increasingly obstructed, rather than facilitated, access to refugee protection. Two key points support this assertion.

Firstly, the acceptance rate for asylum applications in Chile is extremely low.[71] A recent report identified 26,475 applications submitted between 2017 and 2023, of which only 8,721 were reviewed, and only 7.8% were approved.[72] Among these applications, 12,378 were submitted by Venezuelan nationals, while Haitians submitted 203.[73] Furthermore, the Chilean National Migration Service revealed that from 2010 to 2023, only 3.13% of asylum applications were approved, with 41.3% of those approvals corresponding to Venezuelan applicants; however, 36 approvals were granted specifically to Venezuelan citizens.[74] As will be further analysed in Chapter VI of this thesis, the decision to grant refugee protection in Chile is predominantly political. The Commission responsible for adjudicating asylum applications comprises members who are exclusively appointed by

[70] Article 2 prescribes:
Concept of refugee. People who are in any of the following situations will have the right to have their refugee status recognised:

1. Those who, due to well-founded fear of being persecuted for reasons of race, religion, nationality, belonging to a certain social group or political opinion, are outside the country of their nationality and cannot or do not want to avail themselves of its protection due to said fears.
2. Those who have fled their country of nationality or habitual residence and whose life, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have disturbed public order in that country seriously.

[71] SJM, Anuario Estadístico de Movilidad Humana En Chile 2023 (2024), 31–32 <https://sjmchile.org/wp-content/uploads/2024/06/Anuario-2023.pdf> accessed 30 September 2024. ('Statistical Yearbook of Human Mobility in Chile 2023').
[72] SJM, 'Anuario Estadístico de Movilidad Humana En Chile 2023' (2024) 31 <https://sjmchile.org/wp-content/uploads/2024/06/Anuario-2023.pdf> accessed 30 September 2024.
[73] ibid.
[74] SJM, 'Nueva ley que modifica el procedimiento para la determinación de la condición de refugiado' <https://sjmchile.org/opinion/columna-nueva-ley-que-modifica-el-procedimiento-para-la-determinacion-de-la-condicion-de-refugiado/> accessed 20 June 2025.(New law that modifies the procedure for determining refugee status).

the Chilean president. Consequently, asylum applications are not initially assessed by an independent judiciary or by experts in refugee law.

Secondly, in February 2024, Chile enacted new legislation that modifies the procedures for granting refugee protection.[75] Under this legislation, asylum seekers must submit their applications within the first seven days of arrival in Chie. Additionally, they must demonstrate that they are coming directly from the country where they face the risk of persecution. The new framework also introduces an admissibility stage, during which asylum seekers may have to wait up to four months to determine whether their requests are admissible. This stage was established in response to a well-documented practice in which migration authorities in Chile made determinations on the spot regarding an individual's ability to claim asylum.[76] Specifically, authorities responsible for receiving asylum claims exercised discretion in deciding whether to provide applicants with the necessary application forms.[77] Consequently, Chilean authorities effectively implemented the pre-admission stage, which was not explicitly outlined in the law. Given that this legislation is still recent, it is not yet possible to evaluate its outcomes. However, it introduces additional complexity to the asylum-seeking process, complicating the pathway for asylum seekers to obtain refugee protection.

The above discussion demonstrates that, despite explicit recommendations from international and Inter-American human rights organs and NGOs, refugee protection does not constitute a viable regular migration pathway in Chile. Furthermore, the

[75] Chile, Law 21.655. For an in depth analysis of Law 21.655 impacts refugee protection in Chile, see Gabriela Hilliger and Constanza Castillo, 'New law that modifies the procedure for determining refugee status' (*Jesuit Service to Migrants*, 28 March 2024) <https://sjmchile.org/opinion/columna-nueva-ley-que-modifica-el-procedimiento-para-la-determinacion-de-la-condicion-de-refugiado/> accessed 14 October 2024; UNHCR, '*Procedure for the application for recognition of refugee status*' (2024) <https://help.unhcr.org/chile/solicitando-la-condicion-de-refugiado/procedimiento-de-la-solicitud-de-reconocimiento-de-la-condicion-de-refugiada-o/> accessed 15 October 2024.

[76] Mayra Feddersen M. and others, 'Ley sobre Protección de Refugiados en Chile. Nudos críticos, desafíos urgentes y alternativas hacia el futuro' 15 <https://www.politicasmigratorias.org/publicaciones>accessed 20 April 2023 (Law on Protection of Refugees in Chile. Critical knots, urgent challenges and alternatives towards the future); Helena Olea, Refugiados en Chile: Análisis de la Ley 20.430 y su reglamento, 124–125 <https://derechoshumanos.udp.cl/publicacion/refugiados-en-chile-analisis-de-la-ley-20-430-y-su-reglamento/>accessed 21 April 2023. ('Refugees in Chile: Analysis of Law 20.430 and its regulation.').

[77] For further research on how discretion affects asylum policy, see Jonathan Darling, 'The Politics of Discretion: Authority and Influence in Asylum Dispersal' (2022) 94 Political geography 102560.

country's prevailing practices and recent legislative developments indicate that this situation is unlikely to change in the foreseeable future. However, these recommendations extend beyond the recognition of refugee status. They call for applying other forms of protection, such as complementary protection. Chapter VI of this thesis will analyse the framework of complementary protection in light of the principle of non-refoulement, examining the extent to which it contributes to opening regular migration pathways within the country.

Expanding and liberalising visa regimes is also a recurrent recommendation from the organisations mentioned above. Such recommendations resonate with Crépeau's proposal for facilitating regular migration for individuals seeking employment. The following section will examine how Venezuelans and Haitians migrating to Chile may, alternatively, align with the definition of migrant workers and the migration pathways available to them.

2.2.3. Migrant Workers

Venezuelan and Haitian nationals may also qualify as migrant workers. Indeed, until 2018, most Latin American nationals, including these groups, had access to legal pathways for migration to Chile under this classification. Administrative regulations adopted in 2014, during the second government of former President Michelle Bachelet, established a more flexible migration framework for individuals migrating either due to forced displacement or for labour purposes.[78] These regulations allowed Latin Americans to enter Chile without prior authorisation or an employment contract, remain in the country as tourists, apply for asylum or secure a job offer. Asylum seekers were granted work permits while their claims were under review,[79] and individuals who

[78] In this regard, see Presidenta de la República de Chile, 'Instructivo Presidencia No. 005. "Lineamientos e Instrucciones Para La Política Nacional Migratoria' <https://migrantes.mineduc.cl/wp-content/uploads/sites/88/2017/04/6-Instructivo-Presidencial-Migración.pdf> accessed 2 October 2024.
[79] Law 20.430 art. 13.

secured job offers could apply for temporary residency with a work permit from within Chile.[80]

The temporary visa (in Spanish *visa temporaria por motivos laborales*) was initially granted for one year, requiring only a short-term contract, and allowed migrant workers to be employed by more than one employer.[81] The visa could be extended for an additional year, after which migrants were required to apply for permanent residency. [82] However, the entry restrictions introduced by the 2018 Migration Reform imposed visa requirements for Haitians and Venezuelans entering the country as tourists. In practice, this regulation not only controlled their entry as tourists but also restricted their potential status as migrant workers. According to Article 2.1 of the ICRMW, a migrant worker is defined as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.'[83] Therefore, they are protected by the ICRMW.[84]

The practice of changing migration categories within the territory of the country of destination is not exclusive to Chile. As Acosta points out, south american states that are parties to the MERCOSUR Residence Agreement 'decouple' a right to circulate from a right to reside.[85] He explains: 'Regional migrants need to convince border guards of their

[80] The 2018 Migration Reform introduced significant modifications to the residency visas that migrants could obtain, which were met with criticism from both academics and independent experts. Later, Law 21.325 eliminated the possibility of switching visas from within countries. However, this thesis will not delve into that specific debate. Instead, it focuses on the entry restrictions introduced by the Reform, particularly regarding Haitian and Venezuelan nationals. See, María Jesús Mora, Ariel Ruiz Soto and Andrew Seele, 'Building on Regular Pathways to Address Migration Pressures in the Americas' MPI and IOM 39 <https://www.migrationpolicy.org/sites/default/files/publications/mpi-iom_regular-pathways-americas-2024-final.pdf>.

[81] Fabiola Vergara Ceballos, 'Extranjeros En Chile, El Difícil Camino Hacia El Ejercicio de Los Derechos Económicos, Sociales y Culturales', Derecho y Migración. *Actas de las XLVII Jornadas Chilenas de Derechos Público* (Publicaciones de la Escuela de Derecho PUCV 2019) 179–180. ('Foreigners in Chile, The Difficult Path Towards the Exercise of Economic, Social and Cultural Rights').

[82] Fabiola Vergara Ceballos, 'Extranjeros En Chile, El Difícil Camino Hacia El Ejercicio de Los Derechos Económicos, Sociales y Culturales', *Derecho y Migración. Actas de las XLVII Jornadas Chilenas de Derechos Público* (Publicaciones de la Escuela de Derecho PUCV 2019) 179–180.

[83] *International Convention for the Protection of Migrant Workers and their families 2003 Article 2.1*. Ratified by Chile, 21st March 2005.

[84] ibid.

[85] Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 191.

suitability as tourists, and only later can they transform their tourist entry into a temporary residence permit'.[86] A group of migration experts propose a more optimistic perspective. They celebrate this system as one 'betting on legality', as it prioritises maintaining migrants' regular status rather than obstructing their entry.[87]

Nonetheless, the idea of 'betting on legality' through obtaining a working permit also had its flaws. By 2018, Chilean migration institutions were weak and under-budgeted, consequently, processing times for obtaining working permits were delayed.[88] Additionally, a fraudulent practice appeared, where people sold false work contracts to migrants so that they could present them in the migration offices for obtaining a regular migration status and a work permit.[89] As immigration flows into Chile increased, so did the vulnerability of migrants to human rights violations. Although this thesis does not aim to analyse specific situations of migrant vulnerability, it is important to recognise that a significant body of research highlights these issues.[90] Such studies document the

[86] ibid. Chile is a party the MERCOSUR Residence Agreement, together with Argentina, Brasil, Paraguay, Uruguay and Bolivia. However, the Agreement has not been ratified by the Chilean Parliament.

[87] Gandini and Selee, 'Betting on Legality. Latin American and Caribbean Responses to the Venezuelan Displacement Crisis' 16 ; Mora, Ariel Ruiz Soto and Seele, 'Building on Regular Pathways to Address Migration Pressures in the Americas' MPI and IOM 39 <https://www.migrationpolicy.org/sites/default/files/publications/mpi-iom_regular-pathways-americas-2024-final.pdf>.

[88] SJM, *Migration in Chile. 2019 Yearbook, a Multisectorial Analysis* <https://sjmchile.org/wp-content/uploads/2024/01/Anuario-2019.pdf> 47 Accessed 22 June 2025.

[89] Guido Focacci, 'Contratos de Trabajo "Ideológicamente Falsos" Para Migrantes: ¿qué Arriesgan Ambas Partes?' BioBioChile (7 March 2018) <https://www.biobiochile.cl/noticias/nacional/chile/2018/03/07/contratos-de-trabajo-ideologicamente-falsos-para-migrantes-que-arriesgan-ambas-partes.shtml> accessed 14 October 2024 (Ideologically False" Work Contracts for Migrants: What Do Both Parties Risk?'); Patricio Miranda and Claudio Cerda, 'Extranjería detecta 1.508 contratos falsos en solicitudes de visa durante el primer semestre', EL Mercurio (Santiago, 20 August 2019) <https://www.migracionenchile.cl/post/extranjer%C3%ADa-detecta-1-508-contratos-falsos-en-solicitudes-de-visa-durante-el-primer-semestre-fuente> accessed 10 December 2020. ('Immigration Office detects 1,508 false contracts in visa applications during the first semester').

[90] Rojas Pedemonte and Vicuña S.J. (eds) *Migración en Chile. Evidencias y mitos de una nueva realidad* (Santiago: LOM Ediciones, 2019); Nicolás Rojas Pedemonte et al., 'Migración Haitiana hacia Chile: origen y aterrizaje de nuevos proyectos migratorios', en *Migración haitiana hacia el sur Andino* (2017) < https://cpalsocial.org/documentos/403.pdf> accessed March 2020 (Haitian Migration towards Chile: origin and landing of new migratory projects); Daniella Brondi et al., Informe sobre la situación de personas venezolanas en la frontera norte de Chile (August 2019 < https://6430347d-cdf3-408d-b7dd-ceeee800e49c.filesusr.com/ugd/439982_f831fc4dae244ee48428dadd04bdb6e9.pdf> accessed 30 April 2020 ('Report on the situation of Venezuelan persons at the northern border of Chile'); Vergara Ceballos, 'Foreigners in Chile, the difficult path towards the exercise of economic, social and cultural rights' (2019) in Derecho y Migración. *Actas de las XLVII Jornadas Chilenas de Derechos Público*, Valparaíso, Chile: Publicaciones de la Escuela de Derecho PUCV.

challenges migrants face during transit from their countries of origin to Chile and the difficulties encountered upon entry, while residing in Chile, and during potential returns to their home countries.

In this domestic context, the 2018 Migration Reform imposed new entry restrictions targeting Haitian and Venezuelan nationals, requiring them to obtain visas from their country of origin prior to entering Chile. The limited literature on the subject characterises these measures as 'disguising restrictive measures as protective for immigrants'.[91] In this regard, Acosta, Brumat and Vera-Espinoza briefly assess these policies through the lens of human rights versus securitisation, describing them as 'heavily tilted towards a restrictive vision'.[92] The Chilean government has justified the visa requirements by appealing to the national interest in ensuring a 'safe, orderly and regular migration'-[93] a formulation that echoes the language used by the Global Compact for Migration and international human rights systems. However, as will be demonstrated in the following section, the assertion is simply rhetoric and does not reflect the substantive realities of migration flow into Chile. Section 2.4 of this chapter will explore the highly restrictive nature of these visa requirements in detail. Implementing the 2018 Migration Reform, particularly the CVTs, led to a sharp increase in irregular migration in Chile, a trend that the next section aims to demonstrate.

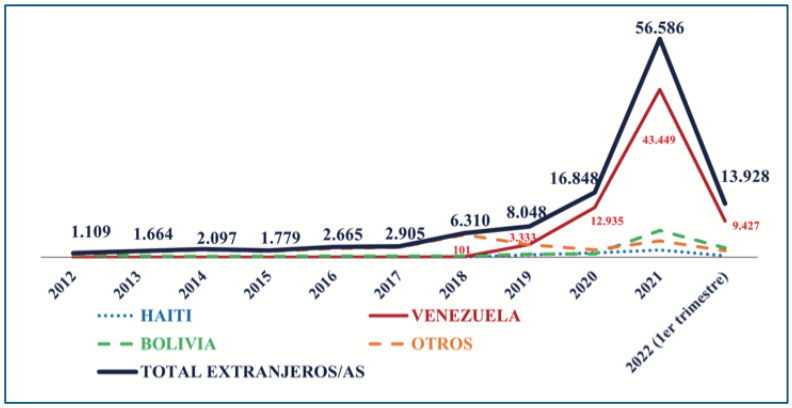
2.2.4. Irregular migration in Chile

Alongside regular migration, Chile is witnessing an exponential increase in irregular migration. Estimating irregular migration is a worldwide challenge. Obtaining more accurate data is, in fact, one of the aims of the Global Compact for Migration.[94]

[91] Victoria Finn and Sebastián Umpierrez de Reguero, 'Inclusive Language for Exclusive Policies: Restrictive Migration Governanve in Chile, 2018' (2020) 11 Latin American Policy 42, 44; Diego Acosta, Leiza Brumat and Marcia Vera-Espinoza, 'The New Chilean Government and Its Shifting Attitudes on Migration Governance' (*MPC Blog*, 3 May 2018) <https://blogs.eui.eu/migrationpolicycentre/new-chilean-government-shifting-attitudes-migration-governance/> accessed 19 September 2024.
[92] Acosta, Brumat and Vera-Espinoza, 'The New Chilean Government and Its Shifting Attitudes on Migration Governance'.
[93] See Decree 237, establishing a consular permit for Venezuelan nationals' tourism visa, 2019.
[94] UNGA, *Global Compact for Safe, Orderly and Regular Migration* UN Doc 73/195 (19 December 2018) Objective 1.

Comprehensive studies of irregular migration data in Chile are found in civil society organisations advocating for migrants' rights. Every year, the Jesuit Migrant Service publishes an annual report with estimations of regular and irregular migration in Chile. According to the Jesuit Migrant Service's 2022 annual report: 'There is a considerable increase in irregular entries since 2019. In fact, 88% of the irregular entries registered since 2012 occurred between 2018 and 2021'.[95] The report highlights that in 2012, 1.109 irregular entries were registered. This number surged to 6.310 in 2018 and reached 56.586 in 2021.[96] Furthermore, the Jesuit Migrant Service report reveals that Venezuelans constitute the largest nationality among individuals entering the country irregularly. Graph No. 1 below illustrates these figures.

Graph No. 1. 'Registers of the PDI of irregular entries of foreigners between 2012 and the first semester of 2022, per year and nationality'.[97]



Source: Jesuit Migrant Service [98]

[95] SJM, 'Migración en Chile: Aprendizajes y desafíos para los próximos años. Balance de la Movilidad Humana en Chile 2018 -2022.' (2022) 28 https://www.migracionenchile.cl/publicaciones accessed 11 July 2023. ('Migration in Chile: Lessons learned and challenges for the coming years. Balance of Human Mobility in Chile 2018-2022).

[96] SJM, 'Migration in Chile: Lessons learned and challenges for the coming years. Balance of Human Mobility in Chile 2018-2022', (2022) 28 <https://www.migracionenchile.cl/publicaciones> accessed 11 July 2023.

[97] SJM, 'Migration in Chile: Lessons learned and challenges for the coming years. Balance of Human Mobility in Chile 2018-2022' (2022) 29 <https://www.migracionenchile.cl/publicaciones> accessed 11 July 2023.

[98] SJM, 'Migration in Chile: Lessons learned and challenges for the coming years. Balance of Human Mobility in Chile 2018-2022.' (2022) 29 <https://www.migracionenchile.cl/publicaciones> accessed 11 July 2023.

The data depicted in the graph is supplemented by Jesuit Migrant Service 2023 annual report, which recorded 53,875 irregular entries in 2022, including 40,089 irregular entries by Venezuelans.[99]

This information underscores that the implementation of the 2018 Migration Reform was accompanied by a significant increase in irregular migration. Both the CVTs and humanitarian visas share the characteristic of transferring the borders of Chile to the countries of origin, as they must be requested at Chilean consulates. Consequently, these mechanisms represent a method of externalising border control. The UN Secretary-General and the UN Special Rapporteur on the Human Rights of Migrants have already affirmed that restrictive migration policies and the externalization of border control are directly linked to the rise in irregular migration. These policies exacerbate the vulnerability faced by migrants and reinforce trafficking and smuggling networks.[100] Furthermore, the Jesuit Migrant Service report concludes that the rise in irregular entries is attributable to the closure of borders resulting from the implementation of CVTs for Venezuelan citizens, and the COVID control measures of 2020.[101] Legal practitioners from university law clinics specializing in migrants and refugees in Chile support this conclusion.[102] In this context, Rodríguez recently stated:

> Since 2019, a consular visa has been applied that prevents Venezuelan nationals from entering Chile regularly when they reach the Chilean border. People do not stop migrating because of this measure; instead, they enter through unauthorized

[99] SJM 20.
[100] UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility*, UN Doc A/HRC/35/25, 28 April 2017, para 32; UNGA, *Making Migration Work for All. Report of the Secretary-General* para 4c), UN Doc A/72/643, 12 December 2017.
[101] SJM 19.
[102] Valeria Álvarez González and others, Derechos de Las Personas En Movilidad Humana: Ingresos Por Pasos No Habilitados y Desprotección,' in Judith Shonsteiner (ed), *Anuario Derechos Humanos 2022* (UDP Human Rights Center, 2022). ('Rights of Persons in Human Mobility: Entry Through Unauthorized Border Crossings and Lack of Protection.); Macarena Rodriguez Atero, 'Columna de opinión: Un esqueleto en el armario' (Servicio Jesuita a Migrantes, 16 August 2024,<https://sjmchile.org/opinion/un-esqueleto-en-el-armario/> accessed 16 October 2024. (A skeleton in the closet).

crossings. Telling them to enter regularly, as if it were within their reach to do so, is nothing more than a euphemism.[103]

Additional data corroborates the connections between the implementation of CVT and the increase in irregular entries of migrants into Chile. Table 1 below illustrates that the surge in clandestine crossings accelerated between 2018 and 2019, accounting for 51.4% of the complaints regarding clandestine entry for the entire decade.[104] This trend is detailed in Table 1 below.

Table 1. Complaints for clandestine entry[105]

Country /year	2011	2012	2013	2014	2015	2016	2017	2018	2019
Cuba	30	23	11	9	24	38	715	3574	1448
Haití	12	4	1	11	15	31	12	19	644
Rep. Dominicana	12	32	297	665	1017	1811	1453	1785	1190
Venezuela	0	2	1	1	1	11	9	101	3.333

This table reflects data on complaints of clandestine entry for four Latin American nationalities: Cuba, Haiti, the Dominican Republic, and Venezuela. These are the only nationalities subject to Chile's CVT, as discussed in section 2.4.

For citizens of the Dominican Republic, the CVT was introduced in 2012, and the table illustrates a sharp rise in complaints from 297 in 2013 to over 1,800 in 2016, with numbers remaining high thereafter. Regarding Venezuelans, the Democratic Responsibility Visa was imposed in 2018, correlating with a rise in complaints from 9 to 101 that same year. In 2019, the introduction of a CVT for Venezuelan citizens coincided with a dramatic 3,200% increase in complaints for irregular entry. Similarly, the CVT requirement for Haitians, introduced in 2018, resulted in a 3,289% rise in complaints.

[103] Rodriguez Atero, A skeleton in the closet'.
[104] Pablo Roessler and others, Anuario migración 2019 – Migración en Chile 24 https://www.migracionenchile.cl/anuario-migracion-2019/ accessed 17 November 2020. ('Migration yearbook 2019 - Migration in Chile').
[105] Own elaboration based on data obtained by the SJM via request by the Law of Transparency to the Investigative Police of Chile. Available in Pablo Roessler and others, ''Migration yearbook 2019 - Migration in Chile'.

This data reinforces the argument that restrictive immigration laws directly contribute to irregular migration. [106] The evidence suggests that implementing stricter border controls is not effective solution for curbing migration flows or reducing irregular migration. Rather, these measures force migrants to seek alternative, unauthorised routes into the country.

Section 2.4 of this chapter will delve into the implementation of the CVT requirements and humanitarian visas for nationals of Haiti and Venezuela. This thesis will not delve into the specific migratory measures adopted during COVID-19, as they fall outside its scope.

Irregular migration lies at the centre of public debate on migration in Chile and is frequently associated with criminality.[107] The Chilean Congress is currently debating a proposal to criminalise irregular entry by amending Article 9 of 2021 Migration Law, [108] which currently states that 'irregular migration is not constitutive of a crime'.[109] In addition, in April 2023, the Public Prosecutor's office adopted a new criterion for prosecuting migrants: it agreed to request pre-trial detention for all migrants who are arrested and do not have a RUT (spanish acronym for 'Unique Tributary Rol'*)*, even when

[106] Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law', *Research Handbook on International Migration Law and Migration* (Edward Elgar 2014) 77.

[107] Antonia Laborde, El Despliegue Militar En El Norte de Chile Mitiga La Llegada de Inmigrantes Sin Papeles, Que Cae En Un 55% En Tres Meses' El País (Spain, 30 March 2023) https://elpais.com/chile/2023-03-30/el-despliegue-militar-en-el-norte-de-chile-mitiga-la-llegada-de-inmigrantes-sin-papeles-que-cae-un-55-en-tres-meses.html accessed 20 July 2023 (The Military Deployment in Northern Chile Mitigates the Arrival of Undocumented Immigrants, Which Falls by 55% in Three Months); Chilean Senate, 'Inmigración irregular: ampliación de facultades de control policial a tercer trámite- Senate - Republic of Chile' (Senate) https://www.senado.cl/inmigracion-irregular-ampliacion-de-facultades-de-control-policial-a accessed 20 July 2023.(Irregular immigration: expansion of police control powers to third procedure).

[108] Chamber of Deputies, 'Commission Initiated the Debate on the Bill that Criminalizes the Offense of Clandestine Entry to National Territory' (11 April 2023) https://www.camara.cl/cms/destacado/2023/04/11/comision-inicio-el-debate-de-proyecto-que-tipifica-el-delito-de-ingreso-clandestino-a-territorio-nacional/ accessed 19 May 2023.

[109] Translated from Spanish: Article 9. Non-criminalization. Irregular migration does not constitute a crime. Law No. 21.325 of 2021 on Migration and Foreign Affairs 2021. See also Valentina Rioseco V and Juan Pablo Ramaciotti M., 'Tipificación Del Delito de Ingreso Clandestino: Análisis Normativo y Práctico Del Proyecto de Ley Boletín 15.261-25' (2024) <https://www.politicasmigratorias.org/publicaciones/tipificacion-ingreso-clandestino> accessed 20 June 2025. (Definition of the Crime of Clandestine Entry: Normative and Practical Analysis of the Bill Bulletin 15.261-25).

they carry another form of identity document .[110] The RUT is a unique identification number issued in Chile to all taxpayers and is also used as a general form of identification. All Chilean nationals are registered with a RUT at birth, and it is also issued to migrants once they have been granted a work permit. Migrants in an irregular situation do not possess a RUT, as they lack authorisation to work. Consequently, the Public Prosecutor's new criterion disproportionately affects migrants with irregular status.

Solving irregular migration in Chile was a concern expressed by the CMW during the country's second periodic review of its implementation of the ICRMW. As will be examined in Chapter IV of this thesis, states parties to the ICRMW are obliged to adopt measures that promote regular migration. In line with the obligations set out in Article 69 of the ICRMW, the CMW in its 'List of issues prior to submission' for Chile's second periodic report, requested Chile to indicate:

> What measures have been taken to ensure the availability of regular, safe, accessible and affordable migration channels through the progressive liberalization of the visa regime and other schemes to make visas more readily accessible, and also any other measures taken in relation to, for example, subsidiary protection, temporary protection, humanitarian visas, visitor visas, family reunification, visas for the purposes of employment [and], residence.[111]

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[110] Public Prosecutor's Office. Public Ministry of Chile, 'OFFICIAL COMMUNICATION FN No298/2023' para 1 < https://media.elmostrador.cl/2023/04/Instructivo-Fiscal-Nacional-prisión-preventiva.pdf > accessed 20 July 2023; 'Supreme [Court] ratified "Valencia criterion" in case of foreigner detained for trafficking' < https://radio.uchile.cl/2023/04/25/suprema-ratifico-criterio-valencia-en-caso-de-extranjero-detenido-por-trafico/ > accessed 2 October 2024; El Mercurio S.A.P, 'Implementation of the "Valencia criterion": The first results of preventive detention requests' (*Emol*, 12 April 2023) <https://www.emol.com/noticias/Nacional/2023/04/12/1091957/criterio-valencia-prision-preventiva-extranjero.html> accessed 2 October 2024; Leslie Ayala, 'Preventive Detention for Foreigners Without RUT: Prosecutors Warn Valencia About Limited Capacity of Civil Registry in Regions and Delays of Up to One Month' (*La Tercera*, 11 April 2023) <https://www.latercera.com/nacional/noticia/prision-preventiva-para-extranjeros-sin-rut-fiscales-advierten-a-valencia-sobre-poca-capacidad-del-registro-civil-en-regiones-y-demoras-de-hasta-un-mes/YB2YD7SAFRAZZMWPGNJVWYY5OM/> accessed 2 October 2024; Rodrigo Verdejo, '"Valencia Criterion": Senators Present Bill So That Preventive Detention Is Applied to Foreigners Detained Without RUT' (*La Tercera*, 13 April 2023) <https://www.latercera.com/politica/noticia/criterio-valencia-senadores-presentan-proyecto-de-ley-para-que-se-aplique-prision-preventiva-a-extranjeros-detenidos-sin-rut/LR5KPDPR3NGCFLQYGZBXULIIJA/> accessed 2 October 2024.

[111] UNCMW, *List of Issues Prior to Submission of the Second Periodic Report of Chile,* UN Doc CMW/C/CHL/QPR/2 *(*2018) para 34.

The above request was subsequently addressed by the CMW in its Concluding Observations, where it expressed concern that Chile had demonstrated:

> Insufficient focus on the rights of migrants and members of their families, the protection of the rights of migrants in an irregular situation, regularization mechanisms, the right to due process and procedural guarantees, the recognition of refugee status and other forms of international protection (...).[112]

Aiming to expand on the CMW's concerns, this chapter seeks to demonstrate Chile's decision to impose entry restrictions on specific nationalities has effectively closed regular migration channels, thereby contributing to the increase in irregular migration.

Having outlined the dynamics of both regular and irregular migration flows in Chile, and established a correlation between the introductions of CVTs and humanitarian visas and the rise in irregular entries, the chapter now turns to an analysis of the legal and policy frameworks governing migration in the country.

2.3. Chilean Migration Legislation and Policy

Chilean migratory policy has historically lacked continuity and coherence. Thayer identifies three main phases in the development of Chile's migratory policy.[113] The first, referred to as the 'policy by default' phase (1992-2004), was characterised by the absence of a comprehensive migration framework.[114] The second phase, from 2005 to 2017, marked a period of fragmented but increasingly diverse policy initiatives.[115] The third phase began with the announcement of the 2018 Migration Reform and extended to 2023.[116] Events in Chile after Thayer's publication indicate the beginning of a fourth

[112] UNCMW, *Concluding Observations on the Second Periodic Report of Chile,* UN Doc CMW/C/CHL/CO/2, 2021, para 10. Due process and procedural guarantees are understood as
[113] Thayer, Causes and Consequences of Migration Irregularity, 312–318.
[114] Ibid 312.
[115] Ibid 314.
[116] Ibid 317.

period in 2023, marked by the introduction of the 'National Policy on Migration and Foreign Affairs'.[117]

To understand these phases in context, it is necessary to outline the legal framework governing migration in Chile. The entry, stay, departure, and expulsion of migrants are regulated through a broad set of legal instruments. [118] The primary legislation includes Law No. 21.325 of 2021 on Migration and Foreign Affairs (2021 Migration Law)[119] along with Decree No. 296 of 2022, which approves the Regulation to 2021 Migration Law (Migration Regulation).[120] Refugee protection is governed separately under Law No. 20.430 of 2010, which sets out provisions for the protection of refugees (Refugee Law)[121] and Decree No. 837 of 2010, which approves the Regulation of Law No. 20.430 (Refugee Regulation).[122] In addition, a series of recently issued decrees regulate transitory stay permits (*Permanencia Transitoria*) and temporary residence permits (*Residencia Temporal*).[123] Citizenship matters are regulated by Decree No. 5.142 of 1960.[124]

In Chile, both 'laws' and 'decrees' are legally binding instruments, but they originate from different branches of government and occupy distinct positions within the legal hierarchy. 'Laws' are defined as a 'declaration of the sovereign will, expressed in the manner prescribed by the Constitution, with the purpose of commanding, prohibiting or permitting'.[125] These are enacted by the Chilean National Congress and may take various forms, depending on the quorums required for their adoption, amendment, or repeal. 'Decrees', on the other hand, are a written mandate issued by an administrative authority

[117] Chilean Government, *National Policy on Migration and Foreign Affairs*, 2024, available at: https://serviciomigraciones.cl/wp-content/uploads/2024/01/PNME-25-01-2024.pdf
[118] Servicio Nacional de Migraciones, '*Immigration Regulations in Chile*' (*SERMIG*, 17 May 2023) <https://serviciomigraciones.cl/en/immigration-regulations/> accessed 12 July 2023.
[119] Law No. 21.325 of 2021.
[120] Decree No. 296 of 2022, approving Regulation to Law No. 21.3225.
[121] Law No. 20.430 of 2010, establishes provisions for the protection of refugees.
[122] Decree No. 837 of 2010, approves the Regulation of Law No. 20.430 2010.
[123] Decree No. 23 of 2022, establishes the immigration subcategories of the Permanencia Transitoria permit 2022; Decree No. 177 of 2022, establishes the immigration subcategories of the Residencia Temporal permit 2022; Exempt Decree No. 4.236 of 2022, which establishes the validity of subcategories of the Residencia Temporal permit 2022.
[124] Decree No. 5.142 of 1960, establishes the consolidated text of the provisions on the citizenship of foreigners 2960.
[125] Chilean Civil Code, Article 1.

within the scope of its legally conferred powers and subject to the formalities established by the legal system. When issued by the President of the Republic, they are referred to as Supreme Decrees (*Decretos Supremos)*. Where such decrees regulate a specific subject matter, they are commonly classified Regulations (*Reglamentos*).[126] In the Chilean legal order, 'decrees' rank below 'laws' in the normative hierarchy. Against this backdrop, the following subsections examine of each of the four phases of Chilean migration policy in turn.

2.3.1. Policy by default period (1992-2004)

Thayer characterises the initial phase of Chilean migration policy (1992–2004) as a 'policy by default' (in Spanish, "política por defecto"),[127] in which migration was managed reactively under Decree Law 1094 of 1975 (DL 1094), and its implementing regulation, Supreme Decree No. 597 of 1984,[128] without a human rights-based approach. During this period, two key factors contributed to the emergence of irregular migration: first, institutional weakness led to delays in processing residence permits. At that time, the 'Department of Foreigners and Migration' (DEM), [129] under the Chilean Ministry of the Interior, was responsible for migration matters until it was replaced by the National Migration Service in May 2021, following the enactment of 2021 Migration Law. Second, the visa system linked residency to an employment contract, so that losing one's job often resulted in the loss of the residence permit.[130] As a result, the government had to conduct its first extraordinary regularisation process to address the growing number of migrants with irregular status.[131]

Scholars across Latin America, including Chile, have broadly recognised that DL 1904 was grounded in a national security paradigm and failed to meet human rights

[126] Biblioteca del Congreso Nacional de Chile, 'Acerca de La Ley Chile' (*Biblioteca del Congreso Nacional de Chile*, 2024) <https://www.bcn.cl/leychile/acerca-de-ley-chile>.
[127] Thayer, 'Causes and Consequences of Migration Irregularity312.
[128] Decree Law 1094, Establishes rules on foreigners in Chile 1975.
[129] Translated from Spanish: *Departamento de Extranjería y Migración*
[130] Thayer, 'Causes and Consequences of Migration Irregularity', 314.
[131] ibid 313–314.

standards.[132] Notably, DL 1094 made no reference to human rights and conferred broad discretionary powers on administrative authorities to determine the residency status of migrants within the country.[133]

Furthermore, DL 1094 was enacted during the period of the Pinochet dictatorship, a period marked by widespread human rights violations. A 'Decree Law' such as DL 1094, holds the same legal status as a regular 'law', but is issued by a *de facto* government during periods of constitutional anomaly, without the involvement of the legislative branch.[134] DL 1094 was signed by the '*Junta de Gobierno de la República de Chile*' (*Junta de Gobierno*), the military junta that led the regime following the coup of 11 September 1973. General Pinochet, who presided over the Junta, concentrated executive, legislative and constitutional powers. Consequently, DL 1094 of 1975 was neither debated by a democratically elected legislature nor issued by a democratically elected president.

The 'policy by default period' followed the end of Pinochet's dictatorship and unfolded within a democratic context, with the state formally committed to the rule of law. However, DL 1094 remained in force until 202 as a legacy of the dictatorship. Despite the return to democratic governance, DL 1094 continued to shape Chile's migration policy, reflecting a legal and institutional framework inherited from an authoritarian regime - one that perceived foreigners as a threat to national security.

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[132] Regina Ingrid Díaz Tolosa, 'Ingreso y permanencia de las personas migrantes en Chile: Compatibilidad de la normativa chilena con los estándares internacionales',14 Estudios constitucionales 179, 218. (Entry and Stay of Migrants in Chile: Compatibility between Chilean Norms and International Standards.); Liliana Galdámez Zelada, Algunos criterios del Tribunal Constitucional sobre el estatuto jurídico de las personas extranjeras en Chile' (2015) 5 Revista Chilena de Derecho y Ciencia Política 119, 120. (Selected criteria applied by the Constitutional Court to the legal status of foreigners in Chile); Pablo Ceriani Cernadas, 'Luces y sombras en la legislación migratoria latinoamericana' (2011) 233 Nueva Sociedad 19, 1. (Lights and shadows in Latin American migration legislation); Lawson and Rodriguez Due Process in Administrative Expulsion Procedures of Immigrants: Current Situation and Alternatives 221; Iskra Pavez-Soto and Sofía Colomés, 'Derechos humanos y política migratoria. Discriminación arbitraria en el control de fronteras en Chile' (2019) 17 Polis (Santiago) 113, 115. (Human rights and migration policy. Arbitrary discrimination in Chile's border control); Mayra Federsen Martínez, 'La Persistencia Del Paradigma de Seguridad En La Regulación de Los Impedimentos de Ingreso En La Legislación Migratoria Chilena' (2022) 12 Oñati Socio-Legal Series 287 298. (The Persistence of the Security Paradigm in the Regulation of Entry Requirements in the Chilean Immigration Law)

[133] Henriquez-Viñas, 'La Corte Suprema Chilena y La Protección de La Libertad Personal de Los Migrantes: Un Estudio Jurisprudencial' , 266.

[134] Biblioteca del Congreso Nacional de Chile.

2.3.2. Second period

The second period of Chilean migration policies covering the years 2005 to 2017,[135] was marked by a series of changes influenced by shifts in political leadership.[136] A key development during this period was the introduction, in 2012, of nationality-based Consular Visas for Tourism (CVT) for Dominican nationals, which inadvertently contributed to an increase in irregular migration from this group.[137] The connection between this visa requirement and the rise in irregular entry will be discussed in Section 2.4.1.1 below. In addition, Chile implemented another extraordinary regularisation process, in 2017, underscoring persistent deficiencies in its migration framework.

The national security paradigm embedded in DL 1904 resulted in a lack of sufficient regular pathways for migration, thus contributing to the creation of irregular migration. Evidence supporting this claim is found in the transitory Article 8 (*Artículo Octavo)* of 2021 Migration Law, which establishes an extraordinary regularisation period for individuals who entered the country irregularly.[138] Furthermore, Chile has implemented extraordinary regularisation procedures approximately once every decade since 1990. As noted by Finn and de Reguero, these processes often aim to rectify the consequences of earlier restrictive policies which imposed complex bureaucratic requirements that many migrants were unable to comply with.[139] The recurrent need for such measures indicates that the legal framework failed to provide effective tools for responding to evolving migration dynamics or for managing migration flows in an orderly, safe and regular manner.

In this context, President Michelle Bachellet, who governed during this period, issued a series of administrative instructions aimed at safeguarding migrants' rights and

[135] Thayer, 'Causes and Consequences of Migration Irregularity', 314.
[136] ibid 314–315.
[137] ibid 317.
[138] Law No. 21.325 of 2021, Article eight.
[139] Finn and Umpierrez de Reguero, 'Inclusive Language for Exclusive Policies: Restrictive Migration Governanve in Chile, 2018' (2020) 11 Latin American Policy 42, 52.

facilitating regular migration.[140] However, the validity of these measures depended on the political will of the administration in power. As a result, many were repealed under the subsequent government of president Sebastian Piñera (2018-2022).

2.3.3. Third period

The third period identified by Thayer began in April 2018, when President Sebastián Piñera published the 2018 Migration Reform.[141] This reform was presented as a six-page briefing note (in Spanish, *minuta*), which included two sections titled 'Reasons' and 'Actions'. Under the 'Actions' section, the briefing note outlined both the proposal to adopt the 2021 Migration Law and a set of 'Administrative measures with Immediate Effect'. These included the introduction of CVTs and humanitarian visas for Venezuelan and Haitian nationals. As demonstrated in section 2.3 above, irregular migration peaked during this period. The 2018 Migration Reform remained in force throughout the pandemic, during which borders were closed globally between 2020 and 2021.

The repeal of DL 1094 and the development of a new migration law was a protracted process. Over a period of ten years and across four successive governments, various draft bills were debated before the eventual enactment of 2021 Migration Law.[142] The CMW directly influenced the enactment of a new migration law by recommending that Chile revise its migration legislation during the two most recent periodic reviews.[143] Furthermore, members of the CMW and the OHCHR spoke to the Chilean parliament

[140] Being the most important, 'Instructivo Presidencial sobre Lineamientos e Instrucciones para la Política Nacional Migratoria 2015 – 005. <https://archivospresidenciales.archivonacional.cl/index.php/instructivo-presidencial-sobre-lineamientos-e-instrucciones-para-la-politica-nacional-migratoria> accessed 22 June 2025.(Presidential Instruction on Guidelines and Instructions for the National Immigration Policy 2015 – 005).

[141] Ministry of Interior and Public Security (n 5).

[142] Chamber of Deputies, '*Bulletin Number 9870-06*' https://www.camara.cl/ accessed 18 July 2023; Government of Chile, 'President Bachelet signed Migration Law Project' (*Government of Chile*, 21 August 2017) https://www.gob.cl/noticias/presidenta-bachelet-firmo-proyecto-de-ley-de-migraciones/ accessed 18 July 2023; Government of Chile, 'President Piñera Announces Migration Reform' (*Presidential Press*, 9 April 2018) http://prensa.presidencia.cl/discurso.aspx?id=73020 accessed 18 July 2023.

[143] UNCMW, *List of Issues Prior to Submission of the Second Periodic Report of Chile* para 2(a); CMW, 'Consideration of Reports Submitted by State Parties under Article 74 of the Convention' para 9.

during the debates on 2021 Migration Law.[144] Scholars and civil society also pressured Chilean governments to repeal DL 1094 and replace it with legislation incorporating human rights standards.

2.3.2. Fourth Period

The emergence of a new and ongoing phase can be identified from the 2023 launch of the 'National Policy on Migration and Foreign Affairs' (*Política Nacional de Migración y Extranjería*), which marks a shift towards the full implementation of 2021 Migration Law.[145] This period is characterised by the challenges of implementing the new migration policy in accordance with the new Migration Law and its regulations, as well as launching the National Service for Migrations. Notably, scholar Eduardo Thayer- who previously identified the earlier phases of Chilean migration policy -currently serves as the first director of the National Service for Migrations.

The recently enacted 2021 Migration Law represents a significant evolution from DL 1094, particularly in its recognition and protection of migrants' rights -a development that has been welcomed by legal scholars and migration experts.[146] Title II of 2021 Migration Law, entitled 'Fundamental Principles of Protection', encompasses Articles 3 to 23. These provisions set out the core objectives of the new legal framework, including the promotion of orderly, safe, and regular migration. They also define the rights and duties of migrants and establishing the foundations for the National Migration Policy.[147]

The section 'objectives' in 2021 Migration Law begins with Article 3, which includes a general recognition of the rights of migrants. Paragraph 1 recognises the state's duty to

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[144]UNCMW, '*Conversation: Human Rights Standards and Migration*. Senate of Chile' https://acnudh.org/load/2020/08/Conversatorio-Proyecto-de-Ley-de-Migración-de-Chile-Senado-ABN-y-ECS.pdf accessed 22 May 2023; Andrea Ordóñez, Análisis Del Proyecto de Ley de Migración y Extranjería. Bulletin No 8970-06. Third Constitutional Procedure - Joint Commission. (Analysis of the Migration and Foreign Affairs Law Project).

[145]Chilean Government, *National Policy on Migration and Foreign Affairs*, available at: https://serviciomigraciones.cl/wp-content/uploads/2024/01/PNME-25-01-2024.pdf

[146] Ordóñez Analysis of the Migration and Foreign Affairs Law Project, 1; CMW, 'Conversation: Human Rights Standards and Migration. Senate of Chile' 1, 2; Vargas Rivas and Canessa Zamora, 'Rights of Migrants and Refugees: Collective Lack of Protection', 332.

[147] Law 21,325 Title II. On the fundamental principles of protection

protect and respect the human rights of foreigners in Chile, regardless of their migration status, including refugees and asylum seekers. Similarly, paragraph 5 prescribes that the state shall protect, respect, and guarantee the rights of foreigners in Chile, as well as their rights and obligations established in the Constitution, the law, and the international treaties ratified by Chile. In paragraph 6, Chile commits to effectively protecting the economic, social, and cultural rights of migrants recognised in the Constitution, the law, and international treaties ratified by Chile by adopting all necessary measures to the maximum of the country's available resources. Paragraph 6 also stipulates that Chile can resort to international assistance and cooperation when this is not feasible.

In addition to including a general framework for the human rights protection of foreigners, Article 3 explicitly codifies Chile's sovereign right to regulate migration. Paragraph 3 of Article 3 states: 'it is for the state to decide whom to admit into its territory'.[148] This provision reflects the principle of state sovereignty over immigration matters, as interpreted by the HR Committee in paragraph 5 of General Comment 15. This interpretation will be further analysed in Chapter IV of this thesis.

However, Article 3 of 2021 Migration Law also establishes important limitations on the exercise of this power, specifically though norms of due process and the principle of non-discrimination. It prescribes that:

> All foreigners applying for entry or a residence permit in the country shall be assured the application of a rational and fair procedure for the approval or rejection of their application, which shall be carried out under non-discriminatory admission criteria.[149]

Despite the abovementioned limitations, Chile applies entry restrictions to specific nationalities, as explained in the following section. Consequently, Chapters IV to VI of

[148] ibid, Article 3 para 3. Translated from Spanish: 'Corresponde al Estado decidir a quén admitir en su territorio'.
[149] ibid, Article 3 para 3. Translated from Spanish: 'A todo extranjero que solicite el ingreso o un permiso de residencia en el país se asegurará la aplicación de un procedimiento racional y justo para la aprobación o rechazo de su solicitud, el que se efectuará bajo criterios de admisión no discriminatoria'.

this thesis will analyse the extent to which these limitations comply with international human rights standards.

The human rights language incorporated in 2021 Migration Law is found within the Title II provisions. Articles 3 to 10 of 2021 Migration Law outline objectives that include: the best interest of the child; an informed migratory process; inclusion and integration; regular, safe, and orderly migration; the value of migration for the state; non-criminalisation of irregular migration; and complementary protection, which is a protection against removal that includes elements of the principle of non-refoulement.

Regarding the rules of interpretation, 2021 Migration Law regulates the interpretation of all its provisions following the 'values, principles, rights and freedoms contained in the Constitution and in international human rights treaties ratified by Chile' in Article 11. Furthermore, the *pro homine* principle is explicitly recognised in Article 12, according to which the rights recognised in the law shall be interpreted according to the broadest or most extensive provision.[150] Conversely, when restricting or suspending rights, the interpretation will follow the most restrictive provision. [151]

Regarding substantive rights, 2021 Migration Law includes an equality and non-discrimination rule, labour rights, right to access to health, access to social security, access to education, access to housing, family reunification, sending and receiving remittances, and due process. Each of these recognitions includes its regulations and limitations, which, in some instances, have been criticised for failing to comply with human rights standards.[152] Furthermore, when studying prohibitions to entry in the Chilean migration legislation, Feddersen argues that the security paradigm persisted in the draft project of 2021 Migration Law.[153] The problematic legal provisions of the draft

[150] Ibid, Article 12.
[151] Ibid.
[152] Liliana Galdámez, Rita Lages and Rodrigo Mallea, Comentarios al Proyecto de Ley En Segundo Trámite Constitucional, Ley de Migración y Extranjería, (Bulletin No 8.970-06)' (2020) Report elaborated in the context of the ANID research: 'Contemporary Migrations in Chile: challenges for democracy, global citizenship and access to rights for non-discrimination' PIA SOC180008. (Comments on the Law Project in Second Constitutional Procedure, Migration and Foreign Affairs Law)
[153] Federsen , The Persistence of the Security Paradigm in the Regulation of Entry Requirements in the Chilean Immigration Law , 314–316.

law she analysed were ultimately included in the enacted 2021 Migration Law.[154] Thus, 2021 Migration Law is an advancement in terms of legal recognition of the human rights of migrants. However, criticism and doubts about its implementation persist. Whether the new regulation will effectively manage orderly, safe, and regular migration remains to be seen.

As will be further developed in the next chapter, the above-mentioned human rights and principles underpin the argument presented in this thesis that the law should facilitate human rights-based pathways to migration. Chapter IV of this thesis explains how each of these rights and principles can be read as imposing a limitation on Chile's right to admit and exclude migrants. Chapter IV will also analyse how the reading of the varying human rights invocations is in line with the interpretations of the UN Human Rights Committee, in General Comment No. 27, affirming that states may restrict the entry and stay of migrants, provided that these restrictions 'comply with state's international obligations'.[155] Notwithstanding the multitude of human rights expressly included in 2021 Migration Law, this thesis analyses Chile's entry restrictions in light of two critical limitations on the state's authority to admit and exclude migrants: the principles of non-discrimination and of non-refoulement, which will be discussed in detail in Chapters V and VI, respectively.

As demonstrated in this section, the entry and residence of migrants in Chile are regulated by law and influenced by migration policy. Chilean migration policy establishes criteria for admission and residence, as well as the justifications the state employs to apply these criteria. As will be analysed in Chapter IV, the IAHR Court set human rights standards for state parties' migratory policy in its *Advisory Opinion OC 18-03*.

In summary, this section has shown that Chile has undergone changes in its migration legislation and policy, which have influenced the phenomenon of irregular migration. The entry restrictions of the 2018 Migration Reform were originally implemented under DL

[154] ibid.
[155] CCPR, *General Comment No 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, para 4.

1.094, and remain in force under 2021 Migration Law. The following section will narrow the analysis on the regulations governing these restrictions.

2.4. Entry restrictions under the 2018 Migration Reform.

This section critically analyses the visa categories implemented by the 2018 Migration Reform, focusing primarily on the CVT, while also addressing the two humanitarian visas. As illustrated in Section 2.2, the implementation of the 2018 Migration Reform was associated with a dramatic increase in irregular migration. Furthermore, it has been noted that while studies on these measures are scarce, those studies that have been carried out consistently indicate that, despite employing human rights language, the primary aim of the measures is to exclude Venezuelans and Haitians from entering Chile. Building on these limited studies, this section will thoroughly examine the regulations governing these visa requirements and demonstrate that the restrictions associated with the 2018 Migration Reform are incoherent and excessively restrictive.

2.4.1. Consular Visas for Tourism (CVTs)

The first entry restriction established under the 2018 Migration Reform was CVTs for nationals of Haiti and Venezuela. Although CVTs are not explicitly defined in Chilean migration law, they are codified under Article 27 of 2021 Migration Law and were previously regulated by Article 45 of DL 1094. As mentioned in the introduction of this chapter, CVTs can be understood as entry permits that nationals of specific countries must obtain from the Chilean consulate in their country of origin before travelling to Chile on a temporary basis. According to 2021 Migration Law, those travelling to Chile on a temporary basis are mainly tourists.[156] The list of countries whose nationals are required to obtain a CVT to enter Chile is published online in the 'Chart of fees for visas and

[156] Law 21.325, Article 47.

tourism visas granted overseas', by Chile's Ministry of Foreign Affairs.[157] Nationals of Venezuela and Haiti are still required to obtain a CVT to enter the country.[158]

Article 27 of 2021 Migration Law stipulates that no pre-authorisation is required for those entering and staying in Chile on a transitory basis, unless legislation provides otherwise. A similar provision was previously established under Article 45 of DL 1.094, which exempted tourists from the obligation to obtain a consular visa. Exceptionally, Chile may require nationals of specific countries to enter the country with a CVT. Such an exception must be established by a Supreme Decree and can only be justified by 'national interest' (in Spanish, *interés nacional*) or international reciprocity. Both DL 1094 and 2021 Migration Law include this exception. However, national interest is not defined in Chilean law. Authoritative Chilean literature insists on the concept's 'indeterminate' and 'vague' nature.[159] As will be further analysed in this section, the difficulties in defining national interest were also acknowledged by the Chilean Constitutional Court when deciding on the constitutionality of the CVT for Haitian nationals.[160]

Before introducing the CVT for nationals of Venezuela and Haiti, Chile had implemented similar requirements for only two nationalities in the region: Cuba and the Dominican Republic. The implementation of CVTs for these countries has shown to contribute to irregular migration, as demonstrated in the following discussion of the CVT's impact on individuals from the Dominican Republic.

2.4.1.1. CVT for nationals of Dominican Republic

[157] MINREL, 'Table of Visa Fees and Tourist Visas Granted Abroad' https://serviciosconsulares.cl/tramites/site/artic/20190220/asocfile/20190220161313/cuadro_de_aranceles_y_vistos_de_turismo_2020.pdf accessed 16 August 2023.

[158] MINREL, 'Cuadro de Aranceles de Visas y Vistos de Turismo Otorgados En El Extranjero' <https://serviciosconsulares.cl/tramites/site/artic/20190220/asocfile/20190220161313/cuadro_de_aranceles_y_vistos_de_turismo_2020.pdf> accessed 16 August 2023.

[159] Jorge Correa Sutil, La "Seguridad de La Nación" y El "Interés Nacinoal" Como Límites a La Publicidad de Los Actos y Resoluciones de Los Órganos Del Estado, 102, https://www.consejotransparencia.cl/consejo/site/artic/20131009/asocfile/20131009150104/s559.pdf. (The "Security of the Nation" and the "National Interest" as Limits to the Publicity of Acts and Resolutions of State Bodies).

[160] Chilean Constitutional Court, Case 4757-18, 2018.

The CVT for nationals of the Dominican Republic came into effect on 1 September 2012, during the first administration of President Piñera.[161] Unlike the CVTs for Haitian and Venezuelan nationals, the CVT for Dominican nationals lacks clear normative basis. According to Thayer, the CVT was established through a verbal note transmitted by telephone by the General Directorate of Consular Affairs of the Ministry of Foreign Affairs to the Government of the Dominican Republic.[162] This measure was ostensibly a response to trafficking and smuggling networks linked to the Dominican Republic,[163] but there is no record of this justification being supported with objective and verifiable information.[164]

The CVT for Dominican nationals does not adhere to the principle of international reciprocity, as the Dominican Republic has not imposed a similar requirement for Chilean nationals visiting as tourists.[165] Thus, this CVT was established based on national interest, the only other legal ground permitted to impose such visas under Chilean migration law.

The implementation of the CVT can be seen as a response by the Chilean government to the rising migration flows from the Dominican Republic. Both the National Institute for Migration of the Dominican Republic and the former Director of the Migration and Foreignness Department identified 2010 as a pivotal year for the increase in Dominican migration to Chile.[166] Since then, there has been a noticeable rise in requests for temporary visas from Dominican nationals in Chile, with 1,081 temporary visas granted

[161] Thayer, 'Causes and Consequences of Migration Irregularity', 321–322.
[162] ibid.
[163] ibid.
[164] ibid 322.
[165] Embassy of the Dominican Republic in Chile, 'Frequently Asked Questions' (*Embassy of the Dominican Republic in Chile*, 2023) https://www.embajadadominicana.cl/preguntas-frecuentes/ accessed 20 October 2023.
[166] José J. Castillo Javier, 'Gobernanza Migratoria y Políticas Públicas: Un Análisis Descriptivo Sobre La Migración Dominicana Hacia Chile En El Periodo 2005-2018. Informe Técnico' (Instituto nacional de Migración de la República Dominicana Ministerio del Interior y Policía 2018) 16 <https://inm.gob.do/transparencia/phocadownload/Publicaciones/INFORME%20EMIGRACIN%20DOMINICANA%20A%20CHILE%2029112918.pdf> accessed 27 October 2023. (Migration Governance and Public Policies: A Descriptive Analysis of Dominican Migration to Chile in the Period 2005-2018. Technical Report).; Patricio Piña, 'República Dominicana Es El Único País al Que Chile Le Exige Visa' (*elpinguino.com*, 19 February 2016) <https://elpinguino.com/noticia/2016/02/19/republica-dominicana-es-el-unico-pais-al-que-chile-le-exige-visa> accessed 27 October 2023.

in 2010, increasing to 1,883 in 2011 and escalating to 4,472 in 2012.[167] The numbers continued to increase, as will be discussed in a later paragraph of this section.

The Chilean government justified the introduction of the CVT for Dominican nationals by citing concerns over human trafficking and smuggling related to sexual exploitation.[168] However, no official information was provided that would demonstrate an increase in irregular entries from the Dominican Republic, and show how applying a CVT would decrease such irregular entries.[169] Indeed, judicial cases from the same period also revealed irregular migration of citizens from other countries, such as Colombia[170] and Ecuador,[171] yet CVTs were not introduced for these nationalities.

A potential explanation for the irregular migration from the Dominican Republic is the massive statelessness problem that the country has faced since 2003.[172] As acknowledged by the Dominican Republic, the country 'also expels migrants in a situation of irregularity',[173] identifying among them individuals without valid documentation for international travel.[174] The lack of valid documentation for international travel stems from a constitutional provision that denied nationality to children of Haitian descent, an issue that was brought before the IAHR Court in two significant cases decided in 2003 and 2014. These cases highlighted the extensive harm caused by this policy,[175] making it plausible to deduce that by 2012, many stateless individuals in the Dominican Republic still lacked valid passports or other documentation necessary for overseas travel. Indeed, as late as 2015, NGOs such as Amnesty International and Minority Rights Group International were actively

[167] SERMIG, 'Migration Statistics - Temporary Residences Granted.' (*National Migration Service*, 28 August 2023) https://serviciomigraciones.cl/estudios-migratorios/registros-administrativos/ accessed 20 October 2023.
[168] Thayer, 'Causes and Consequences of Migration Irregularity' 322.
[169] ibid.
[170] Corte Suprema de Chile, *Rol No 4551-2014*; *Rol No 5008-2014*.
[171] Corte Suprema de Chile, *Rol No 13391-2014*.
[172] Jo Shaw refers to this problem in Jo Shaw, *The People in Question. Citizens and Constitutions in Uncertain Times*. (Bristol University Press 2021) 108.
[173] Castillo Javier, Migration Governance and Public Policies: A Descriptive Analysis of Dominican Migration to Chile in the Period 2005-2018. Technical Report
[174] ibid.
[175] *Case of Expelled Dominicans and Haitians v Dominican Republic Judgment of August 28, 2014* (Inter-American Court of Human Rights).

campaigning for the Dominican Republic to address statelessness within its borders,[176] an issue that persists to this day.[177]

For stateless individuals entering through irregular pathways as victims of trafficking and smuggling, regular migration pathways were inaccessible under Chilean migration law. According to Article 45 of DL 1.094, stateless individuals were only permitted to enter Chile as tourists if they possessed a passport issued by their country of origin or an international organisation recognised by Chile.[178] The same rule required them to hold a CVT and a return ticket.[179] However, it is unclear how a stateless person could obtain a passport if their nationality is not recognised. This was the precise issue faced by the claimants in both IAHR Court cases cited above, who lacked valid identity documents.

Once the CVT was established, the regular entry of nationals from the Dominican Republic decreased significantly. This trend is evident in the number of temporary residence visas granted to Dominican nationals by the Chilean migration authorities. As shown in Table 2, in 2012, 4,472 visas were granted to Dominican nationals. This number dropped to 3,792 in 2013, further declining to 2,601 in 2014, 2,058 in 2015, and 1,383 in 2017. The years 2018 and 2019 saw a resurgence, with 3,898 and 4,216 visas granted, respectively, likely due to the 2018 regularisation process.[180] In 2020, the number of visas granted plummeted to 1,190, likely due to COVID-19 restrictions, as well as delays and resolutions related to the 2018 regularisation process. By 2022, there was an increase in temporary visas granted, matching with the easing of COVID-19 restrictions and changes in both migration law and policy.

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[176] Amnesty International, '*República Dominicana: Sin nacionalidad y sin Derechos'* (2015) <https://www.es.amnesty.org/actua/acciones/republica-dominicana-apatridas-nov15/> accessed 27 October 2023. (Dominican Republic: Without nationality and without rights); Minority Rights Group International, '*Apatridia En Republica Dominicana*. *Minority Stories'* (2015) <https://stories.minorityrights.org/dominican-republic-es/> accessed 27 October 2023.(Statelessness in the Dominican Republic. Minority Stories).

[177] Julieth Riaño, 'Migrants. Without nationality and without rights: the situation of stateless persons in Dominican Republic and Sudan.' (*France 24*, 20 April 2023) https://www.france24.com/es/programas/migrantes/20230420-sin-nacionalidad-y-sin-derechos-la-situaci%C3%B3n-de-los-ap%C3%A1tridas-en-rep%C3%BAblica-dominicana-y-sud%C3%A1n accessed 27 October 2023.

[178] Decree Law 1094 Establishes rules on foreigners in Chile, Article 45 para 3.

[179] ibid.

[180] Own elaboration, with data obtained from: SERMIG.

Table 2. Number of temporary visas granted to Dominican Republic nationals.[181]

Year	Visas granted
2012	4.472
2013	3.792
2014	2.601
2015	2.058
2016	1.418
2017	1.383
2018	3.898
2019	4.216
2020	1.190
2021	710
2022	1.976

As discussed in Section 2.4, there is no mechanism to accurately capture the number of irregular entries, making it complex to determine the exact impact of the CVT on the irregular entry of Dominican nationals. However, both the literature and figures obtained by Jesuit Migrant Service provide insights into yearly variations in irregular entries. While this thesis cannot establish a direct cause-and-effect relationship, a noticeable correlation exists between the implementation of the CVT and the rise in irregular entries by Dominican nationals. Specifically, in 2013 -the same year that the number of temporary visas granted to Dominican nationals decreased -the number of expulsions for unauthorised crossings increased sharply, rising from 39 to 166. This upward trend continued in subsequent years, with expulsions reaching 448 in 2014, 632 in 2015, and 935 in 2016, as shown in Table 3 below.

[181] ibid.

Table 3. Expulsions for non-authorised crossings[182]

Year	Number of expulsions for non-authorized crossings
2010	13
2011	32
2012	39
2013	166
2014	448
2015	632
2016	935

As analysed in section 2.3., the year 2013 also marked a significant rise in the number of complaints regarding irregular entry. According to data obtained from Jesuit Migrant Service, in 2012, there were only 12 complaints of irregular entries by nationals of the Dominican Republic. This figure surged to 297 in 2013, 665 in 2014, 1,017 in 2015 and 1,811 in 2016.[183]

2.4.1.2. CVT for nationals of Haiti.

The CVT for Haitian nationals was established by Decree 776, dated 17 April 2018 (Decree 776),[184] which outlines three justifications for implementing the CVT. This permit allows Haitians to stay for 30 days, unlike the standard Chilean tourism permit that authorises a 90-day stay.[185] Migrant and pro-migrant organisations argued the CVT for Haitians is discriminatory,[186] and the Chilean Constitutional Court reviewed the

[182] Elaborated with information provided by the Chilean Immigration Department and quoted by Luis Eduardo Thayer 'Causes and Consequences of Migration Irregularity' 322.
[183] Roessler and others, 'Migration yearbook 2019 - Migration in Chile'.
[184] Decree 776 of 2018 establishes consular visa for tourism for national of Haiti.
[185] Acosta, Brumat and Vera-Espinoza, 'The New Chilean Government and Its Shifting Attitudes on Migration Governance' (*MPC Blog*, 3 May 2018) <https://blogs.eui.eu/migrationpolicycentre/new-chilean-government-shifting-attitudes-migration-governance/> accessed 19 September 2024.
[186] ibid; Cristóbal Torres, 'Jesuit Migrant Service to the Government: We are making Haitian migration more difficult' *BioBioChile* (16 April 2018) http://www.biobiochile.cl/noticias/opinion/entrevistas/2018/04/16/servicio-jesuita-migrante-al-gobierno-estamos-haciendo-mas-dificil-la-migracion-haitiana.shtml accessed 25 September 2024; Isabel Allende, 'Discriminatory Visas' (*Cooperativa Political Opinion*, 23 May 2018) https://opinion.cooperativa.cl/opinion/politica/visas-discriminatorias/2018-05-23/100228.html accessed 25 September 2024.

constitutionality of Decree 776 in 2018 and found it to be consistent with the Chilean Constitution.[187] Chapter V will provide a detailed analysis of the Constitutional Court's decision and dissenting opinions as part of an evaluation of whether the CVTs for Haitians and Venezuelans constitute discriminatory practices under international human rights law. Despite the Constitutional Court's decision, the justifications outlined in Decree 776 for implementing the CVT for Haitian nationals must be critically analysed, as will be discussed in the following paragraphs.

Paragraph one of Decree 776 stated that 'it is in the national interest to provide the country with orderly, safe and regular migration'.[188] Similar to the CVT for Dominican Republic nationals, this visa is based on 'national interest'. Additionally, it does not adhere to the principle of international reciprocity, as Haiti has not imposed a similar visa requirement for Chilean nationals. As previously noted, the concept of 'national interest' is a vague term in Chilean law. In its decision on the constitutionality of the Haitian CVT, the Chilean Constitutional Court, although it referred to the notion of 'national interest', opted to focus on evaluating whether this CVT contributed to the general well-being of Chilean society (referred to in Spanish as *bien común general*).

Despite the challenges in defining 'national interest,' this CVT failed to promote 'safe, orderly, and regular migration,' resulting in ineffective implementation. As it was demonstrated, since the implementation of the immediate measures of the 2018 Migration Reform, the number of non-authorised crossings and victims of human trafficking and smuggling has increased. In addition, the migration practice discussed above is contradictory to the terms 'orderly', 'safe', and 'regular' migration, as used in international instruments such as the Global Compact for Migration and the New York Declaration, where states commit to facilitating migration rather than hindering it.

The second justification provided in Decree 776 is that 'the sustained increase of Haitian citizens who enter the country declaring tourism purposes but remain in Chile in an

[187] Chilean Constitutional Court, *ROL Nº 4757-18-CDS*.
[188] Decree 776 of 2018 establishes consular visa for tourism for national of Haiti, Considerando 1.

irregular situation is an unavoidable reality'.[189] This statement lacks support from objective and verifiable facts. Firstly, according to the 2017 census, Haitian nationals in Chile numbered 62,683, representing only 8.4% of the total migrant population.[190] Five other migrant groups surpassed this number: Peruvians constituted the largest group at 25.5%, followed by Colombians (14.1%), Venezuelans (11.1%), Bolivians (9.9%) and Argentinians (8.9%).[191] Despite this, the CVT measure was imposed solely on Haitian nationals, with Venezuelans added later.[192] Secondly, Decree 776 did not cite any study or data to substantiate the claim that Haitian nationals were overstaying their tourist visas. Moreover, at the time of its issuance, Chilean migration law permitted all foreign nationals to convert their tourist visa into a 'temporary visa for employment purposes', or a 'visa subject to a work contract', provided they met the necessary requirements. This legal pathway allowed individuals to maintain regular migration status, undermining the assertion that a significant number of Haitian nationals were in an irregular situation due to visa overstays.

In Chile, there is no objective and verifiable data that pinpoints the exact moment or specific reasons a person transitions to irregular migration. There is no evidence to suggest that those who become irregular migrants after entering as tourists are predominantly Haitian nationals. In fact, all migrant workers -except for the few subject to consular visa limitations- had access to this pathway. The absence of reliable data and the targeted nature of the CVT toward Haitian nationals raise concerns regarding its discriminatory character, an issue that will be examined in detail in Chapter V.

The third justification for implementing a CVT for Haitian nationals is found in the third paragraph of the decree, which states: 'Staying in Chile beyond the time provided for tourists exposes migrants and their families to becoming targets of human trafficking networks and other risks arising from their irregular situation in the country'.[193] Two key errors can be identified here. First, under article 411bis of the Chilean Penal Code, the crime of 'migrant smuggling' occurs at the moment of 'illegal entry'. The provision does

[189] ibid, Considerando 2.
[190] National Statistics Institute, Chilean census 2017.
[191] Ibid.
[192] In this line, see, Francisca Vargas and Martin Canessa, 'Rights of Migrants and Refugees: Changes in Migration Matters in Chile', 246.
[193] Decree 776 of 2018 establishes consular visa for tourism for national of Haiti, Considerando 3.

not extend to the smuggling of migrants during their stay in the country,[194] making the scenario described in the first part of paragraph 3 legally unsound.[195] Additionally, in its concluding observations on Chile's first report to the CMW, the Committee issued specific recommendations for combating migrant smuggling and human trafficking, none of which included the establishment of a CVT.[196] Second, the vulnerabilities faced by migrants in an irregular status are primarily tied to violations of their essential rights. As a signatory to the ICRMW, along with the rest of the core international human rights treaties, Chile is obligated to uphold both positive and negative duties to protect migrants from these vulnerabilities. These obligations do not include the creation of CVTs as a method to reduce such risks. As explained in the introduction of this thesis, a human rights-based approach to addressing irregular migration focuses on facilitating regular migration by creating accessible legal pathways. On similar grounds, the Chilean National Institute for Human Rights, has recommended the elimination of the CVT for Haitian nationals.[197] The grounds outlined in the decree also demonstrate that Chile did not acknowledge the situation of crisis that encouraged Haitians to leave their country. No consideration is given to the structural causes that motivated them to migrate. Overall, this section shows that, by implementing the CVT for Haitian nationals, the Chilean government closed a migration pathway to Haitians without providing objective and verifiable reasons.

[194] Criminal Code of Chile, Article 411bis.

[195] Similarly, INDH, 'Informe sobre Proyecto de Ley de Migración y Extranjería (Boletín 8970-06) y las Indicaciones presentadas' 14 <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/1138/Informe.pdf?sequence=4&isAllowed=y> accessed 17 November 2020. (Report on the Draft Law on Immigration and Foreigners (Bulletin 8970-06) and the Indications presented).

[196] UN CMW, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Chile,* UN Doc CMW/C/CHL/CO/1 (19 October 2011), paras 46, 47.

[197] INDH, 'Informe Anual Situación de los Derechos Humanos en Chile 2018' 87 <https://www.indh.cl/destacados-2/informe-anual-2018/> accessed 17 November 2020. _The INDH recommended: 'That the Executive Branch modify the consular nature of the tourist visas established for migrants of Haitian origin, to the extent that - in view of the social situation of that country - the requirements established for their processing have not been sufficiently founded and they can expose them to a context of greater vulnerability, irregularity and potential circumstances of human smuggling or trafficking.' (Translated by the author)

2.4.1.3. CVT requirement for Venezuelan nationals

The requirement for Venezuelan nationals to obtain a CVT was not originally part of the 2018 Migration Reform but was later established through Decree 237, issued on 22 June 2019.[198] The Decree provides justifications for implementing the CVT, most of which refer to the ongoing democratic and institutional crisis in Venezuela.[199] However, by comparing these justifications with both the actual conditions of Venezuelans on the move and the outcomes of the Decree, it becomes clear that, despite its protective language, the CVT ultimately restricts Venezuelans' entry without consistent justification, resulting in increased irregular migration. The following arguments support this conclusion.

First, like the CVT for Haitians requirement, Decree 237 was based on national interest and did not adhere to the principle of reciprocity.[200] At the time of its publication, Venezuelan authorities had not imposed a similar visa requirement for Chilean nationals visiting Venezuela. Only months later, the Venezuelan embassy in Chile announced the implementation of a similar measure.[201] Although Decree 237 stated that it is in the national interest to promote 'safe orderly and regular migration', it has been shown that irregular migration increased. Second, paragraphs two and three justify the CVT based on the Venezuelan democratic crisis and the massive exodus of its nationals. These paragraphs reference data from reports by the International Organisation for Migration and the Organisation of American States (OAS) Working Group for the Venezuelan crisis. However, neither of these reports recommended the implementation of a visa requirement like the CVT as a solution to the Venezuelan exodus.[202] Furthermore, as mentioned in Section 2.2 above, the OAS determined that those fleeing from Venezuela

[198] Decree 237 of 22 June 2019 establishes consular visa for tourism fo nationals of Venezuela.
[199] ibid, Considerando 2, 3, 4, 5, 7.
[200] ibid, Considerando 1.
[201] El Mostrador, 'Venezuela hardens entry policy to the country and will require visa from Chilean tourists' (*El Mostrador*, 19 August 2019) https://www.elmostrador.cl/dia/2019/08/19/venezuela-endurece-politica-de-ingreso-al-pais-y-exigira-visa-de-turistas-a-los-chilenos/ accessed 16 August 2023.
[202] OAS, '*Venezuela: Report of the OAS Working Group to address the Venezuelan migrant and refugee crisis in the region*' https://www.refworld.org/es/ref/inforpais/oea/2019/es/129559 accessed 20 September 2024.

qualify to receive refugee protection under the Cartagena Declaration.[203] In some cases, they even qualify for protection under the 1951 Refugee Convention. As noted earlier, the rate of refugee recognition for Venezuelans in Chile remains very low.

Additionally, the OAS Working Group for the Venezuelan crisis report analysed the status of Venezuelans across Latin America and criticised the sudden changes in entry requirements imposed by various countries. [204] The report argued that such measures failed to provide adequate legal protection, and caused confusion to Venezuelans on the move.[205] For instance, the report highlighted that this was caused by new passport requirements in Peru and Ecuador and countries that shifted from allowing entry without a visa to requiring one.[206] The Chilean CVT for Venezuelans mirrored these problematic characteristics, as it represented a sudden change in Chilean immigration law, introducing a visa requirement where none previously existed. Therefore, it was inconsistent for Chile to justify the CVT by citing a report that critiques such measures. In fact, confusion among Venezuelans on the move followed immediately after the CVT came into effect in June 2019. According to a report from Chilean NGOs presented to the CMW, the implementation of the CVT triggered a humanitarian crisis at the northern border.[207] Around 400 people were stranded in precarious conditions at the Chacalluta crossing in the final days of June. [208]

The third justification is included in paragraph four of Decree 237, which states that the Venezuelan exodus is 'aggravated in a large number of cases, by the presence of undocumented children'. Similar to the previous paragraphs, it is unclear how a CVT would contribute to solving the situation of undocumented children. On the contrary, it

[203] OAS, 'Venezuela: Informe del Grupo de Trabajo de la OEA para abordar la crisis de migrantes y refugiados venezolanos en la región' 49, 51 <https://www.refworld.org/es/ref/inforpais/oea/2019/es/129559> accessed 20 September 2024.
[204] ibid 42.
[205] ibid 42–43.
[206] ibid 42.
[207] SJM and others, '*Alternative report committee for the protection of the rights of all migrant workers and their families'* 6 https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/CHL/INT_CMW_CSS_CHL_41795_S.pdf accessed 17 November 2020.
[208] SJM and others, *'Alternative report committee for the protection of the rights of all migrant workers and their families'* 6

would only close the borders to them, as they will not have sufficient documentation to request the CVT in Venezuela. The OAS WG for the Venezuelan crisis report referred to the situation of undocumented children and identified situations in which states allowed their entry. [209] For instance, in Argentina, they authorised the entry of Venezuelans with expired identity documents, and children younger than nine could enter the country only with their birth certificate.[210] In Ecuador, a protocol for children is implemented on the northern border that allows children to enter the country along with their carers.[211]

The fourth justification of Decree 237 was the implementation of a Democratic Responsibility Visa for Venezuelans. This visa will be further analysed in the following section. Here, it will be demonstrated that, despite being presented as a mechanism to open regular migration pathways for Venezuelans, it introduced new bureaucratic obstacles, ultimately contributing to irregular migration.

A fifth justification is provided in paragraph 6 of Decree 237, which states that overstaying a tourist visa places migrants in a vulnerable position due to their irregular status. However, the CVT does not change the transitory nature of the permit. Those entering the country with a CVT are still granted a permit that allows them to stay for a limited time, 90 days, as stipulated in the same Decree.[212] In both cases, there is a risk of individuals overstaying and becoming irregular migrants.

A sixth and final justification in Decree 237 refers to implementing a consular visa in Peru for Venezuelan citizens seeking to reside there. According to paragraph 7, the introduction of this visa is expected to increase the number of Venezuelans migrating as tourists to the Chilean border. This justification highlights that Chile is replicating Peru's migration policy of closing borders to Venezuelans rather than facilitating their movement. Adopting unilateral measures for a regional issue contradicts what has been agreed upon by states, including Chile, in international and regional forums.

[209] OAS, 'Venezuela: Report of the OAS Working Group to address the Venezuelan migrant and refugee crisis in the region'
[210] ibid 71.
[211] ibid 84.
[212] Decree 237 of 22 June 2019 establishes consular visa for tourism for nationals of Venezuela. Artículo único.

Moreover, this reasoning reveals that no realistic migration pathway is being offered to Venezuelans. It suggests that they will migrate as tourist, but as numerous reports have shown, Venezuelans are being forced to migrate. Since refugee claims are often rejected, migrating 'as tourists' becomes their only available option. Paragraph 8 of Decree 237 asserts that Chile's goal is to 'protect migrants', but if the real aim is protection, efforts should first acknowledge the root causes driving their migration and, second, focus on opening legitimate pathways for migration, including granting international protection. Along these lines, the OAS WG for the Venezuelan crisis expressed concern over the increasing migration restrictions imposed by destination countries on Venezuelan migrants and refugees.[213]

In summary, despite acknowledging the crisis in Venezuela and the massive exodus it has produced, the CVT's response is to add bureaucratic requirements that are difficult for Venezuelans to comply with. Rather than facilitating their migration, the abovementioned shows that the CVT for Venezuelans is designed to restrict their entry into Chile.

2.4.2. Humanitarian Visas

2.4.2.1. Democratic Responsibility Visa for Venezuelan Nationals (DRV)

The 2018 Migration Reform included the implementation of a Democratic Responsibility Visa (DRV) for Venezuelan nationals. Initially, Venezuelans could only apply for this visa at the Chilean consulate in Caracas, but the program was later expanded to other Chilean consulates worldwide. The DRV granted a one-year residence permit, which could be renewed once.[214]

The implementation of a DRV can initially be interpreted as an alternative to refugee protection for Venezuelans. While refugee status is the ideal form of protection for this

[213] OAS, Venezuela: Report of the OAS Working Group to address the Venezuelan migrant and refugee crisis in the region'.

[214] SJM and others, 'Alternative report committee for the protection of the rights of all migrant workers and their families' ; Ministry of Interior and Public Security, Chile., 'Brief: Migration Reform and National Migration and Foreign Affairs Policy' 5 https://cdn.digital.gob.cl/filer_public/d2/39/d239d0df-c4e9-488e-a36f-8b1ac2ca00ef/nueva_ley_de_migracion.pdf accessed 12 April 2019.

migrant population, a DVR offers a way to facilitate human mobility by potentially alleviating pressure on the asylum system and allowing Venezuelans entry with a pre-approved residence permit.[215] This mechanism could help maintain regular migration status and, therefore, legal residency, aligning with Crépeau's proposition to facilitate migration pathways. According to Crépeau, 'many potential refugees would be able to cross borders thanks to other mobility options'.[216] This interpretation is supported by studies that consider the DRV an example of a mechanism to providing legal status to Venezuelans in the broader context of the Latin America's responses to the Venezuelan Displacement crisis.[217]

However, in practice, DRV obstructed Venezuelan's migration to Chile, contributing to increased irregularity. The documentation required to obtain a DRV was highly complex, particularly given the collapse of Venezuelan institutions. Applicants were required to submit a valid passport, a criminal record certificate issued by the Venezuelan Ministry of Interior, Justice and Peace, and a birth certificate with an 'apostille'.[218] A report presented by Chilean NGOs to the CMW confirmed long processing times and a low number of DRV approval.[219] Another study recorded an overall approval rate of just 14%.[220]

Despite its flaws, VDR improvements could have been introduced to the DRV to effectively contribute to opening regular migration pathways. However, the DRV is no

[215] SJM and others, Alternative report committee for the protection of the rights of all migrant workers and their families'.
[216] François Crépeau, 'Towards a Mobile and Diverse World: Facilitating Mobility as a Central Objective of the Global Compact on Migration' 30 International Journal of Refugee Law 650, 655.
[217] Gandini and Seele, 'Betting on Legality: Latin American and Caribbean Responses to the Venezuelan Displacement Crisis', 16; Mora, Ruiz Soto and Seele, 'Building on Regular Pathways to Address Migration Pressures in the Americas' MPI and IOM 39 38.
[218] OAS, Venezuela: Report of the OAS Working Group to address the Venezuelan migrant and refugee crisis in the region', 43.
[219] SJM and others, Alternative report committee for the protection of the rights of all migrant workers and their families'.
[220] Mora, Ruiz Soto and Seele, 'Building on Regular Pathways to Address Migration Pressures in the Americas' MPI and IOM 39; Luciana Gandini, 'Betting on Legality: Latin American and Caribbean Responses to the Venezuelan Displacement Crisis' 16.

longer available for Venezuelans.[221] Although there has been no explicit derogation, access to the DRV application was removed from the Chilean consular services webpage on 22 February 2022.[222] Additionally, the application is not available on the Chilean National Migrations Service's webpage, where other visa applications are processed.[223] Consequently, the DRV contributes to the striking contradiction of Chile publicly acknowledging the crisis in Venezuela and the need to protect its citizens, while simultaneously imposing barriers to entry, leaving them unprotected.[224]

2.4.2.2. Family Reunification Visa for Haitian Nationals

The family reunification visa was introduced on April 16, 2018, and was available exclusively to Haitian nationals. At the time of its introduction, Chile did not have a legal framework that specifically regulated family reunification. In its 2011 Final Views, the CMW had recommended that Chile incorporate legal provisions to regulate this principle, in line with Article 44 of the ICRMW. [225]

Eligible applicants included spouses, civil partners, and children of Haitian nationals under the age of 18, as well as adults under 24 who were studying. Applicants were required to have no criminal record, and the visa could only be requested at the Chilean Consulate in Haiti.[226] This visa is no longer available and has been replaced by a family reunification permit, which is granted through a temporary residence permit to family of migrants residing in Chile under a permanent residence permit.[227] Despite its significant role in opening migration pathways, this thesis will not delve into the analysis of family

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[221] INFOMIGRA, 'What happened to the Democratic Responsibility Visa?' (*Infomigra*, 16 May 2023) https://www.infomigra.org/que-sucedio-con-la-visa-de-responsabilidad-democratica/ accessed 25 July 2023.

[222] Ministry of Foreign Affairs. Government of Chile, 'Visas' https://minrel.gob.cl/visas/minrel/2008-06-19/154024.html#vtxt_cuerpo_T5 accessed 12 April 2019.

[223] SERMIG, 'List of Available Procedures' (*Official digital procedures portal*) https://tramites.extranjeria.gob.cl/ accessed 25 July 2023.

[224] In this line, see Finn and Umpierrez de Reguero, 'Inclusive Language for Exclusive Policies: Restrictive Migration Governanve in Chile, 2018', 56, 57; Acosta, Brumat and Vera-Espinoza, 'The New Chilean Government and Its Shifting Attitudes on Migration Governance' (*MPC Blog*, 3 May 2018) .

[225] UN CMW, 'Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Chile' (n 196) paras 38, 39.

[226] Ministerio del Interior y Seguridad Pública, Chile., 'Minutes: Immigration Reform and National Policy on Migration and Foreigners, 5 <https://cdn.digital.gob.cl/filer_public/d2/39/d239d0df-c4e9-488e-a36f-8b1ac2ca00ef/nueva_ley_de_migracion.pdf> accessed 12 April 2019.

[227] Law 21.325, Article 19; Decree 177, Articles 10 a) and 12 to 16.

reunification as an obligation for states to allow entry. The family reunification visa for Haitians is briefly mentioned in this chapter as an example of how Chile restricted entry for a specific nationality while framing it within human rights language. Additionally, Chapter III will address family reunification to demonstrate how early regulations on human mobility primarily regarded migrants as workers. As explained in Chapter III, the concept of family reunification has evolved in human rights law, recognising situations where migrants should be allowed entry to reunite with family members. While Chile adopted this language by creating a visa aimed at reuniting families, its implementation ultimately restricted entry for the majority of Haitian nationals who applied for it. The following arguments will illustrate this point.

Firstly, the Chilean government set a cap of 10,000 per year,[228] which was not proportional to the number of Haitians arriving in Chile between 2017 and 2018 – more than 100,000 during that period.[229] This fixed limit failed to reflect the actual demand for family reunification. Secondly, the family reunification visa was valid for 12 months, with the option to renew it only once.[230] This time limit was inconsistent with the purpose of reuniting families, as family bonds do not have an expiration date. Families need to remain together beyond the visa's validity period. Thirdly, only a very small number of family reunification visas were granted. By December 2019, out of 2,254 visa requests, only 144 were approved and had their application process finished, representing just 6.4%. Additionally, the visa processing was notably slow. A total of 1,114 visas, or 49%, were still classified as 'in process' or 'pending'. Meanwhile, 857 applications, equivalent to 38%, remained unresolved. In the end, 139 visas were rejected outright.[231] Finally, in its second periodic report submitted to the CMW the family reunification argument was invoked by the Chilean government to justify the a 'humanitarian repatriation programme' aimed at assisting foreign citizens who wish to return to their countries

[228] Ministry of Interior and Public Security, Chile. Minutes: Immigration Reform and National Policy on Migration and Foreigners, 5.
[229] Finn and Umpierrez de Reguero, 'Inclusive Language for Exclusive Policies: Restrictive Migration Governanve in Chile, 2018', 54.
[230] Ministerio del Interior y Seguridad Pública, Chile., 'Minuta: Reforma Migratoria y Política Nacional de Migraciones y Extranjería' 5
[231] Roessler and others, 'Migration yearbook 2019 - Migration in Chile' 53.

freely and voluntarily to reunite with their families'.[232] Although it did not explicitly identify specific nationalities, this program was primarily directed towards Haitian nationals. In fact, the Chilean Immigration and Aliens Department publicized the program on its webpage when the first repatriation flight to Haiti departed.[233] One of the conditions for benefiting from the program was that Haitian nationals were living with their families, had to undertake the repatriation process together. [234] Additionally this plan was linked to a 9-year ban on entering to Chile. [235]

The above illustrates that the family reunification visa did not genuinely open regular migration pathways to Haitians. It allowed only a small number of them to reunite with their families in Chile, while restricting entry to the majority, effectively closing regular migration pathways. Furthermore, the humanitarian repatriation program indicates that family reunification was used as a pretext to promote the return of Haitians to their countries of origin.[236] The 9-year ban associated with this return program contributes to interpreting that Chile's interest was to close migration pathways to Haitians.

2.5. Summary of Findings: Similar entry restrictions, new legislation. How does the 2021 Migration Law take a step towards building regular migration pathways?

Chapter II began by asking to what extent Chilean migration law contributes to the creation of irregular migration. The chapter has explored the current migration realities

[232] UN CMW, *Second Periodic Report Submitted by Chile under Article 73 of the Convention Pursuant to the Simplified Reporting Procedure, Due in 2016*, UN Doc CMW/C/CHL/2 (22 October 2019) para 188.
[233] Government of Chile, 'Registration Began: What the Humanitarian Return Plan for Migrants Consists of' (*Ministry General Secretariat of Government*) https://msgg.gob.cl/wp/2018/10/18/comenzo-inscripcion-en-que-consiste-el-plan-de-retorno-humanitario-para-migrantes/ accessed 14 December 2020
[234] Gobierno de Chile, 'Comenzó Inscripción: En Qué Consiste El Plan de Retorno Humanitario Para Migrantes' (*Ministerio Secretaría General de Gobierno*) <https://msgg.gob.cl/wp/2018/10/18/comenzo-inscripcion-en-que-consiste-el-plan-de-retorno-humanitario-para-migrantes/> accessed 14 December 2020.
[235] ibid.
[236] In this line, Finn and Umpierrez interpreted that the actual purpose of this visa was to encourage Haitians residing in Chile without their families to return to their country rather than facilitating the entry of their family members Chile. Finn and Umpierrez de Reguero Inclusive Language for Exclusive Policies: Restrictive Migration Governanve in Chile, 2018', 54.

in Chile, focussing on Venezuelan and Haitian nationals. Both groups share the characteristic of being forced to migrate due to differing internal pressures but offered an alternative pathway to refugee status in Chile. In Chile, the asylum-seeking process is notoriously slow and rarely results in the recognition of refugee status. Thus, this regular migration pathway (assylum-seeking) is effectively closed to Venezuelan and Haitian nationals under the guise of offering an 'alternative' path that is ineffectively delivered. While extensive literature and international recommendations, including from the Inter-American and the international human rights systems, advocate for the recognition of refugee status for Venezuelan and Haitian citizens, this chapter has instead examined their migration pathways as migrant workers. It has demonstrated that regular pathways that were previously more accessible, have been largely closed.

The introduction of CVTs and humanitarian visas under the 2018 Migration Reform significantly restricted entry for these specific groups. The chapter has also shown that irregular migration surged following the implementation of these restrictive visa requirements, thus confirming Sassen's assertion that 'it is the law that creates irregular migration'.

Furthermore, the chapter has traced the evolution of Chile's migration law, from a national security-focussed framework toward one that nominally incorporates human rights protections. Yet, tensions between human rights and national security remain evident in the implementation of the new legislation. Moreover, Chilean migration policy continues to lack stability, shifting over time in response to changing political agendas and generally failing to manage migration flows in a regular, safe and orderly manner. The discretionary power of the state to control migration has often been used to close migration pathways, but it can also be used to open them, as demonstrated by Bachelet's migration policies between 2014 and 2017.

Given that stricter migration controls contribute to irregular migration, the next chapters of this thesis will explore whether and how Chile's human rights obligations can serve to constrain this discretion and promote the opening of regular pathways. After analysing how migration and human rights law limit the right of states to control borders, the thesis will focus on two perspectives: the principle of non-discrimination, and the principle of

non-refoulement. The following subsections give a brief introduction to these two principles.

2.5.1. The principle of Non-Discrimination

With respect to the principle of non-discrimination, CVTs were first enacted under DL 1.094, and remain in force under 2021 Migration Law. As explained in section 2.4, the 2021 Migration Law maintains the provision allowing Chile to apply CVTs, specifically in Article 27. However, this Article introduces two key limitations to the concept of 'national interest'. First, the phrase 'qualified reasons' was added, meaning that a CVT can now only be implemented for 'qualified reasons of national interest', or 'international reciprocity'. Second, a non-discrimination clause was incorporated. Paragraph 3 of Article 27 states that reasons of 'national interest' cannot justify the establishment of a CVT 'in an arbitrary or discriminatory manner concerning the nationals of a particular country'.[237] The inclusion of these limitations was motivated by concerns that the sole phrase 'national interest' was 'not precise, could be interpreted dangerously and could thus restrict the right to freedom of movement'.[238]

As will be further explored in the following chapters, the principle of non-discrimination is widely recognised as a limitation on the state's right to control migration. Despite the recognition of this limitation in the 2021 Migration Law, no reassessment has been made by the Chilean government of the potentially discriminatory nature of CVTs for Venezuelans and Haitians. If these CVTs are found to be discriminatory, alternative pathways would need to be developed to regulate the migration routes for these groups. Chapter V of this thesis delves into this topic in greater detail.

[237] Law 21.325, Article 27.
[238] Chamber of Deputies, 'Report of the Human Rights and Indigenous Peoples Commission on the Law Project Originated in a Message from H.E. the President of the Republic on Migration and Foreign Affairs. Bulletin No 8970-06' 22 https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=9377 accessed 19 October 2023.

2.5.2. The Principle of Non-Refoulement.

By tightening migration restrictions, Chile risks encouraging irregular migration and violating its obligations under the principle of non-refoulement, which, in turn, increases their vulnerability to suffer human rights violations. This principle, which stems from the right to life and the prohibition against torture, enshrined in Articles 9 and 10 of the ICRMW, among other human rights treaties, is increasingly at risk due to Chile's practice of externalising its borders through the implementation of consular visas, its denial of asylum applications, and the bureaucratising of humanitarian visa processes. During Chile's second periodic review before the CMW, the Committee requested clarification on the legal and administrative procedures for processing applications for international protection, determining refugee status and granting subsidiary protection in compliance with the principles of non-refoulement and the prohibition of arbitrary and collective expulsion.[239] Notably, Chile has violated the prohibition on collective expulsions, as the Chilean Supreme Court declared in a case involving the re-embarkation of 62 Haitian citizens.[240]

It is important to note that the principle of non-refoulement also applies to cases involving severe socioeconomic deprivation, further complicating the restrictions on regular entry routes for Haitian nationals.[241] Earlier drafts of the 2021 Migration Law included the principle of non-refoulement, but parliamentarians ultimately removed it in favour of a provision on 'complementary protection'. Chapter VI will explore this decision and assess the extent to which 'complementary protection' offers alternative migration pathways.

2.5.3. Judicial counterbalance and case law.

Although creating regular migration pathways through human rights law might appear complex, Chilean case law demonstrates progress. After the implementation of the Dominican Republic CVT and the increase in clandestine entries, the role of the Chilean

[239] UNCMW, '*List of Issues Prior to Submission of the Second Periodic Report of Chile*', para 14.
[240] Chilean Supreme Court, 4292/2018, March 21st, 2018.
[241] UN HRC, 'Report of the Special Rapporteur on the Human Rights of Migrants' para 20.

Appeal Courts became crucial. When a migrant's entry was declared clandestine, the authorities issued a criminal complaint and expulsion orders. While the criminal complaints were often dropped, the expulsion orders persisted. In response to *habeas corpus* actions filed by irregular migrants, the Appeal Courts frequently revoked these expulsion orders on various grounds, including violations of due process, the disproportionality and arbitrariness of the expulsion, or breaches of the principle of principle of family unity.[242] In such cases, the courts based their decisions on Article 5 of the Chilean Constitution, which prescribes that state sovereignty is limited by fundamental rights enshrined in international treaties signed and ratified by Chile.

These cases, examined further in subsequent chapters, illustrate the judiciary's role in protecting the human rights of irregular migrants, counteracting the legal vulnerability these migrants faced under Chile's migration rules and visas requirements prior to the 2021 Migration Law. Once 2021 Migration Law entered into force, the situation changed, as Article 9 of the 2021 Migration Law decriminalised irregular migration. Nevertheless, uncertainty remains as the Senate is evaluating a bill seeking to re-criminalise irregular migration in Chilean law.

Case law concerning non-refoulement and non-discrimination has also evolved in Chilean courts, and will be briefly examined in Chapter V and VI. This thesis seeks not only to analyse the protective role of Article 5 but also to assess how the 2021 Migration Law explicitly engages human rights provisions, particularly with respect to non-discrimination and non-refoulement, can support the development of a more rights-based approach to migration control. Since irregular migration is, to a significant extent, a consequence of the law, this thesis aims to explore legal solutions within the framework of the law itself.

[242] See, for example, Corte Suprema, ROL 10243/2013 sentencia de fecha 28 de octubre de 2013, ROL 45845/2016 sentencia de fecha 27 de julio de 2016; ROL 37160/2017 de fecha 21 de agosto de 2017.
See also Henríquez Viñas, 'The Jurisprudence of the Supreme Court as a transforming agent in the protection of migrants' personal freedom'; Lawson and Rodríguez, 'Due Process in administrative expulsion procedures of immigrants: Current situation and alternative.

2.5.4. Concluding thoughts on the impact of migration law on irregular migration flows.

This chapter asked to what extent Chilean migration law has contributed to creating irregular migration. The analysis demonstrates that the entry restrictions introduced by the 2018 Migration Reform and maintained under the 2021 Migration Law, have significantly restricted regular migration pathways for Venezuelan and Haitian nationals, thus providing a clear example that restrictive migration policies are ineffective. The disproportionate impact of CVTs on Venezuelan and Haitian nationals, combined with restrictive asylum pathways has led to a marked increase in irregular entries. While the 2021 Migration Law formally incorporates human rights protections, Chile's migration framework continues to privilege discretionary security-driven approaches over a human-rights based facilitation of regular migration pathways. Therefore, the extent of the law's contribution to irregular migration is significant and ongoing, making it necessary for the incorporation of a human rights-based approach that would not only set limits to state control, but would also facilitate regular migration. The following chapters will examine how human rights law may limit such restrictive migration policies, and the extent to which Chile's current legal framework complies with its international obligations, focusing specifically on the principles of non-discrimination and non-refoulement.

CHAPTER III

ILO CONVENTIONS NO. 97 AND 143. THE BASIS OF MIGRANT'S RIGHTS.

3.1. Introduction

The previous chapter demonstrated how Chile's entry restrictions have contributed to an increase in irregular migration. The country's rationale for imposing strict entry restrictions on migrants aligns with the global narrative asserting states' sovereign rights to control their borders.[1] However, this right is limited by international migration law and human rights law. As a party to various international human rights treaties, Chile is obligated to exercise its migration control within these limits. This raises the question of whether the contribution of the law to irregular migration is born and sustained by structural shortcomings in international law regulating migration. To address this, the current chapter examines the origins of international law regulating the rights of migrants.

Accordingly, the chapter will analyse International Labour Organisation (ILO) Convention (No. 97) concerning migration for employment (Revised) of 1949[2] (ILO C97) and Convention (No. 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975 (ILO C143)[3]. Alongside the ICRMW, these conventions form the core of what some scholars call the 'International Charter of Migrant Workers'.[4] The chapter examines how migrants, both regular and irregular, are treated in the ILO C97[5] and ILO C143.[6] Chile is not a party to

[1] Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Modern Law Review 588.
[2] *Convention (No 97) concerning migration for employment (Revised)* (adopted 1949, entered into force 22 January 1952) 120 UNTS 71 (ILO C97)
[3] *Convention (No 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975* (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 323 (ILO C143).
[4] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 200; Patrick A Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization' in Ryszard Cholewinksi and others (eds), *Migration and Human Rights: The UN Convention on Migrant Workers' Rights* (Cambridge University Press 2009) 154.
[5] ILO C97.
[6] ILO C143.

these ILO conventions, however, their examination is relevant for this thesis because scholars and international organisations consider ILO C97 and ILO C143 as the basis of the International Convention on the Rights of Migrant Workers and their Families (ICRMW).[7] These ILO conventions are usually incorporated in the international human rights documents concerning the human rights of irregular migrants.[8] The examination is further relevant with regard to the incorporation of the human rights of migrants at the domestic level, which will also be analysed in this thesis. The Committee on Migrant Workers (CMW) recognised that states are guided by the said ILO Conventions for formulating national laws and policies concerning labour migration and the protection of migrant workers in an irregular situation.[9]

The ILO is the only United Nations (UN) agency that is tripartite in its structure.[10] It brings together governments, employers and worker representatives to set labour standards, develop policies and devise programmes promoting decent work for all women and men.[11] Its mission is the promotion of social justice and of internationally recognised

[7] Lori A Nessel, 'Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Migration Law and Migration* (Edward Elgar 2014) 333; Patrick A Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization' in Ryszard Cholewinksi and others (eds), *Migration and Human Rights: The UN Convention on Migrant Workers' Rights* (Cambridge University Press 2009), 154; Antoine Pecoud and Paul de Guchteneire, 'Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights Special Issue: Problems Concerning Human Rights' (2006) 24 Windsor YB Access Just 241, 245; Michael Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers' (1990) 28 International Migration 133, 134; International Labour Conference (87th Session) Report III (Part 1B), 'Migrant Workers' (Geneva June 1999) ILC.87/III(1B) para. 50; David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008) 70.

[8] UNGA *The Impact of Migration on Migrant Women and Girls: A Gender Perspective. Report of the Special Rapporteur on the Human Rights of Migrants*. UN Doc A/HRC/41/38 (15 April 2019) para. 24; UN CMW *Day of General Discussion on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families. Background Note Prepared by the Secretariat* CMW/C/15/CRP.1(19 September 2019), 6; IOM, 'Issue Brief # 6. Irregular Migration and Regular Pathways, Including Decent Work, Labour Mobility, Recognition of Skills and Qualifications and Other Relevant Measures' (no date) 10; UNGA *Report of the Special Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante* Un Doc A/65/222 (3 August 2010) para. 72.

[9] UNCMW *General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families* CMW/C/CG/2 (28 August 2013), para. 12.

[10] ILO, 'Mission and Impact of the ILO' (1996–2019) <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed 26 July 2019; Virginia A Leary, 'Lessons from the Experience of the International Labour Organisation' in Philip Alston (ed), *The United Nations and Human Rights A critical Appraisal* (Oxford University Press 1992) 584.

[11] ILO, 'Mission and impact of the ILO'.

human and labour rights.[12] Despite being a specialised agency of the UN, it was established in 1919, by the Treaty of Versailles and was later incorporated to the UN, in 1945.[13] Thus, it antedates the UN by 26 years.[14] As stated by, Pecoud and de Guchteneire, 'the origins of the UN Convention on Migrant Workers' Rights lie in the work of the ILO which has historically been in charge of the protection of migrants since its creation in 1919'.[15] The historical concerns of ILO for protecting migrants can be found in the preamble of its constitution, which recognises the obligation of ILO to 'improve the protection of the interests of workers when employed in countries other than their own'.[16] Through ILO C97 and ILO C143, the ILO sets labour standards that should allow maintaining a balance 'between the sovereign right of states wishing to protect the interests of their domestic labour market and the fundamental human rights of individuals who, for various reasons, are forced or choose to migrate in search of employment'.[17] The influence that ILO C97 and ILO C143 had in the ICRMW can be initially found within the UN General Assembly resolution that created the working group that elaborated the ICRMW.[18] The resolution was made 'bearing in mind the international instruments elaborated by the International Labour Organisation' and it particularly mentions ILO C143.[19] Thus, the analysis contained in this chapter serves as the starting point for evaluating if the human rights law system that developed after ILO C97 and ILO C143 constitutes an advancement towards the human rights protection to regular migration. This analysis also contributes to understanding how these standards influence in the balance contained in international human rights law, between the

[12] ibid.
[13] Leary, 'Lessons from the Experience of the International Labour Organisation', 582.
[14] ibid.
[15] Pecoud and de Guchteneire, 'Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights Special Issue: Problems Concerning Human Rights', 245.
[16] Constitution of the International Labor Organisation (adopted April 1919, published 1919, 28 June 1919) 15 UNTS 40, Preamble; ILO Recommendation 151: Migrant Workers Recommendation (Recommendation concerning Migrant Workers) (60th Conference Session Geneva 24 June 1975) (ILO R151) para. 32; Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, in Chetail, Vincent; Bauloz, Céline (eds), *"Research Handbook on International Law and Migration"*, 306.
[17] International Labour Conference (87th Session) Report III (Part 1B, para 24.
[18] UNGA *Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers*, UN Doc 34/172 (17 December 1979) GAOR 34th Session Supp. 46, pp. 188, 189.
[19] ibid; Hasenau 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers' 134.

principle of national sovereignty and the human rights of migrants. In particular, this chapter aims to identify whether the ILO conventions contain initial steps towards creating human rights-based pathways to regular migration.

The two ILO Conventions analysed here are not widely ratified. In fact, ILO C97 has been ratified by only 50 countries in the world, with only 6 Latin American countries. ILO C143 has been ratified by only 24 states, and has no Latin American ratifications.[20] Other ILO Conventions complement the regulations that this institution provides to migration,[21] such as the Convention (No. 118) concerning equality of treatment of nationals and non-nationals in social security,[22] the Convention (No 181) concerning private employment agencies[23] and the Domestic Workers Convention.[24] Generally, the labour standards established by the ILO are applicable to all workers, without distinction of their nationality or their migratory status.[25] However, this chapter focuses on ILO C97 and ILO C143 as these are the only two that directly address migrant workers' rights.[26] This chapter, however, will also make reference to ILO Recommendation 86 Migration for Employment (Revised) of 1949 (ILO R86)[27] and Recommendation 151 on Migrant Workers of 1975 (ILO R151)[28]. Both are non-binding guidelines that complement the application of ILO C97 and ILO C147, respectively.[29]

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[20] See annex 1.

[21] Vincent Chetail, 'The Transnational Movement of Persons under General International Law - Mapping the Customary Law Foundations of International Migration Law.' in *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014) 7; International Labour Conference (87th Session) Report III (Part 1B).

[22] *Convention (No. 118) concerning equality of treatment of nationals and non-nationals in social security* (adopted 28 June 1962, entered into force 25 April 1964) 494 UNTS 271

[23] *Convention (No 181) concerning private employment agencies* (adopted 19 June 1997, entered into force 10 May 2000) 2115 UNTS 249

[24] *ILO, Convention (No 189) concerning decent work for domestic workers* (adopted 16 June 2011, entered into force 5 September 2013)

[25] Ryszard Cholewinksi, 'The Rights of Migrant Workers' in *International Migration Law Developing Paradigms and Key Challenges* (TMC Asser Press 2007) 257–58; International Labour Conference (87th Session) Report III (Part 1B) paras. 37 and 302.

[26] Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307.

[27] ILO Recommendation 086: *Migration for Employment Recommendation* (Revised) (32 Conference Session Geneva 1st July 1949) (ILO R86) (US).

[28] ILO R151.

[29] ILO, 'Conventions and Recommendations' (1996–2019) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 26 September 2019; Cholewinksi , The Rights of Migrant Workers' in *International Migration Law Developing Paradigms and Key Challenges* 258; Cholewinksi,

The analysis in this chapter will also be guided by the General Survey that the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) prepared on the effect given to these four instruments, both in the states that have ratified one or both of the ILO Conventions and in those which have not.[30] The Committee of Experts is a supervisory ILO body, which examines the government reports on ratified conventions.[31] It is composed of 20 independent experts, appointed by the ILO Governing Body.[32] The role of the Committee of Experts is to provide an impartial and technical evaluation of the application of international labour standards in ILO member states. The evaluations of the Committee of Experts are contained in annual reports.[33] The General Surveys are contained in Part III of the Committee of Experts annual reports.[34] They are in-depth evaluations of the national law and practice of member states, concerning specific Conventions and Recommendations chosen by the ILO Governing Body.[35]

The chapter will begin by analysing the definition of 'migrant for employment', contained in common article 11 of ILO C97 and C143. Then, the chapter will analyse the principle of equality of treatment included in ILO C97 and C143.

Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment*. (Clarendon Press 1997) 82.

[30] International Labour Conference (87th Session) Report III (Part 1B) para. 1.

[31] ILO, Applying and Promoting International Labour Standards (1996–2019) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> accessed 20 September 2019; ILO, 'Committee of Experts on the Application of Conventions and Recommendations' (1996–2019) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 19 September 2019.

[32] ILO, 'Committee of Experts on the Application of Conventions and Recommendations' (1996–2019) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 19 September 2019; Leary, 'Lessons from the Experience of the International Labour Organisation', 596. According to ILO, the Committee of Experts is composed by '20 eminent jurists'. ILO, 'Committee of Experts on the Application of Conventions and Recommendations. Leary specifies that this committee is composed by 'prominent judges, professors and labour law experts from selected geographic areas.

[33] ILO, 'Committee of Experts on the Application of Conventions and Recommendations'.

[34] ibid.

[35] 'General Surveys' (1996–2019) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm> accessed 9 September 2019.

3.2. Migrant for Employment.

ILO C97 and ILO C143 are significant because they provide the first multilateral treaty definition of a 'migrant for employment'.[36] Common Article 11 defines a "migrant for employment" as person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment'.[37] Consequently, the central focus of these instruments is labour. To qualify for protection under these Conventions, and individual must have migrated expressly for the 'very purpose of employment'.[38] This section examines the extent of the protection these Conventions offer when considering only the labour aspect of migration. It will firstly analyse the prospective nature of this labour-related protection, then assess the rights granted to regular migrant workers, and, finally, it will explore how an exclusive focus on labour migration limits the protection afforded to the family members of migrant workers.

3.2.1. The prospective nature of labour.

When analysing the concept of migration for employment in ILO C97 and ILO C143, the first consideration is that to receive the protection of under these instruments a person must have migrated with the intention of being employed. This definition has a prospective nature, as it focuses on the migrant's intent to work rather than requiring them to have secured a job before migrating.[39] This prospective approach contributes to more flexible pathways for regular migration, as it avoids restricting status to specific visa categories. A narrower definition – such as limiting protection to those who already hold an offer of employment– would have significantly reduced access to regular migration channels. Working visas are typically granted only to migrants with a pre-arranged employment contract, which can increase irregular migration by excluding those seeking

[36] Chetail, *International Migration Law*, 201.
[37] ILO C97; ILO C143 Art. 11.
[38] Chetail, *International Migration Law* 221.
[39] ibid 201.

work after arrival.[40] Thus, the ILO Conventions adopt a broad definition of migrant workers: by emphasising the intent to work rather than the possession of a work visa, they extend protection to a wide range of labour migrants.[41]

However, ILO C97 and C143 do not impose an obligation on states to admit migrant workers.[42] Nor do they require member states to refrain from making the possession of a work contract a condition for granting working visas. On the contrary, the two annexes of ILO C97 reinforce and promote recruitment as the primary means of migration, with one of the main objectives being to establish standards for the recruitment of migrants.[43] ILO C97 and ILO C143 do not call for the creation of visa schemes that would allow migrants to reside regularly in a destination country while searching for employment. As a result, the prospective nature of migrant workers remains largely aspirational. Consequently, the protection of national sovereignty takes precedence over the development of regular migration pathways.[44] Additionally, the definition of migrant worker explicitly excludes certain categories of migrants. Self-employed migrants are not considered migrant workers,[45] and irregular migrants are explicitly excluded from the definition, as it will be further analysed in section 3.3 of this chapter. ILO C97 excludes frontier workers, short-term entry of members of the liberal professions and artistes, and seamen.[46] ILO C143 adds two further excluded categories: individuals migrating specifically for training or education, and employees of organisations or enterprises operating within a country who have been admitted temporarily at their employer's request to undertake specific duties or assignments for a defined and limited period,

[40] Laura Bartolini and others, *Exploring the Links Between Enhancing Regular Pathways and Discouraging Irregular Migration* (2019) 1, 6; G Bertinetto, 'International Regulations on Illegal Migration' (1983) 21 International Migration 189, 190.
[41] Chetail, *International Migration Law*, 201.
[42] ibid 202.
[43] Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307; Bernard Ryan and Virginia Mantouvalou, 'The Labour and Social Rights of Migrants in International Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 183.
[44] In this regard, Chetail states, 'the sovereign competence of the states to allow or refuse entry of foreigners into its territory is accordingly taken for granted'. Chetail, *International Migration Law*, 202.
[45] International Labour Conference (87th Session) Report III (Part 1B) para. 110; Hasenau 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers', 135; Chetail, *International Migration Law*, 202.
[46] ILO C97 Art. 11, para 2. .

after which they must leave.[47] These exclusions narrow the scope of protection of ILO C97 and C143.[48]

Moreover, not all people migrate for the purpose of employment.[49] Venezuelan and Haitian migration to Chile is an example of this. As analysed in the previous chapter, many have migrated to Chile despite not being recognised as refugees. Another example includes those who migrate to accompany a family member or to reunite with one.[50] This category will be further examined in section 3.2.3. Non-citizens may engage in remunerated activities without having initially migrated for the purpose of employment. As demonstrated in the previous chapter, some individuals may have travelled for tourism and later decided to stay and work in the destination country.[51]

The fact that migrant workers are defined for the first time in multilateral treaties represents an advancement in their protection. While recognising a prospective nature for labour could potentially broaden the scope of protection afforded by the Conventions, this remains largely aspirational. Making the purpose of labour a requirement for migrant status further restricts the protection offered by ILO 97 and 143, and the scope is even more limited by the explicit exclusions outlined in these Conventions.

3.2.2. The protection of labour rights to regular migrants.

Both ILO Conventions focus exclusively on safeguarding the labour-related rights of migrant workers.[52] They do so based on promoting the principle of equality of treatment

[47] ILO C143 Art 11, para. 2.
[48] Chetail, *International Migration Law,* 201–02.
[49] Catherine Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law*. (Cambridge University Press 2008) 24; Stephen Castles and Alastair Davidson, *Citizenship and Migration. Globalization and the Politics of Belonging* (Aardvark Editorial 2000); Javier de Lucas, 'La herida original de las políticas de inmigración. A propósito del lugar de los derechos humanos en las políticas de inmigración' (2002) 0 Isegoría 59. (The original wound of immigration policies. On the place of human rights in immigration policies).
[50] Chetail, *International Migration Law*. 221.
[51] ibid.
[52] Nessel 'Human Dignity or State Sovereignty?. 344.

between regular migrants and national workers.[53] This subsection will firstly address the principle of equality of treatment, and then examine the exclusive protection of labour rights.

3.2.2.1. Equality of treatment

The principle of equality of treatment protects migrants from discrimination.[54] It derives from the principle of 'equality', which is one of the four guiding principles of the ILO.[55] Since its inaugural session, the ILO has aimed to promote equal treatment for migrant workers vis-à-vis nationals'.[56] According to the Committee of Experts, both ILO Conventions and their respective Recommendations seek to eliminate the 'discrimination in employment and living conditions to which migrant workers are exposed'.[57]

In ILO C97, equality of treatment is enshrined in Article 6, by which states undertake to

> Apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals [...][58]

[53] Weissbrodt, The Protection of Non-Citizens in International Human Rights Law, 184; Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307; Richard B Lillich, *The Human Rights of Alliens in Contemprary International Law* (Manchester University Press 1984) 71; Cholewinksi, The Rights of Migrant Workers' in *International Migration Law Developing Paradigms and Key Challenges*, 258; Nessel, Human Dignity or State Sovereignty?, 333; Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 100.

[54] Pecoud and de Guchteneire, 'Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights Special Issue: Problems Concerning Human Rights', 246.

[55] Janelle Diller M, 'Social Justice, Rights and Labour' in Dinah Shelton (ed), *The oxford handbook of international human rights law* (Oxford University Press 2013) 308.

[56] Lillich, *The Human Rights of Alliens in Contemprary International Law*, 69; Pecoud and de Guchteneire, 'Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights Special Issue: Problems Concerning Human Rights', 245. In this regard, Pecoud and de Guchteneire affirm "The origins of the UN Convention on Migrant Workers' Rights lie in the work of the International Labour Organisation (ILO), which has historically been in charge of the protection of migrants"

[57] International Labour Conference (87th Session) Report III (Part 1B) para. 369.

[58] ILO C97. Article 6.

Article 6 further specifies that the non-discrimination clause applies to matters related to remuneration, union membership, accommodation, social security, employment taxes and legal proceedings pertaining to these issues.[59] This protection is provided 'when it is regulated by law or regulations or is subject to the control of the administrative authorities'.[60] In ILO C143, the corresponding protection is contained in Article 10.[61] This Article requires states to 'promote and guarantee [...] equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory'.[62]

Promoting the principle of equality of treatment can initially be seen as and advancement in protecting the human rights of migrants. In the drafting of certain ILO Conventions predating ILO C97, dating back to 1919, Commonwealth states opposed the introduction of regulations on equal wages and employment conditions, arguing that such regulations would undermine state sovereignty.[63] In fact, it was not until 1920 that the ILO's governing body established an international migration commission tasked developing measures to organise international labour movements with equality of treatment as one of its objectives.[64] However, this commission encountered significant challenges, including entrenched power dynamics and a general reluctance to establish standards for migrant workers.[65] It took twenty-nine years and two world wars before states signed a legally binding instrument that promoted equal treatment between migrant workers and nationals. This demonstrates that treating migrants on par with nationals has been a contentious issue since the early days of international regulation.

Moreover, grounding ILO C97 and C143 in the principle of equality of treatment can be seen as laying the foundation for human rights-based pathways to regular migration. The current human rights-based framework, as proposed by international human rights

[59] ibid.
[60] ibid.
[61] ILO C143 Art. 10.
[62] ibid Art. 10.
[63] ibid.
[64] ibid 690.
[65] ibid 691.

instruments, is built on the principles of equality and non-discrimination,[66]a framework that will be further analysed in Chapter V of this thesis. As stated in the introduction of this thesis, according to this approach, regulating mobility does not mean closing borders, but rather creating accessible, regular, safe, and affordable migration channels.[67] As equal right holders, migrants must be protected at every stage of their migratory process.[68]

Furthermore, equality of treatment may also serve as the basis for a recognised human right to migrate. This is seen in the analysis that Acosta makes of the relationship that South American countries have with foreigners.[69] When he analyses the elements that a right to migrate should entail, he affirms 'a true right to migration should be intrinsically related to equal treatment'.[70] In contrast to the controversies within the ILO, South American nations frequently promoted the rights of freedom of entry and exit shortly after gaining independence in the first half of the twentieth century.[71] These rights were enshrined in several bilateral and multilateral legal instruments that guaranteed South American citizens the same rights and privileges as nationals.[72] Today, this principle is applied to MERCOSUR citizens residing in a MERCOSUR country,[73] as established by the

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[66] UNGA *Human Rights of Migrants. Report of the Special Rapporteur on the Human Rights of Migrants*, Mr. François Crépeau. A/71/285 (4 August 2016), para. 30; UN HRC, *Report on the Compendium of Principles, Good Practices and Policies on Safe, Orderly and Regular Migration in Line with Internatinal Human Rights Law* A/HRC/36/42 (4 September 2017), para. 34 (d).
This is so because international human rights law requires that every person enjoy his or her rights without discrimination. The exceptional differences in treatment between national and non-nationals must be enshrined in national legislation and serve to a legitimate objective. In addition, any action taken to achieve this objective must be reasonable and proportionate. UNGA, 'The impact of migration on migrant women and girls: a gender perspective Report of the Special Rapporteur on the human rights of migrants' para. 17.
[67] UNGA *Human Rights of Migrants Report of the Special Rapporteur on the human rights of migrants, Mr François Crépeau* para. 21.
[68] ibid para. 30.
[69] Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018).
[70] ibid 158.
[71] ibid 65.
[72] ibid.
[73] MERCOSUR, 'Residir' (*MERCOSUR*, 2019) <https://www.mercosur.int/ciudadanos/residir/> accessed 26 September 2019.
The Member Parties of MERCOSUR are Argentina, Brazil, Uruguay, Paraguay, Venezula. It also have Associate States, which are Bolivia, Chile, Colombia, Ecuador, Guyana, Perú and Surinam. For further information regarding MERCOSUR, see its webpage: MERCOSUR, 'Sitio Oficial del MERCOSUR' (*MERCOSUR*, 2019) <https://www.mercosur.int/> accessed 26 September 2019.

Santiago Declaration of Principle for Migration in 2004,[74] one of the early and distinctive documents of the South American integration process.[75]

It is, however, important to evaluate the effectiveness of the principle of equality of treatment and opportunity as recognised in ILO C97 and ILO C143. Article 6 of ILO C97 merely prohibits unequal treatment in the legislation and practices of administrative authorities and imposes a positive obligation on states to adopt legislations or enact measures that ensure equality of treatment.[76] Consequently, the scope of protection of this principle is narrow,[77] and the lack of clarity over what equality of treatment should entail leaves states with a wide margin of discretion.[78] This underscores the ILO's deference to state control over immigration. In contrast, ILO C143 broadens the protection of equal of treatment by requiring states to pursue a national policy designed to promote and guarantee equality of opportunity and treatment.[79] This commitment obliges states to adopt positive measures in practice,[80] and can be regarded as a step towards a human rights-based approach to regular migration, as it clearly identifies both duty-bearers and rights-holders.[81]

Nonetheless, the effectiveness of these protections is undermined by the absence of clearly identified implementation methods in ILO C143.[82] States are free to choose their own methods when declaring and pursuing their policies.[83] While Article 12 of ILO C143 outlines some positive measures that should be incorporated, states are instructed to

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[74] Author's translation from 'Declaración de Santiago sobre Principios Migratorios'. Declaración de Santiago Sobre Principios Migratorios (May 2004) < https://cdn.educ.ar/dinamico/UnidadHtml__get__f0e096bc-13e6-42d1-97c2-e0468339c5a0/14446/data/0575a4a2-c846-11e0-821e-e7f760fda940/anexo1.htm > accessed, 26 September 2019

[75] Lila García, 'Migrations, the State and a Policy of the Human Right to Migrate: Towards a New Era in Latin America?' (2016) 88 Colombia Internacional 107, 110.

[76] International Labour Conference (87th Session) Report III (Part 1B), 371.

[77] Weissbrodt, *The Human Rights of Non-Citizens*, 184.

[78] Chetail, *International Migration Law,* 211.

[79] Weissbrodt, *The Human Rights of Non-Citizens*, 184; Chetail, *International Migration Law*, 211; ILO C143 Art. 10.

[80] International Labour Conference (87th Session) Report III (Part 1B), para. 374; Chetail, *International Migration Law*, 211.

[81] OHCHR DRAFT. *Global Forum on Migration and Development. Addressing Irregular Migration Through a Human Rights Based Approach* (1 December 2011).

[82] International Labour Conference (87th Session) Report III (Part 1B), para. 376.

[83] ibid 376; Chetail, *International Migration Law*, 211.

apply them 'by methods appropriate to national conditions and practice'.[84] The Committee of Experts considers the achievement of equality of treatment to be an obligation of progressive realisation.[85] However, by not specifying direct measures and by leaving the application of these policies subject to varying national conditions, the effective protection of migrants is jeopardised. In times of economic crisis, changes in may prompt states to lower their standards of migrant protection,[86] often leading to the adoption of more restrictive immigration policies and even border closures.[87] Research shows that these measures frequently lead to an increase in irregular migration,[88] as demonstrated by the Chilean case in the previous chapter, which undermines the goal of creating more diverse and regular migration pathways.[89]

3.2.2.2. Equality of treatment, but only with labour rights.

The principle of equality of treatment and opportunity promoted in ILO C97 and ILO C143 is applicable solely to labour rights.[90] ILO C97 does not recognise any human rights for workers beyond their labour rights. It could be argued that this omission is due to ILO C97 having entered into force before the ICCPR and the ICESCR were in existence. However, this argument is easily refuted. ILO C97 was adopted in 1949, just one year after the proclamation of the UDHR, in 1948. By that time, ILO member states had already declared that everyone was entitled to all the rights and freedoms set forth in the UDHR, without any form of distinction.[91] According to Hasenau, by 1947 the ILO's Committee

[84] ILO C143 Article 12.
[85] International Labour Conference (87th Session) Report III (Part 1B), para. 377; Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers', 145.
[86] OECD, 'International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses' [2009] 11, 13.
[87] ibid.
[88] ibid 13–14; Bertinetto, International Regulations on Illegal Migration' (1983) 21 International Migration, 190; Ruben Andersson, *Illegality, Inc. Clandestine Migration and the Business of Bordering Europe* (University of California Press 2014); UNHRC *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility*. UN Doc A/HRC/35/25 (28 April 2017) , para 30.
[89] UNGA, *Making Migration Work for All. Report of the Secretary-General* A/72/643 (12 December 2017), para 4 (c).
[90] Joan Fitzpatrick, 'The Human Rights of Migrants' in T Alexander Alienkoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 177; Nessel, Human Dignity or State Sovereignty?, 344.
[91] *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (US). Art. 2

for Migration of the ILO 'expressed the hope that ILO would receive exclusive jurisdiction in migration questions'.[92] This led to 1947 agreement between the ILO and the UN, whereby the ILO's competences were confined to safeguarding the rights of migrants in their capacity as workers, while the competences of the UN covered 'the rights and the situation of migrants in their quality as aliens'.[93] Although ILO C97 entered into force after this agreement, it does not include any provisions for general human rights protection. Despite the agreement, it is important to examine the concerns raised by the Committee for Migration. By seeking exclusive jurisdiction over migration issues, migrants are essentially treated solely as workers. Since the ILO's objective is to establish labour standards rather than to promote and protect the full spectrum of human rights, only the labour rights are protected under this framework.[94] However, as emphasised by Taran, applying a human rights-based approach to migration requires rejecting the assumption that migrants merely workers.[95] This position is reinforced from a legal-theoretical persepective by Lucas, and from a sociological perspective by Dauvergne.[96] Migrants are individuals involved in a complex and multifaceted migratory process and,[97] as such, require the protection of all their human rights.[98]

The observations provided by the Committee of Experts regarding Article 10 of ILO C143 further support this argument. Article 10 includes the promotion of equality of opportunity and treatment in respect of cultural rights.[99] The Committee of Experts affirmed that the inclusion of these rights 'cannot be considered as anything more than

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[92] Hasenau, ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis, 693.
[93] ibid.
[94] UN OHCHR, 'What We Do' (no date) <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> accessed 22 September 2019.
[95] Patrick A Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization' in Ryszard Cholewinksi and others (eds), *Migration and Human Rights: The UN Convention on Migrant Workers' Rights* (Cambridge University Press 2009)
[96] Lucas, The original wound of immigration policies. On the place of human rights in immigration policies, 65–67; Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* 24.
[97] Lucas, The original wound of immigration policies. On the place of human rights in immigration policies, 65–67; Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* 24; UNGA, 'The impact of migration on migrant women and girls: a gender perspective Report of the Special Rapporteur on the human rights of migrants', para 30.
[98] New York Declaration for Refugees and Migrants (adopted 19 September 2016 UNGA Res A/RES/71/1 (New York Declaration) (US).
[99] ILO C143 Art. 10.

the statement of a general principle whose purpose cannot be to regulate all the matters arising out of its publication'.[100] Furthermore, with regard to education as a cultural right, the Committee of Experts noted that the ILO only takes this right into account when it constitutes a condition for accessing a job.[101] Cultural rights and education are particularly significant for the integration of migrants into their destination countries.[102] Reducing people solely to their economic value contributes to irregular migration.[103] According to Dauvergne, this perspective implies that individuals migrate only for financial reasons, when in reality 'migration is rarely solely about the money'.[104] She argues that reducing migration to mere economic factors limits our 'capacity to think fully about the life experiences of those who are differently situated from us'.[105] In the context of ILO C97 and ILO C143, this approach ultimately results in protecting only the labour rights of migrants.

ILO C143 addressed the previous lack of a general human rights protection by enshrining in Article 1 that member states 'undertake to respect the basic human rights of all migrant workers'.[106] Adopted in 1975, after the ICCPR and ICESCR had already entered into force, this Convention was understood by both the Committee of Experts and scholars to refer to the entire body of human rights gradually codified by the UN.[107] Incorporating this Article could be seen as an advancement in the protection the human rights of migrants and a step towards regular migration, as it opens the door to applying the limitations on national sovereignty contained in the ICCPR, ICESCR, and future international human rights treaties. These limitations will be further analysed in later chapters of this thesis. However, Article 1 of ILO C143 is 'generally viewed as limited in

[100] International Labour Conference (87th Session) Report III (Part 1B), Para. 442.
[101] ibid para. 443.
[102] Castles and Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging*, Routledge, 2000, Ch. 5; IOM, 'Education and Migration. An Assessment of the Types and Range of IOM's Education and under the International Covenant on Economic, Social and Cultural Rights. Advanced Version' UN Doc E/C.12/2017/1 (24 February 2017).
[103] Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* 25.
[104] ibid 24.
[105] ibid.
[106] ILO C143. Art. 1
[107] Bertinetto, International Regulations on Illegal Migration' (1983) 21 International Migration, 194; Linda S Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 The International Migration Review 737, 739, JSTOR; International Labour Conference (87th Session) Report III (Part 1B)para. 296.

scope'.[108] This is evident from the Committee of Experts's interpretation of the word 'basic'. Since ILO C143 does not specify what 'basic' means,[109] the Committee of Experts lists a series of rights that would be applicable, but these rights are focused solely on labour.[110] This brings us back to the issue of protecting migrants merely as workers, rather than recognising them as complex human beings with diverse and valid migratory projects.

Article 5 of ILO C97 requires states to provide appropriate medical services for migrant workers and their family members.[111] This protection covers only the period of departure and arrival.[112] Healthcare is guaranteed only at the time of recruitment, during transit and upon arrival in the destination country.[113] While this Article represents and advancement in protecting the rights of migrant workers and their families by recognising the need for healthcare during the initial stages of the migratory process, neither ILO C97, nor ILO C143 include an explicit provision guaranteeing healthcare for migrant workers and their families once they reside in the destination country.[114] Instead, the Committee of Experts interpretations on this Article are focussed on the health and hygiene conditions under which states send migrants. In their interpretations, Article 5 is designed firstly to ensure that migrants are fit to undertake the journey from their country of origin to the destination country,[115] and, secondly, to avoid migrants having completed the journey to the host country being denied entry on medical grounds.[116]

Under this interpretation, Article 5 does not challenge the right of states to control immigration; rather, it establishes conditions to ensure that migrant workers and their

[108] Bosniak, Human Rights, State Sovereignty and the Protection of Undocumented Migrants', 739.
[109] Bertinetto, International Regulations on Illegal Migration' (1983) 21 International Migration, 194.
[110] International Labour Conference (87th Session) Report III (Part 1B), 'Migrant Workers' (Geneva June 1999) ILC.87/III(1B). The rights are: '(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation', para. 296
[111] ILO C97 Article 5 (a).
[112] ibid Article 5 (a).
[113] Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 120.
[114] ibid.
[115] International Labour Conference (87th Session) Report III (Part 1B), para. 226.
[116] ibid para. 226.

families do not become a burden on the destination state. The Committee of Experts notes that states require medical examinations for migrants, not only to ensure they are free from diseases that might threaten public health, but also to verify that they are healthy enough to work and not 'become a burden on public funds'.[117]

Nevertheless, early steps to limiting states' rights to control migrant entry can be identified from the Committee of Experts' analysis of the medical testing content mandated by states. For instance, the Committee of Experts considered Trinidad and Tobago's practice of prohibiting entry to homosexuals as an 'unacceptable discrimination'.[118] Additionally, dismissals based solely on HIV status are interpreted as discriminatory.[119] The principle of non-discrimination as a limitation on states' border control rights has since evolved within international human rights law. As will be analysed in Chapter V of this thesis, denying migrants entry on health grounds,-except where they pose a genuine threat to public health,[120] may constitute discrimination and could therefore be prohibited.[121]

When migration is viewed solely as an economic phenomenon and combined with the right of states to control migration, states end up distinguishing between 'wanted' and 'unwanted' migrants based on their ability to meet needs of the state's market.[122] De Lucas refers to the 'wanted' as 'good migrants', linking them to the concept of 'real migration',[123] while he labels the 'unwanted' as 'bad immigrants', suggesting that these are the individuals likely to be rejected, especially during economic crises. These distinctions build on the categorisation developed by Castles regarding the phases of migration since 1945.[124] Similarly, Dauvergne identifies this differentiation in terms of legal and illegal migrants, referring to the former as 'insiders' and the latter as

[117] International Labour Conference (87th Session) Report III (Part 1B) (n 7) para. 262.
[118] International Labour Conference (87th Session) Report III (Part 1B) (n 7) para. 262.
[119] International Labour Conference (87th Session) Report III (Part 1B) (n 7) para. 264.
[120] Benton, Meghan and Lawrence Huang. Lessons from COVID-19: Managing Borders in the Next Global Public-Health Crisis. Washington, DC: Migration Policy Institute, 2024.
[121] UNAIDS, IOM, 'UNAIDS/IOM Statement on HIV/Aids-Related Travel Restrictions' (June 2004) 2, 3.
[122] Lucas, The original wound of immigration policies. On the place of human rights in immigration policies, 65–67.
[123] ibid 67.
[124] Castles and Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging,* 54.

'outsiders'.[125] This polarised distinction limits the available paths for regular migration and exacerbates irregular migration as those rejected are forced to seek alternative means of entering or remaining in the country, thereby increasing the likelihood of falling into irregular status.[126]

When migration is considered purely an economic matter, the emphasis is placed on the state's economic needs. In contrast, a human rights-based approach centres on the rights of migrants and the obligations that states must meet to guarantee, protect and fulfil these rights. However, Paragraph 1 of ILO R151 demonstrates that migration is often framed from the perspective of state needs, asserting that a coherent policy on international migration should be 'based upon the economic and social needs of both, countries of origin and countries of employment'.[127] Consequently, the primary subject of protection becomes the state rather than the individual, thereby strengthening national sovereignty. This stance, however, may conflict with the human rights of migrants.

In conclusion, applying the principle of equality of treatment between regular migrants and nationals marks a significant advance in protecting migrants' rights, especially in safeguarding labour standards. However, focussing solely on labour standards is insufficient because migrants are more than just workers. In ILO C97 and ILO C143, migrants are primarily viewed through the lens of labour, which reduces migration to an economic phenomenon and treats migrants in an instrumental manner.[128] This approach risks limiting them to the role of useful workers rather than recognising them as human beings engaged in a complex and multifaceted migratory process.[129] Moreover, the strong emphasis on national sovereignty enables states to reject migrants deemed

[125] Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* 18.
[126] Bartolini and others, *Exploring the Links,* 1.
[127] ILO R151. Art. 1.
[128] This concept is further developed by de Lucas. Javier de Lucas, 'Globalización, Migraciones y Derechos Humanos: La Inmigración Como Res Politica' [2004] Cuadernos electrónicos de filosofía del derecho, ISSN 1138-9877, Nº 10, 2004 (Ejemplar dedicado a: Los emigrantes como nuevos actores del desarrollo Globalización, migración, participación y derechos humanos (Valencia, 27, 28 y 29 de octubre de 2004)). (Globalisation, Migration and Human Rights: Immigration as a political res).
[129] Lucas, The original wound of immigration policies. On the place of human rights in immigration policies, 65–67; Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* 24.

unproductive, thereby diminishing the pathways for regular migration and contributing to irregular migration.

3.2.3. The protection of the family members of regular migrant workers.

The Committee of Experts noted that ILO C97 and ILO C143, along with their complementary Recommendations were drafted with the understanding that migration is not solely an economic phenomenon, but also a social one.[130] They recognised that migration for employment often impacts not only the individual involved in the employment relationship, but also their family members.[131] Moreover, the Committee of Experts observed that throughout ILO instruments, 'the protection of many of the rights outside the employment relationship as such are explicitly extended to the members of migrant workers' families'.[132] These observations can be used to counter critics of the purely economic perspective on migration discussed in the previous sub-section and serve as a starting point for advancing regular migration pathways. This suggests that the ILO Conventions do not regard migrants solely as workers, but instead, could potentially broaden the scope of protection, especially considering that family members now account for roughly one-third of the immigration flow.[133]

However, the Committee of Experts also affirmed that the protection afforded to the family members of migrant workers applies only if they are legally entitled to accompany the migrant.[134] To determine whether this protection truly opens pathways to regular migration, a deeper analysis is needed. This analysis will firstly examine the definition of 'family' as provided by ILO C97 and ILO C143, and then assess the rights that these

[130] International Labour Conference (87th Session) Report III (Part 1B), para 102.
[131] International Labour Conference (87th Session) Report III (Part 1B), para 102.
[132] ibid.
[133] OECD, 'Global Migration Data Portal' (*Migration data portal*, no date) <https://migrationdataportal.org/> accessed 9 August 2019; Chetail, 'The Transnational Movement of Persons under General International Law - Mapping the Customary Law Foundations of International Migration Law', 41.
[134] International Labour Conference (87th Session) Report III (Part 1B), para. 102.

Conventions recognise for these family members, with particular emphasis on family reunification and other specific rights applicable to this group.

3.2.3.1. Definition of members of the family of the migrant

Article 13 (2) of ILO C143 defines 'members of the family of the migrant', as 'the spouse and dependent children, father and mother'.[135] This definition entails a clear male gender focus, is strictly heterosexual and overlooks the decline of marriage, particularly among highly mobile populations. Moreover, it does not take into account that the concept of family may vary according to cultural values. Although the Committee of Experts later addressed the male gender focus by recommending that states avoid gender-specific nouns,[136] the definition remains narrow and conservative, covering only heterosexual married couples and only recognising children and parents as dependants.[137]

Defining family in international law is inherently complex due to the absence of a single, universally accepted definition.[138] Changes in family structures, driven by gender equality, the recognition of the autonomy of the child, and the impact of different cultures, challenge traditional conservative notions of family.[139] Sexual diversity further challenges the conservative concepts of family, as it includes same sex-unions.[140] As a result, 'in order to protect the rights of family members adequately, international law must be [...] sufficiently flexible to accommodate a wide range of different family

[135] ILO C143. Art. 13 (2)
[136] International Labour Conference (87th Session) Report III (Part 1B), para 20.
[137] ibid para 103.
[138] Geraldine Van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches' (1995) 17 Human Rights Quarterly 732, 734; Kate Jastram, 'Family Unity' in Chetail Chetail Vincent and T Alexander Alienkoff (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 197.
[139] Van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches', 734; Hélène Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Migration Law* (Edward Elgar 2014) 200, 2001; UNHCR, 'Background Note for the Agenda Item: Family Reunification in the Context of Resettlement and Integration.' (20–21 June 2001) Annual Tripartite Consultations on Resettlement, Geneva para. 14.
[140] Kate Jastram, 'Family Unity: The New Geography of Family Life' (*migrationpolicy.org*, 1–May 2003) 202 <https://www.migrationpolicy.org/article/family-unity-new-geography-family-life> accessed 24 September 2019.

structures and values'.[141] The HR Committee, has taken steps to broaden the concept of family in its interpretations under Article 17 of the ICCPR.[142] In *Hopu and Bessert v. France*, the HRC declared that 'cultural traditions should be taken into account when defining the term family in a specific situation'.[143] Furthermore, in General Comment No.16, it affirmed that the term 'family' should be 'given broad interpretation to include all those comprising the family as understood in the society of the state party concerned'.[144] *Hopu and Bessert v. France* is dated from 1997, while the General Comment No. 16 is dated from 1998. Thus, both of these documents were published before the General Survey of the Committee of Experts, which dates from 1999. However, the Committee of Experts retained the narrow conception of family as described above. This divergence highlights a lack of dialogue among international bodies tasked with protecting migrant rights and contributes to a fragmented approach of the protection of the rights of migrant workers.[145] Scholars affirm that such fragmentation promotes irregular migration.[146]

Overall, the definition of family members in Article 13 of ILO C143 is disconnected from the reality of contemporary family life. It lacks the necessary flexibility to accommodate evolving family structures, and the Committee of Experts has not updated this approach to reflect current societal norms. As a consequence, individuals who might initially migrate with the migrant worker are excluded.

3.2.3.2. Family Reunification

[141] Van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches', 734; Similarly, Jastram, Family Unity: The New Geography of Family Life'.
[142] International Covenant on Civil and Political Rights' (first published 1966, 23 March 1976) 999 UNTS 171 (ICCPR) Article 17.
[143] UN CCPR *Francis Hopu and Tepoaitu Bessert v. France*, Communication No 549/1993 CCPR/C/60/D/1993/Rev.1 (29 December 1997), (*Hopu and Bessert*), para. 10.3
[144] UN CCPR *General Comment No. 16: Article 17 (Right to Privacy). Thiry second session, 1988* in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN1/1Rev.9 (Vol.1) (27 May 2008) para.5.
[145] Chantal Thomas, 'Conceptualizing International Migration Law. Remarks by Chantal Tomas' (2016) 110 204, 205, Academic OneFile; E Tendayi Achiume, 'The Fatal Flaw in International Law for Migration Commentaries' (2017–18) 56 Colum J Transnat'l L 257, 258.
[146] Thomas, 'Conceptualizing International Migration Law. Remarks by Chantal Tomas', 205; Achiume, 'The Fatal Flaw in International Law for Migration Commentaries', 258.

The definition of family is particularly relevant for family reunification matters.[147] Jastram defines family reunification as 'the efforts of family members already separated by forced or voluntary migration to regroup in a country other than the one of their origin, and so implicates state discretion over admission'.[148] This term forms part of the broader concept of 'family unity', which encompasses issues related to admission, stay, and expulsion.[149] Family reunification is especially significant for the rights of the child,[150] as it t requires states to permit migrants to enter and remain in their territory in order to be reunited with their families.[151] As a result, this requirement may conflict with the right of states to control their borders.[152]

Family Reunification is regulated in Article 13 (1) of ILO C143.[153] According to this Article, member states 'may take all necessary measures which fall within its competence and collaborate with other members to facilitate the reunification of the families of all migrant workers legally residing in its territory'.[154] Notably, family reunification was not included in ILO C97 which makes its inclusion in ILO C143 particularly significant.[155] However, the wording of Article 13(1) is weak because it uses the word 'may' rather than 'should',[156] meaning that no duty to reunite migrant workers with their families is imposed on states.[157]

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[147] Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law*, 153; Jastram, 'Family Unity', 197; Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', 200.
[148] Jastram, 'Family Unity', 185.
[149] Jastra, 'Family Unity'.
[150] UNICEF, 'Refugee and Migrant Crisis in Europe' (May 2016); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), art. 9 and 10; UN OHCHR, 'Separating Children from Undocumented Migrant Parents is Shocking, Inhumane and Has Dire Effects on the Children' (19 October 2018).
[151] Jastram, 'Family Unity', 194; UNICEF (n 154).
[152] Jastram, 'Family Unity',194.
[153] Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers', 149; Lillich, *The Human Rights of Alliens in Contemprary International Law*, 74; Cholewinksi, Ryszard, Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment, 118.
[154] ILO C143. Art. 13 (1)
[155] Lillich, *The Human Rights of Alliens in Contemprary International Law*, 74.
[156] Cholewinksi, Ryszard, Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment, 118; Lillich, *The Human Rights of Alliens in Contemprary International Law*, 74.
[157] Cholewinksi, Ryszard, Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment, 118.

ILO R151 broadened the obligation in paragraph 13[158] by stating that 'all possible measures *should* be taken [...] to facilitate the reunification of families of migrant workers as rapidly as possible'.[159] However, since ILO Recommendations are not legally binding instruments, the discretionary power of states regarding the family life of migrant workers continues to prevail over their right to be reunited. The weakness of this Article is considered especially controversial.[160] This is demonstrated by the practice of member states after the entry into force of ILO C147, as many have refrained from admitting family members as defined in Article 13 of ILO C147 and have imposed additional prerequisites for their admission.[161] Rather than providing more flexible pathways for regular migration, states have used their discretionary powers to apply stricter migration controls.

Human rights-based pathways for regular migration are directly linked with family reunification.[162] However, the framework established by ILO C97 and C143 for family reunification ultimately reflects a balance that favours the protection of national sovereignty.

3.2.3.3. Substantive rights recognised to the family members of the migrant

Regarding the substantive rights of migrant workers' family members, ILO C97 provides protection in Article 5, as discussed above.[163] In addition, Article 6 of ILO C97 obliges member states to grant treatment regarding family allowances in remunerations,[164] and

[158] International Labour Conference (87th Session) Report III (Part 1B) para 103.
[159] ILO R151. Art. 13 (1).
[160] Fitzpatrick, The Human Rights of Migrants', 177.
[161] Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 119.
[162] UNGA, '*Making migration work for all'* , para 38; UNGA, '*The impact of migration on migrant women and girls: a gender perspective Report of the Special Rapporteur on the human rights of migrants'* para 80 (g).
[163] ILO C97. Art. 5(a) and (b). "Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for-- (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health; (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination."
[164] ibid. Art 6(1)(a)(i)

social security, including family responsibilities,[165] that is no less favourable than afforded to nationals.

ILO C 147 addresses the rights of family members in Article 10. This Article includes a provision on equality of opportunity with respect to employment and occupation, implying that family members should have a free choice of employment.[166] In principle, such a right would open pathways for regular migration by enabling family members to work, even if their initial migration was not employment driven, thereby reducing their likelihood of resorting to the irregular market. However, as affirmed by Hassenau, this right is implicitly restricted.[167] Article 10 of ILO C143 does not impose an obligation on states to issue work permits to family members solely on the basis of their relationship with the migrant worker,[168] nor does it limit state's discretion to exercise immigration control.[169] States are free to establish their own conditions for granting work permits, meaning that family members can access employment only if they secure such permits. Therefore, this group will only be able to access employment if they possess a work permit.[170] In other words, they will only be able to freely choose their job if they are migrant workers themselves. This leads to the conclusion that the protection provided by Article 10 of ILO C143 for the family members of migrant workers is largely illusory.

These provisions constitute the only explicit protections for the family members of regular migrant workers, which underscores that the focus remains essentially on labour-related rights. Further rights are not recognised; for example, there is no provision protecting the residence permit of the members of the family in case of death or dissolution of their marriage. This omission likely explains why Chetail affirms that ILO C97 and ILO C143 'contain very few provisions on family',[171] and why Bosniak goes

[165] ibid. Art 6(1)(b)
[166] Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers', 150.
[167] ibid.
[168] ibid.
[169] ibid.
[170] ibid.
[171] Chetail, *International Migration Law*, 223.

further to assert that 'ILO Convention does not protect the family members of migrant workers'.[172]

Protecting the family members of migrant workers is crucial for creating human rights-based pathways to regular migration. In this regard, Acosta suggests that a fundamental right to migrate would address three key questions. Whether an individual right to family reunification exists, which family members may join the migrant worker (sponsor), and what the conditions of residence and rights for these family members should be.[173] The analysis in this subsection demonstrates that the provisions in ILO C143 offer negative and narrow responses to these questions. The limited definition of family members, the ineffective protection of family reunification and the lack of substantive rights for migrant workers' families represent shortcomings rather than advantages in establishing human rights-based pathways for regular migration.

3.3. Treatment of irregular migration by ILO C97 and ILO C143.

3.3.1. Initial exclusion from the definition and further inclusion in protection.

The definition of 'migrants for employment' in common Article 11 of ILO C93 and ILO C147 refers only to migrants who are 'regularly admitted',[174] therefore excluding irregular migrants, that is, those who 'owing to unauthorized entry, breach of a condition of entry or the expiry of his or her visa, lacks legal status in a transit or host country'.[175] This exclusion is extended in ILO C97,[176] as Article 6 applies solely to 'migrants lawfully within' the territory of a member state. Similarly, part II of ILO C143[177] grants equality of opportunity and treatment only to persons who, as migrant workers or as members of their families are lawfully present in the country.[178] The sole only exception to this

[172] Bosniak, Human Rights, State Sovereignty and the Protection of Undocumented Migrants', 739.
[173] Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law*, 153.
[174] ILO C97; ILO C143. Art. 11
[175] IOM, 'Glossary on Migration' (2011) 54.
[176] ILO C97. Art 6 (1).
[177] ILO C143. Art. 10 - 14
[178] ibid Article 10.

exclusion appears in Part I of ILO C143, entitled 'Migration in Abusive Conditions',[179] which begins by recognising basic rights for 'all migrants' in Article 1.[180] As a result, ILO C143 is often considered 'the first multilateral treaty to address the rights of irregular migrants directly'.[181] The historical and legal context in which ILO C143 was created explains this inclusion,[182] as Bertinetto recounts:

> In 1972, a sealed truck theoretically carrying sewing machines, broke down near Geneva. It turned out to be transporting 38 African workers from Mali who were travelling to France from Tunisia through Italy and Switzerland. The UN Economic and Social Council was meeting in Geneva at the time, and it was this incident that triggered the decision of the UN to take action regarding the clandestine traffic in manpower and illegal migration. And it was this same incident that gave an impetus to the work of the ILO which culminated three years later – also in Geneva – in the adoption of the ILO Convention 143.[183]

This context is reflected in the preamble of ILO C143,[184] which states that its aim is to combat irregular migration.[185] Unlike ILO C97, the preamble of ILO C143 also affirms the right of everyone to leave and enter their own country, as declared in the UDHR and codified in the ICCPR.[186] One might interpret this framing as recognising a right to migrate, or at a minimum, imposing a duty on states to facilitate regular migration. After all, for the right to depart one's own country to be effective, another country must permit entry – a point Chetail describes as a 'normative disjuncture between departure and admission'.[187] Nevertheless, Part I of ILO C143 ultimately reinforces sovereign control rather than establishing pathways for regular migration, for several reasons.

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[179] ibid. Art 1 – 9.
[180] ibid. Art 1
[181] Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307.
[182] In this regard, Cholewinski affirms that ILO Convention 143 was "adopted at a time when particular migration abuses, such as the smuggling of migrant workers, were attracting the attention of the international community". Cholewinksi, 'The Rights of Migrant Workers' in *International Migration Law Developing Paradigms and Key Challenges*, 258; Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 132.
[183] Bertinetto, International Regulations on Illegal Migration' (1983) 21 International Migration, 189–90.
[184] ILO C143. "*Considering the evidence of the existence of ilicit and clandestine trafficking in labour call for further standards specifically aimed at eliminating these abuses*".
[185] Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307; Fitzpatrick, The Human Rights of Migrants' , 177; Chetai, *International Migration Law*, 205.
[186] ILO C143. Preamble.
[187] Chetail, 'The Transnational Movement of Persons under General International Law - Mapping the Customary Law Foundations of International Migration Law', 11.

Firstly, there is obligation for states to regularise irregular migrants. Article 9 of ILO C143 allows member states to grant irregular migrants the right to stay and work by stating 'nothing in this convention shall prevent members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment'.[188] Furthermore, paragraph 13(1) of ILO R151 offers procedural guidance on regularisation, suggesting that decisions be made as soon as possible so that migrant workers can learn whether their status can be regularised.[189] At a first glance, these provisions might seem to pave the way for human rights-based pathways for regular migration by enabling regularisation rather than merely suppressing irregular migration.[190]

However, the nature of Article 9 is largely declaratory, and no binding duty to regularise irregular migrants is imposed.[191] In effect, allowing states the discretion to grant the right to work and to stay to irregular migrants simply acknowledges their broader power to control immigration. Even though paragraph 13(1) of ILO R151 uses the word 'should' instead of 'may' as in ILO C143, Recommendations are not a legally binding. The opening sentence of paragraph 13(1) of ILO R151 reiterates the right of states to exercise immigration control by stating 'without prejudice to measures designed to ensure that migrant workers and their families enter the national territory and are admitted to employment in conformity with the relevant laws and regulations'.[192] Moreover, neither ILO C143, nor ILO R151 provide clear guidance on how migrants should be regularised.[193] According to the Committee of Experts, ratifying states are not required to take any specific measures for the regularisation of irregular migrants.[194] As previously noted, there is no direct duty on states to admit migrant workers or to grant them regular status.[195]

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[188] ILO C143 Art. 9 (4).
[189] ILO R151 para. 13(1).
[190] Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 135.
[191] ibid 134.
[192] ILO C143 para. 8(1).
[193] Chetail, *International Migration Law*, 207.
[194] International Labour Conference (87th Session) Report III (Part 1B), para 299.
[195] Chetail, *International Migration Law*, 202.

Secondly, the duties imposed on states by ILO C143 do little to create pathways for regular migration and may even exacerbate vulnerabilities among migrants. Article 2 of ILO C143, requires member states to 'systematically seek to determine whether there are illegally employed migrant workers on its territory'.[196] Chetail describes this as a duty of detection;[197] however, it is not balanced by any obligation to avoid seeking irregular migrants in spaces where fundamental rights are protected, such as hospitals, legal aid offices, or courts.[198] Instead, it enables states to expel irregular migrants imposing only limited restrictions on such expulsions – a matter that will be further explored in the next subsection. In addition, Article 6 mandates that member states to adopt 'national laws or regulations for the effective detection of the illegal employment of migrant workers,[199] but these measures do not come with an obligation to refrain from criminalising irregular migrants. Consequently, there is a risk that domestic legislation will adopt an overly punitive approach, as has been observed in Italy.[200]

Furthermore, ILO instruments draw a clear distinction between the rights afforded to regular migrants and those extended to irregular migrants.[201] Article 9(1) of ILO C143 guarantees equality of treatment for irregular migrants and their family members regarding rights arising from of past employment, such as remuneration, social security and other benefits.[202] However, this equality of treatment is measured against regular migrants rather than against nationals.[203] Irregular migrants are explicitly excluded from the protections provided by the principle of equal opportunity and treatment with

[196] ILO C143. Art. 2 (1)
[197] Chetail, *International Migration Law*, 205.
[198] Currently, refraining from seeking irregular migrants in these spaces is understood as 'Firewalls', UNGA *Human Rights of Migrants. Report of the Special Rapporteur on the Human Rights of Migrants, Mr. Felipe González* UN Doc A/73/178/Rev.1(25 September 2018) .
[199] ILO C143. Art. 6 (1).
[200] ILO, 'Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations.' (2012) 908–09, ILC.101/III1A. It is relevant to highlight here, that the repressive measures where adopted due to the effects that the global economic crisis had in Italy. This also demonstrates the effects that migration control has in irregular migration in times of crisis.
[201] Weissbrodt and Rhodes, United Nations treaty bodies and migrant workers, 307.
[202] ILO C143. Art. 9 (1)
[203] Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 134; Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers', 151.

nationals,[204] as Article 10 of ILO C143 applies only to migrants who are 'lawfully' present in the destination country.[205]

Thirdly, rather than promoting pathways to irregular migration, ILO C143 primarily emphasises states' sovereign to control their borders as a means of detecting irregular migration. Article 3 of ILO C143 commits each member state to 'adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other members to supress clandestine movements of migrants for employment [...]'[206]. Committee of Experts interpretations reinforce that:

> the Convention does not in any way affect the sovereign right of each member state to allow or refuse to allow a foreigner to enter its territory, leaving it to each state to determine the manner in which it intends to organize the potential entry of migrant workers or the refusal of their entry'.[207]

The committee also noted that the measures implemented by states typically include police checks and assign responsibility to transport companies for verifying travel documents and residence permits.[208] Clearly, the extensive discretionary powers granted to states for control serve to eliminate alternative migration pathways.

The outcome of applying this legal framework to combat irregular migration is evident. More than five decades after the incident that spurred the creation of ILO C143, similar situations persist – and likely with increasing frequency and severity. Reports from NGO's and contemporary news sources highlight these ongoing issues,[209] underscoring

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[204] Cholewinksi, Ryszard, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment,* 133.
[205] ILO C143 Art. 10.
[206] ibid. Art. 3
[207] International Labour Conference (87th Session) Report III (Part 1B), para 295.
[208] International Labour Conference (87th Session) Report III (Part 1B), para 324.
[209] El País, 'The Figures of the Migration Crisis at the Border Between the United States and Mexico' (22 July 2019) https://elpais.com/internacional/2019/07/22/america/1563811397_922321.html accessed 27 September 2019; El Comercio, 'Mexico Detains 791 Migrants Who Were Traveling Hidden in Four Trucks Mexico' (26 September 2019) https://elcomercio.pe/mundo/mexico/mexico-hallan-791-migrantes-cuatro-camiones-veracruz-noticia-nndc-645814-noticia/ accessed 27 September 2019; UN OHCHR, '*Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya'* (20 December 2018); UNHCR, '*Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe´s Borders'* (January–December 2018).

the need to examine how have these standards evolved in international human rights law.

3.3.2. Solving irregular migration by protecting regular migration status.

Irregular migration can occur even when migrants reside in the destination country, leaving them at risk of expulsion. This subsection examines how ILO C97 and ILO C143 attempts to prevent irregular migration by protecting the regular migration status, focussing on residence rights and protection from expulsion under three key approaches.

Firstly, Article 8 (1) of ILO C97 prohibits the expulsion of migrants admitted on a permanent basis - and their family members - if the migrant is unable to continue their occupation due to an illness or injury contracted after entry, unless there is an agreement that allows it between the sending and the receiving states.[210] According to the Committee of Experts, this Article provides 'security of residence' for permanent migrants and their families in cases of health issues or injury', and it is considered one of the most important provisions of ILO C97[211]. This Article could form a basis for creating pathways for regular migration by protecting the regular status of migrants and thus restricting national sovereignty when all the stipulated conditions are met.[212] However, its protection is limited to those with permanent residence and it applies only for health reasons, excluding temporary or fixed-term workers. [213] Moreover, the protection does not apply if states have signed an agreement concerning the return of migrants, demonstrating that even this key provision is subject to the overriding tension with territorial sovereignty.

Secondly, paragraph 18 of ILO R86[214] requires member states to refrain, *as far as possible,* from expelling a regularly admitted migrant due to their lack of means or an

[210] ILO C97. Art. 8
[211] International Labour Conference (87th Session) Report III (Part 1B), para 608.
[212] Chetail, *International Migration Law*, 203, 204.
[213] ibid 204.
[214] ILO R86.

unfavourable employment market – an agreement between the sending and receiving states permits it.[215] This provision shifts the focus from health-related issues, as in Article 8 of ILO C97, to the migrant's financial circumstances and the state of employment market. Although this duty could potentially foster pathways for regular migration by limiting expulsion, the phrase 'as far as possible' underscores its declaratory nature and the prevailing right of states to control migration. In effect, states are still permitted to expel migrants under these two conditions. This reinforces the distinction between 'wanted' and 'unwanted' migrants – particularly economic crises, where the migrant's situation (such as lack of financial means) and the state's circumstances (such as the state of the employment market) influence decisions. The sole limitation on these discretionary powers is an agreement between the sending and the receiving states, which often includes the 'principle that no migrant shall be removed who has been there for more than five years'.[216]

Thirdly, an evolution from paragraph 8 of ILO R86 is evident in Article 8 of ILO C143. This Article protects migrant workers who lose their jobs by stipulating that they

> shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of their employment, which shall not in itself imply the withdrawal of their authorization of residence or, as the case may be, work permit.[217]

The use of 'shall not' in this Article clearly limits the discretionary power of states over border control. Moreover, unlike ILO C 97 and ILO R86, this protection does not depend on the length of the migrant's stay. The significance of this change is underscored by reports from several member states; according to the Committee of Experts some considered Article 8 with their national legislation,[218] perceiving it as a threat to their national sovereignty. In fact, many viewed it as a barrier to ratifying Part I of ILO C143.[219] In response, the Committee of Experts noted that 'this provision appears only in one part

[215] Lillich, *The Human Rights of Alliens in Contemprary International Law* ,72. ILO R86, Art. 18 (1).
[216] Lillich, *The Human Rights of Alliens in Contemprary International Law* ,72; ILO R86. Art 18 (2)
[217] ILO C143. Article 8(1)
[218] International Labour Conference (87th Session) Report III (Part 1B), para 590.
[219] ibid para 597.

of the Convention, which can be excluded from ratification',[220] once again highlighting the predominance of national sovereignty over the creation of regular migration pathways.

3.4. Conclusion

In summary, this chapter analysed ILO C97 and ILO C143 as foundational instruments in the regulation of migrant workers' rights. While these conventions represent a significant milestone by establishing the first multilateral definitions and frameworks for migrants, their focus remains predominantly on labour-related rights. As a result, they do not provide a comprehensive basis upon which states can develop and apply a human rights-based approach to migration. The prospective nature of the definition of migrant worker, emphasising the intention to work, demonstrates an intention towards creating flexible pathways to regular migration; however, in practice, this approach often remains largely aspirational. Furthermore, the analysis revealed that the protections offered under ILO C97 and ILO C143 are limited in scope. Migrants are primarily viewed through an economic lens which restricts the protection to labour standards while excluding broader human rights considerations and the right of family members. The examination of the provisions related to family reunification and substantive rights underscores that, despite some advances, the overall framework falls short in fully recognising the complex multifaceted nature of migration.

Additionally, the treatment of irregular migration within these conventions highlights a persistent tension between national sovereignty and the creation of effective human rights-based pathways for regular migration. Although certain provisions aim to regularise irregular migrants and protect them from expulsion, the overriding emphasis on state discretion ultimately curtails these efforts.

Overall, while ILO C97 and ILO C143 have laid the groundwork for the international protection of migrant workers' rights it was demonstrated that a more holistic approach

[220] ibid.

that includes a broader and more inclusive recognition of migrants' rights is needed. The next chapters further explore how international and Inter-American human rights law reconcile a balance between national sovereignty and migrants' rights, while analysing the extent to which they evolved to creating regular pathways for migration.

CHAPTER IV

DUTIES TO PERMIT REGULAR ENTRY AND STAY IN THE INTERNATIONAL AND INTER-AMERICAN HUMAN RIGHTS SYSTEM

4.1. Introduction

The previous chapter demonstrated that ever since ILO C97 and ILO C143, the international migration framework has prioritised border control over the creation of regular migration pathways. As addressed in the introduction of this thesis, scholarly literarue agrees that there is no recognised right for migrants to enter or to remain in a country, and although regularisation is encouraged, states are granted broad discretion. Moreover, these regulations focus on migrants solely as a source of labour. This chapter examines how the protection of migrants has evolved within human rights law, particularly in relation to facilitating regular migration pathways. Specifically, it aims to determine whether international and Inter-American human rights law impose any obligations on states to permit entry of migrants in countries other than their own. To achieve this, the chapter analyses the evolving interpretations by human rights institutions regarding admission and exclusion of migrants.

The next subsection offers an overview of the interpretative role of human rights law. Consequently, the chapter reviews the human rights law governing the entry and stay of migrants in countries other than their own and then investigates the evolving interpretations of these regulations. Initially, it analyses interpretations within the international human rights system, followed by those within the Inter-American human rights system. The analysis incorporates human rights instruments to which Chile is a party, as well as the evolving interpretative approaches within both systems, thereby enabling an assessment of how these systems interact. While the analysis acknowledges the rights of migrants, it seeks to extend beyond the rights enshrined in

the International Convention on the Rights of Migrant Workers and their Families (ICRMW), since the state's obligation under the ICRMW 'must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party'.[1] Ultimately, the chapter concludes that the international human rights systems clearly impose limitations on the discretion of states regarding the entry and stay of migrants, identifying the principle of non-discrimination and the prohibition against torture between the specific scenarios that afford human rights protection during the entry and stay of migrants.

4.1.1. Evolving interpretation of human rights law

Following the thesis' central argument that irregular migration stems from the absence of regular migration pathways,[2] this chapter explores the consensus among human rights institutions that an effective solution for preventing irregular migration lies in facilitating regular migration pathways, creating accessible and realistic mobility channels for migrant workers and their families at all skill levels.[3] As noted in Chapter I, applying human rights norms to the facilitation of regular migration pathways aligns with the approach advanced by Crépeau and contributes to the construction of a human rights-based approach to irregular migration. Moreover, such an approach has been endorsed by UN member states in the Global Compact on Migration[4] and the New York

[1] UN CMW, *General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families* UN Doc CMW/C/CG/2 (28 August 2013) para 7.
[2] IOM, *Issue Brief # 6. Irregular Migration and Regular Pathways, Including Decent Work, Labour Mobility, Recognition of Skills and Qualifications and Other Relevant Measures* (no date) <https://refugeesmigrants.un.org/sites/default/files/ts6_issues_brief_0.pdf> accessed 24 August 2019; UNGA, *Making Migration Work for All. Report of the Secretary-General* UN Doc A/72/643 (12 December 2017) para 34; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility* UN Doc A/HRC/35/25 (28 April 2017) paras 28 - 31, 44.
[3] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants* Un Doc A/HRC/38/41 (4 May de 2018) para 92 f); UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility* para 45; UN CMW, *General Comment No. 1 on Migrant Domestic Workers* Un Doc CMW/C/CG/1 (23 February 2011) para 51; UN CMW, *General Comment No. 2* para 16.
[4] UNGA, *Global Compact for Safe, Orderly and Regular Migration* UN Doc A/RES/73/195 (11 January 2019) [Global Compact for Migration].

Declaration of 2016,[5] and facilitating regular migration is also included as a target within the Sustainable Development Goals.[6]

However, it is important to note that facilitating migration pathways is not a specific obligation in international human rights law. No text explicitly grants a right to enter or remain in a country other than one's own; under the principle of territorial sovereignty, states retain the right to determine admission and exclusion of migrants. As shown in the previous chapter, state sovereignty prevails in ILO C97 and ILO 143. Nonetheless, migrants continue to enjoy most human rights throughout the entire migration process, which, according to the ICRMW, includes 'preparation for migration, departure, transit and the entire period of stay and remunerated activity in the state of employment, as well as return to the state of origin or the state of habitual residence'.[7] States are obliged to respect these rights, even as they exercise their authority over who may enter or remain within their borders, including those in an irregular situation. In essence, while national sovereignty underpins migration control, this right is not absolute; it is limited by the human rights obligations to which states are bound.[8]

Human rights obligations emanate from the rights contained in human rights treaties, which, concurrently set the human rights standards. Consequently, when a state ratifies a human rights treaty, it becomes bound by the human rights obligations contained therein. This is where evolutionary interpretation becomes relevant. For evolutionary interpretation to be applied, two elements must be met: time and change.[9] Human rights law tracks these two elements. Much time has passed since the human rights treaties entered into force, and many of the circumstances under which they were agreed have

[5] UNGA, New York Declaration for Refugees and Migrants (adopted 19 September 2016) UN Doc A/RES/71/1 [New York Declaration].
[6] UNGA, Transforming our World: The 2030 Agenda for Sustainable Development UN Doc A/RES/70/1 (2015) Goal 10, target 7.
[7] ICRMW Article 1 para 2.
[8] Linda S Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 The International Migration Review 743; Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 6; Saskia Sassen, *Loosing Control? Sovereignty in an Age of Globalization* (Columbia University Press 2015) 70, 72, 77.
[9] Georges Abi-Saab and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2021) 15.

changed. This evolution is acknowledged by regional human rights courts. In *Tyrer v United Kingdom*,[10] the European Court of Human Rights affirmed, 'the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions'.[11] A similar approach was later adopted by the IAHR Court in the Advisory Opinion *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,*[12] where the court stated that human rights treaties 'are living instruments, the interpretation of which must evolve with the times and current living conditions'.[13] Due to the dynamic character of human rights law, human rights obligations 'evolve to reflect rights in the modern world'.[14] As a consequence, evolutionary interpretation is necessary.[15]

There are specific institutions, both within the international and the Inter-American human rights systems, mandated to guide states in implementing the human rights treaties to which they are parties, as well as in promoting fundamental human rights more broadly. They do so by applying evolutionary interpretation. This chapter analyses the interpretations of these institutions, mainly, the UN Human Rights Treaty Bodies, the UN Special Rapporteur on the Human Rights of Migrants and the IAHR Court.

The UN Human Rights Treaty Bodies are the 'primary interpreters' of the international human rights treaties.[16] These committees of experts 'monitor the implementation of the core international human rights treaties'.[17] Although each human rights treaty sets out the specific functions, working methods, and thematic focus for its corresponding treaty body there are general tasks common to all.[18] In general, UN Human Rights Treaty Bodies

[10] *Tyrer v The United Kingdom,* European Court of Human Rights App No 5856/72 2 EHRR 1 (25 April 1978).
[11] ibid 31.
[12] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights, OC-21/14 (19 August 2014) [*Rights and Guarantees of Children in the Context of Migration]* para 55.
[13] ibid.
[14] Kasey McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte, Gammeltoft-Hansen and John Cerone (eds), *Tracing the role of Soft Law in Human Rights* (Oxford University Press 2016) 27
[15] McCall-Smith, 'Interpreting International Human Rights Standards' 28.
[16] McCall-Smith, 'Interpreting International Human Rights Standards' 27.
[17] UN OHCHR, 'What Are the Treaty Bodies?' (*Treaty Bodies*, 2022) <https://www.ohchr.org/en/treaty-bodies> accessed 7 July 2022.
[18] UN OHCHR, 'What the Treaty Bodies Do' (*Treaty Bodies*, 2022) <https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do> accessed 7 July 2022.

consider state reports and individual complaints, conduct enquiries and adopt general comments.[19] It is through the exercise of these tasks, and mainly in the adoption of general comments, that the provisions of their treaties are interpreted. The evolutionary nature of these interpretations is well acknowledged by scholars.[20]

The Special Procedures of the Human Rights Council also play a significant role in the evolutionary interpretation of human rights obligations, as they are mandated to 'contribute to the development of human rights standards'.[21] They are 'independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective'.[22] These experts undertake country visits, send individual communications to states in cases of reported human rights violations, engage in advocacy, raise public awareness and provide advice for technical cooperation.[23] The Special Procedures can take the form of Special Rapporteurs, Independent Experts and Working Groups. In the context of migration, the Human Rights Council appointed a Special Rapporteur on the Human Rights of Migrants, whose mandate is to examine and advise on how to overcome obstacles to the full and effective protection of the human rights of migrants.[24] Established in 1999, this mandate has been renewed eight times, each for a three-year period, [25] and has been held by five experts, namely Ms Gabriela Rodríguez Pizarro (1999 – 2005), Mr. Jorge A. Bustamante (2005 – 2011), Mr. François Crépeau (2011 – 2017), Felipe González Morales (2017 – 2023), and

[19] ibid.
[20] Gloria Gaggioli, 'The Strength of Evolutionary Interpretation in International Human Rights Law' in Abi-Saab, Georges and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing); Luigi Crema, 'The Interpretative Work of Treaty Bodies: How They Look at Evolutionary Interpretation, andHow Courts Look at Them' in Abi-Saab, Georges and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing); McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer'.
[21] UN OHCHR, 'United Nations Human Rights Special Procedures' (2022) <https://www.ohchr.org/en/special-procedures-human-rights-council> accessed 8 July 2022.
[22] ibid.
[23] ibid.
[24] UN OHCHR, 'Special Rapporteur on the Human Rights of Migrants' (2021) <https://www.ohchr.org/en/issues/migration/srmigrants/pages/srmigrantsindex.aspx> accessed 18 November 2021.
[25] UN OHCHR, 'United Nations Human Rights Special Procedures'; UN HRC, *Resolution Adopted by the Human Rights Council on 19 June 2020* UN Doc A/HRC/RES/43/6 (30 June 2020) para 1 (d).

Mr Gehad Madi (2023 to date).[26] The chapter analyses the interpretations of the first four Special Rapporteurs.

At the Inter-American level, interpreting the American Convention on Human Rights is a mandate explicitly granted to the IAHR Court,[27] a Court with voluntary jurisdiction that monitors the Convention.[28] The Court exercises its interpretative role through both contentious and its advisory proceedings,[29] both of which are applicable to Chile, one of the 20 countries that have accepted the Court's contentious jurisdiction.[30] The evolutionary nature of the Court's interpretations is particularly pertinent to migration issues, as it is acknowledged by the Court itself[31] and by scholars.[32]

The IAHR Commission is also central to the evolutionary interpretation of Inter-American human rights standards. Comprising seven members selected for their high moral character and expertise in human rights,[33] the IAHR Commission's primary function is to 'promote respect for and defence of human rights'.[34] It does so through three main channels: its individual petition system, its monitoring of the human rights situation in member states, and its focus on priority thematic areas. In 2012, the IAHR Commission appointed a Rapporteur on the Rights of Migrants, whose role is to ensure the respect of the rights of migrants and other vulnerable groups in the context of human mobility. Both, the IAHR Court and the IAHR Commission are guided by the *pro homine principle*, as

[26] UN OHCHR 'Special Rapporteur on the human rights of migrants' <https://www.ohchr.org/en/special-procedures/sr-migrants> accessed 25 June 2025.
[27] *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 article 62 para 3.
[28] Belen Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Rights: Past, Present and Future.' (2017) 21 The International Journal of Human Rights 1477, 1749.
[29] *American Convention on Human Rights* articles 61 - 64; Statute of the Inter-American Court of Human Rights (Approved by Resolution No. 448 Adopted by the General Assembly of the OAS in its Ninth Regular Session, Held in La Paz, Bolivia, October 1979) article 2.
[30] OAS, 'What Is the I/A Court H.R.?' (*Inter-American Court of Human Rights*, 2022) <https://corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 15 July 2022.
[31] *Rights and Guarantees of Children in the Context of Migration* para 55.
[32] Ana Bedouschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges' (2015) 34 Refugee Survey Quarterly 45; Belen Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Rights' 1477.
[33] American Convention on Human Rights a*rticle 34*.
[34] ibid article 41.

derived from Articles 29 paragraph a) and 1.1. of the ACHR,[35] which requires that 'a law must be interpreted in the manner most advantageous to the human being'.[36] Consequently, interpretations that afford broader protection to human beings must always be preferred.

By applying evolutionary interpretation, human rights bodies have identified obligations that are not explicitly codified in human rights treaties. For example, in the case of *Magyar Helsinki Bizottság v Hungary*, the European Court of Human Rights interpreted Article 10 of the European Convention on Human Rights to imply a right to access public interest information, despite the provision not explicitly recognising such freedom.[37] In this chapter, it is argued that there has been a notable evolution in the human rights system's interpretations regarding the admission and exclusion of migrants. The aim is to ascertain whether the International and Inter-American human rights systems interpretations have evolved to recognise human rights duties to permit entry and stay in countries other than one's own. Identifying such duties is a direct mechanism for facilitating regular migration pathways. Duties to permit entry would require states to allow migrants to enter under certain circumstances, while duties to permit stay would entail circumstances where expulsion is prohibited or where states must regularise the status of irregular migrants. At the international level, the analysis will primarily focus on the UN Human Rights Treaty Bodies, the UN Special Rapporteur on the Rights of Migrants. At the Inter-American level, the focus will be on the interpretations of the IAHR Court, and will be further complemented with interpretations of the IAHR Commission cemented in the 'Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking' (Inter-American

[35] Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants'; *American Convention on Human Rights* articles 29a] and 1.1.

[36] OAS, 'What Is the IACHR?' (*Inter-American Commission on Human Rights*, 2022) <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> accessed 15 July 2022.

[37] M Schaap-Rubio Imbers, 'Magyar Helsinki Bizottság v Hungary: A (Limited) Right of Access to Information under Article 10 ECHR' (*Strasbourg Observers*, 30 November 2016) <https://strasbourgobservers.com/2016/11/30/magyar-helsinki-bizottsag-v-hungary-a-limited-right-of-access-to-information-under-article-10-echr/> accessed 11 July 2022; Erik Bjorge, 'Time, Present and Past: The Intention of the Parties and the Evolutionary Interpretation of Treaties.' in Abi-Saab, Georges and others (eds), *Evolutionary Interpretation and International Law* 39, 41.

Principles), published by the IAHR Commission in Resolution 4/19 of 2019.[38] These Inter-American Principles consist of a series of guidelines aimed at supporting states and other stakeholders in the development and implementation of the human mobility standards of the IAHR System.[39]

4.2. Human rights treaty law regulating entry and stay of migrants

The lack of pathways to a regular migration status is intrinsically linked to both entry into and residence within the destination country. According to Article 5 of the ICRMW, migrants considered to be in an irregular situation are those that are not 'authorized to enter, to stay and to engage in a remunerated activity in the state of employment pursuant to the law of that state and to international agreements to which that state is a party'.[40] States retain the authority to determine who may enter and remain within their territories.[41] As previously analysed, this power is born from the legal principle of territorial sovereignty.[42] International and Inter-American human rights law reflect this sovereign authority. However, a legal lacuna persists at the intersection of the right to freedom of movement and state sovereignty, as evidenced in Article 12 of the ICCPR,[43] Article 8 of the ICRMW,[44] and Article 22 of the ACHR.[45] These provisions recognise only two of the three elements of human mobility, namely, the right of everyone to leave any

[38] Inter-American Commission of Human Rights, *Inter-American Principles on the Human Rights of all migrants, refugees, stateless persons and victims of human trafficking* (Resolution 04/19 approved by the Commission on December 7, 2019) <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf.> accessed 25 June 2025 [Inter-American Principles]
[39] ibid.
[40] ICRMW article 5.
[41] T Alexander Alienkoff, 'International Legal Norms and Migration: A Report' in T Alexander Alienkoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 3.
[42] Laurie Berg, 'At the Border and between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law' (2007) 8 Melbourne Journal of International Law 1, 15; Linda S Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 The International Migration Review 737, 742; Acosta (n 197) 749; T Alexander Alienkoff, 'International Legal Norms and Migration: A Report' in T Alexander Alienkoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 3; Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2011) 79 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 22 May 2023.
1/30/26 6:46:00 PM30/01/2026 18:46:00[43] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171[ICCPR]
[44] ICRMW Article 8.
[45] American Convention on Human Rights *Article 22*.

country including their own and the right to return to their country.[46] None of these instruments acknowledge 'the third aspect of mobility', that is, the right to immigrate.[47] Most scholars understand that this right would entail being allowed to enter to another country.[48] As early as 1973, Rosalyn Higgins affirmed 'there is no general right for an alien to obtain entry into another country',[49] and more recently, Chetail has observed that 'a right to leave is not accompanied by a general right to enter any country'.[50] Some argue that a right to immigrate should be understood as the right to not be prevented from entering,[51] or even as the ability to reside in a country other than one's own.[52] Therefore, it is evident that human rights treaties do not recognise a right for migrants to enter or to remain in a country other than their own.[53]

This position is confirmed by the ICRMW, one of the nine core UN Human Rights Treaties and widely recognised as the most comprehensive treaty in the field of migrant workers right.[54] The ICRMW recognises that states have the authority to determine who may enter and who may live within their borders, and under what conditions. With regard to entry, Article 79 of the ICRMW states in its opening part: 'Nothing in the present Convention shall affect the right of each state party to establish the criteria governing admission of migrant workers and members of their families'.[55] Concerning the right to remain, Article 35 of the ICRMW stipulates that none of the rights contained in Part III 'shall be interpreted as implying the regularization of the situation of migrant workers and

[46] Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 149.
[47] ibid.
[48] ibid; Athanasia Georgopoulou and others, 'Chapter 5. Putting Things into Perspective: The Added Value of the ICPMW's Substantive Provisions' in Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017) 133.
[49] Rosalyn Higgins, 'The Right in International Law of an Individual to Enter, Stay and Leave a Country' (1973) 49 International Affairs (Royal Institute of International Affairs) 444.
[50] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 92.
[51] David Miller, 'Is There a Human Right to Immigrate?' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press 2016) 14.
[52] Kieran Oberman, 'Immigration as a Human Right' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press 2016) 34.
[53] UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* adopted 11 April 1986, UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 5
[54] UN OHCHR, 'The International Convention on Migrant Workers and Its Committee. Fact Sheet No. 24 (Rev)' 1 <https://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf> accessed 29 September 2019; Chetail, *International Migration Law* 218.
[55] ICRMW article 79.

members of their families who are non-documented or in an irregular situation, or any right to such regularization of their situation'.[56] Part III of the ICRMW enumerates rights applicable to all migrant workers, regardless of their migration status. Although regularisation is envisaged as an option within the ICRMW, it remains at the discretion of the state. For instance, in paragraph 1 of Article 68 of the ICRMW states commit to 'collaborate with a view of preventing and eliminating illegal or clandestine movements and employment of migrant workers in irregular situations'.[57] Additionally, in paragraph 1 of Article 69 of the ICRMW, member states agree to take appropriate measures to ensure that irregular migration does not persist, and they recognise regularisation as an alternative in paragraph 2 of the same Article.[58] The latter states:

> Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

Nonetheless, the wording of the first sentence of paragraph 2, makes it clear that regularisation remains a discretionary decision for the state. It is merely an option that states may choose to consider. Consequently, no right to remain is guaranteed.

The power of states to exclude migrants is also reflected in Articles 13 of the ICCPR, Article 22 of the ICRMW and Article 22 paragraph 6 of the ACHR. These provisions begin by recognising that states may expel migrants from their territories, and they subsequently regulate the minimum procedural guarantees that must be observed in the expulsion process. In each case, the instruments stipulate that migrants may only be expelled following a decision reached in accordance with law. For example, in Article 13 of the ICCPR, states agreed that migrants shall be allowed to contest their expulsion and to 'have their case reviewed by, and be represented for the purpose before, the

[56] ICRMW article 35.
[57] ICRMW article 68.
[58] ICRMW article 69.

competent authority or a person or persons especially designated by the competent authority'.[59] The only exception to these two last requirements is when 'compelling reasons of nationality security' so require.[60] Similarly, Article 22 of the ICRMW provides further procedural guarantees although it does not specify the grounds for expulsion. In all these instances, the provisions regulate only the procedures for expulsion rather than establishing substantive grounds for expulsion.[61] Therefore, no right to remain is conferred by these instruments.

In conclusion, no general international or Inter-American human rights instrument confers a right for migrants to enter or remain in a country other than their own. Having established the substantive human rights law governing the entry and stay of migrants, this chapter now turns to the evolutionary interpretations developed by both the international and the Inter-American human rights systems. It will first identify interpretations that recognise the right of states to determine who may enter and remain within their borders, and then demonstrate how these interpretations have evolved to impose specific limits on states' rights to admit or exclude migrants, while also recommending that states open safe, regular and realistic mobility channels. The analysis will begin at international level focusing on the UN Human Rights Treaty Bodies and the UN Special Rapporteur on the Rights of Migrants, before turning to the Inter-American system, where interpretations from the IAHR Court and will be examined, along with specific provisions of the Inter-American Principles.

4.3. Interpretations on entry and stay in the International Human Rights system.

4.3.1. UN Human Rights Treaty Bodies

[59] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR] article 13.
[60] ICCPR Article 13; UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* para 10.
[61] UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* para 10.

International human rights institutions recognise that states retain the authority to decide who may enter and remain within their borders. However, their interpretations are evolutionary; when they affirm this state authority, they concurrently acknowledge the limitations imposed by individual human rights. This was first articulated by the HR Committee in General Comment No. 15 'The Position of Aliens under the Covenant' (1986). In paragraph 5 of that General Comment, the HR Committee stated:

> The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

A similar stance was reiterated by the HR Committee in General Comment No. 27 (1999), which addressed the right to freedom of movement.[62] In paragraph 4, the HR Committee affirmed:

> The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations.

Thus, the ICCPR does not confer a right upon migrants to enter or remain in the territory of a state party. This position is explicitly stated in the first part of paragraph 5 of General Comment No. 15 and further reinforced paragraph 4 of General Comment No. 27, where the HR Committee recognised that states may impose restrictions on entry as long as those restrictions comply with their international obligations.[63]

In both General Comments, the HR Committee subsequently examined the limits of state discretion. In General Comment No. 15, the Committee noted that migrants may

[62] UN Human Rights Committee, *General Comment No. 27 (67*) Freedom of Movement (Article 12)* UN Doc CCPR/C/21/Rev.1/Add.9 (12 November 1999).
[63] ibid para 4.

nonetheless benefit from the protection of the ICCPR in relation of their entry and stay when considerations such as of non-discrimination, protection of family life, and prohibition against torture and inhuman treatment are at stake.[64] Later, in General Comment No. 27, the HR Committee interpreted that any restrictions imposed by states on the entry of migrants must be 'in compliance with the state's international obligations'.[65]

This thesis suggests that these two interpretations exhibit an evolution in approach. In General Comment No. 15, the HR Committee referred to 'considerations' that justify applying ICCPR protections, suggesting a situational approach. By contrast, General Comment No. 27 situates the limitations on entry within the broader framework of state's 'international obligations'. This phrase could be understood as comprising not only the ICCPR, but all the international obligations to which a state is bound.

Other scholars have also noted this evolutionary trend. For instance, Di Pascale argued in 2015 that, as a result of the emergence of the human rights paradigm, an obligation to admit aliens appears to be foreseeable when the unit of the family and the principle of non-refoulement are at stake.[66] Di Pascale identified two categories of foreigners 'in respect of which it is questionable whether they have the right to invoke the admission, at least temporarily'.[67] Namely, those 'applying for refugee status under the Geneva Convention and, in broader terms, those who are exposed to danger for their lives and safety in the country of return; and those who claim their right to family life'.[68] Conversely, in 2019 Chetail contended that while the principles of non-refoulement and family unity 'do not provide for a clear cut right of entry',[69] states are nonetheless prohibited from refusing admission when such a refusal would violate these principles.[70] In Chetail's

[64] UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* para 5
[65] UN Human Rights Committee, *General Comment No. 27 (67*) Freedom of Movement (Article 12)* UN Doc CCPR/C/21/Rev.1/Add.9 (12 November 1999) para 4.
[66] Alessia di Pascale, 'Exceptional Duties to Admit Aliens' in Sir Richard Plender (ed), *Issues in International Migration Law* (BRILL 2015) 222.
[67] ibid 216.
[68] ibid.
[69] Chetail, *International Migration Law* 119.
[70] Ibid.

view, the practical effect may be analogous to a 'right of entry under treaty law'. [71] This thesis adds to these contributions in two ways. Firstly, it examines, in Chapter V, the extent to which the principle of non-discrimination limits the states' discretion to control admission. Secondly, by analysing the how these principles are incorporated into Chilean migration legislation, this thesis tests Chetail's argument that they may operate in practice an analogous to a right of entry under treaty law. The analysis in Chapters V and 6 demonstrates that, in the Chilean context, what ultimately prevails is the states' prerogative to control migration.

Additionally, scholars diverge regarding the legal source of these principles. Chetail regards both family reunification and the principle of non-refoulement as general principles of customary international law,[72] while di Pascale points out that the customary nature of the principle of non-refoulement remains a subject of debate. The role and impact played by the interpretations of the treaty bodies is indeed relevant for this matter. In fact, Kasey McCall-Smith further observes that although non-refoulement is not yet universally recognised as customary international law, the evolving interpretations by treaty bodies are leading to this interpretation.[73] The following chapters will narrow its analysis to explore the extent to which the principle of non-discrimination and the principle of non-refoulement effectively impose obligations to permit entry within the Chilean legal migration framework.

Recognition of human rights as a counterbalance to states' authority over the admission and exclusion of migrants is also evident in the CMW. In paragraph 13 of General Comment No. 2 'On the rights of migrant workers in an irregular situation and members

[71] Ibid.
[72] Ibid 119–132.
[73] Kasey McCall-Smith, 'Treaty Bodies: Choreographing the Customary Prohibition against Torture' (2019) 21 International Community Law Review 344, 362.; Some authors interpret the *non refoulement* principle as customary and even, *ius cogens*, see, Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) 13 International Journal of Refugee Law 533; Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016) <https://doi.org/10.1007/978-94-6265-114-2_10> accessed 21 June 2025.

of their families',[74] the CMW interprets that the human rights afforded to all migrant workers and their families under Part III of the ICRMW 'strike a balance' against 'the sovereign power of states parties to control their borders and to regulate the entry and stay of migrant workers and members of their families'.[75] The paragraph states:

> The Convention strikes a balance between the sovereign power of States parties to control their borders and to regulate the entry and stay of migrant workers and members of their families, on the one hand, and the protection of the rights, under Part III of the Convention, of all migrant workers and members of their families, including those in an irregular situation, on the other. This balance is reflected in Article 79 of the Convention.

This interpretation can be seen as narrower than the ones provided by the HR Committee. A comparison between paragraph 13 of General Comment No. 2 by the CMW and paragraph 5 of General Comment No. 15 by the HR Committee reveals two main points: first, there are specific rights that the respective Committees consider as limiting migration control; and second, while the HR Committee frames these rights as protecting migrants in their entry and residence into another country, the CMW interprets them as a balance between the rights of migrants and the right of states to control migration.

Regarding the rights that might limit migration control, both Committees acknowledge a broad array of rights that could counterbalance state power. In General Comment No. 15, the HR Committee identifies three examples of circumstances that would bind states to permit entry and stay, namely: non-discrimination; family unity and protection against torture. The list is not exhaustive, because these circumstances were presented simply as examples. Consequently, the HR Committee opened the possibility for identifying other circumstances in which migrants may be entitled to ICCPR protection regarding entry and stay. By contrast, the CMW does not explicitly identify such circumstances. Instead, it maintains that the power to admit and exclude migrants is limited by the rights

[74] UN CMW, *General Comment No. 2* para 13; International Labour Conference, *(87th Session) Report III (Part 1B), 'Migrant Workers'* ILC.87/III(1B) (June 1999).
[75] UN CMW, *General Comment No. 2* para 13.

of all migrant workers and their families as set out in Part III of the ICRMW. Although the CMW dedicates an entire subsection to the principle of non-discrimination, it stops short of identifying this principle as a basis upon which states must allow entry or stay.[76]

The Committee's broad reference to the rights of all migrant workers and their families increases the limitations on states authority to admit and exclude migrants. Furthermore, the ICRMW recognises certain migrant rights absent in the ICCPR, such as Article 20 of the ICRMW, which protects migrant workers and their families from losing their residence and work permits 'merely on the ground of failure to fulfil an obligation arising out of a work contract'.[77] This specific right is not recognised in the ICCPR. However, the CMW only refers to 'the protection of the rights, under Part III of the Convention', therefore excluding the rights contained under Part IV, which contains rights only recognised to those in a regular situation. By excluding these rights, the CMW risks narrowing the non-exhaustive list provided by the ICCPR. For example, according to the ICRMW, the protection of family unity is guaranteed only to migrants in a regular status.[78]

A further comparison can be drawn regarding the connection that each Committee establishes between human rights and the state's authority over entry and stay. In paragraph 5 of General Comment No. 15, the HRC clearly asserts that there are circumstances under which migrants are entitled to the protection of the ICCPR concerning entry and residence. Human rights protection as limiting state's authority is also acknowledged by the CMW as reflected in the section under which paragraph 13 of General Comment No.2 appears: Section III, entitled 'Protection of the Convention in relation to the rights of migrant workers and members of their families in an irregular situation'. However, the CMW frames this protection as a 'balance of rights'. Furthermore, it cites Article 79 of the ICRMW, which reinforces the states' authority to admit migrants. The balance would mean that on one side, states retain their right to control admission and exclusion, while on the other side, they must also guarantee

[76] UN CMW, *General Comment No. 2* paras 18–20.
[77] ICRMW article 20.
[78] ICRMW article 44; Berg, 'At the Border and between the Cracks' 17.

procedural rights prior to any expulsion of migrant workers and their families.[79] This provision effectively limits the procedural aspects of expulsion but does not constrain the substantive grounds for it. Consequently, the ultimate decision regarding admission and expulsion remains largely within the discretion of the state.

Scholars have criticized this balance for allowing sovereignty to override the rights of migrant workers.[80] Laurie Nessel, for instance, asserts that 'the Convention reaffirms the state's control over immigration',[81] which, in her view, ultimately undermines 'its potential to alter the legal landscape, particularly for undocumented migrants'.[82] Procedural guarantees are further developed by the IAHR Court as a limit for the state to exclude migrants, a point that will be explored in greater details in section 4.4. and Chapter V, particularly with reference to the Chilean case involving non-refoulement.

Beyond recognising limitations on states' rights to admit and exclude migrants, the CMW offers a distinct perspective on facilitating regular migration channels. This perspective derives from its interpretations of the obligations under Articles 68 and 69 of the ICRMW. As discussed previously, Article 68 sees states committing to collaborate with a view to preventing irregular migration. In General Comment No. 1 the CMW interpreted this Article by affirming that states should 'ensure that migrant domestic workers have access to regular channels for migration based on actual demand'.[83] This evolutionary interpretation recognises that states have a positive obligation, even though not explicitly stated in Article 68, to establish regular migration channels that correspond with actual market demand. In doing so, it also serves as a limitation on states' discretion regarding admission and exclusion of migrants. The following section will demonstrate that a similar evolution can be found in approaches advanced by Special Rapporteurs Crépeau and Gonzalez, who emphasised the need for states to adopt positive measures to facilitate safe, regular and accessible migration channels. As will be further reinforced,

[79] Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants' 753.
[80] Lori A Nessel, 'Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Migration Law and Migration* (Edward Elgar 2014) 336.
[81] ibid.
[82] ibid 345.
[83] UN CMW, *General Comment No. 1,* para 51.

these interpretations mark an important development for the argument advanced in this thesis, by framing human rights law not only as imposing negative obligations that limit state discretion, but also as recommending the adoption of positive measures to regulate migration, by opening accessible, regular, safe and affordable migration channels.

The relationship between 'demand' and irregular migration is further highlighted by the CMW in General Comment No.2. After noting the increasing demand of migrant workers in various economic sectors, the CMW observed that this demand 'has not been matched by a corresponding increase in regular migration channels. As a result, employers often resort to migrant workers in an irregular situation to fill the gaps'.[84] As mentioned earlier, Article 69 of the ICRMW obliges state to take appropriate measures to ensure that irregular migration does not persist. Although regularisation is presented as a voluntary measure to combat irregular migration, the CMW emphasises that states should 'consider policies, including regularization programmes, for avoiding or resolving situations whereby migrant workers and members of their families are in, or are at risk of falling into, an irregular situation'.[85] Regularisation programmes require states to permit migrants to remain within their borders, thereby challenging their sovereign power to determine who may stay. In this sense, the CMW's interpretation also limits the discretion of states regarding the entry and residence of migrants.

Further evolution on the issue of regularisation is evident in the joint General Comments No. 3 and 4 of 2017, issued by the CMW in collaboration with the Committee on the Rights of the Child (CRC).[86] The joint Comments recommended that states establish regularisation programmes as an obligation arising from the right to development enshrined in Article 18 of the UN Convention on the Rights of the Child (UNCRC),[87] and in

[84] UN CMW, *General Comment No. 2* para 1.
[85] UN CMW, *General Comment No. 2* para 16
[86] UN CMW, *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017).
[87] Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Signed on 26 January 1990 and ratified on 13 August 1990 [UNCRC]

the best interest of the child enshrined in Article 3 of this Convention.[88] They affirm that states should implement regularisation mechanisms 'as a means to promote integration and prevent exploitation and marginalization of migrant children and their families'.[89] Additionally, the joint Comments extended the recommendations to provide 'available regular and non-discriminatory migration channels' to the parents of the child, enabling them to fulfil their responsibilities regarding child development.[90] Furthermore, regularisation is again framed as a procedural safeguard that states must observe under the principles of due process and access to justice,[91] and it is recommended as a pathway to ensure the right to family unity.[92]

As previously mentioned, the interpretations made by the CMW and the CRC on enabling regularisation mechanisms are clearly evolutionary and differ from the HR Committee, which focus more on the limitations placed on the authority of states to admit and exclude migrants. While the HR Committee emphasises human rights constraints, the CMW and the CRC propose positive measures to facilitate compliance with the obligations under Articles 68 and 69 of the ICRMW, thereby preventing irregular migration by focusing on ensuring regular migration channels as a means of fulfilling a range of human rights obligations. Nonetheless, these interpretations remain recommendations rather than binding positive obligations, since Article 69 of the ICRMW preserves regularisation within the realm of state discretion. Joint General Comments No. 3 and 4 of the CMW and the CRC represent a way to bridge this threshold. The interpretations contained in these joint General Comments are based on the provisions and principles of the UNCRC. Consequently, the 'authoritative guidance' contained in the UNCRC, is 'equally applicable to all state parties to the CRC and the ICRMW'.[93] By applying the *pro-homine* principle, which mandates that laws should be interpreted in the manner most

[88] UN CMW, *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* UN Doc CMW/C/GC/3 – CRC/C/GC/22 (16 November 2017) para 44; UN CMW, *Joint General Comment No. 4*, para 18.
[89] UN CMW, *Joint General Comment No 3*, para 44.
[90] UN CMW, *Joint General Comment No 4*, para 31.
[91] UN CMW, *Joint General Comment No 4*, para 18.
[92] UN CMW, *Joint General Comment No 4*, para 29.
[93] UN CMW, *Joint General Comment No 3,* para 4.

advantageous to the human being, this approach challenges state sovereignty and the right of states to admit and exclude migrants.

The next section of this chapter examines further evolution proposed by the UN Special Rapporteur on the Rights of Migrants, which explores the concept of 'opening migration channels' as a means for states to regain control of their borders while upholding their human rights obligations.

4.3.2. UN Special Rapporteur on the Rights of Migrants

Evolutionary interpretation regarding the limitations on states' rights to admit and exclude migrants are also reflected in the reports the Special Rapporteur on the Human Right of Migrants. Each of the Special Rapporteurs has contributed distinct perspectives. By examining their interpretations in chronological order, this section traces how these interpretations have evolved, and highlights their relevance to the argument advanced in this thesis concerning the limits and positive measures arising from human rights law. [94]

Limitations on state discretion regarding entry and residence were evident from the very first mandate of Special Rapporteur Gabriela Rodríguez Pizarro. Influenced by other human rights bodies, her initial report in 2001 referenced the HR Committee's interpretation of the right to freedom of movement under Article 12 of the ICCPR, as set out in paragraph 5 of General Comment No. 15. She stated:

> The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party, but, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise, as stated by the Human Rights Committee at its twenty-seventh session in 1986 in its General Comment No. 15.[95]

[94] The current UN Special Rapporteur on the Human Rights of Migrants began his mandate by the end of 2023, when the analysis of this chapter was finished. Therefore, his work is not included in this chapter.
[95] UNGA, *Human rights of migrants: report of the Special Rapporteur, Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution* 2000/48 UN Doc E/CN.4/2001/83 (9 January 2001) para 24.

Therefore, a clear line of influence from the UN HR Committee to the UN Special Rapporteur on the Rights of Migrants can already be identified, as the interpretations of the HR Committee in General Comment No. 15 provided the foundation for the Special Rapporteur's subsequent analyses. Despite recognising these limitations, in her 2002 report the Special Rapporteur maintained that 'the protection of the human rights of migrants is not incompatible with either the exercise of sovereignty by states or the practical implementation of national security policies'.[96] In these early years tensions between the human rights of migrants and states' discretion over admission were not as pronounced as they are today. At that time, her primary concern centred on the practice of granting or denying visas on the basis of nationality.[97] This matter will be examined further in the next chapter, which focuses on the principle of non-discrimination.

By her 2004 report, however, the Special Rapporteur's perspective of a compatible coexistence between the right of states to admit and exclude migrants and the human rights of migrants changed. She declared that states must balance their sovereign right to formulate migration policies with the 'respect for and protection of the human rights and fundamental freedoms of all persons under their jurisdiction, regardless of their legal status'.[98] This 'balance of rights' approach is similar to the approach later adopted by the CMW in General Comment No. 2 of 2013, discussed in the preceding section.[99] The Special Rapporteur's report was also influenced by *Advisory Opinion OC 18-03 Juridical Conditions and Rights of Undocumented Migrants* of 2003 (*Advisory Opinion OC 18-03*),[100] a decision she identified as a core document in the development of migration policies and the regulations applied by states to control migratory flows.[101] Based on this

[96] UNGA, *Human rights questions: human rights situations and reports of special rapporteurs and representatives* UN Doc A/57/292 (10 December 2001) para 74.
[97] Ibid para 28.
[98] UNGA, *Report on the human rights of migrants submitted by the Special Rapporteur of the Commission on Human Rights* Un Doc A/59/377 (22 September 2004) para 64.
[99] CMW, *General Comment No 2* para 13: 'The Convention strikes a balance between the sovereign power of States parties to control their borders and to regulate the entry and stay of migrants workers and members of their families, on the one hand, and the protection of the rights, under Part III of the Convention, of all migrant workers and members of their families, including those in an irregular situation, on the other. This balance is reflected in article 79 of the Convention'.
[100] *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003). [*Advisory Opinion OC-18/03*].
[101] UNGA, *Report on the human rights of migrants submitted by the Special Rapporteur of the Commission on Human Rights* Un Doc A/59/377 para 52.

Advisory Opinion, she argued that states are obliged to observe human rights when pursuing their migratory policy objectives, noting:

> States may not subordinate or condition the observance of human rights or the principle of equality before the law and non-discrimination to achieving the goals of its migratory policies, any act or omission to the contrary being inconsistent with the international human rights instruments.[102]

Advisory Opinion OC 18-03 will be further discussed in the subsequent sections of this chapter.

In her final report of 2005, the Special Rapporteur highlighted a 'Joint statement of the annual meeting of special rapporteurs/representatives, independent experts and chairpersons of the working groups of the special procedures of the Commission on Human Rights and of the advisory services programme'. This statement recognised the 'sovereign right of states to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay'.[103] However, it also underscored that such measures 'must, be consistent with their obligations under international humanitarian law and human rights law'.[104] Similar to the HR Committee's General Comment No. 27, discussed earlier, this recommendation is grounded in human rights obligations rather than in rights explicitly contained in a particular international treaty. This dual approach results in two important implications: first, it broadens the scope of protection for migrants' entry and stay under human rights law; and second, it indicates that the interpretations advanced by Special Rapporteur Rodriguez Pizarro align closely with those issued by the UN Human Rights Treaty Bodies during this period. This reinforces the argument advanced in this thesis that the scope of human rights obligations applicable at the borders has progressively expanded beyond the explicit rights enshrined in human rights treaties. Chapters V and VI analyses the implications that these interpretations have in Chile's migration legislation.

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[102] Ibid.
[103] UNGA, *Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 2004/53* Un Doc E/CN.4/2005/85 (27 December 2004) para 77.
[104] Ibid.

The next mandate holder, Special Rapporteur Bustamante, also acknowledged that human rights impose limitations on states' authority to determine who may enter and remain within their borders. In his 2009 report on the 'Protection of children in the context of migration',[105] he reaffirmed that children must be protected regardless of the migration status of their parents.[106] Among his recommendations, he introduced the concept of 'promoting legal migratory channels' as a means to encourage regular migration.[107] The next chapter will analyse how, according to the Bustamante, lack of regular migration pathways is linked to states' obligation to comply with their non-discrimination duties.[108] Notably, his recommendation to promote legal migration channels preceded similar suggestions by the CMW by three years, marking it as a significant point of departure for subsequent evolutionary interpretation.

In fact, the concept of 'opening migration channels' was one of the key concepts further developed by Special Rapporteur François Crépeau in both, his reports,[109] and academic writings, as mentioned in the introduction of this thesis.[110] He argued on his 2013 report that sealing borders was impossible for states, because it drove migrants underground, and fostered conditions that precipitate human rights violations, including

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[105] UNGA, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante* Un Doc A/HRC/11/7 (14 May 2009).

[106] Ibid. para 41 'The international legal framework for the protection of the child applies irrespective of the migration status of the child or his or her parents or family members. Notwithstanding the State's prerogative to determine the conditions of entry and stay of non-nationals on its territory and to sanction violations to its migration laws and regulations, no human being under the jurisdiction of a State should be devoid of protection; the State has the obligation to respect human rights during its engagement with children affected by migration, regardless of their or their parents' migration status.'

[107] UNGA, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante* UN Doc A/HRC/7/12 (25 February 2008) para 68.

[108] UNGA, Human rights of migrants. Report of the Special Rapporteur on the human rights of migrants UN Doc A/64/213 (3 August 2009) para 74

[109] UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants* Un Doc A/HRC/23/46 (24 April 2013); UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Labour exploitation of migrants* Un Doc A/HRC/26/35 (3 April 2014) para 67; UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Banking on mobility over a generation: follow-up on the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants* UN Doc A/HRC/29/36 (8 May 2015) para 89; UNGA, Human Rights of migrants. *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/71/285 (4 August 2016) para 123 (d); UNGA, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility* UN Doc A/HRC/35/25 (28 April 2017) para 16.

[110] François Crépeau, 'Towards a Mobile and Diverse World: Facilitating Mobility as a Central Objective of the Global Compact on Migration' 30 International Journal of Refugee Law 650.

discrimination.[111] He therefore recommended opening accessible migrations channels, including for so-called 'low skilled' workers, thereby reflecting the labour needs of receiving countries.[112] This idea evolved in his subsequent 2017 report, '2035 Agenda for Facilitating Mobility' where he incorporated the concepts of safe, regular and affordable migration channels. In that report, he stated:

> The Special Rapporteur proposes a fundamental shift in the way that migration is perceived and framed. Migration itself is a natural part of human existence; it is neither a crime nor a problem, and it has the potential to be a solution. Accordingly, migration governance is not a matter of closing off borders and keeping people out, but one of regulating mobility by opening accessible, regular, safe and affordable migration channels and promoting and celebrating diversity.[113]

Crépeau's recommendations were not only confined to his 2035 Agenda; he also emphasised it in his 2016 annual report, that the Global Compat on Migration should ensure such measures.[114] The shift proposed by Crépeau altered the relationship between the human rights of migrants and the right of states to admit and exclude them. Similar to the CMW, the Crépeau's interpretations of the relationship between state obligations and the rights of migrants evolved. Whereas earlier Special Rapporteurs framed human rights as a limit to the right of states to admit and exclude migrants, Special Rapporteur Crépeau presented them as the means through which states could

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[111] UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, para 83

[112] UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants* para.84; UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Labour exploitation of migrants* para 67 and 96, UNGA, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Banking on mobility over a generation* para 89; UNGA, Human Rights of migrants. *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/71/285 para 123 (d)

[113] UNGA, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility* para 16

[114] UNGA, Human Rights of migrants. *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/71/285 para 123 (d) 'Ensure that States adopt measures to facilitate accessible, regular, safe and affordable migration and mobility channels at all skill levels, as well as family reunification and the regularization of undocumented migrants'

regain effective control over their borders. He affirmed that 'if states want to regain control over their borders, migrants should be provided with regular, safe, affordable and accessible mobility channels'.[115] In his view, states must facilitate human mobility while upholding the human rights of all migrants. To this end, he developed a comprehensive 2035 Agenda, which included goals, targets and indicators that advocate for opening migration channels within a human rights-based approach.[116] As stated in the previous section, these interpretations mark an important development for the argument advanced in this thesis, by interpreting human rights law not only as negative obligations limiting state discretion, but also as positive obligations facilitate regular migration. Chapters V and VI analyse if the principles of non-discrimination and of non-refoulement offer Chile an opportunity towards achieving these positive obligations.

Despite the progressive proposals, Crépeau continued to recognise a set of rights to which migrants are entitled even when states exercise their discretion over entry and stay. Similar to the approach taken in paragraph 5 of General Comment No. 15 of the HR Committee, his list included 'procedural safeguards, obligations related to non-refoulement, best interests of the child and family unity'.[117] However, unlike General Comment No. 15 of the HR Committee, Crépeau treated non-discrimination as a general obligation, rather than listing it among the specific rights that protect migrants' entry and stay.[118] The next chapter will delve deeper into this distinction.

In summary, by the end of Special Rapporteur Crépeau's mandate, interpretations of the limitations that human rights impose on states' discretion regarding migrant admission and residence had evolved into a two-tier perspective. On the one hand, there is the traditional approach of enumerating specific rights to which migrants are entitled even

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[115] UNGA, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility* para 17

[116] UNGA, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*.

[117] UNGA, *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/68/283 (7 August 2013) para 28.

[118] The Special Rapporteur affirmed: 'All migrants, without discrimination, are protected by international human rights law. There are very few and narrowly defined exceptions to this, namely the right to vote and be elected and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be respected, as well as obligations related to non-refoulement, best interests of the child and family unity.'

when entering or remaining in a country other than their own. On the other hand, a new perspective has emerged, that recommends states to open regular, accessible and realistic mobility channels to facilitate human rights-based migration.

Special Rapporteur Felipe Gonzalez Morales continued this two-tier perspective by acknowledging the lack of regular migration pathways and recommending that states facilitate regular mobility channels in various migration contexts. In his 2018 report on 'Return and Reintegration of Migrants',[119] he proposed that states adopt alternative mechanisms to forced return, including regularisation, temporary or long-term options for entry and stay, access to citizenship or the facilitation to family reunification.[120] In the same year, in his report on 'Access to justice for migrant persons' he noted that 'immigration laws in some countries make it extremely difficult to enter regularly and obtain permanent legal status'.[121] His 2019 report on the 'Impact of migration on migrant women and girls: a gender perspective', highlighted instances where women are subjected to mandatory pregnancy tests upon arrival, with a positive result leading to a denial of entry or deportation.[122] UN Special Rapporteur Gonzáles Morales reiterated these concerns in his 2022 report on 'Human rights violations at international borders: trends, prevention and accountability'.[123] This practice reflects the health examinations required by states party to ILO C97 and ILO C143, discussed in Chapter II. Such requirements further close mobility channels for women and girls and are discriminatory, as will be discussed in the next chapter. A link to these observations is found in the 2019 report on good practices on gender-responsive migration governance, in which he recommended that states 'increase channels for entry and stay for migrant women and girls as to enhance their enjoyment of rights'.[124] Furthermore, in a 2020 report

[119] UNGA, *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/HRC/38/41 (4 May 2018.
[120] Ibid para 90
[121] UNGA, *Human Rights of Migrants. Report of the Special Rapporteur on the human rights of migrants* UN Doc A/73/178/Rev.1 (25 September 2018) para 36
[122] UNGA, *Human Rights of Migrants. Report of the Special Rapporteur on the human rights of migrants. The impact of migration on migrant women and girls: gender perspective* UN Doc A/HRC/41/38 (15 April 2019) para 63.
[123] UNGA, *Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales. Human rights violations at the international borders: trends, prevention and accountability* UN Doc A/HRC/50/31 (26 April 2022) para 29.
[124] UNGA, *Report of the Special Rapporteur on the human rights of migrants: good practices and initiatives on gender-responsive migration legislation and policies* UN Doc A/74/191 (18 July 2019) para 114.

reviewing immigration detention of children, the Special Rapporteur affirmed that regularisation policies contributed to the integration, development, and protection of family life for migrant children.[125] This finding aligns with the joint interpretations provided by the CMW and the CRC in their joint General Comments, which reinforces this thesis' argument on the evolving human rights interpretations related to limiting the right of states to control migration. Furthermore, it shows how recent interpretations move beyond such limitations towards recommending that states adopt positive measures to facilitate regular, safe and accessible migration channels. This thesis identifies such development as central to the ongoing evolution of human rights law in the context of irregular migration.

In addition to recommending the opening of regular migration pathways in specific migration contexts, Special Rapporteur Gonzalez Morales also addressed the human rights limitations on the right of states to admit and exclude migrants in his 2021 report on 'Means to address the human rights impact of migrants on land and sea', by urging states to end to pushback practices, as they violate the prohibition on collective expulsion and the principle of non-refoulement. States justify pushback operations under their sovereign right to control their borders. Chapter VI demonstrates that refraining from applying these practices is a negative obligation emanating from the prohibition of collective expulsion and the principle of non-refoulement.

Finally, on his report on the impact of climate change on the human rights of migrants, UN Special Rapporteur affirmed:

> It must be acknowledged that human rights law can establish grounds of admission and stay for migrants, which give effect to international human rights obligations and principles. These include the right to private and family life and the deriving obligation to maintain family unity, the principle of the best interests of the child, the right to health, the principle of equality and non-discrimination,

[125] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales. Ending immigration detention of children and providing adequate care and reception for them* UN Doc A/75/183 (29 July 2020) para 73.

the fundamental principles and rights at work and the principle of non-refoulement.[126]

This final interpretation represents a clear evolution from the previous positions. By using the phrase 'grounds of admission and stay for migrants', the Special Rapporteur recognises that positive obligations to allow entry and stay emanate from specific human rights. This interpretation offers a broader protection than those that frame human rights as limiting states' discretion over migrant admission and exclusion. Moreover, the scope of protection is expanded to include not only family unity, the principles of equality and non-discrimination, and the principle of non-refoulement, but also the right to health and the rights at work. This interpretation contributes to answering one of the key questions posed by thesis, namely whether human rights law contains obligations to allow entry and stay of migrants. Despite the progressive and evolving understanding of the relationship between states' obligations and migrants' rights in the reports of the various Special Rapporteurs, it remains unclear how these obligations would operate in practice; this issue will be explored in the subsequent chapters of this thesis.

4.3.3. Summary of findings.

To conclude, this section demonstrated that evolutionary interpretation is evident in the international human rights system's approach to the rights of states to determine who may enter and remain within their territories, as well as in the limitations that human rights impose on this discretion. Identifying this evolution clearly contributes to building a human rights-based approach to irregular migration. The HR Committee's evolving interpretations now clearly recognise that international human rights obligations limit state authority over entry and residence. To some extent, this can be seen as filling the legal lacuna left in the right to freedom of movement which -as mentioned in section 2.4- excluded a right to enter to another country. Similarly, the CMW's interpretations have evolved to underscore that the rights of migrant workers serve as a counter-balance to the sovereign power of states to control their borders and regulate the entry and stay of

[126] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales* UN Doc A/77/189 (19 July 2022) para 18.

migrant workers and members of their families. However, because this balance is articulated in Article 79 of the ICRMW, its effect is somewhat constrained. First, because the rights contained in Part IV of the ICRMW are excluded from this balance; and, second, because the ultimate decision regarding admission and expulsion remains with states.

A similar evolution is identified in the reports of the Special Rapporteurs on the Rights of Migrants. Across the four mandates, they have identified specific human rights limitations on states discretion over migrant admission and exclusion. Crépeau's work must be highlighted, for shifting the approach to migration management not only within the international human rights system, but also witinth the scholarly literature. Furthermore, in his recent report, Special Rapporteur Gonzalez Morales asserted that the obligations arising from these rights provide grounds for entry and stay. Although there are variations in the rights that would allow migrants to enter and remain, the principles of non-discrimination, family unity, and the prohibition against torture consistently emerge in these interpretations. Furthermore, the emerging positive obligation of 'facilitating regular, accessible and realistic mobility channels' is supported by interpretations from both UN Human Rights Treaty Bodies and the Special Rapporteurs on the Rights of Migrants. Nonetheless, this obligation continually encounters the limitations imposed by Articles 68 and 69 of the ICRMW.

Chapters V and VI explore the extent to which the principles of non-discrimination and non-refoulement constitute a limit to Chile's authority to control migration by analysing their impact in the 2021 Migration Law. The following section will analyse the evolutionary interpretations on a state's authority to regulate migration control in the Inter-American Human Rights System.

4.4. Interpretations on entry and stay at the Inter-American human rights system.

The balance between the rights of migrants and the authority of states to control migration is further illuminated by the Inter-American human rights system. The Inter-American Principles, explained in section 4.2, include guidelines related to border

control operations, which address both the obligations of states and the rights of migrants within the Inter-American human rights system.

The right to freedom of movement and residence is included in Principle 52, which prescribes:

> Every person has the right to leave any country, including their own, and to return to their own country. This shall not be conditional upon any specific purpose or period of time that the individual chooses to stay out of the country. Likewise, the right to determine the state of the migrant's destination is part of this guarantee. Every migrant lawfully within the territory of a member state shall, within that territory, have the right to freedom of movement and freedom to choose their residence. All persons also have the right to remain in their country of origin.
>
> The exercise of the foregoing rights may not be restricted except by a law, to the extent indispensable in a democratic society, to prevent criminal offences or to protect national security, public safety or order, public morals or health or the rights and freedoms of others.[127]

Unlike Article 12 of the UDHR, Article 12 of the ICCPR, Article 22 of the ACHR and Article 8 of the ICRMW, paragraph 1 of Principle 52 explicitly refers to a right to determine the state of destination as part of the guarantee of leaving any country and returning to one's own country. It is this thesis' argument that this can be interpreted incorporating the third aspect of human mobility, 'immigrating' understood as the 'right to migrate,' thereby filling the legal lacuna of the right to freedom of movement, as discussed in the introduction of this thesis and in section 4.2. The fact that paragraph 2 of Principle 52 allows for limitations on this reinforces this argument: States may only restrict entry in accordance with law and in full compliance with the requirements set forth therein. This represents the furthest a human rights institution has gone towards recognising a right to enter another state and thus plays an important role in this thesis' contribution. It demonstrates further evolution in the interpretation of the right to freedom of movement.

[127] Inter-American Principles, Principle 52.

Departing from the interpretations of the international human rights system -which primarily frames human rights as limiting state discretion and imposing positive measures to facilitate migration– Principle 52 of the Inter-American Principles goes further, by framing entry as the general rule and exclusion as an exception, permissible only when strictly meeting the conditions provided by law.

This marks a distinctive contribution of the Inter-American human rights system to advancing a human rights-based paths to regular migration and demonstrates the potential scope of human rights protection at the moment of entry. However, despite being recognised as a 'framework for international migration law', the Inter-American Principles are not legally binding. Their impact depends on whether states incorporate them into their domestic legislations and practices. The following chapters will analyse the extent to which this is reflected in Chile's 2021 Migration Law.

Despite the broad protection recognised in Principle 52, the IAHR Court has consistently recognised state's authority to determine who may enter and remain within their territory. As in the international human rights system, this authority is subject to limitations imposed by individual human rights. This position was first established by *Advisory Opinion OC 18-03*[128] and further developed through subsequent contentious cases and Advisory Opinions. The following subsection examines the interpretations of the IAHR Court, which provide a key framework for understanding how human rights considerations limit state discretion over migrant entry and residence. This analysis contributes to answering this chapter's question regarding the extent to which human rights protect migrants at the point of entry, and to identifying the specific contributions of the Inter-American human rights system to human rights-based paths to regular migration.

4.4.1. Limitations to the authority of states to permit entry and stay at the Inter-American Court of Human Rights

[128] *Advisory Opinion OC-18/03*.

The limitations imposed on states' authority to control entry and stay within the IAHR system remain an under-studied subject. Broader analyses of Inter-American migration case law can be found in both anglophone and Hispanic scholarship. Within the anglophone literature,[129] the system is often characterised as one that provides strong protection to the human rights of migrants, frequently prioritising such protection over state security concerns. A leading contribution in this field is provided by Diego Acosta, whose comprehensive study of two centuries of South American migration and citizenship law identifies regularisation as the main regional response to irregular migration.[130] As noted in the introduction, Acosta characterises this response as a 'far-reaching development', that 'goes beyond the international framework, which does not provide for any right to regularisation'.[131]

A more explicit comparative perspective is offered by Marie-Bénédicte Dembour, who, analysing the jurisprudence of the European Court of Human Right's alongside that of the IAHR, argues that 'the European Convention was elaborated in order to protect primarily citizens, while the American Convention always addressed the plight for migrants'.[132] Such an approach is, however, not exempt from criticism. The IAHR system

[129] Ana Bedouschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges' (2015) 34 Refugee Survey Quarterly 45; Belen Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Rights' 1477; Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP) 2015; Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018); Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP) 2015, 23; Elizabeth Salmón and Cécile Blouin, 'The Standards of the Inter-American Human Rights System Regarding Migration and Its Impact on the Region's States' in Armin von Bogdandy and others (eds), *The Impact of the Human Rights System* (Oxford University Press 2024) 373–374; Ashley Mason, Interpretation of the American Convention in Latin America: The impact of the Inter-American Court of Human Rights' Decision in Velez Loor v. Panama on Irregular Migrants (2012) 18 LAW & Bus. REV AM 71; Beth Lyon, 'The Inter-American Court of human rights defines unauthorized migrant workers' rights for the hemisphere: a comment on Advisory Opinion 18' 590 <https://socialchangenyu.com/wp-content/uploads/2017/12/BETH-LYON_RLSC_28.34.pdf> accessed 22 June 2025; André de Carvalho Ramos, 'Immigration and Human Rights: The Impact of the Inter-American Court of Human Rights Precedents (Towards a "Latin American Migration Policy"?)' (2018) 56 Archiv des Völkerrechts 155, 168.

[130] Acosta, *The National versus the Foreigner* 123.

[131] ibid 132.

[132] Dembour, *When Humans Become Migrants*, 23

has been described as a body with relatively low levels of compliance,[133] and as issuing far-reaching decisions, an issue that will be further analysed in section 5.2.1,

The Hispanic human rights law literature related to migration can by divided into two broad strands. The first group focusses on identifying standards developed by both, the international and the IAHR systems,[134] while the second assess specific domestic migration laws and policies against those standards.[135] In the case of Chile, only a limited number of studies engage in depth with the specific jurisprudence of the IAHR Court on migration.[136]

Despite these contributions, advances within the Inter-American system relating to the facilitation of regular migration pathways are rarely addressed in either the anglophone or Hispanic literature on international migration law. Aiming to fill this gap, this thesis identifies such developments and examines the extent to which they contribute to the construction of a human rights-based approach to migration.

Only a few cases before the IAHR Court address international migration directly both in its advisory and contentious jurisprudence. These cases, recorded under the Inter-American Rapporteurship on Human Mobility registers, are grouped together with cases

[133] Ashley Mason, Interpretation of the American Convention in Latin America: The impact of the Inter-American Court of Human Rights' Decision in Velez Loor v. Panama on Irregular Migrants, 79-81

[134] Helena Olea, 'Olea H, 'Derechos Humanos y Migraciones. Un nuevo lente para un viejo fenómeno' (2011) Anuario de Derechos Humanos, Universidad de Chile; Lila García, 'Migrations, the State and a Policy of the Human Right to Migrate: Towards a New Era in Latin America?' (2016) 88 Colombia Internacional 107; Lila García, 'Estándares del Sistema Interamericano de Derechos Humanos sobre garantías del debido proceso en el control migratorio' (2020) 77 Medellín 77 (Standards of the Inter-American Human Rights System on guarantees of due process in immigration control)

[135] Regina Ingrid Díaz Tolosa, 'Ingreso y permanencia de las personas migrantes en Chile: Compatibilidad de la normativa chilena con los estándares internacionales',14 Estudios constitucionales 179, 218. (Entry and Stay of Migrants in Chile: Compatibility between Chilean Norms and International Standards.); Pablo Ceriani Cernadas, 'Luces y sombras en la legislación migratoria latinoamericana' (2011) 233 Nueva Sociedad 19, 1. (Lights and shadows in Latin American migration legislation); Lawson and Rodriguez Due Process in Administrative Expulsion Procedures of Immigrants: Current Situation and Alternatives 221; Miriam Lorena Henríquez Viñas, 'El habeas corpus contra las expulsiones ilegales y arbitrarias de migrantes' (2018) Revista de Derecho Aplicado LLM UC (Habeas corpus against arbitrary and ilegal expulsión of migrants).

[136] Such as Lawson and Rodriguez, 'Due process in administrative deportation proceedings' and Mayra Feddersen, Tomas Pascual and Macarena Rodriguez Atero, 'The Human Right to Immigrate in the Latinamerican Legal System' (2022) 49 Revista Chilena de Derecho 43, 46–49.

concerning internally displaced people, massacres in Colombia and in Guatemala, and enforced disappearances.[137] In a study on the standards of the IAHR system regarding migration, Elizabeth Salmón and Cécile Blouin selected seven of these cases.[138] Their broad definition of 'migrant' includes refugees and asylum seekers, thereby incorporating a case related to the right to seek and receive asylum.[139]

For the purposes of this thesis, this section narrows its focus to six of the seven cases that specifically address the authority of states to determine who may enter and remain within their territories.[140] Consistent with the interpretations of both the HR Committee and the CMW, the jurisprudence of the IAHR Court on migration reveals an evolutionary trend, a point also noted by Salmón and Blouin.[141] The IAHR Court acknowledges the right of states to control the entry and stay of migrants while simultaneously recognising the human rights limitations on that authority.

Recognition of limitations of state's right to control migration was first established in *Advisory Opinion OC 18-03*,[142] a decision widely regarded as a 'milestone in the development of international protections related to both, non-discrimination and the rights of migrant workers'.[143] The case arose from a request submitted by Mexico

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[137] OAS, 'Decisions of the Inter-American Court of Human Rights' (2022) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/dm/corteidh.asp#1> accessed 12 April 2022.

[138] Elizabeth Salmón and Cécile Blouin, 'The Standards of the Inter-American Human Rights System Regarding Migration and Its Impact on the Region's States' in Armin von Bogdandy and others (eds), *The Impact of the Human Rights System* (Oxford University Press 2024) 373–374.

[139] The Institution of Asylum and its recognition as a human right in the Inter-American System of protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in Relation to Article 1(1) of the American Convention on Human Rights) Advisory Opinion OC-25/18 Inter-American Court of Human Rights Series A No 25 (30 May 2018) para 50.'

[140] *Advisory Opinion OC-18/03* para 119; *Case of Pacheco Tineo Family v Plurinational State of Bolivia*, Inter-American Court of Human Rights, Series C No 272 (Judgment of 25 November 2013) [*case of Pacheco Tineo*]; *Case of Vélez Loor v Panama***,** Inter-American Court of Human Rights, Series C No 218 (Judgment of 23 November 2010) [*case of Vélez Loor v Panama*] paras 97, 100; *Case of Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights, Series C No 282, (Judgment of 28 August 2014) [*case of Expelled Dominicans and Haitians*] paras 350, 351; *Case of Nadege Dorzema and others v Dominican Republic*, Inter-American Court of Human Rights, Series C No 250, (Judgment of 24 October 2012) [*case of Nadege Dorzema*] paras 153, 154; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 39.

[141] Salmón and Blouin, 'The Standards of the Inter-American Human Rights System' 368.

[142] *Advisory Opinion OC-18/03*.

[143] David D Caron, 'Legal Statues and rights of undocumented workers' (2005) 99 American Journal of International Law 460, 465; Similarly, Elisabeth Salmón and Cécile Blouin, 'The Standards of the Inter-American human rights system' 369; Beth Lyon, 'The Inter-American Court of human rights defines

concerning the differential treatment, based on migratory status, in the recognition of labour rights of non-documented migrants by an American state. It is understood as a response from Mexico to *Hoffman Plastic Compounds v NLRB*, a case decided by the U.S. Supreme Court a month and a half earlier,[144] in which it was held that 'undocumented workers were not entitled to back pay under the National Labor Relations Act as a remedy for wrongful termination for union activity'.[145] In *Advisory Opinion OC 18-03* the IAHR Court determined that, although a state may differentiate between regular and irregular migrants, 'the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature'.[146] The Court supported this conclusion by attributing *ius cogens* status to the principle of non-discrimination.[147] The *ius cogens* nature of the principle of non-discrimination and its relevance to the rights of states to admit and exclude migrants will be further explored in the next chapter.

Despite not directly addressing the specific protections for migrant admission and exclusion provided by the Inter-American Convention on Human Rights, the IAHR Court nevertheless highlighted the limitations that human rights law imposes on a state's authority to control who may enter and remain within its borders. This is clearly demonstrated in two key arguments set out in *Advisory Opinion OC 18-03*, which the Court later reiterated in subsequent cases dealing with migration admission and exclusion, demonstrating further elements of evolutionary interpretation. The arguments refer to firstly, limitations on a state's authority to control migration, and secondly, to the definition of migration policy.

4.4.2. Recognition of state's authority along with its human rights limitations.

unauthorized migrant workers' rights for the hemisphere: a comment on Advisory Opinion 18' 590 <https://socialchangenyu.com/wp-content/uploads/2017/12/BETH-LYON_RLSC_28.34.pdf> accessed 22 June 2025.

[144] Caron, 'Legal Statues and Rights of Undocumented Workers' 460

[145] ibid.

[146] *Advisory Opinion OC-18/03* paras 173, Opinion 8.

[147] ibid para 178 Opinion No. 4.

In paragraph 119 of *Advisory Opinion OC 18-03,* [148] the IAHR Court held that:

> States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard to the guarantees of due process and respect for human dignity.

In doing so, the Court identifies two key circumstances that would limit states' power to migrant entry and residence: guarantees of due process and respect for human dignity. Essentially, the Court is focussing on an obligation to respect, and, as such, a negative obligation to refrain from violating these two circumstances can be identified. A similar argument was adopted in later cases *Vélez Loor v. Panama* of 2010 *(Vélez Loor)* and *Expelled Dominicans and Haitians v Dominican Republic*, of 2014 (*Expelled Dominicans and Haitians),*[149] and *Advisory Opinion OC-21/14 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* of 2014 (*Rights and Guarantees of Children*).[150] In these instances the Court reiterated,

> States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention.[151]

Compared to *Advisory Opinion OC 18-03*, these later decisions broaden the scope of human rights protection to migrants during their entry and their stay in two important aspects: First, the Court extends the protection from migrants in an irregular situation to all non-nationals, therefore including the protection to regular migrants, refugees and asylum seekers. Second, the Court widened the limitations on migration control from focussing solely on 'procedural guarantees and respect to human dignity' to

[148] ibid para 119.
[149] *Case of Expelled Dominicans and Haitians* para 350.
[150] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 39.
[151] *Case of Vélez Loor v. Panamá* para 97.

encompassing the broader 'standards of human rights protection established in the American Convention'.

The argument of *Advisory Opinion OC 18-03* was reiterated by the Court in the case of *Nadege Dorzema et al. v Dominican Republic of 2012 (Nadege Dorzema)*, where it was used as an example of when differential treatment would be permissible. In this case, the Court affirmed that principles of due process and human dignity must always be guaranteed by states in their control mechanisms for the entry and exit of migrants, stating that these protections apply 'irrespective of their migratory status'.[152] Consequently, the scope of protection is broadened to include a wider group of migrants.

Although not explicitly mentioned in every case, a recurring theme is the imperative to respect guarantees of due process. In most of the cases discussed, the Court focussed on whether the state had breached minimum procedural guarantees afforded to the claimants. For instance, in *Vélez Loor*, the Court examined whether Panama had violated specific rights, including the right to personal liberty and a fair trial, when Mr. Vélez Loor was detained and imprisoned for entering the country without the necessary documentation. [153] In *Expelled Dominican and Haitians,* the issue was centred on whether the expulsion of the claimants from the Dominican Republic adhered to the minimum standards for expulsion procedures. Similarly, in *Nadege Dorzema* the Court addressed due process concerns when evaluating claims of discrimination,[154] particularly in relation to detentions and collective expulsions carried out without due process guarantees.[155]

The fact that guarantees of due process are cited as a limitation on a state's power to control who enters and remains within its borders is significant. Although these guarantees do not challenge the substantive grounds for expulsion, they can, in certain circumstances, prevent a state from expelling a migrant if such expulsion would breach

[152] *Case of Nadege Dorzema* para 233.
[153] *Case of Vélez Loor v. Panamá* paras 91–101.
[154] *Case of Nadege Dorzema* paras 228–238.
[155] ibid 237.

due process guarantees. To avoid breaching these guarantees, the only solution for the state may be to allow the migrant to remain within its territory. Even though this outcome does not explicitly recognise a duty to allow entry, it does contribute to answering this chapters' question regarding the extent to which human rights law protects migrants' entry. This outcome is also in line with Chetail's argument discussed in section 4.3.1, that the practical effect of prohibiting states from refusing entry may become analogous to a right of entry. The impact of this outcome at the domestic level will be examined further in Chapter V of this thesis, with specific reference to the principle of non-refoulement.

The other two circumstances mentioned by the IAHR Court are of a general character: 'human dignity' and 'standards of human rights protection established in the American Convention'. Regarding 'human dignity', the Court offers no further explanation or qualification. This is in line with Elaine Webster's studies on human dignity.[156] She affirms that the 'internationally recognised meaning' of human dignity 'has limited depth and detail',[157] and, within this context, 'human dignity is associated with the full spectrum of rights'.[158] Unlike the UN Human Rights Treaty Bodies' General Comments and the reports of the UN Special Rapporteur on the Rights of Migrants, the IAHR Court does not delineate specific situations in which migrants would benefit from the protection of the American Convention on Human Rights during their entry and stay in a foreign country. Although the prohibition against torture is not expressly mentioned here as limitation on state control, it could arguably fall under a general framework of human rights protection. The subsequent substitution of the term 'of human dignity' from *Advisory Opinion OC 18-03* with the term 'standards of human rights protection established in the American Convention' in the later IAHR Court's cases, further underscores this broader understanding.

4.4.3. Migratory Policy

[156] Elaine Webster, 'The Underpinning Concept of Human Dignity' (2020) <https://pure.strath.ac.uk/ws/portalfiles/portal/124832871/Webster_AAP_2021_The_Underpinning_Concept_of_Human.pdf> accessed 25 April 2022.
[157] ibid 1.
[158] ibid 9.

In *Advisory Opinion OC 18-03,* the IAHR Court introduced the concept of 'migratory policy' and directly linked it to limitations on a states' authority to control entry and residence. The Court defined migratory policy as 'any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, etc.) that refers to the entry, departure or residence of national or foreign persons in its territory'.[159] The IAHR Court consistently employs this concept in its migration cases. Following its definition, the Court asserts that 'the goals of migratory policies should take into account respect for human rights. Likewise, migratory policies should be implemented respecting and guaranteeing human rights'.[160] This standard is applied throughout subsequent cases related to migration control; indeed, the Court reiterated this reasoning in the cases of *Vélez Loor,*[161] *Expelled Dominicans and Haitians,*[162] and in *Advisory Opinion on the Rights and Guarantees of Children*.[163]

The reasoning of the concept of 'migratory policies' in *Advisory Opinion OC 18-03* concludes with the IAHR Court addressing the relationship between the principle of non-discrimination and migration policies. It affirms 'The distinctions that the states establish must be objective, proportionate and reasonable',[164] and refers to specific paragraphs that elaborate on definitions of discrimination: paragraph 84, which sets out the definitions of discrimination; paragraph 89, which discusses the implications of differential treatment; paragraph 105, which details the standards of objectivity, reasonableness, and legality that states must apply when making distinctions; and paragraph 119, which addresses the human rights limitations imposed on mechanisms used by states to control the entry and stay of migrants. A review of the Court's affirmation in conjunction with the cited paragraphs demonstrates that for the IAHR Court, the principle of non-discrimination significantly limits a state's right to control migration. The next chapter further examines the extent to which the principle of non-discrimination limits Chile's right to control migration by analysing how it is applied by

[159] *Advisory Opinion OC-18/03* para 163.
[160] ibid 168.
[161] *Case of Vélez Loor v. Panamá* para 97.
[162] Case of Expelled Dominican and Haitians para 350.
[163] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 39.
[164] *Advisory Opinion OC-18/03* para 168.

the international and Inter-American human rights systems in the context of migrant's entry to another country, and its impact in the regulations of CVTs in 2021 New Chilean Migration Law.

Therefore, the evolution of IAHR Court jurisprudence clearly demonstrates that states may not prohibit entry or residence on grounds that contravene any international human rights instrument. This evolution is expressly acknowledged by the IAHR Court in the case of *Vélez Loor* which stated that

> The evolution of this aspect in international law has placed certain limits on the application of immigration policies, which must always be applied with strict regard for the guarantees of due process and respect for human dignity, regardless of the migrant's legal status.[165]

A similar statement is found in the cases of *Nadege Dorzema*,[166] and *Pacheco Tineo*.[167]

By focussing on migratory policies, the IAHR Court recognises that the limitations on state control over migration are reflected when controlling migration both, in domestic legislation and in state practice. In *Advisory Opinion OC 18-03*, the IAHR Court went further by declaring that it would only be permissible for a state to establish measures relating to the entry, residence, or departure of migrant workers, 'provided this is in accordance with measures to protect the human rights of all persons and, in particular, the human rights of the workers'.[168] Thus, the IAHR Court not only recognises a negative obligation for states to refrain from impeding entry and residence when doing so would violate human rights, but it also identifies a positive obligation to apply migration control measures solely with the aim of protecting the human rights of migrant workers. This positive obligation, however, is not recognised in the General Comments of the UN Human Rights Treaty Bodies analysed in the previous sections of this chapter.

[165] *Case of Vélez Loor v. Panamá* para 100.
[166] *Case of Nadege Dorzema* para 154.
[167] *Case of Pacheco Tineo* para 129.
[168] *Advisory Opinion OC-18/03* para 169.

This thesis argues that when examined together, these evolving interpretations open new paths for regular migration, as they progressively prioritise the human rights of migrants over the discretionary authority of states to admit them. The evolutionary trend identified here contributes to answering this chapter's main research question: whether human rights law contains obligations to allow the entry of migrants. While such an obligation is not yet explicitly recognised, the IAHR Court is creating a foundational framework that shifts the narrative of migration control, reducing the scope of extensive state discretion and expanding the protection of migrants' rights. Furthermore, this evolving narrative contributes both to the broader development of human rights law and to building human rights-based paths for regular migration.

As the following chapters will demonstrate, this evolving framework is particularly relevant for assessing Chile's migration law, particularly the provision allowing the application of discretionary restrictions such as CVTs, and the provision regulating -at least part- of the principle of non-refoulement.

4.4.4. Linkages of *Advisory Opinion OC 18-03 with General Comment No. 2 of the CMW*.

A final observation concerns the relationship between *Advisory Opinion OC 18-03*, and General Comment No. 2 of the CMW. Although *Advisory Opinion OC 18-03* was issued ten years before the CMW's General Comment No. 2, both documents address the protection afforded to migrant workers in an irregular situation. In fact, the IAHR Court applied the same definition of 'migrant worker in an irregular situation' as the one contained in Article 5 of the ICRMW. Moreover, despite its focus solely on labour rights, section VIII of *Advisory Opinion OC 18-03* is entitled 'Rights of Undocumented Migrant Workers', which is similar to the title of General Comment No. 2 of the CMW – 'Rights of Migrant Workers in an irregular situation and members of their families' – and its section III, 'Protection of the Convention in relation to the rights of migrant workers and members of their families'. It was within the context of protecting the rights of migrants in an irregular situation that these human rights institutions addressed the limitations that

human rights impose on states' authority to admit and exclude migrants, thereby demonstrating the close relationship between these two concepts.

Furthermore, *Advisory Opinion OC 18-03* developed its interpretative guidance based on both international and regional human rights law applicable to migrants in an irregular situation. This is significant given that the IAHR Court applied rights from the ICRMW despite the fact that not all OAS countries have ratified this treaty. Two factors enabled the IAHR Court to do so: first, the case was decided within the framework of the IAHR Court's advisory jurisdiction; and second, the attribution of *ius cogens* status to the principle of non-discrimination rendered the decision applicable *erga omnes*. *Advisory Opinion OC 18-03* was published immediately after a controversial case in the United States – a country that is not a party to the ICRMW or the ACHR. The ICRMW and the interpretative guidance of the CMW are not applicable to the US. Although the US is a member of the OAS, it does not fall under the contentious jurisdiction of the IAHR Court because it is not a party to the ACHR. Nevertheless, the IAHR Court has 'asserted the exercise of its advisory jurisdiction as a way to convey a clear message to all OAS member states, including those who are not parties to the ACHR'.[169] Thus the interpretative guidance of *Advisory Opinion OC 18-03* is also directed to the US. The broad influence of the IAHR Court's Advisory Opinions on all OAS member states stems from the Court's attribution of *ius cogens* character to certain human rights principles.[170] In *Advisory Opinion OC 18-03,* it is the principle of non-discrimination that is interpreted as a norm of *ius cogens*, while in *Rights and Guarantees of Children* this character is ascribed to the principle of non-refoulement.

André de Carvallo Ramos analysed the IAHR Court's reasoning and affirmed that 'the ampliative interpretation of the Convention ensures a way of bypassing the non-ratification of specific treaties related to migrant's rights (such as the United Nations

[169] Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' 1482.
[170] ibid.

Convention on the Protection of Migrant Workers and Members of their Families)'.[171] Indeed, by applying international human rights law to a regional conflict in *Advisory Opinion OC 18-03*, the IAHR Court has advanced the applicability of international human rights law through mechanisms that differ from those of a legally binding treaty. This approach has a direct and significant impact on the migration jurisprudence of the IAHR Court.

4.4.5. Summary

In summary, the IAHR Court approaches the limitations imposed on state's rights to admit and exclude migrants from a human rights obligations perspective, indicating an evolutionary interpretation to the international human rights laws relating to migrants. In *Advisory Opinion OC 18-03* the IAHR Court adopted a progressive stance by transforming migration control into a positive human rights obligation, permitting such control only when it is aimed at protecting the human rights of migrant workers. However, at present, no clear examples have been provided to illustrate how this might be achieved in practice.

The IAHR Court recognises that guarantees of due process serve as a limitation on migration control. It also invokes the principles of human dignity, and of non-discrimination. Its interpretations have evolved to establish a general framework for Inter-American human rights protection for migrants entering and remaining in a country other than their own, although the Court does not specify the exact circumstances under which a state should be compelled to allow entry and stay. Furthermore, the IAHR Court introduced the idea that states need to ensure human rights through migratory policies, and provided a clear definition of this concept, clarifying that states may only apply such policies in strict conformity with human rights. Notably, by incorporating the definition of irregular migrants within the *Advisory Opinion OC 18-03*, the Court facilitated the application of international human rights law even in contexts where the ICRMW has not been ratified by all OAS states. The influence of *Advisory Opinion OC 18-03* is further

[171] André de Carvalho Ramos, 'Immigration and Human Rights: The Impact of the Inter-American Court of Human Rights Precedents (Towards a "Latin American Migration Policy"?)' (2018) 56 Archiv des Völkerrechts 155, 168.

evident in General Comment No. 2 of the CMW, which addresses the human rights protection of irregular migrants and the corresponding limitations on state's rights to determine migrant admission and exclusion.

4.5. Conclusion

This chapter began by asking whether human rights law imposes obligations on states to permit the entry of migrants into countries other than their own. It acknowledged at the outset that the right to freedom of movement does not include an explicitly codified human right to enter another country; instead, the authority to regulate admission remains with states. The chapter proceeded to analyse how the international and Inter-American human rights systems have interpreted this authority, based on the observation that human rights bodies have, over time, identified obligations not explicitly codified in human rights treaties.

A straightforward answer to the chapter's guiding question must, at present, be in the negative. Human rights law does not formally impose general duties to allow entry, and despite advances in interpretation, neither the international, nor the Inter-American systems have coherently concluded that states are legally required to admit migrants as a general rule.

However, the analysis has identified a clear and progressive evolution towards recognising such duties in specific contexts. The chapter characterised the lack of recognition of a right to enter as a *legal lacuna* and demonstrated that since General Comment No. 15, there has been a consistent trend towards progressively imposing limitations on the right of states to control admission – through both negative and positive obligations – thereby contributing to filling this normative gap.

At the international level, evolving interpretations by the UN Human Rights Treaty Bodies – particularly the HR Committee, the CMW and the CRC – as well as the successive UN Special Rapporteurs on the Rights of Migrants, have acknowledged that the sovereign right of states to regulate migration is limited by human rights obligations. Initially anchored in the principles of non-discrimination, family unity and non-refoulement – identified by the HR Committee as 'circumstances under which an alien may enjoy the protection of the Covenant' – these limitations have progressively expanded to

encompass all applicable human rights obligations. Importantly, these interpretations have evolved towards recommending states to adopt positive measures for facilitate regular, safe and accessible migration channels – thereby marking a conceptual shift from viewing human rights merely as limitations to state discretion to positioning them as enablers of pathways to regular migration. The furthest expression of this evolution to date is found in Special Rapporteur Gonzales Morale's final report, which affirms that 'human rights law can establish grounds of admission and stay which give effect to international human rights obligations and principles'. [172] However, the precise content and operationalisation of such obligation remains unclear.

While an evolutionary trend towards recognising duties to permit entry was identified at the international level, it is within the Inter-American system that these interpretations come closest to explicitly recognising such duties. From its earliest jurisprudence on migration control, the IAHR Court has framed migration control as a domain that must conform strictly to human rights obligations and has introduced positive obligations requiring that migration policies be designed and applied to protect the rights of migrants. Consequently, the Court shifted the narrative from one grounded in border control to one that prioritizes the rights of migrants. Principle 52 of the Inter-American Principles goes even further by in framing entry as the general rule and exclusion as an exception permissible only under narrowly defined and justified conditions. These developments underscore the unique contribution of the Inter-American human rights system to advancing human rights-based paths to regular migration.

At the same time, this chapter has also highlighted that it is human rights law itself – notably Article 79 of the ICRMW read in conjunction with Articles 68 and 69 – that constrains the so-called balance between human rights of migrants and border control. Ultimately, the decision regarding admission remains a prerogative of states, and legally binding treaty law continues to define the scope of their obligations.

[172] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales* UN Doc A/77/189 para 18.

In sum, the convergence of the interpretations analysed in this chapter reveals, on one side, the emergence of a human rights-based framework that progressively challenges the discretionary authority of states in matters of migrant admission and exclusion. On the other side, it exposes a persistent tension between these interpretative advances and substantive content of international treaty law.

Chile provides a compelling case study for examining how this evolving balance is managed at the domestic level. First, the impact of the principle of non-discrimination in protecting migrants' entry can be tested against the regulation that allows for entry restrictions applied through CVTs. Secondly, the scope of protection that Chile affords under the principle of non-refoulement and the implications of its partial exclusion in the 2021 Migration Law will shed further light on how these evolving human rights obligations are being operationalised, or resisted, in legal incorporation. The following chapters will address these questions in detail.

CHAPTER V

THE IMPACT OF THE PRINCIPLE OF NON-DISCRIMINATION ON CHILE'S RIGHT TO RESTRICT MIGRATION AND THE CASE OF CONSULAR VISAS FOR TOURISM FOR HAITIAN AND VENEZUELAN NATIONALS.

5.1. Introduction

The previous chapter demonstrated that within both the international and the Inter-American human rights systems the principle of non-discrimination is interpreted as a limitation on the authority of states to control their borders. This chapter examines the legal standards established by these human rights systems with respect to that limitation and evaluates their practical effectiveness in the Chilean context, particularly in relation to the imposition of Consular Visas for Tourism (CVTs). Special attention is given to the application of CVTs to Haitian and Venezuelan nationals, and whether the policies establishing these visas align with Chile's human rights obligations under international and regional law.

Chapter II established that CVT requirements have contributed to the increase in irregular migration in Chile. It also demonstrated that the principle of non-discrimination was recently incorporated into 2021 Migration Law as a limitation on establishing CVTs. Nonetheless, CVTs for Haitians and Venezuelans remain in force. Accordingly, this chapter seeks to analyse the effectiveness of the principle of non-discrimination both as a limit on Chile's migration control and as a mechanism for opening regular migration pathways. It poses the following questions: To what extent does the principle of non-discrimination limit the right of states to restrict migrants' entry? Considering the role of evolutionary interpretation, has this principle evolved to impose obligations on states to allow entry? Finally, by maintaining CVTs for Haitian and Venezuelan nationals, is Chile complying with its international and Inter-American human rights obligations under the principle of non-discrimination?

This chapter is divided into two parts. The first part (section 5.2) considers the circumstances in which the principle of non-discrimination limits a state's power to refuse entry. Drawing on case law about visas and border control, it shows that the principle of non-discrimination, on its own, does not create a duty to allow entry. Even so, international and Inter-American bodies regularly treat it as a limit on states' authority to regulate migration. The standard they apply is not uniform, creating a degree of legal uncertainty. The Inter-American Human Rights System goes further than the UN Human Rights Treaty Bodies, applying a more specific test that sees the Inter-American Human Rights Court (IAHR Court) assessing the legitimacy, objectivity and proportionality of distinctions relied on to admit or exclude migrants. The second part (section 5.3) applies those standards to Chile's CVTs imposed on Haitian and Venezuelan nationals. It argues that the CVTs amount to nationality-based discrimination and should, therefore, be withdrawn. If the visas were abolished, Haitians and Venezuelans would be subject to the same entry rules as other Latin-American citizens, which in practical terms would permit their entry into Chile through other regular migration channels.

5.2. The principle of non-discrimination in the light of migrant's rights. Concept and scope of application.

Non-discrimination is a 'basic general principle relating to the protection of human rights'.[1] Every international human rights treaty contains a provision prohibiting discrimination, such as Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the International Convention on the Rights of Migrant Workers (ICRMW). The American Convention on Human Rights similarly prohibits discrimination in Article 1(1). Under this principle, states are obliged to respect and ensure the rights recognised in the human rights treaties to which they are a party for all individuals within their territories and subject to their jurisdiction, without distinctions based on a specific suspect grounds.[2] Common grounds of protection across these instruments include sex, race, colour, language, religion, political or other opinion and national or social origin. The ICRMW explicitly includes nationality as a prohibited ground

[1] UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* (1989) para 1.
[2] ibid 1; Rhona KM Smith, *International Human Rights Law* (10th edition, Oxford University Press 2022) 194.

for discrimination. In addition to these general prohibitions of discrimination, certain human rights treaties, such as the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)-establish specific protection against discrimination for particular groups.

The principle of non-discrimination has been widely examined in academic literature and significantly developed through international and Inter-American human rights jurisprudence. This thesis does not seek to provide a comprehensive review of these contributions. Rather, it focusses on distinctions, exclusions, restrictions or preferences made by states when regulating individuals' entry into their territory.

The ICCPR and American Convention on Human Rights do not provide an explicit definition of discrimination. The CEDAW and ICERD define discrimination within the scope of their respective protections, and both the international and Inter-American human rights systems have drawn upon these definitions in their broader understanding of the principle.[3] The HRC, in General Comment No. 18, defines discrimination as:

> To imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[4]

Although this definition does not explicitly reference migration control, it applies to such contexts. In fact, the IAHR Court directly adopted this definition in *Advisory Opinion OC 18-03* when determining the applicability of the principle of non-discrimination to

[3] IACHR, 'Compendium on Equality and Non-Discrimination. Inter-American Standards' (2019) paras 5, 80 <https://www.oas.org/en/iachr/reports/pdfs/compendium-equalitynondiscrimination.pdf>.
[4] UN Human Rights Committee, *General Comment No. 18* para 7.

migrants in an irregular situation.[5] The IAHR Commission also endorsed this definition in contentious cases related to migration.[6]

Non-discrimination is also prohibited in law. According to Article 26 of the ICCPR and Article 24 of the AHCR, states are bound to guarantee equal protection before the law and equal protection of the law, and they must refrain from discriminating under the law on any ground, such as race or national and social origin.

The scope of application of the principle of non-discrimination is particularly relevant regarding migration issues. It has served as a basis for evolutionary interpretation and for some horizontal cross-fertilization between the international and the Inter-American human rights systems. Additionally, limits to the state's authority to determine migration control have been established through the principle of non-discrimination. This will be demonstrated in the following analysis on non-discrimination as a norm of *jus cogens,* and its application in relation to another substantive right.

5.2.1. The principle of non-discrimination as a norm of jus cogens

Norms of *ius cogens* are defined in Article 53 of the Vienna Convention of the Law of the Treaties (VCLT)[7] and in Draft Conclusion 2 of the International Law Commission (ILC) Draft Conclusions on peremptory norms of general international law (ius cogens).[8] The ILC text, based on five reports by the UN Special Rapporteur on *Jus Cogens*, Dire Tladi,[9] also addresses how norms of ius cogens are identified and their legal implications. According to both Article 53 of the VCLT and the ILC Draft Conclusions, 'a norm of *jus cogens* or peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no

[5] *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 92 [*Advisory Opinion OC-18/03*].
[6] IACHR, 'Compendium on Equality and Non-Discrimination. Inter-American Standards' 19.
[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [*VCLT*] Article 53
[8] ILC, *Peremptory Norms of General International Law (Jus Cogens). Text of the Draft Conclusions and Draft Annex Provissionally Adopted by the Drafting Committee on First Reading* UN Doc A/CN.4/L936 (29 May 2019).
[9] ILC, *First Report on Jus Cogens by Mr. Dire Tladi, Special Rapporteur* UN Doc A/CN.4/693 (8 March 2016).

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[10]

An evolutionary interpretation of non-discrimination as a *jus cogens* norm has emerged in both the international and the Inter-American human rights systems, particularly in migration-related cases, though not without controversy. The IAHR Court first recognised non-discrimination as a *jus cogens* norm in *Advisory Opinion OC 18-03*.[11] In response to Mexico's question regarding whether the principle of non-discrimination and the right to equal and effective protection of the law could be considered *jus cogens*, the Court affirmed: 'At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens'.[12] This interpretation was reiterated in subsequent migration-related judgments.[13]

The IAHR Court's recognition of non-discrimination as a *jus cogens* norm has sparked debate among scholars. While some endorse this view,[14] others are critical.[15] For instance, Ana Beduschi sees it as a misuse of the concept of *jus cogens*,[16] and Belen Olmos Giupponi views it as an attempt to extend the reach of *Advisory Opinion OC 18-03*

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[10] VCLT article 53; ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 2 [3(1)].

[11] *Advisory Opinion OC-18/03 paras* 97–101.

[12] *Advisory Opinion OC-18/03* 101.

[13] *Case of Expelled Dominicans and Haitians v Dominican Republic*, Judgment Inter-American Court of Human Rights, Series C No 282, (28 August 2014) [*case of Expelled Dominicans and Haitians*] para 264; *Case of Vélez Loor v Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-American Court of Human Rights, Series C No 218 (23 November 2010) [*case of Vélez Loor v Panama*] para 248; Case of Nadege Dorzema and others v Dominican Republic, Judgment Inter-American Court of Human Rights, Series C No 250, (24 October 2012) [*case of Nadege Dorzema*] para 225.

[14] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint.* (First edition, University Press 2015) 312; Beth Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18' 596 <https://socialchangenyu.com/wp-content/uploads/2017/12/BETH-LYON_RLSC_28.34.pdf> accessed 22 June 2025.

[15] Ana Bedouschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges' (2015) 34 Refugee Survey Quarterly 45, 52–56; Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 The European Journal of International Law 101, 119, 122; James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768, 823–824.

[16] Ana Bedouschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights Opportunities and Challenges' 52–56.

to non-parties of the American Convention on Human Rights.[17] Similarly, Andrea Bianchi considers that the Court used the concept of *jus cogens* instrumentally to extend the influence of its decision to the United States, which is not a party to the Inter-American Convention on Human Rights.[18] As noted in the previous chapter, this suggests a possible strategic interpretation. Bianchi further argues that one of the main risks of *jus cogens* lies in its overly broad application, including in relation to the principle of non-discrimination.[19] Other scholars, such as Gleider Hernández, do not challenge its potential status but omit it from lists of recognised or likely *jus cogens* norms.[20]

Despite scholarly debate, the CMW affirmed the *jus cogens* status of the principle of non-discrimination in General Comment No.5 of 2021, stating: 'The principle of non-discrimination is fundamental in international human rights instruments, being regarded as a *jus cogens* norm'.[21] This aligns with the IAHR Court's evolving interpretation of human rights law. The UN Special Rapporteur on the Human Rights of Migrants also recognise non-discrimination as a well-established,[22] core,[23] or fundamental principle of international human rights law,[24] though they all stop short of declaring it a norm of *jus cogens*.

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[17] Belen Olmos Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Rights: Past, Present and Future.' (2017) 21 The International Journal of Human Rights 1477, 1483.

[18] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 The European Journal of International Law 491, 506; Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18' 596.

[19] Bianchi, 'Human Rights and the Magic of Jus Cogens' 506; See also Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights'; Cavallaro and Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' 768.

[20] Gleider Hernández, *International Law* (Oxford University Press 2019) 70–75.

[21] UN CMW, *General Comment No. 5 (2021) on Migrants' Rights to Liberty, Freedom of Arbitrary Detention and Their Connections with Other Human Rights* UN Doc CMW/C/GC/5 (23 September 2021) para 33. The CMW reaffirmed its view in the recently published *General Comment No.6 (2024) on the convergent protection of the rights of migrant workers and members of their families through the Convention and the Global Compact for Safe, Orderly and Regular migration* UN Doc CMW/C/GC/6 (2 January 2025), by stating in para 20: 'The Committee, for its part, emphasizes that the principle of non-discrimination is fundamental to international human rights instruments and is considered a jus cogens norm.'

[22] UNGA, *Human rights of migrants. Report of the Special Rapporteur on the human rights of migrants* UN Doc A/67/299 (13 August 2012) para 55

[23] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales* UN Doc A/77/189 (19 July 2022) para 18

[24] UNGA, *Report of the Special Rapporteur on the human rights of migrants: good practices and initiatives on gender-responsive migration legislation and policies* UN Doc A/74/191para 13

The IAHR Court's approach in *Advisory Opinion OC 18-03* has influenced international interpretations of non-discrimination in migration. One year after was published, Special Rapporteur Gabriela Rodriguez Pizarro endorsed the Court's view, which highlighted the universal nature of the principle and state's international responsibility for violations.[25] She affirmed that any discriminatory treatment by a state triggers international responsibility.[26] Thus, while scholars debate the issue, the IAHR Court influence is evident in the discourse of the international Human Rights System. The CMW explicitly affirms non-discrimination as a *jus cogens* norm, while the UN Special Rapporteurs on the Rights of Migrants remain more cautious in their interpretations.

Recognising non-discrimination as a *jus cogens* norm is significant for advancing regular migration pathways, as it limits states' authority to admit or exclude migrants. Three arguments support this claim. First, *jus cogens* norms are universally binding,[27] even on states that are not parties to treaties where such norms are codified. The IAHR Court affirmed in *Advisory Opinion OC 18-03* that the principle of equality and non-discrimination applies to all states.[28] Therefore, if this principle limits the right to control migration, those limitations apply universally – even beyond the scope of specific human rights instruments.

Second, *jus cogens* norms are 'hierarchically superior to other rules of international law'.[29] In contrast, there is no authoritative recognition to the right to admit and exclude migrants as a *jus cogens* norm. Where these rights conflict, the *jus cogens* principle prevails.[30] As such, the right of a migrant to not be discriminated against should override a state's discretion, potentially obliging the state to allow entry or stay.

[25] UNGA, *Report on the human rights of migrants submitted by the Special Rapporteur of the Commission on Human Rights* Un Doc A/59/377 (22 September 2004) para 28.
[26] Ibid para 41.
[27] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 3.
[28] *Advisory Opinion OC-18/03* para 110.
[29] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft conclusion 3.
[30] Hernández, *International Law* 58.

Third, *jus cogens* obligations have *erga omnes* effect,[31] meaning 'any state is entitled to invoke the responsibility of another state for breach of a peremptory norm of general international law (*jus cogens)* in accordance with the responsibility of states for wrongful acts'.[32] This has implications at the domestic level, particularly in states where the hierarchy between international and domestic law is debated. If national legislation contradicts a *jus cogens* norm, the state risks incurring international responsibility.[33] This includes migration legislation with discriminatory entry or stay restrictions. Legislation containing discriminatory restrictions for allowing entry or stay of migrants has been identified at both the international and Inter-American human rights systems, such as Ecuador's requirement for Colombian migrants to submit criminal records, as will be further analysed in the next section, and a Dominican Republic Directive to deport Haitian pregnant women to Haiti.[34]

However, a caveat to non-discrimination as a *jus cogens* norm must be noted. Provisions of human rights treaties recognised as customary international law also generate *erga omnes* obligations.[35] Since non-discrimination is considered customary international law, the debate over its *jus cogens* status may appear less significant – unless the right to admit and exclude migrants is also deemed customary international law, which is not. As argued above, *jus cogens* norms take precedence in cases of conflict.

One final point must be addressed. It remains unclear whether the *jus cogens* character of the principle of non-discrimination is recognised beyond the migration context. Given the universal nature of *jus cogens* norms, limited acceptance outside this field may suggest it does not qualify as such. According to the ILC Draft Conclusions a norm qualifies of *jus cogens* if:

(a) It is a norm of general international law, and

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[31] Erika De Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* 554; ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 17; *Advisory Opinion OC-18/03 para* 101.

[32] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft conclusion 17 para 1.

[33] De Wet, 'Jus Cogens and Obligations Erga Omnes' 559

[34] UNGA, *Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales. Human rights violations at the international borders: trends, prevention and accountability* UN Doc A/HRC/50/31 (26 April 2022) para 29.

[35] De Wet, 'Jus Cogens and Obligations Erga Omnes' 554.

(b) It is accepted and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[36]

The principle of non-discrimination meets the first requirement for jus cogens status, as it is a norms of general international law.[37] According to the ILC, such norms are derived from customary international law and treaty law.[38] Non-discrimination is included in all nine core international human rights treaties, as well as in the American Convention on Human Rights.

The second criterion -acceptance and recognition as a norm from which no derogation is permitted- remains contested for three reasons. Initially, the recognition of non-discrimination as a *jus cogens* norm has been affirmed by the IAHR Court and an interpretation of the CMW. However, under ILC guidance, decisions by courts and experts are only subsidiary means for determining the peremptory character of norms of general international law.[39] Thus, these interpretations alone are insufficient to establish the *jus cogens* character of the principle of non-discrimination. Next, recognition of a norm as *jus cogens* relies primarily on state practice, as *jus cogens* norms are a subcategory of customary international law. The ILC identifies relevant evidence as official state statements, national court decisions, and resolutions made in an international organisation.[40] Neither the CMW nor the IAHR Court offered such references when affirming non-discrimination as a *jus cogens* norm. The CMW cited no legal instruments to support its claim,[41] and although *Advisory Opinion OC 18-03* cited nineteen treaties and fourteen soft law instruments, these support non-discrimination as a general norm, not as one from which derogation is not permitted.[42] Moreover, the

[36] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 4.
[37] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 5.
[38] Ibid.
[39] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 8.
[40] Ibid.
[41] UN CMW, *General Comment No. 5* para 33.
[42] Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 The American Journal of International Law 291, 310; De Wet, 'Jus Cogens and Obligations Erga Omnes' 544; *Advisory Opinion OC-18/03* para 86.

IAHR Court's reliance on natural law, arguing that non-discrimination derives from human dignity and the oneness of humanity,[43] does not meet the ILC's evidentiary threshold. While UN Special Rapporteur Dire Tladi acknowledged that the IAHR Court attributed *jus cogens* character to the principle of non-discrimination in the case of *Expelled Dominicans and Haitians v Dominican Republic*,[44] he did not address its legal validity.

There is, however, a point to be made. The lack of systematic reference to state practice by the IAHR Court and the CMW does not in itself disqualify non-discrimination as a *jus cogens* norm. Other norms now recognised as peremptory norms, such as the prohibition of genocide, were also accepted without detailed reference to state practice, as shown in the ICJ's decision in *Democratic Republic of Congo v Rwanda*.[45] As Erika de Wet notes, many such determinations lack systematic evidence of state practice and/or opinion juris.[46]

Another reason to question whether non-discrimination qualifies as a norm of *jus cogens* is the requirement for acceptance and recognition by a very large majority of states.[47] It remains unclear whether this threshold has been met. Notably, non-discrimination does not appear in the ILC's non-exhaustive list of *jus cogens* norms.[48] Either in its Draft Conclusions or its earlier commentary on the 1966 Draft Articles on the Law of the Treaties.[49] In contrast, the prohibition of racial discrimination is included in the ILC's recent examples, suggesting that a narrower, more specific version of non-discrimination may be recognised as *jus cogens*, but not the broader principle. Racial discrimination and its relationship with state's entry restrictions is analysed in section 5.2.4 of this chapter.

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[43] *Advisory Opinion OC-18/03* para 100; De Wet, 'Jus Cogens and Obligations Erga Omnes' 544.
[44] ILC, *First Report on Jus Cogens by Mr. Dire Tladi, Special Rapporteur* para 47.
[45] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (International Court of Justice, General List No 126, Judgment of 3 February 2006) ICJ Rep (2006) 6.
[46] De Wet, 'Jus Cogens and Obligations Erga Omnes' 544.
[47] ILC, *Peremptory Norms of General International Law (Jus Cogens)* Draft Conclusion 7 para 2.
[48] I ILC, *Peremptory Norms of General International Law (Jus Cogens* Draft Conclusion 23 |24|.
[49] ILC, *Yearbook of the International Law Commission 1966, Vol II* UN Doc A/CN.4/SER.A/1966/Add.1 248.

On the other hand, support for recognising non-discrimination as a norm of *jus cogens* may be drawn from the non-derogation clauses in international and Inter-American human rights treaties. These clauses list non-discrimination alongside other obligations that states must uphold even when derogating from human rights commitments. For instance, Article 4 (1) of the ICCPR prescribes:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and **do not involve discrimination** solely on the ground of race, colour, sex, language, religion or social origin.[50]

As these treaties are widely ratified, such clauses could imply that non-discrimination is non-derogable and therefore qualifies as *jus cogens*. Some scholars argue that recognising 'a right as non-derogable in an international human rights instrument could be a factor to be taken into account when determining whether the right has acquired *jus cogens*, but is not itself decisive'.[51] This is because certain rights are non-derogable in some human rights instruments but not in others.[52] However, non-discrimination features consistently across all nine core international human rights treaties and in the ACHR as an obligation that must be upheld in all circumstances. Still, it is not listed among the non-derogable rights. In the same example, article 4 (2) prescribes:

> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

The omission of the prohibition of discrimination in the list above-mentioned is likely due to its requirement of being applied in relation with another substantive right, an issue explored in the following section

[50] ICCPR article 4.
[51] De Wet, 'Jus Cogens and Obligations Erga Omnes' 545.
[52] Ibid.

In conclusion, the principle of non-discrimination has been recognised as a *jus cogens* norm within the migration context by both the IAHR Court and the CMW. The similarity in their interpretations suggests a clear influence from the IAHR Court in the CMW's interpretations. Additionally, these interpretations reflect an evolutionary trend toward assigning greater normative weight to this principle, and therefore, a limitation to states' rights to admit and exclude migrants.

However, recognition of non-discrimination as a *jus cogens* norm beyond the migration context remains contested in the literature. When evaluated against the criteria established by the ILC, the principle clearly satisfies the first requirement: it is a norm of general international law. Its fulfilment of the second requirement – acceptance and recognition by the international community as a norm from which no derogation is permitted – is more debatable. One view holds that the decisions of IAHR Court and the interpretations by the CMW are not enough to recognise this status. Another perspective suggests that the principle's inclusion across in all nine-core international human rights treaties, and the American Convention on Human Rights, as well as in its non-derogation clauses may support its recognition as a regional *jus cogens* norm.

Although full recognition of non-discrimination as a *jus cogens* norm is not yet settled in international law, the evolving interpretations towards this recognition, particularly in relation to migration, demonstrates it is significantly recognised as a limitation on states' right to admit and exclude migrants in Latin America.

5.2.2. Application of the principle of non-discrimination in relation to another substantive rights.

The prohibition of discrimination in human rights law, as established in provisions such as Article 2 of the ICCPR,[53] is generally applied when it occurs in conjunction with the exercise of another substantive human right.[54]

[53] ICCPR article 2; ICRMW article 7; UN CRC article 2; CEDAW article 2; CRPD article 5; CAT article 1; American Convention on Human Rights article 1.
[54] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein 1993) 28, 34; UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* para 12.

In its case law, the UN Human Rights Treaty Bodies consistently declare inadmissible claims in which applicants allege a direct violation of Article 2 in isolation, including cases where individuals invoke a right to enter or remain in a country on non-discrimination grounds. For instance, in *H.E.A.K. v. Denmark*, the author of the communication, an Egyptian national residing in Denmark and seeking asylum, claimed a violation of Articles 2 (non-discrimination) and 7 (prohibition of torture) of the ICCPR. However, he failed to substantiate the alleged violation of Article 2 in conjunction with Article 7. The HR Committee deemed his claim under Article 2 inadmissible but concluded that returning the applicant to Egypt would violate his rights under Article 7 of the ICCPR.[55]

UN Human Right Treaty Bodies have also dismissed claims of non-discrimination alongside other rights where the connection was not sufficiently substantiated. For instance, in *A.B. v Finland*, a Russian child was denied a residence permit in Finland on the grounds of asylum or compassionate considerations.[56] The child had suffered harassment and bullying in kindergarten in the Russian Federation due to his biological mother's sexual orientation, as she lived with her female partner. The applicant argued that this treatment violated his right not to be discriminated against under Article 2 of the UNCRC.[57] However, the CRC found that the author had failed to 'sufficiently substantiate' the discrimination claims as 'alleged violations of Finland's non-refoulement obligations', and consequently declared them inadmissible.[58] Nevertheless, the CRC ruled in favour of the applicant on the basis on the best interests of the child and the real risk of harm if he were returned.[59]

The CMW acknowledged a 'non-autonomous character' of the principle of non-discrimination in its general comments.[60] In General Comment No.2, the CMW

[55] UN Human Rights Committee, *Communication No. 2343/2014* UN Doc CCPR/C/114/D/2343/2014 (24 September 2015) [*H.E.A.K. v. Denmark*] para 9.
[56] UN CRC, Communication No. 51/2018 UN Doc CRC/C/86/D/51/2018 (12 March 2021) [A.B. v. Finland] para 2.8.
[57] Ibid para 3.4.
[58] Ibid para 11.3
[59] Ibid para 12.6
[60] *UN CMW, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families UN Doc CMW/C/CG/2 (28 August 2013) para 19; UN CMW, General Comment No. 5* para 33.

interpreted the scope of application of Article 7 of the ICRMW (non-discrimination) as it applies to migrant workers and members of their families in an irregular situation, stating:

> Article 7 does not provide an autonomous right. Its application is limited to those rights of migrant workers and members of their families in an irregular situation that are protected in the Convention, and in particular, part III.'[61]

A similar interpretation was provided by the CMW in General Comment No. 5.[62] Consequently, the prohibition on discrimination under Article 7 of the ICRMW must be read in conjunction with the rights expressly recognised in the ICRMW.

Similarly, within the IAHR system the scope of application of Article 1.1 of the American Convention on Human Rights (principle of non-discrimination) is interpreted as a norm of general application which, according to both the IAHR Court and the IAHR Commission, extends to the exercise and application of all the provisions enumerated in the treaty.[63] Furthermore, the prohibition of discrimination is understood to impose an obligation on states to guarantee and respect the exercise of the rights enshrined in the American Convention on Human Rights without discrimination of any kind.[64] In light of the above interpretation, when invoked in isolation the principle of non-discrimination has not established a right to enter or remain in a country. This assertion could support the argument that, in the absence of a general human right to enter and stay in a country other than one's own, there is no substantive right with which the prohibition of discrimination can operate in conjunction. States frequently rely on this reasoning in the formulation and implementation of migration policies and visa regulations.

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[61] UN CMW, *General Comment No. 2* para 19.
[62] UN CMW, *General Comment No. 5* para 33.
[63] *Case of Expelled Dominicans and Haitians v Dominican Republic*, Judgment Inter-American Court of Human Rights, Series C No 282, (28 August 2014) [*case of Expelled Dominicans and Haitians*] para 262. *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84; Inter-American Commission on Human Rights, *Report No 80/15, Case 12.689, J.S.C.H. and M.G.S. v Mexico, Merits* (28 October 2015).
[64] *Case of Expelled Dominicans and Haitians* para 262; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights, Series A No 4 (19 January 1984) para 53.

Martin Heijer has examined this issue in the context of EU visa policy, arguing that for such a policy to be deemed discriminatory, it must:

> ...overcome the axiom that States, in the absence of specific treaty obligations to the contrary, are free in deciding which immigrants may enter its territory, and that, consequently, distinctions on the ground of nationality are not considered to be discriminatory.[65]

A more flexible pathway can be found in the provisions safeguarding equal protection of the law without discrimination. In the international Human Rights System, Article 26 of the ICCPR (equal protection of the law) differs from Article 2 in that the former 'is not limited to the rights which are provided for in the Covenant'.[66] As interpreted by the HR Committee, Article 26 'provides in itself an autonomous right',[67] prohibiting discrimination in law or any area regulated by public authorities. Consequently, it imposes an obligation on states to ensure that the legislation they enact is not discriminatory on any of the grounds enumerated in Article 26 of the ICCPR. [68]

In the scarce case law of the HR Committee concerning entry restrictions and the prohibition of discrimination, the Committee has ruled against a visa restriction by applying the principle of non-discrimination 'within the meaning of Article 26 of the ICCPR' (equality before the law).[69] In *Andrea Vandom v the Republic of Korea*, the author challenged the requirement for mandatory HIV tests as a precondition for visa renewal, arguing that it was discriminatory. The requirement applied only to non-national language instructors of non-Korean ethnicity, excluding others in similar positions.[70] She claimed a violation of her rights under Articles 2, 14(1), 17 and 26 of the ICCPR.[71] The Korean government contended that it had broad discretion in regulating the entry of non-

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[65] Maarten den Heijer, 'Visas and Non-Discrimination' (2018) 20 European Journal of Migration and Law 470, 472.
[66] UN Human Rights Committee, *General Comment 18* para 12.
[67] Ibid
[68] Ibid
[69] UN Human Rights Committee, *Communication No. 2273/2013* UN Doc CCPR/C/123/D/2273/2013 (10 August 2018) [*Andrea Vandom v Republic of Korea*] para 8.5.
[70] Ibid.
[71] Ibid 3.1.

citizens and argued that the HIV test served the 'legitimate aim of protecting public health and maintaining public order'.[72]

The HRC assessed the non-discrimination aspect of the case under Article 26 of the ICCPR. Recalling General Comment 15 para 5,[73] it applied the circumstance of non-discrimination 'within the meaning of Article 26', affirming that a difference in treatment is permissible only if it adheres to objective and reasonable standards.[74] As a consequence, the HRC found that the state had not been able to demonstrate that the mandatory HIV testing policy as a precondition for granting a visa renewal for the specific group of foreign language instructors of non-Korean ethnicity was based on objective or reasonable grounds or in the interest of public health or public order and concluded that the requirement amounted to a violation of the applicant's rights under Article 26 of the ICCPR.[75] While this is the singular case from the HR Committee, it demonstrates how non-discrimination could be interpreted as a restriction on a state's authority to exclude migrants. This supports the broader argument of this thesis argument that human rights law can contribute to create regular migration pathways against irregular migration.

By applying Article 26 within the meaning of Article 2 to assess the visa restriction imposed by the Republic of Korea, the HR Committee effectively limited the state's authority to determine whether the applicant could remain in the country. Furthermore, although the Republic of Korea argued that it had broad discretion in controlling migration, the state justified the visa requirement by invoking reasons of public health and public order. In doing so, the state implicitly acknowledged the limitations imposed on its authority to regulate entry or residence.

Similarly, in the Inter-American HR System, the prohibition of discrimination is reinforced at the regional level through Article 24 of the ACHR (equal protection of the law). When interpreting this provision, the IAHR Court affirmed that it imposes a duty on states to respect and guarantee the principle of equality and non-discrimination in all domestic

[72] Ibid 4.3.
[73] Ibid 8.4.
[74] Ibid 8.5.
[75] Ibid.

laws enacted.[76] Therefore, Article 24 would apply in cases where discrimination results in unequal protection or the discriminatory application of domestic law.[77] In this regard, the Court has ruled that if a state discriminates in the respect or guarantee of a right enshrined in the ACHR, it would be in violation of both Article 1.1 and the corresponding substantive right. Conversely, if the discrimination concerns the unequal protection or application of domestic law, the violation must be analysed under Article 24, complemented by the protected grounds established in Article 1.1.[78] Section 5.3 will apply this reasoning to the case of Chilean CVTs, as these visas are created by law, they must not discriminate on any grounds.

5.2.3. Indirect discrimination.

Human rights Law prohibits both direct and indirect discrimination, including in the context of migration control. Direct discrimination involves differential treatment explicitly based on a protected ground.[79] The 'test' applied to determine direct discrimination will be addressed in section 5.2.4. Indirect discrimination, on the other hand, is not explicitly defined in Human Rights Law, though the concept has evolved through the interpretations of regional human rights courts, including the IAHR Court, as well as the UN Human Rights Treaty Bodies.[80] This evolution is also recognised by scholars, who regard indirect discrimination as an established component of legal equality and non-discrimination standards.[81] Titia Loenen defines indirect discrimination as:

> Rules or measures which are not expressly based on protected grounds, such as race, sex, religion, sexual orientation, et cetera, yet have a disparate, negative

[76] *Yatama v Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 June 2005, Inter-American Court of Human Rights, Series C No 127.
[77] *Case of Expelled Dominicans and Haitian*, para 262
[78] *Ramírez Escobar and Others v Guatemala*, Merits, Reparations and Costs, Judgment of 9 March 2018, Inter-American Court of Human Rights**,** Series C No 351 para 272.
[79] *Advisory Opinion OC-18/03* para 103; Titia Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards. From Formal to More Substantive Equality.* (Brill Nijhoff 2025) 97.
[80] Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards* 118–123.
[81] Ibid 123.

> effect on the groups protected by the prohibition or discrimination on these grounds.[82]

The CMW has explicitly analysed indirect discrimination against migrant workers, affirming that it arises 'when a law, policy or practice appears neutral at face value, but has disproportionate impact on their rights'.[83] For example, the CMW highlights the requirement of birth certificates for school enrolment, which, although neutral in its wording, may disproportionately affect migrant workers in an irregular situation who often lack such documentation or have been denied access to it. [84]

Similarly, the IAHR System has established that norms and policies may have a discriminatory impact even when they appear neutral in their wording or apply broadly without explicit differentiation.[85] The IAHR Court first referred to the concept of indirect discrimination in Advisory Opinion OC-18/03, affirming that 'states must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination'.[86] The concept was later reiterated in the cases of *Nadege Dorzema* and *Expelled Dominicans*, where the Court held that:

> a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups.[87]

Thus, rather than focussing on the sameness or difference of the treatment itself, the concept of indirect discrimination centres on the *effects* produced by rule or measure.[88]

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[82] Ibid 76.
[83] CMW, 'General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families' (n 110) para 20.
[84] ibid.
[85] IAHR Commission, 'Compendium on Equality and Non-Discrimination. Inter-American Standards' 31–33.
[86] *Advisory Opinion OC-18/03* para 103.
[87] *Case of Nadege Dorzema and others v Dominican Republic*, Judgment, Inter-American Court of Human Rights, Series C No 250, (24 October 2012) [*case of Nadege Dorzema*] para 235; *Case of Expelled Dominicans and Haitian* para 263.
[88] Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards* 77.

This understanding is particularly relevant for assessing the Chilean regulation on CVTs. As discussed in Chapter II, one of the effects of imposing CVTs on nationals of Venezuela and Haiti was a marked increase in their irregular entry into Chile, this supports the thesis argument that the policy may constitute. This claim will be further developed in section 5.3.

5.2.4. Direct discrimination on the basis of nationality, national origin and race.

Having established that indirect discrimination in the context of migration is focussed on the effect produced by migration law, policies or practices, this thesis will now address direct discrimination.

Direct discrimination can be produced by rules and measures that are expressly based on specific grounds, which are broadly defined in international HR instruments. These instruments provide an open-ended list of grounds for discrimination, as indicated by phrases such as 'distinction of any kind',[89] or 'any other social condition'.[90] The HR Committee clarifies this concept, stating:

> [T]he term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground [...] and which has the purpose or effect of impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

In the Inter-American human rights system, the grounds for discrimination enumerated in Article 1.1. of the American Convention on Human Rights are identified as 'suspect categories'[91] or 'prohibited grounds for discrimination'. Like the international human rights system, the IAHR Court and Commission acknowledge that the list of grounds provided in Article 1.1 of the American Convention on Human Rights is not exhaustive or

[89] ICCPR article 2
[90] American Convention on Human Rights article 1.1.
[91] IAHR Commission 'Compendium on Equality and Non-Discrimination. Inter-American Standards' paras 57, 58; IAHR Court, 'Cuadernillo de Jurisprudencia de La Corte Interamericana de Derechos Humanos. Igualdad y No Discriminación.' (2021) 2 <https://www.corteidh.or.cr/cdf/cuadernillos-jurisprudencia.html> accessed 2 April 2024.

restrictive. Furthermore, Principle 12 of the Inter-American Principles includes within the grounds for discrimination the 'reasons for crossing international borders'.

As analysed in Chapter II, the CVTs introduced by Chile's 2018 Migration Reform resulted in stricter entry requirements for Venezuelan and Haitian nationals. In this context, the ground of nationality (or national origin) will be examined next.

5.2.4.1. Discrimination on the grounds of nationality or national origin.

Article 1(1) of the ICRMW explicitly includes 'nationality' as a prohibited ground for discrimination – a protection that is not explicitly listed in the ICCPR, the CRC, the CERD or the CEDAW. These instruments, however, include 'national origin' as a prohibited ground. The concepts have been treated both indistinctly and differently depending on the instrument, as will be analysed in this and the following section.

The CMW has identified as discriminatory state practices where stricter visa requirements have been applied to specific nationalities, including Chilean CVTs for Haitian and Venezuelan nationals. In its Concluding Observations on Chile's second periodic report, the CMW expressed concern over:

> ... the administrative measures adopted that institute specific requirements for migrants of Venezuelan and Haitian origin, such as the creation of specific consular visas.[92]

Furthermore, the CMW recommended that Chile:

> ... ensure that administrative measures do not discriminate on the basis of national origin of migrants, in particular against Venezuelans and Haitians.[93]

A second example of the CMW's assessment of discriminatory visa requirements involved Ecuador, where a regulation required Colombian immigrants to submit their criminal records as part of their visa application. In its Concluding Observations on

[92] UN CMW, 'Concluding observations on the second periodic report of Chile' UN Doc CMW/C/CHL/CO/2 (11 May 2021) para 27.
[93] ibid 28 (e).

Ecuador, the CMW highlighted that this requirement was discriminatory, as it was only imposed on certain nationalities, thereby reinforcing stigmatisation.[94] The CMW expressed regret that the measure specifically targeted Colombian nationals and urged Ecuador to take the necessary steps to uphold the principle of non-discrimination and to refrain from implementing migration policies directed at a specific group of migrants.[95] Although the CMW did not explicitly define what these 'necessary measures' should entail, it recommended that Ecuador review and eliminate the requirement in question.[96]

A common feature in both the Chilean and the Ecuadorian examples is that the principle of non-discrimination was applied as a limitation on the right of states to control migration. This approach is consistent with the CMW's interpretations in General Comment No. 2 (on the rights of migrant workers in irregular situation and members of their families), and Joint General Comment No. 3 of the CMW and No. 22 of the CRC (on the general principles regarding the human rights of children in the context of international migration). In both General Comments, the principle of non-discrimination is interpreted as a limitation on state laws, policies and practices,[97] including border control measures.[98] Furthermore, in joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC, the Committees clarified that:

> The principle of non-discrimination shall be at the centre of all migration policies and procedures, including border control measures, and regardless of the migration status of the children or their parents'.[99]

Additionally, in both the Chilean and Ecuadorian cases, the CMW's assessment of discrimination focused on a differential treatment based on national origin or nationality. In these examples, the distinction between 'national origin' and 'nationality' is not clearly defined, nor is there an explicit assessment of reasonableness or objectiveness. While

[94] UN CMW, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Ecuador* UN Doc CMW/C/ECU/CO/2 (15 December 2010) para 25.
[95] ibid 26.
[96] ibid 25.
[97] UN CMW *General Comment No 2*, para 19
[98] UN CMW *Joint General Comment No 3*, para 22, UN CMW *General Comment No 5*, para 35.
[99] UN CMW *Joint General Comment No 3*, para 22.

the CMW recommended that Chile and Ecuador amend their policies, it did not specify the exact measures required to ensure compliance with non-discrimination standards.

As examined in Chapter II, CVTs close regular migration pathways for certain nationalities which, in turn, 'may also push migrants into irregular entry routes and/or irregular residence status'.[100] Therefore, the likelihood of irregular migration increases.[101] A similar situation has been analysed by Elspeth Guild and Maja Grunder in the context of the EU, particularly regarding the externalisation of Schengen borders. Their study examines how migrants from certain countries are required to apply for visas in their countries of origin,[102] effectively restricting their ability to access regular migration channels. Thus, preventing border externalisation that is based solely on nationality serves as a dual mechanism. It contributes to ensuring that migration control is non-discriminatory and facilitates regular migration pathways.

In summary, the cases analysed in this subsection demonstrate that differential visa requirements based on nationality or national origin can amount to discrimination. In response, the CMW has urged states to ensure that their migration control measures comply with the principle of non-discrimination. In the case of Ecuador, the Committee explicitly recommended eliminating the stricter visa requirement for Colombian nationals. While its recommendation to Chile did not explicitly call for the elimination of CVTs for Venezuelan and Haitian nationals, the Committee expressed concern over their creation and urged Chile to ensure that such administrative measures do not discriminate on the basis of national origin.

As will be further developed in section 5.3, this thesis builds on the Committee's interpretation to argue that CVTs are indeed discriminatory and incompatible with Chile's positive obligations to facilitate regular migration pathways. Rather than promoting regularisation, these visas contribute to increasing irregular migration.

[100] Mathias Czaika and Mogens Hobolth, 'Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?' (2016) 17(3) European Union Politics 345, 361.
[101] Elspeth Guild and Maja Grundler, 'The EU Visa Policy: To Deter and to Facilitate' in Evangelina Tsourdi and Philippe de Btuycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 394.
[102] Ibid 397.

However, in applying the general prohibition of non-discrimination to entry restrictions, the CMW does not clearly distinguish between 'national origin' and 'nationality'. The next section analyses how this ambiguity is addressed within the specific framework of racial discrimination.

5.2.4.2. Nationality as an exception to racial discrimination.

Racial discrimination is also recognised as a limitation on states' authority to control migration. In General Comment No. 30 (on discrimination against non-citizens), the CERD interpreted that:

> State parties should adopt measures to ensure that immigration policies do not have the effect of discriminating against persons based on race, colour, descent, or national or ethnic origin.[103]

Unlike the CMW, the CERD does not explicitly mention border control measures within the scope of immigration policies. However, as previously established, border control measures form part of immigration policies. Therefore, it could be argued that CERD's prohibition against discriminatory immigration policies also applies to border control practices.

Additionally, this interpretation is consistent with the IAHR Court's definition on migration policies discussed in section 4.4.3, which links such policies to the state's duty to protect the human rights of all persons, particularly migrant workers. Although the CERD does not go as far as to assert that immigration policies would only be admissible when aimed at protecting migrants from discrimination, it affirms that states have positive obligations to prevent these migration policies from being discriminatory. This interpretation directly addresses this chapter's central question regarding the extent to which the principle of non-discrimination limits the right of states to restrict entry. Under the CERD framework, states must not only refrain from discriminatory practices in border control but must also adopt positive measures to ensure their policies do not result in racial discrimination. Furthermore, in doing so, the CERD's interpretation

[103] UN CERD, *General Recommendation 30. Discrimination against Non-Citizens* para 9.

reinforces this thesis broader argument that human rights law contains positive and negative obligations that contribute to opening regular migration pathways.

Racial discrimination is defined in Article 1 (1) ICERD as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, and national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

However, ICERD includes two exceptions in Articles 1(2) and (3) ICERD. Article 1(2) states:

> This convention shall not apply to distinctions, exclusions or preferences made by a state party to this Convention between citizens and non-citizens.[104]

This exception raises an interpretative challenge. On the one hand, Article 1(2) could be understood as specifically excluding nationality and migration status-based discrimination from the scope of ICERD.[105] If interpreted this way, the provision could provide states with broad discretion to differentiate between citizens and non-citizens, even when such differentiation is based on grounds expressly prohibited in Article 1(1), such as national origin.[106] Furthermore, states could invoke Article 1(2) when establishing stricter entry conditions for specific groups of non-citizens. Under this interpretation, states would not consider these restrictions as racial discrimination, even if they are based on prohibited grounds under Article 1(1), such as national origin.

The practice of states denying entry to specific groups of non-citizens can be examined in the light of this interpretation. For example, in the case of refugees, Achiume highlights

[104] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December, 1965, entered into force 4 January 1969) 660 UNTS 195 [ICERD] article 1 para 2.
[105] David Fennelly and Clíodhna Murphy, 'Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive' (2021) 39 Netherlands Quarterly of Human Rights 308, 313.
[106] Cathryn Costello and Michelle Foster, 'Race Discrimination Effaced at the International Court of Justice' (2021) 115 AJIL Unbound 339, 340.

how Global North states have explicitly adopted a discriminatory application of the Refugee Convention to exclude certain groups from recognition and protection based on race.[107] Similarly, in the case of migrants, den Heijer analyses how the EU visa regime allows for distinctions based on nationality. He argues that the risk of this visa regime is that it might create 'disproportionate distortions on prohibited grounds such as race and nationality'.[108] The Chilean CVT requirement imposed on Haitian and Venezuelan nationals may fall within this context, as it establishes differential entry conditions based on nationality. Section 5.3 will further explore how this distinction may amount to discrimination under Human Rights Law.

Costello and Foster critique the above interpretation of Article 1(2) ICERD arguing that it is 'wrongly invoked to insulate all state migration control action from scrutiny'.[109] Building on their reasoning, a more accurate interpretation of Article 1(2) challenges the assumption that states enjoy a broad margin of discretion in migration control on three grounds: First, Article 1(2) permits states to apply distinctions based on nationality. Costello and Foster acknowledge that this provision accommodates a state's right to 'control the admission of non-citizens'.[110] However, CERD's General Recommendation 30 offers an evolutionary interpretation of Article 1(2), establishing a standard that states must follow when differentiating based on nationality and immigration status.[111] According to CERD, such differentiation must meet the standard of legitimacy and proportionality, assessed in light of the object and purpose of ICERD. The Committee affirmed:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied

[107] E Tendayi Achiume, 'Race, Refugee and International Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 50–51.
[108] Maarten den Heijer, 'Visas and Non-Discrimination' (2018) 20 European Journal of Migration and Law 470, 488.
[109] Costello and Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 International Journal of Discrimination and the Law 233, 254.
[110] Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice' 399.
[111] Fennelly and Murphy, 'Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive' 315.

pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[112]

Second, while Article 1(2) permits states to differentiate between citizens and non-citizens, it does not explicitly allow distinctions between certain groups of non-citizens.[113] Consequently, differential treatment of specific groups of non-citizens risks constituting racial discrimination.[114]

Lerner's studies on the drafting history of ICERD support this argument.[115] According to Lerner, paragraphs 2 and 3 of Article 1 ICERD emerged from protracted debates over the term 'national origin'.[116] A draft Article 8 initially offered a definition of this term, but it was later removed, complicating the negotiations.[117] The drafters where unable to agree on the distinctions between national origin, ethnic origin, nationality, and citizenship.[118] By incorporating these paragraphs, their intention was to ensure that ICERD would not 'interfere in the internal legislation of any state regarding differences in the rights of citizens and non-citizens'.[119] Furthermore, Lerner affirms that ICERD 'only proclaims the principle that any particular nationality – and here the term is used as equivalent to "national origin"- should not be discriminated against'.[120] Thus, Lerner's analysis of the historical context of Article 1(2) supports the argument that ICERD places limits on the rights of states to differentiate between citizens and non-citizens. His interpretation aligns with previously discussed interpretations of the HRC, the CMW and the CRC: when states apply differential treatment to specific groups of non-citizens or nationalities, such treatment risks amounting to racial discrimination. This argument

[112] UN CERD, *General Recommendation 30. Discrimination against Non-Citizens* para 4.
[113] Cathryn Costello and Michelle Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' 255.
[114] Ibid.
[115] Fennelly and Murphy 'Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive' 313; Nathan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: Reprint Revised by Natan Lerner* (Brill, 2014) 33–35.
[116] Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: Reprint Revised by Natan Lerner* 33.
[117] ibid 34.
[118] ibid 35.
[119] ibid.
[120] ibid.

was recently invoked by Qatar in an inter-state communication before both the CERD and the ICJ, as will be further explained below.[121]

Additionally, non-citizens are not entirely excluded from the protections afforded by ICERD. Applying Article 31 of the VCLT, which requires treaties to be interpreted in light of their context, Foster and Costello argue that Articles 5 (equality before the law) and 6 (right to effective protection and remedies) of ICERD employ the term 'everyone' rather than 'citizens'.[122] Had ICERD been intended to exclude non-citizens from its scope, these provisions would have explicitly referred to 'citizens' instead. A complete exclusion of non-citizens from the protection of ICERD would be inconsistent with the Convention's Preamble, which affirms that 'the existence of racial barriers is repugnant to the ideals of any human society'.[123]

This interpretation aligns with Thornberry's authoritative commentary on the Convention, where he affirms:

> A reading of Article 1(2) that rules out from the Convention any concern with non-citizens could be classified in VCLT terms as a manifestly absurd or unreasonable reading of ICERD, and as not corresponding to its object and purpose.[124]

This reasoning was also adopted by CERD in its decision on jurisdiction and admissibility of the inter-state communication submitted by Qatar against the United Arab Emirates (UAE).[125] This, along with an inter-state communication presented by Qatar against Saudi Arabia, were the first interstate communications ever received in the Committee's

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[121] UN CERD, *Jurisdiction of the Inter-State Communication Submitted by Qatar against the United Arab Emirates* UN Doc CERD/C/99/3 (22 March 2022) para 15.

[122] Costello and Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' 233.

[123] ICERD; Costello and Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' 255.

[124] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*. (Oxford University Press 2016) 158.

[125] UN OHCHR, 'Qatar against United Araba Emirates: UN Ad Hoc Conciliation Commission Terminates Operation' <https://www.ohchr.org/en/press-releases/2023/02/qatar-against-united-arab-emirates-un-ad-hoc-conciliation-commission> accessed 25 June 2025; David Keane, 'CERD Reaches Historic Decisions in Inter-State Communications' (*EJIL:Talk!*, 6 September 2019) <https://www.ejiltalk.org/cerd-reaches-historic-decisions-in-inter-state-communications/> accessed 2 April 2025.

history.[126] In its decision, CERD reaffirmed its established practice of urging state parties to address discrimination against non-citizens on the basis of nationality. The case specifically concerned sanctions imposed by the UAE, which included prohibiting Qatari nationals from entering its territory solely on the basis of their nationality. The UAE justified these measures on the grounds of political differences. Qatar, in turn, claimed that the sanctions constituted racial discrimination based on nationality, while the UAE argued that ICERD 'does not prohibit differentiated treatment based on current nationality'.[127] Afterwards, an ad hoc Conciliation Commission was appointed, in compliance with Article 12 of ICERD, to offer good offices to settle the interstate dispute concerning Qatar against UAE. The ad hoc Conciliation Commission decided to end his work in February 2023, following a request by the parties.[128]

CERD's decision on jurisdiction and admissibility in the *Qatar v UAE* case is a historic decision, in that it considered itself competent to examine whether differential treatment between citizens and non-citizens constitutes discrimination. In arriving at this conclusion, the Committee affirmed:

> Far from considering any difference of treatment between citizens and non-citizens as contrary to the Convention, which would be in contravention of its article 1(2), the Committee considers itself competent to examine whether such differences pursue a legitimate aim, are proportional to the achievement of this aim and do not result in a denial of fundamental human rights of non-citizens. Only when those requirements are fulfilled and when a difference in treatment does not discriminate any particular nationality as required by article 1(3) of the

[126] UN OHCHR, 'Qatar against United Araba Emirates: UN Ad Hoc Conciliation Commission Terminates Operation' <https://www.ohchr.org/en/press-releases/2023/02/qatar-against-united-arab-emirates-un-ad-hoc-conciliation-commission> accessed 25 June 2025; UN OHCHR, 'Interstate Communications Qatar v Kingdom of Saudi Arabia and Qatar v. United Arab Emirates' <https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications> accessed 25 June 2025; David Keane, 'CERD Reaches Historic Decisions in Inter-State Communications' (*EJIL:Talk!*, 6 September 2019) <https://www.ejiltalk.org/cerd-reaches-historic-decisions-in-inter-state-communications/> accessed 2 April 2025.

[127] UN CERD, *Admissibility of the Inter-State Communication Submitted by Qatar against the United Arab Emirates* UN Doc CERD/C/99/4 (22 March 2022) para 53.

[128] UN OHCHR, 'Qatar against United Araba Emirates: UN Ad Hoc Conciliation Commission Terminates Operation'; Keane, 'CERD Reaches Historic Decisions in Inter-State Communications'.

> Convention, such differences do not constitute discrimination as prohibited by the Convention.[129]

However, Qatar instituted parallel proceedings against the UAE before the ICJ, which led to a markedly different outcome. The issue of *lis pendens* arose in the context of a provisional measure request made by the UAE,[130] and motivated scholarly discussion.[131] In this regard, the UAE asked the Court to order that:

> Qatar immediately withdraw its Communication submitted to the CERD Committee [the Committee on the Elimination of Racial Discrimination] pursuant to Article 11 of the CERD on 8 March 2018 against the UAE.[132]

The ICJ, however, found it unnecessary to rule on the matter and declined to determine whether a *lis pendens* exception was applicable in this case.[133]

In relation to Qatar's request, the ICJ departed from CERD's decision, concluding that the UAE's measures constituted a difference in treatment based on nationality – a ground which, in its view, does not fall within the scope of the ICERD.[134] The key point of controversy, therefore, centred on the distinction between the concepts of 'nationality' and 'national origin'. On this matter, the ICJ affirmed:

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[129] UN CERD, *Admissibility of the Inter-State Communication Submitted by Qatar against the United Arab Emirates* para 63.

[130] The question of parallel proceedings was briefly discussed by David Keane and William Thomas Worster, see: David Keane, 'Application of the CERD Convention (Qatar v UAE) and "Parallel Proceedings" before the CERD Committee and the ICJ' (*EJIL: Talk!*, 17 May 2019) <https://www.ejiltalk.org/application-of-the-cerd-convention-qatar-v-uae-and-parallel-proceedings-before-the-cerd-committee-and-the-icj/>; William Thomas Worster, 'The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination Regarding Nationality-Based Discrimination' (*American Society of International Law*, 30 November 2022) <https://www.asil.org/insights/volume/26/issue/13#_ednref19>.

[131] David Keane, 'Application of the CERD Convention (Qatar v UAE) and "Parallel Proceedings" before the CERD Committee and the ICJ'; David Keane, 'CERD Reaches Historic Decisions in Inter-State Communications'.

[132] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates), Request for the Indication of Provisional Measures*, International Court of Justice (14 June 2019) para 12 (i) and para 19.

[133] Ibid. para 25

[134] For further analysis on the ICJ case, see: Geir Ulfstein and others, 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee).' (2022) 116 American Journal of International Law 397.

> The Court observes that the definition of racial discrimination in the Convention includes 'national or ethnic origin'. These references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the state and can change during a person's lifetime. [135]

According to the ICJ, national origin is determined at birth and should not be conflated with current nationality. On this basis, the Court held that the ICERD protects individuals from discrimination based on national origin, but not from discrimination based on nationality. It concluded that the term 'national origin' does not encompass 'current nationality'. As a result, the ICJ found that the UAE's admission restrictions did not constitute a violation of the ICERD.[136] Therefore, the interpretation adopted by the ICJ regarding racial discrimination on the basis of nationality stands in stark contrast to that of the CERD. In addition to the considerable academic criticism directed at the Court's decision,[137] a number of issues require further consideration.

Unlike the interpretations provided by CERD and the CMW discussed above, the ICJ distinguishes between nationality and national origin, asserting that national origin is inherent from birth while nationality is a legal status that individuals may change. With respect to national origin, the Court affirmed its inborn character, grouping it alongside the other protected grounds.[138] In the same paragraph, it stated:

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[135] *Application of the International Convention on the Elimination of All forms of Racial Discrimination (Qatar v United Arab Emirates*) (Preliminary Objections) Judgment of Feb 4, 2021, International Court of Justice [Qatar v U.A.E.].

[136] Ibid. para 83, 88, 97, 105

[137] Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice'; Ulfstein and others 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee)'; Geir Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?' (*EJIL: Talk!*, 22 February 2021) <https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/> accessed 3 April 2025; Fennelly and Murphy, 'Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive'; William Thomas Worster, 'The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination Regarding Nationality-Based Discrimination' (*American Society of International Law*, 30 November 2022) <https://www.asil.org/insights/volume/26/issue/13#_ednref19> accessed 30 April 2025.

[138] Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice'; Diane Desierto, 'A Study Contrasting Jurisdictional Methodologies: The International Court of Justice's February 2021 Judgments in Iran v USA and Qatar v. UAE' (*EJIL:Talk!*, 15 February 2021) <https://www.ejiltalk.org/a-study-

> The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth. [139]

This conservative interpretation of race raises methodological concerns.[140] As Diane Desierto has noted, scientific research increasingly shows that race and colour are socially constructed concepts rather than categories rooted in human genetics.[141]

Regarding the Court's view that nationality is a changeable legal attribute, it fails to acknowledge that altering one's nationality is not a matter of personal choice alone. The legal requirements for acquiring a different nationality are often complex and vary widely between states.[142] Costello and Foster critically observe: 'Is it that Qatari citizens can avoid these bans because their citizenship is not immutable? That is, can they simply change their nationality?'[143] When applying the ICJ's reasoning to this chapter's central question – the extent to which the principle of non-discrimination limits the right of states to restrict migrant's entry – it becomes clear that this decision expands the margin of discretion available to states. Under the Court's view, states could legally impose entry restrictions on specific nationalities, without violating ICERD, thereby significantly limiting the Convention's scope of protection. This outcome stands in stark contrast to the broader argument advanced in this thesis: that human rights obligations – particularly those relating to non-discrimination and non-refoulement – contribute to the opening of regular migration pathways.

Contrary to the ICJ's view, treating nationality and national origin indistinctively is not only a CERD practice. Other UN Human Rights Treaty Bodies include nationality-based discrimination as part of national origin, or as a ground that is part of the 'other status'

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in-contrasting-jurisdictional-methodologies-the-international-court-of-justices-february-2021-judgments-in-iran-v-usa-and-qatar-v-uae/> accessed 3 April 2025.

[139] *Qatar v U.A.E* para 81

[140] Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?'.

[141] Diane Desierto, 'A Study Contrasting Jurisdictional Methodologies: The International Court of Justice's February 2021 Judgments in Iran v USA and Qatar v. UAE'.

[142] For the case of Chile, see, i.e. Valentina Rioseco V, 'Propuestas Constitucionales: Acceso a La Nacionalidad y Voto Migrante' (2024) <https://www.politicasmigratorias.org/publicaciones/propuestas-constitucionales> accessed 22 June 2025. For a broader study on citizenship, see Jo Shaw, *The People in Question. Citizens and Constitutions in Uncertain Times*. (Bristol University Press 2021).

[143] Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice' 342.

category, discussed above in section 5.2.4. [144] Therefore, it is the ICJ's view the one that appears to be isolated from the broader evolutionary interpretations that have been built at both, the international and the Inter-American human rights systems.

When analysing the context in which the term 'nationality' is used in the ICERD, the Court examined paragraphs 2 and 3 of Article 1 of the Convention, as cited above, and concluded that 'these provisions support the interpretation of the ordinary meaning of the term "national origin" as not encompassing current nationality'.[145] The Court maintained that the differentiation made in these provisions between citizens and non-citizens indicates that the Convention does not prohibit state parties from adopting measures restricting the entry or residence of non-citizens based on their current nationality.[146] Thus, the Court did not accept that distinctions between certain groups of non-citizens are not permitted under Article 1(2),[147] a position that stands in clear contrast to the CERD's interpretation. Notably, the ICJ failed to apply the CERD's standard for assessing whether the UAE's nationality-based distinctions pursued a legitimate aim and were proportionate to that aim. Nor did it consider the possibility that 'discrimination based on nationality' might, in certain cases, also constitute 'discrimination based on national origin'.

In taking this approach, the ICJ departed from its earlier approach in the *Diallo* case, where it held that the interpretations of the ICCPR by its treaty body should be given 'great weight'.[148] Here the Court explicitly distanced itself from *Diallo*, stating that it was 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee'.[149] While the Court noted that it had 'carefully considered the position taken by the CERD Committee', [150] it nonetheless reaffirmed its conclusion outlined above. Consequently, the Court afforded only limited weight to the

[144] William Thomas Worster, 'The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination Regarding Nationality-Based Discrimination' (*American Society of International Law*, 30 November 2022) <https://www.asil.org/insights/volume/26/issue/13#_ednref19>.
[145] *Qatar v U.A.E* para 83
[146] Ibid.
[147] Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice' 343.
[148] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, International Court of Justice Reports 2010 (II)*, p 664, para 66
[149] *Qatar v U.A.E* para 101.
[150] *Qatar v U.A.E* para 101.

interpretations of UN Human Rights Treaty Bodies. However, the Court failed to provide a clear rationale for its departure from *Diallo*, particularly given CERD's role as the authoritative 'guardian of the Convention'.[151]

Such an unexplained shift in jurisprudence undermines the universal and indivisible character of human rights and reinforces longstanding critiques to human rights law as fragmented and inconsistent, with the scope of protection varying according to the venue in which the claim is brought. In a world where the realisation of human rights interpretations remains a constant challenge, the ICJ had an opportunity to demonstrate 'the real legal weight of pronouncements of such bodies'.[152] Moreover, it could have fostered cross-fertilization and dialogue with UN Human Rights Treaty Bodies, thereby contributing greater 'clarity, consistency and security'.[153] However, state practice, characterised by broad discretion in determining who may enter and remain within their territories, ultimately prevailed over these opportunities. This outcome prompts reflection on how much progress has truly been made since the era of the ILO conventions, where despite advancements, state sovereignty in controlling migration continued to override the protection of migrants' rights concerning entry and stay. This thesis challenges the ICJ's approach, arguing that the interpretation of the relationship between national origin and nationality cannot be severed so easily.

Furthermore, Qatar's third claim before the Court alleged that the UAE had indirectly discriminated against persons of Qatari origin by imposing nationality-based restrictions. Qatar contended that although these measures were formally based on nationality, they disproportionately affected individuals of Qatari origin. While the Court acknowledged that 'measures based on current Qatari nationality may have collateral or

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[151] *Qatar v U.A.E* Dissenting Opinion of Judge Bhandari dissenting opinion, Ulfstein and others, 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee).' 401. Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?'

[152] Ulfstein and others, 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee).' 401; Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?'.

[153] *Qatar v U.A.E* Dissenting Opinion of Judge Robinson.

secondary effects on persons born in Qatar [...]',[154] it nevertheless concluded that this did not 'in purpose or effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin'.[155] No further explanation was provided for this conclusion. Notably, the Court did not assess the impact of the travel bans on persons of Qatari origin. Such an assessment would have required an analysis of the broader context, mapping 'the empirical or social realities'[156] of people of Qatari origin to determine whether they align with the group protected under non-discrimination law, namely, 'national origin'. Such an assessment could have been done in the merits phase.[157] This aligns with the views of Judges Yusuf, Sebutinde and Iwasawa, whose position was that 'more evidence was needed from the parties to resolve this issue'.[158]

In summary, despite being recognised as a norm of *jus cogens*, the application of the prohibition of racial discrimination remains a contentious issue.[159] The divergence between the positions of the ICJ and the CERD regarding the extent to which racial discrimination protects migrants in the context of states regulating entry and stay illustrates that international human rights law still lacks a clear standard for applying this norm. The fact that the ICJ decision attracted six dissenting opinions - five from judges originating from former colonies –[160] underscores the unresolved nature of this matter and underpins the core aim of this thesis, which is to identify the specific human rights obligations that allow advancing human rights pathways to regular migration.

The cases analysed in this section demonstrate that the CERD's interpretations carry a degree of ambiguity. General Recommendation 30 explicitly states that while states may

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[154] *Qatar v U.A.E*. para 112.
[155] Ibid.
[156] Titia Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards. From Formal to More Substantive Equality* 123–124; an empirical analysis is also highlighted by Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice' 343.
[157] Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?'; Ulfstein and others, 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee).' 399–401.
[158] Ulfstein and others, 'International Court of Justice - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Preliminary Objections on Jurisdiction - Discrimination Based on Nationality or National Origin - Committee on the Elimination of Racial Discrimination (CERD Committee)' 162.
[159] Ulfstein, 'Who Is the Final Interpreter in Human Rights: The ICJ v CERD?'.
[160] ibid.

differentiate on the basis of nationality, such distinctions must satisfy the criteria of legitimacy and proportionality.[161] The CERD also affirms that states are prohibited from making discretionary distinctions between particular groups of citizens. Nevertheless, these interpretations remain controversial. Despite introducing legitimacy and proportionality standards, the CERD does not clearly address the conceptual distinctions between nationality and national origin, nor does it specify with sufficient clarity which forms of migrant-related treatment would constitute racial discrimination and which would be permissible. Scholars have noted this lack of clarity. As Costello and Foster observe, the CERD 'does not provide a reasoned justification for the interpretation put forward, nor a clear framework for analysis'.[162] Similarly, Fennelly and Murphy argue that in General Recommendation 30, 'the Committee does not systematically explain the relationship between racial discrimination and non-citizenship or migration status.'[163] Consequently, states continue to enjoy considerable discretion in imposing admission restrictions and strict visa requirements. The case of *Qatar v UAE*, adjudicated before both CERD and the ICJ, illustrates that this controversy persists not only in state practice but also at the level of international legal adjudication. This thesis aims to detail this inconsistency and offer avenues for repairing the varied approaches in the Chilean context.

5.2.5. Discrimination test.

Discrimination constitutes a 'form of unjustified unequal treatment'.[164] Not all distinctions amount to discrimination; only those lacking objective and reasonable justification fall within this scope.[165] Accordingly, when a state applies differential treatment based on a protected or sensitive ground, such treatment must be subject to

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[161] UN CERD, *General Comment No. 30*

[162] Costello and Foster, '(Some) Refugees Welcome' 255; Costello and Foster, 'Race Discrimination Effaced at the International Court of Justice' 341.

[163] Fennelly and Murphy, 'Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive' 315.

[164] Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards. From Formal to More Substantive Equality* 97.

[165] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of Discrimination.' 16 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_eng> accessed 17 March 2025; *Advisory Opinion OC-18/03* 89.

heightened scrutiny.[166] Despite the uncertainties, the cases and interpretations analysed in the previous section of this chapter reveal that both the international and Inter-American human rights systems apply a test to determine whether a state's differential treatment is permissible. The formulation of this test may vary slightly depending on the specific human rights instrument under consideration, as will be outlined in the following paragraphs.

As discussed in section 5.2.2, in the case of *Andrea Vandom v the Republic of Korea,* the HR Committee assessed whether the Republic of Korea's requirement for mandatory HIV testing was objective, reasonable and in the interest of public health or public order. This is in line with General Comment No. 18 of the HR Committee, according to which for a distinction to be permissible under the ICCPR it must be reasonable, objective, and aim to achieve a purpose that is legitimate under human rights law.[167]

In the context of migrant workers, the CMW proposes a more specific test, including a requirement of proportionality when assessing the legitimate aim of the treatment. General Comment No. 2 provides, that:

> [A]ny differential treatment based on nationality or migration status amounts to discrimination unless the reasons for such differentiation are prescribed by law, pursue a legitimate aim under the convention, are necessary in the specific circumstances, and proportionate to the legitimate aim pursued.

Similarly, as noted above, the CERD requires that any differentiation based on citizenship or immigration status must align with the objectives and purposes of the Convention, pursue a legitimate aim, and be proportional in the achievement of this aim. When assessing the discriminatory nature of a provision, the IAHR Court, too, has affirmed that distinctions are allowed when differences in treatment serve a legitimate purpose and

[166] Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards. From Formal to More Substantive Equality.* 97; IACHR, 'Compendium on Equality and Non-Discrimination. Inter-American Standards' para 35; *Advisory Opinion OC-18/03* 84, 89.
[167] *Andrea Vandom v Republic of Korea* para 8.4, 8.5; UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* para 7.

maintain a 'reasonable relationship of proportionality between these differences and the aims of the legal rule under review'.[168]

Furthermore, as demonstrated in section 4.4.3, the IAHR Court addressed the relationship between migratory policies and the principle of non-discrimination in *Advisory Opinion OC/03*, stating that if states apply distinctions, they must be objective, reasonable and proportionate.[169]

More specifically, the IAHR Commission developed a targeted test for state practices related to migrant admission and exclusion, which is based in its own synthesis for assessing state distinctions.[170] Principle 12 of the Inter-American principle provides:

> Distinctions in the treatment of migrants are permissible, including in the regulation of admission and exclusion, only where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the goals pursued.[171]

In sum, despite variations in applying a discrimination test, the Inter-American Human Rights System synthetises a shared framework for assessing whether distinctions of admission and exclusion are discriminatory. This includes examining: (i) whether the distinction pursues a legitimate aim; (ii) whether it is based on objective and reasonable justification; and (iii) whether it uses proportionate means to achieve this purpose. Despite the Inter-American Principles being a soft law instrument, this test has a particular significance in the migration context, as it helps clarifying the normative boundaries within which states may regulate admission and exclusion of migrants. Consequently, it contributes to one of this thesis' key research questions: to what extent can the Inter-American Human Rights system can contribute in the advancement of rights-based pathways to regular migration?

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[168] *Advisory Opinion OC-18/03* 91.
[169] *Advisory Opinion OC-18/03* para 168.
[170] IACHR, 'Compendium on Equality and Non-Discrimination. Inter-American Standards' para 36.
[171] Inter-American Principles Principle 12, para3.

CVTs for Haitian and Venezuelan nationals are regulations that apply a distinction in treatment of migrants specifically related to their admission to the country, and they are both based on Article 27 of 2021 Migration Law. Therefore, section 5.3 will apply this standard to determine if the regulation is discriminatory.

5.2.6. Summary

In summary, states have an obligation to combat discriminatory practices and to refrain from introducing discriminatory regulations into their domestic legal frameworks.[172] The extent to which this obligation limits the right of states to admit or exclude migrants remains a matter of debate. From a human rights perspective, however, non-discrimination standards clearly limit state discretion in regulating entry. This view was first expressed by the HR Committee in General Comment No. 15, which affirmed that the principle of non-discrimination applies to migrants seeking entry into a country. Subsequent developments by the CERD and the CMW have reinforced this interpretation. Nevertheless, there is limited jurisprudence from UN Human Rights Treaty Bodies finding a violation of the principle of non-discrimination in cases concerning migrant admission or remain. This is in part due to the requirement that non-discrimination be invoked in conjunction with another substantive right. Since the right to enter or remain in a country is not explicitly recognised under the right to freedom of movement, states retain a wider margin of discretion.

A more flexible route for limiting state discretion over admission and stay is found in the application of provisions guaranteeing equal protection of the law without discrimination. Within this context, the HR Committee found discriminatory the imposition of additional health documentation on a visa applicant, where such requirement was based on her nationality.

Despite the limited jurisprudence, the case law analysed reveals a common approach: while states may distinguish between nationals and non-nationals, they are not permitted to arbitrarily differentiate among specific groups of non-nationals. This

[172] *Advisory Opinion OC-18/03* para 88.

reasoning was adopted by the CMW in relation to Chile's CVTs for Haitian and Venezuelan nationals, as well as Ecuador's requirements that Colombian nationals submit criminal records when applying for visas. A similar standard was applied by the CERD in *Qatar v UAE*. UN Human Rights Treaty Bodies generally interpret 'nationality' and 'national origin' as overlapping protected grounds for discrimination, and use a test based on objectivity, reasonableness and legality – where proportionality plays a key role – to determine whether differential treatment is permissible. However, as shown above, the ICJ departed from this interpretative approach in *Qatar v UAE*, rejecting the CERD's reasoning and distancing itself from its earlier *Diallo* decision which had acknowledged a great weight and legal relevance of UN Human Rights Treaty Bodies.

The IAHR system goes further, explicitly recognising non-discrimination as a limitation on state control over migration. Within this framework, the IAHR Court has affirmed that the principle of non-discrimination is a norm of *ius cogens*, a view that has influenced subsequent interpretations by UN Human Rights Treaty Bodies, particularly the CMW. This thesis argues that although the *ius cogens* character of this principle remains the subject of academic debate, such recognition should further restrict state discretion in matters of admission and exclusion. In addition, the IAHR Commission has developed a specific test for assessing whether state regulations concerning the admission and exclusion of migrants are discriminatory.

While these developments have contributed to strengthening human rights limitations on migration control, none of the cases or interpretations examined impose a direct obligation on states to admit migrants. Rather, their effect is to narrow the scope of discretion available to states, requiring that migration control measures comply with international and Inter-American human rights obligations. The following section applies the non-discrimination standards discussed in this chapter to Chile's regulation of CVTs for Haitian and Venezuelan nationals.

5.3. Non-Discrimination as a limit to CVT in the Chile's Consular Visas for Tourism for Venezuelan and Haitian nationals.

Having established the extent to which the principle of non-discrimination limits the right of states to admit migrants, this section addresses the final question of this chapter: By maintaining CVTs for Haitian and Venezuelan nationals, is Chile complying with its international and Inter-American human rights obligations under the principle of non-discrimination? As explained in Chapter II, this thesis understands CVTs as entry permits required of nationals from specific countries, which must be obtained from a Chilean consulate in the country of origin prior to ravelling to Chile for short-term stays. In the context of the 2018 Migration Reform, Chile introduced CVTs specifically for Haitian and Venezuelan nationals. Chapter II also demonstrated that, following the implementation of these CVTs, irregular migration rose, mirroring earlier patterns seen with the implementation of a CVT for nationals of the Dominican Republic.

A month after the CVT for Haitian nationals entered into force, a group of deputies submitted a request for unconstitutionality before the Chilean Constitutional Court,[173] advancing two main claims: Firstly, they argued that the CVT lacked reasonable justification, a requirement for all Chilean administrative acts under Article 7 of the Chilean Constitution. Secondly, they contended that the measure violated the constitutional right of equality before the law by establishing a discriminatory distinction. The Constitutional Court dismissed both claims, ruling that the measure was rational and fair under Chilean domestic law.[174]

Notwithstanding the Court's ruling, this section will demonstrate that both CVTS are discriminatory when assessed against international and Inter-American human rights standards. While some reference will be made to the Court's reasoning, the focus of this analysis lies not in evaluating the decision itself but rather in examining the CVT in light of International and Inter-American obligations. An assessment of the decision was already done in a detailed dissenting opinion by two of the ten judges integrating the Court.[175] From an international and Inter-American human rights perspective, Chile cannot rely on its domestic legislation or judicial decisions to justify the application of CVTs. In this respect, Articles 26 (*pacta sunt servanda)* and 27 (internal law and

[173] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court).
[174] Ibid, para 21
[175] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court)paras 21–63.

observance of the treaties) of the Vienna Convention on the Law of the Treaties are applicable. Accordingly, irrespective of its internal legal framework, Chile remains bound to uphold its international and Inter-American human rights commitments.

Consequently, the following paragraphs build upon the CMW's concerns regarding the establishment of these CVTs,[176] and its recommendation that Chile ensure its administrative measures do not discriminate on the basis of migrants' national origin, particularly in relation to Venezuela and Haitian nationals.[177] In this context, the argument put forward is that the CVTs for Haitian and Venezuelan nationals are incompatible with Chile's international and Inter-American human rights obligations under the principle of non-discrimination. This claim aligns with this thesis' central claim: that regular migration pathways must be constructed in accordance with human rights law. To demonstrate that CVTs are incompatible with non-discrimination obligations, the discrimination test set out in Principle 12 of the Inter-American Principles will be applied. As demonstrated in 5.2.5, this test offers the clearest and most specific framework for assessing distinctions made by states in the regulations of admission. It must be recalled that such test analyses: (i) whether the distinction pursues a legitimate aim; (ii) whether it is based on objective and reasonable justification; and (iii) whether it uses proportionate means to achieve this purpose.

An additional point must be considered: CVTs are established by law, as will be demonstrated in the paragraphs below. As such, they are not only bound to the general prohibition against discrimination, but also to Articles 26 and Article 24 of the American Convention on Human Rights, which prohibits 'discrimination in law or in fact in any field regulated and protected by law'.[178] As stated in section 5.2, according to these rights, states are bound to guarantee equal protection before the law and equal protection of the law, and they must refrain from discriminating under the law on any ground, such as race or national and social origin. Thus, when legislation is adopted by a state party, its content should not be discriminatory. As such, the provisions provide an autonomous

[176] UN CMW, *Concluding Observations on the Second Periodic Report of Chile* para 27.
[177] Ibid para 28 (e).
[178] UN Human Rights Committee, *General Comment No. 18* para 12.

right.[179] Therefore, this section's assessment does not need to demonstrate a violation of the principle of non-discrimination in conjunction with another right, as analysed in section 5.2.2. Rather, this section needs to assesses the content of the legislation containing the CVTs against the discrimination test. As the entire content of both Decrees regulating CVTs for Haitian and Venezuelan nationals was critically examined in Chapter II of this thesis, this section's assessment will refer to such analysis.

The first element to identify is the existence of a 'prohibited grounds for discrimination'. In the case of CVTs, this ground is 'nationality', as the measure specifically target nationals of Venezuela and Haiti. This affirmation is consistent with both the international and the Inter-American human rights systems, which do not distinguish between 'nationality' and 'national origin'. Chile has itself endorsed this interpretation: in its decision on the requirement for unconstitutionality of the CVT for Haitian nationals, the Constitutional Court affirmed that although the state holds the sovereign power to regulate the entry of foreigners, Chile's migration legislation may not establish distinctions based solely on nationality.[180] The Court, nevertheless identified two permissible exceptions to this general rule, namely, reasons of 'national interest' and 'reciprocity', which will be examined in the following section. Despite these exceptions, the Court's reasoning confirms that, as general rule, Chilean migration law may not apply differential treatment based on nationality when regulating migrant admission. This interpretation not only aligns with human rights law but departs from the position adopted by the ICJ in *Qatar v UAE* analysed in section 5.2.4.2 above.

Having established that the distinction is made on a suspect ground, the thesis must now assess whether the requirements for considering the distinction non-discriminatory are met. The second element to examine if the 'distinction is made pursuant to a legitimate aim'. In this regard, both CVTs are grounded in law. As explained in Chapter II, the CVT for Haitian nationals is regulated by Decree No. 776 of 17 April 2018 while the CVT for Venezuelan nationals is regulated by Decree No. 237 of 22 June 2019. Additionally, both decrees were originally grounded on Article 45 of Decree Law 1.094 of 1975 and are now

[179] Ibid.
[180] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Decimoséptimo.

governed by Article 27 of 2021 Migration Law. As outlined in Chapter II, Article 27 allows Chile, in exceptional circumstances, to require nationals of specific countries to obtain a CVT prior to entry. This requirement must be established through a Supreme Decree and be justified by 'national interest' or international reciprocity.[181] Both CVTs formally comply with these conditions, having been enacted through Supreme Decrees and justified under the exceptional ground of 'national interest'.[182] In both cases, the interest invoked is the aim of ensuring an orderly, safe and regular migration process.[183] This justification is in line with the Constitutional Court's reasoning, as well as that expressed in the dissenting opinion in the requirement for an unconstitutionality decision.[184]

However, despite complying with the formal legal requirements, the CVTs fall short of pursuing a 'legitimate aim' under international and Inter-American human rights standards. As analysed in section 4.4.3 of Chapter IV, a 'legitimate aim' in the context of migration policies must be the protection of the human rights of migrants. This interpretation aligns with the positive obligations outlined by the IAHR Court when addressing the concept of migratory policies. Yet, as demonstrated in Chapter II, these CVTs, despite using human rights language,[185] were not adopted to protect the rights of Haitian or Venezuelan nationals, but rather to restrict the migration pathways available to them. It was also shown that these restrictive measures were associated with a rise in irregular entries, thereby increasing the exposure of these groups to human rights violations.

This thesis contends that, for Chile to comply with the requirement of 'pursuing a legitimate aim' when applying differential treatment based on nationality, it must begin by identifying the specific vulnerabilities of affected groups and the root causes that compel them to migrate. Framing migration control in light of these vulnerabilities, and in accordance with a human rights-based approach to regular migration, which calls on

[181] Particularly, in section 2.4.1.
[182] Decree 237 of 22 June 2019 establishes consular visa for tourism fo nationals of Venezuela. para 1; Decree 776 of 2018 establishes consular visa for tourism for national of Haiti para 1.
[183] Decree 237 of 22 June 2019 establishes consular visa for tourism fo nationals of Venezuela. para 1; Decree 776 of 2018 establishes consular visa for tourism for national of Haiti para 1.
[184] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Legalidad y Constitucionalidad del Decreto Supremo (Legality and Constitutionality of the Supreme Decree) and dissenting opinion, paras 45 - 51.
[185] Particularly in sections 2.4.1.2 and 2.4.1.3

states to establish safe, accessible and realistic pathways to regular migration, would enable Chile to meet the criteria of 'pursuing a legitimate aim'.

This position finds support in the dissenting opinion in the requirement for unconstitutionality, which observed that 'reasons are not only stated, but they are also weighed'.[186] The dissenting judges dedicated a substantial section to identifying the specific vulnerabilities of the Haitian population, summarised in the following affirmation:

> In practice, there is a broad recognition of the vulnerable condition of this population, which makes them subjects of protection rather than a source of threats.[187]

In the dissenting opinion's assessment of the vulnerabilities faced by the Haitian population, particular attention was also given to the issue of race. It was noted that over 95% of the Haitian population is Black.[188] While the CVT requirement for Haitian nationals was not explicitly based on race but rather on nationality, the fact that it disproportionately targets this population results in the imposition of stricter entry restrictions on a group composed almost entirely of Black individuals. This outcome gives rise to indirect racial discrimination. As analysed in section 5.2.3, a legal measure may be indirectly discriminatory when it appears neutral on its face but produces discriminatory effects, particularly when those effects fall upon groups protected under the principle of non-discrimination.

The third element to assess is whether the distinction established by the CVTs has an 'objective justification'. In this regard, the case of *Andrea Vandome v the Republic of Korea* is relevant, where the HR Committee examined whether the Republic of Korea had provided objective justification for imposing stricter visa requirements on a specific group – foreign language instructors of non-Korean ethnicity – based on public health and

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[186] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Dissenting Opinion, para 83. Translated from Spanish: 'En lo práctico, hay un amplio reconocimiento de la condición de vulnerable de esta población los que los convierte en sujetos de protección más que en fuente de amenazas'.
[187] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Dissenting opinion, Para 81. Translated from Spanish: 'Las razones no se enuncian, se pesan'.
[188] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Dissenting opinion, Para 81.

public order considerations.[189] Applying similar reasoning to the CVTs for Haitian and Venezuelans nationals implies that Chile must also offer objective justifications for imposing stricter visa requirements. As demonstrated in Chapter II, while both Decrees regulating the CVTs include justifications, these do not meet the threshold of objectivity.

In the case of the CVT for Haitian nationals one justification cited is the sustained increase in Haitian citizens entering Chile as tourists and remain in the country irregularly. However, as shown, this claim is based on governmental perception rather than objective, verifiable data; Chile lacks reliable statistics to substantiate this assertion. Moreover, when the CVT entered into force Haitians constituted only the sixth largest foreign national group in Chile, and there was no similar entry requirement implemented for the other nationalities.[190] Another justification refers to an alleged increase in the vulnerability of Haitians to trafficking networks. However, as analysed in section 2.4.1.2. this claim was shown to be inaccurate and not in line with Chilean criminal law.

Regarding the CVT for Venezuelan nationals, section 2.4.1.3 analysed that the justification provided in the Decree refers to the Venezuelan democratic crisis and the resulting mass exodus. Although the Decree references data from relevant international reports concerning the situation of Venezuelans migrants across the Americas, this does constitute an objective justification. The regulation fails to demonstrate how these reports support the imposition of entry restrictions. On the contrary, as demonstrated in section 2.4.1.3, these same reports explicitly recommend that states recognise Venezuelan nationals as refugees, either under the Cartagena Declaration or the 1951 Refugee Convention.

The final element to assess is whether there exists a reasonable proportionality between the means employed and the goals pursued. As previously mentioned, Chile's stated objective in implementing the CVTs was to protect the national interest by ensuring safe, orderly and regular migration. However, the broader analysis developed throughout this thesis, grounded in international law, international and Inter-American human rights law,

[189] *Andrea Vandom v Republic of Korea* para 8.5.
[190] *ROL Nº 4757-18-CDS* (Chilean Constitutional Court) Dissenting Opinion, see para 121.

and the evolutionary interpretation of their provisions, has demonstrated that advancing regular migration requires states to open safe, realistic and available migration channels. It was also demonstrated that this can be achieved, at least in part, through compliance with human rights obligations, including those emanating from the principle of non-discrimination and the right to equality before the law.

At no point in this thesis has it been identified that restricting the entry of specific nationalities, especially those experiencing multiple and well-documented drivers of forced migration, constitutes a legitimate or effective pathway to regular migration. On the contrary, the evidence presented shows that the implementation of CVTs has resulted in a marked increase in irregular migration, directly undermining the very goal Chile claims to pursue. The creation of a Humanitarian Visa for Venezuelan nationals,[191] which in practice is not being implemented, and a Family Reunification Visa for Haitians that has not genuinely opened regular migration pathways,[192] further illustrates that the CVTs are not a proportionate measure for achieving safe, orderly and regular migration.

The analysis presented in this section clearly allows affirming that the legislation containing CVTs is directly discriminatory against Haitian and Venezuelan nationals. Consequently, these measures should be withdrawn. If the visas were abolished, Haitians and Venezuelans would be subject to the same entry rules as other Latin-American citizens, which in practical terms would permit their entry into Chile through other regular migration channels.

An argument that can be put forward for justifying the implementation of CVTs under the current Decrees could be that they are regulated by law – the old Article 49 of DL. 1.094 and current Article 27 of 2018 Migration Law – and are also applied by Chile to other nationalities in the world, not only Haitian and Venezuelan nationals. Indeed, this was the reasoning applied by the Constitutional Court when assessing the CVT against Haitians. Following this reasoning, CVTs could be presented as a neutral legislation. However, such an argument can be contested by affirming that, as analysed in section 5.2.4, discrimination can also be indirect. As explained earlier in this section, this is the

[191] Analysed in section 2.4.2.
[192] As demonstrated in section 2.4.2.2.

case with the CVTs for Haitian nationals, which are indirectly discriminatory on the grounds of race. It is also the case for the CVT for Venezuelan nationals, since the effects that the measure produced was an increase in irregularity, which in turn, makes this group of nationals more vulnerable to suffering human rights violations. The previous experience with CVT for nationals from Dominican Republic demonstrates that the Chilean government was aware of this risk, but did not take the appropriate measures to avoid it.

Although CVTs for Haitian and Venezuelan nationals were first introduced under DL 1.094, they remain valid under Article 27 of the 2021 Migration law. While both legal regimes are similar, Article 27 introduces additional safeguards, that can be seen as aiming to align these entry restrictions with Chile's human rights obligations. Notably, it incorporates a requirement that CVTs be based on 'qualified reasons of national interest' and adds a non-discrimination in paragraph. These additions were proposed by Deputies Carmen Hertz and Miguel Crispi during the legislative process, drawing concerns raised by the National Human Rights Institute, and referencing IAHR Court jurisprudence.[193] The inclusion of 'qualified reasons' in the 'national interest' exception requires the state to justify the imposition of a CVT beyond a vague invocation of national interest, limiting state discretion, thus approaching to an objective justification of a differentiated treatment when regulating entry. However, the law still does not define what constitutes 'qualified reason', leaving room for ambiguity.

Additionally, the non-discrimination clause in paragraph 3 of Article 27 reinforces this section's claim that CVTs cannot be applied discriminatorily against the nationals of a specific country. This provision must be interpreted in conjunction with Articles 3 and 13 of 2021 Migration Law, which also affirm non-discrimination in the admission and residence of migrants. Nonetheless, the core tension remains while CVTs inherently

[193] Chilean Deputees Chamber, 'Informe de La Comisión de Derechos Humanos y Pueblos Originarios En El Proyecto de Ley Originado En Un Mensaje de S.E. El Presidente de La República Sobre Migración y Extranjería. Boletín Nº 8970-06' <https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=9377> accessed 19 October 2023. (Report from the Commission of human rights and indigenous peoples of the Draft Law from a Message from the Chilean President about Migration).

differentiate based on nationality, paragraph 3 requires that such distinctions meet non-discrimination standards, such as those identified in section 5.2.5 above.

5.3.1. Summary

The legislative developments analysed in this section reflect Chile's effort to bring its migration policies closer in line with its international and Inter-American human rights obligations, particularly those arising from the principle of non-discrimination in the context of migration control. In this regard, Article 27 of the 2021 Migration law represents progress towards compliance with the obligation identified by the IAHR Court 'to combat discriminatory practices and not to introduce discriminatory regulations in their Laws'.[194] Although Article 27 still leaves room for improvement, especially in terms of clearly defining what constitutes a 'qualified reason' for imposing CVTs, it marks a significant advancement compared to Article 45 of DL 1.094. The developments introduced in the 2021 Migration Law demonstrate that Chile can reform its migration framework in a manner more consistent with human rights law. Next step would be to explicitly incorporate Article 12 of the Inter-American Principles as non-discrimination parameter when controlling admission of migrants.

Importantly, these reforms also illustrate that the principle of non-discrimination was incorporated as a normative limit to Chile's authority to control de admission of migrants. This supports the central argument of this thesis – that human rights law limits state sovereignty in its right to control migration. Chile's incorporation of these limitations into its domestic legal framework suggests a willingness to embed human rights norms in the regulation of migrant admission.

However, this section has also shown that the current application of CVTs to Haitian and Venezuelan nationals remains discriminatory and fails to comply with Chile's international and Inter-American human rights commitments. These measures target specific nationalities, without a legitimate aim, lack objective justification and are disproportionate. Even if direct discrimination were to be dismissed, CVTs still produce

[194] *Advisory Opinion OC-18/03* 88.

indirectly discriminatory outcomes by disproportionately affecting Black migrants and contributing to irregular migration. Consequently, CVTs demonstrate that, when states to not apply human rights-based pathways the consequence is irregularity. Article 27 of 2021 Migration Law provides an opportunity for Chile demonstrate this thesis' main claim: that the incorporation of human rights law opens regular migration pathways.

5.4. Conclusion

To conclude, this chapter examined the impact of the principle of non-discrimination on the state's authority to regulate the admission of non-citizens, focussing on the case of Chile's CVTs for Haitian and Venezuelan nationals. It was guided by three key questions: To what extent does the principle of non-discrimination limit the right of states to restrict migrants' entry? Considering the role of evolutionary interpretation, has this principle evolved to impose obligations on states to allow entry? Finally, by maintaining CVTs for Haitian and Venezuelan nationals, is Chile complying with its international and Inter-American human rights obligations under the principle of non-discrimination?

Section 5.2 addressed the two first questions. Drawing from international and Inter-American human rights standards, it was shown that while states retain a degree of discretion over migration control, that discretion is significantly limited by both positive and negative obligations derived from the principle of non-discrimination – particularly when distinctions are made on suspect grounds, such as nationality, national origin and race. When regulating border control, states, including Chile, have an obligation to refrain from applying discriminatory measures, and a positive obligation to combat discriminatory practices. Although the interpretations analysed do not establish a general human rights obligation to admit migrants, they clearly affirm that entry regulations must comply with non-discrimination standards. Section 5.2.1. demonstrated that the principle of non-discrimination is recognised as a *jus cogens* norm by both, the Inter-American Human Rights system and the CMW. While this status remains contested in legal scholarship, its recognition affirms the principle's hierarchical superiority over domestic legislation and ordinary treaty norms, including in the context of migration control. Moreover, it shows the influence of the Inter-American Court on the CMW's interpretations of states obligations in migration matters.

Section 5.2.2. clarified two distinct pathways to invoke non-discrimination in entry and residence cases. UN Human Rights Treaty Bodies have generally rejected claims that invoke a violation of the principle of non-discrimination in isolation. However, the case of *Andrea Vandom v the Republic of Korea* illustrated that Article 26 of the ICCPR, which is also included in article 24 of the American Convention on Human Rights, enshrine equal protection before and under the law as autonomous rights. These standards establish standalone obligations requiring that laws regulating admission or exclusion not discriminate on protected grounds, thus removing the need to invoke another substantive rights when challenging domestic immigration laws.

These arguments informed the analysis that followed. First section 5.2.3 showed that migration laws and policies that appear neutral may still violate human rights if they disproportionately impact vulnerable protected groups. The CVTs illustrate this, as they produced indirect discrimination against Haitian nationals and exacerbate irregular migration among Haitian and Venezuelan nationals. Second, section 5.2.4 confirmed that visa requirements targeting specific nationalities may amount to discrimination. The CMW's interpretation of the Chilean CVTs for Haitian and Venezuelan nationals as discriminatory, and its recommendation that Chile ensure such measures do not discriminate on grounds of national origin were central to this chapter's argument. Third, section 5.2.4.2 examined the contested distinction between nationality and national origin and noted an interpretative gap between the inclusive approach of CERD and the restrictive view taken by the ICJ in *Qatar v UAE*. The tension underscores the persistent fragmentation in international human rights law and the urgent need for coherence when regulating migration. Tension between the sovereign right of a state to admit migrants and their human rights was also reflected in the Chilean Constitutional Court's decision upholding the CVT for Haitian nationals, which, despite recognising nationality as a suspected ground, failed to fail the measure discriminatory. Nonethless, the Court's reasoning confirms that Chile acknowledges the applicability of the principle of non-discrimination when assessing the law regulating admission.

To clarify how the principle of non-discrimination limits state discretion in admission regulation, section 5.2.5 synthesised the evolving jurisprudence into a discrimination

test commonly applied by international and regional bodies. This test evaluates whether a distinction contained in regulating admission pursues a legitimate aim, is based on objective and reasonable justification, and uses proportionate means. Article 12 of the Inter-American Principles echo this framework, further illustrating how the is the Inter-American Human Rights system contributes to building human rights-based paths to regular migration.

The last section of this chapter responded to the chapter's third guiding question and concluded that CVTs for Haitian and Venezuelans are incompatible with Chile's human rights obligations. Although the measures were formally justified in terms the national interest of maintaining safe, orderly and regular migration, they failed to meet all three elements of the discrimination test. First, despite using human rights language, their aim was not to protect the rights of migrants or to respond to their vulnerabilities, but rather to restrict migration pathways to them. Second the justification was unsupported by objective, verifiable evidence. Third, the CVTs were proven to not be a proportionate measure for achieving safe, orderly and regular migration. Although Chile 2021 Migration Law introduced improvements in the provision regulating CVTs, such as the requirement of 'qualified reasons of national interest' and an explicit non-discrimination clause, these safeguards remain insufficient for Chile to effectively build human rights-based pathways to regular migration. The CVTs remain in force, and no assessment has been conducted under 2021 Migration Law. This thesis argues that the Chilean CVTs for Venezuelan and Haitian nationals are discriminatory at their core and should be repealed. In their place, Chile should adopt regular migration pathways, that are firmly grounded in human rights law.

In sum, Chapter V demonstrates that the principle of non-discrimination imposes concrete limitations on states' right to admit and exclude migrants. Despite not imposing an explicit duty to allow entry, it narrows the margin of discretion available to states, requiring that migration control measures meet legality, objectivity, and proportionality standards. The chapter also showed that non-discrimination may be invoked as a *jus cogens* norm, as an autonomous right (in the light of the right to equality before the law), and both direct and indirect discrimination must be assessed through a standardised

test. In the case of Chile, the CVTs for Haitian and Venezuelan nationals are an example of how failure to apply a human rights-based approach to migration control leads to discriminatory outcomes and increases irregularity. Migration control measures that fail to comply with these obligations contribute to irregularity. This reinforces this thesis' central claim: that human rights law can and must serve as the normative foundation for building rights-based, accessible and non-discriminatory pathways to regular migration.

CHAPTER VI

THE PRINCIPLE OF NON REFOULEMENT AND CHILE'S DECISION NOT TO INCORPORATE IT IN LAW 21.325.[1]

6.1. Introduction

The principle of non-refoulement is recognised under both refugee law and human rights law. In refugee law, it constitutes a 'cardinal principle' of refugee protection,[2] and its relevance is even recognised by critics of the refugee regime. In human rights law, the principle of non-refoulement is explicitly recognised in international and regional human rights treaties. Both the UN and Inter-American human rights systems have interpreted it as imposing a positive obligation on states to prevent refoulement.[3] Current state practice is enough to affirm that -at least in its core protection against torture - the principle of non-refoulement has crystallised as a norm of customary international law.[4] Therefore, states are obliged to apply the principle of non-refoulement to all individuals without discrimination, irrespective of their nationality or migratory status.[5]

The principle of non-refoulement challenges states' right to control their borders and impacts their territorial sovereignty. As reiterated in throughout this thesis, while

[1] An earlier version of this Chapter was published at the Journal 'Human Rights in the Global South', see: Valentina Rioseco Vallejos, 'Non-Incorporation of the Principle of Non-Refoulement in the Chilean Immigration and Aliens Law 21.325 of 20 April 2021' (2023) 2 Human Rights in the Global South. The article is annexed to this thesis.

[2] UNHCR, 'Conclusions Adopted by the Executive Committee on the International Protection of Refugeess. (Conclusion No. 65)' para c <https://www.unhcr.org/en-my/578371524.pdf> accessed 30 March 2023.

[3] Vincent Chetail, *International Migration Law* (Oxford University Press 2019).

[4] Ibid 119; Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored.' (2012) 12 Human Rights Law Review 287, 287, 289; Penelope Mathew, 'Non-Refoulement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 904; Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015*, vol 46 (TMC Asser Press 2016) 273.

[5] A more complex application of the principle of non-refoulement is found in recent case law of the European Court of Human Rights. See, i.e., Giulia Ciliberto, 'A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in N.D. and D.T. v Spain' (2021) 21 Human Rights Law Review 203.

states retain the prerogative to regulate admission and exclusion of migrants,[6] this power is not absolute. It is limited by international human rights law, within which the principle of non-refoulement constitutes a key limitation. As early as 1986, the HR Committee interpreted that the prohibition of inhuman treatment was a circumstance under which 'an alien may enjoy the protection of the Covenant even concerning entry or residence'.[7] Similar interpretations are repeated in both the international and the Inter-American human rights systems[8] and are also supported by a growing body of scholarly literature.[9] As analysed in section 4.2. of Chapter IV, some interpretations go so far as to suggest that the principle of non-refoulement has evolved into a right to entry.[10]

The effectiveness of the principle of non-refoulement can only be measured at the domestic level. It is here where the tensions between the principle of territorial sovereignty and human rights are solved.[11] Thus, this chapter asks to what extent does Chile incorporate a right to enter emanating from the principle of non-refoulement? Unfortunately, domestic incorporation of the principle of non-refoulement is not as clear as articulated at the international and Inter-American levels, and Chile is a clear example. Despite being bound to non-refoulement

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[6] The right of states to control their borders is broadly recognised, even by the UNHCR. James Hathaway discusses this affirmation in the context of the Global Compact for Refugees, proposing to move towards a 'global and amanged system for refugee protection'. James Hathaway, 'The Global Cop-Out on Refugees' (2018) 30 International Journal of Refugee Law 591. For further analysis on the lack of a human right to immigrate, see Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 149; Vincent Chetail, *International Migration Law* 400; CAT, *General Comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22* UN Doc CAT/C/GC/4 (9 February 2018) para 10.

[7] UN Human Rights Committee, *General Comment 15: The Position of Aliens Under the Covenant* adopted 11 April 1986, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (n 631)

[8] UN Human Rights Committee, *General Comment No. 27 (67*) Freedom of Movement (Article 12)* UN Doc CCPR/C/21/Rev.1/Add.9 (12 November 1999) para 4; IACHR, 'Human Mobility. Inter-American Standards' para 437 <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf> accessed 16 September 2019.

[9] Alessia di Pascale, 'Exceptional Duties to Admit Aliens' in Sir Richard Plender (ed), *Issues in International Migration Law* (BRILL 2015) 222. Notably, Byrne and Gammeltoft-Hansen recognise the relevance of law scholarship in expanding the scope of protection of the principle of non-refoulement.Rosemary Byrne and Thomas Gammeltoft-Hansen, 'International Refugee Law between Scholarship and Practice' (2020) 32 International Journal of Refugee Law 181, 190.

[10] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants Felipe González Morales* UN Doc A/77/189 (19 July 2022) para 18.

[11] Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2011) 50 _ _ _ _ _ <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 22 May 2023; IACHR, 'Human Mobility. Inter-American Standards' para 210.

obligations Law 21.325 of 20 April 2021 (2021 Migration Law) does not explicitly incorporate this principle. This omission was not inadvertent but the result of a deliberate decision by the Chilean parliament. Following a heated debate in 2019, Parliament removed a provision titled Article 10: Principle of Non-Refoulement (‘*Artículo 10: Principio de No Devolución*’), which would have enshrined the principle of non-refoulement in domestic law.[12] The justification offered was that the principle was already recognised under existing refugee legislation. Instead, lawmakers introduced ‘Article 10: Complementary Protection’ (‘*Artículo 10: Protección Complementaria*’), which extends non-return safeguards to individuals whose asylum claims have been rejected.

The decision not to incorporate the principle of non-refoulement into Law 21.325 raises questions related to Chile’s international and Inter-American human rights responsibilities. The literature has not addressed or responded to these issues. A recent study analysed the treatment of the principle of non-refoulement at the Chilean Supreme Court.[13] Earlier research examined the extent to which Chile respected the principle of non-refoulement with refugees and asylum seekers.[14] However, no study has addressed whether the deliberate exclusion of the principle from the 2021 Migration Law aligns with Chile’s legal obligations under international human rights law.

In responding to its key question, this chapter also addresses that gap. It begins by analysing the principle of non-refoulement in refugee law. Then, it turns into identifying the human rights obligations emanating from the principle of non-refoulement, including

[12] Article 10 prescribed: No foreigner may be expelled or returned to a country where their right to life, physical integrity, or personal liberty may be at risk of being violated on account of their race, nationality, religión, social status, or political opinión, in accordance with international treaties ratified by Chile. (Translated from Spanish: ‘Ningún extranjero podrá ser expulsado o devuelto del país donde su derecho a la vida, integridad física o la libertad personal corran peligro de ser vulneradas en razón de su raza, nacionalidad, religión, condición social u opinión política, en conformidad a los tratados internacionales ratificados por Chile’)

[13] Mayra Feddersen M. and others, ‘Ley sobre Protección de Refugiados en Chile. Nudos críticos, desafíos urgentes y alternativas hacia el futuro.’ 16–17 <https://www.politicasmigratorias.org/publicaciones> accessed 20 April 2023. (Law on the protection of Refugees in Chile: Critical Issues, Urgent Challenges and Alternatives for the Future)

[14] Helena Olea, ‘Refugiados en Chile: Análisis de la Ley 20.430 y su reglamento.’ 121–124 <https://derechoshumanos.udp.cl/publicacion/refugiados-en-chile-analisis-de-la-ley-20-430-y-su-reglamento/> accessed 21 April 2023. (Refugees in Chile: Analysis of Law 20.430 and its regulation)

interpretations from the Inter-American human rights system to which Chile is a party. Finally, the chapter applies this standard against Chilean legislation, particularly Law 20.430 of 2010, which *establishes provisions for the protection of refugees* and 2021 Migration Law. The chapter concludes that the exclusion of the principle of non-refoulement from the 2021 Migration Law may place Chile in breach of its international obligations, potentially incurring in international responsibility. While the law includes a provision on complementary protection, this does not amount to a full incorporation of the principle of non-refoulement. As a result, Chile's migration legislation does not enshrine a right to entry based on non-refoulement and instead offers a narrower protection that, although it limits the state authority to admit migrants, does not meet the scope of protection of the principle of non-refoulement as understood under human rights law.

6.2. The Principle of Non-Refoulement in Refugee Law.

6.2.1. Law and Scope of Protection.

The principle of non-refoulement is cemented in Article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention), to which Chile is a party.[15]

According to Article 33 (1):

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[16]

[15] To further explore how does the Refugee Convention relates to non-signatory parties, see Maja Janmyr, 'The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda' (2021) 33 International Journal of Refugee Law 188..

[16] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (adopted 13 January 1967, entered into force 4 October 1967) 606 UNTS 267. [1951 Refugee Convention].

Article 33 (2) sets out exceptions to this protection, allowing states to remove an asylum seeker when there are reasonable grounds for considering them as a danger to the security of the country or when the asylum seeker, having been convicted by a final judgment of a severe crime, constitutes a danger to the community.[17]

As outlined in section 2.2.2. of Chapter II, in international refugee law, the protection afforded by the principle of non-refoulement applies to those who meet the criteria for refugee status. These conditions are set out in Article 1 of the Refugee Convention. Recalling the Article, a 'refugee' is defined as any person who:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is 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.[18]

It must also be recalled that, in Latin America, the criteria for refugee recognition have been broadened beyond those set out in the 1951 Refugee Convention. In the third conclusion of the 1984 Cartagena Declaration on Refugees (Cartagena Declaration), states agreed to include in the concept of refugees:

> Persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[19]

[17] Ibid.
[18] Ibid.
[19] Cartagena Declaration on Refugees (adopted 22 November 1984) Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Colombia. [Cartagena Declaration].

Although the Cartagena Declaration is a non-binding instrument,[20] its legal relevance is recognised by the IAHR Court in *Advisory Opinion Rights and guarantees of children in the context of migration and/or in need of international protection*. Based on the 'progressive development of international law', the Court ruled that the obligations under the right to seek and receive asylum are operative for those who meet the requirements of the Cartagena Declaration.[21] The IAHR Court also identified a regional trend among Latin American states of adopting an expanded concept of refugee that encompasses the definitions provided by both the 1951 Refugee Convention and the Cartagena Declaration. This conclusion was based on an analysis of domestic legislation of 19 Latin American countries, including Chile. [22]

As outlined in Chapter II,[23] Chile regulates refugee protection in Law 20.430 of 2012 (Refugee Law) and its regulation, Decree No. 837 (Refugee Regulation). The concept of a refugee is contained in Article 2 of the Refugee Law. While paragraph 1 of said Article contains the concept of a refugee recognised in the Refugee Convention, paragraph 2 includes the broader protection contained in the Cartagena Declaration.[24] The principle

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[20] UNHCR, 'Memorias del Trigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados' 230 <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=568cf8f64> accessed 6 April 2023 (Memoirs of the 31st anniversary of the Cartagena Declaration); UNHCR, 'The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984' (2016) 18 International Journal of Refugee Law 252, 252.

[21] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection,* Advisory Opinion OC-21/14, Inter-American Court of Human Rights, OC-21/14 (19 August 2014) para 79 [*Rights and Guarantees of Children in the Context of Migration]*

[22] *Rights and Guarantees of Children in the Context of Migration* 77. The ongoing Venezuelan crisis challenges the application of the extended definition of 'refugee' contained in the Cartagena Declaration. See Diego Acosta, Cécile Blouin and Luisa Feline Freier, 'La emigración venezolana: respuestas latinoamericanas' <https://www.fundacioncarolina.es/la-emigracion-venezolana-respuestas-latinoamericanas/> accessed 4 July 2023 (Venezuelan emigration: latinamerican responses); Céline Blouin, Isabel Berganza and Freier Luisa Feline, 'The Spirit of Cartagena? Applying the Extended Refugee Definition to Venezuelans in Latin America - ProQuest' [2020] Forced Migration Review 64; Luisa Feline Freier and Nicolas Parent, 'The Regional Response to the Venezuelan Exodus' (2019) 118 Current History 56; Omar Hammoud-Gallego, 'A Liberal Region in a World of Closed Borders? The Liberalization of Asylum Policies in Latin America, 1990–2020' (2022) 56 International Migration Review 63; Omar Hammoud-Gallego and Luisa Feline Freier, 'Symbolic Refugee Protection: Explaining Latin America's Liberal Refugee Laws' (2023) 117 American Political Science Review 454; Javier Ochoa, 'South America's Response to the Venezuelan Exodus: A Spirit of Regional Cooperation?' (2020) 32 International Journal of Refugee Law 472. . For a critical view on the Cartagena Declaration, see José H Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance' (2019) 38 Refugee Survey Quarterly 341..

[23] Sections 2.2.2. and 2.3 of Chapter II.

[24] Article 2 prescribes:

of non-refoulement is also regulated in Article 4 of the Refugee Law, but with a wider scope of protection than the Refugee Convention, incorporating human rights protections, such as the prohibition of torture. This regulation will be further analysed in the last section of this chapter.

Chapter II also showed that, recent legislation and state practice have increasingly obstructed, rather than facilitated access to refugee protection. Firstly, because the acceptance rate for asylum applications in Chile is extremely low. Secondly, because in February 2024, Chile enacted new legislation that modifies the procedures for granting refugee protection. As analysed in Chapter II, the new legislation introduces additional complexities to the Chilean asylum process that complicates the pathway for asylum seekers to obtain refugee protection.

Therefore, recalling what was demonstrated in Chapter II, refugee protection does not constitute a viable regular migration pathway in Chile, and the countries prevailing practices and recent legislative developments indicate that this situation is unlikely to change in the future.

6.2.2. Declaratory Nature of the Refugee Status.

The act by which a state recognises a refugee is declaratory. There are no provisions in the 1951 Refugee Convention related to the procedures that states must follow to determine if a person qualifies as a refugee formally. According to Article 12 of the 1951 Refugee Convention, the personal status of a refugee is governed by the law of the country of his domicile or, if he has no domicile, by the law of their country of residence. Nonetheless,

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Concept of refugee. People who are in any of the following situations will have the right to have their refugee status recognised:

3. Those who, due to well-founded fear of being persecuted for reasons of race, religion, nationality, belonging to a certain social group or political opinion, are outside the country of their nationality and cannot or do not want to avail themselves of its protection due to said fears.
4. Those who have fled their country of nationality or habitual residence and whose life, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have disturbed public order in that country seriously.

states do not make someone a refugee but declare them to be one. As affirmed by the UN High Commissioner for Refugees, 'A person is a refugee within the meaning of the Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur before the time at which his refugee status is formally determined'.[25] The declaratory nature of refugee status is recognised by the IAHR Commission and by authoritative literature.[26]

The declaratory nature of the refugee status produces effects regarding the obligations that states should comply with when respecting the principle of non-refoulement in two ways. Firstly, when states decide to expel or return a person to their country of origin, they must take all the necessary steps to ensure that said person is not a refugee and will not be sent to a place where there is a well-founded fear that they may be persecuted for the reasons indicated in Article 33 of the 1951 Refugee Convention.[27] In addition, states must also ensure that their life, liberty or security are not threatened for the reasons indicated in the expanded definition of a refugee in the Cartagena Declaration. Thus, if the person being expelled claims to be a refugee, an adequate and individualised analysis of their requests must be carried out, respecting the rules of due process, including the prohibition of rejection at borders.[28] Secondly, states must respect the principle of non-refoulement, even when the person enters the country through an irregular pathway. This right emanates from Article 31 of the 1951 Refugee Convention, according to which states cannot impose penalties on those who, coming directly from a country in which their life

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[25] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection' para 28 <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> accessed 5 April 2023.

[26] IAHR Commission, 'Human Mobility. Inter-American Standards' para 131 <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf> accessed 16 September 2019; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 158; Cathryn Costello and Michelle Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 International Journal of Discrimination and the Law 233, 262.

[27] UNHCR, 'Buena práctica 4: Carácter declarativo de la condición de refugiado' <https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/9280.pdf> accessed 11 April 2023. (Good practice 4: Declarative nature of the refugee status)

[28] IAHR Commission, 'Informe Sobre La Situación de Los Derechos Humanos Solicitantes de Asilo En El Marco Del Sistema Canadiense de Determinación de La Condición de Refugiado' para 25 <http://www.cidh.org/countryrep/Canada2000sp/canada.htm#A.%C2%A0%C2%A0%C2%A0 Visi%C3%B3n General del Proceso de Petici%C3%B3n y Determinaci%C3%B3n> accessed 28 February 2019. (Report about the human rights situation of asylum seekers in the context of the Canadian system for determining refugee status)

or freedom are threatened, enter or are present in the country without authorisation, provided they present themselves to the authorities and show good cause for their irregular entry or presence.

The declaratory nature of the recognition of refugee status is incorporated in Article 35 of the Refugee Law, which prescribes: 'The recognition of the condition of refugee is a declaratory act'.[29] Furthermore, denying access to the country without evaluating the risk of non-refoulement is prohibited in Article 4 of the Refugee Law. Finally, Article 6 of the Refugee Law reproduces the regulation on no penalties for irregular entry of Article 31 of the 1951 Refugee Convention.

6.2.3. Summary

According to the ordinary meaning of the Refugee Convention, the non-refoulement principle only applies to those who qualify as refugees under Article 1 of the Convention. The scope of protection of the principle of non-refoulement was broadened at both the international and Inter-American levels in two ways: Firstly, the principle of non-refoulement also applies to those who qualify as refugees in accordance with the Cartagena Declaration, which is reflected in Article 2(2) of the Refugee Law. Secondly, due to the declaratory nature of the refugee status, the principle of non-refoulement applies not only to those whom Chile formally recognises as refugees but also to asylum seekers, at least until the country formally resolves their claim. For this reason, even from the perspective of refugee law, the non-refoulement principle limits states' power to control their borders. Because the evaluation of the refugee application must be individual and respect the norms of due process, refugees or asylum seekers cannot be immediately rejected at the border. This broadened scope of protection was initially reflected in Chilean legislation, but this might be changing with the recent legislation that modified the procedures for granting refugee protection, and with state practice.

[29] The article reads: Article 35.- Declaratory Effect of the act of Recognition and Foundation of the Resolutions. The recognition of refugee status is a declaratory act. All Resolutions issued, referring to the determination of refugee status, must be duly founded.

Despite broadening the scope of protection of the non-refoulement principle in the context of refugees, applying this principle to those who do not qualify as refugees is not solved in the limited reach of Chilean refugee law set out in the Refugee Law. The arguments given by Chilean parliamentarians for excluding the principle of non-refoulement in the later 2021 Migration Law were that the principle is not applicable to those who do not claim refugee protection. The next section of this article argues the opposite: the principle of non-refoulement also applies to those who do not qualify as refugees or asylum seekers. As it will be shown, this affirmation is central to this thesis' main argument, since it explains the extent to which the principle of non-refoulement protects migrants in their entry.

6.3. Principle of Non-Refoulement in Human Rights Law.

6.3.1. Regulation, Definition, and Scope of Protection.

Like the principle of non-discrimination, the principle of non-refoulement is interpreted as a limitation on the authority of states to control their borders. Recalling General Comment No. 15 of the HR Committee, the principle of non-refoulement is one of the recognised circumstances under which 'an alien may enjoy the protection of the Covenant even in relation to entry or residence'.[30]

It is explicitly regulated in international and Inter-American human rights law to which Chile is bound. Additionally, the principle of non-refoulement is developed through the evolutionary interpretation of human rights courts and treaty bodies. In both treaty law and their interpretations, the scope of protection of the principle of non-refoulement is broadened.[31]

[30] UN Human Rights Committee, *General Comment 15* para 5.

[31] Previous research applied the broader non refoulement protection to US, EU and Canada models. Guild, Elspeth, 'Protection in the Event of Removal, Expulsion or Extradition.' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights A Commentary* (Bloomsbury Publishing 2014) <http://dx.doi.org/10.5040/9781849468350.ch-022> accessed 6 May 2023.

In the international human rights system, the principle of non-refoulement is regulated in Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT) and Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance. The former prescribes:

1. No state party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Inter-American human rights system contains a similar protection against refoulement, under Article 13 of the Inter-American Convention to Prevent and Punish Torture.[32] Additionally, Article 22(8) of the American Convention on Human Rights (ACHR),[33] prescribes:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

The scope of protection of Article 22(8) of the ACHR is broader than refugee law regarding whom it protects. The IAHR Court interpreted Article 22(8) as a 'complementary protection' to any person who is not a refugee or an asylum seeker and is threatened by any of the five conditions enumerated therein.[34] Nonetheless, regarding the danger the

[32] Which reads 'Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.'
[33] *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.
[34] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 217.

person faces, the scope of protection of Article 22(8) is narrower than the international and Inter-American conventions against torture. Article 22(8) limits the danger that the person risks facing to the same five conditions enumerated in the Refugee Convention. When presented with both options mentioned above, the IAHR Commission and the IAHR Court prefer the broader protection.[35]

Article 10 of the Chilean migration draft law was identical to Article 22(8) of the ACHR. A comparison of both regulations in their original Spanish language demonstrates that Article 10 of the migration draft law transcribed the entire paragraph of Article 22(8) of the ACHR. Draft Article 10 concluded by including the phrase 'in conformity with international treaties ratified by Chile'. In addition, the migration draft law and Law 21.325 have a norm of 'interpretation following the Constitution and international norms of human rights'. Despite opting for a narrower protection in the final version of the law, the scope of Article 10 of the migration draft law could have been broadened in the case law by Chilean courts interpreting its application. In fact, the Chilean Supreme Court already demonstrated a progressive application of human rights law when deciding on habeas corpus against expulsion orders.[36] Furthermore, and as discussed below, case law at the Supreme Court shows a widened scope of protection when applying the principle of non-refoulement.

In addition to the explicit recognition in human rights treaties, the human rights systems have further interpreted the scope of protection of the principle of non-refoulement by

[35] In this regard, see *Case of Pacheco Tineo Family v Plurinational State of Bolivia*, Inter-American Court of Human Rights Series C No 272 (Judgment of 25 November 2013) para 135; *Case of Wong Ho Wing V Peru,* Inter-American Court of Human Rights, Series C No 297 (Judgment of 30 June 2015) para 127; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 238; Inter-American Principles Principle 6: Non-Refoulement; IAHR Commission, 'Human Mobility. Inter-American Standards' para 438. For further analysis of an expanded LatinAmerican refugee protection, see Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355, 358; David James Cantor and Stefania Eugenia Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?' (2013) 17 International Journal of Human Rights 689; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. (First edition, University Press 2015); Omar Hammoud-Gallego and Luisa Feline Freier, 'Symbolic Refugee Protection: Explaining Latin America's Liberal Refugee Laws' (2023) 117 American Political Science Review 454.

[36] Miriam Henriquez-Viñas, 'La Corte Suprema Chilena y La Protección de La Libertad Personal de Los Migrantes: Un Estudio Jurisprudencial' (2022) 19 Jurídicas 263, 263.

identifying positive obligations emanating from the prohibition against torture and other serious human rights violations.[37] It is not a matter of this thesis to deeply analyse the broad literature and jurisprudence on the topic.[38] Three elements are, however, relevant to mention for this article's case study.

Firstly, a new definition of the principle of non-refoulement is applicable. Synthesising the interpretations of the international human rights system, the UN Special Rapporteur on the Human Rights of Migrants referred to the principle of non-refoulement as a principle which 'prohibits states from deporting *any person* to another state's jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment or other serious human rights violations, or where there would be a real risk of such violations'.[39] Consequently, the scope of protection given in international refugee law to the principle of non-refoulement is expanded. It applies not only to refugees and asylum seekers, but to *any person* under the jurisdiction of the state, regardless of whether they are nationals

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[37] UN CAT, *General Comment No. 4*; Inter-American Principles Principle 6 ; UN CMW, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* UN Doc CMW/C/CG/2 (28 August 2013)'.

[38] Ayşe Bala Akal, 'Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: A Case Study of Australia's Pacific Solution' (2023) 24 Journal of International Migration and Integration 231; Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355; Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311; Rachel Garrett and Nicole Barrett, 'Dublin III in Practice: Synthesizing a Framework for European Non-Refoulement Cases at the Human Rights Committee' (2021) 13 Journal of Human Rights Practice 250; Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' (2020) 21 German Law Journal 598; Penelope Mathew, 'Non-Refoulement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) <https://doi.org/10.1093/law/9780198848639.003.0051> accessed 3 July 2023; Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and Principle of Non-Refoulement' (2020) 114 Cambridge University Press 708; Kasey McCall-Smith, 'Treaty Bodies and States: Shaping Custom' in S Droubi and J d'Aspremont (eds), *International Organizations, Non-State Actors, and The Formation of Customary International Law. Mellan Schill Perspectives on International Law* (Manchester University Press 2020) <https://www.research.ed.ac.uk/en/publications/treaty-bodies-and-states-shaping-custom> accessed 3 July 2023; Keshen Shaindl and Steven Lazickas, 'Non-Refoulement: A Human Rights Perspective on Environmental Migration from Small Island Developing States.' (2022) 74 Journal of International Affairs 21.

[39] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants* Un Doc A/HRC/38/41 (4 May de 2018) para 20. Or as interpreted by the UN Human Rights Committee, 'when there is a real risk or irreparable harm.' UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12.

or foreigners or their immigration status, that is, whether they are refugees, refugee applicants, or migrants in regular or irregular status. As ruled by the IAHR Court in the *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (hereinafter *Case of Pacheco Tineo)*:

> Hence, if the preceding norms are complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is.[40]

The definition also shows that the non-refoulement principle protects not only against torture or ill-treatment but against 'other serious human rights violations'. Among the protected rights, there is the right to life, the right to a fair trial and the prohibition of arbitrary detention, enforced disappearance, threats to the liberty and security of a person, risks to life such as the absence of necessary medical care and living conditions.[41] The UN Special Rapporteur on the Rights of Migrants goes further into affirming that the principle of non-refoulement is also applicable in cases of return to situations of socioeconomic deprivation.[42] The extent of the human rights violation that would trigger the non-refoulement protection is, however, contested.[43] It appears that the minimum requirement is that the violation amounts to ill-treatment.[44]

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[40] *Case of Pacheco Tineo* para 135.
[41] UNCCT, 'Human Rights at International Borders. A Trainer's Guide.' 223 <https://www.ohchr.org/sites/default/files/Documents/Publications/HR_InternationalBorders.pdf> accessed 3 May 2023.
[42] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants* Un Doc A/HRC/38/41 para 20.
[43] Cathryn Costello, 'The Search for the Outer Edges of Non-Refoulement in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (BRILL 2016) <http://ebookcentral.proquest.com/lib/ed/detail.action?docID=4540477> accessed 6 July 2023; Penelope Mathew, 'Non-Refoulement' 901.
[44] Chetail, *International Migration Law* 196.

The Chilean Supreme Court applies a broader scope of protection of the principle of non-refoulement in its case law. Common facts of these cases are Venezuelan citizens who entered the country irregularly due to not having travel documents. Migration authorities dictated an expulsion order against them based on their irregular entry. Claiming the illegality of this expulsion order, they presented habeas corpus at Chilean Appeals Courts. Often, these cases were brought to the Supreme Court, which decided to leave the expulsion order without effect. The recent considerations given by the Court to adopt this decision are health risks. First, the Court considered the impact of the COVID-19 pandemic increased the risks of affecting the claimants' physical and psychical integrity and their personal security if being returned. Second, the Court considered the claimants under the broad definition of refugee protection of the Cartagena Declaration. Third, the Court recognised their non-refoulement guarantee despite not having applied for refugee status and their irregular entry to the country.[45] The Courts' arguments are in line with scholars analysing non-refoulement and COVID-19 around the world.[46]

A second element that is relevant to consider in this study is that, when the protection of non-refoulement is against the risk of torture and ill-treatment and it is an 'absolute and non-derogable principle', it does not admit limitations and must be applied with no exceptions.[47] Consequently, states must apply this principle in all their jurisdiction and to everyone, including those who need international protection, without discrimination and no matter their nationality, their statelessness condition, their juridical,

[45] Chilean Supreme Court, ROL: 5546-2023; 5986-2022; 48889-2022; 39936-2022.

[46] Marta Catro Padrón and Luisa Feline Freier, '¿Invisibles o Invisibilizados? La COVID-19 y Los Solicitantes de Refugio Venezolanos En Perú' (2021) 129 Revista CIDOB dÁfers Internacionals 31 (Invisibles or Hidden? COVID-19 and Venezuelan Asylum Seekers in Peru); Luisa Feline Freier, 'COVID-19, Migrant Labor and Inclusion in South America' (2022) 13 Global Labour Journal <https://mulpress.mcmaster.ca/globallabour/article/view/5304> accessed 4 July 2023; Michelle Foster, Helene Lambert and Jane McAdam, 'Refugee Protection in the COVID-19 Crisis and beyond: The Capacity and Limits of International Law Thematic Issue: Rights Protection amidst COVID-19' (2021) 44 University of New South Wales Law Journal 104; Kate Ogg and Chanelle Taoi, 'COVID-19 Border Closures: A Violation of Non-Refoulement Obligations in International Refugee and Human Rights Law?' (2021) 39 The Australian Year Book of International Law Online 32; Danni Reches, 'Complying with International and Regional Law during the Pandemic - Asylum Seekers and COVID-19 Emergency Measures in EU member states Germany and Greece' (2022) 6 Social Sciences & Humanities Open 100370.

[47] UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc CCPR/C/21/Rev.1/Add.4 para 3; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants* Un Doc A/HRC/38/41 para 20; UNGA, *Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc A/HRC/50 (23 November 2018) para 37.

administrative or judicial situation, and in normal circumstances or an emergency state.[48] This rule differs from international refugee law, where states can invoke the exceptions of Article 33(2) of the 1951 Refugee Convention.[49] This is reflected in the interpretations of the human rights monitoring bodies. For example, in the case of *José Henry Mongue Contreras v Canadá (José Henry*), the HR Committee decided that if Henry was expelled to El Salvador, Canada would violate his rights protected under Article 7 of the ICCPR. This view was taken even considering that Canada did not recognise the complainant's refugee status for security reasons and that it had rejected his application for permanent residence based on humanitarian reasons.[50]

The broadened scope of protection of the principle of non-refoulement is also reflected in Principle 6 of the Inter-American Principles.[51] When the risk of refoulement is related to treatment other than torture, the IAHR Commission interprets that the exceptions of Article 33 (2) of the 1951 Refugee Convention can be applied, but under restrictive interpretation and following the principle of proportionality.

Despite the broader scope of protection that the human rights systems give under the principle of non-refoulement, specific requirements need to be met for a person to claim protection. When discussing the incorporation of the principle into 2021 Migration Law, right-wing parliamentarians argued against it because they feared opening the borders without control. A member of the parliament argued that for protection against refoulement, 'it is enough that the person claims that his life is at risk or that he is afraid to live in his country'.[52] However, this is not the case. As interpreted by the HR Committee, in individual communications, such *as José Henry*, the obligation to refrain from returning a person is applicable when the consequence of said return is a real and personal risk, accompanied by severe reasons to determine that it would cause

[48] UN CAT, *General Comment No. 4* para 10.
[49] Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test'; Penelope Mathew, 'Non-Refoulement'.
[50] UN Human Rights Committee, *Communication No 2613/2015* UN Doc CCPR/C/119/D/2613/2015 (12 May 2017) [*Jose Henry v Denmark]*.
[51] Inter-American Principles.
[52] Chilean Deputees Chamber, 'Legislatura 366ª, Sesión 126ª' 79 <https://www.camara.cl/pdf.aspx?prmID=13491%20&prmTIPO=TEXTOSESION>.

irreparable damage, such as that contemplated in the Article 7 of the ICCPR.[53] Applying this standard also means that in some situations UN Human Rights Treaty Bodies find expulsions to be compliant with human rights law, as in the case of *X v Denmark* at the HR Committee.[54] Furthermore, there should be 'substantial grounds for believing a person is facing a risk of torture'. According to CAT interpretations, 'substantial grounds' exists when 'the risk of torture is foreseeable, personal, present and real', which needs to be proved.[55]

In summary, the principle of non-refoulement forms part of the human right to be free from torture: It is regulated in human rights treaties and emanates as a positive obligation from the prohibition of torture and other serious human rights violations. Therefore, it applies to any person, not only to refugees and asylum seekers, and when deriving from the prohibition against torture, it is absolute and non-derogable. As recognised through the evolutionary interpretation of human rights law, the principle of non-refoulement also protects migrants at the point of entry into a destination country. Consequently, states, including Chile, must recognise and apply this principle in migration law. In line with this thesis' main argument, such recognition would support the development of human rights-based pathways to migration. Section 6.4 will demonstrate that, in the case of Chile, recognition of this principle solely in the Refugee Law is insufficient, as it is limited in scope to refugees and asylum seekers and allows for exceptions.

6.3.2. Obligations to Adopt Positive Measures Against the Violation of Non-Refoulement.

Concrete human rights obligations emanate from the principle of non-refoulement which are interpreted by human rights monitoring bodies and courts.[56] This section will analyse the obligations related to the legal treatment Chile should give to the principle of non-refoulement.

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[53] UN Human Rights Committee *Communication No 2007/2010* UN Doc CCPR CCPR/C/110/D/2007/2010 (12 May 2014) [*X v Denmark]* para 9.2; *Jose Henry v Denmark* para 8.2, 8.7.
[54] *X v Denmark*.
[55] UN CAT, *General Comment No. 4* paras 9–11.
[56] Mathew, 'Non-Refoulement'.

In addition to refraining from returning a person when non-refoulement requirements are met, a positive obligation emanates from the principle of non-refoulement: States must adopt legislative, administrative and other measures they take to prevent and punish its violation.[57] To comply with these obligations, the measures adopted must be immediate.[58] This is the nature of the obligations emanating from civil and political rights, such as the prohibition of torture and ill-treatment from which the principle of non-refoulement emanates. Compliance with these obligations can be analysed in two groups: adoption of administrative and judicial measures, and adoption of legislative measures.

Regarding administrative and judicial measures, a state will only be able to return a person without it being a human rights violation when their return is accompanied by a strict and individualised situation of their case.[59] Thus, each expulsion must be examined by the Chilean administrative and judicial authorities 'individually, impartially and independently [...] in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal'.[60] In addition, the Committee against torture interpreted specific preventive measures to avoid non-refoulement violations, such as providing the person concerned with a lawyer and respecting the person's language during the administrative or judicial procedure.[61] Consequently, the principle of non-refoulement is incompatible with rapid rejections at the border.[62] Regarding legislative measures, this obligation must be read in conjunction with Article 2 of the American Convention on Human Rights 'Domestic Legal Effects', which prescribes:

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[57] UN CAT, *General Comment No 4* para 18; UN Human Rights Committee, *General Comment No. 20* para 8.9.

[58] Staberock, Gerald, 'Human Rights, Domestic Implementation', *Max Planck Ecyclopedia of Public International Law* (Oxford University Press 2011) para 13 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1734> accessed 28 February 2019.

[59] *Case of Pacheco Tineo* para 153.

[60] UN CAT, General Comment No 4.

[61] ibid paras 13, 18; UNGA, *Report on the Special Rapporteur on the Human Rights of Migrants UN Doc A/HRC/38/41* para 89.

[62] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants* Un Doc A/HRC/38/41HRC, para 35.

> Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the states parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The IAHR Commission interpreted the application of this article in the document 'Human Mobility InterAmerican Standards of 2015', which this thesis argues should be read in the light of Chile's obligations to adopt legislative measures for the case of the principle of non-refoulement: Firstly, Chile must eliminate laws and practices of any kind that somehow violate the guarantees of non-refoulement; and secondly, Chile must issue laws and develop methods conducive to the practical observance of the guarantee against refoulement.[63] Detailed recommendations on non-refoulement compliance by UN Human Rights Treaty Bodies to Chile confirm this argument: In fact, guaranteeing the principle of non-refoulement 'in law and practice' is precisely what the CMW recommended to Chile in its Concluding Observations on the second periodic review.[64] Moreover, within this recommendation, the CMW explicitly applied the broader scope of protection of the principle, affirming that, in its view, the principle of non-refoulement prohibits removal of any person to a territory where they would be at real risk of persecution or serious human rights violations.[65] Similarly, the CAT called on Chile to adopt legislative measures necessary to ensure an effective guarantee of the principle of non-refoulement.[66]

Consequently, the principle of non-refoulement should have been incorporated in 2021 Migration Law 21.325 in at least paragraph II of Title II, 'Rights and obligations of aliens.[67] Furthermore, because the principle of non-refoulement constitutes a limitation to the

[63] IAHR Commission, 'Human Mobility. Inter-American Standards' para 179.
[64] UN CMW, *Concluding observations on the second periodic report of Chile* UN Doc CMW/C/CHL/CO/2 (11 May 2021) para 48(c).
[65] Ibid.
[66] UNCAT, Concluding Observations on the Sixth Periodic Report of Chile UN Doc CAT/C/CHL/CO/6 (28 August 2018) para 43.
[67] Translated from original spanish: *Derechos y obligaciones de los extranjeros*.

power of states to expel migrants, the principle of non-refoulement should also be mentioned in Title VIII 'Expulsion'.[68] This would have allowed Chile to align with fully recognising non-refoulement as a limitation to its authority to admit and exclude migrants, aligning with a human rights-based approach to regular migration.

In summary, in light of Chile's positive obligation to adopt administrative, judicial and legal measures, the principle of non-refoulement should be incorporated in 2021 Migration Law. Such incorporation does not mean creating new obligations for the country. On the contrary, it constitutes a tool to facilitate compliance with existing Chilean human rights obligations and align the country with a human rights-based approach to regulating admission and exclusion of migrants. The following section analyses the extent to which the principle of non-refoulement is recognised in Chilean migration legislation.

6.4. The Principle of Non-Refoulement in Chilean Legislation

6.4.1. The Principle of Non-Refoulement in the Refugee Law.

The principle of non-refoulement is incorporated and defined in Articles 3 and 4 of Law 20.430. Article 4 allows analysing of the scope of protection under the principle of non-refoulement in Chilean refugee law. The first thing to consider is that Article 4 of the Refugee Law limits the expulsion of refugees from Chile. This is clear from the first paragraph, which prohibits the expulsion, devolution or refusal at the border of refugees or asylum seekers to a country where their life or personal freedom is in danger. The location of Article 4 in the Refugee Law also demonstrates that expulsion of migrants is limited. The following Article, Article 5 of the Refugee Law 20.430, regulates the expulsion of refugees and prescribes that this is an exceptional measure that can only be applied for national security and public order reasons. It also recognises the right of refugees to appeal against expulsion through administrative and judicial pathways. Therefore, if a refugee or asylum seeker is expelled, they should be allowed to claim their non-

[68] Translated from original spanish: *De la expulsión*.

refoulement protection at the legal procedures identified in Article 5. Consequently, forced returns should always be a measure of last resort and should be applied following the rules of due process.[69] Additionally, appeals against forced returns should suspend deportation.[70] Thus, the principle of non-refoulement contained in Article 4 of the Refugee Law further limits the power of the Chilean state to expel refugees.

Secondly, paragraph 2 of Article 4 of the Refugee Law includes broader protection against refoulement than the 'well-founded fear of persecution' contained in the 1951 Refugee Convention. It refers to the obligation to refrain from returning refugees or asylum seekers whose safety is in danger or for whom there are well-founded reasons to believe they could be subject to torture or cruel, inhuman or degrading treatment or punishment. This is in line with current human rights standards, as commented above in the case of *José Henry*. Furthermore, according to paragraph 3, a persistent situation of manifest, patent or massive violation of human rights will be considered to assess the risk the refugee or asylum seeker faces if being returned. Again, this aligns with the broadened concept of refugees in the Cartagena Declaration.

However, Article 4 of the Refugee Law 20.430 is not entirely in line with the human rights standards analysed in the previous sections of this chapter. The principle of non-refoulement is still applied exclusively to refugees and asylum seekers, as defined in Article 2 of Refugee Law. Thus, the person will have to prove that he or she faces a well-founded fear of being persecuted for reasons of race, religion, nationality, belonging to a specific social group or political opinions; or having fled the country for reasons of generalised violence. Moreover, narrowing non-refoulement protection only to refugees or asylum seekers means establishing limitations and requirements to be protected from torture, which contravenes its absolute and non-derogable character.

The possibility of applying the principle of non-refoulement to those not qualifying as refugees is identified in paragraph 4 of Article 4 of the Refugee Law. Here, it is established

[69] UNGA, Report of the Special Rapporteur on the Human Rights of Migrants UN Doc CAT/C/CHL/CO/6 para 89.
[70] ibid.

that asylum seekers who have not been granted refugee status can request a residence permit in the country. However, the paragraph does not indicate that the migration authorities must grant this permit even when non-refoulement protection is needed. The Chilean law does not recognise a right to stay on the grounds of non-refoulement without the individual first gaining refugee status. It only grants the option to request a residence permit. Despite this, and as indicated in Section 6.3.1 above, the Chilean Supreme Court has interpreted a broader scope of protection for the principle of non-refoulement.[71] Furthermore, the Court also ruled that non-refoulement protection should be applied to a person whose asylum application was denied.[72] These important cases support the thesis' core argument: that human rights law can contribute to building pathways for regular migration. In line with evolutionary interpretations in human rights law, Chile's domestic Court have placed limits on the state's power to exclude migrants by invoking the principle of non-refoulement.

6.4.2. The Decision of Not Incorporating the Principle of Non-Refoulement in 2021 Migration Law.

Chilean 2021 Migration Law does not contain the explicit recognition of the principle of non-refoulement despite being included initially in draft Article 10. Recognition of the principle of non-refoulement was replaced with a 'Complementary Protection', which extends non-return safeguards to individuals whose asylum claims have been rejected. This section discusses this provision in light of the international and Inter-American refugee and human rights standards analysed in the previous sections of this article.

A first point to consider is that incorporating a 'complementary protection' is a positive institutional change.[73] The previous migration law, D.L. 1.094 of 1975, did not include

[71] Despite not being a comparative article, the case of Hong Kong Courts is relevant to mention for their relevance in expanding non-refoulement protection whose legal protection was short Wai Ching Choy and Xuetong Shi, 'A Comprehensive Review of Refugee and Asylum Studies in Contemporary Hong Kong: Law, Policies, and Lived Experiences' (2021) 49 Asian Journal of Social Science 38..

[72] *Sáez con Bellolio* [2021] Corte Suprema ROL 131056-2020 Décimo tercero - décimo cuarto; Feddersen M. and others, 'Ley sobre Protección de Refugiados en Chile. Nudos críticos, desafíos urgentes y alternativas hacia el futuro.' 16, 17.

[73] This was explicitly mentioned by the CMW on paragraph 10 of the Concluding Observations on its second Periodic Review to Chile. It is worth mentioning that the English version reads 'additional protection',

such a guarantee. The title 'complementary protection' is identical to the wording used by the IAHR Court when interpreting Article 22(8) of the American Convention on Human Rights, as analysed in Section 6.3.1 above. Article 10 of 2021 Migration Law protects asylum seekers who were not given refugee status, which means the scope of protection of the principle of non-refoulement, previously recognised only for refugees, is broadened. Nonetheless, the provision falls short in its complementary protection in the context of migrants. Following the interpretation of the IAHR Court, the 'complementary protection constitutes a normative development that is consistent with the principle of non-refoulement'.[74]

Article 10 is inconsistent with the principle of non-refoulement for four reasons. Firstly, the authority granting the complementary protection is the same as the one prescribed in the Refugee Law. According to Title III of the Refugee Law and Title III of Decree 837, this authority is a commission composed of the Home Undersecretary (*Subsecretario del Interior*), two representatives of the Home Office (*Ministerio del Interior*), and two representatives of the Ministry of Foreign Affairs (*Ministerio de Relaciones Exetriores*). The representatives are elected by their respective ministers. A member of the UN High Commissioner for Refugees is allowed to attend. Apart from the latter, these are all political designations which risk having complementary protection dependent on the political views of the commission. Those who guarantee the principle of non-refoulement are not required to have expertise in due process norms and refugee and human rights law. Therefore, respect for the application of administrative and judicial measures analysed in Section 6.3.2. above cannot be ensured. In addition, there was no subsequent modification to the Refugee Law after the 2021 Migration Law entered into force. Therefore, granting complementary protection is not within the faculties recognised by these authorities in the Refugee Law. This legal gap creates uncertainty about the real possibilities of the commission granting complementary protection. The small number of asylum claims granted by this commission in the past years contributes

however, the original spanish version reads 'protección complementaria', which is the same wording used in Article 10 of Law 21.235. UN CMW, *Concluding Observations on the Second Periodic Report of Chile* para 10..

[74] *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* para 240.

to this argument. Hence, giving the power of granting complementary protection to these authorities exacerbates the failure to guarantee the principle of non-refoulement when needed.

Secondly, the article does not include the broader scope of protection recognised under the Cartagena Declaration and in evolved interpretations of non-refoulement in the human rights systems. In Article 10, paragraph 2, the risk of being persecuted is conditioned to six circumstances: race, nationality, religion, social condition, political opinion and sexual orientation or gender identity. Therefore, the complementary protection is not guaranteed to *any person* having substantial grounds for believing that they would be in danger of being subjected to torture, ill-treatment, or other serious violations or where there would be a real risk of such breaches. This narrows the scope of protection of the principle of non-refoulement, placing Chile in danger of incurring international responsibility. Furthermore, Article 10 does not mention specific protection against torture , which is at the core of human rights protection against non-refoulement. In addition, it puts a higher burden of proof on the claimant. They not only have to prove that they face danger but also that they belong to one of these specific groups.

Finally, exceptions to complementary protection are allowed in Article 10 paragraph 3. Allowing for exceptions is an obstacle to guaranteeing the absolute character of the prohibition of torture. An adequate analysis of each claim must be made in any case. Additionally, one exception is having a criminal past, which does not align with previous judicial decisions at the domestic level. Applying a proportionality test, the Chilean Supreme Court has already recognised a right to stay for individuals with a criminal past.[75] In one case, the claimant was subject to an expulsion order after completing a five-year prison sentence for homicide. [76] The Court annulled the expulsion, citing the existence of a Chilean daughter residing in the country. [77] Although that ruling was not based on the principle of non-refoulement, it demonstrates that, in specific circumstances, a criminal record alone may not be sufficient to justify removal. In this

[75] Chilean Supreme Court ROL 37229-2017.
[76] *Ibid* 1.
[77] *Ibid* 5.

instance, the right to family life carried significant weight. Recalling the HR Committee's evolutionary interpretations, both non-refoulement and family reunification -along with the principle of non-discrimination- constitute grounds for protection in the context of entry and stay. As such, they should be afforded comparable legal weight. This supports the central claim of this thesis: that a human rights-based approach to migration contributes to the development of regular pathways to migration.

Another exception in paragraph 3 of Article 10 is to be considered 'for founded reasons as a danger to the national security of the country'. This places Chile a risk of violating the principle of non-refoulement under human rights standards. As mentioned in Section 6.3 above, for the HR Committee in the case of *José Henry*, national security was not reason enough to deny protection against refoulement. Additionally, the phrase allows for broad interpretation and discretion on the side of the authorities deciding on the complementary protection. This is relevant in the current Chilean context, where there exists an intense stigmatisation of migrants and their connection to criminality. Three situations allow confirming this: First, a recent Chilean survey showed that 60% of Chileans think that criminality is more violent due to immigration.[78] Second, as outlined in Chapter II of this thesis, in April 2023, a new criterion for prosecuting migrants was installed at the Chilean prosecution. They agreed on requesting pre-trial detention for all migrants that are detained not carrying an identity document.[79] Third, the parliament has an ongoing discussion about criminalising irregular entry to the country.[80]

In summary, despite constituting a positive step towards recognising complementary protection, Article 10 of 2021 Migration Law falls short in its defence against non-

[78] CADEM, 'Encuesta Plaza Publica' 20 <https://cadem.cl/wp-content/uploads/2023/04/Track-PP-483-Abril-S2-VF.pdf> accessed 19 May 2023. (Public Square Survey)

[79] Leonardo Vallejos and Marcelo Silva, 'Ejecución del "Criterio Valencia": Los primeros resultados de las peticiones de prisión preventiva' (*EMOL*, 12 April 2023) <https://www.emol.com/noticias/Nacional/2023/04/12/1091957/criterio-valencia-prision-preventiva-extranjero.html> accessed 19 May 2023. (Implementation of Valencia criterion: First results of preventive emprisonment requests).

[80] Centro de Prensa, 'Comisión inició el debate de proyecto que tipifica el delito de ingreso clandestino a territorio nacional' (*Cámara de diputadas y diputados*, 11 April 2023) <https://www.camara.cl/cms/destacado/2023/04/11/comision-inicio-el-debate-de-proyecto-que-tipifica-el-delito-de-ingreso-clandestino-a-territorio-nacional/> accessed 19 May 2023. (Commission began debate on a bill that criminalises clandestine entry into national territory).

refoulement. The legislative power failed to fully incorporate the interpretations of the IAHR Court on complementary protection, despite receiving specific recommendations from the CMW. The scope of protection of Article 10 is narrower than the current human rights standards established by human rights law and its interpretations. The Chilean approach lacks explicit protection against torture, limits the protection of refoulement to six specific conditions, and admits exceptions. Furthermore, the absence of a clear procedure for both granting the complementary protection and making it effective might make this provision in practice inapplicable. The consequence of eliminating an explicit recognition of the principle of non-refoulement is not providing Chile with the necessary tools to avoid refoulement as a consequence of returning migrants.

6.5. Conclusion

The principle of non-refoulement exists in refugee law, international human rights law and Inter-American human rights law. In line with all three areas of law, this thesis argues that it limits the right of states to decide who enters and stays within their territory. To a minimum extent, Chilean legislation reflects the overlapping regulation: It incorporates protection against refoulement in refugee law and a complementary protection in migration law. In refugee law, Chile mirrors international and Inter-American standards. It not only recognises entitlement to this right to refugees but also to asylum seekers. Additionally, it includes the broader definition of the Cartagena Declaration, thus expanding the potential protection. Nonetheless, new and more complex procedures on refugee application and the practice of Chilean migration authorities does not reflect the legal requirements set out in the law.

The principle of non-refoulement is firmly regulated in international and Inter-American human rights treaties to which Chile is a party. Consistent interpretations from both systems demonstrate that the principle of non-refoulement constitutes a positive obligation emanating from the prohibition against torture. And as such, it is an absolute, non-derogable right that does not allow for exceptions. Furthermore, it arguably constitutes part of the prohibition of torture in customary international law. A specific obligation of adopting positive measures to prevent its violation emanates from the principle of non-refoulement, which includes incorporating it into the 2021 Migration

Law. This thesis argues that such incorporation into the 2021 Migration Law would provide Chile with the necessary tools to manage its migration flows in a manner consistent with its human rights obligations. By excluding an explicit reference to the principle of non-refoulement and replacing it with the narrower concept of 'complementary protection' of Article 10 of the 2021 Migration Law, Chile falls short of providing the broader scope of protection that human rights law gives to migrants, refugees and asylum seekers. Furthermore, Chile is not complying with its human rights obligations to align domestic legislation with international standards to prevent non-refoulement violations. Thus, in response to the research question posed in this chapter –the extent to which Chile incorporates a right to enter emanating from the principle of non-refoulement- the analysis demonstrates that Article 10 does not amount to full incorporation. Although it does limit the state's discretion to admit and exclude migrants, it falls short to the broader guarantees established under human rights law.

A better alternative would have been to include the principle of non-refoulement explicitly in 2021 Migration Law, accompanied by a definition such as the one provided by the UN Special Rapporteur on the Human Rights of Migrants coupled with an Article on complementary protection, with detailed specifications on the residence permits and rights granted to those holding this protection.

The Chilean Supreme Court applies a broader interpretation of the principle of non-refoulement, in accordance with human rights standards. Of course, this does not mean that every person needing non-refoulement protection will receive it, but it does mean that domestic remedies are available. Unfortunately, however, judicial decisions have not yet encouraged Chile to change its legislation or to modify its practice, and if this continues, the risk of incurring in international responsibility for violating the principle of non-refoulement will remain.

Ultimately, this chapter reinforces a core tension: despite evolutionary interpretation of human rights law and progressive scholarly understandings of the scope of non-refoulement, its effectiveness in establishing a right to entry remains largely subject to state discretion. The central argument of this thesis is that incorporating human rights

law –particularly the principle of non-discrimination and the principle of non-refoulement- can facilitate the creation of regular, rights-based migration pathways. The closer Chile aligns its migration law with international human rights standards, the greater the possibility of developing such pathways. While the inclusion of complementary protection suggest movement in this direction, the absence of full incorporation continues to pose risks of closing regular migration channels beyond the boundaries of human rights law.

CHAPTER VII

CONCLUSION

This thesis examined whether the domestic incorporation of human rights could support an effective solution to irregular migration. It began recognising the asymmetry between migration and human rights law, whereby state sovereignty is upheld over any right to migrate. This tension is most clearly reflected in the right to freedom of movement, which enshrines two of the three dimensions of migration -namely, the right of everyone to leave any country, and the right of everyone to return to their own country. However, international and regional instruments do not substantively recognise a right to enter another country, often referred to as a right to immigrate. The authority to admit or exclude non-citizens remains firmly within the discretion of states, a position consistently affirmed in both human rights jurisprudence and legal scholarship.

At the same time, states are increasingly challenged by the phenomenon of irregular migration. Broadly defined, migrants in an irregular situation are those who enter or remain in a country without state authorisation. The presence of irregular migrants is often seen as evidence of an eroded and weakened sovereignty, and a failure of states to fully control migration. In response, states frequently frame migration as a national security issue, enacting restrictive border measures. These discretionary practices have, in turn, prompted calls for the recognition of a human right to immigrate as a counterbalance to state power.

Positioned between these tensions, this thesis proposed that human rights law offers an alternative approach. Drawing on evolutionary interpretation of human rights norms, the progressive commitments from international declarations, and a growing body of legal scholarship, it argued that a human rights-based approach to irregular migration requires the facilitation of regular, accessible and realistic migration pathways. Adopting such an approach entails not only identifying the substantive content of human rights but also uncovering the obligations they impose on states. In particular, the thesis examined whether duties to allow entry could be derived from existing human rights obligations. Consequently, it engaged directly with the dominant strands of the scholarly debates

identified in the introduction, addressing the tensions between state sovereignty and the human rights of migrants, identifying specific limitations on states' authority to control migration, and engaging with the emerging shift towards facilitating regular migration through a human rights-based approach.

The original contribution of this thesis was to build on a human rights-based approach to regular migration, by demonstrating the extent to which incorporation of human rights law -in particular, the principle of non-discrimination and the principle of non-refoulement- can limit the state's authority to admit and exclude migrants and support the development of regular migration pathways. Rather than arguing for the recognition of a distinct right to migrate, it showed that effective implementation of current human rights law, particularly through these two principles, should limit state authority to admit and exclude migrants and facilitate regular migration pathways, when properly incorporated into domestic legislation. Therefore, the thesis contributes to and advances a specific strand of the scholarship identified in section 1.1.2, reflected in Taran's and Crépeau's work, by identifying concrete human rights obligations capable of structuring regular migration pathways.

Recognising that the tensions between the territorial sovereignty and human rights is ultimately resolved at the domestic level, the thesis focused on how these tensions manifest in Chile's contemporary migration framework. Chile presents a compelling case study, particularly following the enactment of Law 21.325 of 2021 (2021 Migration Law), which incorporated human rights language into national migration law. The inclusion of the principle of non-discrimination and elements of the principle of non-refoulement as limits to admission and exclusion of migrants provide a unique opportunity to assess the extent to which these limitations can be effectively accepted and implemented by a state. Furthermore, the Chilean case allowed the thesis to highlight the specific contributions of the Inter-American Human Rights System to advancing a human rights-based approach to regular migration.

6.1. From State Authority to Human Rights Limitations. Findings from Chapters II to VI.

The analysis began with Chapter II, developing a contextualised analysis of current Chilean migration dynamics and asking to what extent the Chilean migration law contributes to creating irregular migration? The chapter focused specifically on Venezuelan and Haitian nationals, demonstrating that regular migration pathways for these groups are extremely restricted. First, the Chilean asylum system offers little protection, given its limited accessibility and low recognition rates. Second, entry to Chile as tourists is prohibited for Haitians and Venezuelans without a Consular Visas for Tourism (CVT), a requirement introduced in the context of the 2018 Migratory Reform.

Although framed as a visa for tourism, the CVT in practice targets Venezuelan and Haitian nationals not as tourists, but as potential migrant workers. The chapter showed that irregular migration from these countries surged following the implementation of CVTs, thereby confirming Sassen's assertion that it is the law that creates irregular migration. In this context, the chapter traced the evolution of the Chilean migration framework from a national security-oriented framework to one that nominally incorporates human rights language. However, the analysis of the Decrees regulating the CVTs revealed that in the case of Haitians, Chile failed to recognise the humanitarian crisis prompting their displacement, while in the case of Venezuelans, it imposed bureaucratic barriers to mobility rather than facilitating it. In both instances, it was demonstrated that the CVTS lacked objective and reasonable justification.

Additionally, Chapter II examined the ineffective application of humanitarian visas, further illustrating that tensions between national security and the human rights of migrants remain central to Chile's migratory policy. By presenting the Chilean migration situation, Chapter II laid the foundation for analysing how the principles of non-discrimination and non-refoulement impact the state's authority over admission and exclusion.

Chapter II concluded that Chilean migration law actively contributes to irregular migration by restricting the entry of Venezuelan and Haitian nationals through visa requirements introduced in the 2018 Migratory Reform and maintained under the 2021 Migration Law. The disproportionate impact of these CVT's, coupled with ineffective access to asylum, has led to a significant increase in irregular migration. While the 2021

Migration Law formally incorporates certain human rights protections, Chile's migration framework continues to prioritize discretionary, security-driven approaches over a human-rights based model that facilitates regular migration pathways.

Having established that Chile's entry restrictions have contributed to increased irregular migration, the thesis then asked on what basis countries are permitted to apply those restrictions? Chapter III began by affirming that the sovereign right to control migration is subject to limitations imposed by international migration law and human rights law. As a party to various international human rights treaties, Chile is obligated to exercise its migration control within those limits. Therefore, Chapter III analysed the origins of international law regulating the rights of migrants and asked whether the contribution of the law to irregular migration was born and sustained by structural shortcomings in international migration law.

To answer this question, Chapter III focused on the foundational instruments of international migration law: ILO Convention No. 97 concerning migration for employment (Revised) of 1949 and ILO Convention 143 concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975. While these conventions represent a significant milestone in establishing multilateral definitions and frameworks for the protection of migrant workers, their focus remains primarily on labour-related rights. The instruments adopt a prospective definition of 'migrant worker', centred on the intention to work, which implicitly supports the idea of creating flexible pathways to regular migration. However, the analysis revealed that this approach remains largely aspirational. Migrants are predominantly conceptualized through an economic lens, with protections limited to labour standards, thereby overlooking the broader complex and multifaceted nature of migration.

Without a comprehensive recognition of these diverse realities of migration, states are unlikely to develop effective and inclusive regular migration pathways. Finally, Chapter III demonstrated that the treatment of migrants in an irregular situation within these conventions reflects a persistent tension between national sovereignty and the creation of human rights-based pathways for regular migration. Although certain provisions aim

to regularize migrants in an irregular situation and protect them from expulsion, state discretion is ultimately preferred.

Having established first, that the origins of migration law contain structural shortcomings that contribute to irregular migration, and, second, that an exclusive focus on migrants as workers is insufficient for enabling states to design realistic and accessible migration pathways, the thesis then turned to examine how the protection of migrants has evolved within human rights law, particularly in relation to facilitating regular migration pathways. To this end, Chapter IV asked whether international and Inter-American human rights laws impose any obligations on states to permit the entry of migrants into countries other than their own? It analysed the evolving interpretations by international and Inter-American human rights institutions regarding the authority of states to admit and exclude of migrants.

Acknowledging the normative lacuna that is the absence of a substantive right to enter to another country, Chapter IV examined how international and Inter-American human rights institutions have interpreted state's authority to regulate admission and exclusion of migrants. The analysis was grounded in the observation that human rights institutions have identified obligations not explicitly enshrined in human rights treaties. After analysing interpretations of the UN Human Rights Treaty Bodies, the UN Special Rapporteur on the Rights of Migrants, and the Inter-American Court and Commission on Human Rights, the chapter concluded that human rights law does not impose a general obligations on states to permit entry. States are not legally required to admit migrants as a rule. However, a consistent trend was identified -beginning with the HR Committee's General Comment No. 15 -towards progressively limiting state discretion over admission, through both negative and positive obligations. This trend contributes to closing the normative gap surrounding the right to freedom of movement.

These interpretations began by affirming that the principle of non-discrimination, family unity and non-refoulement constitute circumstances under which migrants may enjoy the protection of the ICCPR and have since evolved to encompass a broader set of applicable human rights obligations. A conceptual shift was identified in more recent interpretations, where human rights obligations are framed not only as limits to state

discretion to admit and exclude migrants, but also as the basis for positive measures that state should adopt to facilitate safe, accessible, and regular migration channels. The most advanced expression of this evolution at the international human rights system is found in UN Special Rapporteur Gonzales Morale's statement that 'human rights law can establish grounds of admission and stay which give effect to international human rights obligations and principles'.[81]

In the Inter-American human rights system interpretations go even further in limiting state authority to admit and exclude migrants and approach an explicit recognition of duties to allow entry. This was evident in the IAHR Court's analysis of 'migration policies', stating that they would only be permissible as measures to protect the human rights of migrant workers in particular. This reasoning marks a significant shift from a narrative centred on border control to one prioritizing the rights of migrants. A similar development was found in the IAHR Commission's Inter-American Principles, where Principle 52 frames entry as the general rule and exclusion as an exception, permissible only under narrowly defined and justified conditions. These contributions illustrate the unique role of the Inter-American human rights system in advancing human rights-based approaches to regular migration. These findings align with the literature analysed in section 4.4.1, which highlights the prioritisation of human rights over national security. Moreover, the thesis bridges a gap between the anglophone and Hispanic literatures, by analysing how IAHR standards have evolved towards shaping concrete state obligations that protect migrants' entry. In doing so, the thesis fills a gap in the literature by identifying advances within the IAHR that contribute to the construction of a human rights-based approach to migration.

Despite these progressive developments, Chapter IV concluded that human rights law itself continues to affirm the primacy of border control. Article 79 of the ICRMW read in conjunction with Articles 68 and 69 demonstrates that final authority over admission remains with States. Legally binding treaty law continues to define the scope of states' obligations. Therefore, the interpretations analysed in this chapter reveal, on one hand,

[81] UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales* UN Doc A/77/189 (19 July 2022) para 18.

the emergence of a human rights-based framework that increasingly challenges the discretionary state authority in migration control; and, on the other, a persistent tension between these interpretative advances and the substantive content of international treaty law.

The thesis then focussed on two of the three specific circumstances under which the HR Committee has recognised that migrants may enjoy protection in relation to entry: the principles of non-discrimination and the principle of non-refoulement. In both cases, the central question was whether Chile has incorporated a right to enter derived from these principles. It was demonstrated that, while states retain a degree of discretion in migration control, this discretion is significantly limited by the positive and negative obligations arising from these principles.

Regarding the principle of non-discrimination, the Chapter V showed that such limitations are particularly pronounced when distinctions in entry are based on suspect grounds, such as nationality, national origin or race. The recognition of the principle of non-discrimination as a *jus cogens* norm by the Inter-American Human Rights System underscores its fundamental importance in regulating migration, and its subsequent reaffirmation by the CMW in two General Comments reflects a process of horizontal cross-fertilisation between regional and international human rights bodies.

A further finding of Chapter V was that the principle of non-discrimination may be invoked through the right to equal protection of the law and under the law, as enshrined in Article 26 of the ICCPR and Article 24 of the American Convention on Human Rights. This provides a legal avenue to challenge discriminatory entry restrictions even in the absence of an explicit right to migrate, thus addressing the common obstacle of that litigation, that because there is no right to enter to another country, there is not another right to invoke in conjunction with the discriminatory practices.

Chapter V also demonstrated that entry restrictions targeting specific nationalities may constitute either direct or indirect discrimination, depending on whether they meet the established criteria. Drawing on the interpretations of the UN human rights treaty bodies, on the IAHR Court jurisprudence, and on the IAHR Commission's Inter-American

Principles, the thesis identified a standard discrimination test requiring that such measures pursue a legitimate aim and be based on objective and proportionate justification. Article 12 of the Inter-American Principles offers the most comprehensive formulation of this test, marking another significant contribution of the Inter-American Human Rights System toward the development of human rights-based migration pathways.

Applying this test to the CVTs for Haitian and Venezuelan nationals, Chapter V concluded that despite using human rights language these measures failed to meet the standards of legitimacy, objectivity and proportionality. Chile's implementation of the CVTs, coupled with the sharp rise in irregular migration that followed, demonstrates that discriminatory entry restrictions are not only incompatible with human rights obligations but also directly contribute to irregularity. Although Chile's 2021 Migration Law introduced two specific safeguards when regulating CVTs, namely, the requirement of 'qualified reasons' when invoking national interest, and an explicit non-discrimination clause, these protections remain insufficient. While they reflect a degree of alignment with the evolutionary interpretative trend within the human rights system, they have not altered the fundamental exclusionary structure of CVTs for nationals of Haiti and Venezuela.

This thesis therefore argues that the CVTs for Venezuelan and Haitian nationals are discriminatory at their core and should be repealed. In their place, Chile should adopt regular migration pathways, that are firmly grounded in human rights law. The CVTs for Haitian and Venezuelan nationals serve as clear examples of how the failure to adopt a human rights-based approach to migration control produces discriminatory outcomes and increases irregularity. Migration control measures that fail to comply with human rights obligations directly contribute to irregularity. This reinforces this thesis' central claim: that human rights law can and must serve as the normative foundation for building rights-based, accessible and non-discriminatory pathways to regular migration.

Chapter VI analysed the principle of non-refoulement as a limit to state discretion in the admission and exclusion of migrants. It demonstrated that despite mirroring non-refoulement protection in Chilean Refugee Law the principle is not fully incorporated in

the 2021 Migration Law. A further finding of the chapter was that exclusion of an explicit reference to non-refoulement from the 2021 Migration Law was intentional, as the principle was included in earlier drafts. Instead of incorporating non-refoulement directly, the concept of 'complementary protection' was introduced under Article 10 of the 2021 Migration Law. While this mechanism does provide a form of protection against refoulement, it is tied to the requirement of having applied for asylum, and allows for certain exceptions under which the protection would not be granted. None of these requirements are grounded in human rights law, where non-refoulement stems from the absolute and non-derogable prohibition of torture.

This thesis argued that incorporating the principle of non-refoulement into the 2021 Migration Law would provide Chile with the necessary tools to manage its migration flows in a manner consistent with its human rights obligations. By replacing this principle with the narrower framework of 'complementary protection' Chile falls short of providing the broader and more robust protection guaranteed to migrants, under human rights law. As with the principle of non-discrimination, the principle of non-refoulement reveals that the impact of human rights advancements in interpreting limitations to the rights of states to admit and exclude migrants depends heavily on whether, and to what extent, these principles are incorporated in domestic legislation.

Having identified the conclusions of each chapter, the next section of the conclusion turns to answer the two central research questions that guided this thesis.

6.2. Advancing Pathways to Regular Migration in the International and Regional Human Rights Systems, and in Domestic Legislation.

At the outset, this thesis asked whether incorporating international human rights obligations of non-discrimination and non-refoulement into domestic law to allow entry of migrants could contribute to advancing human rights-based pathways to regular migration?

As discussed in the introduction, a human-rights based approach to regular migration is grounded in international human rights treaties, identifies duty-bearers and rights-

holders, focuses on the protection of vulnerable groups, and incorporates the voices of civil society. Guided by these elements, this thesis analysed the legal foundations of human rights law and examined whether specific obligations exist that would enable migrants to enter a country other than their own through regular pathways. The thesis applied the analysis to the specific case of Chile, framing migrants as rights-holders and Chile as the duty bearer. Furthermore, the analysis focused on two visa restrictions -the CVTs- which, in practice, closed off access to regular migration for Haitian and Venezuelan nationals. Drawing on data from Non-Governmental Organisations, the thesis also identified the specific vulnerabilities affecting these groups. It was shown that the introduction of CVTs directly contributed to an increase in irregular entry, thereby exacerbating their exposure to human rights violations.

The first key finding of this thesis is that international human rights law does not recognise a general right to enter another country. This is confirmed both by treaty law and by the interpretations of international and the Inter-American human rights bodies. A second finding reinforces the observation that it is often the law itself that creates irregular migration. In Chile's case, the introduction of CVTs to Haitian and Venezuelan nationals led to a marked rise in irregular migration. Furthermore, international and human rights law also influence the regularity of migration. The normative gap left by the right to freedom of movement grants states discretion to admit and exclude migrants. As demonstrated in the Chilean case, this discretion is often exercised too restrictively, resulting in an increased irregular migration.

Another finding of this thesis is that there is no clear definition of the limits of this normative lacuna. To help delineate these boundaries, the thesis examined the evolving interpretations of international and Inter-American human rights law. Progressive developments were identified, such as the position of the UN Special Rapporteur on the Human Rights of Migrants and the Inter-American Principles. However, the authority to determine who may enter and stay ultimately continues to reside with states. This was first established in the foundational instruments of international migration law and has remained consistent over time. In this context, the recognition of a human right to migrate, as an alternative to identifying specific human rights obligations to allow entry

and stay, appears even less likely to be seriously and fully acknowledged, let alone implemented, by states.

Although these human rights interpretations do not establish a right to entry, they do limit states' discretion. The two circumstances analysed in this thesis illustrate this dynamic. With regard to the principle of non-discrimination, the thesis applied a standard test, reflected in international and Inter-American jurisprudence, to determine whether differential treatment in entry regulations meets the criteria of legality, legitimacy, objectivity and proportionality. In the case of non-refoulement, the analysis demonstrated the necessity of full incorporation into domestic law, extending protection not only to refugees and asylum seekers, but also to all individuals at risk of serious harm upon return.

From this perspective, a further finding of this thesis is that human rights law contributes meaningfully to the construction of regular migration pathways. Restrictions on state discretion should result in the creation of realistic, accessible, and regular mobility channels. In practical terms, the discriminatory exclusion of Haitian and Venezuelan nationals did not prevent their migration to Chile, it merely diverted it into irregular channels. Instead of attempting to impede their entry, Chile should develop entry pathways that respond to the specific vulnerabilities and needs of these groups. Similarly, by failing to fully incorporate the principle of non-refoulement, Chile not only places migrants at risk of grave harm if returned but also exposes itself to potential international responsibility. Migration laws and regulations must be based not on perceptions of criminality, but on the obligation to prevent return to countries where individuals face serious rights violations.

The second question in this thesis concerned the potential of the Inter-American Human Rights System to support the development of human rights-based migration pathways. Across its chapters, this thesis identified concrete contributions. These can be synthesised as follows: the Inter-American human rights system has shifted the balancing in migration control, by prioritising the rights of migrants over broad state discretion. For example, in the definition of migratory policies, it identified positive obligations on states to protect the rights of migrants. In Principle 52 of the Inter-

American Principles, it framed entry as the general rule and exclusion as an exception, permissible only when strictly meeting the conditions provided by law. In Principle 12 it clearly determined when entry may constitute discrimination. The thesis also demonstrated instances of cross-fertilisation between the Inter-American and international systems, such as the CMW's adoption of the Inter-American Court's interpretation of non-discrimination as a *jus cogens* norm. Domestically, Chile's legislators cited IAHR Court's jurisprudence as justification for the inclusion of a non-discrimination clause in the 2021 Migration Law, and its provision on complementary protection mirrors key rulings of the IAHR Court. These developments highlight the influence of the regional human rights protection system on the domestic Chilean legislation. All of these contributions demonstrate the ability of the Inter-American Human Rights System to giver further impulse towards advancing a human rights-based approach to migration. However, challenges remain in translating these interpretative developments into tangible guarantees for migrants. Ensuring implementation continues to be a critical frontier.

6.3. Further Research.

By answering its central research questions and the sub-questions of each chapter, this thesis has demonstrated the potential of human rights law in providing legal pathways to migration. Therefore, there is a lot more work to be done in this area to establish the full potential of this approach.

First, regarding the right of entry itself, the right to family life and family reunification requires deeper analysis as potential limit on the state's authority to regulate admission. This principle emerged throughout the thesis: In Chilean jurisprudence annulling expulsion orders, in General Comment No. 15 of the HR Committee, and in humanitarian visa requirements for Haitian nationals. Yet, it was not the main focus of the thesis. A dedicated study of how family unity obligations limit the right of states to admit and exclude migrants would make a valuable contribution to advancing human rights-based migration pathways.

Additionally, further research should be done in relation to the right to stay, the other core aspect of legal migration pathways. This includes examining the extent and conditions under which states, particularly Chile, implement regularisation mechanisms. In addition, other rights may prove relevant in shaping regular migration pathways, and future research should explore these rights in depth to assess their potential role.

Finally, an important and underexplored of research relates to the role of civil society actors in advancing human rights-based migration pathways. Civil society play a key role in contributing with their inputs to UN Human Right Treaty Bodies General Comments, submitting shadow reports when their countries are under periodic review, and initiating strategic litigation. Their influence in creating human rights law from a bottom-up approach is particularly relevant for creating human rights-based regular migration pathways. Future research could examine how their advocacy and legal interventions shape legal standards and state practice.

ANNEX 1

Ratification Of Migration Conventions Per Latin American Country

	COUNTRY[82]	ILO 97[83]	ILO 143[84]	ICRMW[85]
1	Brazil	18/6 1965. In Force		
2	Mexico			Signature: 1991, Ratification/Accession: 1999 (Declaration).
3	Colombia			Ratification/Accession 1995 (Declaration)
4	Argentina			Signature: 2004. Ratification/Accession: 2007
5	Peru			Ratification/Accession:2005
6	Venezuela	9/6/1983. In Force		Signature: 2011 Ratification/Accession: 2016 (Declaration)
7	Chile			Signature: 1993. Ratification/Accession: 2005. (Declaration)
8	Guatemala	13/2/1952. In Force		Signature: 2000. Ratification/Accession: 2003 (Declaration)
9	Ecuador	5/4/1978. In Force. E*xcluded provs. of Annexes I to III*		Ratification/Accession 2002
10	Cuba	29/4/1952. In Force		
11	Bolivia			Accession: 2000

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16	El Salvador			Signature: 2002. Ratification/Accession :2003
17	Nicaragua			Ratification/Accession: 2005 (Declaration)
18	Costa Rica			
19	Panama			
20	Puerto Rico			
21	Uruguay	18/4/1954. In force		Ratification/Accession: 2001 (Declaration)
22	Guadeloupe			
23	Martinique			
24	French Guiana			
25	Saint Martin			
26	Saint Barthélemy			
	RATIF.IN L.A	6	0	14 state party / 1 signatory
	RATIF. IN THE WORLD	50	24	54 state party / 13 Signatory

ANNEX 2. COMPARATIVE CHART ON TREATY PROVISIONS INTRODUCED AND ANALYSED IN CHAPTER III.

TOPIC	ILO C97	ILO C143	COMMENTARY
Mentioned as influence for the ICRMW	Yes	No	- As mentioned by both, the UNGA resolution Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers and by Hasenau.
Definition of 'migrant for employment'	**Article 11.1** 1. For the purpose of this Convention the term ***migrant for employment*** means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.	**Article 11.1** 1. For the purpose of this Part of this Convention, the term ***migrant worker*** means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.	- ILO C143 adopts the term 'migrant worker' - The definition is of a prospective nature, as it focuses on the migrant's intent to work rather than requiring them to have secured a job before migrating. - Both provisions incorporate a broad definition of migrant workers, by emphasising the intent to work, rather than the possession of a work visa. - Critique: They do not impose an obligation on states to admit migrant workers. - More general critique: At the existing time, these ILO Conventions where the only instrument regulating migration, and they were focussed on employment, despite this not being the only purpose people migrate for.
Categories of migrants excluded as migrant workers	**Article 11.2** 2. This Convention does not apply to-- (a) frontier workers; (b) short-term entry of members of the liberal professions and artistes; and (c) seamen.	**Article 11.2** 2. This Part of this Convention does not apply to-- (a) frontier workers; (b) artistes and members of the liberal professions who have entered the country on a short-term basis; (c) seamen; (d) persons coming specifically for purposes of training or education; (e) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the	- ILO C143 adds two categories: individuals migrating specifically for training or education, and employees of organisations or enterprises operating within a country who have been admitted temporarily at their employer's request to undertake specific duties or assignments for a defined and limited period, after which they must leave. - These exclusions narrow the scope of protection of the ILO Conventions.

		request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.	
Equality of treatment between regular migrants and national workers	**Article 6** 'Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, **treatment no less favourable than that which it applies to its own nationals in respect** of the following matters (...)' The matters enumerated are: remuneration (a.i), union membership (a.ii), accommodation (a.iii), social security (b), employment taxes (c) and legal proceedings pertaining to these issues (d) This protection is provided 'when it is regulated by law or regulations or is subject to the control of the administrative authorities' (Article 6.2)	**Article 10** 'Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory'.	- ILO C97 merely prohibits unequal treatment in the legislation and practices of administrative authorities and imposes a positive obligation on states to adopt legislations or enact measures that ensure equality of treatment. Consequently, the scope of protection is narrow. - There is a lack of clarity over what equality of treatment should entail, which leaves states with a wide margin of discretion. - ILO C143 broadens the protection of equal of treatment by requiring states to pursue a national policy designed to promote and guarantee equality of opportunity and treatment. This commitment obliges states to adopt positive measures in practice, and can be regarded as a step towards a human rights-based approach to regular migration, as it clearly identifies both duty-bearers and rights-holders. - However, there are no clearly identified implementation methods in ILO C143.
Sole protection of labour rights.	No reference to general human rights protection	**Article 10** refers to 'cultural rights'	- Cultural rights are incorporated in ILO C143, which initially is seen as further protection on solely labour rights. However this is contested by the Committee of Experts, stating that these rights are only taken into account when relating to labour rights.
Sole protection of labour rights.	No reference to general human rights protection	**Article 1** Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.	- Incorporating this Article could be seen as an advancement in the protection the human rights of migrants and a step towards regular migration, as it opens the door to applying the limitations on national sovereignty contained in the ICCPR, ICESCR, and future international human rights treaties.

			- However, Article 1 is viewed as limited in scope, as analysed by the Committee of Experts from the word 'basic'. The Committee of Experts lists a series of rights that would be applicable, but these rights are focused solely on labour
	Medical services: **Article 5.** Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for— (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health (...)	No mention on this.	- While this Article represents and advancement in protecting the rights of migrant workers and their families by recognising the need for healthcare during the initial stages of the migratory process, neither ILO C97, nor ILO C143 include an explicit provision guaranteeing healthcare for migrant workers and their families once they reside in the destination country. Instead, the Committee of Experts interpretations on this Article are focussed on the health and hygiene conditions under which states send migrants. In their interpretations, Article 5 is designed firstly to ensure that migrants are fit to undertake the journey from their country of origin to the destination country, and, secondly, to avoid migrants having completed the journey to the host country being denied entry on medical grounds.
Definition of Family	No definition	**Article 13.2.** The members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother.	- The thesis develops critiques on this definition being a clear male gender focus, strictly heterosexual and overlooking the decline of marriage, particularly among highly mobile populations.
Regulation of family reunification	Not regulated	**Article 13.1** Member states 'may take all necessary measures which fall within its competence and collaborate with other members to facilitate the reunification of the families of all migrant workers legally residing in its territory'.	- Since family reunification was not included in ILO C97, its inclusion in ILO C143 is significant. - However, the wording of Article 13(1) is weak because it uses the word 'may' rather than 'should', meaning that no duty to reunite migrant workers with their families is imposed on states.
Substantive rights recognised to family members	**Article 5** 'Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction,	**Article 10, as cited above**	- In principle, such a right would open pathways for regular migration by enabling family members to work, even if their initial migration was not employment driven, thereby reducing their likelihood of resorting to the irregular market.

	appropriate medical services responsible for— (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health; (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination'. Article 6, as it obliges member states to grant treatment regarding family allowances in remunerations and social security, including family responsibilities, that is no less favourable than afforded to nationals.		However, as affirmed by Hassenau, this right is implicitly restricted. Article 10 of ILO C143 does not impose an obligation on states to issue work permits to family members solely on the basis of their relationship with the migrant worker, nor does it limit state's discretion to exercise immigration control. States are free to establish their own conditions for granting work permits, meaning that family members can access employment only if they secure such permits. Therefore, this group will only be able to access employment if they possess a work permit. In other words, they will only be able to freely choose their job if they are migrant workers themselves. This leads to the conclusion that the protection provided by Article 10 of ILO C143 for the family members of migrant workers is largely illusory.
Treatment of irregular migration	**Article 11**	**Article 11**	- The articles refers to migrants who are 'regularly admitted', therefore excluding those under an irregular status.
Treatment of irregular migration	No explicit protection	**Part I 'Migration in Abusive Conditions'**	- ILO C143 recognises rights 'for all migrants', in Article 1. Therefore, recognised as 'the first multilateral treaty to address the rights of irregular migrants directly'. However, the thesis demonstrated that Part I ultimately reinforces sovereign control rather than establishing pathways for regular migration.
Protection of regular migration	**Article 8 (1)** 1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to	**Article 8 (1) ILO C143** 1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker **shall** not be regarded as in an illegal or irregular	- Article 8 of ILO C 97 is considered one of the most important provisions of ILO C97 as it provides 'security of residence' for permanent migrants and their families in cases of health issues or injury'. However, its protection is limited to those with permanent residence and it applies only for health reasons, excluding temporary or fixed-term workers. Moreover, the

	their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.	situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.	protection does not apply if states have signed an agreement concerning the return of migrants, demonstrating that even this key provision is subject to the overriding tension with territorial sovereignty. - Article 8 of ILO C143 protects migrant workers who lose their jobs by stipulating that they 'shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of their employment, which shall not in itself imply the withdrawal of their authorization of residence or, as the case may be, work permit' - The use of 'shall not' in this Article clearly limits the discretionary power of states over border control. The thesis demonstrate the negative reactions this provision has caused on states.

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8.3. Official Documents and Other Materials

8.3.1. UN Documents

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