www.vrue.nomos.de

VRÜ | WCL

Verfassung und Recht in Übersee
World Comparative Law

1 2026
59. Jahrgang
Seite 1–192
ISSN 0506-7286

Nomos

VRÜ | WCL 1 2026
59. Jahrgang
Seite 1–192

Inhalt / Table of Contents

SYMPOSIUM

ARTICLES / ABHANDLUNGEN

REPORTS / BERICHTE

BOOK REVIEWS / BUCHBESPRECHUNGEN

SYMPOSIUM

Between Rights and Governance: Migration Experiences in Latin America and Europe

By *Sofía Reca Milanta*[*], *Giulia Santomauro*[**] and *Michaela Hailbronner*[***]

A. Introduction

Migration constitutes one of the most defining and contested phenomena of our time, challenging legal systems, political communities, and the very grammar of rights. In both Europe and Latin America, patterns of human mobility have intensified and diversified, intersecting with structural inequalities, geopolitical transformations, and shifting regulatory approaches. The International Organization for Migration estimates that there are about 281 million international migrants in the world, which equates to 3.6 percent of the global population.[1] In this evolving landscape, the protection of migrants' human rights emerges not as a settled domain of law, but a field marked by tension, adaptation, and continuous renegotiation.

The present Special Issue aims to contribute to this broader debate by bringing together a range of comparative and single-jurisdiction studies on migrants' rights in Europe and Latin America. By examining the intersections between supranational human rights standards, judicial reasoning, domestic legal frameworks, and administrative practices, the contributions collectively reveal the increasingly complex and hybrid nature of contemporary migration governance.

Migration has historically occupied different political and legal positions in Latin America and Europe. In Latin America, states have often focused on internal displacement linked to armed conflict, institutional violence, socioeconomic inequalities, and, more recently, climate-related pressures, although the region has also experienced significant international migration flows. More recently, the MERCOSUR agreement has also provided further paths for regularized migration in some Latin American countries.[2] In Europe, post-

* Post-doctoral researcher, University of Münster (Germany). Email: srecamilanta@gmail.com and srecamil@uni-muenster.de.

** Post-doctoral researcher in Constitutional and Public Law at Sant'Anna School of Advanced Studies in Pisa (Italy). Email: giulia.santomauro@santannapisa.it.

*** Professor of German and International Public Law and Comparative Law at the University of Münster (Germany). Email: hailbronner@uni-muenster.de.

1 International Organization for Migration (IOM), World Migration Report, Geneva 2024, p. xii.

2 On the role of Mercosur and the Latin American developments more broadly see e.g. *Diego Acosta Arcarazo*, Global Migration Law and Regional Free Movement: Compliance and Adjudication –

war migration was strongly shaped by intra-European labour mobility, in particular in the context of the European Union's framework of free movement. At the same time, Europe also received substantial migration from former colonies, Turkey, the Middle East, and Africa. While migration within Europe was not universally accepted, increasing arrivals from outside Europe became especially politicized during the last decade. These differing historical trajectories contributed to distinct legal approaches, with Latin American states often adopting a much more migration-friendly language, which is partly mirrored by more migration-friendly legal frameworks on the ground.[3]

At the same time, there has also been some convergence between the different regions and perspectives, as the contributions assembled here highlight. In both regions domestic rules intersect with regional frameworks and security and control-based approaches are entangled with and compete with individual rights-based approaches. That said, there is no single universal pattern to how the protection of migrants ultimately unfolds or fails, but rather a variety of legal frameworks, institutional configurations, and normative rationalities that shape migration governance across both regions.

B. European Developments

Across Europe, the regulation of migration and the protection of migrants' rights unfold within a stratified legal environment shaped by the interaction of multiple normative layers—most notably the European Convention on Human Rights, European Union law and domestic legal systems. This configuration generates both opportunities and frictions: while it has contributed to the consolidation of foundational guarantees—particularly through the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)—it also leaves significant margins of discretion to States, especially in politically sensitive areas such as border control, asylum procedures and access to social rights.

A central feature of this architecture is the growing role of judicial and quasi-judicial actors in defining the scope and content of rights. This is exemplified by the jurisprudence of domestic constitutional courts as well as the ECtHR, which decided in 1989 in its landmark judgment in *Soering*[4] that the Convention's prohibition of torture or to inhuman or degrading treatment and punishment also prohibited the removal of persons to other

The Case of South America, American Journal of International Law Unbound 111 (2017), pp. 159-164.

3 *Diego Acosta / Luisa Feline Freier*, Turning the Immigration Policy Paradox Upside Down? Populist Liberalism and Discursive Gaps in South America, International Migration Review 49 (2015), pp. 659-696.

4 ECtHR, *Soering v. the United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989; for a broader discussion of the European migrants' rights revolution see also *Jürgen Bast*, The Rise of Human Rights Limits to Migration Control. A European Perspective, American Journal of International Law Unbound 118 (2024), pp. 208-213.

countries where they would face such treatment. Yet, as scholars have emphasised, this process should not be understood as linear or uniformly expansive.[5] This ambivalent trajectory is clearly reflected in the Strasbourg Court's migration jurisprudence. While the ECtHR has played a crucial role in affirming core principles—most notably *non-refoulement* and its procedural safeguards—more recent case law suggests a cautious, and at times more deferential, posture *vis-à-vis* State prerogatives.[6] Rather than signalling an explicit retreat from established principles, this evolution points to their re-articulation, with potential implications for their practical efficacy.[7]

Today, migrants' rights have become perhaps the core issue that shapes perceptions and discourse about the ECtHR, with a letter of first nine,[8] then 27 European Council member states pushing for more restraint on these matters by the Court.[9] These demands have now found at least partial expression in the new Chişinău Declaration of May 15, 2026.[10] As others have pointed out, the backlash against the ECtHR appears in many ways ironic given that it has in recent years hardly been a staunch defender of migrants.

At the same time, as Bast and Wessels have emphasized, the European Convention shapes both political and legal discourses about migrants in Europe today—in that sense, albeit only that sense, human rights of migrants' are everywhere.[11] However, their protection is constructed through interpretative processes that balance competing interests—such as State sovereignty, managerial considerations of migration control and individual rights—on a case-by-case basis. In this way, the Strasbourg Court not only applies but actively

5 *Jürgen Bast / Janna Wessels*, The Trajectory of the European Court of Human Rights in Migration Matters, MeDiMi Working Paper No. 3, Münster 2025.

6 See, in particular, ECtHR, *N.D. and N.T. v. Spain*, G. C., Nos. 8675/15 and 8697/15, Judgment of 13 February 2020; concerning the compatibility of summary returns at the Spanish–Moroccan border with the Convention; ECtHR, G. C., *M.N. and Others v. Belgium*, Appl. no. 3599/18, Judgment of 5 May 2020, in which the Court denied jurisdiction over applications for humanitarian visas lodged at embassies; and, more recently, ECtHR, *S.S. and Others v. Italy*, no. 21660/18, Judgment of 12 June 2025 where the Court excluded the existence of indirect refoulement attributable to Italy, notwithstanding its substantial involvement in a search and rescue operation conducted by the Libyan Coast Guard.

7 *Bast / Wessels*, note 5.

8 Open Letter by Italy, Belgium, Denmark, Estonia, Lithuania, Latvia, Poland, the Czech Republic and Austria, 22 May 2025, https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf (last accessed on 29 May 2026).

9 Joint Statement to the Conference of Ministers of Justice of the Council of Europe, https://www.gov.uk/government/news/joint-statement-to-the-conference-of-ministers-of-justice-of-the-council-of-europe (last accessed on 29 May 2026).

10 Council of Europe, Chişinău Declaration, https://rm.coe.int/pdf/09125948802bc2cc (last accessed on 29 May 2026).

11 *Bast / Wessels*, note 5. See also further other scholarly publications in the context of the Medimi-project from different disciplinary lenses on this: https://www.medimi.de/de/topic/8.publikationen.html (last accessed on 29 May 2026).

constructs legal standards, in interaction with domestic courts and other supranational bodies.

As Kamilla Galicz in this issue shows, a comparable dynamic can also be observed in the practice of the European Committee of Social Rights, whose interpretative activity has progressively expanded the reach of the European Social Charter, including with respect to people on the move.[12] Through the collective complaints procedure, the Committee has developed a body of quasi-jurisprudence grounded in a flexible and evolutive reading of Charter provisions, frequently interpreted in conjunction with other international human rights instruments and with the Strasbourg case law. Against this backdrop, the definition of rights emerges as the outcome of a composite interpretative process involving multiple actors with different degrees of authority and binding force. This plurality of actors and approaches reflects the diverse institutional logics and mandates that characterise the European human rights architecture but often lacks coherence. That said, the interaction between the ECtHR, the CJEU and national courts undoubtedly contribute to the gradual articulation of common standards of protection—a process in which quasi-judicial bodies such as the European Committee of Social Rights also play a role, albeit through different interpretative techniques and with a distinct normative force.

At the same time, the European order is characterised by a structural transformation in migration governance, often described in terms of securitisation, externalisation and procedural acceleration, as reflected in the new EU Pact on Migration and Asylum.[13] These trends raise fundamental questions about the resilience of human rights protections and the capacity of existing legal instruments to respond to new forms of control and exclusion. In this picture, human rights law remains indispensable as a normative structure capable of setting limits to State action, even as it is increasingly contested in its scope, effectiveness and legitimacy.

These tensions are clearly visible in the field of social rights, where the gap between normative recognition and effective implementation often becomes more pronounced. In this regard, as illustrated by Galicz's analysis, the European Committee of Social Rights has made a significant contribution in expanding the protective reach of the European Social Charter through an evolutive interpretation, extending key guarantees—with particular emphasis to the right to health—also to migrants, including those in vulnerable or irregular situations. At the same time, however, the paper draws attention to the structural limits of this form of protection, notably in terms of enforcement mechanisms and uneven State compliance, thereby exemplifying the overall challenges affecting the application of human rights standards in the current European migration scenario.

12 *Kamilla Galicz*, (Re)discovering the European Social Charter to Protect the Health of People on the Move in Times of Backsliding, World Comparative Law 59 (2026), in this special issue.

13 *Steve Peers*, The New EU Asylum Laws: Taking Rights Half-Seriously, Yearbook of European Law 43 (2024), pp. 172 ff.

For this purpose, migrants' rights cannot be understood solely as a set of substantive entitlements but must also be analysed considering the procedural guarantees and interpretative practices through which they are realised. The distinction—and interrelation—between substantive and procedural dimensions is especially salient in the sectors of asylum and migration, where access to rights is often mediated by complex procedures, evidentiary standards and administrative structures. Judicial intervention, therefore, frequently operates not only by recognising or denying specific rights, but by reshaping the conditions under which those rights can be effectively exercised.[14]

C. Latin America

In Latin America, migration is also framed and understood through a range of different lenses, varying from more managerial consideration and securitisation narratives to more constitutional and sometimes explicit human rights approaches. In what counts as the most well-known comparative study of migrants' rights in Europe and the Americas, Marie-Louise Dembour has famously argued that the ECtHR's approach has been much more state-centred than the Inter-American Court's (IACtHR) more victim-focused jurisprudence.[15] However, as *inter alia* contributions in this volume show, not only do the two courts start from different premises -the IACtHR does not accept individual complaints and instead relies on the Inter-American Commission and states to refer cases- but the use of human rights frameworks also does not guarantee migrant-friendly outcomes.

As Sofía Reca Milanta's[16] and Lila García's[17] contributions highlight, Advisory Opinions play a pivotal role in shaping migration human rights standards in the InterAmerican jurisdiction which contrasts with the European scenario, where states routinely find themselves in the position of defendant, and where the Court accordingly may have less leeway to manoeuvre than when it is explicitly asked by states to provide an Advisory Opinion. It is particularly in these advisory opinions in which the IACtHR has developed its expansive reading of states' obligations toward irregular migrants, children, refugees, asylum seekers, and, more recently, climate-migration.

Against this background, Sofía Reca Milanta's contribution explores the evolving role of the IACtHR in addressing climate-induced migration, focusing on its landmark Advisory

14 *Giulia Santomauro*, European Court of Human Rights Jurisprudence and National Migration Policies: Exploring the Hermeneutic Tools of 'Proceduralisation' and Margin of Appreciation, in: Maria Grazia Rodomonte / Ludovica Durst (eds.), Judicial Review, Fundamental Rights and Rule of Law, Oxon / New York / Turin 2024, pp. 183 ff.

15 *Marie-Bénédicte Dembour*, When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint, Oxford 2015, pp. 57, 61, 119, 129

16 *Sofía Reca Milanta*, When Climate Moves People: A Turning Point in the Inter-American Human Rights System, World Comparative Law 59 (2026), in this special issue.

17 *Lila García*, Between Sinking Ships and Collective Wins: Human Mobility Standards from the Inter-American System of Human Rights in Argentinean and Mexican Domestic Adjudication, World Comparative Law 59 (2026), in this special issue.

Opinion AO-32/2025 on Climate Emergency and Human Rights. The article argues that the IACtHR's jurisprudence reflects a "gradual" convergence between migration and environmental rights. Building on this premise, the author develops an analytical framework to explain the "emerging bridge" through two interconnected dynamics. First, it highlights the "strategic" use of the IACtHR's advisory jurisdiction as a mechanism for normative development in emerging and complex fields. Second, it identifies the consolidation of what she conceptualizes as a "Transformative Social Approach" (TSA) to human rights violations, characterized by the recognition of structural patterns of discrimination, and transformative remedies aimed at addressing systemic inequalities. Against this backdrop, the article argues that AO-32/2025 constitutes a "turning point" by explicitly articulating a normative link between the right to human mobility under Article 22 and the right to a healthy environment under Article 26 ACHR. In doing so, the IACtHR expands the legal understanding of migration beyond traditional categories and advances a comprehensive human rights-based approach to climate mobility.

Within Latin American states, however, the IACtHR's transformative decisions only sometimes and partly translate into progressive rights-focused approaches to migration. Rather, we find a mix of managerial frameworks and human and constitutional rights approaches in many Latin American states, which is not altogether too dissimilar from what we observe in Europe. Perhaps the most interesting insight that emerges from the studies in Argentina, Chile, and Colombia, is that migration governance is not a simple choice between rights and control; the real story is how those two logics are combined inside courts, agencies, and administrative systems. The common thread is that institutional design matters: who decides, through what legal language, and with what effects on regular status or protection.

Focusing on courts, Lila García's contribution examines how the supreme courts of Argentina and Mexico engage with Inter-American human rights standards in migration and asylum adjudication. Through a "systematic" methodological approach, García analyses 49 judgments from 2004 to 2024 and develops four categories—"collective win", "singular victory", "planting for the future?", and "the sinking ship"—to evaluate both the intensity of the use of Inter-American human rights sources and their relationship to the protection ultimately granted in each case. Her analysis reveals that both courts relied on human rights arguments despite significant divergences between jurisdictions. It also highlights the importance of Advisory Opinions as a key tool in shaping rights-based approaches to migration, particularly AO 18/03, AO 25/2018, and AO 21/2014. Last, but not least, the article demonstrates that even fairly strong human rights-based legal frameworks—such as Argentina, which recognizes a "right to migrate"— do not automatically translate into favourable outcomes for migrants or asylum seekers.

At the level of migration governance and public administration, the contributions by Camila Fernández Meijide and Josefina Moya Hansen[18] as well as María Gabriela Trompetero-Vicent[19], explore how rights-based frameworks increasingly coexist with securitized forms of migration management across Latin America. Drawing on legal frameworks and empirical data, Fernández Meijide and Moya Hansen compare migration policies and regularization processes in Chile and Argentina from 2015 to 2025. Although Argentina was historically more rights-oriented and Chile more security-based, the authors argue that both countries have converged towards increasingly restrictive and discretionary forms of regulation. They stress that "irregularity emerges not as a failure of the system but as an outcome of its design and implementation". In other words, the system does not merely fail to regularize people, it actively produces instability through legal reforms, administrative practices, digitalization, and opaque criteria. Their contribution complements García's findings by illustrating that the fact that states have incorporated human rights language in their decision-making process does not ultimately guarantee an effective protection of these rights on the ground but may contribute to "managing precarity rather than resolving it".

The interplay between managerial logics and human rights frameworks also plays a role in Trompetero's contribution on Colombia, but also provides something of a counterpoint to the previous narratives. The author describes an apparently expansive policy, the Temporary Protection Statute for Venezuelan Migrants (ETPV), but refuses to treat it as a straightforward rights victory. The statute represents an admirable effort to provide regularized stays for nearly two million Venezuelans and thus a pathway to permanent residence. Yet, the policy was largely designed and implemented by the Colombian Migration Office, an institution traditionally oriented toward border control and security. The paper's core argument is that the ETPV does not mark a paradigm shift; it was "a hybrid governance arrangement produced through the co-production of rights and control." Biometric registration and long-term documentation fulfilled both administrative functions of control and surveillance and granted access to rights, thus providing a path to integration. So, unlike Fernández Meijide and Moya Hansen's account, which emphasizes the production of irregularity through increasingly restrictive governance, Trompetero shows a system in which rights can be expanded, but only through the same machinery that also strengthens surveillance and state legibility.

Taken together, the contributions speak to the transformative aspirations on the one hand, and the institutional realities of rights-based migration governance in Europe and Latin America on the other. The articles illustrate how the European Committee of Social

18 *Camila Fernández Meijide / Josefina Moya Hansen*, Human Rights Protection and Migration: Strategies in Tension under a Framework of Regulation, Security and Order. A Comparative Analysis of Chile and Argentina in a Global Context, World Comparative Law 59 (2026), in this special issue.

19 *María Gabriela Trompetero-Vicent*, Co-Producing Rights and Control: Redundancy and Contingency in Migration Governance in Colombia, World Comparative Law 59 (2026), in this special issue.

Rights and the IACtHR have expanded scope of the European Social Charter and the American Convention of Human Rights by interpreting the rights included in a broad manner. At the same time, the contributions highlight the complex and often contradictory realities of migration governance at the domestic level. Across different national contexts, the articles point to the tensions that exist between these transformative normative commitments and contemporary practices of securitization, selective regularization, bureaucratic control, and surveillance.

By placing the European and Latin American experiences on migration governance, the Special Issue highlights the persistent gap between normative ambition and institutional implementation, while contributing to broader comparative debates on the future of migration governance. As most migration world-wide happens within the Global South rather than in a South-North direction, the contributions suggest further areas for research and learning, not least in Europe and North America where migration has become a particularly divisive issue.

(Re)discovering the European Social Charter to Protect the Health of People on the Move in Times of Backsliding

By *Kamilla Galicz**

Abstract: This article engages in a critical analysis of the European Social Charter's scheme to safeguard the health of people on the move, including refugees, asylum-seekers and irregular migrants. It aims to assess how the European Committee of Social Rights has mobilised health-related rights to enhance the Charter's protective potential against restrictive migration and asylum policies. By doing so, this article seeks to contribute to the debate on the relevance of social rights in the context of "human rights backsliding". Accordingly, Section A outlines the state of the art and unpacks the research parameters. Section B reconstructs the Charter's general scheme, personal scope and monitoring mechanisms, as well as its structure of health protection. Against this backdrop, Section C investigates the Committee's interpretative techniques to safeguard the target group's health in collective complaints. The qualitative case-law analysis demonstrates that the Charter protects the well-being of people on the move in a "doubly composite" way: from an internal perspective, health falls under multiple rights and their operationalisation requires an assessment of overlapping material scopes; from an external perspective, the Committee enhances the Charter's potential by embedding it in its wider legal environment and fostering its linkages with the European Convention on Human Rights and other human rights treaties. Section D concludes with some critical reflections on the Charter's role in Europe's human rights architecture.

Key words: European Social Charter; Health; Human Rights Backsliding; Migration; Social Rights

***

A. Introduction: Social Rights Protection in Times of Backsliding

On 31 July 2025, a new collective complaint against Spain was registered by the European Committee of Social Rights (ECSR, Committee), the supervisory body of the European Social Charter signed in 1961 and revised in 1996 (ESC, RevESC, Charter).[1] Submitted by

* Postdoctoral researcher in Law, Institute of Law, Politics and Development, Sant'Anna School of Advanced Studies, Pisa (Italy). Email: kamillazsuzsanna.galicz@santannapisa.it.

1 European Committee of Social Rights [ECSR], *Unión General de Trabajadores (UGT) v. Spain,* Complaint No. 250/2025, available in Spanish at https://www.coe.int/en/web/european-social-charter/-/new-complaint-concerning-spain-3 (last accessed on 29 March 2026).

the *Unión General de Trabajadores* (UGT), it alleges the violation of several provisions[2] due to gaps in Spanish law and practice concerning prostitution and trafficking for sexual exploitation resulting in a serious lack of effective protection of the most vulnerable women and girls, such as young immigrants and those at risk of social exclusion. Since the 1995 Additional Protocol on the system of collective complaints entered into force in 1998, this has been the 250th complaint alleging breaches of social rights, including the right to protection of health. The growing number of complaints proves that it is indeed worth starting a dialogue about social issues in the Council of Europe (CoE). For long, the Charter has been deemed as a list of programmatic principles secondary to the rights and freedoms enshrined in the European Convention on Human Rights (ECHR). Moreover, the ECHR is equipped with an apparently far stronger monitoring mechanism guaranteed by the European Court of Human Rights (ECtHR), while the European Committee of Social Rights does not possess equally powerful tools to effectively enforce compliance with the Charter.[3]

To question such a stereotyped vision, this article engages in a critical analysis of the European Social Charter's scheme to safeguard the health of people on the move, including refugees, asylum-seekers and irregular migrants.[4] It aims to assess how the Committee has mobilised health-related rights to enhance the Charter's protective potential against restrictive migration and asylum policies. By doing so, this article seeks to contribute to the debate on the relevance of social rights in the global context of "human rights backsliding", i.e., resistance to and misuse of the universal human rights doctrine.[5] Forms

2 Alleged Charter breaches include Articles 1 §§ 2 and 4 (the right to work), 3 (the right to safe and healthy working conditions), 11 (the right to protection of health), 17 (the right of children and young persons to social, legal and economic protection), 19§ 1 (the right of migrant workers and their families to protection and assistance), 30 (the right to protection against poverty and social exclusion) and 31 (the right to housing) as well as Article E (non-discrimination) read in conjunction with Articles 1 § 2, 3, 11, 16, 20, 30 and 31 of the Revised Charter.

3 See discussion in *Infra* Section B.

4 To better reflect the complexity of migration patterns, this article endorses the umbrella term 'people on the move' as encompassing refugees, asylum-seekers and migrants arriving in Europe through irregular channels (given the lack of legal pathways) or those finding themselves in an irregular stay. However, this terminological choice does not intend to ignore or deny the differences between the statuses. Accordingly, the case-law analysis will take account the legal status of the groups of individuals whose Charter rights have been violated. See *Annick Pijnenburg / Conny Rijken*, Moving beyond refugees and migrants: reconceptualising the rights of people on the move, in Interventions 23 (2021), pp. 282-284.

5 Many critical theories have emerged arguing that e.g., "human rights law has failed to accomplish its objectives." *Eric Posner*, The Twilight of Human Rights Law, Oxford 2014, p. 7. To reaffirm the importance of human rights, see *Antonio Cassese*, A Plea for a Global Community Grounded in a Core of Human Rights, in Antonio Cassese (ed.), Realizing Utopia: The Future of International Law, Oxford 2012, pp. 136-138; *Frédéric Mégret / Philip Alston*, Introduction: Appraising the United Nations Human Rights Regime, in: Frédéric Mégret / Philip Alston (eds.), The United Nations and Human Rights: A Critical Appraisal, Oxford 2020, pp. 1-36; *Gráinne de Búrca*, Reframing Human Rights in a Turbulent Era, Oxford 2021, Chapter 2; *Gráinne de Búrca / Katharine G. Young,*

of contestation and misappropriation, such as open defiance to courts and non-judicial monitoring bodies, subtle pressure to undermine their authority or abusive interpretation of human rights treaties have spread all over the globe.[6] Such voices are even harsher when it comes to migrants' and refugees' rights that have been progressively curtailed by measures to securitise and externalise migration control.[7] This paper claims that the existing human rights toolbox is indeed able to offer powerful counter-narratives to tackle backsliding, but coherence among the single instruments should be strengthened to foster each one's protective scope.

Crucially, this is the case of the European Social Charter. Accordingly, the paper is structured as follows. Section B outlines the Charter's structure, personal scope and monitoring mechanisms (para. I) and reconstructs the dynamic network of health-related rights (para. II). Against this backdrop, Section C investigates the Committee's interpretative techniques to operationalise Charter rights so as to safeguard the health of people on the move in collective complaints.[8] The qualitative case-law analysis shows that the Charter protects the well-being of people on the move in a "doubly composite" way: from an internal perspective, health falls under multiple rights and their operationalisation requires an assessment of overlapping material scopes; from an external perspective, the ECSR embeds the Charter's interpretation in its wider legal environment and fosters its linkages with the ECHR and other International Human Rights Law (IHRL) instruments. This two-pronged interpretation method is a valuable tool but needs some adjustments to unlock the Charter's true potential. In light of these findings, Section D critically reflects on the Charter's role in Europe's human rights architecture.

B. The Charter's Variable Geometry of Protection

I. From a List of Principles to Enforceable Social Rights

To understand the Charter's structure, some contextualising remarks are in order. Initially, the ESC had been considered as merely containing long-term principles rather than enforceable entitlements. The reform process launched in the late Eighties and culminating in the 1996 revision amplified the scope of some rights and added new ones to address recently emerging social needs; yet, several CoE Member States have not ratified the revised ver-

The (mis)appropriation of human rights by the new global right: An introduction to the Symposium, in International Journal of Constitutional Law 21 (2023), pp. 205-223.

6 *Janna Wessels*, Reverse Strategic Litigation by Governments? Negotiating Sovereignty and Migration Control before the European Court of Human Rights, American Journal of International Law Unbound 118 (2024), pp. 214-218.

7 For a critical overview, see *Michal Cenker / Daniel Holder*, Migration and refugees: applying human rights to 'everyone'?, in: Gerard McCann / Félim Ó hAdhmaill (eds.), International Human Rights, Social Policy and Global Development: Critical Perspectives, Bristol 2021, pp. 129-139.

8 For the parameters of case selection, see the introductory paragraph of Section C.

sion.[9] Also, the Charter has a structure different from other human rights treaties: after a short Preamble, Part I enshrines a list of 31 general undertakings regarding the effective realisation of the rights and principles protected thereof, which guides the interpretation of Part II containing the provisions on the concrete measures to be taken.[10] Furthermore, it has a distinct personal scope compared to other IHRL treaties: pursuant to § 1 of the Appendix foreigners are included "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned."[11] Exception is provided under § 2 to refugees and stateless persons as defined in the 1951 Refugee Convention relating to the Status of Refugees and the 1954 Convention on the Status of Stateless Persons.[12]

This limited ratione personae has been progressively widened by the Committee. In the 2004 Conclusions, the ECSR reminded the Contracting Parties of their human rights obligations vis-à-vis foreign nationals not protected by the Charter, including those unlawfully present on their territory.[13] Crucially, it emphasised that State Parties "have guaranteed

9 For general analysis, see *David Harris, John Darcy*, The European Social Charter. Second Edition. Transnational Publishers, Ardsley, New York 2001, pp. 1-31; *Olivier De Schutter*, The Two Lives of the European Social Charter, in: Olivier De Schutter (ed.), The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l'Europe, Brussels 2010, pp. 11-17; *Karin Lukas*, The Revised European Social Charter: An Article by Article Commentary, Cheltenham 2021, pp. 2-9. For the updated status of ratifications: https://www.coe.int/en/web/european-social-charter/signatures-ratifications (last accessed on 29 March 2026).

10 Article A of the revised Charter distinguishes between hard core provisions and additional ones, among which State Parties may select which they consider to be bound by. States must select at least six of the nine hard core provisions (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20), and additional ones, provided that the total number of articles or numbered paragraphs by which they are bound is not less than sixteen articles or sixty-three numbered paragraphs. For the list of accepted provisions: https://www.coe.int/en/web/european-social-charter/provisions-of-the-charter (last accessed on 29 March 2026).

11 This may be explained by the fact that the Charter was the very first instrument of social protection, its original main focus was on labour rights and the drafters hence followed the convention models of the International Labour Organization (ILO). *Philip Alston*, Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System, in: Gráinne de Búrca / Paul Craig (eds.), Social Rights in Europe, Oxford 2005, p. 61. Likewise, the collective complaints procedure was inspired by Article 24 of the ILO Constitution. *Robin R. Churchill / Urfan Khaliq*, Violations of Economic, Social, and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter, in: Mashood Baderin / Robert McCorquodale (eds.), Economic, Social, and Cultural Rights in Action, Oxford 2007, p. 199.

12 Accordingly, under Articles 18 and 19 states are required to implement a flexible immigration policy towards each other's nationals with measures, e.g., liberalisation of regulations on the employment of foreign workers and facilitation of family reunification. Cf. *Matti Mikkola*, Social Human Rights of Migrants under the European Social Charter, in European Journal of Social Security 10 (2008), pp. 36-52; *Yana Litinska*, Healthcare Services for Asylum-Seekers: Untangling the European Social Charter, in Medical Law Review 32 (2024), pp. 3-5.

13 ECSR, Conclusions 2004, Statement of Interpretation, in CoE, Digest of the European Committee of Social Rights, Council of Europe, Strasbourg, June 2022, p. 212.

to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties—in particular the European Convention on Human Rights (ECHR)—or by adopting domestic rules whether constitutional, legislative or otherwise […]"[14]. The approach to underscore the interrelatedness of human rights enshrined in human rights law instruments and domestic legal provisions was finetuned later on. In 2015, the Committee issued a statement of interpretation on refugees' rights to promote an inclusive interpretation of the exception clause.[15] Stressing "the urgent and unconditional need to treat with solidarity and dignity the men, women and children who arrive on European territory",[16] the Committee recalled that under the 1951 Geneva Convention refugee protection does not depend on the status determination procedure. On this basis, it underscored that asylum seekers fall within the Charter's personal scope,[17] which shall be interpreted in light of its object and purpose, i.e., "so as to give life and meaning to fundamental social rights."[18] Moreover, it stressed that "the Charter should also so far as possible be interpreted in harmony with other rules of international law",[19] including the Universal Declaration of Human Rights.[20]

Remarkably, these statements of interpretation endorsed the reasoning of decisions taken in collective complaints, showing the Committee's strategy to ensure coherence between the different monitoring mechanisms.[21] Its decisions taken in complaints proceedings are not legally binding in the traditional meaning of the term, yet this does not imply that they are devoid of any legal consequence. First, under international law states shall implement these decisions in good faith.[22] Second, the Committee has been appraised for its

14 Ibid.

15 ECSR, Statement of interpretation on the rights of refugees under the European Social Charter (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015).

16 Ibid., para. 1.

17 Ibid., para. 6.

18 Ibid., para 7. In the 2011 Conclusions, it invited states to adopt unilateral declarations to extend the Charter's scope of application to everyone within their jurisdiction. ECSR, Conclusions 2011, Personal Scope of the Charter, p. 9. Sadly, this initiative was not successful: only two States (Lithuania and the Netherlands) replied to the Committee's letter, and both rejected the invitation to extend the Charter's application. See *Giuseppe Palmisano*, The Rights of Asylum Seekers in Europe beyond the EU Charter of Fundamental Rights: Shortcomings and Potential of the European Social Charter, in: Andrea Crescenzi / Rosita Forastiero / Giuseppe Palmisano (eds.), Asylum and the EU Charter of Fundamental Rights, Napoli 2018, pp. 252-257.

19 ECSR, note 15, para. 7.

20 Ibid., para. 8. The decisions cited thereof will be analysed in Section C.

21 Originally, its supervisory function had covered statements of interpretation (similar to UN bodies' general comments) and periodic reports, while the collective complaints procedure was introduced precisely to improve the effective enforcement of social rights. See Second preambular recital of the 1995 Additional Protocol.

22 *Andrea Spagnolo*, They Are not Enforceable, but States Must Respect Them: An Attempt to Explain the Legal Value of Decisions of the European Committee of Social Rights, in: Giovanni

"quasi-judicial"[23] working method and for the articulateness of its decisions that have been growingly appreciated by domestic courts as well.[24] Third, in the follow-up procedure the Committee of Ministers cannot reverse the ECSR's legal assessment. If the decision finds non-compliance with the Charter, the Committee of Ministers shall issue a recommendation to the state involved and the next periodic report shall address what measures have been taken to remedy the situation.[25] Notwithstanding these points of strength, several lacunae of the supervision mechanism have been identified.[26] In particular, such gaps concern the low number of ratifications of the 1995 Protocol,[27] the lack of individual application channel (compared to the ECHR and other IHRL treaties),[28] the restricted group of organisations

Boggero / Francesco Costamagna / Lorenza Mola (eds.), The European Social Charter Turns 60: Advancing Economic and Social Rights Across Jurisdictions, European Papers 7 (2022), pp. 1500-1506.

23 *De Schutter*, note 9, pp. 36-37 on "progressive judicialization" of the Committee's supervision; *Régis Brillat*, The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact, in de Búrca / Craig (eds.), note 11, p. 32 on its "judicial procedure"; *Claudio Panzera*, The Personal Scope of the European Social Charter: Questioning Equality, in Jörg Luther / Lorenza Mola (eds.), Europe's Social Rights under the 'Turin Process' / Les droits sociaux de l'Europe sous le 'Processus de Turin', Napoli 2016, pp. 179-188 on the ECSR's "quasi (judicial) activism".

24 On the Italian Constitutional Court, see *Spagnolo*, note 22; on the case study of dismissal reforms in Italy, France and Greece, see *Nikolaos A. Papadopoulos,* Assessing the Effectiveness of the European Social Charter: A Case Study on Dismissal Reforms, in: Giovanni Boggero / Francesco Costamagna / Lorenza Mola (eds.), The European Social Charter Turns 60: Advancing Economic and Social Rights Across Jurisdictions, European Papers 7 (2022). For a general discussion on epistemic authority, see *Jan Klabbers*, Soft authority in global governance, in: Mariolina Eliantonio / Emilia Korkea-aho / Ulrika Mörth (eds.), Research Handbook on Soft Law, Cheltenham 2023, pp. 162-176.

25 Comments to Articles 8-10 of the Explanatory Report to the Additional Protocol to the European Social Charter. Cf. *Spagnolo*, note 22, pp. 1509-1510, *Giuseppe Palmisano*, Collective Complaints as a Means for Protecting Social Rights in Europe, London 2022, pp. 42-46.

26 *Alston*, note 11, pp. 49-67; *Churchill / Khaliq*, note 11, pp. 227-240, *Palmisano*, note 25, pp. 59-64; *Papadopoulos,* note 24, pp. 1587-1592.

27 In this regard, the main problem may not be that only 16 states have ratified the 1995 Protocol in 30 years, but the very fact that in the last 10 years only one country—Spain in 2022—has proceeded with the ratification and it has done so with a reservation excluding the Charter's extension to irregular migrants. See Spain's Declaration contained in the instrument of ratification of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaint deposited on 6 October 2022.

28 Since 2013, also the UN Committee on Economic, Social and Cultural Rights accepts individual and inter-state complaints. For an updated analysis of the UN's monitoring system, see Part III in *Frédéric Mégret / Philip Alston* (eds.), The United Nations and Human Rights: A Critical Appraisal, Oxford 2020.

that have a right to submit complaints,[29] and the political nature of the follow-up procedure left in the hands of the Committee of Ministers.[30]

To wrap up, the Committee's innovative methods of interpretation have enhanced the Charter's potential to extend social rights to foreigners initially not covered by the ESC's personal scope. Nevertheless, its institutional position to ensure compliance is still rather weak and the low ratification rate of the 1995 Protocol contributes to ossifying the variable geometry of social rights protection both in terms of acceptance of Charter rights and their "(quasi-)justiciability" in collective complaints. Against this backdrop, paragraph II narrows down the scrutiny to reconstruct the network of health-related provisions.

II. Health as a Matter of Intertwined Charter Rights

The Charter has been the first regional instrument to frame health as a human rights issue inspired by the Constitution of the World Health Organization (WHO). The ECSR interprets health on the basis of the WHO concept, i.e., as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[31] The endorsement of the WHO notion reflects a distancing from ILO Conventions that have been the Charter's traditional sources of inspiration and brings it closer to the human rights-based approaches (HRBAs) to health.[32] Indeed, since the late Eighties HRBAs have played a major role in clarifying key questions on health and human rights; namely, whether the safeguard of well-being may qualify as an individual entitlement, how the material scope of related rights should be set, what added value health rights have compared to other rights and what duties they impose on states.[33] Under the Charter, health is protected by several rights, including Article 11 on the right to protection of health, Article 13 to social and medical assistance, Article 17 on the right of children and young persons to social, legal and economic protection, Article 31 on the right to adequate housing. Here, the focus is on Article 11 with some remarks on the other rights.

Inspired by the second preambular recital of the WHO Constitution, Article 11 proclaims everyone's fundamental right "to benefit from any measures enabling him to enjoy

29 See Articles 1 and 2 of the Additional Protocol.

30 For a negative critique, see *Churchill / Khaliq*, note 11, pp. 229-230, 238. For more balanced discussions, cf. *Colm O' Cinneide*, Social Rights and the European Social Charter: New Challenges and Fresh Opportunities, in: Olivier De Schutter (ed.), The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l'Europe, Brussels 2010, pp. 177-178; *Palmisano*, note 25, pp. 42-46; 61.

31 Paragraph 1 of the Preamble of the Constitution of the World Health Organisation. See e.g., ECSR, Transgender Europe and ILGA Europe v. Czech Republic, Complaint No. 117/2015, Decision on the merits of 15 May 2018, para. 71; *Lukas*, note 9, p. 172.

32 UN Development Group, The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies, September 2003. On the distinction between HRBAs and the right to health,

33 See Chapter 2 in *John Tobin*, The right to health in international law, Oxford 2012, pp. 44-74.

the highest possible standard of health attainable."[34] During the drafting process the wording underwent substantial changes: initially, a strong emphasis was placed on the protection of children's health, and the improvement of a wide range of health determinants, such as nutrition, housing, education and environmental factors formed a separate paragraph. Subsequently, these factors were grouped into the umbrella-term of causes of ill-health in § 1.[35] Compared to the original Charter, the 1996 revision introduced accidents in § 3, requiring states to follow a policy of accident prevention.[36] The ECSR has underscored that health is a prerequisite for human dignity; therefore, its protection under Article 11 is complementary to and inextricably linked with Articles 2 and 3 ECHR.[37] It comprises the entitlements to the highest possible standard of health (including the right to physical and mental integrity) and access to health care, conferring both positive and negative duties to states.[38]

Accordingly, states shall refrain from any direct or indirect interference and shall adopt positive and proactive measures to that end, ensuring the best possible state of health not only for individuals, but also for the population as a whole according to existing knowledge.[39] The right of access to health care comprises the entitlement for access to effective, affordable and quality health care without discrimination, based on the patient's informed consent, as well as the possibility to seek remedies and to effectively assert one's rights. The main health indicators are life expectancy, the principal causes of death, infant and maternal mortality.[40] Based on the joint reading of Article 11 with Article E on non-discrimination, states shall ensure adequate protection of the health of vulnerable groups, including the homeless, the elderly, persons living in poverty or with disabilities, detainees and irregular migrants.[41] § 2 gives special role to education and awareness-raising, especially with respect to sexual and reproductive health.[42] Similar to the approach developed by UN bod-

34 Like Article 12 (2) ICESCR, Part II of Article 11 RevESC provides for a non-exhaustive list of measures to take by states directly or in cooperation with public or private organisations to ensure the right to protection of health, such as: 1) to remove as far as possible the causes of ill-health; 2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

35 Parliamentary Assembly, Draft European Social Charter, Report by the Committee of Ministers, Doc. 927, 12 January 1959, p. 4. *Lukas*, note 9, pp. 161-162.

36 Explanatory report to the European Social Charter (Revised), para. 56.

37 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the merits of 3 November 2004, para. 31.

38 CoE, Digest, note 13, pp. 111-112; *Lukas*, note 9, pp. 162-163; *Claire Lougarre*, What Does the Right to Health Mean?: The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights, Netherlands Quarterly of Human Rights 33 (2015), pp. 328-329.

39 CoE, Digest, note 13, pp. 113-114; *Lukas*, note 9, pp. 162-164.

40 For a thorough analysis of indicators, see *Lougarre*, note 38, pp. 336-353.

41 CoE, Digest, note 13, pp. 114-116; *Lukas*, note 9, pp. 164-166. See discussion Section C.

42 CoE, Digest, note 13, pp. 116-118; *Lukas*, note 9, pp. 166-168.

ies and the Inter-American Court of Human Rights on human rights and environmental protection, the Committee interprets Article 11 § 3 in joint reading with the right to life as comprising the right to a healthy environment.[43]

One may raise the question of whether state duties under the Charter are to be interpreted as guided by the principle of progressive realisation. Indeed, neither the ESC nor its revised version contain a provision similar to Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which may be explained by the fact that both have a limited geographical scope, implying that the social systems of CoE Member States have been operational for some time and resource constraints are presumed to be relatively limited.[44] And while the ECSR has deduced this principle from the joint reading of paragraphs 1 and 3 of the Preamble,[45] its understanding of progressiveness is different from the approach taken by the UN Committee on Economic, Social and Cultural Rights (CESCR).[46] Under the Charter, states cannot invoke the lack of financial resources to justify non-compliance even in times of severe economic crisis,[47] while claims to progressive realisation are accepted only insofar as "it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter."[48] Article G contains the horizontal limitation clause inspired by Articles 8-11 and 18 ECHR. Accordingly, any restriction to Charter rights is subject to three conditions: it shall be prescribed by law, pursue a

43 States have the duty to overcome pollution, including air, water, noise and soil pollution, with special regard to minimising nuclear hazards and risks relating to the use, production and sale of asbestos. The ECSR has stressed that "states party must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal." ECSR, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, Decision on the merits of 6 December 2006, para. 204.

44 *Lukas*, note 9, p. 8. See most recently, ECSR, Review of States Parties' ad-hoc reports: Social rights and the cost-of-living crisis, March 2025, https://rm.coe.int/prems-068925-gbr-2005-cost-of-living-crisis-web-final-layout/1680b678f0 (last accessed on 29 March 2026).

45 ECSR, *Centre on Housing Rights and Evictions v. Italy*, Complaint No. 58/2009, Decision on the merits of 25 June 2010, para. 27: "[S]uch realisation of the fundamental social rights recognised by the Revised Charter is guided by the principle of progressiveness, which is explicitly established in the Preamble and more specifically in the aims to facilitate the "economic and social progress" of State Parties and to secure to their populations "the social rights specified therein in order to improve their standard of living and their social well-being."

46 CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23, adopted at the 5th Session, on 14 December 1990; Tobin, note 33, pp. 225-253.

47 ECSR, General introduction to Conclusions XIX-2 (2009), para. 15: "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most." Cf. ECSR, Activity Report 2009. 25 June 2010, pp. 14-17.

48 ECSR, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, Decision on the merits of 18 October 2006, para. 37; Mental Disability Advocacy Centre (MDAC) v. Bulgaria, Complaint No. 41/2007, Decision on the merits of 3 June 2008, para. 39.

legitimate purpose and shall be necessary in a democratic society. Following the ECtHR's approach, the Committee has endorsed a restricted reading of Article G, applying a strict proportionality test to assess Charter limitations.[49]

Furthermore, health is protected by other provisions as well. Article 13 enshrines the right to social and medical assistance of those who lack adequate resources needed to live a decent life and to meet most basic needs.[50] It covers the entitlement to obtain medical assistance in the form of free or subsidised health services or payments that enable those without resources to access the necessary care. The range of services is not limited to specific types of assistance or in time, the only criterion is adequateness. Medical assistance is not confined to emergency treatment, nor it depends on the seriousness of health conditions.[51] Article 17 on the right of children and young persons to social, legal and economic protection confers a wide range of duties upon states to ensure that everyone below the age of 18 has the care, assistance, education and training they need with a view to eradicating child poverty.[52] § 1 covers the right to receive protection appropriate to their age and the risks they are exposed to, including medical care and appropriate accommodation that ensures health determinants in terms of adequate nutrition, sanitary and hygienic conditions.[53] Article 31 enshrines the right to adequate housing (§ 1), to temporary shelter (§ 2), and to accessible housing for those who lack adequate resources (§ 3).[54] Under the principle of progressiveness, § 2 only guarantees an emergency solution to ensure accommodation equipped with the basic amenities, while states shall provide adequate housing within reasonable time to take a further step and comply with § 1.[55]

To sum up, the ECSR has anchored the interpretation of Article 11 and other health-related rights within IHRL, fostering the linkages between the Charter and other instruments starting from (Articles 2 and 3) ECHR. As a result, health falls within the material scope of multiple Charter rights, and indeed, the Committee has taken a flexible approach under which right to assess the complaints. This also helps overcome the Charter's structural limitations discussed above (i.e., the variable geometry of state acceptance): for instance, if the respondent state accepted both Articles 17 and 31 § 2, the ECSR usually grounds its analysis on the latter provision. All 16 states that have ratified the 1995 Protocol have accepted Articles 11 and 13, while 15 of them have accepted Article 17, and only 10 have accepted Article 31.[56] Against this backdrop, Section C analyses how the Committee

49 *Lukas*, note 9, pp. 346-351.

50 CoE, Digest, note 13, pp. 124-125. On the drafting process, see *Lukas*, note 9, pp. 185-190.

51 CoE, Digest, note 13, pp. 127-128; *Lukas*, note 9, pp. 191-192.

52 CoE, Digest, note 13, pp. 149-150; *Lukas*, note 9, pp. 223-226.

53 CoE, Digest, note 13, pp. 154-155; *Lukas*, note 9, pp. 229-231.

54 CoE, Digest, note 13, pp. 201-203; *Lukas*, note 9, pp. 328-333.

55 CoE, Digest, note 13, pp. 204-205; *Lukas*, note 9, pp. 334-336.

56 Bulgaria has accepted 17 § 2, while Cyprus has not accepted the whole provision. The declining states are: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic and Ireland.

has operationalised these rights to safeguard the health of people on the move in collective complaints.

C. The Committee's Case Law on Health, Social Rights and Migration

This Section offers a qualitative case-law analysis of eight collective complaints brought before the ECSR against one of the 16 Member States that have ratified the 1995 Protocol (since its entry into force in 1998 until today). The selection of cases has been guided by two key parameters: collective complaints concern the alleged violation of one or more of the health-related Charter rights analysed above (*ratione materiae* criterion); people on the move—including refugees, asylum-seekers, migrants in an irregular situation (after the rejection of their asylum claim or the expiry of their residence permit)—are either the victims of alleged rights violations or form one of the target groups (*ratione personae* criterion). The complaints are divided into two sets comprising children (para. I) and adults (para. II). The main goal is to identify the Committee's interpretative methods and assess their potential to overcome the Charter's variable geometry of social rights protection.

I. Children's Rights under the Charter and Beyond

The first case (*FIDH v. France*)[57] concerned the 2002-2003 French reform on medical assistance: the new rules ended the exemption of irregular migrants with very low incomes from all charges, requiring beneficiaries to pay a flat-rate charge for out-patient medical care and a daily charge for in-patient treatment.[58] Irregular migrants had to spend an uninterrupted period of three months to be entitled to state medical assistance and emergency care was restricted to life-threatening situations. The complainant organisation argued that the new rules constituted a violation of Articles 13 and 17 RevESC: first, the fact that irregular migrants were not entitled to the same treatment as nationals did not imply that they could be deprived of all medical assistance. Second, children of irregular migrants were not required to have a stay permit so they could not be considered as unlawfully staying. Their distinct treatment in relation to specific services, their admission to assistance after a certain time and the restriction of medical care to life-threatening situations amounted to a breach of Article 17 in conjunction with Article E.[59] The French government argued that irregular migrants, including minors, did not fall within the Charter's personal scope: first, the conditions for Article 13 § 4 (most importantly, to prove one's lawful presence and to be a national of one of the State Parties) were not met and even so, the three-months' time limit was not contrary to this provision. Second, the fact that children of irregular migrants were

57 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France,* Complaint No. 14/2003, Decision on the merits of 8 September 2004.

58 On the new rules, see Ibid., paras. 7-15.

59 Ibid., paras. 16-17, 20, 22-23, 25-26.

not required to have a residence permit did not make their stay lawful, implying their exclusion from the Revised Charter's personal scope.[60]

As regards the admissibility exam, the Committee first focused on the personal scope of the Appendix based on a complex interpretative method composed of the following elements: Article 31 § 1 of the 1969 Vienna Convention on the Law of the Treaties (VCLT), the "complex interaction" between the Charter and the ECHR based on the 1993 Vienna Declaration on the indivisibility of human rights, and the living instrument doctrine "borrowed" from the ECtHR.[61] It recalled that the Charter complements and interacts with the ECHR and is inspired by the values of dignity, autonomy, equality and solidarity. Hence, it shall be interpreted in light of its specific object and purpose; i.e., "to give life and meaning to fundamental social rights", which implies that any restriction shall be set narrowly "in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter."[62] Crucially, this is the case of rights of fundamental importance, like the right to health care, "a prerequisite for the preservation of human dignity."[63] The Committee held that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter."[64]

On this basis, the ECSR proceeded with the assessment of the claim in its merits. As regards the complaint under Article 13 § 4, it pointed out that the range of emergency care services was not precisely set, the competent body was not clearly appointed and the monitoring compliance with the three-months' time limit raised practical difficulties. Nevertheless, it 'gave the benefit of the doubt' to France by acknowledging that some form of medical assistance did indeed exist even for irregular migrants.[65] On the contrary, the Committee found the violation of Article 17: it noted that this provision was "directly inspired" by the UN Convention on the Rights of the Child (CRC); therefore, the restriction of medical care to life-threatening situations and the three months' time limit were not in conformity with Article 17.[66] While this finding may be welcome, the Committee's rather laconic reasoning left unaddressed a number of questions; e.g., what the precise connection between the Charter and IHRL is or what justifies the distinct protection of minors. This landmark decision, taken by no means unanimously,[67] nonetheless paved the way for a growing list of complaints.

60 Ibid., paras. 18-19, 21, 24.
61 Ibid., paras. 26-28.
62 Ibid., para. 29.
63 Ibid., para. 31.
64 Ibid., para. 32.
65 Ibid., paras. 33-34.
66 Ibid., paras. 33-38.
67 The Committee found by 9 votes to 4 the violation of Article 17, and by 7 votes to 6 the lack of violation of Article 13 § 4. *Cf.* the dissenting opinions attached to the decision.

In *DCI v. the Netherlands*,[68] the complaint concerned Dutch law that denied children unlawfully staying access to adequate housing. The complainant organisation stated that the exclusion of irregular migrant children amounted to a breach of Article 31, as well as Articles 11, 13, 16, 17 and 30 RevESC, to be read in light of the CRC.[69] The Dutch government argued that irregular migrant children do not fall within the Charter's personal scope and expressly rejected the Charter's compound interpretation with the CRC.[70] In this decision, the Committee elaborated a more thorough reasoning with respect to the Charter's role as a living instrument and the protection of children's rights. As a preliminary issue, it stated that the Charter shall be interpreted in light of its current circumstances and "of relevant international instruments that served as inspiration for its authors or in conjunction with which it needs to be applied."[71] Reminding that the CRC is one of the most ratified IHRL treaties across the globe of which all CoE Member States are parties, it argued that this instrument and, especially, the principle of the child's best interests—as interpreted by the UN Committee on the Rights of the Child in General Comment (GC) No. 5—shall guide the interpretation of children's rights under the Charter.[72] Recalling Article 31 § 3 (c) VCLT, the ECSR held that:

> *"Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including in the instant case those relating to the provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not."*[73]

The language resembling the ECtHR's reasoning may be evinced from other passages of the decision. As regards the complaint under Article 31, the Committee relied on the Strasbourg jurisprudence to acknowledge states' right to immigration control that nonetheless shall be reconciled with the protection of fundamental rights.[74] Assessing the situation under § 2, the ECSR reminded that the aim of this provision (i.e., to eradicate homelessness) requires states to provide to *all* children under their jurisdiction adequate shelter that meets the basic standards of safety, health and hygiene.[75] Implicitly reflecting the Strasbourg

68 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the merits of 20 October 2009.

69 Ibid., paras. 6-7.

70 Ibid., paras. 8-9.

71 Ibid., paras. 19-27, citation in para. 27.

72 Ibid., paras. 28-29.

73 Ibid., para. 35. Similarly, the interpretation of the ECHR "does not take place in a vacuum." Cf. *George Letsas*, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer, in The European Journal of International Law 21 (2010), pp. 521, 541.

74 Ibid., paras. 41-42.

75 Ibid., paras. 46-48.

Court's judgment in *M.S.S. v. Belgium and Greece*,[76] the Committee established that any eviction from shelter of irregular migrants should be banned, as it would place these persons "in a situation of extreme helplessness which is contrary to the respect for their human dignity," especially in case of children who are "particularly vulnerable."[77] In light of the foregoing, the Committee found the violation of Articles 31 § 2 and 17 § 1.c.[78]

Similarly, the complaint in *DCI v. the Belgium*[79] concerned the alleged breach of Articles 7 § 10, 11, 13, 16, 17 and 30 RevESC with respect to accompanied foreign minors in an irregular situation or seeking asylum, to whom Belgium did not provide any form of accommodation in reception centres since 2009, as well as unaccompanied minors who also lacked the necessary care and assistance due to the saturation of these centres.[80] The Committee recalled that all CoE Member States have ratified the CRC, which justifies the need to take into account this treaty as interpreted by the respective UN Committee.[81] Intriguingly, the ECSR added that the state duty to preserve the right to life and to integrity is a peremptory norm of international law and denying the enjoyment of these rights by irregular migrant children would be incompatible with international *jus cogens* (*sic*).[82] The Committee clarified that the application of the Charter to irregular migrants is exceptional and serves the purpose to safeguard their fundamental rights to life, to the preservation of human dignity, to psychological and physical integrity and to health.[83] Accordingly, migrants in an irregular stay (including unlawfully present minors, whether accompanied or not) are:

> *"[...] not covered by all the provisions of the Charter, but solely by those provisions whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons concerned by the provision in question from serious threats to the enjoyment of those rights."*[84]

The decision placed particular attention to health protection in light of several Charter rights: the ECSR interpreted Article 17 as comprising minors' right to immediate assistance which shall address their material needs, their need for medical and psychological assistance, including a child support plan with a view to giving them effective access to asy-

76 ECtHR (GC), *M.S.S. v. Belgium and Greece*, Application no. 30969/09, Judgment of 21 January 2011.

77 ECSR, *Defence for Children International (DCI) v. the Netherlands*, paras. 58-64, citation in para. 63. Cf. ECtHR (GC), *M.S.S. v. Belgium and Greece*, paras. 252, 254.

78 Ibid., para. 65.

79 ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision on the merits of 23 October 2012.

80 For the parties' arguments, see Ibid., paras. 24-27; 40-67 (Article 17); 87-93 (Article 7 § 10); 103-114 (Article 11); 123-127 (Article 13).

81 Ibid., paras. 31-34.

82 Ibid., para. 33.

83 Ibid., para. 35.

84 Ibid., para. 36.

lum.[85] The Committee found that Belgium's failure to ensure appropriate accommodation forced a large number of minors to live on streets, exposing them to the risks of trafficking, begging and sexual exploitation and ultimately "to a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity" in breach of Articles 7 § 10 and 17 § 1.[86] With respect to Article 11, the Committee reminded that states have a duty to ensure access to health care for irregular migrant children to protect their human dignity, life and integrity. The total lack of reception facilities for accompanied minors and the partial lack of centres for unaccompanied ones undermined their access to health care in breach of § 1, and exposed them to risks of epidemic and endemic diseases in violation of § 3.[87] As regards Article 13, the ECSR affirmed the right of irregular migrant children to medical assistance that extends beyond emergency treatment and covers primary and secondary care, as well as psychological assistance. However, it pointed out that some form of medical assistance was guaranteed by law and operated effectively, while no data showing serious shortcomings was available, concluding that there was no violation of Article 13.[88]

In *EUROCEF v. France*,[89] the claim alleged a number of violations of unaccompanied migrant children's rights, including Articles 7 § 10, 11, 12, 14, 17, 30 and 31§ 2, read alone or in conjunction with the non-discrimination clause. The complainant organisation argued that the French reception system presented serious shortcomings that were not in conformity with the Charter: first reception services were defective, centres were saturated, unaccompanied foreign minors did not receive shelter or guidance, were systematically detained in airport transit zones and subjected to abusive age assessment tests and had no access to health care, education or social protection.[90] As regards the admissibility of the complaint, the ECSR reiterated its line of reasoning constructed in the previous cases, including references to the UN Convention's role, the Charter's intertwinement with the ECHR and the state obligation to ensure irregular migrant children's fundamental rights as a rule of international *jus cogens*.[91]

As regards the complaint in its merits, the ECSR unanimously found the violations of Articles 7 § 10, 11 and 17 § 1, as well as the breaches of Articles 13 § 1, 17 § 2 and 31 § 2. For the purposes here, the focus is on those health-related issues regarding which the Committee reached its conclusions based on unanimous decision. First, it assessed the shortcomings of the reception system (including delays in appointing guardians, systematic detention

85 Ibid., paras. 68-81.

86 Ibid., paras. 82 and 97.

87 Ibid., paras. 115-118.

88 Ibid., paras. 128-132.

89 ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, Decision on the merits of 24 January 2018.

90 Ibid., paras. 12-13.

91 Ibid., paras. 49-57.

in waiting areas and hotels, the use of bone testing for age assessment and the lack of access to effective remedies) under Article 17 § 1. While most of these questions may arguably well raise issues related to this 'umbrella' right, the assessment of bone testing might seem exceptional and deserves a closer look. In this respect, the Committee conducted a thorough scrutiny of French law and practice based on multiple sources, such as a decision of the French Court of Cassation, national medical and human rights bodies, as well as the periodic report of the Committee on the Rights of Child.[92] It admitted that under EU law France may have recourse to medical examinations to determine the age of unaccompanied minors, while under domestic law such examinations constitute a measure of last resort and cannot prevail over civil status documents. Nonetheless, the ECSR pointed out that bone testing may have serious consequences for minors, their use is highly contested for two reasons: practically, they are unreliable (especially for those aged between 16-18); substantially, they undermine children's dignity and physical integrity; therefore, they amount to a breach of Article 17 § 1.[93]

The Committee proceeded with the assessment of the other claims based on the findings reached with respect to Article 17 § 1. It assessed the issue of inappropriate accommodation due to the saturation of reception facilities and the lack of reception homes and their exposure to life on the street, including the risks of trafficking and exploitation under Article 7 § 10 that enshrines children's and young person's right to special protection against physical and moral hazards. The ECSR pointed out that the responding government had not taken the necessary measures to protect unaccompanied migrant children from these dangers, "causing a serious threat to their enjoyment of the most basic rights, such as the right to life, to psychological and physical integrity and to respect for human dignity" in violation of Article 7 § 10.[94] Conversely, the sanitary and hygienic conditions of reception facilities, as well as the health problems arising from children's exposure to street life (including fatigue, infections, hypothermia and mental issues) were assessed under the right to protection of health. In this respect, the Committee found the breach of Article 11 due to the lack of access to health care by children living on streets and by those who are erroneously declared adults.[95]

Finally, in *ICJ, ECRE v. Greece*,[96] the complaint concerned the systemic flaws of the Greek asylum system which deprived unaccompanied children seeking asylum both in the mainland and in the Aegean islands of the effective enjoyment of multiple rights in breach

92 Ibid., paras. 104, 109, 112.

93 Ibid., paras. 105-113.

94 Ibid., paras. 135-139, citation in para. 138.

95 Ibid., paras. 152-155.

96 ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, Decision on the merits of 26 January 2021.

of Articles 7 § 10, 11, 13, 16, 17 and 31 RevESC[97] and was condemned by multiple organisations, as well as the ECtHR.[98] The ECSR confirmed the violation of all these rights; here, the focus is on two elements: the issue of emergency context and the interpretation of Article 11. First, the Committee acknowledged the Greek government's objection that it was faced with an extremely high number of arrivals; yet, it reminded that under Part I of the Charter states have the duty of international assistance and cooperation to effectively ensure the enjoyment of rights protected thereof, especially for children, who are *"extremely vulnerable"*.[99] This is indeed an important remark, and places under a different light the issue of emergency measures, a recurrent state argument to shoulder off their human rights obligations. Unfortunately, the Committee did not add any further clarification yet one may argue that this duty requires host states to sufficiently demonstrate that they have sought for international cooperation to manage the arrival and reception of high numbers of persons.

Second, when assessing the complaint under Article 11 §§ 1 and 3, the Committee reminded that this provision complements Articles 2 and 3 ECHR, as well as Article 24 CRC.[100] In this respect, the ECSR relied on the Joint GC No. 23 of the UN Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which every child should have access to health care under the same conditions with nationals, regardless of migration status.[101] In addition, the ECSR recalled the GCs No. 14 of the CESCR and No. 15 of the Committee on the Rights of the Child to stress the importance of the underlying determinants of health, namely, appropriate accommodation and housing to ensure well-being and to find that the situation in Greece was in breach of Article 11.[102] A last remark on the "vulnerability argument": recalling the ECtHR's case law, the ECSR repeatedly stressed the "extreme" or "particular" vulnerability of asylum seeking children.[103] While children on the move are indeed exposed to multiple risks and dangers, the academic debate has pointed out that in the ECtHR's case law the excessive emphasis has led to the "inflation" of this argument, which has ultimately become exclusionary vis-à-vis those who cannot demonstrate to be 'more vulnerable among the vulnerable.'[104] On the contrary, the approach to in-

97 See Ibid., Conclusion. For the parties' arguments, see *Id*. paras. 12-14; 100-111 (Article 31); 148-155 (Article 17 § 1); 179-183 (Article 7 § 10); 194-198 (Article 17 § 2); 211-217 (Article 11); 232-235 (Article 13).

98 See the list of ECtHR's rulings cited in Ibid., paras. 122; 171.

99 Ibid., paras. 88-89.

100 Ibid., para. 220.

101 Ibid.

102 Ibid., paras. 222-230.

103 Ibid., paras. 89; 119; 133; 134; 145; 189.

104 *Ben Hudson*, Asylum Marginalisation Renewed: 'Vulnerability Backsliding' at the European Court of Human Rights, in International Journal of Law in Context 20 (2024), pp. 16-34; *Ekaterina Yahyaoui Krivenko*, Reassessing the Relationship between Equality and Vulnerability

terpret ESC rights in light of the ECHR and the CRC anchors the Charter within IHRL and ultimately reinforces its potential.

II. Adults' Rights Between Core Duties and Group-Based Protection

Compared to the decisions on children's rights, the Committee's case law on the health protection of adult migrants has taken a slightly different trajectory. While in *FIDH v. France* the Committee did not find violation of Article 13 § 4 with respect to adults, the following cases show that over time it has revised its findings. The complaint in *CEC v. the Netherlands*[105] concerned Dutch law and practice that essentially deprived undocumented adult migrants of food, clothing and shelter. As regards the Charter's applicability, the ECSR reiterated that the personal scope restriction should not be interpreted as depriving irregular migrants of their most basic rights. The assessment shall be carried out on a case-by-case basis with respect to other rules of international law of which the Charter also forms part of.[106] As regards the merits of the claim under Article 13 § 4, the complainant organisation argued that Dutch legislation and practice made access to emergency assistance, including food, clothing and shelter conditional upon residence permit and the majority of irregular migrants did not fall within the exceptional categories.[107] The government underscored the conscious choice of irregular status and the fair balancing between humanitarian concerns and interests of law enforcement (including public security and the encouragement of voluntary returns).[108]

The ECSR recalled that under Article 13 § 4 states shall grant emergency social assistance to everyone under their jurisdiction based on the sole criterion of sufficiently urgent and serious need.[109] The provision of necessary food, water, shelter and clothing is "closely linked to the realisation of the most fundamental rights of these persons, as well as to their human dignity."[110] Based on the previous report on the Netherlands which had already identified the unbearable situation of irregular migrants, the Committee found no proof that the situation had been remedied between 2009 and 2014.[111] Remarkably, the ECSR addressed the Dutch government's argument on the lack of international obligations to grant

in relation to Refugees and Asylum Seekers in the ECtHR, in International Journal of Refugee Law 34 (2022); pp. 192-214.

105 ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision on the merits of 1st July 2014.

106 Ibid., paras. 66-71.

107 Ibid., paras. 77-94. Exceptions included irregular migrants who voluntarily decide to participate in voluntary return programmes, non-removable irregular migrants; rejected asylum-seeking families requesting to stay in reception centres; extreme winter conditions and security problems.

108 Ibid., paras. 95-104.

109 Ibid., paras. 62-73.

110 Ibid., para. 74.

111 Ibid., paras. 105-111.

assistance to the persons concerned by heavily relying on the case law of the ECtHR and the EU Court of Justice on the reception of irregular migrants and asylum seekers, including Dublin transferees,[112] and General Comments No. 4, 12 and 14 of the UN Committee on Economic, Social and Cultural Rights on the interpretation of Articles 11 and 12 ICESCR.[113]

Intriguingly, the ECSR endorsed the concept of non-derogable core obligations developed by the CESCR. In GC No. 3, the CESCR justified the introduction of this ambiguous notion with the experience gained through the analysis of state reports, as well as with the object and purpose of the ICESCR, i.e., to "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights," comprising essential foodstuffs, essential primary health care or basic shelter and housing.[114] In GC No. 14, the CESCR significantly amplified the range of core obligations arising from Article 12 ICESCR (without referring to a minimum level).[115] It took a bold step by stating that states "cannot, under any circumstances whatsoever, justify the non-compliance with the core obligations", which are non-derogable (sic).[116] Relying on this concept, in CEC v. the Netherlands the ECSR observed that "these [non-derogable core] obligations include access to basic shelter and minimum essential food for everyone, regardless of residence status."[117] Recalling that both the Strasbourg Court and the EU Court of Justice linked the state duty to provide a minimum protection for migrants with the preservation of their human dignity as a "fundamental value" and "core" of European human rights law,[118] the Committee established that:

> *"[...] the persons concerned by the current complaint undeniably find themselves at risk of serious irreparable harm to their life and human dignity when being excluded from access to shelter, food and clothing. It (...) holds that access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival in the prevailing weather conditions are necessary for the basic subsistence of any human being."*[119]

112 Ibid., paras. 24-29, 46-49, recalled in para. 116.

113 Ibid., paras. 35-38, recalled in para. 114.

114 CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant),* UN Doc. E/1991/23, adopted at the 5th Session, on 14 December 1990, para. 10.

115 CESCR, *General Comment No. 14,* para. 43. Seemingly, the core obligation to ensure the right of access to health care on a non-discriminatory basis, especially for vulnerable groups is in line with Article 12 ICESCR, but other duties (e.g. to adopt, implement and revise an evidence-based national public health strategy in a participatory and transparent process) arguably burden the capacity of most countries, including more developed ones.

116 CESCR, General Comment No. 14, para. 47.

117 ECSR, *Conference of European Churches (CEC) v. the Netherlands*, para. 114.

118 Ibid., paras. 115-116.

119 Ibid., para. 122.

The ECSR underscored that both emergency medical assistance and emergency shelter are closely connected to human dignity, in light of which legislation and practice denying access to such services are contrary to Articles 13 § 4 and 31 § 2.[120] While linking the protection of irregular adult migrants to the concept of (minimum) core obligations under IHRL is a powerful argument, it is a highly contested one. To set a minimum level of state duties under the ICESCR may help clarify where the threshold of compliance may be, this primarily aims to support developing countries. However, the non-derogable nature of core obligations arising from Article 12 thereof (without a reference to a minimum level) risks increasing such threshold too high without a sufficient legal basis and may eventually backfire on the effectiveness of human rights.[121] Furthermore, the structure of social rights protection under the Charter and the Covenant were distinctly designed, and 'borrowing' concepts from the UN Committee might not well serve the purpose of enhancing social rights in Europe. On the contrary, the argument that states shall implement treaties in good faith and seek international cooperation and aid in order to ensure a minimum level of compliance could have been further developed based on the general undertaking in Part I (to pursue the realisation of Charter rights and principles by all—national and international—means) and Article 32 ESC/Article H RevESc.

Finally, it is worth including two cases in which the situation of people on the move has not been distinctly considered but formed part of the comprehensive assessment of rights breaches involving more groups of individuals. In *FEANTSA v. the Netherlands*,[122] the complaint concerned access to shelter of various groups, such as homeless Dutch nationals, migrant workers, and other migrants residing regularly or irregularly, including women, children and young persons. FEANTSA argued that Dutch law and practice which made access to emergency shelter conditional upon the so-called "local connection criteria" (registration at the municipalities and year-long residence) effectively deprived these persons of shelter and the amount of available emergency shelters was insufficient, which created a widespread housing problem contrary to Articles 13, 16, 17, 19, 30 and 31 of the Charter.[123] The Committee unanimously found the violations of Articles 31 § 2, 13 §§ 1 and 4, 19 § 4 (c) and 30 of the Charter.[124] Here, the focus is on those parts of the assessment that addressed the safeguard of underlying health determinants with respect to people on the move.

The ECSR first analysed the complaint under Article 31 § 2: it recalled that even though states are not obliged to offer alternative accommodation to irregular migrants,

120 Ibid., paras. 124-126, 144-145.

121 For a critical analysis of non-derogable core duties under Article 12 ICESCR, see *Tobin*, note 33, pp. 238-252.

122 ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands,* Complaint No. 86/2012, Decision on the merits of 2 July 2014.

123 Ibid., paras. 18-25.

124 See Conclusion.

forced evictions are contrary to human dignity and hence should be banned even with respect to this group of persons.[125] It pointed out that the economic crisis should not lead to watering down the level of social rights protection and states shall take all necessary measures for the effective safeguard of these rights especially in times of economic hardship.[126] In light of these findings, the Committee held that there was a violation of Article 31 § 2. As regards the complaint under Article 13, it first recalled that the only criterion to access social and medical assistance is to be in urgent and serious need.[127] With respect to irregular migrants, the ECSR pointed out that while immigration control is a legitimate policy aim and a state prerogative recognised by international law, the denial of emergency shelter for this group was not a necessary restriction for achieving this goal.[128] Instead, less onerous means could have been made available, but the practical and legal restrictions denying emergency assistance for irregular migrants were disproportionate and did not respect Article 13.[129] The Committee recalled the case law of the Court of Justice on the reception of asylum applicants, but reminded that the Charter's scope of application is wider compared to EU law.[130] On this basis, it held that:

> *"[...] the right to emergency shelter and to other emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human dignity."*[131]

Intriguingly, the Committee did find the violation of Article 30 but ruled out that it was applicable to irregular migrants. It recalled that under this provision states shall adopt an overall and coordinated approach to take a series of economic, social and cultural measures to ensure the right to protection against poverty and social exclusion. Nevertheless, the ECSR succinctly held that the adoption of these positive measures was not applicable to "groups not covered by the personal scope of the Charter."[132] Such a distinct interpretation of Article 30 seems rather ambiguous was indeed severely criticised by a dissenting Committee member who underscored the complex fabric of social rights protection based on the joint application of multiple Charter rights; here, Article 30 with Articles 13 §§ 1 and 4 and 31.[133]

125 Ibid., paras. 58-61, 110.

126 Ibid., paras. 126-128, whereby it held that "[…] the States Parties should match the increase in need of shelter and the related social housing regardless of the economic situation in order to achieve the steady progress towards the elimination of homelessness, as required under Article 31§ 2 of the Charter."

127 Ibid., paras. 169-171.

128 Ibid., paras. 180-181.

129 Ibid., paras. 182-183.

130 Ibid., para. 184.

131 Ibid., para. 185.

132 Ibid., para. 211.

133 Cf. the partly dissenting opinion of the Committee member Luis Jimena Quesada.

Finally, in *DCI et al. v. Spain*[134] the complaint highlighted the consequences of Spain's failure to address the dire living conditions, especially the issue of power outages in districts 5 and 6 of *Cañada Real*, a shantytown near Madrid, whereby the overwhelming majority of the population is either part of the Spanish Roma community or has foreign (mostly North-African) origins.[135] The complainant organisations alleged that the unbearable situation in these districts due to frequent power outrages seriously undermined the enjoyment of social rights by multiple groups, including persons with disabilities, families, the elderly, children and young persons, and amounted to a violation of Articles 11, 15, 16, 17, 20 (a), 23, 27 § 1 (a), 30 and 31.[136] The Committee unanimously found the breach of Articles 31 § 1, 16, 11 §§ 1 and 3, 17 §§ 1 and 2, 30, 23 and 15 § 3.[137] Remarkably, the ECSR did not scrutinise whether Charter rights were applicable to single groups (including migrants). Instead, it assessed the situation of the entire resident population comprehensively and focused on specific groups only in relation to Charter rights having a circumscribed personal scope (such as persons with disabilities under Article 15, families under Article 16, children under Article 17 and the elderly under Article 23). This seems indeed an efficient strategy to overcome the Charter's variable geometry protection in light of Spain's reservation excluding its applicability to irregular migrants.[138] For the purposes here, the analysis addresses the main health-related issues under Articles 11 and 30.

As regards the alleged breach of Article 11, the complainant organisations argued that the power outages caused severe physical and mental health problems (e.g., respiratory infections, dermatologic and circulatory diseases, heightened risk of exposure to COVID-19, domestic accidents, anxiety, depression) among the population, especially for the most vulnerable.[139] The government contended that the residents enjoy universal and free healthcare like all Spanish citizens (ignoring that many residents were foreigners) and targeted public health programmes aimed at assisting specific social groups, including the Roma community.[140] The Committee reiterated that Article 11 shall be interpreted in light of the WHO Constitution and it imposes both positive and negative duties upon states.[141] It underscored states shall ensure the best possible state of health for the population (including underlying health determinants, such as water, electricity and heating) according to existing knowledge

134 ECSR, *Defence for Children International (DCI), European Federation of National Organisations working with the Homeless (FEANTSA), Magistrats Européens pour la Démocratie et les Libertés (MEDEL), Confederación Sindical de Comisiones Obreras (CCOO) and International Movement ATD Fourth World v. Spain*, Complaint No. 206/2022, Decision on the merits of 11 September 2024.

135 Ibid., para. 42.

136 Ibid., paras. 2 and 15.

137 Ibid., Conclusion.

138 See note 27.

139 Ibid., paras. 123-129.

140 Ibid., paras. 130-132.

141 Ibid., paras. 133-135.

to make the right to protection of health effective.[142] Based on manifold reports of national and international organs, the ECSR considered that Spanish measures did not adequately address the particular health risks related to power outages nor did they prevent epidemics and domestic accidents, and hence did not comply with Article 11 §§ 1 and 3.[143] In addition, the ECSR found that power outages exposed residents to energy poverty which aggravated their precarious living conditions. Its remarks on energy poverty are rather innovative for two reasons: the Committee endorsed the EU law concept[144] and adopted a rights-based approach to assess the impact of this phenomenon on the residents of *Cañada Real*.[145] It concluded that the failure to address energy poverty through adequate measures exposed the population of districts 5 and 6 to a heightened risk of poverty and social exclusion contrary to Article 30.[146]

D. Concluding Remarks: Towards the "Doubly Composite" Protection of Health

To conclude, one may agree that nowadays social rights are still suffering from a 'double weakness.'[147] As regards the European Social Charter, this paper has sought to question such a stereotyped vision by assessing the case law of the European Committee of Social Rights on the health protection of people on the move. The case-law analysis has revealed that the ECSR has mobilised several Charter rights, including Articles 11, 13, 7 § 10, 17, 30 and 31 and anchored their interpretation to Articles 2 and 3 ECHR, Article 24 CRC and GC No. 15 of the UN Committee on the Rights of the Child,[148] and Article 12 ICESCR and GCs No. 4 and 14 of the CESCR.[149] This interpretative method builds a "doubly composite" protection scheme: from the Charter's internal perspective, it brings the safeguard of health under the material scope of overlapping social rights; from an external perspective, it operationalises the Charter in joint reading with the ECHR, other IHRL instruments as in-

142 Ibid., paras. 136-138.

143 Ibid., paras. 139-152.

144 Cf. Commission Recommendation (EU) 2023/2407 of 20 October 2023 on energy poverty, cited in para. 202.

145 Ibid., paras. 205-212.

146 Ibid., para. 213.

147 I.e., in terms of their justiciability and legal recognition, see *Claudio Panzera*, Per i cinquant'anni della Carta Sociale Europea. Intervento al convegno I diritti sociali dopo Lisbona. Il ruolo delle Corti. Il caso italiano. Il diritto del lavoro fra riforme delle regole e vincoli di sistema, Reggio Calabria, 5 November 2011. https://www.gruppodipisa.it/images/rivista/pdf/Claudio_Panzera_-_Per_i_cinquant_anni_della_Carta_sociale_europea.pdf (last accessed on 2 April 2026).

148 *FIDH v. France*, para. 36; *DCI v. the Netherlands*, paras. 26-29; *DCI v. Belgium,* paras. 31-34; *EUROCEF v. France*, paras. 54-55; *ICJ, ECRE v. Greece,* paras. 120-121, 158; 164-165; 172; 202; 220; 222.

149 *CEC v. The Netherlands,* paras. 36-38, 114; *ICJ, ECRE v. Greece,* para. 222; *(FEANTSA) v. the Netherlands,* paras. 30-32.

terpreted by the respective monitoring bodies (and, marginally, EU law). In this respect, two final remarks are in order.

First, as regards the subject matters, a recurrent theme under Articles 11 and 13 has been the impact of saturating national reception systems on health conditions, the capacity challenges of reception facilities forcing minors to live on streets,[150] the living conditions in overcrowded centres adversely affecting physical and mental health, the insufficient numbers of health care facilities, goods, services and professionals.[151] Furthermore, the Committee has affirmed that there are several other Charter rights (including Articles 17 § 1, 30 or 31) that impose duties on states to ensure underlying health determinants, e.g., adequate housing, hygiene and sanitary conditions, or protection from poverty.[152] Such a technique to deploy a holistic rights-based approach is appraisable; yet, as pointed out by the former UN special rapporteur Paul Hunt, adopting HRBAs to health may risk downplaying the importance of the right to health and this may ultimately backfire on these approaches.[153] Conversely, Articles 11 and 13 have several distinctive features that are not encompassed by other rights. Overall, the best strategy would be to place these rights at the centre of the ECSR's assessment both for methodological reasons (to better clarify the material scope of each Charter right) and practical ones (because they are the most widely accepted provisions in terms of health protection).[154]

Second, as regards the Charter's personal scope, in earlier cases the ECSR found rights breaches only with respect to children and young persons, while it has proceeded more cautiously with the recognition of the rights of adult migrants, especially of those in an irregular stay. In this respect, the international concept of (minimum) core obligations may be a valuable tool, but it is a highly contested one: on the one hand, it may help define better the Charter's net level of protection and ensure alignment between ICESCR and the Charter and hence promote consistency in human rights law. On the other hand, it reveals the difficulties of legal transplants without sufficient anchorage in the new legal contexts. Moreover, the non-derogable nature of these obligations raises further questions of both legitimacy and effectiveness and may backfire on HRBAs. It seems that the Committee is aware of these risks and after *CEC v. the Netherlands* it has dropped this concept in later cases. Instead, the comprehensive group-based assessment deployed in *FEANTSA v. the Netherlands* and fine-tuned in *DCI et al. v. Spain* seems a smart strategy to overcome the Charter's variable geometry of protection. Furthermore, the ECSR could elucidate the content of the duty of international assistance and cooperation (especially, with respect to states that are in need of aid), which is a crucial obligation in the migration context. In this

150 On Article 11 see *DCI v. Belgium,* paras. 99-102; on Article 13 see *CEC v. The Netherlands,* paras. 105-126.

151 In relation to Article 11, see *ICJ, ECRE v. Greece,* paras. 218-230.

152 *DCI v. the Netherlands*, paras. 62-64; *FEANTSA v. the Netherlands,* paras. 58-61.

153 *Paul Hunt*, Interpreting the International Right to Health in a Human Rights-Based Approach to Health, Health and Human Rights 18 (2016), pp. 111, 115-116.

154 Ibid., pp. 116-123.

respect, the linkages between the Charter, the ICESCR, International Refugee Law and EU law could be explored to ensure coherence.[155]

With these adjustments, the method of doubly composite protection could well enhance the Committee's interpretative authority, strengthen the Charter's role in Europe's multi-sourced protection system and ultimately contribute to reaffirming the human rights doctrine in times of contestation and resistance.

155 CESCR, General Comment No. 3, paras. 13-14; General Comment No. 14, paras. 38-42; Global Compact for Safe, Orderly and Regular Migration, adopted by the General Assembly on 19 December 2018 (A/RES/73/195); Global Compact on Refugees, Annual Report to United Nations General Assembly, UN Doc. A/73/12 (Part II).

When Climate Moves People: A Turning Point in the Inter-American Human Rights System

By *Sofía Reca Milanta*[*]

Abstract: This article explores the evolving role of the Inter-American Court of Human Rights (IACtHR) in addressing climate-induced human mobility, focusing on its landmark Advisory Opinion AO-32/2025 on Climate Emergency and Human Rights. It argues that the Court's jurisprudence reflects a gradual normative convergence between migration and environmental protection under Article 22 and Article 26 of the American Convention on Human Rights (ACHR). The article develops an analytical framework to explain this emerging bridge, identifying two interrelated dynamics: the strategic use of advisory jurisdiction as a driver of normative development, and the consolidation of a Transformative Social Approach (TSA) to human rights violations. Building on this framework, the article shows how AO-32/2025 advances a comprehensive human rights-based approach to climate mobility through a normative consolidation.
Keywords: Inter-American Court of Human Rights (IACtHR); Climate Change; Human Mobility; Advisory Opinions; Transformative Social Approach (TSA)

***

A. Introduction

In 2025, the Inter-American Court of Human Rights (IACtHR) issued two landmark Advisory Opinions (AO): AO-32/25 on the Climate Emergency and AO-31/25 on the Right to Care. Though developed simultaneously, both opinions serve as a "roadmap"[1] for the State's obligations. AO-32/25 innovatively recognizes a "human right to a healthy climate" under Article 26 of the American Convention on Human Rights (ACHR), with both collective and individual dimensions.[2] AO 31/25, grounded in the principles of equality, social co-responsibility, and solidarity, provides a "key dimension"for understanding and addressing the climate emergency, particularly regarding the inseparable relationship among the care of the person, the community, and the ecosystem.[3]

* Post-doctoral researcher, University of Münster (Germany). Email: srecamilanta@gmail.com and srecamil@uni-muenster.de.

1 Concurring Opinion, Judge Verónica Gómez, IACtHR Advisory Opinion 32/25 of May 29, 2025. Series A No. 32, para. 3.

2 IACtHR Advisory Opinion 32/25 of May 29, 2025. Series A No. 32, paras. 298-316.

3 A special acknowledgment is due to Indigenous associations and Indigenous women's organizations that shared written and oral contributions with the Court in the context of OC-31 and OC-32,

AO 32/25 stems from a process that reflects the "highest"[4] level of participation in the history of the IACtHR, both in terms of the scale and the significance of the locations where the public hearings were held: regions directly impacted by the climate emergency. Days after its publication, the AO was widely hailed by human rights, environmental, and climate activism and doctrine as a "historic milestone",[5] "monumental",[6] "blueprint for rights-based climate action".[7] It has also been praised as a "big" vision of human rights protection.[8]

Among its most significant contributions, AO-32/25 explicitly addresses a human-rights-based approach[9] to the climate–migration nexus. The IACtHR articulates a norma-

concerning the inseparable relationship between the care of the person, the community, and the ecosystem. These contributions bring together key dimensions for understanding and addressing the climate emergency from cultural consensuses vital for our survival as a species (Concurring Opinion, Judge Verónica Gómez, IACtHR Advisory Opinion 32/25 of May 29, 2025. Series A No. 32, paras. 9-10).

4 Ibid., paras. 299-300.

5 CEJIL, La Corte IDH marca un hito histórico: una hoja de ruta jurídica para enfrentar la emergencia climática desde los derechos humanos, 3 July 2025, https://cejil.org/comunicado-de-prensa/la-corte-idh-marca-un-hito-historico-una-hoja-de-ruta-juridica-para-enfrentar-la-emergencia-climatica-desde-los-derechos-humanos/ (last accessed on 27 April 2026); Center for International Environmental Law, Opinión histórica de la Corte IDH: la crisis climática es una emergencia de derechos humanos, 3 July 2025, https://www.ciel.org/news/corte-idh-opinion-climatica (last accessed on 27 April 2026). /

6 *Mary Lawlor*, Climate change, human rights, and human rights defenders, UN Special Rapporteur on Human Rights Defenders, 11 July 2025, https://srdefenders.org/resource/advisory-opinion-of-the-inter-american-court-of-human-rights/ (last accessed on 27 April 2026).

7 *Maria Antonia Tigre / Maxim Bönnemann / Koery Silverman-Roati,* A Blueprint for Rights-Based Climate Action: The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency, 9 July 2025, Verfassungsblog, https://verfassungsblog.de/inter-american-court-of-human-rights-advisory-opinion-climate/ (last accessed on 27 April 2026), DOI: 10.59704/0e9954a4e3c581bb.

8 *Lena Riemer / Luca Scheid*, A Differentiated Path Forward: The Inter-American Court's Advisory Opinion on Climate Change and Human Mobility Rights, A Sabin Center Blog, 10 July 2025, https://blogs.law.columbia.edu/climatechange/2025/07/10/a-differentiated-path-forward-the-inter-american-courts-advisory-opinion-on-climate-change-and-human-mobility-rights/ (last accessed on 27 April 2026); *Laura Clérico / Sofia Reca Milanta*, Symposium on the Inter-American Court Advisory Opinions regarding the climate emergency and the reight to care Part 3: Advisory Opinoon 32 of 2025 on climate emergency and human rights. Climate inequeality and vulnerability: from the margins to the center I, I.Connect Blog, 20 November 2025, https://www.iconnectblog.com/symposium-on-the-inter-american-court-advisory-opinions-regarding-the-climate-emergency-and-the-right-to-care-part-3-advisory-opinion-32-of-2025-on-climate-emergency-and-human-rights-climate-inequalit/ (last accessed on 27 April 2026).

9 According to the United Nations guidelines, rights-based approaches are based on human rights properties: universality and inalienability; indivisibility; interdependence and interrelatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law (United Nations, The Human Rights Based Approach to Development Cooperation Towards A Common Understanding Among UN Agencies, 2003).

tive link between the right to human mobility under Article 22 ACHR and the right to a healthy environment under Article 26 of the Convention. Before this development, the Court had not explicitly connected migrants' rights with environmental harm, nor had it directly framed climate-related displacement within the scope of Article 22. Nevertheless, a closer examination of its jurisprudence reveals a gradual doctrinal trajectory toward such an articulation.

This article argues that the emerging bridge between human mobility and the right to a healthy environment is shaped by two interrelated dynamics: first, the strategic deployment of the IACtHR's advisory jurisdiction; and second, a transformative social approach to human rights violations. These dynamics operate through several interconnected features, including the use of advisory opinions to develop conventional standards in emerging and complex fields, an inclusive, participatory deliberative process, the recognition of structural patterns of discrimination, and transformative remedies to address systemic human rights violations. Together, these features provide the analytical foundation for understanding the doctrinal significance of AO-32/25.

This development must be situated within the broader global debate on climate-induced mobility in a context of democratic backsliding.[10] Climate change has become one of the most critical global challenges of the twenty-first century. Its complex interaction with human mobility has elevated climate migration to a central place in contemporary academic and political debates. Despite growing recognition of this phenomenon, significant gaps persist in international legal frameworks addressing environmentally induced displacement. United Nations Special Rapporteurs have underscored the need for "intersectional" and "rights-based" approaches to address the multidimensional impacts of climate change.[11]

Within the Inter-American Human Rights System (IAHRS), climate mobility has gained increasing prominence.[12] Resolution No. 2/024 of the Inter-American Commission on Human Rights (IACHR) highlights that the Americas are among the "most exposed" regions to climate-related threats that disproportionately affect vulnerable populations. Over the past decade, an average of 24.5 million people have been displaced annually by disasters such as floods and storms, and by 2050, between 9.4 and 17.1 million people in Latin America will be internally displaced due to climate-related events.[13] Climate change further exacerbates these trends; in the Americas, nearly 80% of internal displacement

10 IACtHR Advisory Opinion 32/25 of May 29, 2025. Series A No. 32, para. 461.

11 Special Rapporteur on Climate Change, Providing legal options to protect the human rights of persons displaced across international borders due to climate change, A/HRC/53/34, April 18, 2023, para. 64; Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/HRC/56/46, of July 24, 2024, paras. 23, 47 and 52.

12 See IACHR, Resolution No. 2/24, Human mobility induced by climate change, p. 6; Human Mobility and the Obligation to Protect: Toward a Subregional Perspective, OEA/Ser.L/V/II, July 21, 2023, Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González, A/77/189, July 19, 2022.

13 IACHR, Resolution No. 2/24 on Human Mobility Caused by Climate Change, 26 December 2024, p. 4.

in 2022 was driven by climate disasters, with projections indicating that more than 216 million people across six continents could become internally displaced by 2050 due to environmental impacts.[14]

Domestic courts have also begun to address these emerging challenges. Notably, the Constitutional Court of Colombia, in ruling T-123 of April 2024, recognized forced displacements due to environmental factors and emphasized their multicausal and complex nature, as well as the fact that the most vulnerable populations are the most affected.[15] The Court also refers to the importance of developing a "comprehensive regulatory framework".[16]

Against this backdrop, AO-32/25 significantly broadens the legal understanding of human mobility. It moves beyond rigid categorizations and articulates specific States' conventional obligations, opening significant avenues for addressing one of the most pressing challenges of our time. As some scholars have suggested, this regional achievement may become a global standard for future climate mobility protection.[17]

The article is structured in three parts. The first section reviews conceptual and theoretical debates on climate-induced mobility, focusing on the most controversial definitional and causal challenges. The second section develops the analytical framework by tracing the evolution of Inter-American jurisprudence on migration and environmental protection and identifying the dynamics that gradually connect these two fields. The third section analyzes AO-32/25 as a moment of normative convergence, focusing on the Court's articulation of the notion of climate- migration, the multidimensional approach to climate vulnerability, the duty of inter-American cooperation, and the specific state´s obligations in the context of climate change.

B. Beyond Labels: Unpacking the Empirical and Discursive Dimensions of Climate Migration

Migration is a complex and multicausal phenomenon that takes multiple forms: short- or long-term, circular or linear, internal or international, voluntary or forced.[18] Amid the con-

14 Ibid., p. 7.

15 Ibid., paras. 95-111.

16 Constitutional Court of Colombia, Judgement No. T-123, 16 April 2024, para. 274.

17 *Monica Namanya*, The Inter-American Court's Advisory Opinion on the Climate Emergency and Human Rights: A Win for Climate-Displaced Persons?, EJIL: Talk!, 29 July 2025, https://www.ejiltalk.org/the-inter-american-courts-advisory-opinion-on-the-climate-emergency-and-human-rights-a-win-for-climate-displaced-persons/ (last accessed on 27 April 2026).

18 *Roman Hoffmann / Barbora Sedov / Kira Vinke,* Improving the evidence base: A methodological review of the quantitative climate migration literature, Gobal Environmental Change 71 (2021), p. 4.

ceptual complexities, many scholars advocate for a "rights-based"[19] and "collective"[20]approach to climate mobility centered on individuals affected by climate impacts—whether they move or stay—whose dignity, equality, and security must be protected. That's the reason why scholars and human rights advocates have widely welcomed AO 32/25 on Climate Change and Human Rights, as we will analyze in the following sections.

Before engaging with the normative contributions of AO-32/2025, it is necessary to clarify the main challenges in conceptualizing climate migration and determining how*,* and to what extent*,* climate change acts as a causal driver.[21] The interdisciplinary evolution of the field reflects a growing recognition that climate change interacts with vulnerabilities, capacities, and socio-political contexts in diverse ways (such as economic pressures, social dynamics, and political instability). This "multidimensionality" makes it empirically difficult to identify a "direct cause-and-effect"[22] link between climate impacts and human movement. Consequently, climate change commonly operates as one driver among many rather than the exclusive trigger of mobility.[23]

Before 2010, only a small number of studies explicitly examined how climate change shapes migration decisions; yet between 2010 and 2020, the number of publications increased tenfold[24]. Despite the growing visibility, the category "climate migration" remains contested, with little analytical or methodological consensus.[25] Ferris identifies at least five disciplinary strands that have developed largely in parallel: (i) climate scientists concerned with the nature of environmental drivers; (ii) migration scholars framing mobility as an adaptation strategy; (iii) disaster risk reduction and humanitarian actors focusing on displacement linked to sudden-onset events; (iv) development researchers addressing

19 *Roger Zetter*, Protecting People Displaced by Climate Change: Some Conceptual Challenges, in: Jane McAdam (ed), Climate Change, Forced Migration, and International Law, Oxford 2012, pp. 131-150.

20 *Michael Werz / Max Hoffman*, Climate Change, Migration, and the Demand for Greater Resources: Challenges and Responses, SAIS Review International Affairs 99 (2015), p. 100.

21 *Walter Kälin*, Conceptualising Climate-Induced Displacement, in: Jane McAdam (ed.), Climate Change, Forced Migration, and International Law, Oxford 2012, pp. 81-103, 139.

22 Ibid., p. 138.

23 *Benoit Mayer*, Climate Change and International Law in the Grim Days, The European Journal of International Law 24 (2013), pp. 947-970.

24 *Emily C: Nabong / Lauren Hocking / Aaron Opdyke / Jeffrey Walters*, Decision-making factor interactions influencing climate migration: A systems-based systematic review, WIREs Climate Change 14 (2023), p. 8.

25 *Werz et al*., note 20; *Etienne Piguet*, Linking climate change, environmental degradation, and migration: An update after 10 years, Wiley Interdisciplinary Reviews: Climate Change 13 (2022); *Mayer*, note 24; *Hoffmann et al*., note 19; *Nabong et al*., note 25; *Victor Pérez Segura / Raquel Caro Carretero / Antonia Rua,* The elusive climate migrants: symbolic geographies in migration studies, Comparative Migration Studies 13 (2025), pp. 1-18.

slow-onset environmental change and planned relocations; and (v) international lawyers examining the protection and security implications of climate change.[26]

The complexity of climate-induced migration has produced divergent interpretations: the "maximalist" and "minimalist" approaches.[27] Maximalist perspectives predict large-scale displacement, primarily attributable to climate change. In contrast, minimalist approaches argue that most climate-linked mobility will be limited, internal, and shaped predominantly by non-climatic factors. At the same time, a substantial body of critical scholarship questions the analytical value of the climate migration category, arguing that it often functions as a discursive device that reproduces securitized frameworks and postcolonial imaginaries.[28] Piguet, for example, shows how the concept is selectively territorialized[29] and reinforces securitized or postcolonial imaginaries that disproportionately frame the Global South as a space of vulnerability and instability.[30]

Despite its conceptual limitations, many scholars validate the category "climate migration". In this line, systems-based approaches[31] include a direct causal interlink between migration and specific factors, such as "financial capital", "livelihood", "food security", "political stability", "health", and "social capital", to assist climate-affected communities.[32] The research concludes that deteriorating economic conditions and livelihoods are the main pathways toward climate-induced migration.[33] Further, men are often more likely than women to change their migration behavior in response to slow-onset climatic events.[34]

Other findings focus on time, differentiating the effects of rapid versus slow-onset shocks.[35] They suggest that climate change may affect migration patterns along different

26 *Elizabeth Ferris,* Research on climate change and migration where are we and where are we going?, Migration Studies 8 (2020), pp. 612–625.

27 *Kälin*, note 21, p. 81.

28 See *Betsy Hartmann*, Rethinking climate refugees and climate conflict: Rhetoric, reality and the politics of policy discourse*,* Journal of International Development 22(2010), pp. 233–246; *Andrew Baldwin,* Racialisation and the figure of the climate-change migrant*,* Environment and Planning A: Economy and Space 45 (2013), pp. 1474–1490.

29 Asia is the most referenced region in the climate migration literature. The Research on climate mobility in the Americas has focused disproportionately on the United States. The second most studied country on the continent is Mexico. Research on climate-related mobility in Europe remains limited, absence of explicit references to populations or territories in the abstracts suggests that the dominant approach tends to present climate migration as an abstract phenomenon, detached from empirical contexts (*Pérez Segura et al*., note 26, pp. 6-9).

30 *Piguet*, note 26. Similarly, Pérez Segura, Caro Carretero, and Rúa argue that the climate migrant operates as a "virtual subject": a discursive figure that condenses a horizon of future possibilities shaped by fears, risks, and projections (*Pérez Segura et al.*, note 26, p. 13).

31 *Nabong et al.*, note 15.

32 Ibid.

33 Ibid., p. 11.

34 *Hoffmann et al.*, note 19, p. 4.

35 Ibid; *Gabrielle Daoust / Jan Selby*, Climate change and migration: A review and new framework for analysis. WIREs Climate Change 15 (2024), pp. 1-18.

pathways, such as short-term weather shocks (storms and floods, droughts); gas emissions and environmental changes (increasing average temperatures); through policies in response to climate change (land acquisitions, dam-building); and narratives about current and future climate change impacts.[36]

A second challenge concerns the controversial notion of "climate refugees". Most people affected by environmental stressors move internally, and even when cross-border displacement occurs, they do not typically meet the legal criteria for refugee status. As Castles notes, the term "refugee" refers only to people who have crossed an international border to seek protection from persecution based on a range of factors clearly defined in the 1951 Refugee Convention: danger to life, limb, or liberty, on account of race, religion, nationality, membership of a particular social group, or political opinion[37]. On the other hand, Kälin argues that people displaced across international borders may qualify as refugees in some instances, particularly if the authorities refuse to assist and protect them on account of their race, religion, nationality, membership of a particular social group, or political opinion in the context of disasters, violence, or armed conflict triggered by the effects of climate change.[38]

The third challenge requires recognizing the significance of "immobility," which includes the stasis induced by climate change, when people are physically and emotionally trapped by the environmental changes it causes.[39] These often-overlooked categories are increasingly being brought into the research frame, shifting from traditional approaches to a "new mobilities paradigm".[40] In this sense, immobility not only interacts in complex ways with socio-environmental, infrastructural, political, and economic contexts but also with intersecting dimensions of inequality, such as gender, ethnicity, and race.[41] It provides critical insight into populations who may be among the most vulnerable yet least visible in policy discussions.

36 *Daoust et al.*, note 35, pp. 1-2.

37 *Stephen Castles*, Afterword: What Now? Climate-Induced Displacement after Copenhagen, in: Jane McAdam (ed.), Climate Change, Forced Migration, and International Law, Oxford 2012, pp. 239-243, 241.

38 *Kälin*, note 22, p. 94.

39 *Louis Everuss*, Shifting from Climate Migration to Climate (Im)mobilities: Studying the Intersections between Climate Change and Human Movement, in: Andreas Neef / Natasha Pauli / Bukola Salami (ed) De Gruyter Handbook of Climate Migration and Climate Mobility Justice, Berlin 2024, pp. 19-37, 20.

40 Ibid., *Aniseh Bro / Brandon Pludwinski / Luisa Veronis*, The Decision to Stay: A Framework for Conceptualising Voluntary Immobilities in: Andreas Neef / Natasha Pauli / Bukola Salami (eds.), De Gruyter Handbook of Climate Migration and Climate Mobility Justice, Berlin 2024, pp. 52-68.

41 *Andreas Neef / Natasha Pauli / Bukola Salami* (eds.), Introduction: Climate Mobilities and Climate Mobility Justice in the Anthropocene, in: Andreas Neef / Natasha Pauli / Bukola Salami (eds.), De Gruyter Handbook of Climate Migration and Climate Mobility Justice, Berlin 2024, pp. 1-15, 6.

Amid the conceptual complexities, as we mentioned before, many scholars advocate for a rights-based[42] and collective[43]approach to climate mobility centered on individuals affected by climate impacts—whether they move or stay—whose dignity, equality, and security must be protected. This approach focuses on two predominant dimensions: the global nature of climate change and the responsibility of states and the international community to ensure adequate protection.[44] However, despite growing recognition of these obligations, the international legal framework remains fragmented and insufficient.

The conceptual debates surrounding causality, definitions, and categories underscore the need for flexible, multidimensional understandings of climate-related movement—ones that reflect the empirical realities of mobility, recognize the agency of affected people, and respond to the profound inequities that make climate change not only an environmental crisis but also a human rights challenge. There is consensus that strengthening rights-based approaches and developing more robust normative frameworks are essential to ensuring that individuals facing climate-related mobility or immobility receive adequate protection.

In the Latin American context, a fuller understanding of climate-induced mobility requires a broader "political-economy approach".[45] In regions marked by structural inequality, rural poverty, and institutional fragility, displacement is rarely the result of climatic events alone. Rather, it emerges from the interaction between environmental stressors and structural drivers such as extractive industries, large-scale infrastructure projects, agro-industrial expansion, and processes of land concentration.[46] As the Colombian Constitutional Court emphasized in Judgment T-123/2024, mobility in climate contexts is not reducible to environmental causation. Still, it is instead produced through the intersection of environmental degradation, territorial dispossession, insecurity, and unequal development.[47] Climate mobility not only exposes the unequal distribution of environmental risks and harms but also provides the ethical and legal foundation for reorienting public policies to reduce vulnerabilities and strengthen social resilience.[48]

42 *Roger Zetter*, Protecting People Displaced by Climate Change: Some Conceptual Challenges, in: Jane McAdam (ed.), Climate Change, Forced Migration, and International Law, Oxford 2012, pp. 131-150.

43 *Werz et al.*, note 20, p. 100.

44 *Zetter*, note 42, p. 137.

45 See *Alain De Serres / John Llewellyn / Preston Llewellyn,* The political economy of climate change mitigation policies: How to Build a Constituency to adreess global warming?, ECO/WKP (2011), p. 5; *Diosey Ramon Lugo-Morin*, Climate Induced Exile in Latin America: Intersectionality, Refugee Women, and the Dynamics of Conflic and Negotiation, Histories (2026), pp. 6, 13, 1-29.

46 *De Serres et al.*, note 45, p. 5.

47 *Manoel Maurício Ramos Neto*, A new Latin America climate constitucionalis emerges to protect disaster-induced internatal displacement: lessons from the Mendoza Bohórquez and Niño de Mendoza case, Revista Ciência & Trópico 49 (2025), pp. 103-124, 108.

48 Ibid., p. 109.

The gender dimension further deepens this analysis. Women and girls represent nearly 80% of those displaced by climate-related causes in the region.[49] In this context, an "intersectional feminist approach"[50] highlights how pre-existing social, cultural, and economic inequalities interact with environmental degradation to amplify vulnerability and constrain adaptive capacity. Climate-induced displacement, therefore, cannot be understood without accounting for how gendered and racialized structures of inequality shape both exposure to risk and access to protection, particularly affecting rural, Indigenous, and Afro-descendant women.

Against this background, AO-32/25 on Climate Change and Human Rights has been widely welcomed by scholars and human rights advocates as a "historic milestone," a "monumental" development, and a "blueprint for rights-based climate action".[51] The opinion has also been praised for advancing a "big vision" of human rights protection, marking what many view as a "transformative" moment in international legal doctrine.[52]

As García observes, the Court's contribution is particularly significant in three key dimensions. First, it advances the "connection debate" by explicitly recognizing the relationship between climate change and migration. In doing so, the Court also addresses climate-related immobility, framing it as a condition that can trigger concrete and enforceable human rights obligations for states. Second, the opinion intervenes in the "label debate" by questioning rigid categorizations of people on the move—such as the distinction between voluntary and forced mobility or between internal and cross-border movement. Instead, the Court adopts a functional approach that conceives mobility as a de facto condition of lack of protection. On this basis, through a political economy approach, the Court articulates specific state obligations. It suggests that effective protection may require developing new or adapted legal categories that respond to the realities of climate-related displacement.[53] AO-32/25 opens important avenues for addressing not only state responsibility but also the role of private and corporate actors in generating and exacerbating conditions of displacement.

Taken together, these elements underscore the transformative potential of AO-32/25. Yet, this potential ultimately depends on the extent to which its normative advances are translated into concrete policies capable of addressing the material drivers of inequality, dispossession, and environmental harm that underpin climate-induced mobility in the region.

49 *Pia Riggirozzi*, Climate Change and Forced Migration in Latin America, Renewable Matter, 12 November 2025, https://www.renewablematter.eu/en/cop30-climate-change-forced-migration-latin-america (last accessed on 27 April 2026).

50 *Lugo-Morin*, note 45, pp. 1-29.

51 See paras. 6, 7, 8 and 9.

52 *Riemer et al,* note. 8; *Tigre et al.*, note 7.

53 *Lila Garcìa*, Precariedades In/hiper/mobilizadas en el context de la emergencia climàtica. A propósito de la OC 32/2025, Workshop at University of Buenos Aires, 9 December 2025, https://www.youtube.com/live/B0ZI3mzAOlE?si=a-kdXmjJywcufpSx.Ib (last accessed on 27 April 2026).

C. Moving Borders, Moving Rights: The evolving role of the Inter-American Human Rights Court

Within the field of climate-induced mobility, the IACtHR provides much-needed clarity on several long-contested and controversial issues. The Court reconceptualizes climate-induced human movement as a matter of binding human rights obligations for states. The ruling extends beyond doctrinal innovation by offering guidelines for practical implementation, articulating specific state duties, reinforcing due diligence standards, and calling for the recognition of new legal categories for climate-displaced people, while also addressing immobility in the context of climate-induced displacement.

As will be explored in the following section, these developments demonstrate why the IACtHR's conclusions constitute not merely an incremental development, but a fundamental shift of the human rights law approach to one of the "most pressing challenges of our time.

Although prior to AO 32/2025 the IACtHR had not fully articulated a normative link between migrants' rights and environmental harm, its case law demonstrates a gradual convergence of these thematic strands. This raises a central preliminary question: how have environmental and climate harm, together with human mobility, been addressed in the Inter-American jurisdiction?

I. Fragmented or Simultaneous Pathways?

Since its initial Advisory Opinion in 1984, the Court has consistently advocated for a human rights-based approach to mobility through a broad and inclusive understanding of migration as a "multicausal and complex" phenomenon through the lens of non-discrimination (Article 1ACHR), the Right to Nationality (Article 20 ACHR), and the Right to Freedom of Movement and Residence (Article 22 ACHR). Accordingly, migration includes both internal and international displacement, regardless of whether individuals are there "temporarily, in transit, legally, or in an irregular migratory situation".[54]

Unlike other fields, the Court's Advisory Opinions[55] not only served as the initial driving force behind the development of the conventional standards for migrants' rights but also reflected overarching interests of states, the academy, and international organiza-

54 IACtHR, Advisory Opinion OC-21/2014 of August 19, 2014, para. 62.

55 See IACtHR, Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Arts. 13 and 20 American Convention on Human Rights*)*, 19 January 1984, Series A No. 4; Advisory Opinion OC-16/99*,* The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*,* 1 October 1999, Series A No. 16; Advisory Opinion OC-18/03,Juridical Condition and Rights of Undocumented Migrants 17 September 2003, Series A No. 18; Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, Series A No. 21, and Advisory Opinion OC-25/18, The Institution of Asylum and Its Recognition as a Human Right under the Inter-American System of Protection, 30 May 2018, Series A No. 25.

tions, as evidenced by the "unprecedented participation." Notably, migration case law is essentially grounded in the visionary ruling AO 18/03 on the "Juridical Condition and Rights of Undocumented Migrants". The Court recognized that "all persons have attributes inherent to their human dignity […] which are, consequently, superior to the power of the State".[56] Thus, "the principle of equality before the law, equal protection before the law and non-discrimination belong to jus cogens", which obligates States to "abstain" from carrying out any action that, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. States must also "take affirmative action" to reverse or change discriminatory situations.[57]

Furthermore, AO 18/03 acknowledged the special "vulnerability" of migrants, which has both an "ideological" dimension and a "historical context", sustained by "de jure" inequalities (between nationals and aliens in the laws) and "de facto" inequalities (such as structural disparities).[58] Accordingly, the "migratory status of a person can never justify depriving him of the enjoyment and exercise of his human rights".[59]

On the other hand, environmental jurisprudence can be divided into two distinct phases.[60] The first phase, or "early phase"[61], addressed environmental protection primarily through the rights of Indigenous Peoples—namely, collective property (Article 21 ACHR), dignified life (Article 4 ACHR), and political participation (Article 23 ACHR). During this phase, the Court began to acknowledge—albeit indirectly—that environmental degradation can lead to forced displacement under Article 22 of the ACHR.[62] This position was reflected in *Nadege Dorzema* (2012), a case addressing the mass expulsion of Haitian migrants in the Dominican Republic. Furthermore, the Court recognizes that environmental harm disproportionately affects Indigenous and Afro-descendant communities whose livelihoods and cultural identities are closely tied to their natural environment.[63]

56 IACtHR, Advisory Opinion OC-18/03 of September 17, 2003, para. 73

57 Ibid., para. 103.

58 Ibid., para. 112.

59 Ibid., para. 134.

60 See Separte Opinion Judge Ferrer Mac Gregor Poisot, IACthR Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400.

61 *Gaston Medici Colombo,* Climate Change-Related Obligations under the Inter-American Human Rights System: A prospective mapping, Spanish Yearbook of International Law 28 (2024), pp. 275-288, 279

62 IACtHR, Case of Nadege Dorzema v. Domincan Republic, October 24, 2012, para. 39

63 Cases of del Pueblo Saramaka Vs. Surinam, para. 85, Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina, para. 247; Comunidad Mayagna (Sumo) Awas Tingni. Fondo, Reparaciones y Costas, paras. 148, 149, 151; Comunidad Indígena Yakye Axa Vs. Paraguay, paras. 124, 131, 135-137, 154, Comunidad Indígena Sawhoyamaxa Vs. Paraguay, paras. 118-121, 131. This connection was reaffirmed in Kama and Friol (2024) where affected communities successfully demonstrated that environmental degradation had led to their forced displacement.

The second phase, driven by Advisory Opinion No. 23/17 in 2017, marked a turning point toward an "ecocentric approach".[64] The Court recognized the right to a healthy environment as an "autonomous and actionable" right under Article 26 ACHR in relation to the Economic, Social, Cultural, and Environmental rights (ESCER). The "autonomy" refers to different entitlements (health, liberty, education, life, etc.), and a series of obligations that States must comply with that give meaning to their differentiated legal recognition[65]. The case of *Lhaka Honhat* (2020) represents a "milestone" because it establishes violations of different ESCER that may be derived from and protected by Article 26: the rights to cultural identity, participation in cultural life, a healthy environment, food, and water. Moreover, the remedies ordered have a differentiated focus, seeking to redress violations of each of the social, cultural, and environmental rights.[66]

Finally, in *Habitants la Oroya* (2023), the Court analyzed the multiple effects of environmental and climate harm on vulnerable populations. The Court described the area as a "sacrifice zone," referencing the devastating and differentiated impact of climate harm on certain "geographical" regions and groups in situations of vulnerability[67].

Drawing on the ecocentric approach, the Court acknowledges "the right not to be forcibly displaced" as particularly vulnerable to environmental harm.[68] It also expanded the definition of at-risk groups to include not only Indigenous and Afro-descendant communities but also populations in specific geographic[69] locations whose survival depends on marine, forest, or river ecosystems, and those living in geographically exposed areas such as coastal zones and small islands.[70]

II. Bridging the Gap

The jurisprudence on migration and environmental protection within the Inter-American system reveals a gradual but significant convergence between these two fields. This article argues that this emerging bridge is shaped by two interrelated dynamics: first, the strategic deployment of the IACtHR advisory jurisdiction; and second, a transformative social approach to human rights violations. These dynamics are expressed through advisory opinions

64 *Medici Colombo*, note 62, p. 279; *Sofia Reca Milanta / Diego Montalván Zambrano*, De la resistencia a la participación: El impacto de los amicus curiae en el litigio ambiental y climático interamericano (under review).

65 Seperate Opinion Judge Ferrer Mac Gregor Poisot, note 60, para. 43.

66 *Sofia Reca Milanta*, La navegación de los DESCA en la jurisdicción interamericana, Revista de Estudios Constitucionales, Universidad de Talca (Chile) 22 (2024), pp. 30-53.

67 IACtHR, Case of La Oroya Population v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 27, 2023. Series C No. 511, para 180.

68 IACtHR, Advisory Opinon OC 23/17 on The Environment and Human Rights, of November 15, 2017. Series A No. 23, para. 66.

69 Ibid., para. 66.

70 See para. 64.

as instruments for normative development, a more inclusive and participatory deliberative process, recognition of structural patterns of discrimination, and adoption of structural remedies to address systemic human rights violations. We argue that these features are the analytical foundation of Advisory Opinion AO-32/2025, which explicitly articulates a normative link between the right to human mobility under Article 22 and the right to a healthy environment under Article 26 ACHR.

1. The IACtHR Advisory Jurisdiction as a Strategic Mechanism

Unlike contentious cases, advisory jurisdiction under Article 64 ACHR operates as a parallel system[71] with a dual purpose: interpreting international instruments of the IAHRS and assessing the compatibility of domestic law with those instruments.[72] There is no explicit requirement for States requesting an opinion to be parties to the ACHR. Consequently, all OAS member States and certain OAS organs can seek advisory opinions from the IACtHR.[73] A further distinctive feature of these proceedings is their highly participatory nature, particularly through the extensive use of public hearings and *amicus curiae* submissions[74], which are published as part of the official record (Art 73 Rules of Procedure IACtHR).

The IACtHR´s advisory jurisdiction has served as a "strategic"[75] mechanism with at least two key purposes. First, it provides the Court with specialized knowledge and empirical insights on "core human rights issues"[76], particularly in technically complex domains such as climate change and human mobility.[77] As mentioned in the previous section, AO 18/2003 on the "Juridical Condition and Rights of Undocumented Migrants" and 23/2017 on "The Environment and Human Rights" have played a pivotal role in shaping jurisprudential developments, a trend further consolidated by AO 32/2025. These landmark

71 *Walter Arévalo Ramírez / Andrés Rousset Siri*, Compliance with Advisory Opinions in the Inter-American Human Rights System, AJIL Unbound 117 (2023), pp. 298-302, 299; *Claudia Martin*, Advisory Proceedings: Inter-American Court of Human Rights (IACtHR), The Max Planck Encyclopedia of International Procedural Law, in: Hélène Ruiz Fabri (ed.), Oxford 2019, pp. 1-25, 3. *Pablo Saavedra Alessandri*, A Broader Look at the Transformative Impact of the Inter-American Court of Human Rights' Decisions, in: Armin von Bogdandy et al. (eds.), The Impact of the Inter-American Human Rights System: Transformations on the Ground, Oxford 2024, p. 549.

72 *Arévalo Ramírez,* note 71, p. 298.

73 *Martin*, note 71, p. 7.

74 Ibid.

75 *Reca Milanta et al*., note 63.

76 *Arévalo Ramírez et al*., note 71, p. 300.

77 *Lila García / Estefanía Giaccone / Lauura Clérico*, L. Developing Standards on Climate-Related Human Mobility With (a Little) Help of Amici Curiae in the Advisory Opinion 32/2025, IConnect Blog, 5 March 2026, http://www.iconnectblog.com/developing-standards-on-climate-related-human-mobility-with-a-little-help-of-amici-curiae-in-the-advisory-opinion-32-2025 (last accessed on 27 April 2026).

rulings have enabled the Court to proactively improve emerging conventional standards and specific states' obligations, thereby influencing domestic legal systems beyond the constraints of individual contentious cases.

Second, in previous research, we analyzed how the participatory design of advisory proceedings strengthens the institutional role and legitimacy of the Court by enabling a more inclusive deliberative process involving states, international organizations, academics, and civil society actors.[78] Amicus curiae submissions constitute active and substantive contributions, either as relevant arguments or by providing standards of review to the Court's reasoning, particularly in an area where legal standards remain underdeveloped[79]. In recent research we demonstrated how amici interventions can play a stabilizing role in the Court's deliberative process by tempering radical dissenting opinions of some judges on critical issues, such as the right to a healthy climate and environment under art. 26 ACHR.[80]

Participation in migration-advisory proceedings has progressively expanded over time. Beginning with AO-16/99, which received submissions from eight member States, the IACH, and 22 individuals and institutions, engagement increased in subsequent opinions. AO-18/03 marked a significant turning point in the Court's history. The proceedings included two public hearings—held for the first time outside the Court's headquarters, in Santiago, Chile—and involved 12 States, the IACH, the United Nations High Commissioner for Refugees (UNHCR), nine civil society and academic institutions, and the Central American Council of Attorneys-General for Human Rights. This participatory dynamic continued in later advisory opinions, with AO-21/14 involving nine member States and AO-25/18 receiving 55 written observations and 26 additional contributions from states, OAS bodies, international organizations, state agencies, NGOs, academic institutions, and civil society actors.

A similar trend is observed in the environmental field. AO-23/17 attracted 44 written submissions from states, OAS organs, NGOs, academics, and individuals, alongside a public hearing held in Guatemala, further consolidating the participatory character of the Court's advisory practice. AO-32/2025 reflects the "highest"[81] level of participation in the history of the IACtHR, both in terms of scale and the relevance of the locations where public hearings were held, specifically regions directly impacted by the climate emergency. This proceeding engaged with over 260 amicus curiae submissions by 600 actors. Regarding climate-induced mobility, García, Giaccone and Clérico identify three categories

78 *Reca Milanta et al.,* note 64. See *Sandra Fredman*, Adjudicating Human Rights: Bounded Deliberative Democracy, Federal Law Review 53 (2025), pp. 1-29.

79 *García et al*., note 77.

80 *Reca Milanta et al.,* note 64.

81 IACtHR Advisory Opinion 32/25 of May 29, 2025. Series A No. 32, paras. 299-300.

of participants: international organizations[82]; the academic community, represented by the contribution of the "European Professors" and affected populations, specifically the "Comunidad El Bosque".[83]

Against this backdrop, the "transformative impact"[84] of advisory proceedings rests on democratic and participatory features that shape a particularly fruitful source of collective construction of conventional law. Nevertheless, several questions remain regarding its enforceable nature. The Court has repeatedly emphasized that, while advisory opinions do not have the binding force of judgments issued in contentious cases, they nonetheless produce "undeniable legal effects"[85] under the conventionality control doctrine[86]. Accordingly, domestic authorities must interpret and apply national law in conformity with the Inter-American corpus juris.[87] However, their effectiveness depends on States' willingness to implement them into concrete and practical measures, such as establishing domestic legal frameworks to address climate-induced displacement.[88]

Furthermore, some scholars have observed a tension between the breadth of participation and the degree to which contributions are reflected in the Court's reasoning. Despite the large number of submissions in AO-32/2025, it is paradoxical that the IACtHR appeared to privilege "big players" in support of its arguments and in developing its main standards.[89] This dynamic prompts critical inquiry into whether participatory mechanisms genuinely democratize the Court's reasoning or whether certain institutional actors—such as international organizations or prominent academic groups—exercise greater epistemic authority.[90]

82 Including the UNHCR (United Nations High Commissioner for Refugees), IOM (International Organization for Migrations) and the UN Special Rapporteur on the Human Rights of Internally Displaced Persons.

83 *García et al.*, note 77.

84 *Saavedra Alessandri*, note 71, p. 562.

85 IACtHR, Advisory Opinion OC-18/03, 2003, para. 63.

86 *Martin*, note 71, p. 19.

87 IACtHR, Opinion OC- 21/ 14 of August 19, 2014. Ser. A No. 21, para. 31.

88 *Namanya*, note 17.

89 In three cases, amici curiae function as relevant arguments by providing contextual information that reinforces State obligations related to climate mobility. First, the UNHCR's submission is used to demonstrate the effects of climate-related displacement Second, the "European Professors" support the Court's reasoning on the scope and importance of shared responsibility and international and regional cooperation as we will explore in the next section. Third, the submission made by the UN Special Rapporteur on the Human Rights of Internally Displaced Persons is used to reinforce States' obligations to guarantee respect for the family unit within human mobilization processes (*García et al*, note 77).

90 *García et al.*, note 77.

2. The IACtHR's Transformative Social Approach

Secondly, we argue that the emerging bridge between migration and environmental jurisprudence is also reinforced by what we call the IACtHR *Transformative Social Approach* (TSA).[91] This approach has gradually emerged through the Court´s recognition of the judicial protection and autonomy granted to Economic, Social, Cultural, and Environmental Human Rights (ESCEHR) under Article 26 of the ACHR. The TSA provides a critical lens for the interpretation of the principle of equality with reference to several indicators, including historically entrenched discriminatory practices; systemic or historical contexts of exclusion, marginalization, or subordination; geographic vulnerability; and the reality that affected groups may experience discrimination despite formally neutral legal frameworks.[92]

As developed in Section II, this approach aligns with a broader political-economy understanding of climate-induced mobility. From this perspective, forced displacement is not limited to its distributive consequences but must be analyzed in light of the underlying economic, social, cultural, and environmental structures that produce it.

Drawing on previous research, we argue that the TSA rests on several core features. First, it addresses structural patterns of discrimination by conceiving equality primarily as anti-subordination—that is, as the dismantling of hierarchical social relations and institutional practices that perpetuate marginalization.[93] These patterns are dynamic and contextual. Second, it incorporates a cooperative and participatory approach to compliance—including the Inter-American Commission, civil society organizations, domestic oversight institutions such as ombuds offices, and other states. Finally, the TSA emphasizes transformative remedies that seek to reorganize public institutions and policies to ensure effective access to basic needs and social rights. Although the phenomenon of courts ruling against governments and ordering broad institutional reforms raises important legitimacy debates at

91 *Sofia Reca Milanta,* Mapping the Inter-American path of human mobility: Toward a Transformative Social Approach? (under review).

92 Separate opinion of Judge Ferrer Mac GregorCase of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, par.79.

93 *Martín Aldao / Laura Clérico / Liliana Ronconi*, A Multidimensional Approach to Equality in the Inter-American Context: Redistribution, Recognition, and Participatory Parity, in: Armin von Bogdandy / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi / Flávia Piovesan / Ximena Soley (eds.), Transformative Constitutionalism in Latin American. The emergence of a New Ius Commune, Oxford 2017, pp. 83-96, 84.

the domestic[94] and international levels[95], within the IAHRS, the principle of equality and non-discrimination under Article 1 of the ACHR has played a pivotal role in addressing deeply embedded discriminatory factors.[96]

The Court has consistently acknowledged the heightened vulnerability of migrants as a condition shaped both “ideological” narratives and “historical contexts”, sustained by *de jure* inequalities (between nationals and aliens in the laws) and *de facto* inequalities (structural disparities). Accordingly, migration-related rulings frequently address structural patterns of discrimination affecting Haitian and Mexican migrants, as well as forced internal and cross-border displacement in contexts of systemic violence, armed conflict, and enforced disappearances.[97] These dynamics have become intensified due to the recent “anti-immigrant backlash”,[98] which threatens democratic institutions and shapes large-scale migration trends.[99] In this context, the IACtHR’s “multidimensional” approach to climate mobility in AO 32/2025 is grounded in the premise that the climate emergency exacerbates inequality.

Similarly, structural poverty and inequality have been identified as critical factors exacerbating environmental harm as an autonomous right under Article 26 ACHR, particularly for Indigenous communities, as evidenced in cases *Lhaka Honhat* (2020), *Pueblos Rama y Kriol* (2023), *Pueblo Indígena U’ma* (2024), and *Pueblo Indígena Tagaeri* (2024). The Court has further acknowledged the severe and differentiated impacts of climate harm on certain “geographical” regions and vulnerable groups, notably in *La Oroya* (2023).

Structural remedies have thus become a defining feature of the Court’s response to cases involving both migration and environmental harm. These measures frequently intervene directly in public policy and institutional frameworks to address systemic discrimination and ensure access to essential services, including housing, healthcare, food, potable water,

94 *Mark Tushnet,* Social Welfare Rights and the Forms of Judicial Review, Texas Law Review 82 (2004), pp. 1897-1898; *David Landau*, Political Institutions and Judicial Role in Comparative Constitutional Law, Harvard Law Journal 51 (2010), p. 319; *Rosalind Dixon*, Responsive Judicial Review. Democracy and Dysfunction in the Modern Age, Comparative Constitutionalism, Oxford 2023, p. 97; *Michaela Hailbronner*, The Failures of Others: Justifying Institutional Expansion in Comparative Public and International Law, Cambridge 2026.

95 *Alexandra Hunneeus*, Reforming the States from Afar: Structural Reform Litigation at the Human Rights Courts, Yale Journal of International Law 40 (2015).

96 *Victor Abramovich*, De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos, Derecho PUCP: Revista de la Facultad de Derecho 63 (2009), pp. 7–39, 31-33; *Laura Clérico / Martin Aldao*, Nuevas miradas de la igual en la jurisprudencia de la Corte Interamericana de Derechos Humanos: La igualdad como redistribución y como reconocimiento. Lecciones y Ensayos 89 (2011), pp. 141–179.

97 *Reca Milanta*, note 91.

98 *Daniel Auer / Max Schaub*, Mass Emigration and the Erosion of liberal Democracy, International Studies Quarterly 68 (2024).

99 NORC Global at the University of Chicago, Final Report on Democratic Backsliding and Migration Intentions in Latin America and the Caribean, norc.org/content/dam/norc-org/pdf2024/backsliding-and-migration-opinion-poll-report-1.pdf (last accessed on 27 April 2026).

and public infrastructure. As highlighted by Judge Ferrer Mac-Gregor, such remedies often have a differentiated focus designed to redress violations across multiple interconnected social and environmental rights.[100]

All these features converge in AO-32/25, particularly in the Court's articulation of "climate vulnerability", the duty of "inter-American cooperation", and the "state obligations" in the context of climate change. These duties are necessary to ensure equal opportunities, eradicate extreme poverty, promote the equitable distribution of resources, and guarantee the participation of affected communities in decisions relating to their development.

D. Normative Convergence: A Paradigm Shift in the IACtHR

AO No. 32/25 firmly situates a human rights-based approach to climate mobility. Rather than treating conceptual ambiguity as a barrier, the AO constructs a comprehensive normative framework that captures the multifaceted causes and consequences of climate change. Crucially, the Court moves beyond abstract doctrinal innovation by providing detailed guidance for implementation. It articulates specific state obligations, strengthens due diligence standards, and calls for the recognition of new legal categories addressing the protection gaps faced by climate-displaced populations, while simultaneously foregrounding the often-overlooked reality of populations unable to move despite escalating climate risks. Most significantly, the Court moves forward the recognition of structural discrimination by developing the category of "climate vulnerability". This analytical shift enables the Court to impose far-reaching state obligations, with particular emphasis on structural remedies to dismantle the underlying conditions that perpetuate vulnerability.

I. A Multicausal, Complex, and Intersectional Approach to Climate Migration

The Court has taken a decisive step in adopting a "multi-causal", "complex" and "intersectional" approach to the climate–migration phenomenon. The comprehensive approach, based on Article 22 ACHR, includes all forms of movement that can result from climate "disasters" or "climate change impacts"[101] coupled with pre-existing situations of vulnerability and displacement factors (such as conflict, violence, poverty, food insecurity, or inequalities).[102] The impacts of climate change can also affect populations already in situations of forced displacement, "exacerbating the risks they face and driving additional displacement, as well as prolonged and continuous displacement".[103]

100 Separate Opinion Judge Ferrer Mac Gregor Poisot, IACtHR Case of The Indigenous Communities of the Lhlaka Honhat Association vs. Argentina, para. 4.

101 IACtHR, Advisory Opinon 32/2025 of 29 May 2025, paras. 416-417.

102 *Clérico et al.*, note 8.

103 According to the UNHCR, by the end of 2023, nearly three-quarters of forcibly displaced people were living in countries with high or extreme exposure to climate-related risks,703 thereby increasing their vulnerability (IACtHR, Advisory Opinon 32/2025 of 29 May 2025, para. 418.

The court also considers the time factor, distinguishing between sudden-onset events (such as droughts, floods, landslides, and fires) and slow-onset environmental degradation (such as desertification, coastal erosion, and potential submersion of low-lying island states).[104] The IACtHR's solutions reflect this analytical sophistication, recognizing that increased disaster risks may necessitate planned resettlement from high-risk areas and acknowledging both the "preventive" and "reactive"[105] dimensions of climate mobility responses.

Furthermore, drawing on the Inter-American Commission on Human Rights Resolution No. 2/24 on "Human Mobility Induced by Climate Change" AO 32/2025 addresses "immobility", an important category often overlooked in most legal and policy frameworks, as we mentioned above. This concept includes individuals or communities living in areas affected by or at risk of climate events who are unable to move, whether "involuntarily" because they cannot adapt or migrate, or "voluntarily" for cultural, traditional, economic, or social reasons, among others.[106]

II. Climate Vulnerability as an Emerging Normative Category

The IACtHR approach to climate vulnerability is multidimensional and dynamic. This approach is superior to reductionist ones that focus exclusively on the economic dimension. Thus, it implies considering multiple factors, such as "access to rights, the quality of environmental governance, and community resilience", and the lack of access to essential services for a dignified life. In addition, it must be interpreted considering variations in each state's circumstances and population (para. 595). Finally, the approach must remain open and be porous to understanding new vulnerabilities.

AO 32/2025 adopts a "multidimensional" approach grounded in the premise that the climate emergency exacerbates inequality[107]. This approach emerges explicitly from the principles of international human rights protection[108], fundamental principles and obligations in the context of the climate emergency[109], and "the best available science" in "dialogue with different knowledges: scientific, traditional, local, and indigenous".

104 *Riemer et al.,* note 7.

105 Ibid.

106 IACtHR, Advisory Opinon 32/2025, para. 419.

107 *Clérico et al.*, note 98.

108 Such as the Pro persona principle, the best interests of the child, the principle of progressivity, and the prohibition of discrimination.

109 Including the pro natura principle, precautionary, prevention, and polluter pays principles, intra- and intergenerational equity, "enhanced" due diligence, the progressive development of ESCR, common but differentiated responsibilities, the obligation to cooperate, and the prohibition of transboundary harm.

Against this backdrop, a multidimensional approach to "climate vulnerability"[110] is shaped by diverse factors, including institutional structures, adaptive capacities, and pre-existing conditions of discrimination or exclusion.[111] Accordingly, AO 32/2025 distinguishes between "high" and "low" vulnerability.[112] High vulnerability is driven by "intersectional socio-economic development patterns, unsustainable use of ocean and land, marginalization, historical and current-day patterns of inequality, and governance deficit".[113] Drawing in case *La Oroya* (2024), the Court also set an overall landscape of the specific vulnerability faced by certain territories: "States in Latin America and the Caribbean are particularly vulnerable, not only because of their geographical position, but also because of their direct dependence on natural resources […] particularly those residing in the Amazon region and in the Caribbean Island States".[114]

Notably, we emphasize two key aspects of climate vulnerability. First, that various territorial and sectoral inequalities influence the diagnosis of the climate emergency. Second, that populations already experiencing structural and intersectional inequality are more vulnerable to the risks and damage associated with the climate emergency.[115] Said vulnerability is reinforced by their rural origin and, in general, it especially affects women and children.[116] In this sense, AO 31/2025 on the Right to Care also acknowledges how the climate crisis—by limiting access to clean air, safe water, and sanitation—disproportionately increases the care burden on women and girls.

Vulnerability must also be understood as a "dynamic and contextual condition".[117] Thus, the Court warns that not all groups especially affected by climate change correspond to "traditionally protected categories within Inter-American jurisprudence".[118] Instead, "new" vulnerability patterns—such as young people in a situation of unemployment—emerge to guarantee the effectiveness of human rights in the context of the climate emergency. Accordingly, States have a "duty to identify groups that, although not traditionally recognized as protected categories, face situations of disadvantage".[119] This obligation entails adopting specific, reasonable, and differentiated measures, including the rights to a

110 IACtHR, Advisory Opinon 32/2025 of 29 May 2025, para. 62.

111 Ibid.

112 Ibid., para. 101.

113 Ibid.

114 Ibid, para. 118.

115 Ibid.

116 Ibid., para. 420.

117 Ibid., para. 98.

118 Including people in a situation of multidimensional poverty, children and adolescents, elderly and disabled people, women and LGBTTIQ+ people, indigenous, tribal, Afro-descendant communities, people who suffer differentiated effects in the context of climate disasters, defenders of the environment and a healthy climate, people in mobility induced by the climate emergency (Ibid., para. 628)

119 Ibid., para. 629.

healthy environment, life, personal integrity and health, private and family life, property and housing, freedom of residence and movement, access to water and food, work and social security, culture, and education.

III. Inter-American Cooperation and Solidarity as Key

To enable the clear delimitation of specific States´ duties to face the climate emergency and to demand "its fulfillment autonomously with respect to other duties related to environmental protection"[120], the Court acknowledges "substantive"[121] and "procedural"[122] obligations. Importantly, this normative framework extends beyond State conduct to incorporate the role of private and corporate actors[123]. Accordingly, AO-32/25 reinforces States' obligations to "regulate, supervise, and monitor" corporate behavior through robust environmental and human rights due diligence frameworks.[124]

During the public hearings, the written observations submitted by the "European Professors" support the Court's reasoning on the scope and importance of shared responsibility and regional cooperation, taking a collective approach to migration flows based on a "good neighbor"[125] principle. In this line, the Court acknowledges for the first time "Inter-American cooperation" as a duty "grounded in democratic principles" to ensure "equal opportunities, eradicate extreme poverty, promote equitable income distribution, and guarantee full participation of communities in decisions relating to their development".[126] This approach highlights the need for coordinated regional responses to climate-related mobility, including strengthened bilateral mechanisms, humanitarian assistance, and the protection of migrants throughout transit and destination processes.[127]

Building on this cooperative framework, states must ensure the safe, orderly, and regular management of migration flows.[128] In doing so, the Court addresses a regulatory gap within traditional human rights frameworks by clarifying that states must protect individuals during displacement, prevent risks along migration routes, combat trafficking,

120 Ibid., para. 300.

121 Substantive rights include the protection of nature rights to life; personal integrity and health; privacy and family life; property; freedom of residence and movement; access to water and food; access to work and social security; as well as access to culture and education.

122 Procedural rights upheld by the opinion comprise the rights to science, access to information, political participation, access to justice, and the right to defend the environment.

123 IACtHR, Advisory Opinon 32/2025, paras. 348-349.

124 Including adopting a "national adaptation plan", developing the required infrastructure works to prevent natural disasters, developing climate policies related to human mobility produced by climate disasters or by the progressive degradation of the environment, and taking measures for the protection, conservation, and revaluation of natural and cultural heritage.

125 Ibid., para. 431.

126 Ibid., para. 248.

127 Ibid., para. 432.

128 Ibid.

establish temporary shelters or relocation mechanisms, and train officials responsible for assisting displaced populations.[129]

IACtHR becomes the first human rights tribunal to explicitly order member states to establish effective legal and administrative mechanisms for cross-border displaced persons.[130] Recognizing the temporal dimensions of climate displacement, the framework encompasses short-term relief measures, such as "humanitarian visas" or "temporary stays" in the aftermath of sudden-onset events. It highlights the need for longer-term protection mechanisms, such as refugee status.

The Court further emphasizes the duty to adopt preventive measures, requiring states to exercise enhanced due diligence to avoid forced displacement resulting from climate-related disasters and environmental degradation.[131] Protecting a broad range of rights—including life, personal integrity, health, housing, water, food, culture, and education—is considered essential to prevent forced mobility linked to climate impacts.[132]

E. Conclusions

Advisory Opinion AO-32/25 consolidates an emerging bridge between migration and environmental protection within the IAHRS. A defining feature of this jurisprudential development is the Court's consistent use of participatory processes as a strategic mechanism to reinforce both its institutional and its interpretative authority. Through the unprecedented involvement of states, civil society, academic institutions, international organizations, and individuals, the advisory proceedings evolved into a deliberative forum in which the Inter-American Court—together with amici curiae—plays a key role in shaping innovative conventional standards to confront one of the defining challenges of our time. This proactive and forward-looking approach is particularly significant given the persistent gaps in the international legal framework governing climate-related displacement.

At the same time, important questions remain unresolved. The expansion of participatory mechanisms prompts critical reflection on whether such processes genuinely democratize the Court's reasoning or whether certain institutional actors—such as international organizations or influential academic networks—exercise disproportionate epistemic authority. More broadly, the Court's transformative approach raises questions about its competence and legitimacy. In the specific field of climate migration, some scholars have also suggested that, despite its ambitious framing, AO-32/25 may fall short of fully addressing the scope

129 Ibid., paras. 428, 431, 432.

130 Ibid., para. 433.

131 Ibid., para. 422.

132 Ibid., paras. 392-457.

and operationalization of the right to seek and receive asylum under Article 22(7), as well as the precise contours of the principle of non-refoulement in climate-related contexts[133].

However, there is no doubt that AO-32/25 represents a turning point in the IAHRS: one in which climate-induced mobility is increasingly understood through a transformative, multidimensional, and cooperative approach to human rights.

133 *Riemer et al.*, note 8; *Felipe Navarro*, How the Inter-American Court Could Advance Protection for Climate-Displaced Individuals, Just Security Blog, 12 June 2026, https://www.justsecurity.org/96690/inter-american-court-climate-displacement/ (last accessed on 26 April 2026).

Between Sinking Ships and Collective Wins: Human Mobility Standards from the Inter-American System of Human Rights in Argentinean and Mexican Domestic Adjudication

By *Lila García* *

Abstract: In recent years, Latin America has witnessed two interrelated trends. The Inter-American System of Human Rights has been developing standards relating to the rights of migrants and refugees since its Advisory Opinion (AO) 18/03, and the rights of foreigners since AO 16/99. Meanwhile, domestic legal frameworks within the region have adopted a new approach to human mobility based on human rights. Argentina was the first country to issue a national law (No. 25,871/2004), which, alongside the Refugees Law (No. 25,615/2006), enshrines the right to migrate. Other Latin American countries have followed suit, albeit with different emphases: Uruguay, Ecuador and Bolivia, and Mexico, Brazil and Costa Rica. Against this backdrop, my contribution aims to examine how domestic courts have incorporated Inter-American human rights sources in their rulings, focusing on the decisions of the highest courts in Argentina and Mexico. Both countries have a long-standing relationship with the Inter-American Human Rights system, particularly with regard to the rights of migrants and refugees, and both have constitutional clauses regarding the rights of foreigners (Argentina) and the more recent right to seek and receive asylum (Mexico). Nevertheless, both countries have undergone political changes in recent years that have had a specific impact on regulations governing the movement of people. To this end, this piece systematically reconstructs the universe of cases and outlines four categories based on the granting of protection and the use of standards: "A Collective Win", "A Singular Victory", "Planting for the Future?" and "The Sinking Ship". It then scores the use of Inter-American human rights sources using a point system.

Keywords: Human Mobility; Human Rights; Migration; Courts; Latin America

***

* Adjunct Professor (tenure-track) at the Department of International Politics, National University of Mar del Plata. Associate Researcher (tenured) at the National Council for Scientific and Technical Research (CONICET) (Argentina). Email: lgarcia@mdp.edu.ar; ORCID https://orcid.org/0000-0002-4666-9717.

A. Introduction

This contribution aims to analyze the use of Inter-American sources in human rights in migration and asylum cases decided by the two highest courts within Latin America (Argentina and Mexico) and their relation to the protection granted in the give case. In trying to grasp the connection between human rights and the solution achieved, the underlying idea is that a more robust *use* of (Inter-American, in this case) human rights sources, might guarantee that protection will be granted to the person or persons involved. Thus, after systematizing the universe of legal decisions on migration, asylum and refugees' topics in both courts, this work asks: how many judgments on migrants, refugees and asylum seekers do include inter-American human rights sources? Then, how "intense" is its use? Finally, does the use of Inter-American human rights sources guarantee a protective response for the individuals and/or their rights? Conversely, is there a link between denials and a lack of human rights references? In order to understand the relationship between the protection granted and the use of human rights sources, the study proposes four categories: the "Collective Win", the "Singular Victory", "Planting for the Future?", and "The Sinking Ship". Provided that the "main challenge [in human rights of migrants] remains in its implementation at the domestic level"[1], this contribution also seeks to shed light on how the judiciary decides on migration and asylum cases, particularly within the Latin American context, which has placed a strong emphasis on its commitment to human rights with regard to human mobility.

This article is divided into three main sections. Firstly, it provides an overview of the 'humanistic shift' that occurred in migration legislation in the region around 2004. In particular, it explains the situation in the jurisdictions chosen for this initial exploration: Argentina and Mexico and their respective supreme courts. The next section then goes on to provide a more detailed explanation of the methodology used to understand and score the "intensity" of the use of Inter-American sources, as well as the relationship between the use of human rights and the outcome of the legal case. The final section presents the main results and discusses why the use of regional human rights documents varies so much between courts, and why there is also no clear relationship between that use and the protection provided.

Over the last 20 years, Latin American legal frameworks have turned towards a new understanding of human mobility from a human rights perspective. This shift has taken place at several levels, ranging from the Inter-American System of Human Rights to domestic legislation, and including integration schemes and consultative migration processes.[2] In this respect, Latin American countries involved in this "humanization" trend can be organised into two main groups: (i) Those that have incorporated the "human right to

1 *Vincent Chetail*, International Migration Law, Oxford 2004, p. 254.

2 *Lila García*, Migraciones, Estado y una política del derecho humano a migrar: ¿hacia una nueva era en América Latina?, Colombia Internacional 88 (2016).

migrate", "to migration" or "the right to human mobility": Argentina in 2004,[3] Ecuador in its 2008 National Constitution[4] and then in its law in 2017,[5] Uruguay in 2008,[6] Bolivia in 2013;[7] and (ii) countries that have incorporated a human rights-based perspective to varying degrees: Costa Rica in 2010,[8] Mexico in 2011 ("Migration Law"), Brazil in 2017 (Ley 13,445).[9] The distinction matters to assess the weight of a human rights-based plan for mobile lives: in countries that recognise the "human right to migrate", the alpha and omega of migration policies would now be the individual, and such mobility would be guaranteed by human rights—the strongest tool for anchoring entitlements in a framework that does not depend exclusively on national laws. In the other countries, the role of human rights would be less defining, with different levels of intensity depending on the particular right involved. Interestingly, Ecuador (group A), Brazil, and Mexico (group B) have included the right to asylum in their national constitutions,[10] and important human rights-based changes to refugee and asylum laws, incorporating both international refugee standards and regional

3 "The right to migration is essential and inalienable to the individual, and the Argentine Republic guarantees it on the basis of the principles of equality and universality." Law 25,871, art. 4.

4 "Persons are entitled to the right to migrate. No human being shall be identified or considered illegal on the basis of their immigration status." Ecuador, National Constitution, art. 40.

5 The Organic Law on Human Mobility of Ecuador (passed in 2017, with amendments in 2023 and 2025) relies on several principles. The principle of "universal citizenship", for instance, implies "recognition of the right of human beings to move freely throughout the planet. It implies the portability of their human rights regardless of their immigration status, nationality, and place of origin, which will lead to the gradual end of foreigner status".

6 "The Uruguayan State recognizes as an inalienable right of migrants and their families, regardless of their immigration status, the right to migration, the right to family reunification, due process and access to justice, as well as equal rights with nationals (...)". Uruguay, Law 18,250, art. 1.

7 "The State guarantees foreign migrants the exercise and enjoyment of the following rights: 1. To migration based on the principles of equality, universality, and reciprocity". Bolivia, Law 370, art. 12.

8 "This Law regulates the entry, stay, and departure of foreign nationals in the territory of the Republic, based on the provisions of the Constitution, international treaties and agreements duly signed, ratified, and in force in Costa Rica, with special reference to international instruments on human rights" (Article 1). Likewise, it will seek to promote (...) 2) Respect for the human rights and constitutional guarantees of all foreigners who enter and remain in the country. Costa Rica, Law 8764.

9 Brazilian migration policy is governed by the following principles and guidelines: I - universality, indivisibility, and interdependence of human rights; II - rejection and prevention of xenophobia, racism, and all forms of discrimination; III - non-criminalization of migration; IV - non-discrimination based on the criteria or procedures by which a person was admitted into the national territory; V - promotion of regular entry and document regularization; VI - humanitarian reception (...) VIII - guarantee of the right to family reunification; etc. Brazil, Law 13,445, art. 3.

10 *Natalia Caicedo Camacho / Luisa Freier*, Voluntary and Forced Migration in Latin America: Law and Policy Reforms, Montreal 2022.

humanitarian traditions on asylum, have also taken place in this period (e.g. Argentina by Law 26,165).[11]

Precisely, the most important feature of this shift, which has been criticised as merely a "human face",[12] is the role of law. Whether by explicitly recognising "migration" or "mobility" as a "human" rights (group A), by including several rights anchored in a human rights framework (group B), or by referring to "human rights" principles (both groups), law plays a key role. Both groups made these recognitions through national legislation approved by their democratically elected parliaments, one of the most powerful democratic tools for organising social life and structuring human mobility in a Latin American context strongly marked by migration laws mostly inherited from dictatorships[13]. For many of these countries, these "new" laws were crucial in overcoming the long-standing tradition of managing migration through decrees and other rapidly changing norms. It is also worth noting that these laws were achieved through strong advocacy by civil society organisations.

In short, the Latin American experience emphasises migrants' rights and promotes universal human mobility. Furthermore, it encompasses the no criminalisation of irregular migration, regularisation and equal rights. In summary, "free residence and equal rights form the two pillars of the South American mobility regime".[14] Some authors have a sort of faith that Latin American countries, which are mostly affected by immigration, can pave the way for better international protection of people on the move.[15]

In addition to the legal aspect, this leap of faith could also be driven by the implications of treating migration as a human right. Some authors have particularly emphasised the profound change that would result from recognising migration as a human right. Regarding the Argentinian experience, it has been argued that this is a 'major step forward for the rights of immigrants' throughout the world,[16] and that it implies that the sovereignty of the state and its discretionary criteria for admitting, excluding and expelling foreign nationals are no longer the starting point or the pivot.[17] Against this backdrop, one case from each group

11 *Leonardo Franco* (ed.), El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo "asilo-refugio" a la luz del Derecho Internacional de los Derechos Humanos, Buenos Aires 2004.

12 *Eduardo Domenech,* Las migraciones son como el agua. Hacia la instauración de políticas de « control con rostro humano »: La gobernabilidad migratoria en la Argentina, Polis Revista Latinoamericana 35 (2013).

13 *Pablo Ceriani,* Luces y sobras en la legislación migratoria latinoamericana, Nueva Sociedad 233 (2011).

14 *Leiza Brumat / Victoria Finn,* Mobility and Citizenship during Pandemics: The multilevel political responses in South America, Partecipazione e Conflitto 14 (2021), pp. 321-340.

15 *Marie-Bénédicte Dembour*, When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint, Oxford 2015.

16 *Barbara Hines*, The Right to Migrate as a Human Right: The Current Argentine Immigration Law, Cornell International Law Journal 43 (2010), p. 472.

17 *Pablo Ceriani*, Nueva ley: un paso hacia una concepción distinta de la migración, in: Ruben Giustanini (ed.), Migración: un derecho humano, Buenos Aires 2004. See also *Eduardo Vior /*

will be selected for analysis, exploring how human rights play out in different contexts. Argentina from group A and Mexico from group B. The idea is to analyse a country where a higher level of protection and use of human rights sources may be expected, since human rights play a more defining role (group A), compared to a country where expectations may not be that high, with decisions made on a case-by-case or right-by-right basis (group B). We can assume that Argentina, a country based on the right to migrate, will make better or more intensive use of Inter-American sources than Mexico, a country that relies solely on a human rights perspective. A second assumption that can be made is that there is a correlation between the robust use of human rights sources and the protection granted; the use of these sources may help achieve protection. In both cases, human rights also played a significant role in their respective "shifts": in Argentina, the law inherited from the last dictatorship changed as part of an amicable settlement within the Inter-American Commission on Human Rights (IACHR), while in Mexico, the 2011 constitutional reform that enshrined human rights in the constitution rapidly led to the adoption of a migration law based on "unrestricted respect for the human rights of migrants" and "consistency on the part of the Mexican state in guaranteeing the rights it claims for its nationals abroad".[18]

Last but not least, both countries have recently experienced significant changes in policies relating to human mobility. Both the Argentinean Migration and Refugee laws were modified in 2025 by presidential decrees No. 366/2025 and 646/2025 under President Javier Milei. These reforms, enacted through decrees of "urgency and necessity", were deemed unconstitutional, regressive and discriminatory.[19] In addition, the "Migration Commission" within the Public Defence Office was officially dismantled in 2025; all the personnel was transferred to continue working before administrative federal courts in general topics. The real impact on the migrants' access to justice is still unknown. For its part, Mexico faces direct challenges as a result of the draconian policies implemented by the Trump administration, against the backdrop of a far-reaching and controversial overhaul of its judicial system.

Alicia Bonilla, El derecho humano a la migración y las ciudadanías interculturales emergentes: el caso de la minoría de origen boliviano en la Ciudad de Buenos Aires. Paper presented in the X Congreso de Antropología Social, Posadas 2008.

18 *Luisa Gabriela Morales Vega*, Categorías migratorias en México: Análisis a la Ley de Migración. Anu. Mex. Der. Inter, Ciudad de México 12 (2012), pp. 929-958. See also *Claudia Perales Galarza*, Ley de Migración: Reforma a Cuentagotas, Boletín Mexicano de Derecho Comparado 137 (2013), pp. 749-767.

19 *Olivia Bueno / Charlotte Muller,* Trump 2.0? Argentina adopts anti-immigration policies mirroring US models, Mixed Migration Centre Newsletter, 13 August 2025, https://mixedmigration.org/articles/argentina-adopts-anti-immigration-policies-mirroring-us-models/, (last accessed on 3 April 2026).

B. Argentina and Mexico: Position, Legal Framework and Judicial Organization

Providing a common perspective on both countries, or even a non-comparative one, is not simple; in that sense, this contribution is not intended to make direct comparisons between them. In terms of human mobility, Argentina is primarily a receiving country located in South America, whereas Mexico is a living laboratory situated next to the US. It is a receiving, transit and emigration country and is often referred to as a "vertical border"[20] or "buffer zone"[21] to illustrate one of the largest processes of externalisation in the world. Pressures and unilateral actions from the US have a direct impact on human mobility in and through Mexico. The creation and deployment of a security force (the National Guard) for migration control operations in Mexico was a response to these pressures. This force coexists with unilateral policies that directly impact Mexican territory, such as the implementation of the Migrant Protection Protocols (MPP), also known as the 'Remain in Mexico' policy, which has forced thousands of asylum seekers to wait in dangerous Mexican border cities for their US court hearings.[22] This relationship with the US might suggest that political pressure would prevent the development of a better application. Argentina in the Southern cone may be considered irrelevant in this respect, so for the purposes of this contribution, more progressive achievements may be expected from the latter country.

Both countries are members of the Organisation of American States, meaning the jurisdiction of the Inter-American Court of Human Rights (IACtHR) extends to them. They are also both parties to the Inter-American Convention on Human Rights (IACHR): although they both became members in the 1980s, the constitutional treatment they provided to the convention took place several years apart. While Argentina incorporated many human rights documents (including the IACHR and the American Declaration on the Rights and Duties of Man) into its constitutional hierarchy during its 1994 constitutional reform, Mexico only prioritised human rights in its 2011 reform.

Despite these differences, both countries have played a significant role in establishing standards for human mobility. There are four advisory opinions from the Inter-American Court of Human Rights on human mobility. Two of these were requested by Mexico: AO-16/99, which concerns consular protection[23] and AO-18/03, which concerns the rights

20 The concept of "vertical border" has not a single author, but for instance: *María Eugenia Anguiano / Alma Trejo Peña*, Políticas de seguridad fronteriza y nuevas rutas de movilidad de migrantes mexicanos y guatemaltecos, LiminaR 5 (2007).

21 *María Eugenia Varela*, México. De Frontera Vertical a País Tapón. Migrantes, deportados, retornados, desplazados internos y solicitantes de asilo en México. Iberoforum. Revista de Ciencias Sociales de la Universidad Iberoamericana 27 (2019), pp. 49-76.

22 *Elena Sánchez-Montijano / Roberto Zedillo Ortega*, Migration in Mexico: complexities and challenges, UNDP Latin America and the Caribbean, Policy Documents Series, New York 2022.

23 I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16.

of undocumented migrants.[24] Argentina (alongside Brazil, Uruguay and Paraguay, as MERCOSUR states) requested the AO-21/14 on the rights of children and adolescents on the move.[25]

Neither Mexico nor Argentina have been subject to any judgements by the Inter-American Court of Human Rights regarding migration or asylum issues; Argentina was brought before the court on a case relating to nationality granted to a foreign person but was found not to be responsible. Therefore, their judiciaries will not be enforcing any supranational rulings that directly involve them. However, it was a case brought before the Inter-American system (the "De La Torre" case) and settled within the IACtHR that triggered Argentina's 2004 immigration reform. On the other hand, it is hardly surprising that Mexico has received more attention from reports and recommendations. One of the most recent reports issued by the Inter-American Commission on Human Rights (IAComHR) is the "Subregional Report on Human Mobility and the Obligation to Protect". This report, launched in 2023, deals with mobility from Central America to the US through Mexico.[26] Previously, in 2013, the same body had issued "Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico".[27] In 2017, the IAComHR organised a thematic hearing on asylum seekers and refugees from Central America. Soon after, provisional measures were requested to protect those involved in the Migrant Caravan. There have also been thematic hearings requested by civil society about changes to the law by decree in Argentina.

At a more domestic level, the Argentinean Constitution has granted rights to foreigners since its first version in 1853–60. There is also still an anachronistic clause about promoting "European" migration. Following the liberal roots that inspired the 1853/60 Argentinean Constitution, we find that, at the level of this fundamental rule, (i) every "inhabitant", regardless of their status, enjoys basic rights, including those relating to private property and criminal guarantees; and (ii) specific rights for "foreigners" are provided.[28] In 2011, the Mexican National Constitution included clauses relating to the rights of foreigners. They shall enjoy all constitutional rights and guarantees (arts. 1 and 33)., and the right to seek

24 I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

25 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21.

26 Inter-American Commission on Human Rights, Movilidad humana y obligaciones de Protección. Hacia una Perspectiva SubRegional. Washington DC, 2023. Similar reports on the rights of migrants (families and children) in US and on internal displacement in Center American had been previously issued in 2015 and 2019, respectively.

27 Inter-American Commission on Human Rights, Derechos humanos de los migrantes y otras personas en el contexto de la movilidad humana en México, Washington DC 2013.

28 *Lucila Nejamkis / Lila García,* Migration Legislation and Policy in Argentina, in: Natalia Caicedo Camacho / Feline Freier (eds.), Voluntary and Forced Migration in Latin America: Law and Policy Reforms, Montreal 2022.

asylum was also incorporated. The constitutional reform of 2016 further strengthened this right by including the right to receive asylum.[29]

Their respective migration and asylum laws complete the legal framework. Argentina's Law on Migration Policy No. 25,871, passed in 2004, replaced a decree from the last military dictatorship in Argentina (1981), which was openly criminalising. This decree was known as the "Ley Videla". The law underwent major amendments in 2017 through the national decree 70/2017, which was revoked in March 2021. So, the law in its original wording was in force during the period covered by this article. However, the right to migrate has never been modified, either due to a strong commitment or a sense of futility. It is still stated as follows: "The right to migration [derecho a la migración] is essential and inalienable of the person and the Argentina Republic guarantees it on the principles of equality and universality" (article 4, Law 25,871). At the same time, the right is framed by human rights principles settled in the law itself and in constitutional clauses (Article 75.22), which connect the domestic legal framework to international human rights agreements.

Meanwhile, the Mexican "General Law on Population", enacted in 1974 and amended in 1990, 1996 and 2008, was replaced by a Migration Law and a Refugee Law in 2011. Both laws were based on strong human rights principles, but neither recognised the right to migrate. Figures relating to asylum were incorporated in 1996, while a clause regarding non-criminalisation appeared in 2008.[30] In short, the 2011 Migration Law starts with its aim: "to regulate matters relating to the entry and exit of Mexican nationals and foreigners into and from the territory of the United States, Mexican States and the transit and stay of foreigners therein, within a framework of respect, protection, and safeguarding of human rights, contribution to national development, and preservation of national sovereignty and security" (art. 1). A similar wording would be enunciated within the principles "international mobility facilitation, safeguarding order and security" (art. 2).

This tension between rights, national sovereignty and security is reflected in the migration policies of all Mexican presidents,[31] but it is also present, albeit less noticeably, in Argentinian legislation. Law 25,871 of Argentina establishes, among its aims, "to establish

29 "Every person has the right to enter the Republic, leave it, travel within its territory, and change residence, without the need for a security letter, passport, safe-conduct, or other similar requirements. The exercise of this right shall be subject to the powers of the judicial authority in cases of criminal or civil liability, and to those of the administrative authority in relation to the limitations imposed by the laws on emigration, immigration, and general health of the Republic, or on harmful foreigners residing in the country. Everyone has the right to seek and receive asylum. The recognition of refugee status and the granting of political asylum shall be carried out in accordance with international treaties. The law shall regulate its origins and exceptions" (Mexico, National Constitution, art. 11).

30 *Rodolfo Casillas R.,* Notas para entender la migración: instituciones gubernamentales y política migratoria mexicanas en los albores del siglo XXI, Migración y desarrollo Zacatecas 24 (2015), pp. 47-80.

31 *Valentina Rabasa Jofre,* ¿De una nación fuerte a una nación segura? Recuento de la legislación y la política migratoria en México, Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional 50 (2024), pp. 283-305.

fundamental principles" in order to fulfil international human rights obligations (Article 3.a), "to guarantee the right to family reunification" (Article 3.d), to ensure non-discriminatory admission procedures (Article 3.f), to promote, "bearing in mind the Argentinean humanitarian tradition", the rights, duties and guarantees of migration pursuant to international commitments (Article 3.g), and to promote integration. However, it does not provide for an open border policy. The recitals also include the aim of "promoting international order and justice by denying entry to and/or residence in Argentine territory to persons involved in acts that are criminally punishable under our legislation". Similarly, Mexico includes a more detailed list of principles, including an integral approach, shared responsibilities, hospitality and international solidarity, social and cultural integration, "equity" between nationals and foreigners, and family reunification and the best interests of the child.

Many of these principles have counterparts in rights. Relevant provisions in Argentina include the right to family reunification, the right to free legal aid and several others concerning the state's duties, such as taking measures to ensure that everyone has regular status. Regarding migration-based categories, Argentina grants all MERCOSUR nationals the right to reside in the country regardless of whether they have a work, study or family visa. In Mexico, family reunification is guaranteed to all regular migrants (Article 10), while the right to a translator or interpreter and to seek and receive justice is enshrined in law, regardless of migration status.

Then, the Argentinean Refugee Law, enacted in 2006, was amended by National Decrees 942/2024 and 819/2024 in 2024.[32] On the other hand, Mexico's 2011 "Law on Refugees, Complementary Protection, and Political Asylum", similar to Argentina's law, incorporates the definitions of the 1951 Refugee Convention and the 1984 Cartagena Declaration, which expand the scope of protection. These legal frameworks include crucial principles such as non-refoulement. While international asylum and refugee instruments are not the focus of this research, it is worth noting that Mexico ratified the 1951 Refugee Convention in 2000, whereas Argentina has done so in 1961.

Regarding their judicial branches, the Argentinian legal system has stated since 2004 that the Judiciary can review all migration control issues, whereas in Mexico this is still exceptional and is mostly done through an expedited remedy ("amparo"), which requires a violation that gives rise to an amparo action directly before the constitutional courts. Alternatively, another legal remedy requires a nullity action that begins in the federal administrative courts—which are not part of the judiciary.[33] This is a key point for the

32 In spite of these modifications, provided the scope of this research reaches supreme court's rulings is until December 2024, these major amendments have not a direct impact on the judgments; beyond the political atmosphere that these Executive decisions create, we will see how modifications are articulated in the ongoing cases before the Argentinean Supreme Court (and within the Judiciary in general) in the next years.

33 *Mauro Pérez Bravo,* La protección de los derechos de las personas migrantes en el juicio contencioso administrativo, Revista del Instituto de Ciencias Jurídicas de Puebla 47 (2021), pp.

scope of this research, which covers the period from 2004 to 2024 —the year in which the "new" Argentine immigration law came into effect —and reviews a period of twenty years up to December 2024. All administrative decisions regarding migration control can be revised by the federal judiciary (part of the judicial branch) in Argentina through a two-tier legal remedy (first instance, then a chamber of appeals, and on an extraordinary basis it can reach the Supreme Court). In addition, asylum denials can also be revised by both instances and an extraordinary appeal can be made to the highest court. In Mexico, most legal actions were "amparos" and thus exceptional. This was also the situation in Argentina before 2004, when the legal framework expressly included the judiciary as a key actor in the cycle of migration policies. This helps to explain the significant difference in the number of appeals reaching the respective highest tribunals.

Another significant difference lies in the availability of free legal assistance, officially available since 2010. These offices provide free legal aid and representation in administrative and judicial proceedings, which is particularly important in a legal system where submitting a legal claim requires representation. In Argentina, almost all appeals brought to the Supreme Court were submitted by public attorneys. In Mexico, legal representation is also mandatory in order to challenge a decision, but until 2019 it relied on the limited human resources offered by NGOs. It was only in 2019, as a result of a Mexican Supreme Court ruling, that a general agreement was signed with the UNCHR to organise a public defence service in Mexico. However, reports by some NGOs indicate that the denial of legal access is widespread: 92% of detained asylum seekers interviewed reported that they were never offered legal representation during their time in migratory detention. The remaining 8% who did access legal counsel did so mainly through the intervention and assistance of CSOs or ACNUR partners.[34]

C. Towards a Judicial-Based Assessment of the Latin-American "Humanistic Shift" in Human Mobility

In recent years, greater attention has been paid to how human rights standards are incorporated into countries' judicial systems. In 2004, the Inter-American Court of Human Rights began to debate the effect of its judgments on cases and states beyond those directly involved.[35] On the one hand, there is an "indisputable" basis pursuant to which "decisions of the IACtHR are binding on the involved state", and on the other, they imply interpreta-

133-155. *Elisa Ortega Velázquez*, El asilo como derecho en disputa en México. La raza y la clase como dispositivos de exclusión, Mexico City 2022.

34 Asylum Access Mexico, Informe Alternativas a la Detención, Mexico City 2019.

35 *Liliana Galdámez Zelada*, El valor asignado por la jurisprudencia del Tribunal Constitucional a la jurisprudencia de la Corte Interamericana de Derechos Humanos, Estudios Constitucionales 12 (2014), pp. 329-364.

tive obligations or an "interpretative international res judicata" for all other states,[36] not to mention their erga omnes effects. Thus, key literature has focused on justifying how —and even if— they are binding for these "other" states, particularly the judiciary,[37] including a test to determine whether any given authority has breached the Inter-American Convention on Human Rights and consequently incurred international responsibility.[38]

The methodology and scope of the studies vary. The most common approach is to begin by reconstructing human rights standards or identifying key sources, before assessing their application in the domestic sphere. I adopted this approach in my doctoral thesis on the Argentinian judiciary.[39] In her article about 10-year jurisprudence in Chilean courts regarding the expulsion of foreigners, Díaz Tolosa,[40] also begins by reconstructing the applicable international standards, before legally analysing whether these standards were met by the Chilean rulings. Other authors have conducted similar analyses for Mexico[41] or for a broader regional assessment.[42] However, this type of analysis has limitations. Firstly, it requires the reconstruction of the relevant standards for the subsequent enforcement "test". Consequently, only the standards that have been properly reconstructed will eventually be found in the rulings, which speaks more highly of the enforcement of the Inter-American guidelines than of the domestic courts themselves. Furthermore, many reconstructions are incomplete and do not cover all emerging standards.[43]

36 *Victor Bazán*, Vinculatoriedad de los estándares interpretativos de la Corte Interamericana de Derechos Humanos en los órdenes internos, control de convencionalidad y diálogo jurisprudencial, Anuario de Derecho Constitucional Latinoamericano, Bogotá / Berlin, 2014.

37 *Humberto Nogueira Alcalá,* Diálogo Interjurisdiccional, control de convencionalidad y jurisprudencia del tribunal constitutional en período 2006-2011, Estudios Constitutionales 10 (2013), pp. 57-140.

38 This work will not focus on the "control of conventionality/conventionality", since I understand is only one of the manners of "receipting", or "use", incorporating or dealing with inter-American standards.

39 *Lila García,* Nueva Política Migratoria Argentina y Derechos de la Movilidad. Implementacion y Desafíos de una política en derechos humanos a través de las acciones antes las cortes federales (2004-2010) [In English: New Argentinean Migration Policy and mobility rights. Enforcement and challenges of a human rights policy though legal actions before federal courts (2004-2010)], PhD Thesis, University of Buenos Aires, 2013.

40 *Regina Díaz Tolosa*, Aplicación de los estándares interamericanos sobre expulsión de extranjeros en el sistema jurídico chileno, Estudios Constitucionales 18 (2020), pp. 309-352.

41 *Natalia Beltrán Orjuela / Leydi Palacios Segura*, Estándares convencionales en procedimientos de personas migrantes, Anuario Mexicano de Derecho Internacional, XXI, 2021, pp. 867-894.

42 *Elizabeth Salmón / 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 / Flavia Piovesan / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi (eds.), The Impact of the Inter- American Human Rights System Transformations on the Ground, New York 2024.

43 See, for instance, *Salmón / Blouin,* note 42.

A different approach could begin with the domestic courts. I applied this to the Argentinian Supreme Court,[44] but the same domesticity then becomes a limiting factor: migration laws are so deeply rooted in the national context—and thus the legal disputes—that it is difficult to overcome the jurisdiction and provide a broader reading that allows a comparative perspective. Many of these studies (including my own) have opted for a case-by-case description, while other models seek to analyse the "dialogue" between courts (e.g. Inter-American and national courts),[45] the "use"[46] or "reception"[47] by domestic courts. From a European perspective, this has recently been referred to as "interaction".

These later proposals appear to represent an improvement on simply comparing and assessing international standards and on how effectively they are applied. Nogueira Alcalá[48] refers to the dialogue in terms of "interpretation". According to his proposal, it may be: (i) *Extensive*: the court/judge provides a broader interpretation of the right than that provided by the Inter-American Court. (ii) *Innovative*: in that there is no ruling from the IACtHR. The Court takes Inter-American standards into consideration and provides an unprecedented solution based on jurisprudence. (iii) *Corrective*: the court modifies its case law based on an IACtHR judgment against its own country. (iv) *Receptive*: the court decides based on the IACtHR's decisions regarding other countries, without waiting for a ruling addressed to its own country. The court applies "conventional" law. (v) *Neutraliser*: an interpretation aimed at neutralising or avoiding a binding interpretation given by the IACtHR (in this case) by creating a different 'reading' of domestic or international laws. (vi) *Discordant*: the domestic court openly disagrees with the ruling, for example by stating that it is an incorrect interpretation of conventional obligations. Other dialogue analysis also refers to judicial postures as resistance, convergence and engagement.[49]

In their research on the "use" of gender-based standards in Argentina, Ronconi et. al,[50] take a more qualitative approach, starting at the Inter-American level. They first identify the standards, then review the relevant norms, jurisprudence and policies to determine their

44 *Lila García,* Decisiones de la Corte Suprema de Justicia de la Nación (Argentina) sobre control migratorio (2004- 2018), Periplos Revista de Estudios sobre Migraciones 3 (2019). See also *Lila García,* Tres porciento. Debates jurídico-políticos en control migratorio en el máximo tribunal argentino (2019-2022), Revista Chilena de Derecho y Ciencia Política 15 (2024).

45 *Nogueira Alcalá,* note 37; *Antonio Moreira Maués / Breno Baía Magalaes / Paulo Nassar / Rafaela Sena*, Judicial Dialogue Between National Courts and the Inter-American Court of Human Rights: A comparative Study of Argentina, Brazil, Colombia and Mexico. Human Rights Law Review 21 (2021), pp. 108-131.

46 *Liliana Ronconi / Melanie Ghertner / Soledad Guzmán / Nicole Levy / Micaela Ramello,* Uso de estándares del Sistema Interamericano de Derechos Humanos en materia de género en Argentina. Ius et Praxis 29 (2023), pp. 207-231.

47 *Sandra Serrano*, La recepción de los criterios interamericanos en las cortes de Colombia y México: de las ideas a los resultados, Mexico City 2021.

48 *Nogueira Alcalá,* note 37.

49 *Moreira Maués et al*., note 45.

50 *Ronconi,* note 46.

applicability. Based on Vicki Jackson's previous work, they then test the three possible relationships between the domestic sphere and standards: (i) resistance; (ii) convergence (agreement without going beyond the guidelines defined at the inter-American level); and (iii) entanglement. The authors propose a third sub-category within "resistance"— "indifference", a form of implicit resistance consisting of the non-application of human rights standards— and three views on "convergence". Consequently, convergence may be direct, indirect or compatible. "Direct" convergence involves an explicit reference to the standards of the Inter-American system, while "indirect" convergence refers to the use of a norm or act that has itself used standards from the Inter-American human rights system (e.g. a law, a protocol, etc.). Finally, "compatible" convergence implies a "non-use" of inter-American standards since there is no explicit mention, yet the ruling can nevertheless be deemed compatible. In the case of "entanglement" (translated into Spanish as "involucramiento"), domestic laws (and therefore policies and other products) improve due to the Inter-American system: "It seeks to go further, creating better conditions for the recognition of rights at the local level through robust interpretation of international standards". More recently, Clerico and Cardinaux have proposed a device for identifying three levels of "use": nominal (merely as a reference), substantive (as part of the justification for the judgement) and as a control parameter for comparing the given standard with the normative issue to be resolved in the case.[51]

Finally, in her book, Serrano provides a systematic analysis of how the Inter-American Court's human rights guidelines have been received by two high courts: the Constitutional Court in Colombia and the Supreme Court in Mexico. The primary virtue of this approach is its comprehensiveness. The "reception" of Inter-American guidelines by high courts is a process by which they take and use these guidelines in their daily activities. This process can be measured in terms of intensity, ranging from "mention" (0 points) to "innovative interpretation" (6 points). The intermediate levels are "reference" (1 point), "legitimacy criteria" (2 points), "interpretative criteria" (3 points), "modify national criteria" (4 points) and "additional right or criteria" (5 points). This also represents an achievement in moving beyond simplified assessments, and the scoring system is easier to grasp. However, Serrano's model contains so many categories that it can make the assessment less clear and more fragmented, at least for smaller samples such as the one in this contribution. Additionally, if both courts —in her example, Colombia and Mexico— have constitutional clauses that make Inter-American standards and, more generally, decisions mandatory, the first scenario of "active resistance" or "discordance" is almost not an option. Finally, her category "modifying national criteria" overlaps with my intention to outline a correlation between the protection granted and the use of Inter-American sources. In Mexico, almost all legal actions are "amparos", which are decisions that "modify" national criteria and tend to involve protection. Protection is granted because it modifies the act or omission

51 *Nancy Cardinaux / Laura Clerico,* Los usos del Derecho Internacional de los Derechos Humanos por los Superiores Tribunales de Justicia de Provincia y de la CABA, Buenos Aires 2025.

that caused the “amparo” in the first place. On the other hand, tracing the effects of each judgment—e.g. whether it causes a modification to the legal framework—is beyond the scope of this research.[52]

In the next section, I propose four categories based on these developments to capture the relationship between the protection and use of human rights sources and the intensity of such use.

D. Methodology, Universe and Case Selection

This contribution is, firstly, a systematic approach that includes all the appeals that reached the respective supreme courts on migration, asylum and/or refugee matters. By “systematic”, I mean that it is not an analysis of selected or paradigmatic legal cases or decisions, but rather an analysis of all legal cases submitted to the respective supreme courts in Argentina and Mexico. The timeline covers the period from 2004, the year that the Argentinean law came into force, to December 2024, when the most recent decisions were made. Secondly, this is also an attempt to improve our understanding of how international human rights sources are incorporated, rather than merely assessing whether or not they are implemented. To do so, this contribution focuses on the use of Inter-American sources,[53] mostly but not exclusively on human mobility issues: the Inter-American Convention of Human Rights, the American Declaration, specific documents on migration, asylum and refugees from the Inter-American Commission of Human Rights jurisprudence.

The total universe was built by conducting searches in the relevant online databases using the keywords: “migration”, “asylum” and “refugee”. For the Mexican Supreme Court, three searches were run by year in the 'Decisions and File Data' tool, and these were then cross-checked with the “Semanario Judicial de la Federación”. For the Argentinian Supreme Court, I ran the same searches in the “All the Rulings” tool, year by year, until I covered the period from 2004 to 2024. The results (178 appeals in Mexico and 1,057 in Argentina) require thorough and precise curation. Some legal actions appeared in the results of both searches, and many issues were not directly related to the scope of this research. These included topics such as employment (e.g. legal claims against the Migration Directorate in Argentina), extraditions, fines against transportation companies (also in Argentina) and criminal files for human trafficking (Mexico). Finally, debates on competence or jurisdiction were excluded, as were abandoned appeals. After this process, four clear categories of cases relating to migration and asylum (in the strict sense) emerged: firstly, dismissed (on formal grounds) cases[54] and admitted cases. By focusing on the latest

52 *Serrano,* note 47.

53 In addition to my interest in the use of regional sources, the courts involved rarely refer to other human rights sources, such as the universal or European systems.

54 The results and the cleaning were more complex within the Argentina’s court: beyond the large number of appeals, many of them were rejected on formal grounds so there is not ruling to assess the use of sources. Although it does no represent a problem itself, the question on which appeals

cases, where decisions on the merits can be found, it is possible to differentiate between cases that were decided by reference to another case and cases that serve as a "model", known as "modelling cases". This article focuses on these modelling cases, since a high proportion of cases are solved simply by delivery (particularly in the Argentinian case), which would lead to overrepresentation of any category involved in these cases.[55]

Following the aforementioned curation process, the pool of legal decisions on cases to be assessed was significantly reduced to 29 in Argentina and 20 in Mexico. Then, for each case, I identified whether the protection was granted (yes/no) and whether human rights sources were used (yes/no). The results are organised into four categories in this double-entry table: A The. "Collective Win", for cases where protection was granted and HR sources were used; B. The "Singular Victory", for cases where protection was granted without HR sources; C. "Planting for the Future?", comprising a small number of cases where protection was not granted but HR sources were used; D. The "Sinking Ship", for cases where neither protection nor HR sources were used.

Table 1: Resulting Categories

		Protection Granted	
		Yes	No
Use of HRs Sources	YES	A. Collective Win	C. Planting for the Future?
	NO	B. Singular Victory	D. Sinking Ship

Author's own elaboration

Then, to determine the intensity of use, I manually identified the Inter-American source and scored each case accordingly, as shown in the next table.

are admitted (are all dismissed appeals on the same topic or situation?) to be debated and then settled by the court remains. The Argentinean court dismissed more than 50% of the appeals on migration matters.

55 For example, the debate about the deadline to submit an asylum application counts on 9 (nine) appeals before the Mexican Supreme Court. It is essentially the same issue and in four of them, the ruling is exactly the same. Before the Argentinean Court, there are thousands of similar appeals but harder to be identified. I did this task in two previous publications regarding the Argentinean Supreme Court for two different periods (2004-2018 and then, 2019-2022) so I just work on the last two years to identify what I call "modeling" or "witness" rulings. See *García*, note 44.

Table 2: Scoring Sources

Scoring	Label	Definition
-1	Reversal	Use of an Inter-American Source in favor of the State.
0	Silence	No Inter-American Source is mentioned in the ruling.
0.50	Footnoting	An Inter-American Source is quoted in footnote.
1	Reference	Specific Clauses (Articles) of Inter-American Convention are refereed, or specific sources are referred in the text and **as part of the court's reasoning**.
2	Involvement	An Inter-American Source is referred extensively as part of the argument or reasoning of the court, e.g. to support the interpretation of a (legal) right.

Author's own elaboration based on Serrano's idea[56]

In the reversal use, the Court uses a human rights source to support the state. This argument is usually in favour of national sovereignty. Each reversal argument in each ruling scores -1. If no human rights source is mentioned, the score is 0. For example, if a ruling includes a human rights source only in a footnote, the score is 0.50, for the source and provided is the only one, for the entire judgment; however, if no mention is made, the decision receives a score of 0 and is not included in Tables 3 or 4. Additionally, there are no cases with purely reversal uses; all reversal uses are embedded in other categories with a score above 0.

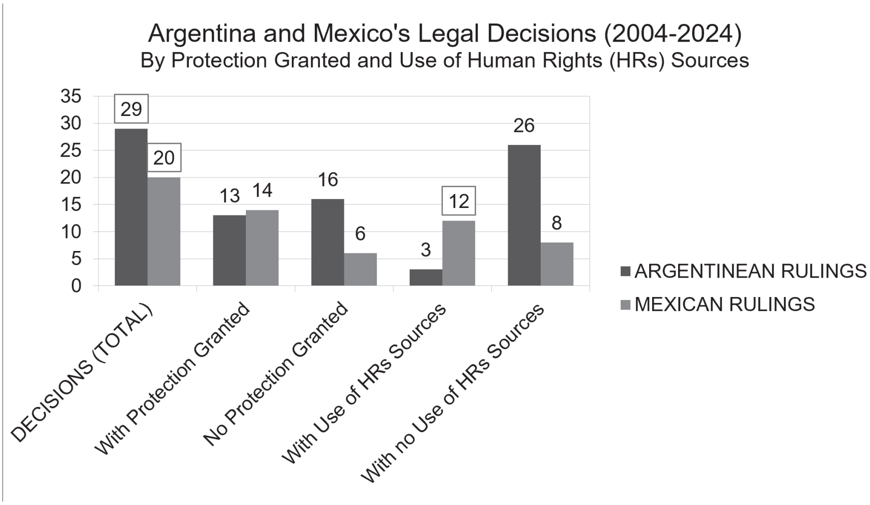
Besides the initial positive use of footnoting, the court may also incorporate human rights sources by referencing or engaging with them. Each reference in the ruling scores 1. If there is more than one reference to a given source (e.g. AO 18/03), it is considered an involvement and scores 2. References form part of the court's reasoning and are included in the text. When a human rights source is used more extensively (i.e. more than one reference that forms part of the text and the court's reasoning), it is considered an involvement and scores 2. It does not matter if the source is used two or five times.

E. Results and Debate

The most evident result is the significant disparity in the use of human rights (HR) sources: only three out of 29 Argentinean court decisions refer to Inter-American HR sources, whereas 12 out of 20 Mexican court decisions include HR sources, and in 14 of these cases, the person involved received protection. However, there is no such clear relationship with protection granted in Argentina, since protection was granted in 13 cases without reference to Inter-American human rights sources. The following chart illustrates the outcome of protection and the use of HR sources in both countries for the period under study (2004–2024).

56 *Serrano*, note 47.

Chart 1 Argentina and Mexico's Legal Decisions (2004-2024)

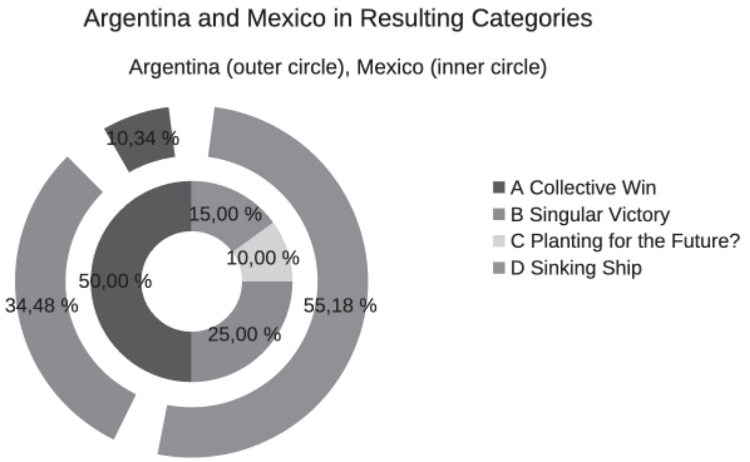


Author's own elaboration

Although the N is too small to calculate in percentages, it can be said that while almost 45% of the cases involving migration, asylum or refugee issues find a protective decision in Argentina, in Mexico this number is 70%. This is where the type of legal action (amparos in Mexico, mostly ordinary actions in Argentina) could help to understand this difference: just to start, a fundamental right violation is required to submit an amparo in Mexico; while in Argentina cases revolves more about the interpretation of the migration law. However, Inter-American human rights sources are extensively quoted in the legal actions and in the appeals (mostly submitted by public defenders) and it is the supreme court's decision to use them or not.

In percentages (to keep the proportion), the next chart organizes the decisions into the four categories mentioned in section C. The outer circle corresponds to Argentina; the inner one to Mexico.

Chart 2 Argentina and Mexico in Resulting Categories



Author's own elaboration

The "Collective Win" (shown in blue) is the most important development for human rights. While it is a win for the plaintiff(s), insofar as the decisions are anchored in Inter-American human rights sources, they are not dependent on the national context and can be used as a reference in other countries within the region. Argentina used a few of these sources (10% of cases), whereas Mexico used them in 50% of cases. Further explanation on the topics of the cases and details of the sources used in each case can be found in chart 3 below.

Similarly, the "Singular Victory" (in orange) is a victory, even when considered alone and without reference to Inter-American human rights sources. A right or favourable interpretation for the plaintiff was achieved, which is significant in a field dominated by state sovereignty. However, this victory is limited in that it is dependent on nationality, so in that sense it sets a precedent and is difficult for foreign jurisdictions to reference. In Argentina, the cases involve topics such as the guarantee of the double check ("Ojeda"), a restrictive interpretation of criminal records ("Apaza", "Manzaba") or the prevalence of the principle of non-refoulement in front of expulsion orders ("ML"[57] and "L.C"[58]). In Mexico, the following protective decisions were made: a request for regularisation based on family reunification (File 257/2017); a plenary on legal aid in detention facilities (PL 16/2019); the

57 Argentinean Supreme Court, Recurso Queja Nº 2 - M. R., L. c/ EN-M Interior y T-DNM s/Recurso Directo DNM. AF 036321/2015/2/RH001.

58 Argentinean Supreme Court, L., C. c/ EN-M Interior Op y V-DNM s/Recurso Directo DNM. File CAF 89674/2017.

validity of the principle of innocence within migration proceedings (File 4421/2020); and the obligation to create a registry for detentions (File 459/2024).

The large green area corresponding to Argentina's cases shows the "Sinking Ship" from the title, "We All Lost": in 55% of the decisions, neither the court granted protection, nor did it use Inter-American human rights sources. Contrary to what the reader might expect, the issues involved in these decisions are not so different; almost all of them focus on the importance of criminal records versus family reunification or the right to education ("Costa Ludueña"). Then, there is a case about the (due notice about the) right to free legal aid ("Zuluaga"[59]), and two more cases about (denial) of regularization without criminal records ("Huang"[60] and "Qiu"). Finally, some cases involve addressing legal changes that affect grounds of exclusion ("Cai W."), for instance, or the impact of DNU 70/2017. These cases all have one thing in common: they are all migration-residence based, meaning they revolve around the migration aw rather than the refugee law. Conversely, Mexican decisions in this category account for just 15% of cases, comprising three decisions in files 346/2019, 385/2020 and 351/2022. The first case, decided on 16 October 2019, involved a debate about the denial of a social security number (the "CURP"), which entitles holders to access work, education and healthcare. At the time, the court found no evidence of discrimination.[61] The second case, decided on 2 December 2020, concerned the refusal of refugees' requests for family reunification with their children, initially abroad and then within Mexico. The court ruled that the refugee law regulations contain constitutional requirements, such as the need for financial resources to bring family members, and that any recognised refugee may choose the option that suits them better: family reunification with financial resources or separate applications.[62] In the remaining case (351/2022), the court denied the request of a foreign national who, based on the migration law and his status as a victim of crime, had applied for a humanitarian visa.

In conclusion, the "Planting for the Future?" category was found only in Mexico: Files 555/2016 and 198/2024. The former is a case concerning migration-based residence and family reunification, and how a deadline should be considered when the documentation to renew residence has expired. The latter is about the collective expulsion of migrants who had previously been removed from the US. The sources involved can be found in Chart 3. Interestingly, a court still uses Inter-American human rights sources even when protection is denied; however, it is also about how a court takes sides by providing guidelines for the future.

59 Argentinean Supreme Court, Zuluaga Celemin, Claudia Lucía c/ DNM s/ Recurso Directo a Juzgado. FLP 90945/2017/CS1.

60 Argentinean Supreme Court, Huang, Qiuming c/ EN – DNM s/ recurso directo DNM, File CAF 89674/2017.

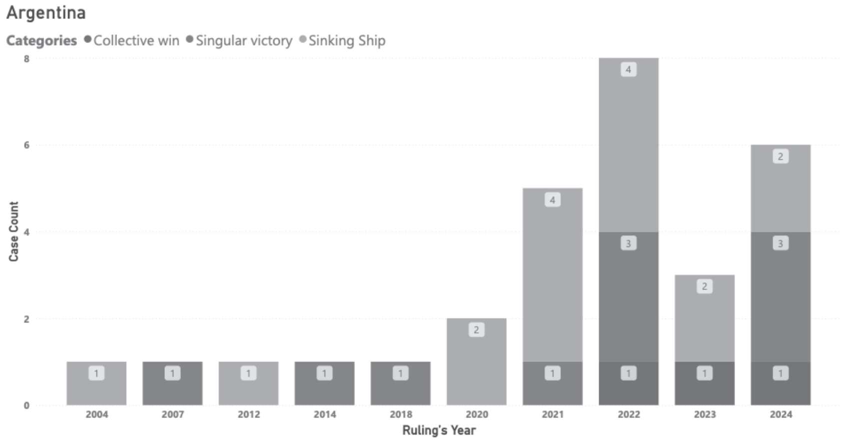
61 Two years later, the Supreme Court will recognize the CURP for all asylum seekers (File 114/2020). Human rights sources will be quoted in this decision.

62 Mexican SCJN, Amparo en Revisión 385/2020, judgment dated of Dec. 2, 2020.

In summary, the categories are spread differently across the twenty years covered by this study. The following chart shows this, broken down by country and year of the ruling. Please note that there are no Mexican court decisions for the period 2004–2015.

Chart 4 firstly exhibits the rulings' delay within the Mexican court: there was no ruling on migration, asylum or refugee issues until 2016, whereas Argentina had issued four rulings by that time (see Chart 3). More significantly, however, the number of decisions clearly increased in both courts after 2019. I had noticed it to the Argentinean court[63] and it is insightful to see how the Mexican court has also had an active role in the last years. Of course, one remaining issue is how long it takes for a case to be heard and settled by a supreme court, bearing in mind that Mexico's migration and refugee laws were passed in 2011, while Argentina's were passed in 2004 and 2006. In terms of categories, the Sinking Ship in Argentina is clearly more prevalent in 2021 and 2022, as well as in three cases in Mexico in 2019, 2020, and 2023. It is also important to note that the Argentinean Supreme Court saw a dramatic increase in appeals reaching its jurisdiction around 2020,[64] but this does not justify the decisions, as the court also increased its dismissal rate and solved thousands of cases by referring to previous decisions.

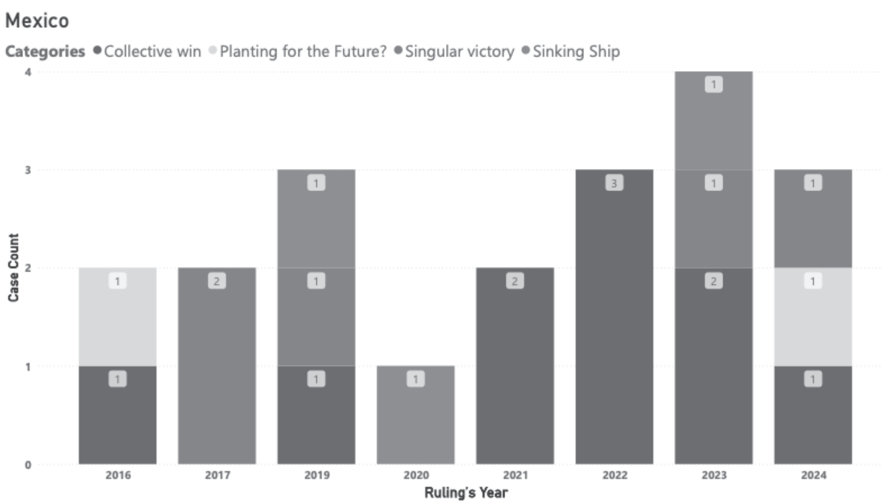
Chart 3 Argentinean Cases by Category by Year (2004-2024)



Based on Juan Pablo Cordoba's Elaboration

63 *García,* note 46.
64 Ibid.

Chart 4 Mexican Cases by Category by Year (2016-2024)



Based on Dr. Juan Pablo Cordoba's Elaboration

Next, the focus will be on the decisions that use Inter-American human rights sources, such as the Collective Win and Planting for the Future. Are human rights sources used with the same intensity? As previously mentioned, the use of HR sources in Argentinian cases is poor. The total score of eight points is made up of quotations from the Inter-American Convention on Human Rights and the Inter-American Court of Human Rights, as shown in the chart below:

Table 3 All Argentinean Cases with Human Rights Sources, Per Year of Ruling

Legal Case (ID)	**Ruling's Year**	**Category**	**IA Convention**	**Velez Loor (2010)**	**Chaparro Alvarez case**	**Ruano Torres case**	**Scoring**
ARG. CAF 59609/2011 (Condori)	2022	Collective Win	3 (art. 11, 17, 19)				**3**
ARG. CAF 7320/2015 (Li)	2023	Collective Win	1 (art. 8.2)	1	1	1	**4**
ARG. CAF 63829/2019 (Alcaraz)	2024	Collective Win	1 (art. 8.1 and 8.2)				**1**

Author's own elaboration

Two of the three cases from Argentina classified here as a collective win refer to due process guarantees in the context of reforms to migration law 25,871. The remaining case, Condori, is a family reunification that was a real milestone. In a context where other family reunification cases had previously been lost before the same Supreme Court, this case—involving a migrant in an extremely vulnerable situation and the mother of three children—not only secured protection for the individual but also marked the first time that human rights sources were referred to, albeit very tentatively. We all won together with the group of public defenders who literally fought the case. However, the first two cases were not the only ones in which the Argentinean court granted protection in the face of legal changes: Zhang (2007). Z. 138. XL and CCF 7917/2017 (García s/ciudadanía), both of which are covered by "Singular Victories". These cases debate different topics—the granting of a visa for a family member and of nationality, respectively—but protection is achieved by recognising that the more restrictive applicable law is no longer in force, and that a new sentence must therefore be handed down so as not to undermine the right to defence.

As the next table shows, the situation is more fruitful within the Mexican court.

Table 4: All Mexican Cases with Human Rights Sources, Per Year of Ruling

			A Inter-American Documents		B Inter-American Court Decisions									C Inter-American Human Rights COMMISSION			D Result
Legal Case (ID)	**Ruling's Year**	**Category**	**IA Convention**	**American Declaration**	**AO 18/2003**	**Velez Loor (2010)**	**AO 25/2018**	**AO 21/2014**	**Pacheco Tineo (2013)**	**Nadege Dorzema**	**Dominican and Haitian Persons (2014)**	**Chaparro Alvarez**	**Other Cases**	**Report 2013 Mexico**	**Principles on Migrants Human Rights 2019**	**Other Reports**	**SCORING**
MEX. File 382/2015	2016	Collective Win	2 (art. 8 and 25)	0	0	0	0	0	0	0	0	0	1 (Bamaca) 1 (Villagrán Morales) 1 (Radilla Pacheco) 1 (La Rochela) 1 (Fernández Ortega)	0	0	0	**7**
MEX. File 555/2016	2016	Planting for the Future?	1 (art. 17)	0	0	0	0	0	0	0	0	0	0	0	0	0	**1**
MEX. File 665/2019	2021	Collective Win	3 (asylum), (art. 3, 16)	0	3	1	2	2	1	1	0	0	0.50 (list in footnote)	-1 and 1 1 1: so 2	0	0	**15.50**
MEX. File 275/2019	2022	Collective Win	1 (Art. 2 2 all; 22.3 in particular)	0	2	2	0	1	0	1	3	1	0.50 (list)	1	0	0	**12.50**

			A Inter-American Documents		B Inter-American Court Decisions									C Inter-American Human Rights COMMISSION			D Result
Legal Case (ID)	**Ruling's Year**	**Category**	**IA Convention**	**American Declaration**	**AO 18/2003**	**Velez Loor (2010)**	**AO 25/2018**	**AO 21/2014**	**Pacheco Tineo (2013)**	**Nadege Dorzema**	**Dominican and Haitian Persons (2014)**	**Chaparro Alvarez**	**Other Cases**	**Report 2013 Mexico**	**Principles on Migrants Human Rights 2019**	**Other Reports**	**SCORING**
MEX. File 353/2919	2019	Collective Win	3 (art. 30, 22.7, 22.8, 8)	0	1	-1 and 2: so 1	0	2	2	0	0	0	0.50	0	0	0	**9.50**
MEX. File 282/2019	2023	Collective Win	2 (Art. 7 .5, 2)	2 (Arts. 1, 25)	0	0	0	0	0	1 1 so: 2	0	1	0.50 (list)	1	0	0.50 (Doc. 46/2015)	**9**
MEX. File 302/2020	2022	Collective Win	0	0	2	0.50	0	2	0	0	0	0		0.50	0.50	8 Reports, listed in a single footnote: 0.50	**6**
MEX. File 4421/2020	2021	Collective Win	1 (art. 8.2)	1 (11.1)	1	0	0	0	0	0	0	0		1	0	0	**4**
MEX. File 07/2020	2022	Collective Win	2 (arts. 19, 22.7, 22.8)	0	0	0	0	3	0	0	0	0		0	0	0	**5**
MEX. File 388/2022	2023	Collective Win	0	0	2	-1 and 2: so 1	0	0.50	0.50	0.50	-1 +0.50+ 2: so 1.50	1	0.50 (list)	1		0	**8.50**

			A Inter-American Documents		B Inter-American Court Decisions									C Inter-American Human Rights COMMISSION			D Result
Legal Case (ID)	**Ruling's Year**	**Category**	**IA Convention**	**American Declaration**	**AO 18/2003**	**Velez Loor (2010)**	**AO 25/2018**	**AO 21/2014**	**Pacheco Tineo (2013)**	**Nadege Dorzema**	**Dominican and Haitian Persons (2014)**	**Chaparro Alvarez**	**Other Cases**	**Report 2013 Mexico**	**Principles on Migrants Human Rights 2019**	**Other Reports**	**SCORING**
MEX. File 186/2023	2024	Collective Win	0.50 (art. 22.7)	0.50 (art. XXVII)	1	0	2	0	0.50	0	0	0	0.50 (AO 04/84)		2	3 (Human Mobility 2015 1 +Venezuela with 2 mentions 1 + 2 more footnotes: 1.	**9.50**
MEX. File 198/2024	2024	Planting for the Future?	2 (art. 22.8-9) +1 Art. 2)	0	0	0	0	2	2	1	0	0		0	0	0	**7**

With a total score of 39 points (Column D), it is quite obvious that the Mexican court makes more intensive use of standards. Both courts used the Inter-American Convention, with the Mexican court's use being more intense at 17.5 points (Column A) compared to Argentina's 5 points. A use of the American Declaration was low (3.5 points, Column A). All the relevant advisory opinions (AO) in this area were then included in the adjudication. AO 18/2003 on the legal status of undocumented migrants scored 12 points, AO 25/2018 on asylum scored 4 points, and AO 21/2014 on children's rights in the context of migration scored 12.5 points. These developments are all important for putting into practice standards derived from non-contentious case law. In terms of case law, the cases "Velez Loor vs. Panama" and "Nadege Dorzema vs. Dominican Republic" achieved 5.5 points each (with two uses in "Velez" in favour of the state, resulting in a score of -1 twice), "Pacheco Tineo vs. Bolivia" scored 6, and "Dominican and Haitian Persons vs. Dominican Republic" scored 4.5 points. Reports and case law from the Inter-American Commission are quoted less frequently, but they include the 2013 report on Mexico, which scores 6.5 points.

Mexican cases that invoke Inter-American human rights law tend to address extremely serious issues and involve more strategic, collective litigation. These cases often concern structural barriers to accessing various social rights for asylum seekers (case 665/2019, "CURP"), racial profiling for migration control outside of international borders (case 275/2019), deadlines for submitting asylum applications (case 353/2019), obligations towards unaccompanied children (case 07/2020), due process guarantees and limitations on detention (case 388/2022), the presumption of innocence in favour of applicants (file 4421/2021), and the right to dual nationality and asylum (case 186/2023). As I mentioned at the beginning, almost all of these cases are "amparos", meaning that a severe infringement of the rights involved is necessary in order to successfully litigate an "amparo", or for it to be selected for strategic litigation. Please note that there was no free public legal representation in Mexico until 2019, so it can be assumed that NGOs and university legal clinics selected their cases quite carefully.

Finally, the use (or non-use) of human rights sources in judgements cannot be explained by their mention (or non-mention) in the appeals filed or in the proceedings in general. Legal representatives in both Argentina and Mexico use extensive citations in their arguments. Ultimately, it is the court that chooses which arguments will be debated and on which sources decisions will be based. The decision to use or not use human rights sources must also be analysed in the context of each court's broader involvement with the Inter-American system of human rights. While Argentina started supporting regional case law strongly in the nineties, in 2017 it decided to limit the effects of inter-American decisions.[65] The Mexican tribunal ruled that the jurisprudence issued by the Inter-American Court of Human Rights is binding on Mexican judges whenever it is more favourable to the individual,

65 *Moreira Maues et al.,* note 49.

regardless of whether the rulings are against Mexico (P./.21/2014). There are also strong signs that it is becoming a rights-based court instead of a relatively independent body.[66]

F. Concluding Remarks

This contribution aimed to illuminate how two high courts used human rights sources from the Inter-American System of Human Rights in all cases involving migration, asylum, or refugee issues over the past two decades. Despite the absence of a comparative approach and the omission of any attempt to establish a correlation between the use of standards and the current migration situation in each country (or even the recent and profound judicial reform in Mexico), the value of the piece lies, first, in the systematic organization of the array of decisions that have been adjudicated by the courts. This systematic organization provides a foundation for reconstruction in other legal jurisdictions, particularly regarding the cleaning of the results.

Then, the proposal further entails the establishment of a measurement tool and categories for the purpose of conceptualizing and refining the relationship between decisions pertaining to the protection of human rights and their subsequent use. The four categories try to capture this relation by naming a protective decision with human rights sources as a collective win: within the current context of backsliding, anchoring judicial decisions in human rights sources and so, obligations for states, is an intelligent strategy to put some limits to regressive politics. Even cases where protection was denied but human rights sources were used (the "Planting for the Future?") may function as an invitation to litigate in the future. The Mexican court recognised an opportunity to set some standards and seized it. Within the Argentinean cases, one of the collective win cases ("Condori") could have been dismissed because the situation had been solved, but the court decided to rule it anyway by recognizing that it was an isolated case and it could be repeated in the future.

The "Singular Victory", even with no Inter-American human rights sources, is still a victory over decisions that prioritize state sovereignty over the rights of migrants, refugees, and asylum seekers. However, their limits are given for the difficult to export the results to foreign jurisdictions, or by the ever-changing migration laws: basing a decision solely on migration or refugee laws is not the best guarantee to challenge restrictive movements.

On the other hand, a plethora of alternative international sources were omitted (e.g. the 1951 Refugee Convention), but at first sight, it was clear at the beginning of this research that a predominant focus on the regional system of human rights was exhibited by Latin American courts. In addition, both the Refugee Convention or the Cartagena Declaration has been incorporated in the domestic refugee laws.

As one of the anonymous reviews of this article pointed out, the contrast between the Argentinian and Mexican Supreme Courts raises interesting questions about whether the formal recognition of a "right to migrate" leads to greater engagement by the courts with

66 *Serrano*, note 47.

regional human rights standards. It was evident that the use of Inter-American human rights sources was more intense on the part of the Mexican Supreme Court. On the other hand, the Argentinean "right to migrate as a human right" proved to be of little consequence within its Supreme Court. This leads us to consider how much more weight political decisions carry than legal statements. One swallow does not make a summer, nor does a right whose exercise is mainly resisted by the judiciary.

It would be worthwhile to conduct further research, employing the same methodology with enhancements, on the other courts that constitute group A, such as Ecuador, and one other country from group B (Brazil). What factors provoke that a court uses human rights sources, with more or less intensity? Why is one court more silent than others regarding human rights sources? I would need another study and methodology to answer this question, but so far, I dare say that attention should be paid to the amount of claims that are solved before arriving to the judiciary, during proceedings or before achieving the supreme courts, and the type of breaches involved. It is not possible to ignore the context in which the respective human movements are taking place (particularly, the so called "Migrant Caravan" through Mexico) and, therefore, the context in which court rulings are produced and to which they are directed. Nor is it possible to overlook the setbacks in both the migration and the refugee laws that have occurred in Argentina in the last two years, or the challenges that Mexico is facing in relation to the most recent US policies. The urgency of the Mexican situation could help to explain this substantial appeal to human rights that goes beyond the merely domestic. Of course, the real test is in judgment's enforcement and in the extent to which civil society can take ownership of the results. Otherwise, the "Collective Wins" are made of paper and there is not seed for planting the future.

Human Rights Protection and Migration: Strategies in Tension under a Framework of Regulation, Security and Order. A Comparative Analysis of Chile and Argentina in a Global Context

By *Camila Fernández Meijide** and *Josefina Moya Hansen***

Abstract: This article analyses transformations in migration governance in Argentina and Chile between 2015 and 2025, focusing on access to regular status as a central dimension. Despite their historically divergent normative frameworks -one more rights-oriented (Argentina) and the other more security-based (Chile)-, this paper argues that both countries have converged towards increasingly restrictive and discretionary forms of regulation. The analysis shows that legal reforms, administrative practices and digitalisation processes have introduced new barriers to regularisation, producing fragmented and unstable forms of legal status. In both cases, irregularity emerges not as a failure of the system but as an outcome of its design and implementation. The article argues that migration governance in the region is shifting towards models that manage, rather than resolve, migrant precarity, reinforcing the role of economic and labour requirements as key criteria for access and permanence.

Keywords: Migration Governance; Latin America; Legal Pathways; Human Rights; Securitasation

***

A. Introduction

Over the past two decades, Latin America has become a region characterised by intense mobility of both intra- and extra-continental migrants within and towards the American

* Lawyer and holder of a PhD in Law from the University of Buenos Aires (Argentina), where she teaches at both undergraduate and postgraduate levels. At the time of writing this chapter, she is a postdoctoral fellow in the Postdoctoral Fellowship Programme of the Universidad Nacional Autónoma de México (Mexico), based at the Instituto de Investigaciones Jurídicas, under the supervision of Dr. Luciana Gandini and funded by the Directorate General for Academic Personnel Affairs (DGAPA). She is also an affiliated researcher at the University Seminar on Internal Displacement, Migration, Exile and Repatriation (SUDIMER); Email: cfernandezmeijide@derecho.uba.ar.

** Sociologist and PhD candidate at the National University of San Martín (UNSAM) and its School of Economics and Business (EEyN). She is a doctoral fellow at the Research Centre for Transformation (CENIT), funded by UNSAM and EEyN (Argentina); Email: jmoyahansen@unsam.edu.ar.

continent, following a pattern of south-to-north transit towards North America. This process has been driven by persistent economic, political and social factors, including inequality, precarity, violence, transformations in the global labour market, limited access to social protection systems, the expansion of criminal governance, climate change and geopolitical tensions.

This phenomenon has intensified since 2015, particularly in a context shaped by the large-scale Venezuelan and Colombian migration waves, the effects of the COVID-19 pandemic, and policies of pressure and externalisation of migration control promoted by the United States.[1] It reflects a broader global trend of increasing forced and non-forced migration, which has reconfigured the conditions under which States in the region regulate mobility, placing existing legal frameworks under strain and giving rise to new forms of migration governance.[2]

In the Southern Cone, and up to the period under study, Argentina and Chile consolidated their position as key destination countries. Over the past decade, both countries experienced sustained growth in regional and extra-regional migrant populations, including flows from Venezuela, Colombia, Haiti, China, Senegal and the Dominican Republic.[3] These processes are embedded in divergent institutional trajectories, legal cultures, and geopolitical alignments and integration projects. In this context, Argentina adopted, in 2003, a migration law aligned with a national human rights agenda and a regional integration strategy through MERCOSUR member and associate states.[4] Chile, by contrast, maintained since 1975 a selective model of migration management, based on more restrictive admission criteria and administrative filtering of foreign nationals.[5]

1 *Sofía López Franco*, Moving Beyond Externalization in the US-Mexico Relationship, Policy Paper El Colegio de México (COLMEX) and the Center for Immigration Law and Policy (CILP) at the UCLA School of Law (2026), p. 4: In migration context externalization refers to “measures undertaken by destination countries to shift migration management processes from a country’s interior or physical border to instead take place partly or entirely outside of a country’s territorial boundaries”, that might set out in formal or informal or ad hoc agreements between countries.

2 *López Franco*, note 1, p. 4.; *Luciana Gandini*, Keeping in transit: flexible externalization and the dual logics of transit governance in the Americas, Frontiers in Human Dynamics 7 (2026).

3 *Brenda Matossian / Ana Melisa Pardo Montaño*, Migración, normativas y desigualdades en América Latina: análisis comparativo Argentina y México, Geograficando 21 (2025).

4 Both countries are framed within the Residence Agreement for Nationals of the States Parties of the Southern Common Market (MERCOSUR), together with Brazil, Paraguay, Uruguay, Venezuela and Bolivia. This agreement seeks to promote, as core pillars of integration, the principles of democracy and economic development, alongside a range of arrangements in the areas of migration, labour, culture and social policy. It also aims to incorporate the dimensions of social citizenship and productive integration, which has led to the need to expand institutional frameworks across the region in response to emerging demands, including more effective forms of civic participation.

5 *Lorena Oyarzún Serrano / Gilberto Aranda / Nicolás Gissi*, Migración internacional y política migratoria en Chile: tensiones entre la soberanía estatal y las ciudadanías emergentes, Colombia Internacional 106 (2021), p. 89.

Despite these divergences, between 2015 and 2025 both countries introduced legal, executive and administrative reforms, as well as management practices and criteria which, together with the stringent migration restrictions adopted in response to the COVID-19 health emergency, shifted towards greater control over entry and stay and imposed restrictions on access to rights and social protection for non-nationals. In this context, migration policies implemented by governments of different political orientations increasingly came to be structured around logics of control, order and the management of flows, even within normative frameworks formally grounded in rights, contributing—albeit to varying degrees—to the production of irregularity.

Based on an analysis of the transformations introduced in both countries during the period 2015–2025, this article argues that, despite their divergent institutional trajectories, Chile and Argentina have converged over the past decade towards forms of migration governance which, under public discourses of both human rights and order, have contributed, explicitly or implicitly, to the production of irregularity and to the deepening of precarious living conditions among migrant populations. This convergence does not necessarily take the form of comprehensive legal reforms or normative homogeneity, but rather the progressive adoption of legal and administrative mechanisms that are shifting, discretionary and lacking transparency. These developments reconfigure the boundaries of migration legality, effectively restricting access to regular status[6] and social protection in ways that are often unpredictable and difficult to navigate for migrants already residing in these countries, as well as for those seeking to do so.

B. Conceptual Framework and Research Problem

For much of the twentieth century, migration studies and migration policy analysis were dominated by state-centred approaches.[7] Within this perspective, migration governance was understood primarily as the control of the entry and stay of foreign nationals. Contemporary scholarship has expanded this view by recognising that migration policy also involves decisions concerning belonging, integration and access to rights.[8] In this sense, migration governance is conceived as a process in which legal frameworks, public policies and

6 A legal-administrative condition through which a foreign national may obtain a residence permit or authorised stay recognised by the State of residence, as a result of regularisation policies and programmes. At the normative level, this is grounded in the right to migrate, the non-criminalisation of irregular status, and a human rights-based approach, although it coexists with logics of control and securitisation.

7 *Andreas Wimmer / Nina Glick Schiller*, Methodological nationalism and beyond: nation-state building, migration and the social sciences, Global Networks 2 (2002), p. 301.

8 *Marcia Vera Espinoza et al.*, Towards a typology of social protection for migrants and refugees in Latin America during the COVID-19 pandemic, Comparative Migration Studies 9 (2021), p. 52.

everyday practices intersect, involving multiple actors across different levels of decision-making.[9]

Within this framework, the study of access to legal pathways for migration[10] constitutes a central axis for understanding migrants' trajectories and processes of integration. Legal pathways refer to the set of legal instruments and administrative procedures that enable individuals to move, enter and remain in a country on a regular basis, regardless of whether their initial entry was regular.[11] Migration scholarship has shown that their existence and conditions of access not only define migrants' legal status. Access to regular status and lawful stay also structures their possibilities for integration, effective access to rights and participation in social life.[12]

However, the global increase in mobility has been accompanied by the proliferation of legal instruments that do not ensure straightforward or linear transitions to permanent residence and/or the acquisition of nationality.[13] Recent scholarship shows that experiences of migration legality are increasingly fragmented, unstable and reversible, and that the likelihood of falling into irregular status is growing.[14]

9 *Antoine Pécoud / Hélène Thiollet*, Research Handbook on the Institutions of Global Migration Governance, Cheltenham 2023; *Andrew Geddes*, Governing migration beyond the state: Europe, North America, South America, and Southeast Asia in a global context, Oxford 2021.

10 *Ana Paula Penchaszadeh*, De papeles y derechos: La difícil traducción del paradigma de derechos humanos en la política migratoria de la Argentina actual, Colombia Internacional 106 (2021); *Diego Acosta / Luisa Feline Freier*, Expanding the Reflexive Turn in Migration Studies: Refugee Protection, Regularization, and Naturalization in Latin America, Journal of Immigrant & Refugee Studies 21(2023).

11 United Nations Network on Migration, Vías regulares para la admisión y la estancia de migrantes en situación de vulnerabilidad, Nota de Orientación, 2021: they include a range of legal instruments and arrangements, from visa waivers and the issuance of visas to different forms of temporary or permanent regularisation processes.

12 *Deisy Del Real*, Gradations of Migrant Legality: The Impact of States' Legal Structures and Bureaucracies on Immigrant Legalization and Livelihoods, International Migration Review (2024); *Martha Luz Rojas Wiesner,* La irregularización de migrantes en el sur de México, Más Poder Local 62 (2025), p. 32; *Cecilia Menjívar /Daniel Kanstroom* (eds.), Constructing immigrant "illegality": Critiques, experiences, and responses, Cambridge 2014; *Martin Ruhs / Philip Martin*, Numbers vs. Rights: Trade-Offs and Guest Worker Programs, International Migration Review 42 (2008).

13 *Ibrahim Awad / Usha Natarajan*, Migration Myths and the Global South, The Cairo Review of Global Affairs 30 (2018); *Fiona Adamson / Gerasimos Tsourapas*, The Migration State in the Global South: Nationalizing, Developmental, and Neoliberal Models of Migration Management, International Migration Review 54 (2020), p. 853; *Andrew Selee / María Jesús Mora /Ariel G. Ruiz Soto*, El cambio de patrones y políticas migratorias en las Américas, Migration Policy Institute, 11 April 2023, https://www.migrationpolicy.org/article/el-cambio-de-los-patrones-y-politicas-migratorios-en-las-americas (last accessed on 6 May 2026); *Marie Mcauliffe / Linda Adhiambo Oucho* (eds.), Informe sobre las migraciones en el mundo 2024, Organización Internacional para las Migraciones (OIM), https://publications.iom.int/books/informe-sobre-las-migraciones-en-el-mundo-2024 (last accessed on 6 May 2026).

14 *Awad / Natarajan*, note 15; *Mcauliffe / Oucho*, note 15. *Rojas Wiesner*, note 14.

This set of processes has been analysed through concepts that problematise the relationship between migration, legality and irregularity, emphasising that migration irregularity does not depend on the actions of migrants alone, but is produced by legal frameworks and the practices of multiple actors, particularly—though not exclusively—national States.[15] From this perspective, the acquisition, loss and recovery of regular status are mediated not only by legislation enacted by Congress[16] and executive regulations, but also by policies, administrative procedures and practices, interpretative criteria and institutional dynamics.[17]

Within this framework, scholars such as Cecilia Menjívar, Martha Rojas Wiesner and Tania Basok have developed notions such as *liminal legality*[18] and *precarious legality*[19] to account for the experiences of individuals who are neither fully nor permanently documented nor undocumented, but who, as a result of legal frameworks, migration policies and their implementation, inhabit forms of legality that are temporary, conditional and unstable. These forms of fragmented regularity are sustained through administrative mechanisms—often temporary—that require periodic renewal, compliance with changing requirements and the payment of costs that may be prohibitive, generating relationships of dependence on local bureaucracies.

In Latin America, the study of legal pathways is of particular relevance, as their accessibility mediates -albeit in different ways- access to rights and social protection. On the one hand, in many countries the recognition of rights is directly linked to migration status, as in the case of Chile. It is also relevant in countries that have incorporated human rights principles into their legal frameworks, including access to rights irrespective of migration status, as in Argentina. This is so insofar as formal expansion has not necessarily translated into effective access, given the persistence of administrative, institutional and social barriers that continue to condition their exercise.[20]

From a perspective that situates these experiences within a global regime of migration governance, this literature has also shown that formally rights-based legal frameworks have continued to centre control and regularity within migration policy. Rather than eliminating gaps in access to rights for migrants in irregular status, some countries—such as Argenti-

15 *Martha Luz Rojas Wiesner / Tanya Basok*, “Legalidad ilegal” y precariedad: la perspectiva desde el sur de México, Sociologias 55 (2020), p. 74. *Nicholas P. De Genova*, Migrant ‘illegality’ and deportability in everyday life, Annual Review of Anthropology 31 (2002), p. 419.

16 *Kelly Bauer*, Extending and restricting the right to regularisation: lessons from South America, Journal of Ethnic and Migration Studies (2019).

17 *Cecilia Menjívar*, Liminal legality: Salvadoran and Guatemalan immigrants' lives in the United States, American journal of sociology 111 (2006); *Del Real*, note 14.; *Anna Tuckett*, Rules, papers, status, Stanford 2018.

18 *Menjívar*, note 19.

19 *Martha Luz Rojas Wiesner / Tanya Basok*, “Legalidad ilegal” y precariedad: la perspectiva desde el sur de México, Sociologias 55 (2020).

20 *Acosta / Freier,* note 12; *Leilo Mármora*, Modelos de gobernabilidad migratoria: La perspectiva política en América del Sur, Revista Interdisciplinar da Mobilidade Humana 18 (2010).

na—have focused on large-scale regularisation programmes, thereby reinforcing regular status as the primary mechanism mediating access to rights and integration.[21] In this sense, the human rights approach -materialised in access to rights beyond migration status- and the logic of security can converge within the same normative framework.[22]

This observation shifts the analytical focus towards the ways in which these logics are articulated within legal frameworks, migration policies, interpretative criteria and administrative practices, as well as how they operate in practice and shape migration trajectories, access to rights and integration into host societies.

In recent years, several countries in Latin America, including Argentina and Chile, have introduced reforms that make regular entry and residence, the renewal of permits, transitions to permanent residence, and access to rights and social protection more difficult. These changes initially took place through shifts in administrative policies and practices and were subsequently consolidated through various legal instruments.

In this context, the article seeks to analyse how two countries with divergent legal and institutional trajectories can converge towards similar forms of migration regulation. In particular, it examines the mechanisms through which policies formally grounded in human rights principles and those shaped by security-oriented logics contribute—through partial legal and administrative reforms and institutional practices—to the production of irregularity and to the restriction of effective access to rights. The comparison is organised around shared analytical dimensions (security/control, mechanisms of production and management of irregularity, and the use of human rights language), which allow for a comparative analysis beyond differences in normative trajectories.

C. This Study and Its Methodological Strategy

Argentina and Chile were selected based on: (a) their relevance as destination countries within South-South mobility in the Southern Cone, and (b) the contrast between their underlying regulatory frameworks. While Argentina has had, since 2003, a Migration Law that incorporates—at least nominally—a human rights-based language, Chile maintained until 2021 a regulatory framework inherited from the dictatorship, with a strong security-oriented approach. The period 2015-2025 allows for the examination of the increasing

21 *Eduardo Domenech*, "Las migraciones son como el agua": Hacia la instauración de políticas de "control con rostro humano". La gobernabilidad migratoria en la Argentina, Polis. Revista Latinoamericana 12 (2013); *Marta Fernández y Patallo*, Los Os direitos (dos outros) humanos: Migrantes, activistas e política migratória en Argentina, Universidade Federal Fluminense, Tesis para optar por el título de Doctora en Antropología, 2016.

22 *Corina Courtis / María Inés Pacecca*, Migración y derechos humanos: una aproximación crítica al "nuevo paradigma" para el tratamiento de la cuestión migratoria en la Argentina, Revista Jurídica de Buenos Aires (2007), p. 183; *Eduardo Domenech*, La visión estatal sobre las migraciones en la Argentina reciente: De la retórica de la exclusión a la retórica de la inclusión, in: Eduardo Domenech (ed.), Migración y política: el Estado interrogado. Procesos actuales en Argentina y Sudamérica, Córdoba 2009, p. 21.

adoption of measures aimed at control and the production and management of irregularity within a broader regional and global context of securitisation. This includes State responses to changes in the composition and volume of flows (e.g. Venezuelan migration), the COVID-19 pandemic, domestic political developments, and regional and international pressures.

Accordingly, this study adopts a comparative strategy between two cases with divergent legal and normative trajectories, with the aim of identifying convergences and divergences in forms of migration governance. The comparison is structured around a stable set of analytical guidelines. The comparative design examines transformations in migration governance between 2015 and 2025 across two interrelated levels: (1) the legal-normative and (2) the administrative-institutional. At the first level, the analysis focuses on legal reforms regulating access to regular status and, to a lesser extent, to social rights. At the second level, it examines procedures, bureaucratic practices and institutional arrangements that mediate the implementation of these norms and shape individuals' interactions with the State.

The analysis draws on: (a) normative documents (laws, decrees, regulations and administrative provisions), (b) public policy and institutional documents (circulars, guidelines and official communications), (c) reports and statistics produced by public bodies, and (d) empirical data generated through the authors' MA and doctoral research, which allow for the reconstruction of administrative practices and the effects of reforms.[23]

The analysis distinguishes between explicit policies (legislative reforms, decrees, programmes and formal regularisation processes) and implicit policies (administrative practices, requirements, digitalisation, costs and control criteria which, without being formally restrictive, produce barriers or segmentation in access to regular status). Following this analytical distinction, the examination of the language of rights focuses on its use as (a) a normative and legitimising justification and (b) an operational criterion in the regulation of entry, stay and regularisation.

For ease of reading, the article is structured as follows: Section C presents the research problem, along with the theoretical and conceptual framework on migration governance, the tensions between human rights and security, and regularisation/irregularity. Section D situates the cases of Argentina and Chile in sociodemographic and normative-institutional terms, in order to establish the baseline conditions for the comparative analysis. Section E develops the comparative analysis of both countries. Two levels are examined in parallel: (1) the legal-normative (declared rights, admission/inadmissibility criteria, expulsion and

23 *Josefina Moya*, Gubernamentalidad migratoria en el Sur Global, una mirada en tiempos de COVID19: políticas públicas de protección social a población migrante en contexto COVID19, análisis desde una reconstrucción de las trayectorias de la gubernamentalidad migratoria de Chile y Argentina, Facultad Latinoamericana de Ciencias Sociales (FLACSO), pending defense; *Camila Fernández Meijide*, Entre trámites y papeles. Intervenciones por el derecho a la regularización de migrantes internacionales en la Ciudad de Buenos Aires (2017-2022), Universidad de Buenos Aires, 2024.

residence categories) and (2) the administrative-institutional (procedures, control mechanisms and effective access to regularisation). At each level, the comparison is organised around three cross-cutting dimensions: security/control, mechanisms for the production and management of irregularity, and the use of human rights language. This strategy allows the comparative argument to move beyond a nominal reading of “securitised Chile” versus “rights-based Argentina”.

Finally, Section F synthesises the comparative findings, discusses the tensions between regulation, security and rights in the period 2015–2025, and offers concluding reflections.

D. Cases of Analysis: Brief Sociodemographic Context and Normative Configuration of Migration Policy in Argentina and Chile

This section provides a brief description of the cases of Argentina and Chile in sociodemographic and normative-institutional terms, with the aim of situating the comparative analysis developed in the following section. It outlines the general characteristics of migration in both countries, as well as the structural features of their regulatory frameworks and migration policy trajectories prior to the period 2015–2025. This focus makes it possible to identify the starting points from which both States have regulated international migration, highlighting their differences: a model oriented, albeit with nuances, towards regularisation (Argentina), and another centred on control and administrative discretion (Chile).

I. Argentinian Case

Since the consolidation of the national State between the nineteenth and twentieth centuries, Argentina has been conceived as a country of immigration[24], with changes in the composition of migration flows and in the relative weight of the foreign-born population within the total population[25]. Since the mid-twentieth century, a predominantly Latin American migration pattern has been consolidated[26], with a strong presence of individuals from countries in the region—such as Bolivia, Paraguay, Peru and Chile—and, more recently, from Venezuela and Colombia, alongside a smaller presence of extra-continental migrants, mainly from the Dominican Republic, Haiti, Senegal, other Sub-Saharan African countries and China.[27]

24 Organización Internacional para las Migraciones, Informe Condiciones de vida de migrantes en la República Argentina: caracterización de la población migrante para el seguimiento del ODS Nº1, 2019.

25 *Matossian / Pardo Montaño,* note 5, p. 7.

26 Ibid.

27 *Gabriela Fernández / Carla Gerber*, Migración y derechos humanos en el marco de la emergencia por COVID-19, in: Juan Pablo Bohoslavsky (ed.), COVID-19 y derechos humanos, la pandemia de la desigualdad, 2020.

According to the most recent national census, the number of foreign nationals in the country is just under two million, and between 2010 and 2022 the proportion of the foreign-born population remained at slightly above four per cent of the total population.[28]

At the normative level, the regulation of international mobility in Argentina is structured by Migration Law No. 25.781 (hereinafter, Migration Law), enacted in 2003. This law, albeit belatedly, is grounded in the human rights framework established by the 1994 constitutional reform, which granted constitutional hierarchy to a set of international human rights treaties (Article 75(22)) and enshrined provisions on the equality of rights of non-nationals, substantive equality and affirmative action measures (Articles 16, 20 and 75(23)).[29]

The new law introduced a substantial shift in the way migration was conceived by the State, moving from the expulsion-oriented regime of Law No. 22,439 -enacted during the last Argentine military dictatorship (1976–1983)- to a system of integration grounded in human rights[30] and in the regional integration agenda linked to the formation and consolidation of MERCOSUR, strongly promoted by Presidents Néstor Kirchner (2003–2007) and Cristina Fernández de Kirchner (2007–2015).[31]

In this vein, the normative framework incorporated the recognition of the right to migrate as a human right (Art. 4), as well as principles of non-discrimination and access to health, education, social security and justice, and participation in public life, irrespective of migration status (Articles 6, 7 and 8). At the same time, it introduced provisions that prioritised regularisation as a State response to the then high levels of irregularity[32], and others aimed at reducing -though not eliminating- the margin of discretion previously granted to the migration administration in the issuance of visas and residence permits, as well as in the recognition of rights for persons in irregular status.

This was implemented in different ways. On the one hand, it decriminalised undocumented migration, which is now considered an administrative offence. In this regard, it

28 Portal oficial del Instituto Nacional de Estadísticas y Censos, https://www.indec.gob.ar/ (last accessed on 6 May 2026).

29 *Mónica Pinto*, Temas de Derechos Humanos, Buenos Aires 2004; *Laura Clérico* / *Martín María Aldao,* La adjudicación directa de DESCA por la Corte IDH., in: Armin von Bogdandy, Mariela Morales Antoniazzi (eds.), Avances metodológicos, en Construcción de un ius commune del derecho al medio ambiente sano y la justicia climática, 2023.

30 Decreto N° 836/2004; *Lila García*, Práctica y discurso de los operadores judiciales en sus decisiones de control migratorio: el caso de la justicia administrativa federal en la ciudad de Buenos Aires. Estudios Socio-Jurídicos, 18(1), 2016; *Bárbara Hines*, The Right to Migrate as a Human Right: The Current Argentine Immigration Law, Cornell International Law Journal 43 (2011).

31 *Fernández / Patallo*, note 23.

32 Defensoría del Pueblo CABA, Políticas de regularización migratoria y prácticas de las agencias estatales, 2003;. *Pablo Ceriani Cernadas*, Nueva Ley: un paso hacia una concepción distinta de la migración, in: Rubén Giustiniani (ed.), Migración: un derecho humano, Buenos Aires 2004, p. 113: At the time the Migration Law was enacted, a large proportion of this population was in an irregular situation. Ceriani notes that, at the time of the adoption of the new Migration Law, there were at least 750,000 migrants from MERCOSUR countries in an undocumented situation in Argentina.

established that when, in the course of a residence control, the National Directorate of Migration (DNM) identified that a person was in an irregular situation, it was required (*debía*) to instruct that person to regularise their status before ordering expulsion.

On the other hand, in line with the MERCOSUR Residence Agreement adopted in 2002[33], it facilitated access to regular status for the foreign population most present in Argentina -namely nationals of neighbouring countries- through the creation of a regularisation criterion based on nationality from a MERCOSUR member or associate State. It also simplified access to permanent residence, particularly for individuals with immediate family members holding Argentine nationality or permanent residence, as well as for MERCOSUR migrants[34].

Moreover, it incorporated family reunification and humanitarian grounds as categories enabling the administrative authority to suspend expulsion orders and residence cancellations, and to grant residence even where the applicant was unable to meet certain requirements in the regularisation process. In addition, the law and its implementing decree established relatively clear means of proving migration criteria[35], thereby limiting the administration's margin of discretion in the granting of residence permits. The law also introduced a new system of administrative and judicial[36] appeals against administrative decisions and regulated access to public legal defence.[37]

Finally, the law established a legal obligation, directed at the State through the National Directorate of Migration (DNM), "to provide for the adoption and implementation of measures aimed at regularising the migration status of foreign nationals" (Article 17). This orientation informed the institutional policies and practices adopted up to 2015, which likewise focused on migration regularisation and sought, to some extent, to embed a human rights perspective in the functioning and control practices of the DNM.

33 Organización Internacional para las Migraciones, Evaluación del Acuerdo de Residencia del MERCOSUR y su incidencia en el acceso a derechos de los migrantes, 2018: The Agreement establishes common and simplified rules and requirements for processing residence permits for nationals of MERCOSUR member and associate States. It introduces a migration criterion based on proof of nationality, referred to as the "MERCOSUR nationality" criterion. Under this framework, the submission of criminal background certificates and documentation establishing identity and nationality is considered sufficient for granting temporary residence to nationals of MERCOSUR member or associate States.

34 It could be applied for directly on the basis of family reunification and, if processed within the required timeframe, it could also be obtained through the passage of time with the second renewal of MERCOSUR residence and, for non-MERCOSUR migrants, with the third renewal. Unlike MERCOSUR migrants, non-MERCOSUR nationals are required to renew their residence annually.

35 In addition to the nationality criterion, the most common grounds are family reunification, employment (which requires the signing of an employment contract and the registration of the employer in a DNM registry), and study.

36 *García*, note 32, p. 79.

37 *Camila Carril*, El rol de la Defensoría del Pueblo en el acceso a la justicia de las personas migrantes, Revista del Ministerio Público de la Defensa 17 (2022).

Among the earliest measures were the implementation of a strategy to normalise the functioning of the DNM and training programmes for its staff and officials on the Migration Law and human rights.[38] Subsequently, there was a progressive development of mechanisms aimed at reducing material and symbolic distance between the administration and migrant communities, including regularisation programmes[39] and cost-control measures—such as the possibility of requesting fee exemptions with limited formal requirements—the establishment of local DNM offices and branches, the signing of cooperation agreements with local governments and civil society organisations, and the creation in 2011 of a Territorial Outreach Programme (*Programa de Abordaje Territorial*) to bring DNM procedures closer to neighbourhoods with a high concentration of migrants.

However, certain provisions within the regulatory framework introduced limits to this regularisation-oriented approach. In particular, the law required -and continues to require -regular entry into the territory as a condition for accessing residence, with exceptions to this requirement largely left to the discretion of the administrative authority.

It also established a classification, still in force, between migrants from MERCOSUR and non-MERCOSUR countries[40], whose conditions of access to residence are more complex and difficult to meet for individuals migrating in situations of vulnerability and irregularity.

As a result, irregularity among migrants from non-MERCOSUR countries facing structural or general barriers to accessing residence tended to be addressed, where it was addressed at all, on a case-by-case basis or through extraordinary regularisation programmes that lowered the requirements for access to regular status but were temporary in nature.

Thus, at the beginning of the period under study, the Argentine case was structured around a normative model that, despite its limits and tensions, tended to prioritise migration regularisation as a means of managing mobility and promoting social integration.

II. Chilean Case

In recent decades, Chile has consolidated its position as a relevant destination country for migration, particularly from Latin America, largely due to its relative political and macroeconomic stability. Since 2015, the country has experienced sustained growth in its migrant population, accompanied by significant changes in its composition. Whereas flows

38 Decree No. 836/2004, which declared an administrative emergency in the National Directorate of Migration; *María Dolores Linares / Cecilia Melella*, La Dirección Nacional de Migraciones entre 2008 y 2015: identidad institucional en disputa, POSTData 23 (2018), p. 213; *María Dolores Linares*, Política migratoria y capacidad estatal: la Dirección Nacional de Migraciones (República Argentina) entre los años 2004 y 2015, POLIS, Revista Latinoamericana 16 (2017), p. 245.

39 In 2004, through Decree No. 1169/2004, the government implemented a regularisation programme for “nationals outside the MERCOSUR framework”, and between 2006 and 2010 it launched the National Programme for “Migration Documentation Regularisation” for MERCOSUR nationals, also known as the *Patria Grande Plan* (Provision No. 53,253/2005 of the Ministry of the Interior).

40 *Fernández / Patallo*, note 32.

from Peru and Bolivia had previously predominated[41], from 2015 onwards there has been a marked increase in migrants from Venezuela and Haiti.[42]

This increase sustained figures of over one million regular entries, with a decline observed between 2021 and 2024.[43] However, this process has developed in parallel with a significant rise in irregular migration -reaching levels of up to 49 per cent- particularly in the context of restrictions associated with the pandemic and a series of recent regulatory changes.

Chilean migration regulation was structured for more than four decades around Decree Law No. 1.094 on Migration and Foreign Nationals, enacted in 1975 during the military dictatorship (1973-1990) and grounded in the logic of the National Security doctrine[44] and the neoliberal Constitution of 1980. It has been argued that the Chilean Constitution institutionalises forms of structural inequality, violence and democratic restrictions in relation to its own nationals.[45] Although it does not explicitly address migration, this institutional framework places migrants in a context of heightened vulnerability.

Thus, this normative framework is embedded in an institutional matrix that, while formally recognising guarantees for all individuals[46], establishes democratic restrictions and significant differences in access to political and labour rights[47] between nationals

41 Biblioteca del Congreso Nacional de Chile (BCN), Chile y la migración: los extranjeros en Chile, actualidad territorial, https://www.bcn.cl/siit/actualidad-territorial/chile-y-la-migracion-los-extranjeros-en-chile (last accessed on 1 December 2025). Between 2005 and 2015, the nationalities with the highest number of visas granted were Perú (40.4%) and Bolivia (13.1%). Thereafter, both remained stable at around 50,000 and 40,000 visas respectively, well below the changes driven by Venezuelan migration from 2015 onwards.

42 *Servicio Nacional de Migraciones (SERMIG),* Estadísticas generales de registros administrativos. Cifras de enero 2015 a diciembre 2014 (Informe Nº4) Santiago, Chile (2025). Indeed, their presence increased from 300,000 (26.4%) in 2018 to 750,000 (38%) in 2023. The Haitian population also saw an increase in the number of visas granted (120,000), although this declined considerably by 2021.

43 Servicio Nacional de Migraciones (SERMIG), Comunicado público sobre gestión migratoria, https://serviciomigraciones.cl/comunicado-publico-sobre-gestion-migratoria/ (last accessed on 1 December 2025).

44 *Juan Pablo Jarufe*, El fenómeno migratorio. Evolución normativa, experiencia comparada, y principales hitos en la discusión del Proyecto de Ley de Migración y Extranjería., 19 July 2019, https://www.bcn.cl/asesoriasparlamentarias/detalle_documento.html?id=74862 (last accessed on 6 May 2026).

45 Fundación Nodo XXI, Análisis Constitucional Feminista, 2023.

46 *Liliana Galdámez Zelada / Karin Castro Cruzatt / Sebastián Cepeda Valdés,* Constitución, igualdad y migración: el mínimo desarrollo del ordenamiento chileno en la protección contra la discriminación de grupos migrantes. Estudios constitucionales 20 (2022); *Jaime Bassa Mercado / Fernanda Torres Villarrubia*, Desafíos para el ordenamiento jurídico chileno ante el crecimiento sostenido de los flujos migratorios, Estudios constitucionales 13 (2015).

47 It is in dialogue with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which enshrines the principle of “non-discrimination in the recognition of rights” (Article 6, Part II).

and non-nationals. In this sense, migration governance in Chile is structured on a basis that legally distinguishes between national citizenship and the foreign population, placing migrants in a structurally more vulnerable position in terms of access to rights and social protection. This starting point is key to understanding the forms that migration regulation takes in the period under analysis and its contrast with other normative models in the region.

Law No. 1.094 granted broad powers to the administrative authority to regulate the entry and stay of foreign nationals; for example, Article 2 provided that "[b]y supreme decree, the entry into the country of certain foreigners may be prohibited on grounds of national interest or security." Migration policy was thus historically configured as an instrument of control, with limited mechanisms aimed at the regularisation of migrants in irregular status and at the integration of migrants into Chilean society.

This approach was maintained, with partial modifications through executive measures, throughout the dictatorship and during subsequent democratic governments. It consolidated a political stance towards international migration and an institutional trajectory characterised by the centrality of migration control, an emphasis on security, and discretionary administrative management. Even under democratic rule, this entailed the continued application of a migration policy framed within a doctrine shaped under an authoritarian regime.

The absence of comprehensive legislative reform until 2021 contributed to the persistence of this framework. In this context, access to regular status largely depended on administrative decisions[48] and on specific regularisation programmes as mechanisms to address irregularity. The same applied to access to rights and social protection, which until 2021 was regulated through administrative instruments adopted in 2003 and 2017.[49]

In practice, this framework resulted in a differentiated legal status and unequal access to rights for migrants, both in law and in its implementation, consolidating a model of migration governance based on the distinction between nationals and non-nationals and on the centrality of control as the organising principle of the system.[50]

E. Comparison: Divergences and Convergences

The comparative analysis conducted in this study is organised around a central empirical dimension of migration governance in Chile and Argentina between 2015 and 2025: access to regular migration status, examined at both the normative level and in terms of policies and implementation practices. It also considers how transformations in legal pathways affect access to rights and social protection in both national contexts. This approach makes it possible to identify convergences and divergences in the mechanisms through which

48 *Galdámez / Castro / Cepeda*, note 48.

49 *Luis Eduardo Thayer*, Migración, Estado y seguridad: Tensiones no resueltas y paradojas persistentes, Polis 15 (2016), p. 109.

50 *Galdámez /Castro / Cepeda*, note 48.

States regulate migration beyond their differing normative trajectories, and to analyse how these transformations contribute to the production of irregularity.

I. Argentina

During the period under analysis (2015-2025), three successive governments with distinct political agendas and positions on international migration reshaped the country's migration policy: the conservative government led by former president Mauricio Macri and the Cambiemos coalition (2015-2019); the Peronist government of Alberto Fernández (2019-2023); and the libertarian government of Javier Milei (2023-2027). These shifts were materialised through modifications to the Migration Law via executive instruments (Decrees of Necessity and Urgency, DNUs), as well as through the adoption of policies, interpretative changes and administrative practices that progressively transformed Argentine migration policy.

1. Normative Aspects

Between 2015 and 2019, the government of Mauricio Macri introduced a set of measures framed within broader shifts in official discourse which, in a national context of social and economic crisis and an international climate of growing hostility towards mobility, sought to associate migration -particularly from neighbouring, racialised populations- with criminality and the alleged misuse of public services and social benefits, such as schools, hospitals, universities, subsidies and welfare programmes.[51]

Actors within the field of migrant rights advocacy interpreted these measures as an attempt to shift the human rights paradigm towards a security-oriented approach to migration management.[52] At the normative level, the most significant change was the amendment of the Migration Law through DNU 70/2017.[53] This facilitated the expulsion of migrants by: (1) expanding the range of criminal records that could trigger the issuance of expulsion orders, and (2) modifying the system of appeals against decisions of the National Directorate of Migration (DNM) by shortening deadlines for filing appeals (from 30 to 3 days) and eliminating review instances.

Although DNU 70/2017 did not formally modify the regularisation regime, it introduced restrictions on access to regular status and to naturalisation. On the one hand, by expanding grounds for expulsion and modifying the appeals system, it increased the circumstances that prevented individuals from regularising their status, as well as those that

51 *Brenda Canelo / Natalia Gavazzo / Lucila Nejamkis*, Nuevas (viejas) políticas migratorias en la Argentina del cambio, Si Somos Americanos 18 (2018), p. 150.

52 *Canelo et al.*, note 53; *Lila García*, Control migratorio en la Argentina reciente: Hacia un mapeo de los efectos de la modificación a la Ley de Migraciones a través de las acciones judiciales, Revista Academia y Crítica 2 (2018), p. 83.

53 Decree No. 70/2017 amending Law No. 25.871, Buenos Aires, 27 January 2017. It also amended Citizenship Law No. 346.

allowed the administrative authority to cancel residence permits of individuals involved in criminal proceedings at any procedural stage.

With regard to access to naturalisation, the decree redefined the conditions for proving the two years of residence required to initiate the procedure, excluding forms of demonstrating ties to the country other than temporary or permanent regular residence, whereas previously the process could be initiated from an irregular status. On the other hand, it created a new administrative category, the “temporary stay permit”, for individuals in an irregular situation who were challenging expulsion decisions. Unlike the *precaria*, the document issued to individuals applying for or renewing residence, this permit restricted territorial mobility by preventing exit from and re-entry into the country. This limited administrative strategies that some migrants had previously used, often following guidance from DNM officials, to address situations of irregular entry.

Additionally, the decree expanded the grounds for inadmissibility and the grounds for the cancellation of residence. It also modified the regime of waivers on family reunification grounds, granting the DNM greater discretion in their application and introducing more demanding requirements, such as proof of cohabitation and economic ties. Taken together, these reforms not only strengthened the migration control regime but also restricted access to regular status, particularly for individuals in more vulnerable situations.

The return to power of a Peronist government in 2019 under Alberto Fernández, with Cristina Fernández de Kirchner as vice-president, did not entail an immediate return to the pre-2015 migration policy. In 2021, after two years of pressure from migrant organisations, the government repealed Decree 70/2017, thereby formally restoring the previous legal framework. The repeal reinstated the prior regime, nullifying the amendments introduced to both the Migration Law and the Citizenship Law.[54] However, even after its repeal, some of the criteria introduced by the decree continued to have practical effects, for instance in the rejection of citizenship applications by civil courts, which adopted restrictive interpretations regarding the proof of residence.

After two years of pressure from civil society organisations, the migration authority also implemented temporary regularisation programmes targeting specific groups of non-MERCOSUR migrants facing particular difficulties in accessing regular status, namely nationals of CARICOM countries and Senegal. Many of these migrants, who worked in public spaces as street vendors, were also subject to targeted police and judicial enforcement practices.[55] These programmes constituted targeted interventions which, while expanding access to regularisation for these groups, did not structurally or permanently alter the broader conditions of access to regular status for non-MERCOSUR migrants.

Finally, the reform introduced by DNU 366/2025 under the government of Javier Milei (2023–2027) consolidated and deepened the process initiated by DNU 70/2017, through the

54 Decree No. 138/2021 repealing Decree No. 70 of 27 January 2017.

55 *Gisele Kleidermacher*, Entre cofradías y venta ambulante: una caracterización de la inmigración senegalesa en Buenos Aires, Cuadernos de Antropología Social 38 (2013), p. 109.

implementation of changes that structurally affect the conditions of access to regular status and to migrants' rights.

With regard to access to social rights, and in continuity with processes initiated at the subnational level, the reform authorised the charging of fees in public universities and hospitals for foreign nationals without Argentine documentation, thereby introducing new restrictions on access to social protection.

In terms of access to residence, the reform expands the grounds for expulsion and redefines the criteria for access to permanent residence by: (1) eliminating the possibility of obtaining permanent residence on the basis of an Argentine family member or a family member with permanent residence, and (2) requiring proof of economic solvency -defined in strict terms- in order to transition from temporary to permanent residence. Another significant change concerns the modification of the State's obligation to instruct individuals to regularise their status in cases of irregularity. Whereas the previous regime established a duty on the part of the administration to promote regularisation prior to ordering expulsion, the new decree transforms this obligation into a discretionary power. This legal reform, combined with changes in DNM practices, once again makes expulsion a possible State response to migration irregularity.

As noted by civil society organisations, including Lucía Galoppo, a lawyer at the Centre for Legal and Social Studies (CELS)[56], this modification effectively alters the role of the State in relation to migration irregularity: from a State with a legal obligation to promote regularisation to one that contributes to the production of irregularity and subsequently enforces against it.

2. Policies and Practices

During the period 2015-2019, in parallel with and in line with the normative reforms, the DNM implemented administrative changes that created or deepened obstacles to regularisation. These transformations included, first, the digitalisation of migration procedures through the introduction in 2018 of the RADEX digital system. This system substantially altered the experience of booking appointments, initiating procedures and paying fees, introducing new barriers for groups with limited access to technological resources, difficulties in using digital platforms, or limited literacy in Spanish.

These changes were accompanied by increases in migration fees[57], reduced opening hours, staff cuts within the DNM, and the reduction of territorial service points, which

56 Personal communication.

57 Observatorio sobre Migraciones y Asilo en Argentina, Gabriel Chausovsky, El DNI ¿más lejos o más cerca? Regularización y documentación de migrantes a través del sistema RADEX, 2023: Between 2014 and 2018, the fees for MERCOSUR and non-MERCOSUR applicants increased fivefold, and subsequent increases quadrupled the cost of the procedure as a proportion of the minimum wage.

further restricted access to the administration, particularly in areas distant from the DNM's central offices.

Second, more restrictive administrative criteria were adopted in the processing of applications. This included, for example, the imposition of increasing requirements and formalities in applications for fee exemptions, as well as the systematic rejection of residence applications on humanitarian grounds and a more limited use of waivers based on family reunification. In this way, previously existing margins for regularising complex migration situations were reduced[58].

Finally, these measures were articulated with a strengthening of migration control mechanisms, including the proposal -later suspended- to create detention centres for individuals in breach of the Migration Law, the effective dismantling of the Territorial Outreach Programme, and an increase in residence control operations in public spaces and workplaces. Taken together, these administrative transformations not only accompanied the tightening of the normative framework but also effectively restricted access to regular status. They also reshaped the relationship that the State had progressively established with the migrant population between 2003 and 2015.

From 2019 onwards, at the level of policies and implementation, the change in government and the repeal of DNU 70/2017 did not entail an immediate transformation of the conditions of access to regular status. On the contrary, measures adopted during this period contributed to maintaining -and in some cases deepening- existing restrictions.

In particular, the COVID-19 pandemic had a significant impact on access to regularisation. Border closures, the interruption of services at the DNM, and the suspension of procedures hindered both the initiation and continuation of residence applications[59]. These developments were compounded by administrative decisions that, in practice, maintained or even reinforced restrictions introduced under the previous administration. They included the absence of a general policy to regularise the situation of individuals who had entered the country through border crossings that were closed during the lockdown, the raising of evidentiary standards required to meet certain migration criteria beyond what was established in the legal framework, and the continued use of digital processing systems introduced previously, without substantive modifications to facilitate access.

In this context, the combination of persistent restrictive administrative practices and the exceptional conditions resulting from the pandemic contributed, in practice, to limiting

58 This particularly affected migrants from countries such as Senegal, Haiti and the Dominican Republic, non-MERCOSUR countries whose nationals required a tourist visa to enter Argentina and who, due to the cost or lack of access to an Argentine consulate, had entered through unauthorised border crossings and were therefore unable to demonstrate lawful entry in order to initiate regularisation procedures.

59 *Brenda Canelo / Corina Courtis*, Cuestión de papeles: migrantes y acceso al DNI en tiempos pandémicos en Buenos Aires, Cuestión Urbana 6 (2022), p. 73; Observatorio sobre Migraciones y Asilo en Argentina, Gabriel Chausovsky, note 57.

access to regular status, even in a scenario of formal reversal of the normative reforms introduced by DNU 70/2017.

The normative transformations introduced by Decree 366/2025 under the government of Javier Milei have been accompanied by a set of policies and practices that reinforce this reorientation of the migration regime. These include the implementation of migration control operations and the detention of undocumented individuals in public spaces, particularly in neighbourhoods with a high concentration of migrants, as well as the intensification of public discourses that mediatise and spectacularise the enforcement of irregular migration.

At the same time, migration policy has incorporated selective mechanisms of regularisation, such as an extraordinary and temporary programme targeting Venezuelan nationals, implemented in 2024, which simplifies the requirements for accessing residence. These types of targeted and temporary interventions reflect a differentiated logic of managing regular status, which does not alter the structural restrictions on access to residence but enables the selective management of particular migration flows.

II. Chile

1. Normative Aspects

From the perspective of normative paradigms, the Chilean case is characterised by the continuity of a regulatory logic centred on control and security, rather than by the introduction of recent structural changes. This is reflected in the initial migration framework, Decree Law No. 1.094 of 1975, and is further reinforced in Law No. 21.325 of 2021.

These normative frameworks are embedded in an institutional tradition linked to the National Security doctrine and a legal culture characterised by granting broad decision-making powers to the administration. Moreover, this regulatory framework is articulated with other legal instruments, including the 1980 Constitution, Supreme Decree No. 597 (regulating Decree Law No. 1.094), Law No. 20.430 on refugee protection, and Law No. 20.507 on the smuggling of migrants and trafficking in persons. Together, these instruments delimit the conditions of stay and regularisation.

With regard to access to regular status, Law No. 1.094—applicable until 2021—established visa categories (Art. 22) granted by the Ministry of the Interior within Chilean territory, which generally required the submission of criminal background certificates and a valid passport. These categories structured access to regular status on the basis of specific criteria, none of which were linked to nationality or to regional integration schemes such as MERCOSUR. Among the most relevant were: (1) the contract-based visa, strictly tied to the existence of an employment relationship and whose validity depended on the continuation of the contract; (2) the student visa, temporary in nature and not permitting paid employment; (3) temporary residence, granted on the basis of family ties or economic utility criteria; and (4) permanent residence, which could be obtained after two years of contract-based residence, was conditional upon the continuity of regular residence, and could be revoked in cases of prolonged absence.

Access to these visas and the continuity of regular status were subject to the fulfilment of strict requirements, such as obtaining and maintaining a formal employment contract without interruption, the submission of enrolment and attendance certificates for study-based visas, among others. In addition, as noted above, the framework granted broad discretionary powers to the migration authority in individual cases to grant or deny residence, for example when it authorised the granting of temporary residence to individuals able to demonstrate that their stay was "useful or advantageous".

At the same time, the broad discretionary powers granted to the administration by the law provided successive national governments with a degree of flexibility to resolve favourably cases of individuals who did not strictly meet migration criteria. Moreover, this flexibility enabled institutional actors to create and implement, through decrees and administrative measures, non-permanent avenues of access to rights, generally in response to political pressures and specific conjunctural dynamics. Thus, for example, the government of Michelle Bachelet (2014-2018) introduced changes related to social protection[60] and, like Sebastián Piñera's (2018-2022) later administration, implemented special regularisation measures.

These dynamics unfolded in a context marked by social and political tensions. On the one hand, there were tensions between discourses of openness towards Venezuelan migration flows—which gained prominence from 2015 onwards[61]—and the limited availability of legal pathways for entry and stay.[62] On the other hand, the sociopolitical climate shaped by the social uprising of 2019 -a major moment of conflict in Chile- together with the

60 Michelle Bachelet's administration placed access to social benefits for the migrant population on the governmental agenda, enabling access to public healthcare and education, as well as to pension systems. However, this process was not without difficulties, largely due to a lack of institutional coordination, which significantly limited migrants' effective access to these benefits. This was marked by the adoption of administrative strategies aimed at facilitating access to social benefits, such as specific regularisation periods and the issuance of temporary tax identification numbers (RUT), which were, in practice, incompatible with subsequent regularisation.

61 Organización Internacional para las Migraciones (OIM), Tendencias Migratorias Nacionales en América del Sur. Oficina Regional para América del Sur, 27 February 2018,

62 This was further reinforced by the Chilean State's decision in 2018 not to sign the Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195), with the Minister of Foreign Affairs arguing that it constituted an international framework that could undermine national sovereignty. Ministerio de Relaciones Exteriores, Chile no va a adherir a nada que pueda ser usado en su contra y que atente contra nuestra soberanía, 10 December 2018, https://www.minrel.gob.cl/sala-de-prensa/chile-no-va-a-adherir-a-nada-que-pueda-ser-usado-en-su-contra-y-que-atente (last accessed on 6 May 2026).

COVID-19 pandemic, contributed to the strengthening of control- and security-oriented policies.[63]

At the normative level, this was reflected in measures such as the militarised closure of borders[64] and the possibility of denying entry to, or imposing quarantine measures on, foreign nationals. In this context, xenophobic discourses and rejection of non-nationals became more widespread, as the institutional strain on public services—particularly in healthcare—was socially attributed to vulnerable populations, publicly characterised as migrants.

Legal constraints on regular entry and stay in the territory did not reduce arrivals. On the contrary, they led to an increase in entry through unauthorised border crossings.[65] To address the insufficiency and inaccessibility of legal pathways, the national government resorted to temporary and extraordinary schemes for entry and migration regularisation.

This both resulted from and deepened the disconnect between a normative framework centred on a logic of national security and control—granting broad discretionary powers to the administration—and the actual dynamics of mobility. In 2018, the humanitarian crisis at the northern border, particularly in Colchane, made these tensions visible, as thousands of people -mostly Venezuelan nationals- entered Chile through unauthorised crossings, without the possibility of doing so through regular channels.[66]

Previously , the government of President Michelle Bachelet had implemented a temporary regularisation programme, the "Regularisation of Stay Process". This amnesty programme, which did not require a valid employment contract, lowered access requirements and enabled more than 20,000 individuals to obtain visas, thereby reducing the number of

63 Decree No. 4/2020 of 8 February 2020, declaring a health alert for the specified period and granting extraordinary powers in response to a public health emergency of international concern (PHEIC) due to the outbreak of the novel coronavirus (2019-nCoV).

64 The militarised border closure entailed "denying entry into the country or ordering the isolation of foreign nationals not resident in Chile who were suspected of or affected by the novel coronavirus 2019".

65 Data from the Jesuit Migrant Service (SJM) report 8,048 irregular entries in 2019, 16.848 in 2020, and an unprecedented increase to 43.541 in 2021; *Carolina Stefoni/ Matías Jaramillo /Aline Bravo / Gustavo Macaya-Aguirre,* Colchane. La construcción de una crisis humanitaria en la zona fronteriza del norte de Chile, Estudios fronterizos 24 (2023).

66 *Norberto Paredes,* La crisis sin precedentes de la pequeña Colchane, el pueblecito chileno que tiene más migrantes que habitantes, BBC News, 6 February 2021, https://www.bbc.com/mundo/noticias-america-latina-55950140 (last accessed on 4 May 2026); At the same time, while messages of openness were promoted at the political level, restrictive mechanisms governing access to regular status were being consolidated at the normative and administrative levels. Thus, for example, President Sebastián Piñera travelled to Cúcuta to support Juan Guaidó's self-proclamation, while one of his ministers publicly stated, "come to Chile, we have work for all of you." See *Germán Silva Cuadra*, El spoiler de Piñera en 2019: 'Vénganse a Chile, ¡tenemos trabajo para todos ustedes!', Elmostrador, 31 January 2022,

https://www.elmostrador.cl/noticias/opinion/2022/01/31/el-spoiler-de-pinera-en-2019-venganse-a-chile-tenemos-trabajo-para-todos-ustedes (last accessed on 4 May 2026).

people in irregular status and without access to social benefits. In addition, its implementation made it possible to generate updated statistical data on the migrant population in the country.

In 2018, the government of Sebastián Piñera introduced a new extraordinary regularisation programme through the so-called “Visa of Democratic Responsibility”. The application process cost approximately USD 90, in addition to the required documentation, and more than 155,000 individuals regularised their status through this mechanism. These visas sought to channel Colombian and Venezuelan migration flows, alongside an increase in asylum applications, through the creation of an institutional mechanism distinct from the international refugee protection framework.[67]

Although presented as stable regularisation mechanisms, these programmes established temporary residence schemes requiring transition to other categories in order to ensure continued stay, thereby producing fragmented and unstable migration trajectories. In addition to operating as a regulatory “bypass” to the right to asylum and the principle of non-refoulement[68], this new category is limited to a duration of two years, requiring applicants to transition to permanent residence in order to remain in the country. This, in turn, requires identity documentation that is not always easily obtainable, or an employment contract, creating a situation of uncertainty for individuals who have already resided in the country for at least two years.

The social tensions that characterised the social uprising and the pandemic were used by the government to justify the need for changes to migration legislation. This led, in 2021, to the enactment of the new Migration Law No. 21.325. Discursively, this process was presented as an update and democratic reconstruction of the migration regime, incorporating a catalogue of rights and human rights principles.[69]

However, the law maintains an emphasis on control, restricts access to regular status, and reinforces mechanisms of expulsion and border management. It also introduces as an objective the promotion of “orderly, safe and regular” migration, in line with global trends towards strengthened migration control[70]. Finally, while it proclaims principles of equality and non-discrimination, it introduces explicit distinctions in treatment between nationals

67 United Nations, Convention Relating to the Status of Refugees 1951; Declaración de Cartagena sobre Refugiados 1984.

68 Art. 33, Convention Relating to the Status of Refugees.

69 This framework reflects the dissonances between normative structures and the articulation of bureaucracy, institutional arrangements and practices. It was shaped in a context of a public health crisis, marked by a significant rise in xenophobia, and through a legislative process in the Senate characterised by the limited capacity of social organisations to participate actively. This resulted in a regulatory framework with little or no effective participation, associated with a security-oriented approach and with a governing strategy under Sebastián Piñera framed around the objective of “putting the house in order”, in line with a broader regional and global trend towards promoting “safe and orderly migration”.

70 A measure strengthened during the COVID-19 pandemic and subsequently sought to be made permanent through legislative reform; *Galdámez / Castro /Cepeda*, note 48.

and foreign nationals, and between migrants in regular and irregular status in access to rights.

One of the most significant changes affecting access to regular status is the requirement to apply for visas through consular procedures, meaning that all regularisation processes must be initiated outside the national territory. This externalisation of the border significantly limits the possibilities of regularisation for individuals already present in the country who are unable to maintain their migration status due to difficulties in meeting the requirements for residence renewal.

The new law also introduces border control mechanisms such as the immediate return of migrants at the border—a form of "summary return"—to the country from which they arrived. In addition to granting broad discretion to officials, this practice raises tensions with refugee law and due process guarantees, thereby reinforcing the security-oriented character of the system.

In practice, these normative provisions have contributed to an increase in entries through unauthorised crossings by individuals unable to meet visa requirements or afford the costs of application, thus reinforcing the dynamics of the production of migration irregularity.

2. Policies and Practices

With regard to the implementation of migration law through policies, the enactment of Law No. 21.325 transformed the visa application process, which became fully digitalised. While this change accelerated procedures that had previously been carried out by mail, it also introduced barriers for individuals without access to digital devices or the internet, particularly migrants in transit.

In addition, the law substantially reconfigured the institutional framework responsible for implementing migration policy and its instruments. In this regard, it replaced the Department of Immigration and Migration (DEM) with the National Migration Service (SNM), which became a decentralised public body with regional offices and its own legal and financial autonomy. It also established an Interministerial Council on Migration Policy and Regional Directorates, with the aim of improving access to information, decentralising migration governance—previously highly centralised- and enhancing operational capacity in contexts such as public health emergencies.

In practice, however, the implementation of this new institutional framework generated new obstacles in migration procedures, including longer waiting times during the pandemic and problems related to the transfer of information between administrative units and institutions. During the transition, data from thousands of regularisation applications were lost.[71]

71 *Macarena Segovia / Luna Angel,* Falla en el sistema de migraciones y falta de respaldo obligaron a reconstruir datos de miles de extranjeros desde 1993 a 2021, Ciper Chile, 22 February 2022, https://www.ciperchile.cl/2022/02/21/falla-en-el-sistema-de-migraciones-y-fal-

In addition to the new data system, associated with a form of technological governance, in 2023 the National Migration Service (SNM), in coordination with the Investigative Police (PDI), implemented the "Biometric Registration" programme. This government strategy aimed to quantify the migrant population in irregular status and to improve policy efficiency and security through the collection of fingerprints and biometric data.[72] However, it was not linked to any mechanism for regularising migration status and, at the same time, was associated with the expulsion of migrants in complex regulatory situations.

Taken together, the Chilean case shows the persistence of a normative model that, even while incorporating new instruments and discourses, remains structured around the management of migration as a problem of control, generating conditions that hinder access to stable pathways to regular status.

These practices have become institutionalised and have given rise to mechanisms that are not necessarily formal but are nonetheless embedded in administrative cultures. For example, access to social benefits is often contingent on documentation linked to a formal employment contract, in a context where national-level programmes have been limited. This contributes to the production of differentiated forms of inclusion, in which migrants face constraints in accessing public education due to documentation requirements, while labour markets tolerate informal work, pushing certain groups into precarious conditions that affect their ability to secure residence, access rights, employment and housing.

F. Discussion and Final Reflections

The comparative analysis of Argentina and Chile reveals a shift towards more securitised forms of migration governance in the Southern Cone over the past decade. This shift has translated into the consolidation of institutional mechanisms that manage migration irregularity and contribute to the precarisation of the living conditions of non-nationals.

Both countries originate from distinct normative trajectories. Argentina developed a model oriented -albeit with limitations- towards regularisation and the recognition of the right to migrate, in which the institutional response to irregularity prioritised regularisation over expulsion. Chile, by contrast, was structured around a national security framework characterised by high levels of administrative discretion, in which regular status operated more as a concession than as a right.

Despite these divergent starting points, the analysis identifies three main areas of convergence. First, both countries have increasingly relied on executive and administrative mechanisms to reshape migration policy. In Argentina, the most significant changes occurred through executive decrees (DNU 70/2017 and DNU 366/2025), which altered access

ta-de-respaldo-obligaron-a-reconstruir-datos-de-miles-de-extranjeros-desde-1993-a-2021/ (last accessed on 4 May 2026).

72 Servicio Nacional de Migraciones (SERNAM) Programa de empadronamiento biométrico (2023). https://serviciomigraciones.cl/empadronamiento-biometrico-hasta-fin-de-ano/última revisión diciembre 2025 (last accessed on 4 May 2026).

to regular status and expanded State discretion. In Chile, by contrast, normative rigidity has been managed through administrative provisions and control mechanisms that operate as filters prior to entry, limiting possibilities for regularisation from the outset of migration trajectories.

Second, both cases show an increasing digitalisation of migration governance. The implementation of systems such as RADEX in Argentina and digital infrastructures within the National Migration Service in Chile has been framed as administrative modernisation. However, in practice, these mechanisms have introduced new barriers to access, particularly for individuals with limited technological resources or difficulties in meeting complex administrative requirements, thereby reinforcing segmentation in access to regular status.

Third, both countries have recurrently resorted to extraordinary regularisation mechanisms in response to the limitations of ordinary regimes. These temporary "windows" do not eliminate structural barriers but rather manage them, producing fragmented and unstable forms of regularity. In this sense, migration irregularity does not appear as a system failure, but as an effect of its normative design and modes of implementation.

Within this framework, the comparative analysis shows that both Argentina and Chile are converging towards forms of precarious or liminal legality. This convergence is sustained, among other factors, by the growing centrality of economic and labour requirements as criteria for access and permanence. In Argentina, particularly following recent reforms, the introduction of economic solvency requirements redefines access to residence and shifts migration policy away from a regularisation paradigm towards one that structurally restricts permanence. In Chile, these criteria have long been more prominent, linking access to rights and regular status to labour market insertion and economic capacity. In both cases, access to regular status becomes increasingly uncertain, conditional and reversible.

These transformations reveal a widening gap between normative language and its effective implementation. While human rights language remains present in Argentina's legal framework, its operability has been eroded by restrictive reforms and administrative practices. In Chile, although recent legislation incorporates references to rights, these remain subordinated to criteria of control, economic solvency and labour insertion. In both cases, regularisation is increasingly configured as an exception or concession rather than a guaranteed right.

In this context, migration irregularity does not emerge as a system failure or solely as the result of individual trajectories, but as an outcome produced by normative and administrative frameworks. At the same time, States deploy mechanisms of control, sanction and expulsion aimed at managing and policing the very irregularity they help to produce. Thus, the production and control of irregularity operate as two complementary dimensions of contemporary migration governance.

Taken together, these processes show that, despite their different starting points, Argentina and Chile are converging towards forms of migration governance that do not seek the full integration of migrant populations, but rather the management of their precariousness and, in some cases, the discouragement of their permanence. The production of irregularity thus emerges as a central mechanism of regulation, sustained through both legal reforms and administrative practices.

This analysis suggests the need for further research on recent transformations in regional migration governance, focusing on concrete implementation practices and their effects on migrants' trajectories, particularly in terms of access to regular status and the strategies developed to navigate increasingly restrictive contexts.

Co-Producing Rights and Control: Redundancy and Contingency in Migration Governance in Colombia

By *María Gabriela Trompetero-Vicent*[*]

Abstract: Colombia's Estatuto Temporal de Protección para Migrantes Venezolanos (ETPV), adopted in 2021, is one of the most ambitious regularization programs in the world, granting nearly two million Venezuelans ten years of legal status, access to social and economic rights, and a pathway to permanent residence. Strikingly, the policy was designed and implemented largely by the Colombian Migration Office, an institution historically oriented toward border control and security. This article examines how a security agency incorporated a rights-based logic into its policymaking and argues that the ETPV did not represent a paradigmatic shift, but a hybrid governance arrangement produced through the co-production of rights and control. Drawing on document analysis and interviews with policymakers, migration officials, and international organizations, the article shows that the ETPV's core mechanisms—particularly biometric registration and long-term documentation—operated redundantly, simultaneously fulfilling security functions (identification and surveillance) and rights-based functions (access and integration). This redundancy stabilized support across actors who interpreted the same instruments through different institutional logics, while contingent conditions—particularly the COVID-19 pandemic and the visibility of mass irregularity—opened a window of opportunity for such hybrid solutions to emerge. By explaining how rights became embedded within a security institution without normative convergence, the article advances theoretical debates on migration governance and highlights how South–South contexts generate hybrid models in which protection and control are mutually constitutive rather than opposed.
Keywords: Migration Governance; Regularization; Rights and Control

***

A. Introduction

The scale and speed of Venezuelan displacement have reshaped migration governance across Latin America. Colombia, as the principal receiving state, now hosts more than 2.8

* Associated Researcher and Doctoral Candidate in Sociology at Bielefeld University (Germany). Email: Gabriela.trompetero@uni-bielefeld.de.

million Venezuelans.[1] Managing this phenomenon has brought to the fore the central tensions that define contemporary migration governance, namely those between humanitarian commitments, state sovereignty, utilitarian considerations and security logics.[2]

These tensions became especially visible in Colombia in 2021, when the government of Iván Duque introduced the *Estatuto Temporal de Protección para Migrantes Venezolanos* (ETPV), a mechanism celebrated internationally as an unprecedented step in global migration governance.[3] The ETPV has regularized close to two million Venezuelans, granting them access to human rights such as health care, education, and formal labor markets for a period of ten years, with a pathway to permanent residence.[4] Strikingly, this initiative was designed and implemented largely by the Colombian Migration Office (CMO)—a body with a mandate for border control and surveillance. Existing scholarship would predict institutional resistance rather than rights incorporation: security-oriented agencies typically prioritize enforcement over protection and limit the expansion of rights for irregular migrants.[5]

This creates a central puzzle: how did a security-oriented institution come to design, lead and implement one of the most ambitious rights-based regularization programs? While Latin American migration governance has long combined rights-based rhetoric with uneven implementation,[6] the Colombian case goes a step further by locating a major rights-expanding initiative within a security institution.

This article argues that the incorporation of rights into the CMO did not represent a paradigmatic shift but a process of co-production, in which rights and security were fused through a mechanism of redundancy. This process was enabled by crisis-driven contingency, challenging Global North–oriented dichotomies that conceptualize restriction and

1 Colombian Migration Office, Informe de migrantes venezolanos en Colombia corte 31 de diciembre de 2024, June 2024, https://www.migracioncolombia.gov.co/infografias-migracion-colombia/informe-de-migrantes-venezolanos-en-colombia-a-diciembre (last accessed on 7 May 2026).

2 *James Hollifield*, Immigrants, Markets, and States: The Political Economy of Postwar Europe, Cambridge 1992; see also *Antoine Pécoud,* Philosophies of Migration Governance in a Globalizing World, Globalizations 18 (2020).

3 International Organization for Migration, IOM and UNHCR welcome Colombia's decision to regularize Venezuelan refugees and migrants, 9 February 2021, https://www.iom.int/news/iom-and-unhcr-welcome-colombias-decision-regularize-venezuelan-refugees-and-migrants (last accessed on 7 May 2026).

4 *María Trompetero-Vicent*, Situando al Estatuto Temporal de Protección para Migrantes de Venezuela en Colombia desde una perspectiva global, Aldea Mundo: Revista sobre Fronteras e Integración Regional 27 (2022), pp. 76, 80.

5 See e.g. *Reinhard Schweitzer*, How Inclusive Institutions Enforce Exclusive Immigration Rules: Mainstream Public Service Provision and the Implementation of a Hostile Environment for Irregular Migrants Living in Britain, in: Sophie Hinger / Reinhard Schweitzer (eds.), Politics of (Dis)Integration, Cham 2022.

6 *Diego Acosta / Luisa Feline Freier*, Turning the immigration policy paradox upside down? Populist liberalism and discursive gaps in South America, International Migration Review 49 (2015), p. 1.

protection as mutually exclusive.[7,8] Rather than replacing its security and control logics, the CMO reinterpreted core control practices, such as biometric registration, as simultaneously serving rights-based logics. Rights became incentives for registration and legal visibility, while expanded documentation and surveillance became the gateway to access rights. This hybrid arrangement stabilized political and bureaucratic support because different actors—state authorities, international organizations, and civil society—could justify the same policy instrument through different logics.

This argument makes three contributions. First, it shows how rights become embedded within a security institution not through normative convergence but when policy instruments acquire overlapping functions capable of satisfying divergent institutional logics. Second, it demonstrates how contingency (particularly the COVID-19 pandemic and the political visibility of mass irregularity) creates windows of opportunity for institutional reinterpretation and policy innovation. Third, it advances the study of South–South migration governance by illustrating a hybrid model in which rights and control are not opposing logics but mutually constitutive dimensions of governance.

Empirically, the article draws on qualitative analysis of official documents and thirty semi-structured interviews with officials from Colombian migration-related institutions, including the Colombian Migration Office, the Ministry of Foreign Affairs, and the Border Management Office; international organizations, and subject-matter experts. Analytically, it integrates the institutional logics perspective with Luhmannian concepts of redundancy and contingency to explain how security-oriented bureaucracies can become sites of rights innovation without undergoing wholesale paradigm change.

B. Conceptual and Analytical Framework: Migration Governance, Rights, and Institutional Logics

This section develops the conceptual and analytical framework guiding the article. It brings together two bodies of literature—migration governance and institutional logics—and complements them with Luhmannian concepts of redundancy and contingency to explain how security- and rights-based rationalities coexist, interact, and are operationalized within Colombia's ETPV.

I. Migration Governance Debates: North vs. South, Securitization vs. Rights

Much of the literature on migration governance has focused on South-North dynamics, particularly the Global North's reliance on restrictive frameworks designed to deter and control

7 *Antoine Pécoud,* Philosophies of Migration Governance in a Globalizing World, Globalizations 18 (2020).

8 *Bridget Collrin / Harald Bauder,* Migration governance between sovereignty, security and rights: An analysis of the literature, International Migration 63 (2025).

migration.[9] These include securitization, deterrence, externalization of border control,[10] and the liberal paradox.[11] The result has been a dominant narrative in which the Global North is both the central site of migration research and the archetype of restrictive governance and the tensions around it. By contrast, South–South migration has received comparatively little scholarly attention,[12] even though most displaced populations are hosted in low- and middle-income countries.[13]

Scholars have frequently characterized Latin American migration and refugee policies as comparatively liberal and progressive in the global context.[14] Acosta[15] explains that, following the democratic transitions of the 1980s, South American states—historically countries of immigration that became countries of emigration amid recurrent economic instability—implemented constitutional reforms strongly influenced by international human rights norms, particularly the American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights. This rights-based orientation continues to shape the region's migration, mobility, and citizenship regimes. As Acosta notes, it is reflected in several key dimensions: the expansion of political rights; the recognition of migration as a human right in national legislation—such as in Argentina—accompanied by the non-criminalization of undocumented migrants; the development of regional free-movement initiatives, particularly the 2002 MERCOSUR Residency Agreement; and relatively inclusive citizenship regimes, where the predominance of *ius soli* and short residence requirements make access to nationality less restrictive than in many other parts of the world. These developments underscore how Latin America has emerged as a region with some of the most expansive and rights-oriented migration and citizenship policies worldwide. Moreover, landmark agreements such as the 1984 Cartagena Declaration institutionalized a broad definition of refugees and promoted regional solidarity.

9 *Claudia Finotelli / Irene Ponzo,* Migration Control Logics and Strategies in Europe A North-South Comparison, Cham 2023.

10 *David Fitz Gerald,* Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence, Journal of Ethnic and Migration Studies 46 (2019).

11 *James Hollifield*, Immigrants, Markets, and States: The Political Economy of Postwar Europe, Cambridge 1992.

12 *Abel Chikanda / Jonathan Crush / Sujata Ramachandran*, South–South Migration: What is at Issue?, in: Jonathan Crush / Abel Chikanda / Sujata Ramachandran (eds.), New Directions in South-South Migration, Singapore 2025.

13 UNHCR, Global Trends: Forced Displacement in 2024, 14 June 2025, https://www.unhcr.org/global-trends-report-2024 (last accessed on 7 May 2026).

14 *Diego Acosta,* The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law, Cambridge 2018; *David James Cantor / Luisa Feline Freier / Jean-Pierre Gauci* (eds.), A liberal tide? Immigration and asylum law and policy in Latin America. London 2015; *Diego Acosta / Luisa Feline Freier,* Expanding the Reflexive Turn in Migration Studies: Refugee Protection, Regularization, and Naturalization in Latin America, Journal of Immigrant & Refugee Studies 21 (2023).

15 *Acosta,* note 14, pp. 5, 6.

Despite the availability of these rights-oriented instruments for refugee protection and migration regularization, they have largely been disregarded in responses to Venezuelan displacement, with most countries adopting increasingly restrictive migration policies. Although most Venezuelans would qualify as refugees under the broader definition established by the Cartagena Declaration, only a few states have granted them refugee status. Scholars argue that this human rights tradition often coexists with significant domestic constraints, including limited welfare states, economic crises, and political backlash.[16]

A central debate in migration studies concerns the relationship between rights-based approaches and institutions traditionally oriented toward security. For many scholars, security logics and rights logics appear fundamentally opposed: while security emphasizes control, surveillance, and exclusion, rights emphasize protection, inclusion, and equality.[17] The prevailing assumption has therefore been that security-oriented institutions are structurally resistant to the incorporation of rights. However, other scholarship complicates this dichotomy by showing that rights themselves can be instrumentalized by security institutions. Rather than serving exclusively emancipatory purposes, rights may also function as governance tools by encouraging registration, enabling surveillance, and legitimizing restrictive regimes. Domenech describes this dynamic as a form of "control with a human face",[18] in which policies framed in progressive or humanitarian terms incorporate mechanisms that facilitate control and securitization.

As Vera Espinoza[19] further notes, one of the defining features of Latin America's regional migration approach is its recurrent emphasis on migrant regularization.[20] Although in countries such as Argentina, Brazil, Colombia, and Uruguay the discourse of inclusion has, to some extent, translated into practice, fragmented implementation and contradictory policies reveal underlying tensions. This human-rights–oriented regional model, rooted in the integrationist projects of the 2000s, thus exemplifies how progressive rhetoric often coexists with practices that sustain control and securitization. Building on this perspective,

16 *Diego Acosta Arcarazo / Luisa Feline Freier*, Turning the Immigration Policy Paradox Upside Down? Populist Liberalism and Discursive Gaps in South America, International Migration Review 49 (2015).

17 *Antoine Pécoud,* Philosophies of Migration Governance in a Globalizing World Globalizations 18 (2020). *Bridget Collrin / Harald Bauder,* Migration governance between sovereignty, security and rights: An analysis of the literature, International Migration 63 (2025).

18 *Eduardo Domenech*, Las migraciones son como el agua: Hacia la instauración de políticas de "control con rostro humano". La gobernabilidad migratoria en la Argentina, Polis, Revista Latinoamericana 12 (2013).

19 *Marcia Vera-Espinoza*, Migration Governance in South America: Change and Continuity in Times of Crisis, in: Heaven Crawley / Joseph Kofi Teye (eds.), The Palgrave Handbook of South–South Migration and Inequality, New York 2024.

20 *Diego Acosta / Jeremy Harris*, Regímenes de Política Migratoria en América Latina y el Caribe Inmigración, libre movilidad regional, refugio y nacionalidad, Washington DC 2022.

Brumat[21] shows that the Colombian State justified the implementation of the ETPV through both utilitarian and rights-based arguments: irregular migration undermines state authority over territory, the economy, and the population, while fostering informality, criminality, and violations of fundamental rights. Within this framework, migration governance is conceptualized as a dual strategy of "state control and rights expansion", premised on the assumption that migration is an inevitable phenomenon beyond the State's capacity to halt. This literature highlights the coexistence of rights-based frameworks and restrictive practices but does not explain how these logics are operationalized, aligned, and stabilized within a single institution.

To better understand how these tensions are translated into policy outcomes, recent scholarship has focused on the role of bureaucratic institutions in shaping migration policy paradigms in Latin America. Fernández-Rodríguez and Celleri argue that migration policy toward Venezuelans is shaped by bureaucratic paradigms, which are significantly influenced by bureaucracies' missions and institutional cultures. They further show that "the hierarchical position and specialization of competing migration bureaucracies determine their ability to advance their paradigms during policy-making processes."[22] These dynamics help explain why states such as Colombia and Ecuador have adopted divergent approaches to Venezuelan displacement, including nationalist, managerial, and rights-based models.

While this literature makes an important contribution by highlighting the role of bureaucratic dynamics in shaping migration governance in Latin America, and by identifying changes in migration paradigms—such as the emergence of managerial orientations within the Colombian Migration Office—it primarily explains these dynamics as the result of institutional structures, missions, and organizational transformations. However, it pays less attention to how competing logics, such as security and rights provision, are aligned and operationalized within a single institution rather than one displacing the other. This article adopts a processual and relational perspective. Rather than treating bureaucratic structures as determinants of policy orientations, it examines how competing institutional logics—particularly security and rights-based rationalities—are actively co-produced through policy design, mediated by redundancy and contingency, and shaped by the agency of actors embedded within these logics.

In this sense, the analysis of the Colombian Migration Office (CMO) and the ETPV moves beyond the identification of structural paradigms to explore the micro-processes through which rights are incorporated, negotiated, and rearticulated within a security-oriented apparatus. This approach highlights how hybrid governance arrangements emerge through the alignment of competing logics within shared policy instruments. revealing the dynamic and adaptive character of bureaucratic action in South–South migration gov-

21 *Leiza Brumat*, Gobernanza migratoria en Suramérica en 2021: Respuestas a la emigración venezolana durante la pandemia, Análisis Carolina 12 (2021).

22 *Nieves Fernández-Rodríguez / Daniela Célleri*, The power of bureaucracies: Shaping migration policy paradigms in Colombia and Ecuador, Migration Studies 12 (2024), p. 3.

ernance. Rather than viewing rights and security as alternative or competing policy orientations, it shows how the same instrument can simultaneously enact both logics through mechanisms of redundancy, revealing the dynamic and adaptive character of bureaucratic action in South–South migration governance.

II. Institutional Logics, Redundancy and Contingency

Institutional approaches provide a useful analytical lens for examining how multiple and sometimes contradictory rationalities coexist within bureaucratic systems. According to Thornton and Ocasio[23], institutional logics are "the socially constructed, historical patterns of material practices, assumptions, values, beliefs, and rules by which individuals produce and reproduce their material subsistence, organize time and space, and provide meaning to their social reality." In this sense, institutional logics connect individual agency with broader institutional practices and rule systems.[24]These logics are not static but dynamic, frequently overlapping, competing, and evolving within the same organization.

While institutional logics theory helps explain the coexistence of different logics, this article draws selectively on Niklas Luhmann's systems theory, particularly the concepts of redundancy and contingency, as mechanisms that help explain how multiple logics can be operationalized simultaneously without requiring their full reconciliation. From a Luhmannian perspective, organizations are decision-making systems that reproduce themselves under conditions of complexity.[25] Faced with a multiplicity of possible alternatives, organizations must reduce complexity while maintaining legitimacy across different audiences.[26] One mechanism through which they achieve this is redundancy. Rather than implying inefficiency, redundancy refers to the existence of alternative or overlapping structures capable of fulfilling the same function, thereby enabling flexibility and communicative adaptability. As Luhmann notes, "the concept of redundancy designates countless possibilities that fulfill the same function."[27]

Building on Luhmann's concept of redundancy, the article defines migration governance redundancy as the capacity of policy instruments to perform multiple institutional functions simultaneously. This does not preclude the introduction of new instruments or measures but highlights how established policy instruments can acquire additional functions in response to emerging migratory dynamics. In this sense, redundancy enables policy instruments that simultaneously grant rights and exercise control. Registration and documentation, for example, function both as tools of control—facilitating identification,

23 *Patricia Thornton / William Ocasio*, Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990, American Journal of Sociology 105 (1999), p. 804.

24 *Haverman / Gualtieri,* note 1.

25 *Niklas Luhmann*, Social Systems, Stanford 1995.

26 *Niklas Luhmann,* Organization and Decision, Cambridge 2000.

27 Ibid., p. 172.

surveillance, and state oversight—and as gateways to rights, enabling access to services, legal status, and socioeconomic integration. This functional overlap allows different stakeholders to interpret and justify the same instrument through distinct institutional logics, thereby stabilizing cooperation and sustaining legitimacy without requiring normative convergence.

Complementing this framework, the concept of contingency highlights the conditions under which such hybrid arrangements become possible. For Luhmann, contingency refers to the recognition that social outcomes are not predetermined but depend on specific historical and situational conditions: "Something is contingent insofar as it is neither necessary nor impossible; it is just what it is [or was or will be], though it could also be otherwise […] it describes objects within the horizon of possible variations."[28] Periods of crisis or disruption reveal this openness by destabilizing existing arrangements and making alternative institutional pathways visible.

In this sense, contingency explains when institutional change becomes feasible, whereas redundancy explains how such change is stabilized. In migration governance, moments of acute disruption—such as large-scale displacement or health crises—can open "windows of opportunity"[29]in which previously marginal logics gain prominence within institutions historically oriented toward control. However, for these shifts to become institutionally viable, they must be embedded in policy designs capable of accommodating multiple institutional logics simultaneously.

Taken together, this combined perspective offers a more dynamic understanding of migration governance. Institutional logics identify the competing normative orientations within organizations, while redundancy and contingency explain how these logics are translated into hybrid policy arrangements under specific institutional and historical conditions. As the analysis of the ETPV in Colombia shows, the coexistence of security and rights-based rationalities did not result from a paradigmatic shift but was operationalized through redundant instruments under contingent conditions.

C. Context: Venezuelan Migration in Colombia, Institutional Architecture, and the Pandemic as Catalyst

I. *Venezuelan Displacement and Colombia's Pre-ETPV Institutional Context*

Venezuelan displacement is one of the most significant population movements in recent history, with over eight million Venezuelans leaving their country since 2015[30] due to the consolidation of an autocratic regime, economic collapse, and a complex humanitari-

28 Ibid., p. 106.

29 *John Kingdom*, Agendas, Alternatives, and Public Policies, New York 1995.

30 R4V, Latin America and the Caribbean, Venezuelan refugees and migrants in the region, November 2024, www.r4v.info/en/document/r4v-latin-america-and-caribbean-venezuelan-refugees-and-migrants-region-nov-2024-0 (last accessed on 7 May 2026).

an emergency. Colombia has been the primary destination, hosting almost three million Venezuelans, with both regular and irregular status.[31] By 2020, nearly one million[32] Venezuelans in Colombia lacked legal status, creating urgent challenges for governance, humanitarian assistance, and social cohesion.

Compared to other countries in the Americas, Colombia presents a distinct migration trajectory. Shaped by more than five decades of armed conflict and recurrent economic crises throughout the latter half of the twentieth century and into the early twenty-first, the country was historically characterized by emigration and internal displacement.

Colombia's legal framework was not adequately prepared to manage the mass arrival of Venezuelan migrants, as the country operated in the absence of a unified migration law, leaving migration governance primarily subject to executive discretion.[33] Before the development of the ETPV, the Colombian state's response to Venezuelan migration had relied primarily on administrative measures, resulting in a migration policy concentrated within the Ministry of Foreign Affairs and the CMO. This approach produced a fragmented and reactive public policy that is difficult to navigate. Although the Colombian Congress passed Law 2136 in August 2021, which establishes the guidelines for the Integral Migration Policy, a critical analysis shows that the law, in many respects, reproduces decisions already contained in previous administrative acts without introducing substantial changes.[34]

II. Colombian Institutional Migration Landscape

Institutionally, migration and refugee matters fall under the authority of the Ministry of Foreign Affairs. Within this framework, the Special Administrative Unit Migration Colombia (Colombian Migration Office, CMO) was created by Decree 4062 of 2011. Its objective is to exercise the Colombian State's migration control functions within the framework of national sovereignty and under the laws and policies defined by the National Government on this matter.[35] From a normative perspective, therefore, the CMO's institutional mandate is one of security and control.

To substantiate the characterization of the Colombian Migration Office (CMO) as a security-oriented institution, it is necessary to consider its legal mandate, organizational

31 Colombian Migration Office, note 1.

32 Colombian Migration Office, Radiografía venezolanos en Colombia: 31 October 2020, https://unidad-administrativa-especial-migracion-colombia.micolombiadigital.gov.co/sites/unidad-administrativa-especial-migracion-colombia/content/files/000042/2057_radiografia-venezolanos-en-colombia_oct.pdf (last accessed on 7 May 2026).

33 *Deisy Del Real,* Seemingly inclusive liminal legality: the fragility and illegality production of Colombia's legalization programmes for Venezuelan migrants. Journal of Ethnic and Migration Studies 48 (2022).

34 *Gracy Pelacani / Carolina Moreno*, La respuesta del Estado colombiano frente a la migración proveniente de Venezuela: la regularización migratoria en detrimento del refugio, Estudios Socio-Jurídicos 90 (2023), p. 501.

35 Decree 4062, 2011.

practices, and policy trajectory prior to the ETPV. Formally, the CMO was established as the State's authority for migration control, explicitly tasked with overseeing entry, stay, and exit in accordance with national sovereignty and security considerations. This mandate has been operationalized through practices centered on surveillance, identification, and enforcement, including border monitoring systems, registration mechanisms, and the production of migration status categories that differentiate between regular and irregular populations. Institutionally, this orientation is further reflected in its historical roots in Colombia's security apparatus, as migration control functions were previously located in the Departamento Administrativo de Seguridad (DAS), and in the professional trajectories of key decision-makers with backgrounds in security and criminal policy. Moreover, early policy instruments developed or implemented by the CMO in response to Venezuelan displacement—such as the Tarjeta de Movilidad Fronteriza and the Permiso Especial de Permanencia—prioritized monitoring, registration, and the management of mobility flows, even when framed as regularization tools. Taken together, these elements indicate that security-oriented rationalities were not incidental but structurally embedded in the CMO's institutional orientation prior to the adoption of the ETPV.

Although the CMO's formal mandate is oriented toward control and security, the literature identifies the presence of additional institutional logics. The relocation of the CMO to the Ministry of Foreign Affairs fostered a more managerial orientation, emphasizing service provision and citizen assistance while maintaining its core control functions.[36] At the same time, since the onset of the Venezuelan displacement, Colombia has adopted a range of innovative rights-based regularization measures, including the Permiso Especial de Permanencia (PEP) and, later, the ETPV, both led by the CMO. However, these initiatives have largely relied on ad hoc presidential decrees, making them vulnerable to shifts in policy agendas, limiting legal certainty, and falling short of providing durable, long-term solutions.[37]

The National Commission for Refugees (CONARE), also under the Ministry of Foreign Affairs, holds responsibility for refugee recognition, determining eligibility for international protection. However, CONARE has long been institutionally weak, with refugee status determinations taking up to three years and the expanded Cartagena Declaration definition rarely applied. Moreover, until January 2025 the temporary permit for asylum seekers neither explicitly authorized nor prohibited employment, creating regulatory uncertainty that discouraged employers from hiring them.[38]

36 *Fernández-Rodríguez / Célleri*, note 28, p. 11.

37 *Pía Riggirozzi / Cintia Quiliconi*, Latin American migration governance: the politics of ambiguity and adhocracy, International Affairs 102 (2026); *María Trompetero-Vicent / Nelson Camilo Forero,* Autocratic Policy Tools and Permissive Outcomes: Governing Venezuelan Displacement in Colombia, Hague Journal on the Rule of Law (2026).

38 Dejusticia, Informe sobre la situación de los derechos humanos de las personas migrantes y refugiadas en Colombia, 14 May 2024, https://www.dejusticia.org/lo-que-dejusticia-le-dijo-a-la

Complementary institutional actors have intermittently emerged. The Border Management Office (BMO), an ad hoc body created under the Presidency in 2018 and dismantled by the Petro administration in 2022,[39] played a particularly influential role in responding to Venezuelan forced displacement. Unlike the CMO, the BMO promoted socio-economic integration and coordinated the response to Venezuelan displacement across national and local institutions and international cooperation actors. The BMO also played a key role in the policy design of the ETPV.[40]Although this institution was central to promoting a rights-based approach, the analysis focuses primarily on the CMO, since the incorporation of a rights-oriented logic within a control- and security-oriented agency presents the greater theoretical puzzle.

Furthermore, international organizations, whose presence in Colombia predates the displacement of Venezuelans due to their involvement during the armed conflict, have played an important role in shaping migration governance debates. These organizations have consistently promoted rights-based approaches and connected migration governance to broader development agendas.[41]

III. Policy Trajectory

Colombia's initial response relied on a series of short-term, ad hoc regularization mechanisms, most notably the *Permiso Especial de Permanencia* (PEP), which granted temporary authorization to reside and work but required periodic renewal. The instrument was later institutionalized through the PEP-RAMV mechanism, enabling the regularization of more than 400,000 individuals in 2018.[42] While these measures represented important steps, they nonetheless left large numbers of migrants in precarious situations: by 2020, nearly one million Venezuelans remained in irregular status.[43] Moreover, the PEP did not offer

-cidh/ (last accessed on 7 May 2026), p. 1. Since January 28, 2025, Decree 0089 allows asylum seekers to exercise their right to work in Colombia.

39 La Opinión, Gobierno de Petro elimina la Gerencia de Fronteras, 14 October 2022, https://www.laopinion.co/politica/el-gobierno-de-petro-elimina-la-gerencia-de-fronteras (last accessed on 7 May 2026).

40 *María Trompetero-Vicent*, Neither migrants nor refugees: (Re)categorization processes of forcibly displaced Venezuelans by the Colombian State, Doctoral Thesis, Universität Bielefeld (forthcoming); *Fernández-Rodríguez / Célleri*, note 2, p. 13.

41 *Nieves Fernández-Rodríguez / María Trompetero-Vicent*, Supporting without Steering: The Role of International Actors in Colombia's Policy on Venezuelan Displacement, International Migration (forthcoming).

42 *Ana María Ibáñez / Andrés Moya / María Adelaida Ortega / Sandra Rozo / María José Urbina*, Life out of the shadows: The impacts of regularization programs on the lives of forced migrants, Journal of the European Economic Association 23 (2025), p. 949.

43 Colombian Migration Office, Radiografía Venezolanos en Colombia, 31 de agosto de 2020, https://unidad-administrativa-especial-migracion-colombia.micolombiadigital.gov.co/sites/unidad-administrativa-especial-migracion-colombia/content/files/000042/2051_radiografia_venezolanos_corte-agosto.pdf (last accessed on 7 May 2026).

a pathway to durable solutions such as permanent residence. Instead, beneficiaries were required to continually extend a document that lacked formal recognition and legitimacy across institutions.

Another important predecessor to the ETPV was the National Council of Economic and Social Policy, Republic of Colombia National Planning Department: Strategy for Addressing Migration from Venezuela (CONPES 3950). This document explicitly shows the imperative of integration as a guiding principle to be embraced across all institutions tasked with addressing migratory concerns:

> *"In attention to the continuous migratory dynamics, between 2019 and 2020, the Colombian Migration Office (...) will present strategies to make the migratory status for Venezuelans more flexible through regulatory adjustments and new mechanisms in migratory matters (...). This will facilitate access to the labor market, family integration, and the provision of health and education services, according to the institutional offer of each sector."*[44]

IV. Situating the Colombian Response within Regional and Global Temporary Protection Mechanisms

Colombia has not been the only country in the region to implement ad hoc and temporary measures for the regularization of Venezuelans. Other states such as Ecuador, Peru, and Chile have adopted comparable mechanisms, including entry visas, special temporary work permits, and humanitarian visas.[45] Yet, these countries have progressively tightened their migration policies, restricting access to such mechanisms. While Colombia's approach has also faced significant challenges, it has nonetheless been distinguished by what has been described as an open-door policy,[46] at least until 2022. Within this regional context, the Colombian ETPV, which grants ten years of temporary protection and provides a pathway to a resident visa, stands out among the ad hoc responses adopted across Latin America.[47]

44 Consejo Nacional de Política Económica y Social, CONPES 3950, Estrategia para la atención de la migración desde Venezuela, 23 November 2023, https://www.cancilleria.gov.co/documento-conpes-estrategia-atencion-migracion-venezuela (last accessed on 30 September 2025), p. 101.

45 *Luisa Feline Freier / Marta Luzes*, How humanitarian are humanitarian visas? An analysis of theory and practice in South America, in: Liliana Lyra Jubilut / Marcia Vera Espinoza / Gabriela Mezzanotte (eds.), Latin America and refugee protection: Regimes, logics and challenges, New York 2021; see also *Victoria Prieto-Rosas / Gisela Zapata,* Unequal origins to unequal destinations: Trends and characteristics of migrants' social and economic inclusion in South America, in: Heaven Crawley and Joseph Kofi Teye (eds.), The Palgrave Handbook of South–South Migration and Inequality, New York 2024.

46 *Luciana Gandini*, Between closure and openness: Migration governance and the Venezuelan exodus, in: Andreas Feldmann, Xochitl Bada, Jorge Durand, Stephanie Schütze (eds.), The Routledge history of modern Latin American migration, New York 2022.

47 *María Trompetero-Vicent / Ana Moreno-Sáchica*, Del papel a la práctica: principales desafíos del tránsito del Estatuto Temporal de Protección para Migrantes Venezolanos (ETPV) a la Residencia

Temporary protection mechanisms are not a recent development; rather, they have been implemented in different parts of the world (e.g. South Asia during the late 1970s and early 1980s, as well as during the Balkan wars of the 1990s).[48] They emerged because the 1951 Refugee Convention does not adequately address the challenges posed by large-scale movements of people fleeing armed conflicts[49], climate crises, or other human rights violations. In this context, the need arose for a specific regime of temporary protection.[50] Other examples include the Temporary Protected Status in the United States, the Temporary Protection Regulation in Turkey to safeguard Syrians escaping civil war, and the European Union Directive 2001/55/EC, adopted in response to the large-scale displacement caused by the Russian invasion of Ukraine. The Directive was activated on 4 March, 2022, with the aim of providing urgent protection and a clear legal status to those escaping the conflict in Ukraine.[51] Although the Directive had originally been adopted in 2001 as a potential response to forced displacement during the wars in the former Yugoslavia, it had never been activated until 2022. This occurred despite multiple calls for its activation in response to forced displacement resulting from the Arab Spring in the 2010s and from conflicts in Afghanistan, Libya, and Syria.[52] The Directive "allows immediate access to protection and grants work and residence permits to Ukrainian nationals, stateless persons, and third-country nationals legally residing in Ukraine who are unable to return to their country of origin".[53]

Although the Directive has proven effective in providing protection to Ukrainians, it does not include a pathway toward permanent residence or nationality, an element present in the ETPV.[54]

These regional and global comparisons highlight the distinctiveness of the Colombian case. Unlike most temporary protection regimes, the ETPV combines an unusually long

Definitiva en Colombia, in: Diego Acosta / Jacques Ramírez / Ana Penchaszadeh (eds.), Descentrando los estudios migratorios desde Latinoamérica, Madrid 2026.

48 *Joan Fitzpatrick,* Temporary Protection of Refugees: Elements of a Formalized Regime, The American Journal of International Law 94 (2000).

49 *Meltem Ineli-Ciger,* Temporary Protection in Law and Practice, Leiden 2018.

50 *María Trompetero-Vicent*, Situando al estatuto temporal de protección para migrantes de Venezuela en Colombia desde una perspectiva global, Aldea Mundo 27 (2022).

51 European Commission, Ukraine refugees: Operational guidelines to support Member States in applying the Temporary Protection Directive, 18 March 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1727 (last accessed on 7 May 2026).

52 *Sergio Carrera / Meltem Ineli-Ciger / Lina Vosyliute / Leiza Brumat,* The EU Grants Temporary Protection for People Fleeing War in Ukraine, CEPS Policy Insights 9 (2022).

53 UNHCR, ACNUR aplaude la ágil y amplia implementación de la directiva de Protección Temporal para refugiados de Ucrania en España, 15 March 2022, https://www.acnur.org/noticias/comunicados-de-prensa/acnur-aplaude-la-agil-y-amplia-implementacion-de-la-directiva-de (last accessed on 7 May 2026).

54 *María Trompetero-Vicent*, Situando al estatuto temporal de protección para migrantes de Venezuela en Colombia desde una perspectiva global, Aldea Mundo 27 (2022), p. 74.

duration, a pathway to permanent residence, and implementation by a security-oriented migration authority. This combination makes Colombia a particularly compelling case through which to examine the co-production of rights and control.

D. Methods

This article employs a qualitative, interpretive research design to examine how the CMO, a security-oriented institution, came to adopt rights-based logics in the development of the ETPV. The analysis combines document analysis and semi-structured interviews and adopts a constructivist grounded theory–inspired analytical approach[55]allowing conceptual insights to emerge inductively from the empirical material while remaining in dialogue with institutionalist theory. Rather than testing predefined hypotheses, this approach enabled concepts such as redundancy and contingency to be further developed through continuous engagement between empirical observations and existing theoretical frameworks.

I. Data Collection

The analysis incorporated a broad set of policy and institutional documents produced between 2017 and 2023, including presidential decrees, CONPES policy papers, official communications issued by the CMO and the Ministry of Foreign Affairs, as well as reports from international organizations (IOM, UNHCR) and civil society actors. Media coverage and public speeches by policymakers were also included to trace the evolving political discourse surrounding Venezuelan migration.

A total of 30 semi-structured interviews were conducted between 2020 and 2023.[56] Participants included: senior officials from the CMO, the Ministry of Foreign Affairs, and the Border Management Office; staff from international organizations (IOM, UNHCR, NGOs); scholars and policy experts on Colombian migration governance. Participants were recruited through a purposive sampling[57] to capture institutional diversity and insider perspectives on both the design and implementation of the ETPV. Additional participants were identified through snowball[58] sampling, whereby initial contacts referred other relevant actors. Interviews were conducted in Spanish, recorded with consent, and later transcribed and anonymized to ensure confidentiality.

55 *Kathleen Charmaz,* Constructing grounded theory, New York City 2014.

56 See Annex 1 for a list of anonymized interviewees cited and codes.

57 *Omid Tajik / Jawad Golzar / Shagofah Noor*, Purposive Sampling, International Journal of Education and Language Studies 2 (2024), p. 1.

58 *Harvey Russel Bernard*, Research methods in anthropology: Qualitative and quantitative approaches, Plymouth 2011.

II. Data Analysis

Data analysis followed an iterative coding process inspired by grounded theory. Interview transcripts and documentary materials were imported into Atlas.ti for coding. Initial open coding identified categories related to security, rights, control, and humanitarianism. Subsequent axial coding explored how these categories related to broader institutional logics. Analytical memos were used to trace emerging connections with the concepts of redundancy and contingency, allowing theory-building from the empirical material.

To enhance validity and reliability, findings from different sources were triangulated: discourses from official documents were compared against interview narratives and secondary literature. Rather than being treated as inconsistencies, discrepancies between actors' accounts were interpreted as analytically meaningful evidence of institutional tensions and competing interpretations.

E. Analysis: The Colombian ETPV and the Co-Production of Rights and Control

This section applies the theoretical framework developed above to the Colombian ETPV, showing how rights and security became co-produced through hybrid institutional logics, redundancy, and contingency. It demonstrates that the ETPV represents both an institutional innovation and a form of pragmatic governance, in which mechanisms traditionally associated with control simultaneously expanded access to rights.

I. Institutional Logics and the Emergence of Hybrid Governance

Interviewees consistently identified the Colombian Migration Office (CMO) as the central actor in the design and implementation of Colombia's response to Venezuelan displacement. According to a legal representative of the CMO (CMO2), the Colombian Migration Office became the principal institution responsible for designing Colombia's migration policies to respond to Venezuelan displacement. Interviews with international experts, including representatives from IOM and UNHCR, highlighted the centrality of the CMO as the first point of contact for migrants and the primary actor coordinating inter-institutional responses. One IOM official noted: “The Colombian Migration Office is the first to react […]. Migrants know it more than other entities. It acts as an articulating entity among State institutions, because it has the information and capacity to link interventions” (IOM1). Border Management Office official (BMO2) also explained that the ETPV “was created collaboratively between the Presidency, the Border Management Office, and the CMO, with the CMO playing a much more prominent role.” An official from IOM also explained the role of the CMO: “All flexibilization mechanisms have consistently been led by the CMO working in close coordination with the Border Management Office, the Ministry of Foreign Affairs, and other relevant institutions.” (IOM1)

As discussed in Part C, the CMO has historically operated under a security-control logic, reflected in its mandate for border management, surveillance, and documentation, the institution that previously exercised these functions (the Departamento Administrativo de Seguridad, DAS), and the career paths of key policy makers. These features illustrate the predominance of a security-oriented institutional logic, in which irregular migration is framed as a challenge to sovereignty and public order, justifying practices of monitoring, identification, and enforcement. The security-control logic initially shaped the organization's response to Venezuelan displacement, first through the *Tarjeta de Movilidad Fronteriza* (Border Mobility Card), a card designed to monitor pendular flows across the Venezuelan border, and later through the *Permiso Especial de Permanencia* (Special Permission to Stay). However, the sheer scale of displacement—nearly two million Venezuelans in Colombia by 2020, with close to one million in irregular status—quickly exceeded the capacity of these early control and regularization mechanisms.

In this complex context in 2020, MFA1 said:

> *"I think this has already turned against our own solidarity and against local acceptance of Venezuelans. When people see migration becoming disorderly, many host communities have grown xenophobic and resistant toward the Venezuelan population. Even though there may be Venezuelans who cause problems, it shouldn't be generalized. So that very high level of solidarity, combined with institutional and logistical pragmatism, is creating a sort of crisis, and it has put us in a critical situation now."*

These dynamics illustrate what this article conceptualizes as contingency: a moment in which existing policy instruments became insufficient, creating pressure for institutional reinterpretation. The Venezuelan crisis and subsequent COVID-19 pandemic created conditions for institutional reinterpretation. Registration, biometric identification, and documentation—mechanisms historically framed as instruments of control—were reframed as gateways to rights, linking security and humanitarian objectives in ways that had previously been absent. One CMO officer highlighted the dual nature of these practices:

> *"The ETPV [...] builds on the progress made with the PEP and includes all the security features, is a card—just like the foreigner ID card, just like our national ID card—that serves a dual purpose. First, it regularizes their migration status, meaning they will now be allowed to stay in Colombia for ten years. And additionally, because it is an identification document, it allows them access to the full range of public and private services. They can access financial services, complete notarial procedures—that is, they can get married, change their name, buy a house, they can do anything [CMO1]."*

These accounts indicate that the ETPV did not replace a security paradigm with either a rights-based or managerial paradigm. Rather, existing control practices were reinterpreted so that they simultaneously advanced security and rights-based objectives. This hybridity challenges the traditional view of migration governance as a zero-sum negotiation between enforcement and protection.

In addition to security- and rights-based rationales, the ETPV reflects a managerial logic in which administrative feasibility and bureaucratic efficiency shaped policy design. For example, asylum seekers were required to withdraw pending refugee applications to obtain ETPV status. According to CMO1, this measure was intended to reduce the burden on the already overloaded refugee determination system. As a former BMO official recalled: "The first draft of the ETPV did not include this restriction, but the CMO ultimately prioritized administrative feasibility over ideal protection" (BMO1). As discussed in Part C, the relocation of the CMO to the Ministry of Foreign Affairs fostered a managerial orientation, emphasizing service provision and citizen assistance[59] while maintaining core control objectives. In practice, security, rights-based, and managerial logics coexisted and interacted within the same bureaucratic apparatus, at times generating tensions but ultimately producing a stable hybrid arrangement.

From a pragmatic perspective, several interviewees emphasized the length and complexity of the border with Venezuela (2,219 km), making its closure unfeasible. Consequently, regularizing Venezuelans through mechanisms more robust than the PEP was deemed necessary:

> *"Colombia has had, in my view, a pragmatic approach to this issue, in the sense that it has allowed people to enter and has not established barriers. [...] In any case, within this pragmatic approach, I think there was a clear understanding that even if the border were formally closed, people would still cross, and that it was better to have at least minimal registration and control of those entering. That is why passage was allowed, no major formalities were required, and once they were inside, certain regularization mechanisms were facilitated [HRA]."*

Together, these dynamics demonstrate that the ETPV did not arise from replacing one dominant logic with another. Rather, it emerged through the co-production of security, rights-based, and managerial logics within a single organization.

II. Redundancy: Aligning Rights and Control through Policy Design

The ETPV exemplifies redundancy, whereby a single policy instrument—registration—simultaneously fulfills control and rights-based functions. From the state's perspective, registration provided informational control, reduced irregularity, strengthened enforcement capabilities, and enhanced planning for social services. From migrants' perspectives, registration served as a precondition for accessing rights, including health care, education, labor market participation, and eventual pathways to permanent residence. This functional overlap—where the same mechanism simultaneously enhances control and enables access to rights—illustrates what this article conceptualizes as redundancy.

59 *Fernández-Rodríguez / Célleri*, note 3, p. 11.

Former senior officials of the CMO highlighted how rights operated as necessary incentives for migrants to engage with institutions and initiate the regularization process, so that the state institutions could also identify them. As CMO2 explained:

> *"[...] the issue was that when I traveled to the regions, there was always a police officer [...] who would say, 'We can't press charges because we don't have biometric identification.' Fine. Then there was the health-care issue: when someone comes in, how am I supposed to confirm that Pepito Pérez is actually Pepito Pérez—just like any person anywhere else in the world? So, I started working on that and began imagining a system that would collect—well, we already had information on many people, but I was missing the biometric information, right? Whether iris scans, fingerprints, whatever it might be, so that they could also be subjects of rights and obligations and everything could be verified. So, we set that up, and the idea was that everyone who had a PEP would transition to the ETPV, to this document, so they could do so. And what I always said was: look, you must give people incentives to complete the process. First, we can't charge them. If you charge, it becomes an expensive procedure; you charge and no one comes, because if they had money, they probably wouldn't be here—they'd be in Venezuela or another country, I don't know. So, it must be free. Second, you must give them additional benefits. Not just swapping the PEP for the PPT—what's the point of that?."*

This account highlights how rights were intentionally designed as incentives to induce participation in registration processes, aligning migrants' interests with state objectives of identification and control.

A second official emphasized how the limitations of earlier instruments made this dual functionality necessary:

> *"Do you remember those images of the walkers (caminantes)? Crossing the bridge and traveling across the entire country, putting themselves in very serious situations—becoming targets of crime, even risking their lives. Not only migration-related crimes, such as smuggling and trafficking, but sometimes being forced to commit crimes themselves. Their documents were stolen, they were exploited—labor-wise and sexually—faced xenophobia, discrimination, all of that. We started to see very serious consequences, and the PEP began to be insufficient. So, if you remember, despite being an identification document, it had no security features [CMO1]."*

Redundancy was critical for institutional stability. By enabling multiple actors to interpret and justify the same policy instrument through different logics, the ETPV minimized conflict between security-oriented bureaucrats, integration-focused institutions, and international organizations. As a UNHCR official noted:

> *"[...] the (ETPV) benefits most of the Venezuelan population. It is flexible, allowing—for a significant period, ten years—a temporary protection statute. It provides*

> *access to rights without restriction, beyond the usual limitations that any foreigner in the country might face. So, we see it as very positive [UNHCR1].”*

Similarly, an IOM representative emphasized the functional duality of registration for control and development goals:

> *“The best way to assist a population and provide an effective and timely response is by knowing who they are, given the diversity of the border [...]. Migration can act as a driver of development and stimulate local economies as well as the national economy. So, what the ETPV aims to do is precisely that: to dignify the person, to provide them with all the conditions of an ordinary citizen, and to guarantee their capacity to contribute. Beyond being a vulnerable person in need of support—which is a particular characteristic of Venezuelans—the Venezuelan people want to work, to start businesses, and to move forward in life [IOM1].”*

This functional overlap reflects what this article conceptualizes as redundancy: rather than forcing consensus among conflicting logics, the ETPV operationalized overlap, allowing rights and control to coexist and reinforce one another. Redundancy thus functioned both as a pragmatic tool of governance and as a mechanism for sustaining legitimacy in a politically sensitive context, enabling the introduction of a policy such as the ETPV.

As CMO2 explained, institutional mindsets had to shift to enable migrants’ socioeconomic incorporation:

> *“How do we begin to incorporate them into productive life? So, of course, there were different views, right? Some would say, ‘We can’t do it, we don’t even have enough health resources for Colombians, let alone for others.’ We worked on changing the mindset of all the institutions and actors involved in the process, and we began looking for ways to start regularizing this situation. [...] So, what I say is that we need to develop creative strategies that benefit both migrants and the host community. And the perspective I always promoted—and that I always tried to convey to the other institutions—was that this is a win–win. We cannot think only about migrants; if we focus exclusively on them, we will generate complex feelings among the host population.”*

This perspective highlights how redundancy also required shifts in institutional framing, presenting regularization as mutually beneficial for migrants and host communities, thereby strengthening political and social legitimacy. These dynamics illustrate how redundancy enabled the co-production of competing institutional logics within a single policy instrument, allowing rights and control to coexist without requiring normative convergence. However, the use of redundancy does not necessarily entail institutional transformation; in most cases, it allows existing structures to persist, often reproducing constraints for both states and migrants. What made the Colombian case distinctive was the role of contingency in opening space for a different configuration—one in which rights could be expanded without abandoning control and security logics.

III. Contingency: The Pandemic as a Catalyst for Innovation

While redundancy explains the mechanics of co-production of logics, contingency illuminates the timing and conditions that enabled it. Until 2020, Colombia relied on short-term measures such as the PEP, leaving around one million forcibly displaced Venezuelans in precarious situations and excluded from formal regularization processes. The outbreak of COVID-19 in 2020 dramatically exposed the vulnerabilities of irregular migrants. Without legal status, many were excluded from health care, economic relief, and formal employment, exacerbating both humanitarian concerns and security risks. These conditions made evident to policymakers, public officials, and international organizations the urgent need to move beyond short-term permits toward a more comprehensive solution. BMO1 indicated that they needed to establish a regularization process because they lacked legal means to provide services to undocumented migrants during the pandemic. This situation exemplifies what this article conceptualizes as contingency: a moment in which existing policy instruments become insufficient, creating pressure for institutional innovation. These pressures exposed humanitarian vulnerabilities and revealed the limitations of existing governance tools, rendering alternative approaches both necessary and politically viable.

In April 2020, this debate became visible in the public arena when Senator Antonio Sanguino highlighted the precarious situation of Venezuelans in Colombia.[60] He explained that by December 31, 2019, their numbers of Venezuelans had reached 1,771,237, of whom 754,085 had regular status while 1,017,152 remained irregular. He stressed that such figures revealed a profound challenge for safeguarding health and security during the pandemic, asking government officials at a Public Hearing a pivotal question: "Will Venezuelans residing irregularly in the country be able to access health services?"

This convergence of pressures—mass irregularity, limited state capacity, and the pandemic—opened the political and institutional window that ultimately enabled the approval of the ETPV in 2021. Unlike previous measures such as the PEP, the ETPV established long-term regularization (ten years), access to rights, and pathways toward permanent residence and citizenship.

Senior CMO Officer recounted his personal experience witnessing the humanitarian crisis during the pandemic:

> *"I remember starting to buy tangerines to give away because it was a very difficult hot weather and there were so many people walking. There were too many children*

60 Senado de la República de Colombia, Antonio Sanguino le pide al Presidente Duque expedir decreto para atender a migrantes en Colombia, 3 April 2020, https://www.senado.gov.co/index.php/component/content/article/13-senadores/923-antonio-sanguino-le-pide-al-presidente-duque-expedir-decreto-para-atender-a-migrantes-en-colombia (last accessed on 7 May 2026).

[…]. Then we immediately went to Bogotá. This must be solved. We have to work on this. We must do something [CMO3].”

This account illustrates how individual experiences of crisis reinforced the recognition among institutions that existing approaches were no longer sustainable, thereby accelerating the implementation of alternative policy solutions. The convergence of a humanitarian crisis, mass irregularity, and pandemic-related pressures exemplifies the above-theorized concept of contingency: a moment in which established arrangements are destabilized, opening a window of opportunity for institutional reinterpretation and innovation. These dynamics demonstrate how contingency created the conditions under which aligning competing institutional logics became possible and necessary.

IV. Agency and Institutional Interactions in the Co-Production of Policy

While institutional logics structure organizational behavior, institutional logics theory also emphasizes the role of individual agency in interpreting, mobilizing, and transforming those logics in practice. Decisions and policy outcomes therefore emerge from the interaction between institutional structures and the actors embedded within them.The efforts of senior officials at the Colombian Migration Office—traveling to remote rural areas, maintaining continuous communication with migrants, and personally witnessing the hardships faced by children walking long distances—illustrate how personal empathy can shape policy implementation, even within a security-oriented bureaucracy.

These experiences were especially significant during the pandemic when many migrants were forced to return to Venezuela with their children. This was due to their inability to work in the informal sector during lockdown, as well as subsequent evictions. One senior official recalled:

“I remember starting to buy tangerines to give away because it was a very difficult hot weather and there were so many people walking. There were too many children. I spent all the money I had and all the money my travel companions had. I ran out of tangerines, but I kept seeing people walking. The generosity of the migrants, who didn't keep a single tangerine for themselves but shared them with those who didn't have any, was a very strong lesson. Then we immediately went to Bogotá. This must be solved. We have to work on this. We must do something [CMO3].”

This account illustrates how direct exposure to migrants’ suffering shaped policymakers’ perceptions of urgency and feasibility, reinforcing the need for institutional innovation. Agency thus operated as a mediating force between structural constraints and policy change, particularly under conditions of contingency that enabled actors to reinterpret existing practices. These dynamics demonstrate that the co-production of rights and control was not solely the result of institutional design, but emerged from the interaction of multiple logics, contingent conditions, and the agency of actors operating within and across institutions.

The ETPV was shaped not only by the CMO but also through interactions with other institutional actors. The Presidency's Border Management Office (BMO) promoted an integration-oriented logic, advocating for long-term regularization and pathways to permanent residence. As BMO1 explained, the BMO's institutional power—stemming from its position within the presidency and its socio-economic integration approach to migration—enabled it to prevail in difficult negotiations with more restriction-oriented actors within the Ministry of Foreign Affairs. These actors were initially reluctant to accept both the ten-year duration of the ETPV and the inclusion of a pathway to a residence permit.

International organizations leveraged their long-standing presence in Colombia to promote rights-based and socio-economic integration strategies, framing regularization as both a moral imperative and a pragmatic governance instrument capable of stabilizing labor markets and mitigating vulnerabilities.[61] These interactions illustrate how multiple institutional logics—particularly integration-oriented, humanitarian, and security logics—were negotiated across institutional actors, reinforcing the hybrid character of the ETPV.

V. Limits and Contradictions of Co-Produced Governance

Despite these convergences, certain populations remained excluded—most notably asylum seekers awaiting decisions, who were forced to choose between continuing to wait for the outcome of their refugee applications and the ETPV[62], as well as Venezuelans in an irregular situation who were ineligible for the ETPV because they arrived in Colombia after the eligibility cut-off date of 31 January 2021. Similarly, Venezuelans who entered the country regularly more than two years after the adoption of Decree 216 of 2021 were also excluded from the ETPV.[63]

These exclusions are not incidental but constitutive of the hybrid governance arrangement. By conditioning access to rights on registration, timing of entry, and administrative criteria, the ETPV produces differentiated legal statuses that stratify the Venezuelan population. Those excluded remain in situations of irregularity, with limited access to services and increased exposure to labor exploitation, insecurity, and marginalization. In this sense, the co-production of rights and control simultaneously generates new forms of inclusion and exclusion, raising questions about the long-term sustainability of the model and its implications for future migration flows and policy responses.

61 *Fernández-Rodríguez / Trompetero-Vicent*, note 1.

62 This changed in 2023, when the Colombian Constitutional Court (Judgment SU-543/23) ruled that preventing the simultaneous holding of a PPT and a pending asylum application violated fundamental rights. The Court therefore allowed both mechanisms to coexist, particularly to eliminate barriers such as the inability to work while awaiting a decision on an asylum claim.

63 Departamento Administrativo de Función Pública, Decree 216, 2021, https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=159606 (last accessed on 30 October 2025), p. 6.

F. Conclusion

This article has argued that Colombia's ETPV demonstrates that rights-expanding policies can emerge from within security-oriented institutions not through ideological transformation, but through the co-production of rights and control.

By examining the ETPV through the integrated framework of institutional logics, redundancy, and contingency, this article shows how a security and control agency—the Colombian Migration Office (CMO)—came to design and implement one of the most ambitious regularization programs in the world. The findings reveal three core dynamics. First, the ETPV did not entail a wholesale shift from a security paradigm to a rights paradigm. Instead, CMO actors reinterpreted long-standing practices of registration, identification, and documentation in ways that served multiple institutional logics simultaneously. Biometric registration, for example, functioned redundantly: it served as a tool of informational control for security-oriented actors, a gateway to rights for humanitarian and integration-oriented actors, and a planning instrument for technocratic and managerial actors.

Second, the unprecedented scale of Venezuelan displacement and the catalytic impact of the COVID-19 pandemic created the conditions under which such reinterpretation became feasible. These contingent pressures exposed the limits of Colombia's fragmented migration architecture and rendered the status quo untenable. Crisis made visible that institutional practices could be otherwise structured: long-term regularization became not only normatively desirable but administratively necessary to ensure public health, social stability, and state oversight. The ETPV emerged in this window, enabled by the convergence of governance imperatives, humanitarian concerns, and political opportunity.

Third, the Colombian case demonstrates that South–South migration governance is neither uniformly progressive nor a mirror image of Global North restrictionism. Instead, it is characterized by hybrid arrangements in which rights and control are mutually constitutive. The ETPV reflects this hybridity: it expanded access to residence, labor markets, health, and education while simultaneously deepening state capacity for surveillance, data management, and population oversight. These tensions were not resolved; they were managed through institutional mechanisms that allowed seemingly contradictory institutional logics to coexist productively.

At the same time, it is important to recognize that the CMO was not the only institutional actor shaping the governance environment in which the ETPV emerged. Agencies such as the Border Management Office (BMO), which operated under a more explicit migrant integration logic, played a significant role in advocating for the social and economic inclusion of Venezuelans. Their work contributed to a broader policy climate receptive to rights-enabling measures. However, this study focuses analytically on the CMO precisely because of its normative orientation toward security and control. By examining the institution least expected to drive rights expansion, the analysis highlights the mechanisms through which security bureaucracies can reinterpret their practices and accommodate alternative logics within their existing operational repertoire.

Beyond the empirical case, this article advances theoretical debates in three ways. It shows, first, that institutional logics within bureaucracies are not static paradigms but relational repertoires that can be selectively activated. Second, it identifies redundancy as a key mechanism through which institutions stabilize support, maintain legitimacy, and communicate across diverse audiences. Third, it demonstrates how contingency drives institutional innovation by opening space for the rearticulation of practices within security agencies. Taken together, these findings suggest that the politics of migration governance cannot be understood only through dichotomies of protection versus restriction, rights versus security, or humanitarianism versus control. Instead, South–South migration governance reveals that rights and control can also be co-produced through overlapping logics, multifunctional instruments, and context-dependent adaptations. These findings identify a mechanism through which rights become embedded within a security institution: contingency opens space for reinterpretation, agency mobilizes change, and redundancy stabilizes alignment across competing logics.

Moreover, the exclusion of significant segments of the Venezuelan population highlights the limits of this model: over 450,000 Venezuelans currently remain in an irregular situation in Colombia,[64] as the ETPV was not extended by the Petro administration and subsequent regularization mechanisms introduced after 2022 have proven insufficient.[65][66] By producing differentiated legal statuses, the ETPV risks entrenching new forms of precarity that may shape future migration dynamics and place pressure on subsequent policy responses.

Whether the hybrid model embodied in the ETPV will endure remains an open question. Its long-term trajectory will depend on political will, bureaucratic capacity, and the institutionalization of integration frameworks beyond crisis moments. Yet the Colombian experience offers a compelling analytic insight: rights innovations can emerge from within security institutions when existing tools are reinterpreted, crises create openings, and redundancy enables multiple logics to converge. By foregrounding these dynamics, this study provides a new lens for understanding how states in the Global South govern large-scale displacement and how rights become embedded not by replacing security logics but by working through them. This perspective invites a reconsideration of migration governance beyond binary frameworks, emphasizing instead the relational and processual dynamics through which states govern mobility in complex and unequal contexts.

64 Colombian Migration Office, note 2.

65 *Trompetero-Vicent / Forero*, note 2.

66 *María Trompetero-Vicent / César González*, Colombia pasó de referente mundial a incertidumbre migratoria, 3 March 2026, https://www.lasillavacia.com/red-de-expertos/red-de-venezuela/colombia-paso-de-referente-mundial-a-incertidumbre-migratoria/ (last accessed on 7 May 2026).

Annex 1: List of Interviewees Cited

Acronym used	**Institution**	**Mode and date of the interview**
CMO1	Colombian Migration Office	Online, 09.06.2022
CMO2	Colombian Migration Office	Bogotá, 24.03.2022
CMO3	Colombian Migration Office	Online, 15.02.2023
BMO1	Border Management Office	Bogota, 25.01.2022
BMO2	Border Management Office	Online, 25.02.2022
IOM1	International Organization of Migration	Bogota, 24.03.2022
UNHCR1	United Nations High Commissioner for Refugees	Online, 14.12.2021
HRA	Human Rights Activist	Virtual, 06.08.2020
MFA1	Ministry of Foreign Affairs	Virtual, 01.08.2020

ARTICLES / ABHANDLUNGEN

Revisiting Indonesia's Mineral and Coal Mining Law: An Inquiry into the Adequacy of Public Participation

By *Muhamad Pelengkahu**

Abstract This article examines the development of the legal framework regulating mineral and coal mining in Indonesia, highlighting the adequacy of public participation and its constitutional implications. The study analyses four primary Mining Law frameworks, commencing with Law Number 11 of 1967, progressing to Law Number 4 of 2009, including later reform amendments, and culminating with Law Number 2 of 2025, the most recent framework. The primary analytical approach utilises Arnstein's Ladder of Citizen Participation to assess the quality, status, and effect of public participation in the formulation and implementation of mining policy. The study reveals that, notwithstanding an increasing normative recognition of public interaction in post-reform legislation, these changes are mostly procedural rather than substantive. In the early stages of the New Order administration, public participation was almost absent, characterised by rigorous state control and an absence of deliberative possibilities. The post-reform administration instituted mechanisms for public participation; yet, this involvement frequently remains shallow, devoid of any guarantee of meaningful influence on strategic decision-making. The structure of Law Number 2 of 2025 illustrates the tension between the goals of efficient natural resource management, centralisation of authority, and the principle of popular sovereignty. This paper argues that this legal framework poses considerable difficulties in understanding public participation as a constitutional right, particularly concerning the article 33 of the 1945 Constitution of the Republic of Indonesia. This study promotes a conceptual restructuring of public involvement as an essential element of democratic natural resource management in Indonesia.

Keywords: Public Participation; Indonesian Mining Law; Minerals and Coal Governance

***

* Researcher and Student at the Faculty of Law, Universitas Sebelas Maret, Surakarta; Specialist in Energy Law and Public Policy; Director and Consultant Associate at Taka Institute - Center for Law and Public Policy, Manado (Indonesia). Email: muhamadpelengkahu@gmail.com.

A. Introduction

The abundance of natural resources is advantageous only if managed and utilised logically, ethically, and with a focus on long-term sustainability. The discourse on natural resource governance has consistently developed via critiques and reforms of extractive and short-term exploitation regimes throughout modern history.[1] For decades, the multidisciplinary academic community and practitioners have endeavoured to develop strategies that reconcile economic interests, environmental conservation, and social equity in natural resource management.[2]

By the late 19th century, natural resource management techniques in several nations established the state as a legitimate political entity authorised to regulate and utilise natural resources for economic and social advancement.[3] This paradigm is based on the premise that the state, through the collective mandate of its citizens, has the ultimate competence and authority to control the best use of natural resources. As the 20th century progressed, the escalation of production and the extensive worldwide growth of the mining sector had significant repercussions for environmental health, social inequality, and conflicts within legal frameworks and geopolitical structures.[4]

This circumstance has spurred a series of reforms in global natural resource management. International organisations, notably the World Bank, have significantly influenced nations to develop legislative frameworks, fiscal governance, and institutional structures for the mineral and coal mining industry.[5] This reform initiative seeks to enhance mining procedures that have been perceived as disregarding environmental sustainability and the rights of impacted populations. This reform initiative has established new standards for mining practices from both governmental bodies and the mining industry. Mining frameworks are increasingly requiring the incorporation of occupational safety, environmental protection, and sustainability concepts into mining licensing systems, fiscal policies, and institutional structures.

Simultaneously, there is an increasing focus on the status of local communities, as these groups experience the most immediate social and ecological consequences of mining operations. Consequently, contemporary mining management seeks to ensure communities' rights to knowledge, access to justice, and participation in policy development and

1 *Diego Andreucci / Giorgos Kallis*, Governmentality, Development and the Violence of Natural Resource Extraction in Peru, Ecological Economics 134 (2017), pp. 95-97.

2 *Emmanuel Yeboah-Assiamah / Kerstin Muller / Kofi Ahossey Domfeh*, Transdisciplinary approach to natural resource governance research: a conceptual paper, Management of Environmental Quality: An International Journal 29 (2018), pp. 15-33.

3 *Jenny Springer / Jessica Campese / Barbara Nakangu*, The Natural Resource Governance Framework – Improving governance for equitable and effective conservation, Gland 2021, pp. 3-5.

4 United Nations Department of Economic and Social Affairs, Harnessing the Potential of Critical Minerals for Sustainable Development, January 2025.

5 *Gary McMahon*, The World Bank's Evolutionary Approach to Mining Sector Reform, Washington 2010, p. 5.

decision-making about all mining activities in their vicinity. From a macroeconomic standpoint,[6] the mineral and coal mining sector is an essential catalyst for national development, as extractive activities substantially enhance state revenues, provide foreign exchange, generate employment, and foster the expansion of related economic sectors. Numerous studies, including those by Carvalho, Zhou et al., and the National Bureau of Asian Research, illustrate that mining industrialisation is pivotal in supplying vital raw materials and fostering infrastructure development, especially in previously secluded areas.[7] This consequently positions mining as a pivotal mechanism for expediting economic progress and regional advancement.

Nonetheless, these economic advantages are accompanied by repercussions, as multiple longitudinal studies, including those by Xiaoman et al., Singh et al., and Shah et al., demonstrate that nations rich in natural resource reserves frequently encounter significant difficulties in sustaining stable economic growth.[8] A seminal research conducted by Sachs and Warner on the economic performance of resource-rich vs resource-poor nations indicates, that resource wealth does not consistently correspond with prosperity. Several resource-scarce nations have attained significant economic development, whilst several resource-abundant countries remain mired in stagnation, resulting in an enduring economic crisis.

Auty identifies this phenomenon as the *resource curse*, referring to a state's inability to manage natural resources effectively for the wider public good.[9] Excessive reliance on extractive industries, compounded by volatile commodity prices and institutional weaknesses, heightens these vulnerabilities. Consequently, development discourse has shifted from an exclusive emphasis on economic growth towards prioritising community empowerment and participation. In this context, the International Council on Mining and Metals stresses that

6 *James Otto / Craig Andrews / Fred Cawood / Michael Doggett / Pietro Guj / Frank Stermole / John Stermole / John Tilton*, Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society, Washington 2006, pp. 137–140.

7 *Yongbin Zhou / Yiying Liu / Juanjuan Niu*, Role of mineral-based industrialization in promoting economic growth: Implications for achieving environmental sustainability and social equity, Resources Policy 88 (2024), p. 10; *Fernando P. Carvalho*, Mining industry and sustainable development: time for change, Food and Energy Security 6 (2017), p. 1; *Han Phoumin*, Indonesia's Strategy Toward Critical Minerals and Cooperation with the United States, The National Bureau of Asian Research, October 2024, https://www.nbr.org/ (last accessed on 1 June 2025).

8 *Wu Xiaoman / Abdul Majeed / Dinara G. Vasbieva / Claire Emilienne Wati Yameogo / Nazim Hussain*, Natural resources abundance, economic globalization, and carbon emissions: Advancing sustainable development agenda, Sustainable Development 29 (2021), pp. 3-4; *Sanjeet Singh / Gagan Deep Sharma / Magdalena Radulescu / Daniel Balsalobre-Lorente / Pooja Bansal*, Do natural resources impact economic growth: An investigation of P5 + 1 countries under sustainable management, Geoscience Frontiers 15 (2024), p. 10; *Syed Abdul Rehman Shah / Nasir Abbas / Luminita Serbanescu*, The key challenges and best alternatives to environmental sustainability: a comprehensive study, Scientific Reports 15 (2025), p. 5.

9 *Richard M. Auty*, Sustaining Development in Mineral Economies: The Resources Curse Thesis, New York 1993, pp. 1–5.

meaningful engagement with affected communities (particularly indigenous populations) constitutes both an ethical obligation and a normative imperative in contemporary mining practices.[10]

Indonesia distinctly illustrates the intricacy of this situation. The exploitation of abundant mineral and coal resources is seen as pivotal for national growth. Mining techniques, conversely, contribute to environmental deterioration, social discord, and persistent confrontations among communities, the state, and enterprises.[11] The occurrence of conflict in natural resource management is not an aberration; it is a result of divergent interests, values, and objectives among the stakeholders involved. According to Swingewood, conflict is defined as a form of social interaction that arises when competing claims to resources, power, or interests cannot be simultaneously satisfied.[12] In the context of mineral and coal mining, conflicts frequently emerge from inequitable access to decision-making processes and the distribution of benefits.

The Supreme Court of the Republic of Indonesia documented 2,176 final instances of conflicts adjudicated nationwide over the past five years, according to the most recent statistics for 2025. In 2020, there were 441 cases; in 2021, 394; in 2022, 364; in 2023, 385; in 2024, 312; and in 2025, at the time of reporting, 280 cases.[13] These figures do not include disputes that remain informally documented, particularly in regions with limited access to information and grievance mechanisms. With the growing public awareness of environmental and social rights, there is an increasing demand for greater accountability in mining governance. Communities are calling for transparency of information, institutional responsibility, and meaningful participation in decision-making processes, extending from the initial planning stage through to post-mining activities.

Nonetheless, public participation methods can devolve into mere symbolic administrative formalities. Formal systems like public hearings frequently function to legitimise policies, while failing to facilitate meaningful discussion on social and environmental consequences. This circumstance has engendered scepticism towards official involvement avenues. Kurniawan observed that several impacted populations utilise techniques beyond formal frameworks, like protests and mass mobilisations, to articulate their grievances.[14]

10 International Council on Mining and Metals, ICMM's Mining Principles Respond to Evolving Societal Expectations of the Mining and Metals Industry, 2024, https://www.icmm.com/en-gb/our-principles (last accessed on 26 January 2026).

11 *Mohamad Nasir / Muhamad Muhdar / Laurens Bakker*, Coal hauling on public roads in East Kalimantan: Regulatory failures, overlapping authorities, and conflicts, Resources Policy 113 (2026), p. 3.

12 *Alan Swingewood*, A Short History of Sociological Thought, London 1991, p. 187.

13 Mahkamah Agung Republik Indonesia, Direktori Putusan Mahkamah Agung Republik Indonesia, https://putusan3.mahkamahagung.go.id/search.html (last accessed on 27 January 2026).

14 *Nanang Indra Kurniawan / Päivi Lujala / Ståle Angen Rye / Diana Vela-Almeida*, The Role of Local Participation in the Governance of Natural Resource Extraction, Extractive Industries and Society 9 (2022).

This scenario underscores the disparity between the normative acknowledgement of public participation and the actual practices in mining governance.

Consequently, the administration of mineral and coal resources needs a comprehensive strategy that incorporates the state, communities, and civil society organisations within a paradigm of democratic and sustainable governance. The legitimacy of mining policy hinges on the degree to which their creation process secures public endorsement and facilitates substantial community engagement. This article analyses the formulation and implementation of public involvement within the Indonesian mining legislative framework, from the initial Mining Law to the latest iteration. This research seeks to offer a normative contribution to the development of mining policies that are more attuned to community rights and aspirations in the future.

B. Method

This study employs a doctrinal legal research methodology utilising conceptual, statutory, and constitutional approaches. This technique was selected due to the study purpose, which centres on a normative examination of the sufficiency of public participation in the legislative process in Indonesia, specifically regarding alterations in the legal framework for mineral and coal mining. The statutory method carefully analyses the evolution of public involvement requirements throughout many legislative frameworks, particularly Law Number 4 of 2009 on Mineral and Coal Mining and its amendments, culminating in Law Number 2 of 2025 as the latest framework. The research examines the normative framework, regulatory methods, and internal coherence among rules that control public involvement in the legislative process and public decision-making. The conceptual approach constructs a theoretical analytical framework for public participation, employing participatory democracy theory, legislative formation theory, and the principle of good governance. Arnstein's theory of participation levels serves as an analytical framework to evaluate the quality and extent of participation assured by law, while also differentiating between substantive and symbolic involvement.

Additionally, a constitutional methodology is employed to evaluate the alignment of public participation legislation with constitutional tenets, including popular sovereignty, democratic governance, and the ideal of transparency as outlined in the 1945 Constitution of the Republic of Indonesia. This methodology enables the research to frame the 2025 Minerba legal regime as a definitive instance, serving as the quintessential example to evaluate whether recent legislative advancements embody the realisation or erosion of constitutional norms on public participation. The legal materials utilised comprise main legal materials, including pertinent legislation and Constitutional Court rulings; secondary legal materials, encompassing scholarly literature, legal theories, and policy reports; and a restricted selection of non-legal items to enhance the analytical framework. All resources undergo qualitative analysis employing prescriptive and argumentative reasoning strategies to yield logical and critical normative findings.

C. Results and Discussion

I. Foundational Thinking in the Formation of Legislation in Indonesia

Laws are a tangible embodiment of the essential principle of the rule of law, guaranteeing that government is systematic in both vertical and horizontal interactions among social actors.[15] Laws function as the legal foundation for governmental operations, serving both as a technocratic regulatory instrument and as a manifestation of the state's values, attitudes, and objectives.[16] Consequently, the establishment of laws should be perceived not just as a formal-procedural undertaking, but as a manifestation of the legal principles (*Rechtsidee*) and state ideals (*Staatsidee*) inherent inside a nation.

In Indonesia, legality is embodied in the esteemed principles of *Pancasila*. Kaelan emphasises that Pancasila constitutes the intellectual foundation of Indonesian legislation, explicitly oriented towards the attainment of social justice as a prerequisite for collective prosperity.[17] This vision encompasses both material and spiritual dimensions, while maintaining a proportionate balance between the individual and society. Soeprapto further elaborates that Pancasila, as both a national and legal ideal, performs formative and regulative functions in the life of the nation and the state.[18] Through its formative role, Pancasila provides the normative framework for the establishment of the state and its legal system, whereas its regulative role offers an evaluative criterion for the exercise of state authority. As an open philosophy, Pancasila is expected to remain responsive to societal change while safeguarding its identity and fundamental value orientation.

Moreover, as the cornerstone of the state, Pancasila must function as a conceptual framework, a repository of values, and a guiding principle in the evolution of national legislation.[19] In this context, ideology should not be perceived only as a compilation of normative slogans, but as a comprehensive framework that influences perceptions regarding the interplay of the state, law, and citizens.[20] Ideology comprises foundational ideas, essential concepts, and shared values that guide the implementation of governmental authority. Buchanan and Levinson define ideology as a framework of abstract reasoning applied to

15 *Muhamad Pelengkahu*, Interpretation, Inclusiveness, and Ambiguity: A Critique of Rule Design in Modern Legal System, The Indonesian Journal of International Clinical Legal Education 7 (2025), p. 401.

16 *Pelengkahu*, note 15, p. 405.

17 *H. Kaelan*, Negara Kebangsaan Pancasila: Kultural, Historis, Filosofis, Yuridis, Dan Aktualisasinya, Yogyakarta 2013, pp. 1–7.

18 *Soeprapto*, Implementasi Pancasila Dalam Kehidupan Bermasyarakat Berbangsa Dan Bernegara, Jurnal Ketahanan Nasional 10 (2005), pp. 18-19.

19 *Haposan Siallagan / Otong Syuhada*, The Role of Pancasila in the Formation of National and Regional Regulations, Journal of Law and Sustainable Development 11 (2023), p. 3.

20 *Siallagan / Syuhada*, note 19, p. 10.

societal matters, hence constituting the core of political activity and legal policy.[21] Ideology, as a conceptual framework, is typically categorised into open and closed ideologies. Open ideologies originate from societal ideals and ambitions, evolve via dialogue, and remain receptive to critique and transformation. Conversely, closed ideologies are normative frameworks enforced hierarchically, frequently mirroring the objectives of certain factions and utilised as instruments of social engineering.

Pancasila is normatively regarded as an open ideology.[22] Thus, the development of law must embody transparency to public desires and attentiveness to genuine societal requirements. This idea is constitutionally grounded in the 1945 Constitution of the Republic of Indonesia, which serves as the paramount legal authority, stipulating that all legislation must align with and not contravene constitutional standards. Moreover, the Preamble to the 1945 Constitution delineates the national legal strategy grounded on Pancasila and aimed at realising state objectives. This policy directive embraces all facets of national and state existence (political, economic, socio-cultural, and environmental), so establishing law as a cohesive tool that must be developed in a participative, equitable, and democratic fashion.

II. Public Participation in the Formation of Legislation in Indonesia

Pancasila, as the foundational philosophy of the nation, distinctly underscores the principles of mutual collaboration, deliberation, and popular sovereignty, which are normatively embodied in the fourth principle. These ideals strongly correlate with the notion of public participation in the development of public policy, including the legislative process. Public involvement should not be only a procedural formality; it is a fundamental tool to guarantee that passed laws reflect the intentions and interests of the populace. Sherry Arnstein posits that community engagement exists on a continuum from superficial informational participation (*tokenism*) to collaborative involvement and complete community empowerment (*citizen power*), wherein data subjects or people exert genuine influence in strategic decision-making.[23] An successful participation model not only aids in the creation of inclusive legislation but also functions as a tool for alleviating social conflict and enhancing democratic legitimacy in the control of natural resources.

Law is fundamentally a collection of standards instituted by an authoritative body, whereas legislation encompasses both the methodology and the procedure by which these norms are created.[24] In a democratic society, the lawmaking process is inherently linked to

21 *Allen Buchanan / Enrique Levinson*, Theories of Ideology: Origins, Development, and Prospects, Social Philosophy and Policy 41 (2024), pp. 13-15.

22 *H. Kaelan*, Filsafat Pancasila: Pandangan Hidup Bangsa Indonesia, Yogyakarta 2009, p. 21.

23 *Sherry R. Arnstein*, A Ladder of Citizen Participation, Journal of the American Planning Association 35 (1969), p. 220.

24 *Pelengkahu,* note 15, p. 415.

the notion of popular sovereignty.[25] Public involvement acts as a safeguard against power abuse, directs public ambitions, engages citizens in decision-making, and fundamentally reinforces the notion of popular sovereignty.

Public involvement is hence both a right and a duty of citizens to achieve effective administration. The criteria for establishing participatory legislation encompass: a commitment to good governance; adherence to the principles of transparency, accountability, and oversight; acknowledgement of participation as both a right and a duty; enabling stakeholders to engage equitably; consideration of all aspirations without bias; decision-making via a just and impartial process; extensive access to public information; and a mechanism for assessing policy outcomes.

Arnstein's theory of participation offers a significant analytical framework by categorising public involvement into eight tiers, determined by the degree of power possessed by the public, spanning from manipulation to citizen control. The eight stages may be categorised into three overarching groups: non-participation, tokenism, and citizen power. This approach illustrates that various types of involvement possess differing democratic attributes; symbolic engagement devoid of genuine impact may sustain the supremacy of state authority. Attamimi asserts that the legislative process in Indonesia must adhere to essential principles, specifically those rooted in the ideals of Indonesian law (Pancasila), the rule of law, and a government founded on the constitutional system.[26] Pancasila functions as a normative guiding principle and a foundational norm that invigorates the whole legal system.

The notion of public participation is intrinsically linked to the principle of transparency. In the absence of transparency, participation devolves into a superficial formality. The notion of openness, encompassing both transparency and accessibility, is essential for the realisation of democratic and accountable governance. In a democratic state, transparency is seen as a constitutional ideal that governs the appropriate and responsible exercise of power. As a democratic nation, Indonesia is required to ensure participation and transparency as fundamental elements of democratisation. Couwenberg observes that a democratic *rechtsstaat* is underpinned by the concepts of accountability, transparency, political rights, the majority principle, and the principle of representation.[27] Magnis-Suseno asserts that popular sovereignty necessitates that government operates under the authority of the populace, facilitated by representative systems and transparent decision-making procedures.[28]

25 *George Duke*, Habermas, Popular Sovereignty, and the Legitimacy of Law, Law and Critique 35 (2024), p. 240.

26 *A. Hamid S. Attamimi*, Teori Perundang-Undangan Indonesia [Indonesia's Theory of Legislation], Paper presented at the Inaugural Lecture for the Position of Full Professor at the Faculty of Law, Universitas Indonesia, Jakarta 1992, p. 11.

27 *S.W. (Wim) Couwenberg*, Westers Staatsrecht ALS Emancipatieproces: Ontwikkeling Van de Constitutionale Emancipatiefunctie in de Democratische Rechtsstaat, Alphen aan den Rijn 1977, p. 25.

28 *Franz Magnis-Suseno*, Etika Politik: Prinsip-Prinsip Moral Dasar Kenegaraan Modern, Jakarta 1987, pp. 20-25.

In the context of good governance advocated by the World Bank and UNDP, participation is seen as a fundamental attribute of effective government.[29] UNDP defines participation as community engagement in the policy formation process, either directly or via lawful representative organisations.[30]

The notion of public involvement is normatively incorporated in Article 96 of Law Number 12 of 2011 about the Formation of Legislation, as revised by Law Number 13 of 2022.[31] This clause asserts the state's duty to create the broadest feasible opportunities for involvement, including access to information and the formulation of draft rules. In the absence of substantial involvement, democracy in legislative processes is at risk of devolving into just formal mobilisation. Consequently, public scrutiny of the legislative process is not only a normative desire but a constitutional duty imposed on politicians, including both the House of Representatives and the President.

III. Public Participation in the Mineral and Coal Mining Management Post-Independence

1. Regime of Law Number 11 of 1967 concerning Basic Provisions on Mining (The Mining Act 1967)

Law Number 11 of 1967 concerning Basic Provisions on Mining (Mining Act 1967) was enacted within the political framework of the New Order during President Soeharto's administration. In the realm of legal political studies, Mahfud MD elucidates that laws are not formulated in a value-neutral environment; rather, they are invariably a manifestation of power dynamics, state ideology, and the developmental strategies embraced by the governing authority.[32] Within the framework of the New Order, the governing authority effectively utilised legislation as a tool for political and a driver of economic advancement, resulting in the constriction of democratic space and stringent regulations on public participation.

Lubis, as referenced by Sutrisna, observed that the New Order administration effectively institutionalised authoritarian power, relegating the populace to the status of development subjects.[33] This perspective is supported by Agustino, who references the New Order as the most tangible illustration of the challenges inherent in achieving a democratic society, state, and nation.[34] The regime's principal objective was to establish political order, foster econo-

29 The World Bank, Governance: The World Bank's Experience, Washington 1994, pp. 42-47.

30 United Nations Development Programme, Governance for Sustainable Human Development, New York 1997, p. 14.

31 *Muhamad Pelengkahu / Najib Satria*, Web-Based Citizen Contribution: A Model to Optimize Political Participation in the Legislation Function of the Representative Council, Jurnal Kajian Pembaruan Hukum 2 (2024), p. 340.

32 *Moh. Mahfud MD*, Politik Hukum di Indonesia, Jakarta 1998, p. 251.

33 *I Wayan Sutrisna*, Partisipasi Masyarakat Dalam Kebijakan Anggaran Daerah, Jurnal Ilmiah Cakrawarti 1 (2020), p. 31.

34 *Leo Agustino*, Partisipasi Publik Dalam Proses Menuju Indonesia Baru Evaluasi Terhadap Perkembangan Pemerintahan, Unisia 28 (2005), p. 72.

mic progress, and eradicate public involvement in government. These traits were evident in the military's significant political influence, the bureaucratisation and corporatisation of socio-political entities, and the implementation of selective repression against groups viewed as threats to stability.

In this political atmosphere, public participation in policymaking, particularly with the creation and execution of the Mining Act 1967, had a distinct character compared to the pre- and post-reform eras. Public involvement was not conceived as a democratic entitlement for citizens, but rather as a mechanism to legitimise governmental authority. Moreover, public participation during the New Order regime, utilised as a mechanism to legitimise authority, was conducted through three principal forms of engagement to assure its perceived significance. Initially, involvement was restricted and regulated. The New Order dictatorship exercised total control over the arenas and modalities of public participation.[35] The public was urged to endorse official programs, while avenues for dissent and resistance were ruthlessly suppressed. Any manifestation of dissent was perceived as a threat to political stability and national progress.

Secondly, participation is defined by mobilisation. The New Order dictatorship employed the state civil bureaucracy and a network of social organisations to engage the population in different preordained development plans and political activities.[36] This engagement sought to establish a participative image rather than facilitate a forum for discourse. This mobilisation pattern was apparent in the conduct of general elections, which occurred regularly but within a tightly regulated framework. Third, involvement was superficial.[37] Public participation was restricted to administrative and symbolic functions, precluding any significant impact on policy direction. Deliberation and consensus served as methods for reaching agreement, although the essence of conclusions was preordained by the state.

The aforementioned three patterns establish a contrived framework for public participation. Although the public seems engaged, this engagement is not meant to affect the decision-making process. This trend results in political stability and expedited economic progress, but at the expense of diminished democratic quality and the disregard for individuals' political rights. The interaction between the state and society under this system is exclusively unilateral. Decisions are made centrally, with the public serving as the beneficiary of policy. This decision-making mechanism exemplifies the instrumental and authoritarian characteristics of the New Order legal framework.

Moreover, an examination of the legal framework of the Mining Act 1967 discloses an absence of provisions that facilitate public involvement in the development of mining

35 *Mark T. Berger*, Old State and New Empire in Indonesia: Debating the Rise and Decline of Suharto's New Order, Third World Quarterly 18 (1997), p. 325.

36 *Muhamad Pelengkahu*, Model Pengaturan Pengelolaan Pertambangan Mineral dan Batubara Berbasis Keadilan Ekologis [A Regulatory Model for Mineral and Coal Mining Management Based on Ecological Justice], [Undergraduate Thesis], Universitas Sebelas Maret 2024, p. 210 (last accessed on 27 January 2026).

37 *Pelengkahu,* note 36, p. 220.

policy. The public lacks a method to express criticism, complaints, or input about the identification of mining areas, the issuance of mining permits, or the execution of extractive operations. The draughting process of the Mining Act 1967 reveals an absence of mechanisms for public participation in its discussion or development.

Nonetheless, the Mining Act 1967 offers restricted opportunities for community engagement through artisanal mining. Article 5 (e) characterises artisanal mining as the extraction of minerals conducted by local individuals on a small scale or via collaborative efforts utilising basic tools for their subsistence. This clause was regarded as an acknowledgement of traditional mining techniques that had been conducted for generations prior to the ascendance of the New Order administration. Artisanal mining has always been integral to the economic activities of local communities and indigenous populations, predating the establishment of the Indonesian state.[38] Mineral resource extraction is conducted in accordance with customary law, which recognises communal rights, encompassing ownership of resources both above and below the land's surface. This approach redefines permits as a social authority intrinsic to the community that has the customary area, rather than viewing them as a mere administrative tool of the state.

The Mining Act 1967 disrupted historical continuity by conferring Mining Authorisation holders' comprehensive rights to engage in extractive operations inside regions that are socially and culturally inhabited by indigenous groups. Any activity considered to obstruct "legitimate" mining activities was classified as illegal, thereby denying traditional mining practices and customary rights normative protection. This situation led to communities losing their negotiating power in deciding the future of their own environment. The examination of community engagement under the Mining Act 1967 regime is elucidated when interpreted through Arnstein's ladder of participation theory.

Arnstein's typology categorises participation into eight levels, which are organised into three overarching categories: non-participation, tokenism, and citizen power. According to normative and empirical analysis, public participation under the Mining Act 1967 regime is classified as non-participation, the lowest tier of the participation hierarchy. The public's engagement through mass organisations, elections, and deliberative forums is really an illusion. Arnstein characterises this scenario as a type of manipulation and treatment, wherein involvement is employed to mitigate any public opposition and fabricate an illusory feeling of legitimacy for governmental policies. The public is regarded as an entity to be managed and manipulated, rather than as a political agent capable of influencing policy direction. As previously said, public participation just serves as a validation for decisions that have already been made. In this instance, public participation lacks any corrective impact on mining policy, much less the capacity to affect the allocation of power and resources.

38 *Ami A. Meutia / Royke Lumowa / Masayuki Sakakibara*, Indonesian Artisanal and Small-Scale Gold Mining —A Narrative Literature Review, International Journal of Environmental Research and Public Health 19 (2022).

Consequently, the Mining Act 1967 framework signifies the nadir of public participation in the annals of Indonesian mining legislation.

2. Regime of Law Number 4 of 2009 concerning Mineral and Coal Mining (The Mining Act 2009)

Subsequent to the 1998 Reformation, the dynamics of the connection between the state and society in the development of public policy saw a profound transformation. Constitutional change, the enhancement of human rights, and the implementation of decentralisation via regional autonomy fostered a new recognition of society as a vital entity in state government.[39] In the realm of natural resource management, this consciousness has prompted calls for society to be regarded not only as a subject of policy, but as an entity with normative, ecological, and social interests that must be considered at every phase of decision-making.[40]

This development signifies a substantial departure from the Mining Act 1967, which fundamentally positioned communities at the lowest tier of the participation hierarchy. The prior regime's practices positioned communities in the lowest tier of the participation hierarchy. Under the previous regime, communities were considered as beneficiaries of policy impacts, with little significant scope for deliberation in the planning or identification of mining sites. This relational pattern cultivated a hierarchical governance framework that sidelined local ambitions and disregarded the ecological interplay between habitation and extractive practices. The Mining Act 2009 was enacted in a distinct political context. The ethos of decentralisation and regional autonomy cultivated anticipations that mining governance ought to be more attuned to the needs of local regions and people.

The Mining Act 2009 established public involvement as a normatively legitimate element for national mining governance. The incorporation of participatory principles (refer to Article 2(c)), openness, and accountability illustrates lawmakers' attempts to embed democratic norms inside the extractive industry, traditionally associated with centralised authority. In the normative formulation of the Mining Act 2009, public participation is no longer regarded a symbolic activity, but rather an essential feature inherent in various stages of mining management. The regulations regarding the designation of mining regions, licensing, community empowerment, and oversight of corporate operations reflect an acknowledgement that communities possess a direct interest in mining activities. This acknowledgement is also linked to the assurance of the right to a sound and healthy environment, therefore reinforcing the community's status as a legitimate stakeholder.

39 *Aditya Prabowo / Muhammad Bagas Zalika Tjenreng*, Decentralization and Regional Autonomy: A Historical and Conceptual Review, International Journal of Science and Society 7 (2025), p. 420.

40 *Petrus Gunarso / Titiek Setyawati / Terry Sunderland / Charlie Shackleton* (eds.), Managing Forest resources in a decentralized environment: lessons learnt from the Malinau research forest, East Kalimantan, Indonesia, Bogor 2007, pp. vi-vii.

Decentralisation is fundamental in influencing this participatory design. In this context, according to the Regional Government Law, mining activities are classified as a component of regional authority, but within a coordinating framework with the central government. The interplay between central and regional authorities regarding financial management and natural resource allocation enables local people to express their goals via local governments. The Mining Act 2009 illustrates that public participation is intrinsically linked to the calls for distributive justice, openness in income allocation, and acknowledgement of ecological concerns as the living and social environment of production areas.

The Mining Act 2009 normatively incorporates several types of involvement, encompassing both direct and indirect methods. Direct participation is shown in the need to cultivate and enhance communities, prioritise local workforce, and offer avenues for community engagement in artisanal mining (see to Articles 6 & 7). Simultaneously, indirect participation is shown through consultation processes, public disclosure of activity plans, and collaboration among the central government, regional governments, and representative entities. This array of forms illustrates that involvement exists along a spectrum rather than conforming to a singular model. Nonetheless, this normative acknowledgement does not inherently ensure the sufficiency of participation in a real context.

The critique of the Mining Act 2009 is on the excessively vague participation standards, which depend on governmental discretion (see to Article 7(i)). The provisions concerning community engagement are articulated in a manner that permits extensive administrative interpretation, lacking a definitive method to guarantee that community goals genuinely impact decision-making. This jeopardises involvement by potentially confining it to a procedural level devoid of robust corrective authority. The issue regarding the normative character of participation under the Mining Act 2009 has to be located within the context of normative legal theory. Legal norms are fundamentally evaluative, functioning as criteria for evaluating and directing social conduct towards specific values. Consequently, the normative aspect of involvement should not be indiscriminately seen as a deficiency. The primary concern is the degree to which these norms are intended to induce transformative changes in the power dynamics among the state, companies, and society.

Moreover, an examination of the Mining Act 2009 through the lens of Arnstein's ladder of participation reveals that, although participation is broadly acknowledged, its normative framework has not attained a degree of engagement that confers meaningful power or authority to communities. Current standards predominantly enable participation through the expression of desires, consultation, or economic empowerment, without conferring the authority to actively impact strategic choices. The Constitutional Court's decision No. 10/PUU-X/2012 concerning the phrase "taking into account community opinions" in the designation of mining sites serves as a notable signal of these constraints. The Court underscored that community engagement should be seen as the state's duty to safeguard, honour, and realise the interests of impacted groups. This verdict illustrates that the original framework of the Mining Act 2009 was not entirely consistent with constitutional tenets of popular sovereignty and the safeguarding of community rights.

Upon further examination via Arnstein's ladder, involvement in the Mining Act 2009 predominantly occurs at the levels of placation and consultation (see to Articles 23, 24, 38, 46, 51, 57, 69, and 113 (4)). The public is afforded the opportunity to articulate thoughts and participate in certain activities, while ultimate authority resides with the government. In certain respects, involvement ceases at the informing stage, characterised by unidirectional communication via official announcements and publications. This trend suggests that participation now serves not as a power-sharing mechanism, but as a method of legitimising policies. Nevertheless, it is vital to emphasise that the Mining Act 2009 nevertheless shows normative improvement relative to the prior system. The clear acknowledgement of involvement, the enhancement of local government authority, and the connection to environmental rights constitute the fundamental basis for the democratisation of natural resource management. This foundation acts as a crucial benchmark for evaluating later alterations.

Thus, the Mining Act 2009 regime might be seen as a transitional period. This government expressed ambitions for decentralisation and democratisation, although it has not effectively implemented robust, binding participation procedures. This stance elucidates why the post-2009 regime has transformed into a battleground between the reinstatement of state authority and the need for more citizen engagement.

3. Regime of Law Number 3 of 2020 Concerning Amendments to Law Number 4 of 2009 Concerning Mineral and Coal Mining (Mining Act 2020) Juncto Law Number 6 of 2023 Concerning Job Creation (Job Creation Law)

a) The Mining Act 2020

The amendment of the Mining Act 2009 on Mineral and Coal Mining via the Mining Act 2020 signifies a pivotal stage in the development of mining regulation in Indonesia. This alteration occurred within a political-legal environment marked by a vigorous drive for centralisation of power, expedited investment, and modification of the national regulatory structure to align with global economic trends.[41] The matter of public involvement has a pivotal role in this context, as it is intrinsically linked to the democratic legitimacy of natural resource management and the notion of state control aimed at maximising the welfare of the populace. The Mining Act 2020 regime has a heightened acknowledgement of public participation relative to its predecessor. This enhancement is seen in the proliferation of participatory language, acknowledgement of impacted communities, and legislation governing local government engagement in mining area planning. Nonetheless, within the context of Arnstein's Ladder of Participation analysis, this extension cannot be unequivocally construed as an augmentation of public authority in decision-making. An evaluation of public participation necessitates an analysis that prioritises power dynamics

41 Constitutional Court of the Republic of Indonesia, Govt: Mineral and Coal Mining Law Amended to Rehabilitate Mining Sector, 5 January 2022, https://www.mkri.id/index.php?page=web.Berita&id=17942 (last accessed on 28 January 2026).

as the central variable, rather than merely the presence of processes or the degree of administrative engagement.

The formulation of the Mining Act 2020 is a fundamental foundation for evaluating the essence of public participation. The government and the House of Representatives (DPR) said that they have facilitated participation via public hearings, stakeholder discussions, and the engagement of local governments and the Regional Representative Council (DPRD). The assertion of transparency was then evaluated through a formal legal assessment at the Constitutional Court, which determined if the legislative process adhered to the concept of substantive participation as required by the constitution. The Constitutional Court, in Decision Number 60/PUU-XVIII/2020, underscored that public involvement does not necessitate unanimous approval from all parties, but rather the provision of access and the chance to articulate objectives.[42] The Court's reasoning highlighted the importance of adhering to procedural requirements, including the recording of formal invitations and participation in discussion forums. This approach affirms that the constitutional criterion for public participation in Indonesia is seen more as the "*right to be heard*" rather than the "*right to decide*".

This legal framework theoretically positions involvement in the Mining Act 2020 at the consultation tier of Arnstein's ladder of participation. The public is afforded two-way contact; nonetheless, decision-making authority is exclusively retained by policymakers. Despite the Court's intention to enhance legislative quality via the notion of meaningful participation, the execution of Decision No. 60/PUU-XVIII/2020 appears to diminish participation to a simple procedural formality. This establishes a legal paradox: participation is acknowledged as a constitutional right, yet it forfeits the coercive authority to legally influence policy content. Consequently, public participation in the legislative process frequently serves just as a tool for procedural legitimacy, rather than as a significant participant in decision-making.

Moreover, the Mining Act 2020 affirms the participation of regional governments and the Regional Representative Council (DPRD) in the deliberation of mining policy. Such involvement, however, takes place within a consultative framework that does not permit corrective influence over final decisions. This arrangement consolidates central authority and defines mining zones, thereby diminishing regional autonomy in the governance of mineral and coal resources. In this context, subnational entities serve merely as supplementary sources of information and administrative legitimacy. Although regional administrations may express their perspectives and aspirations, they lack the legal competence to amend or overturn policies determined by the national government. This condition exemplifies the stage of *placation* in Arnstein's Ladder, wherein peripheral actors are granted limited engagement without any genuine redistribution of power.

42 Constitutional Court of the Republic of Indonesia, Decisions Number 60/PUU-XVIII/2020; 91/PUU-XVIII/2020; and 37/PUU-XIX/2021.

An examination of the participation standards in the Mining Act 2020 indicates an expanded acknowledgement of impacted communities. The regulations for the identification of Mining Areas (refer to Article 10) mandate the government to take into account community goals, the entitlement to a healthy environment, and regional interests. This standard signifies advancement relative to the prior, more technocratic government. Nonetheless, expanding normative recognition does not correspond to enhanced public control. These laws are devoid of a veto mechanism, binding objection rights, or the government's duty to modify policies depending on participation results. In this instance, community ambitions function just as a consideration rather than a decisive element, thus aligning with Arnstein's concept of high-level tokenism.

Despite legislation concerning the transparency of regional plans and public consultations suggesting enhanced access to information, these processes have not substantially altered the power dynamics in decision-making. The state maintains complete control over zoning and strategic licensing in the mining and coal sectors. This phenomenon is underscored by the Constitutional Court's position in Decision Number 60/PUU-XVIII/2020, which declined to evaluate the quality of public impact on legislative substance. The Court regarded the establishment of material content as a question of political discretion (open legal policy) by the lawmakers.[43] This statement affirms the presence of strict constitutional limits, wherein participation is legally acknowledged yet significantly constrained.

Analysed through the lens of the Arnstein Ladder, these constraints indicate that the Indonesian legislative framework has not yet embraced the notion of public empowerment in the development of strategic natural resource policy. Public participation is largely regarded as a tool for legitimacy rather than a means of power distribution. The Mining Act 2020 regime signifies an enhancement of formal involvement mechanisms; however, it persists within a hierarchical structure that designates the state as the preeminent entity.

The public participation framework established by the Mining Act 2020 might be categorised as deliberative tokenism. Participation is enabled by consultative forums, normative acknowledgement, and comparatively transparent administrative processes. In this instance, discussion manifests as the expression of opinions and ambitions, however, fails to affect a significant alteration in power dynamics. This intentional tokenism reinforces the legitimacy of mining policy within the framework of procedural democracy. The public is acknowledged as a legal entity, yet continues to occupy the role of policy receiver. This framework embodies a concession between the requisites for democratic engagement and the objective of centralising natural resource governance.

43 Constitutional Court of the Republic of Indonesia, Decision Number 2/PUU-XXII/2024 (Judicial Review of the Mineral and Coal Mining Law regarding Special Mining Business Permit Area (WIUPK) for Religious Organisations), 3 January 2025. The Court dismissed the petition, ruling that granting priority mining permits to religious organisations constitutes an "open legal policy" intended to expand public participation.

b) Job Creation Law 2023

The enactment of Law No. 6 of 2023, which pertains to the stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation, signifies a new phase in the political and legal evolution of natural resource management in Indonesia. This regime functions not only as a sector-specific regulatory tool, but as a comprehensive legal framework that redefines the interactions among the state, the market, and society. The Job Creation Law in the mineral and coal mining industry intensifies the centralisation of authority created by the Mining Act 2020, while also transforming public participation from a deliberative tokenism model to a more instrumental approach.

These alterations are occurring within the framework of a multifaceted crises, including the global economic deceleration, foreign investment pressures, and the national discourse on employment generation and expedited development. In this context, public participation is now regarded not as a normative deliberative process for shaping policy, but as an administrative factor that must be controlled to avoid obstructing corporate efficiency and certainty. This transition has significant ramifications for the democratic legitimacy of mining governance. The omnibus legislative methodology employed in the Job Creation legislative has significant implications for public participation. The legislative process, which amalgamates several laws into a one legal instrument, complicates the public's ability to discern viable areas for involvement. The intricacy of the content and the rapidity of discussions establish an epistemic gap between legislators and the populace.

The Constitutional Court, in Decision Number 91/PUU-XVII/2020, recognised procedural deficiencies in the formulation of the Job Creation Law, namely concerning the adherence to the norm of substantive public involvement. The Court contended that public involvement necessitates the right to access sufficient information, the chance to articulate viewpoints, and the assurance that such viewpoints be evaluated judiciously.[44] Nevertheless, the government's response to this ruling was adherence to formalities, without a meaningful overhaul of the participation process. From a substantive-procedural standpoint, analysed through Arnstein's framework of participation, the Job Creation Law regime illustrates a transition from consultation to enhanced information dissemination. The public can acquire information via online publishing, regulatory, and administrative complaint mechanisms. Nonetheless, the scope for meaningful discussion is constricted, and the public's ability to affect policy results is progressively diminished. Participation serves as a unilateral information dissemination process intended to promote adherence, rather than as a platform for policy deliberation.

44 Constitutional Court of the Republic of Indonesia, Decision Number 91/PUU-XVIII/2020 (Judicial Review of the Job Creation Law), 25 November 2021, which declared Law No. 11 of 2020 conditionally unconstitutional due to lack of "meaningful participation". This was followed by the issuance of Government Regulation in Lieu of Law (Perppu) No. 2 of 2022, subsequently enacted as Law No. 6 of 2023. Most recently, the Court in Decision Number 168/PUU-XXI/2023 (31 October 2024) partially granted a petition by labor unions, nullifying 21 provisions regarding labor rights and mandating the creation of a separate Manpower Law within two years.

A notable transformation in the mining sector subsequent to the Job Creation Law is the consolidation of permits via the risk-based business licensing system (OSS RBA). This alteration redirects supervision from the pre-permit phase to the post-permit phase, resulting in diminished public participation throughout the early planning and decision-making processes. The removal or reduction of various public consultation mandates in the permitting process undermines the standing of impacted communities. In this instance, public participation is limited to the submission of objections or complaints post-permit issuance. This process positions communities reactively rather than proactively. This scenario aligns with Arnstein's therapeutic ladder of involvement, wherein engagement serves to alleviate social opposition without exerting genuine impact on policy.

Moreover, the Job Creation Law framework redefines the function of Environmental Impact Assessments (AMDAL) as a cohesive administrative tool within business licensing, influencing the quality of engagement. In this context, the environmental consultation process, formerly a forum for discourse, now operates primarily as a technical requirement. Communities operate under the confines of the administrative structure, without access to strategic decision-making about project viability. The Job Creation Law further consolidates authorities in mining management, encompassing standard-setting, permit issuing, and oversight. Local governments operate as executors of central policies, with progressively constrained discretionary authority. This circumstance directly affects local community engagement, which depends on local government representation.

This topic has led to many court assessments of the Job Creation Law, revealing the limitations of legal remedies over the erosion of public participation. The Constitutional Court often confines its function to procedural evaluations and affords legislators considerable latitude. This approach highlights that public participation in the Indonesian judicial system has not been established as a fundamental constitutional right. This trend indicates that the judicial review system has failed to enhance public participation to the status of citizen authority. Participation continues to be regarded as an administrative variable that may be modified to align with economic policy objectives. The legitimacy of mining policy has transitioned from democratic to functional validity.

The research indicates that the Job Creation Law regime exemplifies the use of public participation. Participation is not abolished but restructured to conform to the objectives of efficiency, legal clarity, and investment competitiveness. The public is regarded as an entity of restricted socialisation and supervision, rather than a participant in policy discourse. This instrumentalisation engenders a democratic dilemma in the administration of natural resources. The state professes a dedication to participation yet effectively constrains the public's area of influence. This regime on Arnstein's Ladder transitions from deliberative tokenism to administrative tokenism.

An analysis of the Mining Act 2020 and the Job Creation Law indicates a decline in the quality of public participation. The initial regime solidified participation via deliberative tokenism, but the subsequent regime diminished it to a mere administrative tool. This transformation is deliberate, resulting from a legal political orientation that emphasises investment stability and the centralisation of authority. This reading establishes a crucial basis for the normative synthesis in the subsequent section. A comparative examination of the regimes facilitates critical reflection on the limitations of public participation in Indonesian mining law and the associated constitutional problems.

4. Regime of Law Number 2 of 2025 Concerning the Fourth Amendment to Law Number 4 of 2009 concerning Mineral and Coal Mining (Mining Act 2025)

The discourse over the adequacy of public involvement in Indonesian mining legislation is inextricably linked to the normative framework that has been progressively shaped by revisions to the Mineral and Coal Law. The Mining Act 2025 regime exemplifies the conclusion of a policy trajectory that progressively emphasises state supremacy and the rationale of economic growth in the management of mineral and coal resources. Moreover, enquiries about the adequateness of public participation are beyond mere technical procedures, now addressing fundamental issues of constitutionalism, substantive democracy, and the legitimacy of state authority in the management of natural resources. Public participation in contemporary legislation is conventionally perceived not just as a consultative tool, but as an embodiment of the idea of popular sovereignty and the accountability of authority. This principle, within the framework of Indonesian constitutional law, is founded on Article 1 paragraph (2) of the 1945 Constitution and is manifested through the assurance of the right to a good and healthy environment, the right to access information, and the right to engage in public decision-making (Article 28H of the 1945 Constitution). Consequently, the effectiveness of public participation should be evaluated not just by its formal presence, but by its ability to impact policy content and mitigate the misuse of authority.

The Mining Act 2025 regime signifies a substantial conceptual transformation in the comprehension of public participation. Participation is often relegated to a supplementary administrative tool rather than being seen as a fundamental component of mining policy legitimacy. Regulations concerning community engagement are situated within the context of expediting licensing, securing investment, and adapting national strategic policies. Consequently, public participation is now perceived not as an independent right, but as a negotiable element within the context of developmental objectives.

A primary feature of the Mining Act 2025 is the further consolidation of centralised control over mining licenses and administration. This alteration solidifies a pattern that has arisen following the second and third amendments to the Mineral and Coal Mining Law, wherein the central government has a pivotal role in delineating mining business permission regions, issuing licenses, and supervising business operations. Normative reasons supporting this centralisation typically hinge on assertions of enhanced legal clarity, mitigation of local corrupt practices, and the harmonisation of national policy. From the standpoint of constitutional and administrative law, this centralisation prompts essential enquiries about the principles of decentralisation, regional autonomy, and the closeness of decision-making to impacted populations.

In the 2025 regime, the state functions not just as a regulator, but progressively as a *manager* and even a collaborator in mining operations. The enhancement of state-owned enterprises (SOEs) and state-affiliated corporate organisations in the administration of strategic mineral resources signifies a transition from the regulatory state model to the modern developmental state. This transition has normative consequences for the notion of governmental authority over natural resources as outlined in Article 33 of the 1945 Constitution. Previously, state control was viewed as a mechanism for regulation, management, and oversight aimed at maximising public welfare; however, under this regime, it is increasingly perceived in operational and instrumental terms, emphasising the optimisation of economic value and the state's negotiating power in the global market.

Nonetheless, enhancing the state's participation does not inherently result in the fortification of public accountability systems. Conversely, a primary critique of the Mining Act 2025 is the progressively limiting scope for substantive public participation. Although it legally acknowledges the significance of public consultation and participation, its stipulations are often procedurally insufficient and lack methods for substantial impact on decision-making. Public participation has been diminished to a mere administrative procedure, rather than a deliberate process capable of impacting the substance of mining policy.

The 2025 regime exhibits both continuity and amplification of trends established in prior changes. In the prior regime, public participation was diminished by the streamlining of licensing processes and the amalgamation of environmental licenses with corporate permits; in the 2025 regime, this deterioration is institutionalised in a more systematic manner. Participation is now regarded not as a normative need for policy legitimacy, but as a variable that can be modified to accommodate the demands of expedited investment and policy stability.

This strategy has substantial ramifications for populations residing near mining regions. The Mining Act 2025 presumes that national and local interests are congruent, therefore interpreting social and ecological problems as matters of execution rather than as questions of normative design. This assumption is flawed since it overlooks that mining impacts—both environmental and social—are localised, contextual, and frequently cannot be simplified to macroeconomic metrics. From an ecological justice standpoint, this method may exacerbate the disparity in the allocation of risks and rewards between the central government and regional authorities, as well as between the state and impacted populations.

Moreover, the framework established by the Mining Act 2025 has a propensity to institutionalise uniqueness in mining regulation. The mining legislation is shifting towards discretionary governance due to many clauses that provide the central government considerable latitude in formulating strategic goals. Although administrative discretion is essential in a contemporary state, its potential for abuse escalates in the absence of judicial monitoring and robust public participation. In this scenario, the law ceases to act as a constraint on power and instead serves as a mechanism that legitimises the augmentation of executive authority.

From a legal philosophy standpoint, the 2025 regime signifies a transition from a paradigm of legal formalism to what may be termed instrumental legalism. The law is utilised as a mechanism to attain particular policy objectives—specifically, economic growth and resource security—while insufficiently considering the independent normative aspects of the law itself. Consequently, concepts like participation, openness, and accountability diminish in normative significance and are relegated to mere policy buzzwords.

This scenario also prompts significant enquiries over the alignment of the Mining Act 2025 with international environmental and human rights legal norms. Despite Indonesia's stated commitment to many international instruments advocating for public participation and the safeguarding of impacted communities, the execution of these obligations under national mining legislation is significantly insufficient. The 2025 regime, prioritising acceleration and flexibility, may exacerbate the disparity between international obligations and domestic implementation.

Nonetheless, it is crucial to recognise that the framework of the Mining Act 2025 cannot be entirely interpreted as normative retreat. This regime exemplifies an effort to tackle the structural difficulties confronting the Indonesian mining sector, including policy fragmentation, inadequate control, and minimal local added value. The issue is in the normative design decisions used to tackle these difficulties. This system has opted for centralisation and legal instrumentalisation instead of enhancing participatory and rights-based governance.

Consequently, the framework established by the Mining Act 2025 epitomises the culmination of normative trends that have emerged from prior amendments: reinforcing the state's authority, constricting public participation, and subordinating procedural democratic principles to the economic development agenda. This government does not directly oppose the preceding one; instead, it exhibits a progressively clear continuity. The distinction resides in the strength and clarity of its normative focus.

Within this approach, it is crucial to regard the regime of the Mining Act 2025 as a subject of critical assessment, rather than merely a good legal phenomenon. This evaluation should assess whether the consolidation of authority and policy flexibility provided by this regime genuinely conforms to the constitutional mandate of maximising public prosperity, or if it compromises the principles of participation and justice for the sake of immediate efficiency. This inquiry gains significance when examining the escalating socio-ecological conflicts in mining regions and the worldwide desire for sustainable and equitable resource governance.

D. Conclusion

This study illustrates that the evolution of the Mineral and Coal Mining Law in Indonesia embodies the dynamic interplay of state power arrangement, economic development orientation, and the extent of public involvement acknowledgement. The Mining Act 1967, originating from an authoritarian developmental state, and the Mining Act 2025, functioning within the framework of electoral democracy and strategic resource governance, exhibit considerable normative transformations in public participation, though they remain substantively problematic. An analysis utilising Arnstein's Ladder of Citizen Participation indicates that the alteration in the mining legal framework has not yet culminated in a substantial enhancement of participatory quality. Despite the implementation of post-reform rules that established procedures for consultation, outreach, and community engagement, the decision-making framework continues to exhibit the predominance of the state and influential economic stakeholders. Public participation often culminates in tokenism, when public voices are acknowledged procedurally without ensuring substantial impact on policy results.

The Mining Act 2025 framework epitomises these tendencies. The centralisation of authority, the enhancement of administrative discretion, and the streamlining of licensing procedures generate significant conflicts with the notion of popular sovereignty and individuals' constitutional rights to engage in natural resource management. This circumstance poses a constitutional challenge to the interpretation of Article 33 of the 1945 Constitution as a principle of economic democracy and social fairness. Consequently, forthcoming improvements to mining legislation necessitate the reestablishment of public participation as a fundamental component of democratic resource control, rather than solely as a tool for policy legitimacy. In the absence of normative reforms, mining legislation is likely to perpetuate power disparities in the management of natural resources.

Standing as Barrier or Gateway: Contrasting U.S. Doctrine with Global Climate Jurisprudence

By *Ye-Eun Uhm**

Abstract: This article offers a comparative case law analysis of how courts address standing in climate litigation. Taking U.S. federal Article III standing as a reference point, it examines how courts in various jurisdictions confront analogous threshold questions through different doctrinal forms, including admissibility, legal interest, victim status, and constitutional review. Three questions recur across jurisdictions: whether organizations may sue in a representative capacity, whether climate harm remains legally cognizable when widely shared, and whether threshold review is conducted through a distinct procedural test or through a broader rights-based framework. The article argues that attention to these differences in judicial reasoning helps explain why similar climate claims proceed in some courts but not in others. In doing so, it shows that the procedural gateway to climate adjudication is shaped not only by formal doctrine but also by how courts characterize climate harm, the claimant, and the judicial role.
Keywords: Climate Litigation; International and Comparative Law; International Environmental Law; International Climate Change Law; Standing

***

A. Introduction

Standing remains one of the most significant procedural hurdles in climate litigation. Most jurisdictions require courts to consider whether the parties attempting to bring a legal action have "standing" to do so.[1] The term "standing" refers to the set of requirements that a plaintiff must meet in order to demonstrate their right to bring a claim before the court. While standing exists across legal systems, its interpretation and application vary significantly. Moreover, the landscape of climate litigation has shifted dramatically in recent years, with courts increasingly confronting novel questions about the justiciability of systemic environmental harm. For the purposes of this article, "climate litigation" refers

* Adjunct Professor, Ajou University Graduate School of International Studies (Republic of Korea). Email: yuhm@ajou.ac.kr.

1 United Nations Environment Program, Global Climate Litigation Report 2017 Status Review, pp. 28-29, noting that while the question of standing has been a central issue in climate litigation in the U.S., it remains less of a barrier in some courts outside of the U.S., such as in Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd., Leghari v. Pakistan and Gbemre v. Shell PDC Nigeria Limited.

to judicial proceedings in which climate change mitigation or adaptation is central to the claims or relief sought.

In the US, courts often apply a strict three-part test. In contrast, many other jurisdictions—such as Germany, South Korea, the Netherlands—and regional courts do not treat standing as a distinct doctrine; instead, the concept is structured differently in form and logic. This article adopts a comparative approach, examining selected cases from multiple jurisdictions. The analysis considers how different courts articulate the requirements for standing, the extent to which these requirements have evolved in response to climate change, and what these trends suggest for the future of access to climate justice.

B. Methodology and Scope

This article does not purport to provide a comprehensive survey, but rather to offer a comparative reading of a selected set of climate litigation. Even with these limitations, the exercise remains valuable: by placing a handful of illustrative cases side by side, the analysis highlights recurring tensions and divergences in the treatment of standing across legal systems and thus contributes to the broader understanding of transnational patterns in climate litigation.[2]

Article III standing under U.S. federal law is introduced to provide the definition of standing (*a tertium comparationis*), with subsequent sections showing how other jurisdictions approach the issue in distinct ways.[3] For the comparative analysis, cases are selected based on their capacity to illuminate similar or contrasting judicial reasoning in relation to the specific issues drawn from the preceding examination of U.S. case law.[4] The selection is problem-oriented rather than geographically representative. Instead of aiming to survey global trends, this study identifies illustrative decisions from diverse jurisdictions that engage with analogous threshold questions—such as admissibility, legal interest, victim status, or access to constitutional review.[5]

It should also be noted that the use of the term "standing" in this article is context sensitive. In the U.S. cases section, "standing" refers specifically to the federal Article III doctrine, with its three-pronged injury, causation, and redressability test. In the comparative sections that follow, the term is used more broadly, to denote the procedural gateway, however defined within a given legal system, that enables a claimant to bring a climate-related case before a court.

The selection includes both cases in which standing was decisive and cases in which it was discussed in a meaningful way, even if not dispositive. Decisions at different

2 *Ran Hirschl*, The Question of Case Selection in Comparative Constitutional Law, The American Journal of Comparative Law 53 (2005), p. 125.

3 *Ralf Michaels*, The Functional Method of Comparative Law, in: Mathias Reimann / Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2006, p. 339.

4 *Konrad Zweigert / Hein Kötz*, An Introduction to Comparative Law, Oxford 1998.

5 *Jaakko Husa*, Introduction to Comparative Law, Oxford 2023.

judicial levels—including trial, appellate, and constitutional courts—are included, as the focus extends beyond the ultimate outcome of a claim to the reasoning processes, logical assumptions, and doctrinal framing through which courts determine whether climate-related disputes may proceed. This study therefore does not undertake a comparison of constitutional structures, statutory schemes, or procedural architectures across jurisdictions. Rather, it adopts a functional approach, examining how courts articulate and justify threshold access-to-justice determinations in climate litigation.[6] By concentrating on judicial reasoning, the analysis highlights how structurally distinct legal systems confront comparable procedural dilemmas.

This emphasis on reasoning is particularly significant in the contemporary climate litigation landscape, where courts increasingly look beyond their borders for persuasive authority.[7] The growing practice of engaging with foreign judgments in climate-related disputes reflects an emerging transnational dialogue on access to justice and judicial role in the face of climate crisis.[8]

C. U.S. Cases

In the United States, where approximately 74% of climate litigation was filed according to a UNEP report,[9] standing has been a central topic in a number of landmark climate lawsuits. One of the earliest and most influential precedents is Lujan v. Defenders of Wildlife (1992), an environmental case that crystallized the three core elements of standing under U.S. federal law: the plaintiff must have suffered a concrete and particularized injury that is actual or imminent (injury in fact), there must be a causal link between the injury and the actions of the defendant (causation), and the court must be able to provide redress for the injury (redressability).[10] This tripartite test has since framed judicial analysis in federal environmental and climate litigation.

The first element, injury in fact, requires that the plaintiff demonstrate harm that is (1) concrete and particularized (affecting the plaintiff specifically, not the public generally), and (2) actual or imminent (not conjectural or hypothetical). The second part of the test, attributing a defendant's emissions to climate change overall and linking climate change

6 *Michaels*, note 3, p. 339.

7 *Jacqueline Peel / Hari M. Osofsky*, Climate Change Litigation's Regulatory Pathways: A Comparative Analysis, Law & Policy 35 (2013), p. 150.

8 *Martin Gelter / Mathias M. Siems*, Citations to Foreign Courts — Illegitimate and Superfluous, or Unavoidable? Evidence from Europe, The American Journal of Comparative Law 62 (2014), p. 35.

9 United Nations Environment Program, Global Climate Litigation Report 2023 Status Review, p. 18.

10 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

to specific climate change impacts, has become increasingly easier to satisfy thanks to advances in attribution science and the accumulation of relevant jurisprudence.[11]

Establishing the third element depends on the specific measures the plaintiff asks the court to order. In Juliana v. United States, the plaintiffs requested that the U.S. government "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2."[12] The Ninth Circuit Court of Appeals concluded that the relief plaintiffs sought was outside the power of the court, remanding the case to the district court with instructions to dismiss for lack of Article III standing.[13]

I. Injury in Fact

Across the U.S. cases, one obvious trend is the growing judicial openness to acknowledge climate-related damages as sufficiently specific and concrete to satisfy the injury-in-fact criteria. The recognition of climate harm as cognizable injury has evolved significantly since the mid-2000s. In Massachusetts v. EPA[14](2007), Massachusetts and several other states petitioned the Environmental Protection Agency (EPA) to regulate emissions of carbon dioxide and other gases from new motor vehicles and argued that EPA had the authority to regulate carbon dioxide by the Clean Air Act. The Court ruled that rising sea levels constituted a genuine and imminent threat to the state's territory, recognizing climate impacts as valid harms. The Court also recognized a more lenient standing threshold for states acting in their quasi-sovereign capacity to protect their citizens and territory.

Whether non-state plaintiffs could demonstrate similar injuries initially remained unclear but soon became recognized. In *American Electric Power v. Connecticut*[15] (2011), the Supreme Court assumed standing without deciding it and disposed of the case on statutory displacement grounds. Similarly, in *Washington Environmental Council v. Bellon*[16](2011), the court assumed that members of environmental organizations had alleged concrete and particularized injuries from climate change, but declined to articulate the contours of such injuries, instead resolving the case on other elements of standing. This pattern shifted in *Juliana v. United States*[17] and *Held v. State of Montana*[18] where courts engaged directly with the injury element. In both cases, youth plaintiffs were successful in proving this

11 United Nations Environment Program, Global Climate Litigation Report 2020 Status Review, p. 44, see also *Christopher W. Callahan / Justin S. Mankin*, Carbon Majors and the Scientific Case for Climate Liability, Nature 640 (2025), pp. 893–901.

12 Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

13 Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

14 549 US 497 (2007).

15 American Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

16 Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).

17 Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

18 Held v. Montana, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023).

requirement by giving a detailed account of how climate change has affected their personal lives.

A critical component of the injury-in-fact element requires U.S. courts to scrutinize whether the alleged injury is particularized to the plaintiff rather than a generalized grievance shared by the public. In climate litigation, courts exhibit divergent approaches to this particularization requirement, resulting in a fragmented doctrine that varies by venue, plaintiff identity, and how harms are alleged.

In several cases, federal courts have scrutinized whether alleged climate harms are sufficiently particularized. In Native Village of Kivalina v. ExxonMobil Corp., the district court dismissed for lack of standing (citing causation difficulties), and while the Ninth Circuit affirmed on displacement grounds without reaching standing, Judge Pro's concurrence questioned whether the village's coastal erosion constituted sufficiently particularized harm given that countless communities face similar threats. In Genesis B. v. U.S. Environmental Protection Agency, the federal district court dismissed the youth plaintiffs' amended complaint for lack of standing. As part of its standing analysis, the court concluded that the youth plaintiffs' alleged climate harms were not sufficiently particularized, characterizing them as generalized grievances shared by the broader public. Juliana v. United States represents a notable instance where a federal court acknowledged particularized harm. Here, the Ninth Circuit Court of Appeals found that the plaintiffs met the injury and causation requirements for standing because at least some plaintiffs had alleged concrete and particularized injuries caused by fossil fuel carbon emissions that were increased by federal subsidies and leases.[19] For instance, Plaintiff Kelsey Cascadia Rose Juliana stated that Defendants' actions have caused damage to and continue to threaten the resources on which she relies for her survival and wellbeing, including the freshwaters of Oregon for drinking, hygiene, and recreation.[20]

State courts—particularly those with constitutional environmental rights provisions—apply more flexible particularization standards and grant standing more readily. *Montana's Held v. State* (2024) exemplified this divergence: youth plaintiffs prevailed by showing discrete personal injuries under Montana's constitutional right to a "clean and healthful environment". Rikki testified about currently working outdoors on her family's ranch under dangerous heat and smoke; and Kian testified that his soccer practices were repeatedly canceled during recent summers due to wildfire smoke.[21] Similarly, in *Navahine F. v. Hawaii Department of Transportation* (2024), youth plaintiffs described individualized climate harms—Lucina's disappearing beaches and reefs and Navahine's family farming threatened by drought and flooding—culminating in a historic settlement recognizing their constitutional right to a life-sustaining climate and requiring Hawaiʻi to achieve zero-emissions transportation by 2045.

19 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

20 Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).

21 Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

II. Causation

The causation prong has proven more contentious. Given the inherent global and cumulative nature of climate change, courts have differed in their approaches. Noting the challenge of connecting localized emissions to global climate outcomes, the Ninth Circuit ruled in Washington Environmental Council v. Bellon[22] that the plaintiffs were unable to demonstrate that greenhouse gas emissions from a few oil refineries in Washington State were linked to their claimed climate injuries. In Native Village of Kivalina, the district court dismissed the case in 2009 on two grounds: the political question doctrine and lack of Article III standing, highlighting the difficulties in proving a clear causal link between the plaintiffs' damages and any particular defendant's emissions.[23] When the case reached the Ninth Circuit in 2012, the appellate court affirmed the dismissal but relied on displacement by federal law.[24] This causation barrier persists in recent litigation. In Center for Biological Diversity v. Bureau of Land Management[25](2025), the Ninth Circuit illustrates the growing judicial tendency to separate threshold standing inquiries from substantive causation analysis: while the court accepted a relatively relaxed causal showing for Article III standing, it later applied a far more demanding causation standard at the merits stage under sector-specific environmental law.

III. Redressability

Redressability continues to serve as a key barrier in climate litigation, often turning on the nature of the defendant and how directly the requested remedy addresses the harm. Courts have generally been more receptive to claims where the challenge targets a specific action and the remedy is limited and feasible. For instance, in Juliana, the Ninth Circuit agreed that the plaintiffs had suffered harm and established causation, but rejected the case on redressability grounds, finding that the sweeping request for a court-ordered national climate plan was outside the constitutional authority of the federal courts.[26] A similar outcome occurred in Bellon, where the court held that regulating emissions from a handful of refineries would not significantly reduce global greenhouse gases or address the plaintiffs' injuries.[27] This barrier persisted in later youth-led climate litigation. In Lighthiser v. Trump (2025), Judge Christensen acknowledged that the youth plaintiffs presented overwhelming evidence that climate change was affecting them and would worsen due to the challenged

22 Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).

23 Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876–77, 880–82 (N.D. Cal. 2009).

24 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

25 Ctr. for Biological Diversity v. Bureau of Land Mgmt., 141 F.4th 976, 1001, 1009–11 (9th Cir. 2025).

26 Juliana v. United States, 947 F.3d 1159, 1168–69, 1170–71 (9th Cir. 2020).

27 Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1143–44 (9th Cir. 2013).

executive orders but dismissed the case for failure to show that judicial relief could likely redress those injuries within the court's institutional capacity.[28]

By contrast, cases that tie the remedy directly to regulatory action have seen more success. In NRDC v. Wheeler[29], the court found standing because reversing the EPA's suspension of an HFC regulation would lead to a measurable drop in emissions and help address the environmental harm. Likewise, in Held v. State[30], Montana's court ruled that invalidating a law that prohibited consideration of greenhouse gases in environmental assessments would help restore plaintiffs' constitutional rights—even if the broader climate crisis remained unresolved. Together, these cases reflect a cautious but notable shift in how courts are approaching the standing doctrine in the context of climate litigation.

IV. Associational Standing

Environmental organizations must satisfy a similar requirement as individual plaintiffs.[31] U.S. courts have found that there is standing if organization members could show that the environmental pollution in question directly affected their interests, excluding certain circumstances where the court found a lack of evidence demonstrating a clear link between the defendant's action.[32] In Lujan v. Defenders of Wildlife, the Supreme Court rejected standing because the plaintiffs relied on 'someday intentions' to visit endangered species sites abroad, rather than concrete plans. The boundaries of this restriction were reaffirmed in Friends of the Earth (FOE) v. Laidlaw. The court in this case held that injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges directly affected those affiants' recreational, aesthetic, and economic interests, and explained that that these submissions present more than the mere "general averments", "conclusory allegations", or "someday intentions" found inadequate in Lujan v. Defenders of Wildlife.[33]

28 Lighthiser v. Trump, No. 2:25-cv-00054-DLC, slip op. (D. Mont. Oct. 15, 2025).

29 NRDC v. Wheeler, 958 F.3d 1088 (D.C. Cir. 2020).

30 Held v. State of Montana, No. CDV-2020-307 (Mont. Dist. Ct. 2023).

31 Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343. Following the decision in Hunt v. Washington State Apple Advertising Comm'n, it was accepted that association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit.

32 See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 US 167 (2000). See also Sierra Club v. Morton, 405 U.S. 727, 735 (1972). See also Nat. Res. Def. Council, Inc. v. Wheeler, 367 F. Supp. 3d 219 (S.D.N.Y. 2019), finding that the Natural Resources Defense Council and one of the state petitioners (New York) each had standing based on potential injuries from climate change, which were caused in part by hydrofluorocarbon emissions.

33 Lujan v. Defenders of Wildlife, 504 US 555, 564 (1992).

D. Climate Litigation Beyond the United States

Climate litigation beyond the United States reveals diverse judicial approaches to the threshold question of who may bring a climate-related claim. Although most jurisdictions do not explicitly use the structured three-part standing analysis familiar in the U.S., national, regional, and international courts frequently address issues such as whether plaintiffs have sufficient legal interests, if the claims are admissible, and how far the judiciary should extend its authority into climate-related disputes. In many jurisdictions, the concept operates under different doctrinal labels—such as admissibility, right to sue, or legal interest—but the core question of who may bring a claim remains central.

I. Individual vs. Representative/Collective Action

As examined in Section 2.4, U.S. standing doctrine requires environmental organizations to demonstrate associational standing. They must prove that specific members of the organization have suffered particularized harm from the alleged violations, rather than asserting generalized environmental concerns on behalf of the public. This stands in contrast to the broader public interest standing recognized in many European jurisdictions, where organizations may sue based on their mission alone.

In *Urgenda Foundation v. State of the Netherlands*[34], the Dutch courts affirmed Urgenda's legal standing based on Article 3:305a of the Dutch Civil Code, a provision permitting NGOs to litigate on behalf of broader affected groups. Likewise, in *Milieudefensie et al. v. Royal Dutch Shell*[35], the court permitted claims representing the collective interests of Dutch citizens and residents of the Wadden Sea area, validating a collective action approach against corporate entities contributing significantly to emissions.

In France, a coalition of environmental NGOs brought an administrative action alleging a *carence fautive* by the French State. The Administrative Court of Paris recognized the NGOs' standing and ruled in favor of the plaintiffs, ordering the government to take urgent action to reduce greenhouse gas emissions in line with its international commitments and domestic obligations. In Italy, the Supreme Court of Cassation affirmed the standing of environmental NGOs in *Greenpeace Italy et al. v. Eni S.p.A.* (July 2025), rejecting the argument that climate claims are non-justiciable political questions. By permitting the coalition to challenge a corporation's emissions, the Court aligned Italian jurisprudence with the broader European trend of recognizing organizational standing for collective climate redress.[36]

34 Urgenda Foundation v. State of the Netherlands, ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. Dec. 20, 2019).

35 Milieudefensie et al. v. Royal Dutch Shell plc, ECLI:NL:GHDHA:2024:2100 (Gerechtshof Den Haag [Court of Appeal of The Hague] Nov. 12, 2024).

36 Greenpeace Italy et al. v. Eni S.p.A. et al., Cass., Sez. Un., 21 July 2025, n. 20381 (It.).

Beyond domestic courts, associational standing has emerged at the regional level as a pathway for plaintiffs to advance their claims, notably at the European Court of Human Rights. The European Court of Human Rights (ECtHR) broke new ground in *KlimaSeniorinnen v. Switzerland*[37], overturning earlier national judgments that had dismissed claims due to lack of individual harm. While the Court agreed with Swiss authorities that the individual applicants lacked "victim status", it ruled that the association itself had standing, underscoring that climate change is a matter of "common concern of humankind" where collective action is essential to ensure effective protection. This pivotal distinction, expanding opportunities for organizational litigation, was reaffirmed in October 2025 in *Greenpeace Nordic and Others v. Norway*.[38] There, the Court dismissed the claims of six individual activists for failing to demonstrate direct "high-intensity" victim status, yet simultaneously granted standing to the applicant associations. The Court reasoned that NGOs act as essential guardians of collective rights in the climate context, effectively channeling systemic environmental challenges through organizational standing rather than individual claims.

European courts have also engaged with the generational dimensions of standing. In Urgenda, the Hague Court of Appeal held that Urgenda could represent the current generation of Dutch residents for purposes of admissibility.[39] Because standing was established on that basis, the court did not determine whether the organization could also act on behalf of future generations or individuals outside the Netherlands.[40]

Two years later, Federal Constitutional Court of Germany Court ("Bundesklimaschutzgesetz" or "KSG" case) opened a new intergenerational pathway when it found that legislature had not proportionally distributed the budget between current and future generations, writing "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom".[41] The decision also underscored that because filing a constitutional complaint to remedy the resulting constraints on freedom may be useless by the time the impairments materialize, the complainants have standing to file a constitutional complaint now.[42] The constitutional complaints were brought by several individual complainants, including youth and minors, with support from civil society organizations such as Germanwatch and Friends of the Earth Germany.

37 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, Eur. Ct. H.R. (Grand Chamber), Judgment of 9 April 2024.

38 Greenpeace Nordic & Others v. Norway, App. No. 34068/21 (Oct. 28, 2025).

39 Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment), ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396.

40 Ibid.

41 BVerfG, Order of 24 March 2021 - BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, http://www.bverfg.de/e/rs20210324_1bvr265618en.html [hereinafter "KSG"].

42 Ibid.

The recognition of a broader and more inclusive, socially grounded conception of standing is not confined to European jurisdictions. In the Philippines, *Minors Oposa v. Factoran* pioneered the concept of intergenerational standing, with the Supreme Court recognizing that both present and future generations have the right to sue to protect environmental resources.[43] India's State of Meghalaya v. All Dimasa Students Union illustrates the particularly liberal standing regime of the National Green Tribunal, which allows "any person" (not just affected individuals, but also public-spirited citizens, NGOs, or groups) to bring an environmental or climate-related claim.[44]

Taken together, these cases reveal a divergence between U.S. and non-US approaches to climate standing. In several jurisdictions across Europe and Asia, courts allow claims to proceed through representative actions, collective interest litigation, or frameworks that accommodate intergenerational claims. Within these frameworks, NGOs may bring claims in a representative capacity on behalf of broader affected groups.

II. Injury-in-Fact: Particularized Harm

As examined in Section 2.1, a key barrier to establishing injury-in-fact in U.S. climate litigation is the particularization requirement. Does the fact that many others suffer the same harm invalidate a plaintiff's claim? Across various jurisdictions outside the U.S., courts have taken different approaches, with some dismissing cases on the grounds that the alleged harm was not sufficiently particularized to the plaintiff, while others have chosen to move past that hurdle either by not addressing the issue explicitly or by implicitly accepting a broader conception of standing.

The fact that the plaintiff was not the only one suffering from the climate-related harm has become a common basis for courts to reject cases on standing grounds. In *Armando Ferrão Carvalho and Others v. the European Parliament and the Council* (the People's Climate Case), the applicants, families in the agricultural or tourism sectors, challenged European Union regulations enacted to fulfill its GHG emissions reduction targets, which they claimed were insufficient to protect their lives, livelihoods, and human rights from the effects of climate change.[45] The EU General Court found the claimants—families originating from multiple continents—did not demonstrate sufficiently distinct personal harm, as their injuries mirrored those affecting the public at large.[46] On appeal, the Court of Justice of the European Union rejected the plaintiffs' arguments again and dismissed the claim, concluding that because everyone is affected by climate change the applicants could

43 Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 33 I.L.M. 173 (S.C., Philippines July 30, 1993).

44 In re Court on its Own Motion v. State of Himachal Pradesh, National Green Tribunal (Feb. 2014).

45 Case C-565/19 P, Armando Ferrão Carvalho and Others v. The European Parliament and the Council, ECLI: EU:C: 2021:252 (Mar. 25. 2021).

46 Case T-330/18, Carvalho v. Parliament and Council, ECLI:EU:T:2019:324 (Gen. Ct. May 8, 2019).

not demonstrate that they were individually impacted by the European Union's climate policy.[47]

A similar conclusion was reached by the Swiss Supreme Court in *Association of Swiss Senior Women for Climate Protection v. DETEC*, where a group of senior women alleged that weak national climate policies violated their constitutional and human rights. The Court upheld the lower court's dismissal, ruling that the plaintiffs had not demonstrated a sufficiently distinct impact to warrant judicial intervention.

This trend is not unique to European courts. In *Smith v. Fronterra Co-Operative Group Limited*, the Auckland High Court found that a plaintiff did not have standing to pursue a nuisance claim with regards to GHG emissions because "the damage claimed by [the plaintiff] is neither particular nor direct; it is not appreciably more serious or substantial in degree than that suffered by the public generally and there is no difference in kind between the damage that […] other land owners, and members of the public who live in or use the coastal/marine area may suffer."[48]

A similar reasoning can be found in Japan as well. In Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan, the Osaka District Court denied an injunction request to halt the construction and operation of two new units at a coal-fired power plant. The plaintiffs argued that the project was inconsistent with Japan's 2030 and 2050 climate targets, but the court found that their claims were general rather than individual and therefore lacked standing.[49] The case illustrates how Japanese administrative litigation law requires a "direct and personal" legal interest, making it difficult for public-interest-oriented climate cases to proceed.

More recently in July 2025, the Palembang District Court in Indonesia rejected the lawsuit filed by haze victims and Greenpeace Indonesia, adopting a restrictive interpretation of standing that ignored expert testimony on collective environmental harm.[50] Specifically, the court ruled that the residents' exposure to haze constituted a generalized public nuisance rather than a direct, individualized injury attributable to the defendants.[51]

In contrast to these restrictive approaches, several courts in Asia have explicitly moved away from requiring uniquely individualized harm in climate-related disputes. In Ashgar Leghari v. Federation of Pakistan, the Lahore High Court accepted a farmer's public interest petition challenging the government's inaction on its National Climate Change

47 Ibid.

48 Smith v. Fronterra Co-Operative Group Limited [2020] NZHC 419.

49 Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al., Sabin Center for Climate Change Law, last accessed 31 October 2023, <https://climatecasechart.com/non-us-case/citizens-committee-on-the-kobe-coal-fired-power-plant-v-japan/>.

50 South Sumatra Smoke Haze Victims v. PT Bumi Mekar Hijau, Case No. 256/Pdt.G/LH/2024/PN Plg (Palembang Dist. Ct. July 3, 2025) (Indon.).

51 Ibid.

Policy, without demanding proof that his injury was distinct from that suffered by others.[52] In *Minors Oposa v. Factoran*, the Philippine Supreme Court held that minors could sue on behalf of themselves and future generations to protect the right to a balanced and healthful ecology—a form of intergenerational standing that inherently dispenses with the "individual vs. general" distinction.[53] India's National Green Tribunal, in *State of Meghalaya v. All Dimasa Students Union*, applied its statutory "any person" rule to admit claims concerning environmentally and climate-damaging coal mining.[54]

These more flexible approaches resonate with reasoning seen in Europe and the United States when courts have chosen to move past the individualization hurdle. In KSG, the German Federal Constitutional Court stated that "the complainants are individually affected in their own freedom [and] the fact that the restrictions will affect virtually everyone living in Germany does not exclude the complainants from being individually affected."[55] A similar line of reasoning can be found in Juliana v. United States, where a magistrate judge noted that alleged harms from climate change should not be "minimalized by the fact that vast numbers of the populace are exposed to the same injuries."[56]

The foregoing cases suggest that the particularization inquiry in climate litigation resists straightforward jurisdictional generalization. Instead, the case law reflects a more fundamental disagreement over whether the collective character of climate change is conceptually incompatible with individualized injury. Some courts continue to treat the distinction between personal and general harm as a strict threshold constraint. Others, however, have accepted that climate-related injury may retain legal particularity even when it is not unique to the claimant.

III. Three-Prong Test vs. Rights-Based Approach

One of the key takeaways from the comparative review of climate litigation is how differently courts across jurisdictions treat the concept of standing. While some, especially in the U.S, apply standing as a rigid procedural threshold that can block claims at the outset, others—most notably constitutional and human rights courts—approach it with greater flexibility. This divergence often determines whether climate cases are heard on their merits or dismissed before substantive issues are considered.

In the U.S., plaintiffs must clear all three components of constitutional standing: injury-in-fact, causation, and redressability. Courts have demanded a high level of specificity for each, resulting in the dismissal of several significant climate lawsuits. In Lujan v.

52 Leghari v. Federation of Pakistan, W.P. No. 25501/2015 (Lahore High Ct. Green Bench Sept. 4, 2015).

53 Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 33 I.L.M. 173 (S.C., Philippines July 30, 1993).

54 In re Court on its Own Motion v. State of Himachal Pradesh, National Green Tribunal (Feb. 2014).

55 KSG at 39.

56 Juliana v. United States, 6:15-cv-1517-TC (D. Or. Jan. 14, 2016).

Defenders of Wildlife[57], for instance, the Supreme Court rejected the claim for lack of an imminent, concrete injury. In Washington Environmental Council v. Bellon[58], the Ninth Circuit held that plaintiffs had failed to show that regulating a handful of oil refineries would meaningfully redress their harm. In Native Village of Kivalina v. ExxonMobil Corp[59], the court found no sufficient causal link between the defendants' emissions and the climate impacts suffered by the village. And in Juliana v. United States[60], while the court acknowledged the plaintiffs' injuries and established causation, it ruled the case nonjusticiable on redressability grounds, concluding that the sweeping nature of the remedy sought—a national climate recovery plan—fell outside judicial power. None of these cases made it past the procedural gate to a full evaluation of the legal obligations at stake.

By contrast, courts in other jurisdictions have increasingly interpreted standing in a way that reflects the societal and intergenerational nature of the climate crisis. This is illustrated by cases already mentioned in previous sections: in Neubauer v. Germany, the German Federal Constitutional Court found that young people were particularly affected by insufficient climate targets and emphasized that standing should accommodate future risks and the principle of intergenerational justice[61]; in *KlimaSeniorinnen v. Switzerland*, the European Court of Human Rights accepted the standing of an association of elderly women, recognizing the group's unique vulnerability and the broader implications of inadequate climate policy.[62]

South Korea offers another compelling example. In 2020, a group of young plaintiffs filed a constitutional complaint, alleging that the government's insufficient climate efforts violated their rights to life, equality, work, and a healthy environment. The government's opinion in response to the plaintiff's complaint was published in October 2020. The statement refuted each of the constitutional claims presented in the complaint and argued that plaintiffs lack standing because they are not the direct target of the GHG reduction regulations in question, meaning they are not directly related to the case.[63] The government went on to argue that with respect to the GHG reduction laws, not only the youth plaintiffs of this case but citizens in general are not a concerned party and rather closer to a third party, leaving plenty of questions to be answered in court.[64] The Constitutional Court, however, did not frame standing as a distinct procedural hurdle. Instead, it proceeded to

57 Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

58 Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).

59 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

60 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

61 Neubauer et al. v. Germany, BVerfG, 1 BvR 2656/18, Order of Mar. 24, 2021 (Ger.).

62 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, Eur. Ct. H.R. (Grand Chamber), Judgment of 9 April 2024.

63 Youth for Climate Action v. Republic of Korea, Youth 4 Climate Action, https://youth4climateaction.org/climate-litigation/?q=YToxOntzOjEyOiJrZXl3b3JkX3R5cGUiO3M6MzoiYWxsIjt9&bmode=view&idx=7706326&t=board (last accessed on 31 October 2023).

64 Ibid., pp. 14-15.

consider the merits and ruled in 2024 that when legislation to protect the right to a healthy environment is absent or clearly insufficient, and such legislative failure leads to a violation of that right, individuals must be able to seek constitutional remedy.

Before South Korea's constitutional court decision, there was Ashgar Leghari v. Federation of Pakistan, where the Lahore High Court accepted a farmer's petition under the country's public interest jurisdiction, holding that any citizen can seek enforcement of constitutional rights where the government fails to implement climate policy.[65] This decision is widely regarded as Asia's first climate litigation win, setting a precedent for rights-based climate claims in the region.

These courts either dispensed with the need for individualized harm or interpreted it in a manner consistent with collective and future-oriented climate interests. In these examples, courts that adopt a more flexible view of standing tend to frame climate change as a rights-based issue or as a matter of democratic accountability.

E. Implications for Advancing Climate Litigation

Considering that this study engages with a considerable number of courts operating within different institutional settings, whether domestic or regional, and across both civil law and common law traditions, the analysis has been narrowed to judicial reasoning rather than legal system in detail. Across jurisdictions including the United States, Europe, and Asia, meaningful similarities and differences emerge in how courts approach the threshold question of standing. These variations are closely linked to how judges interpret the nature of climate harm and the identity of the claimant.[66] The legal characterization of climate change and of the plaintiff has a direct impact on access to justice.[67] From this perspective, certain interpretive approaches appear more likely to permit climate claims to proceed beyond the procedural threshold.

I. Representation and Organizational Claims

The comparative analysis suggests that the structure of organizational standing has consequences both for the framing and the frequency of climate litigation. Where standing doctrine permits non-governmental organizations to initiate claims in their own name or in a representative capacity, the range of potential claimants expands.[68] The procedural

65 Leghari v. Federation of Pakistan, W.P. No. 25501/2015 (Lahore High Ct. Green Bench Sept. 4, 2015).

66 *Peel / Osofsky*, note 7, p. 37.

67 *Annalisa Savaresi / Joana Setzer*, Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers, Journal of Human Rights and the Environment 13 (2022), p. 7.

68 *Randall S. Abate*, Standing, in: Margaretha Wewerinke-Singh / Sarah Mead (eds.), The Cambridge Handbook on Climate Litigation, Cambridge 2025, p. 105.

gateway is no longer confined to individuals who must assert and substantiate personal injury. As a structural matter, this increases the likelihood that climate related disputes will be brought before the courts.[69]

At the same time, the design of associational standing shapes how such claims are articulated. In systems where an organization must ground its standing in the injury of specifically identified members, the litigation remains procedurally anchored in individualized harm.[70] Even when the dispute concerns systemic regulatory failure, the admissibility inquiry channels the case through personal impact.[71] By contrast, when courts accept an organization's statutory mandate or representative function as sufficient to trigger review, climate claims may proceed without first resolving individualized injury at the threshold stage.

The difference is not merely technical. It affects both the practical capacity to initiate litigation and the legal construction of climate harm at the outset. Standing doctrine, in this respect, structures the conditions under which collective environmental risks are translated into judicial claims.

II. Shared Harm and the Particularization Requirement

The comparative cases also illuminate the structural tension between the particularization requirement and the collective character of climate harm. Climate change produces injuries that are widely distributed, cumulative, and often temporally extended. When standing doctrine insists that a plaintiff demonstrate harm distinct in kind from that suffered by the public at large, the very scale of the problem can operate as a barrier to judicial review.[72]

The implication is not that particularization should be abandoned. Rather, its application depends on how courts conceptualize shared injury.[73] Some judicial approaches treat the fact that many are affected as disqualifying.[74] Others recognize that an injury may be individually experienced even if it is broadly shared.[75] This distinction has significant con-

69 *Joana Setzer / Catherine Higham*, Global Trends in Climate Change Litigation: 2025 Snapshot, Grantham Research Institute 2025.

70 Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167 (2000).

71 *Heather Elliott*, The Functions of Standing, Stanford Law Review 61 (2018), p. 459.

72 Case C-565/19 P, Armando Ferrão Carvalho and Others v. The European Parliament and the Council, ECLI: EU:C: 2021:252 (Mar. 25. 2021).

73 *William A. Fletcher*, The Structure of Standing, Yale Law Journal 98 (1988), p. 221.

74 Association of Swiss Senior Women for Climate Protection v. DETEC, Swiss Fed. Sup. Ct., 1C_37/2019 (May 5, 2020).

75 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); Neubauer v. Germany, 1 BvR 2656/18 (BVerfG Mar. 24, 2021).

sequences. If widespread impact is treated as evidence of generalized grievance, systemic environmental claims will struggle to proceed.[76]

In this respect, the particularization requirement functions less as a fixed doctrinal rule and more as a site of interpretation. How judges understand the relationship between collective risk and personal injury directly shapes the accessibility of courts in climate disputes. The threshold inquiry therefore becomes a reflection of deeper assumptions about whether climate change is viewed as a diffuse political concern or as a legally cognizable injury affecting specific persons.[77]

III. Rights-Based Approach and Specialized Fora

A further implication emerges from the treatment of standing within constitutional and human rights adjudication. In these settings, the threshold inquiry is often integrated into a broader assessment of rights protection rather than applied as a rigid preliminary filter.[78] The question is not framed solely as whether the claimant satisfies a discrete procedural test, but whether an alleged failure to protect fundamental rights warrants judicial review.[79]

Crucially, the implications depend not only on whether a claim is framed in rights-based terms, but on the content of the constitutional text itself.[80] Where a constitution explicitly recognizes a right to a healthy environment or related environmental guarantees, climate harm is more readily understood as implicating a protected legal interest.[81] Claimants need not derive environmental protection indirectly from broader rights such as life or dignity.[82] By contrast, in systems where environmental protection must be inferred from more general constitutional provisions, plaintiffs often face an additional argumentative burden at the threshold stage. The existence of an explicit environmental right therefore alters the structure of the standing inquiry.

This shift in framing has significant consequences. When climate claims are articulated through constitutional or human rights provisions, particularly before specialized fora such as constitutional court or treaty-based human rights tribunals, the standing analysis moves

76 *Douglas A. Kysar*, What Climate Change Can Do About Tort Law, Environmental Law Review 41 (2011), p. 1.

77 *Joseph W. Mead*, The Climate Change Constitution, Environmental Law Review 83 (2020).

78 *Savaresi / Setzer*, note 68, p. 7.

79 *Corina Heri,* Climate Change before the European Court of Human Rights: Capturing Risk, Ill Treatment and Vulnerability, The European Journal of International Law 33 (2022), p. 925.

80 *Annalisa Savaresi / Joana Setzer*, note 79, p. 7.

81 *David R. Boyd*, The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment, Vancouver 2012.

82 *James R. May / Erin Daly*, Global Environmental Constitutionalism, Cambridge 2015.

to the center of the logic of rights enforcement.[83] The focus moves from isolating individualized harm at the outset to assessing whether the claimant falls within the protective scope of a recognized right. In such contexts, the procedural threshold tends to operate in a more inclusive manner, particularly where environmental protection is constitutionally entrenched or linked to life, dignity, or intergenerational equity.[84]

The implication is not that standing disappears, but that it is reconfigured. Where constitutional or human rights norms explicitly acknowledge environmental interests, courts are less likely to treat widespread or future oriented harm as categorically disqualifying.[85] The recognition and strengthening of a constitutional or human right to a healthy environment therefore bears directly on how the procedural gateway functions in climate litigation.[86]

F. Conclusion

What the comparative analysis reveals is not a single global trend toward either expansion or contraction of standing, but a more specific pattern. Across jurisdictions, courts continue to ask a common threshold question: who may bring a climate-related claim before a court? Yet that question is framed through markedly different doctrinal forms, institutional settings, and judicial vocabularies. For that reason, standing in climate litigation is best understood in functional rather than purely formal terms. Whether expressed through Article III standing, admissibility, legal interest, victim status, or access to constitutional review, the procedural gateway remains central to the development of climate adjudication.

The cases examined here suggest three recurring points of divergence. The first concerns representation. U.S. doctrine generally requires organizations to anchor standing in the injury of identified members, while a number of courts outside the United States have been more willing to permit representative, collective, or public-interest claims. The second concerns the treatment of shared harm. Some courts continue to regard the widespread character of climate injury as a reason for denying access to judicial review, while others accept that a harm may be individually cognizable even when broadly shared. The third concerns the structure of threshold review itself. In the United States, injury, causation, and redressability operate as a distinct doctrinal framework. Elsewhere, especially in con-

83 Verein KlimaSeniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Eur. Ct. H.R. Apr. 9, 2024); Advisory Opinion OC-23/17, Environment and Human Rights, Inter-Am. Ct. H.R. (Nov. 15, 2017).

84 Neubauer v. Germany, 1 BvR 2656/18 (BVerfG Mar. 24, 2021); Lhaka Honhat (Our Land) Ass’n v. Argentina, Inter-Am. Ct. H.R. (Feb. 6, 2020).

85 *John C. Dernbach*, The Value of Constitutional Environmental Rights and Public Trusts, Pace Environmental Law Review 41 (2024), p. 153; *Pau de Vilchez Moragues / Annalisa Savaresi*, The Right to a Healthy Environment and Climate Litigation: A Game Changer?, Yearbook of International Environmental Law 32 (2021), p. 3.

86 *Jan Darpö*, Principle 10 and Access to Justice, 28 April 2017, http://jandarpo.se/wp-content/uploads/2021/10/2016-A2J-Final-Skick.pdf, (last accessed on 28 February 2026).

stitutional and human rights settings, comparable threshold questions are often embedded within a broader analysis of rights protection, constitutional function, or statutory purpose.

Viewed in that light, the value of the comparison lies in bringing the underlying judicial reasoning into sharper focus. Courts may be asking a functionally similar question at the threshold stage, yet the answer often turns on how they characterize the plaintiff, the harm, and the judicial task itself. Those choices are consequential. They shape whether climate injury is treated as too diffuse for adjudication, whether collective or future-oriented claims can be heard, and whether procedural doctrine is applied as a strict gatekeeping device or as part of a broader framework of legal protection. For climate litigants and advocates, this has practical significance: the prospects of surviving the standing stage depend not only on the doctrine of a given system, but also on the interpretive approach a court is prepared to adopt. Attention to those interpretive and institutional differences, including the three threshold questions identified in this article, may be especially important at the time of filing, because the framing of climate harm and the court's role may significantly influence whether a climate claim survives the standing inquiry.

REPORTS / BERICHTE

Statehood in Exile: The Sahrawi Arab Democratic Republic

By *Manfred O. Hinz*[*] and *Ahmed Mohamed Sidi Aly*[**]

Abstract: Spain, the colonial administrator of Western Sahara, entered into an agreement with Morocco and Mauritania in 1975. The agreement conceded to territorial claims of Morocco and Mauritania. The people of Western Sahara resisted the agreement and the subsequent occupation of their country by Morocco and Mauritania. What followed was war, led by the liberation movement POLISARIO Front and the flight of many Sahrawis. Part of the resistance of the Sahrawis was the declaration of the State of Western Sahara: the Sahrawi Arab Democratic Republic (SADR) in 1976. With the declaration of the SADR, a first preliminary constitution was enacted. The constitution in force is the Constitution of 2023. The constitutional development, now spanning over 50 years, has been inspired by the expectation to exercise the right to self-determination, but also reflects the process of state-building that responds to the reality of living in refugee camps and to military encounters with Morocco.
Keywords: Western Sahara; Occupation by Morocco; Right to Self-Determination, Colony and State

***

A. Western Sahara: Colony and State

The Berlin Congo Conference of 1884 confirmed Spain to be the colonial power of Western Sahara. Western Sahara remained under direct Spanish administration until the seventies. On 14 November 1975, the Spanish government entered into the so-called Declaration of Principles on Western Sahara or Madrid Accords with Morocco and Mauritania.[1] With this agreement, Spain conceded to claims of Morocco and Mauritania according to which the northern, respectively its southern part belonged historically to these two countries.

* Professor (em.) of Public Law, Political Sociology and Sociology of Law at the University of Bremen, Germany, and adjunct professor of Law and African Studies at the Constructor University, Bremen (Germany). He is spokesperson of the Advisory Board of “Freiheit für die Westsahara” e.V. Email: mhinz@uni-bremen.de.

** Legal consultant in the Presidency of the SADR since 2020. He is enrolled as a PhD researcher in international law at the Université d’Alger (Algeria). Email: amsahmed15@gmail.com.

1 Declaration of principles on Western Sahara. Done at Madrid on 14 November 1975

The administering power of Western Sahara was to be transferred to a temporary tripartite administration. The presence of Spain in Western Sahara should be terminated by 28 February 1976.

The Madrid Accords violate the law on decolonization, as it was accepted in the Charter of the UN and is therefore illegal.[2] As the last African colony, Western Sahara is still registered in the list of the UN of non-self-governing territories in terms of article 73 of the Charter of the UN.[3]

The people of Western Sahara resisted the colonial administration in many ways: it resisted the claims of Morocco and Mauritania, it resisted the Madrid Accords and it resisted the subsequent occupation of its country by the two neighbouring states.[4] What followed was war, led by the liberation movement POLISARIO Front[5] and the flight of many Sahrawis into Algeria. Today, more than 200 000 Sahrawis live in different camps close to El Tindouf in Southwestern Algeria.

The very important political act of resistance of the Sahrawi was the declaration of the State of Western Sahara: the Sahrawi Arab Democratic Republic (SADR) on 27 February 1976.[6] The Sahrawi State is recognized by many African, Asian and Latin American countries, is member of the African Union and party to international agreements.[7]

The legal position of Western Sahara is unique. From the perspective of international law, Western Sahara is a non-self-governing country. At the same time, Western Sahara is a state: there is a territory, there is a population and there is a government. The SADR is sovereign in the full sense when concentrating at the liberated area, i.e. the eastern part of Western Sahara. It has "domestic sovereignty" when taking into account that the bigger part of its people lives in exile, i.e on Algerian soil.[8] Entering the camps requires permission by the Sahrawis.[9] The state is responsible for its people as any state is, but determined by the

2 Letter dated 29 January from the Under-Secretary for legal affairs, S/2002/161, p. 6.

3 Non-self-governing territories, https://www.un.org/dppa/decolonization/en/nsgt (last accessed on 6 May 2025).

4 *Maurice Barbier*, Le conflit du Sahara occidental. Paris 1982, pp. 31 ff.

5 Frente Popular de Liberación de Saguía el-Hamra y Río de Oro.

6 Reprinted in *Manfred O. Hinz*, Le droit à l'autodétermination du Sahara Occidental, Bonn 1978, pp. 89 ff.

7 So far, there are some 84 states that declared their recognition of the SADR. See the list of recognition in: *Manfred O. Hinz / Ahmed Mohamed Sidi Aly / Emma Lehbib,* Western Sahara — State and Colony, Berlin 2026, pp. 271 ff. The recognition of a political entity as state by the international community and its members is not constituent to the legal existence of the state. Political entities are states as soon as they meet the mentioned criteria of statehood. Cf. on this e.g. *Paolo Gaeta / Jorge E. Viñuales / Salvatore Zappalà*, Cassese's international law, Oxford 2020, pp. 80 ff.

8 So termed by: *Alice Wilson*, Sovereignty in exile - A Saharan liberation movement governs. Philadelphia 2016, p. 12.

9 The relationship between Algeria and the SARD, respectively the POLISARIO Front, is part of agreements between the two parties, which are not public.

right to self-determination of its people and, thus, dependent on an objective for which the political movement, the POLISARIO Front, stands.

The legal development of the SADR in general and its constitutional development in particular has so far not been a matter of substantial interest of researchers.[10] What follows hereto is a first approach to research on the constitutional history of the SADR.[11] The constitutional development of the SADR does not only reflect the responses to demands form the socio-political environment, it expresses also the political intention to contribute to societal legitimization and acceptance of the socio-political order. In other words: The legal and, more so, the constitutional development of the SADR, can be described as process of constitutionalization, a process of establishing an accepted order of life as it is fact in the camps, but also in view of a society of home when back to Western Sahara. The constitutional development in the SADR offers also convincing arguments against the attempts to discriminate the state of the Sahrawi and POLISARIO Front as terrorist organizations.[12]

10 See e.g. Les fondements juridiques et institutionnels de la République arabe sahraouie démocratique: actes du Colloque international de juristes tenu à l'Assemblée nationale, Paris, les 20 et 21 octobre 1984; see *Mohamed-Fadel Ould Ismaïl Ould Es-Sweyih*, La République Sahraouie. Paris 2001; see also *Irene Fernandez-Molina / Raquel Ojeda-Garciá*, Western Sahara as a hybrid of a parastate and a state-in-exile: (Extra)territoriality and the small print of sovereignty in a context of frozen conflict, The Journal of Nationalism and Ethnicity (2018), pp. 1-27. The documentation by CONASADAH (Sahrawi National Committee for Human Rights: Institutional and legal building for the consolidation of human rights in the Sahrawi State. Sahrawi Arab Democratic Republic, 2022) is a helpful source. Manfred Hinz had the opportunity to collect information on the law of the SADR during two visits to the camps of the refugees in December 2024 and April 2025.

11 An extended version of this report appeared in *Hinz et al.*, note 7 and contains the constitution of the SADR and the statute of the POLISARIO Front, both enacted in 2023..

12 See on this: The CDU/CSU parliamentary group in the German Bundestag submitted a question to the Federal Government in December 2023, in which it inquired about the Federal Government's knowledge of the “influence of Iran on worldwide terrorist networks against Israel, the United States of America and the entire international rules-based order”. (Parliamentary question of 19 December 2023, German Bundestag, printed matter 20/9864.) The list of “radical and terrorist groups” that may be supported by Iran consists of seven organizations. “Polisario Front in Western Sahara" holds the first place in this list, followed by Hezbollah and Hamas. According to El Independente of 17 April 2025, the president of the USA, Donald Trump, informed Morocco that he will declare the POLISARIO Front a terrorist organization. On 24 June 2025, Joe Wilson, member of the Congress of the USA for the Republican Party, introduced a bill to provide for the imposition of sanctions with respect to the POLISARIO Front. (H.R.4119 – 119th Congress 2025 – 2026). See for further details Otra Lectura, Interview with John Bolton, 28 June 2025, https://otralectura.com/2025/06/28/john-bolton-i-didnt-see-any-sign-of-marxist-jihadist-or-iranians-in-west-sahara/ (last accessed on 7 July 2025).

B. Constitutional Developments from 1976 to 2023

I. Introductory Remarks

When looking at the constitution of the SADR since its declaration in 1976, one has to consider 12 versions of the constitution.[13] What happened in the 50 years in which the SADR existed is a process of developing the constitution from its first version, called provisional constitutional act to a comprehensive document. What later versions of the constitutions expressly state, namely that sovereignty is vested in the Sahrawi people and that the people is the source of all authority[14] applies to the constitutional development since its inception. The constitutions were not granted constitutions. The constituent authority, i.e. the power to draft the constitution, has always been in the hands of the people. The Congress of the POLISARIO Front, convened every three years, is the constituent assembly that adopts the constitution and is set to remain the constituent assembly to amend, better to adopt the revised versions of the constitution.[15]

The composition of the congress is regulated in the statute of the POLISARIO Front. The statute does not provide for a fixed numbers of members. The number varies but usually amounts to around 2000 delegates. It is task of the Preparatory Committee of the congress to decide on the composition of the forthcoming congress and to issue rules ad hoc for the composition based on the administrative structure of districts and the electoral law in order to ensure general and equal representation of all sectors and citizens. [16] Representatives from the part of Western Sahara under control of the Sahrawis, from the occupied areas and the diaspora also belong to the congress.[17] Added to the elected members are government officials and officials of the POLISARIO Front.[18]

The way the constitutions developed prompts to distinguish two phases. The first phase is the phase of establishing the basic structures of the state in exile and lasted until 1982. The second phase is initiated by the Constitution of 1991. The Constitution of 1991

13 The texts of the constitutions (except the Constitution of 2007) are electronically accessible through the website of the Centro de Estudos sobre o Sáhara Occidental (CESO) of the Universidade de Santiago de Compostela.

14 See on this: Art. 3 of the Constitution of 1991 and arts. 8 and 9 of the Constitution of 2023.

15 Art. 73 of the Statute of the POLISARIO Front of 2023.

16 Art. 52 of the Statute of the POLISARIO Front, but see also art. 54, which determines the composition of the committee.

17 See here the Organic Law on Elections, No. 03/2009, which, in its art. 1, refers to the Constitution of the SADR and the Statute of the POLISARIO Front. The institution of "organic law" is common in French and Spanish law. See: Art. 46 of the Constitution of France of 1958 and art. 81 of the Constitution of Spain of 1978, as amended. The latter determines that organic act relate to special areas and that there "approval, amendment of repeal … shall require the overall majority of the Members of the Congress in a final vote on the bill as a whole."

18 Arts. 55-57 of the Statute of the POLISARIO Front.

responded to important internal and external events.[19] It was again provisional in the sense that the constitution was to be revised by the next congress of the POLISARIO Front.[20] This happened with the Constitution of 1995. The Constitutions adopted after 1995, up to the Constitution in force, the Constitution of 2023, repeat the Constitution of 1995 in their main parts. It is therefore that, after describing the first constitutional attempts between 1976 and 1982 and references to the Constitution of 1991, the main focus of this report will be the Constitution of 2023.

II. First Constitutional Attempts: 1976 to 1982

The Provisional Constitution of 1976 has only 18 articles. Still in 1976, the second non-provisional constitution was enacted.[21] This constitution repeats most of the provisions of the provisional constitution but was increased to 31 articles.

In its first chapter,[22] Saguia el Hamra and Rio de Oro are said to be the territory of the Republic. The SADR is affiliated to the Arab world, the “family of Africans” and the “Third World”. The family, based on morality and religion, is declared to be the foundation of society. The realization of socialism and social justice are the goals of the state. Education, health care and social welfare are rights of all citizens. The obligation to pay taxes shall be defined by law. The right to political asylum is guaranteed.

Chapter two, “System of Government”,[23] consists of two sections: the section on the Council of Leadership of the Revolution and the one on the Council of Ministers. As executive organ of the POLISARIO Front, it is the supreme body of the SADR and has executive and legislative powers. The General Secretary of the POLISARIO Front presides over the Council and appoints the President of the Council of Ministers, the ministers and the secretaries of state.

The subsection on the Council of Ministers establishes that a member of the Council of the Leadership of the Revolution presides over the Council of Ministers. Apart from the president, the ministers and general secretaries of the various ministries are members of the council. The council is responsible for all administrative matters. The budget of the SADR shall be cconfirmed by law.

The making of law and the judiciary are given own chapters.[24] The National Council has legislative and advisory functions. The Constitution does not say where the members of the National Council come from, but states that the Council has 41 members. The chapter on the judiciary provides for the establishment of a Judicial Council. This Council

19 To which the report will come back below.
20 Special clauses 1 and 2 of the Constitution of 1982.
21 Enacted by the third congress of the POLISARIO Front, held from 26 to 30 August 1976.
22 Arts. 1-11 of the Constitution of 1976.
23 Arts. 12-20 of the Constitution of 1976.
24 Arts. 21-29 of the Constitution of 1976.

is composed of the presidents of the courts and chaired by the the Minister of Justice. The organization of the judiciary is its task. It appoints the judges and also dismisses them, the latter after consultation with "experts", who are not further defined. The council adopts rules of procedure of the courts and proposes rules on the organization and jurisdiction of the courts to the Council of Ministers. The constitution stipulates that the courts work in three instances: the courts of first instance, an Appellate Court and a Supreme Court. A special court is the State Security Court, whose members are appointed by the Council of the Leadership of the Revolution. The jurisdiction of this court is left to the regulation by law.

The Constitution of 1982 amended the Constitution of 1976 by adding only a few articles. In the chapter on the Council of the Leadership of the Revolution, it is clarified that the General Secretary of the POLISARIO Front is the President of the SADR.[25] The rules on the National Council were extended: the Council has the mandate to set rules for its work; it holds regular meetings, it may have extraordinary meetings requested by the head of the state or by two thirds of its members.[26]

III. The Constitution of 1991

The first far-reaching change of the constitution was adopted during the seventh congress of the POLISARIO Front leading to the Constitution of 1991. The Constitution of 1991 replaced the 35 articles of the Constitution of 1982 with 97 articles.

The introduction of the Constitution of 1991 repeats the contents of the first chapter of the Constitution of 1982 but replaced the references to socialism and social justice by designating the SADR a democratic and social republic.[27] The chapter following the introduction, titled preliminary chapter, is in line with the first chapter of the earlier constitutions. Additionally, it addresses the right to form political associations yet postpones its implementation to the time after liberation.[28]

The Constitution of 1991[29] guarantees the rights and obligations of citizens on the one hand, and social and economic rights on the other, thus going beyond the relative unspecified confirmations of human rights in the constitutions before. Rights guaranteed are the right to liberty of the person, the right to freedom of movement, the right to the inviolability of the home, the right to property, the right to express one's opinion, the right to secrecy of correspondence and the right to access to public office. Work is a right and a duty. The duration of arrests is limited to 72 hours. The death penalty is inadmissible. Torture and practices that violate human dignity are prohibited. Each citizen has the right to

25 Art. 13 of the Constitution of 1982.
26 Arts. 23-26 of the Constitution of 1982.
27 Art. 1 of the Constitution of 1982.
28 Art. 9 of the Constitution of 1982.
29 Arts. 10-24 of the Constitution of 1982.

defend his or her rights before competent judicial bodies. Defending the territory is a right and a duty. Everyone must respect the constitution and the laws of the state.

Social and economic rights[30] include the right to education, health, protection of motherhood and subsistence. The political, economic, social and cultural rights of women must be safeguarded. War survivors must be cared for. The economic and social rights of prisoners of war are guaranteed. Market economy and freedom of enterprise are recognized.

In four detailed chapters, the constitution regulates the division of state power into the usual three powers: legislation, judiciary and executive. The rules on the legislative authority, parliament, are very extended, but were, however, not enforced. In a special note attached to the constitutional text, the continued existence and competence of the so far provided National Council is confirmed until the time when a parliament is constituted after the liberation of the country and the end of the occupation.[31]

The chapter on the judiciary repeats what can be found in the Constitution of 1982. An addition is that the President of the Republic appoints the President of the Supreme Court on the proposal of the institution renamed the Supreme Council of the Judiciary.[32] The Constitution of 1991 also introduced a new regulation on the composition of the Supreme Council of the Judiciary: the President of the Supreme Court is President of the Council. The Council has six members, two of whom are appointed by the President of the Republic, two by the National Council and two by the Supreme Court.[33]

The position of the president is now regulated in a special chapter.[34] This was caused by the fact that the constitution consolidated the other executive powers of the government and their respective functions.. The term of office of the President is three years; re-election is permitted. When the President takes office, he / she takes the oath of office prescribed by the constitution. The President determines the guidelines of policy, is commander of the army, appoints all civilian and military officials and has the power to declare a state of emergency after consultation with the presidents of certain supreme state institutions. The President of the Republic determines the action of the government; the Council of Ministers is responsible to the President.

In view of the expected independence—1991 is the year in which the war against Morocco ended and the plan of the UN to settle the Western Sahara conflict providing for a referendum was agreed—[35] the Constitution of 1991 clarified in the mentioned special clauses at the end of the constitutional text that the final constitution of the SADR will be elaborated for the next Congress of the POLISARIO Front and, thereafter, be ratified by the

30 Arts. 25-33 of the Constitution of 1982.

31 Special Clause 4 annexed to the Constitution of 1991.

32 Art. 68 of the Constitution of 1991.

33 Art. 69 of the Constitution of 1991.

34 Arts. 71-88 of the Constitution of 1991.

35 See on this the contributions in parts A and B in: *Judit Tavakoli / Manfred O. Hinz / Werner Ruf / Leonie Gaiser* (eds.), Westsahara. Afrikas letze Kolonie, Berlin 2021; see also *Hinz et al.*, note 7, pp. 25 ff.

Sahrawi people.[36] The failure of the settlement plan of the UN, the fact that the envisaged referendum did not take place[37] prevented the making of the expected final constitution. What happened instead was the further consolidation of living in exile and the translation of this into a constitutional process that eventually led to the Constitution of 2023.

IV. The Constitution of 2023

The preamble of the Constitution of 2023 refers like the Constitution of 1995 to the Universal Declaration of Human Rights of 1948, the African Charter on the Human and Peoples Rights of 1981 and international agreements signed by the SADR.[38]

The chapter on the state (Chapter 3 of Part 1) notes the decentralized organization of the Sahrawi state, as it developed in the process of settlement of the refugees. The constitutional rights and duties are confirmed, as they were inserted in the Constitution of 1991. The right to equality is strengthened in the two first articles in the chapter on constitutional rights: Each Sahrawi shall enjoy the rights and freedoms recognized and guaranteed by the constitution irrespective of race, colour, sex language, religion, political opinion, and: all citizens are equal before the law and equal as far as protection and punishment are concerned.[39] After the article, which refers to the right to establish political parties to the time after independence, a special article describes the POLISARIO Front as a unifying and mobilizing factor of the Sahrawi people and as an institution through which the Sahrawi people expresses their right to self-determination and independence.[40]

The position of the President of the Republic is regulated in detail after the chapter on the constitutional rights and duties.[41] The duties and powers of the President are listed as also his / her mandate to appoint the important posts in the government.[42] The President has the authority to issue presidential decrees in matters that do not fall within the sphere of law or are not regulated by law. He or she has the authority to make ordinances between the sessions of the National Council, after the dissolution of the Council or the proclamation of the state of emergency. In case of emergency, the constitution or parts of it may be suspended. In such case, the National Secretariat of the POLISARIO Front will be the body to make decisions and manage the implementation of emergency.[43] The provisions on the

36 Special clauses 1 and 2 annexed to the Constitution of 1991.

37 See here *Tavakoli et al.,* note 35; see also *Hinz et al.,* note 7.

38 See the list of treaties signed and ratified by the SADR in: *Hinz et al.,* note 7, pp. 275 ff.

39 Arts. 25-26 of the Constitution of 1991.

40 Arts. 31-32 of the Constitution of 1991.

41 Arts. 50-65 of the Constitution of 1991.

42 Arts. 57-58 of the Constitution of 1991.

43 Arts. 60-62 of the Constitution of 1991. - The National Secretariat of the POLISARIO Front is the highest political organ of leadership. It is elected by the General People's Congress of the Front. See specifically Arts. 77 ff. and also 73 of the Statute of the POLISARIO Front.

state of emergency mark a constitutional key change. Declaring the state of emergency, war, or peace were previously matters regulated in the Statute of the POLISARIO Front.

The detailed regulation of government follows the part on the President.[44] The government works under the guidance of the National Secretariat of the POLISARIO Front and is accountable to its Secretary General and President of the Republic. The Prime Minister is the chair of the Council of Government, supervises its activities and coordinates its work. The powers of the government, the organization of the ministries and the powers and duties of the ministers shall be regulated by presidential decrees. The Prime Minister drafts the programme of the government, the annual budget and submits these matters to the National Council. The members of the Government are obliged to submit an inventory of their property to the President of the Supreme Court when taking office and after terminating them.[45]

The National Council is responsible to oversee the executive and has the authority "to prepare, enact, and ratify laws"[46]. It is elected "by direct and secret ballot".[47] The Constitution has no rule about the number of members of the National Council: Its members are to represent the various constituencies.[48] The candidates for membership in the National Council have to meet certain requirements. They must be at least 25 years old, have political experience and possess a university qualification.[49] The National Council meets in two regular sessions per year and can also convene in emergency sessions.[50] The areas in which the National Council is competent is listed in two articles, one listing the usual fields of legislative concern for the society and one on so called organic laws[51], which determine the relationship between the various institutions of Government.[52] The National Council also approves the annual programme of the Government and its budget.[53] The rejection of the annual programme can lead to the dissolution of the National Council.[54] The National Council can also express its no confidence with respect to the Government collectively or to individual members. For this, a majority of two-thirds of the member of the Council is required.[55]

44 Arts. 66-77 of the Constitution of 2023.
45 Art. 77 of the Constitution of 2023.
46 Art. 78 of the Constitution of 2023.
47 Art. 82 of the Constitution of 2023.
48 Art. 80 of the Constitution of 2023.
49 Art. 82 of the Constitution of 2023.
50 Art. 93 of the Constitution of 2023.
51 See here the Organic Law on Elections, No. 03/2009, which, in its art. 1, refers to the Constitution of the SADR and the Statute of the POLISARIO Front.
52 Arts. 112-113 of the Constitution of 2023.
53 Art. 79 of the Constitution of 2023.
54 Art. 97 of the Constitution of 2023.
55 Arts. 106 ff. of the Constitution of 2023. There is one case in which this rule was practiced: In February 1999, the National Council ousted the then Prime Minister in a vote of no confidence.

The right of equality is re-ensured by stating that the judiciary—accessible to all—is based on “the principles of legality and equality”.[56] While the Constitution of 1999 had *reconciliation tribunals* for the handling of matrimonial matters, which are part of the courts of first instance,[57] later constitutions do not mention these tribunals any more. Military matters are subject of military courts.[58]

The judges are accountable to the Supreme Judicial Council. If a judge violates the Constitution or breaches the law, he /she is subject to disciplinary proceedings before the Council. The Supreme Judicial Council consists of the President of the Republic as the chairperson, the Minister of Justice as Vice-President, the President of the Supreme Court, the Public Prosecutor, two judges appointed by the President of the Republic, two judges appointed by the National Council, and three judges elected by the general assembly of judges.[59] The last article on the judiciary guarantees freedom and independence of the legal profession, whose organization and work must be regulated by law.[60]

The Constitution of 1995 introduced provisions on a Constitutional Council.[61] The President of the Constitutional Council and three of its members are appointed by the President of the Republic, two members are elected by the National Council and two by the Supreme Council of the Judiciary.[62] The task of the Constitutional Council is to monitor the constitutionality of laws, decide on appeals related to the final results of the election to the National Council and to deal with controversies regarding the constitution and organic laws.[63] The Constitution of 2023 amended the competence of the Constitutional Council to deal with constitutional problems with respect to organic laws, but took away certain competences of the Constitutional Council: According to the constitutions before the Constitution of 2023, it was also the task of the Constitutional Council to find solutions to possible constitutional conflicts that might arise regarding the implementation of the statute of the POLISARIO Front and to monitor the constitutionality of international treaties. Deleted was also the mandate to the Constitutional Council to conduct studies

Stephen Zunes / Jacob Mundy, Western Sahara: War, Nationalism, and Conflict Irresolution, New York 2022, p. 120.

56 Art. 120 of the Constitution of 2023.

57 Art. 114 of the Constitution of 1999.

58 Art. 114 of the Constitution of 1999, art. 127 of the Constitution of 2011, art. 120 of the Constitution of 2015.

59 Art. 129 of the Constitution of 2023.

60 Art. 133 of the Constitution of 2023.

61 Arts. 134 of the Constitution of 2023.

62 Art. 135 of the Constitution of 2023.

63 Art. 134 of the Constitution of 2023.

on the constitution.[64] The decisions of the Constitutional Council are binding without the possibility of appeal.[65]

The Constitution of 2023 amended the rules on the Advisory Council, which found its way into the constitution in 1999.[66] The task of the Advisory Council is to deliberate on national issues and express its opinion on them.[67] In its first constitutional arrangement, the Advisory Council was to consist of notables, meaning representatives of the various Sahrawi tribes.[68] Details of the composition and the orientation of the Council were not given in the text of the Constitutions. Up to then, the representation of the notables was limited to the representation in the National Council. According to the Constitution of 1995, up to 10% of the members were to be elected notables.[69] The constitutional establishment of the Advisory Council changed this in 1999. However, later constitutions confirmed the Advisory Council but without mentioning notables.[70] The Constitution of 2023 expects “national figures from various sectors” to become members of the Advisory Council. However, the “notables” are still the dominant voice in the council, understanding themselves as the “pillars” on which the Sahrawi society is based.[71]

The Constitution of 2023 confirmed the Sahrawi National Human Rights Committee as a constitutional institution.[72] The Committee monitors the situation of human rights in the occupied parts of Western Sahara and also in the areas under the control of the SADR. Its mandate is to advise the President of the Republic and to submit annual reports.

C. The SADR: Legitimate Statehood

What happened in the first phase of constitutional development was dominated by the political understanding of the liberation movement that life in the camps was a matter that would be temporary. The constitutions of the first phase, i.e. the constitution up to the Constitution of 1982 were expected to be replaced by a “proper” constitution after independence. The Constitution of 1991 marks a change, reacting to external and internal demands. As the negotiations for the settlement plan of the United Nations started, the

64 See Art. 139 of the Constitution of 2011 and art. 132 of the Constitution of 2015. According to art. 132 of the Constitution of 2019.
65 Art. 139 of the Constitution of 2023.
66 Art. 128 of the Constitution of 1999.
67 Art. 141 of the Constitution of 2023.
68 The use of the word “tribe” for the different nomadic groups of Western Sahara is criticized by many anthropologists and political scientists. The authors of this report follow, nevertheless, the widely used practice.
69 Arts. 43 ff. of the Constitution of 1995.
70 See Art. 146 of the Constitution of 2011; art. 139 of the Constitution of 2015; art. 139 of the Constitution of 2019.
71 So stated in an interview with members of the Advisory Council conducted on 21 April 2025.
72 Arts. 144 and 145 of the Constitution of 2023.

POLISARIO Front was driven to change from an organization of conducting war to a player in the field of diplomacy. The expected vote for the independence of Western Sahara caused reflections on how the legal situation in the independent country would look like. That Western Sahara would be a multi-party democracy belongs to these reflections. Internal events contributed to the change of the constitutional order: After certain incidents in the camps and manifestations of protest, there were calls to strengthen the position of individuals resulting in the insertion of an extended catalogues of human rights and duties.[73]

The failure to conduct the referendum[74] as it was provided for in 1991 forced the Sahrawi society and its political organization, i.e. the state and the movement POLISARIO Front into accepting a reality of abnormal normality. Despite being refugees and despite longing to return to the homeland of Western Sahara, some kind of normal life was to be organized. Thus, the POLISARIO Front transformed the already exiting state order into an order in its own right. The constitutionalized separation of power between the two entities was instituted in the constitutional process, manifesting in this the respect for the constitution-oriented rule of law. The POLSARIO Front, nevertheless, retained prominence in the relationship of the Front and the state. It retained prominence in particular through the remaining of the Congress as the constituent assembly.

A very noticeable result of the ongoing constitutionalization is the further improvement of the constitutional protection of human rights. That the National Human Rights Committee was constitutionally confirmed by the Constitution of 2023 supports the understanding of human rights as supreme rules. The discussed transformation of the Constitutional Council into a constitutional court would be another step in support of human rights.[75]

D. Conclusion

The process of constitution making in the SADR over the 50 years since its establishment has been a societal process that characterizes the political reality of the refugee camps, characterizes the socio-political climate in the SADR and proves the legitimacy of the SADR, the legitimate order of the Sahrawi people.

73 Cf. on human rights violations in the camps and the reactions to them: *Zunes / Mundy*, note 55, pp. 118 ff. (who talk about the events of 1991 as "revolution in the revolution") and also *Karl Rössel*, Wind, Sand und (Mercedes-)Sterne. Der vergessene Kampf für die Freiheit, Bad Honef 1991, pp. 272 ff, with references to statements of Sahrawi politicians.

74 *Tavakoli et al.,* note 35; see also *Hinz et al.,* note 7.

75 Oral information received during the visit of the camps in April 2025. Whether such a transformation will materialize is open, as the necessary legal professionals for a constitutional court are most probably not available.

BOOK REVIEWS / BUCHBESPRECHUNGEN

Gabriela CB Navarro, **Effectiveness of the Inter-American Court of Human Rights: The Case of Indigenous Territorial Rights**, Hart Publishing, Oxford 2025, 264 pages, £90.00, ISBN: 9781509979066

Over the past two decades, the Inter-American Court of Human Rights (IACtHR) has developed the most advanced case law on indigenous territorial rights in international human rights law, expanding the entitlement to collective property, recognizing implicit rights such as cultural identity and self-determination, and ordering a wide range of forward-looking remedies. Yet the question of whether this jurisprudential ambition translates into meaningful change on the ground remains contested. Existing scholarship has progressively moved beyond compliance as the sole proxy for effectiveness, advancing several conceptual frameworks that range from goal-based assessments to analyses of domestic embeddedness and transformative constitutionalism.[1] These frameworks, however, have rarely been operationalised together in a single sustained study. Navarro's book takes on this challenge, applying a multidimensional effectiveness framework drawn from Helfer's four-dimensional classification (norm-development, case-specific compliance, embeddedness, and *erga omnes* effectiveness) to the IACtHR's indigenous territorial rights jurisprudence up to the early 2020s, analysing the first three of these dimensions.[2]

The book is organised in an introduction, six chapters and a conclusion, structured along three dimensions of effectiveness, each analysed through a distinct and appropriately calibrated methodological approach. Chapters one and two assess norm-development through a doctrinal analysis of the first fourteen indigenous-territorial cases, examining both the recognition of rights and the design of reparation measures against three criteria: coherence among cases and among rights, consistent quality of reasoning, and the potential of the developed norms to promote the self-determination of indigenous peoples. Chapter three addresses case-specific effectiveness through an original quantitative dataset on compliance rates, complemented by a qualitative description of domestic implementation processes. Chapters four through six shift to case studies of Nicaragua, Paraguay, and Brazil to assess embeddedness, drawing on primary sources including legislation, judicial decisions, reports from international organisations, and civil society documentation. The methodological variation across the book is itself a notable contribution, demonstrating that different dimensions of effectiveness demand different analytical tools.

1 *Laurence Helfer,* The Effectiveness of International Adjudicators, in: Cesare Romano / Karen Alter / Yuval Shany (eds.), The Oxford Handbook of International Adjudication, Oxford 2014, p. 464; *Yuval Shany*, Assessing the Effectiveness of International Courts: A Goal-Based Approach, American Journal of International Law 106 (2012), p. 225; *Par Engstrom*, The Inter-American Human Rights System: Impact Beyond Compliance, Cham 2018.

2 *Helfer*, note 1.

Navarro's central argument is that the effectiveness of the IACtHR in indigenous territorial rights is multidimensional, variable over time and across domestic contexts, and irreducible to a single binary assessment of effectiveness/ineffectiveness. The book demonstrates convincingly that the Court has been highly effective in norm-development, constructing an advanced framework that expanded collective property rights, recognised cultural identity as a cross-cutting interpretive principle, and built a culturally sensitive reparation system centred on non-monetary remedies and the principles of victim centrality and integral reparation. Compliance, by contrast, is shown to be low, particularly for restitution and accountability measures. Yet the book's most valuable insight is that embeddedness effects have occurred even where compliance remains partial. The author highlights the strengthening of civil society networks, the domestic adoption of international parameters in legislation and judicial reasoning, and the institutional empowerment of human rights bodies as an indication of these successes. The finding that effectiveness contracts as well as expands over time, powerfully illustrated by Nicaragua's trajectory from full compliance with *Awas Tingni* to eventual denunciation of the American Convention, is a compelling empirical contribution that invites reflection on the role of time in effectiveness assessments.

Navarro advances a normative proposal that constitutes a specific contribution on indigenous peoples' rights: an interconnected interpretive model linking self-determination, cultural identity, and territory as an inseparable ensemble of rights that should guide the Court's future jurisprudence towards increasing its effectiveness. This model responds to the Court's overreliance on the right to property under Article 21 of the American Convention and on procedural safeguards, at the expense of substantive protections and the near-absence of self-determination as a guiding interpretive principle. Navarro argues that this has concrete consequences: the preference for consultation over consent, the lenient treatment of restrictions on territorial rights, and what she describes as paternalistic compensation mechanisms that undermine indigenous agency. The evolution of *saneamiento* (the duty to remove encroachments from communal property) in the Court's jurisprudence is particularly instructive as evidence of a Court that refines its remedial orders in response to implementation failures. In *Awas Tingni* the Court failed to issue orders of *saneamiento* that allowed a declaration of full compliance without ensuring adequate protection to indigenous property, a limitation that was addressed in the Court's subsequent case law.

Additionally, the book's embeddedness analysis, while empirically rich, opens productive avenues for future research, particularly regarding the variables that mediate the translation of international jurisprudence into domestic legal change. One such avenue concerns state engagement with the Inter-American system as a variable shaping embeddedness: Nicaragua's subsequent complete disengagement, evidenced by the denunciation and non-participation in *Pueblos Rama y Kriol v Nicaragua* (2024),[3] suggests that the dura-

3 *Rama and Kriol Peoples, the Black Creole Indigenous Community of Bluefields et al. v. Nicaragua*, Merits, Reparations and Costs, IACtHR Series C No. 522 (1 April 2024).

bility of embeddedness effects may depend on conditions that Navarro's selection criteria (representativeness, temporal variation, and compliance rates) do not fully capture. Future comparative work could fruitfully explore how shifts in political regime and institutional commitment interact with the patterns the book identifies. A further avenue opened by the book concerns the horizon of expectations for international litigation itself: Navarro's acknowledgment that guarantees of non-repetition can mobilise institutions but cannot overcome the structural conditions of discrimination and colonisation invites deeper inquiry into which dimensions of effectiveness are realistic aspirations for an international court, and which require complementary mechanisms beyond strategic litigation. This is a key finding as the IACtHR's more recent remedial case law has grown in ambition to address systemic issues, including poverty[4] and democracy.[5]

The book's originality lies in the comprehensiveness of its approach. Navarro is one of the first to operationalise these dimensions together and demonstrate their interconnection in a single theme of case law. The finding that compliance processes generate embeddedness effects, and that all three dimensions are mediated by domestic political context, constitutes a lasting contribution. The interconnected interpretive model she proposes offers a normative horizon for future jurisprudence, applicable to judgments issued after the book was published. Namely, in *Pueblo Indígena U'wa v Colombia* (2024),[6] the Court declared violations of self-determination, cultural participation, and the right to a healthy environment as autonomous rights under Article 26 of the Convention, ordered integral *saneamiento*, and required participation processes for extractive projects. This judgment combines most of the substantive and procedural elements Navarro advocates, offering the most direct opportunity to assess whether her interconnected model translates into improved effectiveness at the norm development, compliance and embeddedness levels.

In conclusion, Navarro's book fills a significant gap in the literature by bridging Helfer's theoretical framework with sustained empirical analysis of indigenous territorial case law. Its case-by-case operationalisation tests this framework against evidence, providing insights of the opportunities and challenges that strategic litigation provides to advance indigenous peoples' rights. The book is relevant reading for scholars of international courts and researchers working at the intersection of indigenous rights, socio-economic rights, and comparative constitutional law. It also provides valuable insights for practitioners engaged in strategic litigation before the IACtHR. Its analytical framework for assessing what makes the IACtHR effective is transferable beyond indigenous territorial rights and the

4 *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v Brazil*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 407 (15 July 2020).

5 *Gadea Mantilla v Nicaragua*, Merits, Reparations and Costs, IACtHR Series C No 543 (16 October 2024).

6 *Pueblo Indígena U'wa y sus miembros v Colombia*, Merits, Reparations and Costs, IACtHR Series C No 530 (4 July 2024).

Inter-American system, contributing methodological insights for effectiveness assessments of other international courts and themes.

Edward Pérez
PhD Candidate in Law, University College London

Call for Papers

»VRÜ/World Comparative Law« analyses developments in constitutional and public law in states and regions outside Europe and North America (in what used be called the 'Third World') as well as their regional and international integration. Founded in 1968 and inspired by the ideals of 'decolonization' and fair cooperation, the Journal also has a special interest in the entanglements between 'Global South' and 'Global North', including the presence of the 'South in the North'. Looking beyond the surface of globalization, 'VRÜ/World Comparative Law' promotes scholarship that uncovers the particularities of legal configurations as well as their interdependencies in an interconnected world.

The journal seeks to publish theoretically and historically informed studies of law in context, but is equally open to contributions from social sciences and from practitioners. It has a particular interest in analyses that compare several legal orders but is equally attentive to studies in international law and its impact on Asia, Africa and Latin America as well as comparative international law.

»VRÜ/World Comparative Law« addresses authors and readers on all world regions and aims to serve as a forum of mutual exchange. It publishes research articles, shorter reports about current events or conferences as well as book reviews.

All manuscripts undergo a double-blind peer-review. The journal is published quarterly and welcomes contributions in English, and exceptionally in German, Spanish and French.

Manuscripts may be submitted as an e-mail attachment and under the condition that they have not been published elsewhere in any form. A short abstract and some details about the author (both in English) should be added. We regret that no remuneration can be offered for publication. Contributions must be saved in a simple editable format (no PDF files please), i.e. without automatic hyphenation, with a consistent font, and NO activated hyperlinks or other macros. The length of an article should not exceed 10,000 words using 12 pt Times New Roman, line space 1,5. Please refrain from using bold type or underlining in the text, italics only sparingly. Footnotes (font 10 pt Times New Roman, line space single) should use tab after standard auto number and keep to the following scheme, including typeface as indicated:

(a) books: author's full name, title, place, year of publication, page number;
(b) journals: author's full name, title, name of journal volume (year), page number; do not cite the publishing company;
(c) book reviews: should contain a head-line citing author(s)/editor(s), full title of book (in bold font), publishing company, place and year of publication, page numbers, price and ISBN-number.

Titles of works cited in languages using non-Latin script should be given in an established transliteration, and a translation of the title should follow in [ ]. For detailed submission guidelines see our website: www.vrue.nomos.de

Impressum

Verfassung und Recht in Übersee (VRÜ)
World Comparative Law (WCL)
ISSN 0506-7286

Editor in Chief: Prof. Dr. Philipp Dann (V.i.S.d.P.)

Please send submissions to: Prof. Michael Riegner – Universität Erfurt – Juniorprofessur für internationales Verwaltungsrecht und Völkerrecht – Nordhäuser Str. 63 – 99089 Erfurt
Telefon: +49 (0) – 361 737-4761
E-Mail: vrue@nomos-journals.de | www.vrue.nomos.de

Manuscripts and other submissions: All submissions should be sent to the abovementioned address. There is no liability for unsolicited manuscripts that are submitted. They can only be returned if return postage is enclosed. Acceptance for publication must be made in text form. With the acceptance for publication, the author transfers the non-exclusive, spatially and temporally unlimited right to reproduce and distribute in physical form, the right of public reproduction and enabling access, the right of inclusion in databases, the right of storage on electronic data carriers and the right of their distribution and reproduction as well as the right of other exploitation in electronic form for the duration of the statutory copyright to Nomos Verlagsgesellschaft mbH & Co.KG. This also includes forms of use that are currently not yet known. This does not affect the author's mandatory right of secondary exploitation as laid down in Section 38 (4) UrhG (German Copyright Act) after 12 months have expired after publication. A possible Creative Commons license attached to the individual contribution, or the respective issue has priority in case of doubt. For copyright, see also the general notes at www.nomos.de/copyright. Unsolicited manuscripts – for which no liability is assumed – are considered a publication proposal on the publisher's terms. Only unpublished original work will be accepted. The authors declare that they agree to editing that does not distort the meaning.

Publisher and overall responsibility for printing and production: Nomos Verlagsgesellschaft mbH & Co. KG – Waldseestr. 3-5 – D-76530 Baden-Baden. Telefon +49 – 7221 – 2104-0 / Fax 49 – 7221 – 2104-27 – www.nomos.de

Geschäftsführer/CEO: Thomas Gottlöber – HRA 200026, Mannheim
Stadtsparkasse Baden-Baden, IBAN DE05662500300005002266 (BIC SOLADES1BAD).

Frequency of publication: quarterly

Annual subscription prices for the print edition: Individual customers: € 118,- Institutions: subscription € 319,-. Single issue: € 34,- All prices include VAT and are subject to a distribution fee (domestic € 18,-/foreign € 33,-) or direct order fee € 3,50. Invoices will be issued after publication of the first issue of the year.

Orders: Orders can be placed at local bookstores or directly at Nomos Verlagsgesellschaft Baden-Baden

Customer Service: Phone: +49-7221-2104-280 – Telefax: +49-7221-2104-285 – E-Mail: zeitschriften@nomos.de

Cancellations: Cancellation of the subscription is possible with a notice period of six weeks to the end of the calendar year.

Change of Address: Please notify us of any changes in address as soon as possible. When doing so, please indicate the new and old address next to the title of the magazine. Note in accordance with Art. 21 (1) EU-GDPR: In the event of a change of address, Deutsche Post AG may notify the publisher of the new address even if no forwarding order has been placed. An objection to this can be lodged with Post AG at any time with effect for the future.