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Migration Issues before International Courts and Tribunals

Edited by Giovanni Carlo Bruno
Fulvio Maria Palombino
Adriana Di Stefano

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National Research Council of Italy
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9.
MIGRATION ISSUES IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: THE DEVELOPMENT OF AN INCREASINGLY HUMANE *JUS MIGRANDI*

Luca Paladini, Nicolás Carrillo Santarelli *

SUMMARY: 1. Preliminary Remarks. – 2. Migration Issues before the Inter-American Commission on Human Rights and Other OAS Bodies. – 3. The IACtHR Case-law on Migration: General Aspects. – 3.1. A Focus on More Vulnerable Migrants: Irregular Migrant Workers and Children. – 3.2. Migration and Nationality. – 3.3. The *non-refoulement* Principle. – 3.4. Asylum and Refugees. – 3.5. Mass Deportations. – 3.6. The Contributions of the IACtHR to the Delineation of the Duty of States to Protect Migrants from non-State Abuses. – 3.7. A Tension between Sovereignty and Limits on State Action in Relation to Migration Aspects? – 4. Final Remarks: Distilling the Essence of the IACtHR Case-law on Migrants.

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1. – Preliminary Remarks

According to this volume goal to analyze the international case-law on migration and migrants, the chapter aims at analysing the *jus migrandi* – if we can name it so – developed in the Inter-American System of Human Rights, mainly (but not exclusively) by the Inter-American Court of Human Rights (hereinafter, also 'the Court', the 'IACtHR', or 'San José judges') in its case-law on migration issues, and to explore its contribution to the application and the development of legal rules on human migration.

The pertinent *corpus* of decisions is not extensive, and it is somewhat recent. Three advisory opinions ('OC', from the Spanish *Opinión Consultiva*) are especially relevant, the first of which was adopted in 2003 on the legal *status* of undocumented migrants,[1] the second addressed rights of migrant children (2014),[2] and the third explored the right to asylum (2018).[3] Additionally, several contentious cases are pertinent as well, such as, for instance, the judgement in case *Vélez Loor* of 2010[4] and the 2016 decision in the case *Wong*.[5]

Among others, two features can be found in the IACtHR case-law. Firstly, the presence of landmark decisions (e.g. OC-18/03 *on Undocumented Migrants* and case *Vélez Loor*) that set and recognize relevant bases for the construction of Inter-American standards on the protection of migrants, which influence future decisions by virtue of the already affirmed standards. Secondly, the distinction between contentious cases and advisory opinions in building the protection of migrants in the Inter-American System of Human Rights has proven to be quite positive in terms of building the *jus migrandi*, since it is possible to explore what conduct is required even

[1] IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003 (hereinafter, OC-18/03 *on Undocumented Migrants*).

[2] IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of 19 August 2014 (hereinafter, OC-21/14 *on Migrant Children*).

[3] IACtHR, *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18 of 30 May 2018 (hereinafter, OC-25/18 *on the Right of Asylum*).

[4] IACtHR, *case of Vélez Loor v. Panama (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment of 23 November 2010 (hereinafter, case *Vélez Loor*).

[5] IACtHR, *case of Wong Ho Wing v. Peru (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment of 30 June 2015 (hereinafter, case *Wong*).

when no individual application has been filed, and due to the control of conventionality doctrine States must take into account and strive to follow what the Court indicates. Furthermore, unlike what happens with contentious jurisdiction judgements, advisory opinions can offer interpretative clarifications on international obligations in migration contexts to all Member States of the Organization of America States ('OAS'), including those which have not accepted the Court's contentious jurisdiction (e.g., the USA).[6] For instance, in the very recent OC-25/18 *on the Right of Asylum*, the Court took into account its previous judgements, starting with the leading case *Vélez Loor*, extending *de facto* the progressively-built protection standards to all the Inter-American System of Human Rights.

Moreover, it's due underlining that with the main bodies of the Inter-American System of Human Rights having been so important in terms of the promotion and protection of human rights in the region of the Americas, and with the region having faced migration issues in human rights terms, it is not surprising to find, as will be explored in this Chapter, developments promoting an evolutionary and progressive protection of the rights of migrants, whether they are refugees or not. This is of the utmost importance, considering that there are xenophobia, abuses, lack of enjoyment of rights, and other problems (mentioned in international instruments, such as the 2001 Durban Declaration)[7] that many migrants have suffered throughout the world. Thus, in addition to addressing regional issues, the Inter-American System of Human Rights can set some examples that may be followed elsewhere.

That being said, for presentation purposes, we have chosen to select some issues, *i.e.* the peculiar situation of irregular migrant workers and children, the issue of nationality as an element strictly connected to the migrant *status*, the (fundamental) *non-refoulement* principle, the issue of asylum and refugees and, finally, mass deportations. In addition, we will consider the pertinent case-law in order to identify what the Court has said with regard to obligations of respect (to refrain from abuses)

[6] See OLMOS GIUPPONI, "Assessing the evolution of the Inter-American Court of Human Rights in the protection of migrants' rights: past, present and future", *The International Journal of Human Rights*, 2017, p. 1482 ff. See also ROA SÁNCHEZ, "Hacia la unificación del derecho al asilo", *DPCE Online*, 2018, n. 3, p. 797 ff. and ALIVERTI, "The Promise of Human Rights? The Inter-American Court's Advisory Opinion on the Rights of Migrant Children", 2014, available at: <http://bordercriminologies.law.ox.ac.uk>.

[7] United Nations, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/Conf.189/12, 8 September 2001.

and protection of migrants – even from non-State abuses, and how those duties sometimes impose limits on State action, and whether this creates some tension with sovereignty-related aspects. The selected issues approach of this text permits to highlight sensitive elements on the rights of migrants in the Inter-American System of Human Rights and permits to help readers identify the standards that are applicable in certain situations. That being said, the IACtHR itself has also provided a document on some salient aspects of its own case-law on the matter.[8]

Before exploring the IACtHR case-law, we also describe some relevant elements found in the practice of other OAS bodies, especially the Inter-American Commission on Human Rights (hereinafter, also the IACHR). They can complement the actions of the Court in a preventive manner and address recommendations based on both the law and humanitarian concerns, thus acting in ways that address migrants' problems and needs, and are not always satisfactorily dealt with by jurisdictional decisions. While internal displacement may involve both nationals and foreigners, it is a dynamic that pertains mobility inside State borders, reason why, although it does involve human rights considerations, it deserves a separate analysis on how the Inter-American System of Human Rights has treated it, as it has also been done elsewhere.[9]

2. – Migration Issues before the Inter-American Commission on Human Rights and Other OAS Bodies

While the pronouncements of the IACtHR garner a well-deserved attention, it would be a mistake to study the developments in the Inter-American System of Human Rights without looking beyond what that Court has decided. This is because one of the defining features of that system, when compared with others such as the one of the Council of Europe, is the fact that the Court is not the only main body in its midst, being the Commission the other one.[10] Furthermore, political bodies as the

[8] IACtHR, *Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos n. 2: personas en situación de migración o refugio*, 2017, available at: <http://www.corteidh.or.cr>.

[9] See CARRILLO-SANTARELLI, "Inter-American and Colombian developments and contributions on the protection of persecuted internally displaced persons", in KATSELLI PROUKAKI (ed.), *Armed Conflict and Forcible Displacement: Individual Rights under International Law*, Abingdon, Oxon-New York, 2018, p. 139 ff.

[10] On the Inter-American System of Human Rights see, *inter alia*, PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003; RODRÍGUEZ-PINZON, "Basic Facts of the Individual Complaint Procedure of the Inter-American Human Rights System", in ALFREDSSON et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Leiden-Boston, 2009, p. 619 ff.

General Assembly and Permanent Council of the Organization of American States also have the power to address migration and human rights issues. Both the Commission and those bodies can act in furtherance of the protection of migrants in ways that complement the actions of the Court.

As to the Commission, it is important to bear in mind that it can adopt a proactive approach towards recent developments and issue recommendations to both origin and host States of migrants due to, among others, its mandate and function to *promote* the observance of human rights in the Americas. Indeed, Article 41 of the American Convention on Human Rights (hereinafter, also the 'ACHR') mentions that the "main function of the Commission shall be to promote respect for and defence of human rights". Unlike what happens in dynamics before jurisdictional bodies such as the Court, there is no need of a prior application and a contentious procedure for such a mandate to take place, and the Commission can study a wide array of legal implications that often go beyond what is specifically discussed before a Court in reports, press releases and other ways. Furthermore, promotion initiatives provide for recommendations with multiple addressees, as exemplified below. The Commission can thus act by virtue of different acts, such as the publishing of thematic or country reports in which migration matters are addressed; the adoption of precautionary measures in order to deal with urgent situations and call for the prevention of imminent risks of irreparable harm against migrants; press releases in which the plight of certain migrants is highlighted and their respect or protection are called for; the adoption of resolutions on worrisome problems in the region concerning the rights of migrants; and else. Several examples demonstrate this.

As to the adoption of resolutions, an example is that of Resolution 2/18 on "Forced Migration of Venezuelans". The Commission declared, first, that the mass migration of Venezuelans may be explained by two factors, namely "massive violations of human rights, as well as the serious crisis that Venezuela has been facing as a result of the shortage of food and medicines".[11] In the same resolution, the Commission indicates that non-State actors as criminal organizations are "exploiting recently arrived Venezuelan individuals in some border areas"; that some migrants have been facing "serious xenophobic and discriminatory practices […] in countries of transit and destination", and after recalling the right "to request and receive asylum […] in the Americas"; and recalled the past solidarity of Venezuelans, urging OAS Member States to guarantee the "recognition of refugee status", to consider adopting

[11] IACHR, Resolution 2/18, "Forced Migration of Venezuelans", 2 March 2018.

"collective protection responses", to guarantee access to those seeking "urgent humanitarian needs" while respecting the *non-refoulement* principle, to identify persons in a "situation of vulnerability", to ensure safe migration channels, protect and provide "humanitarian assistance to Venezuelans within national jurisdictions", to seek the rescue and protection of migrants, guarantee "access to the right to nationality for stateless persons, as well as for children of Venezuelans born abroad who are at risk of being stateless", to implement coordinated responses and strategies, to avoid criminalizing migration, to ensure access to justice, to provide remedies, to promote social integration, and to permit IACHR visits.[12] This resolution highlights many of the issues surrounding migration that will be explored below in this Chapter, and demonstrates how promotion actions can complement jurisdictional ones in terms of addressing immediate crises, addressing multiple actors in the region, and engaging in both preventive and a reactive initiatives.

With regard to press releases used to achieve the aforementioned goals for the promotion of human rights, one example is the press release of 19 February 2019, by means of which the "IACHR Urge[d] Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan". The Commission expressed concern at reports of the use of force by police officers, undue restrictions to the right individuals have "to freely leave any country, including their own", and the *de facto* criminalization of migration. Another example is the press release of 28 August 2015, by means of which the "IACHR Expresse[d] Concern over Arbitrary Deportation of Colombians from Venezuela", addressing the "arbitrary and collective deportation of undocumented Colombian migrants being carried out by Venezuelan authorities in the border state of Táchira", the separation of families, and also reminding States that they "must take every necessary step to guarantee that racial profiling does not occur during migration raids" and make sure that there is an "individual decision in respect of each deportation". Another example is provided in the recent press release of 23 October 2018, in which the Commission expressed its concern over the situation of the "*Migrant Caravan* from Honduras" that was going towards the USA. This not only highlighted the problems faced by migrants on the caravan (violence, hardships, vulnerability, hostile reactions, and else), but also allowed the IACHR to urge the States involved to guarantee the rights of individuals on the caravan, especially "the right of persons in need of international protection to request and receive asylum", and to "strengthen mechanisms of shared responsibility

[12] *Ibid.*

to address" their situation, in addition to the necessity of refraining from carrying out collective deportations, of providing humanitarian assistance, and of guaranteeing fair trial and due process guarantees, among others. Promotion actions, therefore, permit not only to ask for hard law implementation, but also to engage in prevention and response actions even in relation to very recent events.

Likewise, on 7 January 2019 the Commission expressed its concern over the deaths of migrant children "in the custody of Immigration Authorities in the United States", recalling its reports on the protection of migrants, children and the family. In those reports, the IACHR took notice of accusations of threats relating to the separation of relatives from children, and said that detention of persons in an irregular migratory situation should be "extraordinary"; that such detentions should be "the least restrictive" ones; that legal representation should be given to unaccompanied children and families at the "States' expense"; that expedited removal proceedings risk breaching *non-refoulement* and the rights against torture; that there must be a separation of migrants from criminal inmates; that due process always has to be observed; that children undergo separate immigration proceedings;[13] that children have a "right not to be separated from the family"; that there are rights to not be internally displaced, to special protection and to education, among others;[14] and that relevant rights and freedoms in migration contexts include freedom of movement and residence, the right to a fair trial in deportation or extradition proceedings, the right to the protection of families, the right to protection against cruel, inhuman or degrading treatment, personal liberty, the right to request and receive asylum, the *non-refoulement* principle, the right to nationality and the right to property.[15]

In terms of precautionary measures adopted by the Commission, one example is found in the Commission's address to the USA asking it to protect rights "through the reunification of […] children with their biological family's; "regular communication between the beneficiaries and their families", and the adoption of measures to bring about the reunification of families when "beneficiaries [are] deported separately from their children".[16]

[13] IACHR, "Refugees and Migrants in the United States: Families and Unaccompanied Children", 2015, pp. 42, 77, 101-111.

[14] IACHR, "Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System", 2015, para. 235.

[15] *Ibid.*

[16] IACHR, Press release "IACHR Grants Precautionary Measure to Protect Separated Migrant Children in the United States", 20 August 2018.

As to the action of political bodies in the OAS, one example is provided in Resolution 2929 of 5 June 2018, by means of which its General Assembly expressed its concern over the crisis that generated "an increasing emigration of Venezuelan citizens and is having impacts on the capacity of some countries of the Hemisphere to meet their different needs", issued instructions to the Permanent Council to support member States receiving Venezuelan "migrants and refugees", and urged the regime of Nicolás Maduro "to allow the entry of humanitarian aid […] to prevent the aggravation of the humanitarian and public health crisis", also inviting OAS Member States to "implement measures to address the humanitarian emergency in Venezuela", among others.[17]

Altogether, the Commission (and other OAS political bodies, as was just explained) can contribute to identifying necessary standards and courses of action and can have a potential benefit regarding the promotion of the enjoyment of the rights of migrants. In turn, OAS political bodies can debate problems surrounding those rights, including their causes, something the IACHR can do as well.

Having explored the importance of the promotion and political initiatives of different OAS bodies, we will now turn to the analysis of the pronouncements of the IACtHR on issues surrounding the human rights of migrants.

3. – The IACtHR Case-law on Migration: General Aspects

Before delving into the core analysis of the selected issues, it is worth identifying some basic concepts regarding migrants and their protection that constantly permeate the Court case-law, such as standards identified in the OC-18/03 *on Undocumented Migrants*.

Firstly, the vulnerability of migrants in the exercise of their rights. In general, the Court has identified some vulnerable categories – e.g. indigenous people, children, stateless persons, *et cetera* – who, due to their personal condition or specific situation in a given society, are particularly vulnerable and thus need more protection and require the adoption of special measures to ensure the protection of their human rights.[18] As for migrants, in the OC-18/03 *on Undocumented Migrants* the San José judges affirmed that

[17] OAS General Assembly, AG/RES. 2929 (XLVIII-O/18), "Resolution on the Situation in Venezuela", 5 June 2018.

[18] Case *Vélez Loor*, *cit. supra* note 4, paras. 98 ff.

> "Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants […] This situation of vulnerability […] is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations".[19]

As to vulnerability of migrants when compared to "non-migrants", the Court has well pointed out that the

> "[S]ituation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations […] Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability […] which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity […] there are difficulties [migrants] encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation […] the international community has recognized the need to adopt special measures to ensure the protection of the human rights of migrants".[20]

The Court's case-law has also stressed that specific categories of migrants suffer from a particular vulnerability, including, *inter alia*, migrants deprived of their liberty, undocumented migrants or migrants in an irregular situation,[21] migrant workers, and migrant children. With particular regard to workers, in the OC-18/03 *on Undocumented Migrants* the Court affirmed that

> "The vulnerability of migrant workers as compared to national workers must be underscored. In this respect, the preamble to the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families refers to the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment".[22]

[19] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 112.

[20] *Ibid.*, paras. 112-114, 117.

[21] Case *Vélez Loor*, *cit. supra* note 4, para. 98.

[22] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 131. See WOJCIKIEWICZ ALMEIDA, "Le Travailleur Migrant en Situation Irrégulière: L'accès Formel et Effectif aux Droits devant les Organs Juridictionnels et Juridictionnels de Contrôle", *Revista do Instituto Brasileiro de Direitos Humanos*, 2012, p. 324 ff., who refers to their "invisibilité apparente".

Moreover, with specific regard to children, the Court has considered that they are particularly vulnerable (saying that they have a "especial situación de vulnerabilidad"),[23] which is even more true in the case of migrant children.

Considering the vulnerability that migrants may find themselves in, the Court has adequately required that States carry out an analysis and implementation of the pertinent standards in light of an evolutionary interpretation and the principle of effectiveness or *effet utile*.[24] This, coupled with the principle of equality and non-discrimination, implies – among others – that

> "States have an obligation not to introduce discriminatory regulations into their laws; to eliminate regulations of a discriminatory nature; to combat practices of this nature; and to establish norms and other measures recognizing and guaranteeing all persons effective equality before the law".[25]

Another general standard related to migrants deals with their right not to be discriminated against and their right to equality before the law. In the OC-18/03 *on Undocumented Migrants* the Court affirmed that, at the existing stage of the development of international law, the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*,[26] binding all States and demanding its being guaranteed to all persons, including migrants even if their migration status is irregular. Certainly, for the IACtHR "the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of

[23] IACtHR, *case of the girls Yean y Bosico v. República Dominicana (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 8 September 2005 (hereinafter, case *of the girls Yean and Bosico*) and case of expelled Dominicans and Haitians v. Dominican Republic (Preliminary Objections, Merits, Reparations and Costs), Judgment of 28 August 2014, para. 428 (hereinafter, case *of expelled Dominicans and Haitians*). See also IACtHR, case of *Veliz Franco y otros v. Guatemala (Excepciones Preliminares, Fondo, Reparaciones y Costas)*, Judgment of 19 May 2014, para. 134, where the Court talked about the children's *vulnerabilidad consustancial*. See also SIJNIENSKY, *Interpretación evolutiva de la protección especial debida a las niñas y los niños*, in PARRA VERA et al. (eds.), *La lucha por los Derechos humanos hoy. Estudios en Homenaje a Cecilia Medina Quiroga*, Valencia, 2017, p. 230 ff., and also VANNUCCINI, "La protezione dei minori di età nella prassi della Corte interamericana dei diritti dell'uomo", *La Comunità internazionale*, 2013, p. 109 ff.

[24] IACtHR, *cit.*, *supra* note 8, p. 10.

[25] Case *Vélez Loor*, *cit. supra* note 4, para. 248.

[26] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 101.

equality and non-discrimination".[27] The Court has well added that the aforementioned principle is breached by *de facto* discriminatory conduct "even when it is not possible to prove a discriminatory intention", insofar as "international human rights law not only prohibits policies and practices that are deliberately discriminatory, but also those whose impact could be discriminatory with regard to certain categories of individuals", even in the absence of evidence of such an intention.[28]

This is also true in relation to migrant workers. In the same OC-18/03 *on Undocumented Migrants*, the Court clarified that

> "if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers".[29]

This does not mean that States may never grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, neither that it cannot be excluded that a State may sometimes take certain any action against migrants who do not comply with their legal system, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights.[30]

A third general aspect must be highlighted. It is related to the development of human rights protection standards in the IACtHR case-law, also with relation to migrants. In light of the special nature of human rights treaties, the Court decides cases and releases advisory opinion interpreting the American Convention on Human Rights (ACHR) – and other OAS treaties – as living instruments and, accordingly, in light of the *pro homine* principle enshrined in Article 29 ACHR.[31] Moreover, it

[27] *Ibid.*, para. 118 followed by *case of the girls Yean y Bosico*, *cit. supra* note 23, paras. 155 ff., case *Vélez Loor*, *cit. supra* note 4, para. 248 and also IACtHR, *case of Nadege Dorzema et al. v. Dominican Republic (Merits, Reparations, and Costs)*, Judgment of 24 June 2012, paras. 229 ff. (hereinafter, case *Nadege Dorzema*).

[28] Case *Nadege Dorzema*, *cit. supra* note 27, paras. 234, 238.

[29] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 136.

[30] *Ibid.*, para. 119.

[31] IACtHR, *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 1 October 1999 (hereinafter, OC-16/99 *on Con-*

systematically made reference to the pertinent elements of general international law (*jus cogens* included, such as the aforementioned prohibition to discriminate) and to external sources, *i.e.* universal treaties (e.g., the 1989 Convention on the Rights of the Child), regional treaties (e.g., the 1950 European Convention on Human Rights), and to decisions of other international Courts and bodies (e.g., the Strasbourg Court, the EU Court of Justice, the African Commission on Human and Peoples' Rights or UN Charter-based bodies), and of national courts from a comparative law perspective. Indeed, this interpretative method, based on the judicial dialogue among Courts and other human rights bodies, brings a more effective protection of human rights in the Inter-American System of Human Rights[32] and also underscores the universality of the rights of migrants and the risks they face. In the remainder of our study, the external sources on migrants to which the IACtHR referred to will be highlighted, with particular regard to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol as treaties of "crucial importance".[33]

3.1. – A Focus on More Vulnerable Migrants: Irregular Migrant Workers and Migrant Children

We premised that the IACtHR has taken into account the specific needs and vulnerability of some persons, regardless of their refugee *status* or whether they find themselves in a regular migratory situation. Specifically, the Court has referred to children and workers.

Regarding children, acknowledging what the *corpus juris* of the protection of their rights says, the Court often refers to the best interests of the child principle and

sular Assistance) and case *of the Mapiripán Massacre v. Colombia (Merits, Reparations and Costs)*, Judgment of 15 September 2005, para. 106. See also RODRÍGUEZ, "Artículo 29. Normas de Interpretación", in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotà, 2014, p. 712 ff., and also FITZMAURICE, "Interpretation of Human Rights Treaties", in SHELTON (ed.), *International Human Rights Law*, Oxford, 2013, p. 765 ss. and Canosa Usera, "Interpretación evolutiva de los derechos fundamentales", in FERRER MAC-GREGOR and ZALDÍVAR LELO DE LARREA (coords.), *La ciencia del Derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del Derecho*, México, 2008, pp. 59-60.

[32] See DE PAUW, "The Inter-American Court of Human rights and the Interpretive Method of external referencing: regional Consensus v. Universality", HAECK et al. (eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge- Antwerp- Portland, 2015, p. 23.

[33] IACtHR, *case of the Pacheco Tineo Family v. Plurinational State of Bolivia (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 25 November 2013, paras. 138-139 (hereinafter, case *Pacheco Tineo Family*).

to the obligation States have to "ensure to the maximum extent possible the survival and development of the child".[34] Quoting the Committee on the Rights of the Child, the Court has indicated that it is necessary to evaluate the following circumstances:

> "(a) [P]ersonal and public safety and other conditions, particularly of a socio-economic character, awaiting the child upon return including, where appropriate, a home study conducted by social network organizations; (b) availability of care arrangements for that particular child; (c) views of the child expressed in exercise of her or his right to do so under article 12 and those of the caretakers; (d) the child's level of integration in the host country and the duration of absence from the home country; (e) the child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8); (f) the "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20); and (g) in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return".[35]

As to children in detention or migration facilities, and in light of the right to family unity, the Court indicated that, if they travel alone, they ought to be with other children, lest adults may abuse their dominant position. If they travel with relatives or parents, they should remain with them unless there is a risk and the best interests of the child dictates otherwise, as was explained in the OC-21/14 *on Migrant Children*.[36] For the Court:

> "[I]n the case of unaccompanied or separated children […] the children require special care from the persons in charge of the center and must never be lodged together with adults […] In the case of children who are with their families […] the rule must be that they remain with their parents or those acting in their stead, avoiding the separation of the family unit insofar as possible […] unless the best interest of the child advises otherwise".[37]

An event in which it is not in the child's best interest to remain with their relatives is that of the detention of the latter, reason why States are required to think of alternative measures that permit children to remain with them, albeit in non-imprisonment conditions. According to the Court:

[34] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 222.
[35] *Ibid.*
[36] *Ibid.*, paras. 176-179.
[37] *Ibid.*, para. 177.

> "when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children".[38]

Additionally, deprivation of the liberty of children should neither be used as a precautionary measure nor as a consequence of failing to observe migration requirements, considering that there may be less intrusive alternatives. In fact, as the San José judges affirmed:

> "States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity". According to the Court, this is because authorities should look for alternative measures that are less inimical to children and their families, ensuring the protection of their rights "as a priority".[39]

For the Court, also being related to the protection of family unity, whenever this is possible and is in the best interests of the child, the right to "seek and receive asylum" may entail a requirement that "international protection [is granted] when children qualify for this and to grant the benefit of this recognition to other members of the family, based on the principle of family unity".[40] Furthermore, by virtue of the principle of taking into account the best interests of the child, in addition to ordinary guarantees that are applicable "in expulsion proceedings", when children are subject to them it is necessary to "maintain family unity insofar as possible". The Court went on to say that:

> "Hence, any ruling of an administrative or judicial organ that must decide on family separation owing to the migratory status of one or both parents must take into consideration the particular circumstances of the specific case, thus ensuring an individual decision; it must seek to achieve a legitimate purpose pursuant to the Convention, and it must be suitable, necessary and proportionate".[41]

[38] *Ibid.*, para. 158.
[39] *Ibid.*, para. 160.
[40] *Ibid.*, para. 81.
[41] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 357.

To achieve this, among others, States must consider "the extent of the disruption of the child's daily life if the family situation changes owing to the expulsion of a person in charge of the child, so that these circumstances are rigorously weighed in light of the best interests of the child against the essential public interest that it is sought".[42]

The Court has identified other specific rights and forms of protecting children in relation to specific rights-related aspects, such as nationality, asylum or refugee *status*, which are examined in the respective sections of this Chapter. That being said, concerning *non-refoulement*, the Court has highlighted, based on what has been said in the UN Human Rights System, that the obligation to not return is not limited to the identification of irreparable harm to a few rights, but rather "applies to other serious violations of [human rights] […] such as "the insufficient provisions of food or health services", "whether […] they originate from non-State actors or such violations are directly intended or are the indirect consequence of action or inaction […] [r]eturn to the country of origin shall in principle only be arranged if such return is in the best interest of the child" so that it is prohibited "if it would lead to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of *non-refoulement* applies".[43]

Altogether, migrant – and other – children must be protected in ways that take into account their specific needs, situation and the vulnerability they may have in a given situation. This implies, for instance, that it is important to take measures to make sure that all children have registration in a State, considering that, as the Court went on to say, "the failure to register a child 'can impact negatively on a child's sense of personal identity and children may be denied entitlements to basic health, education and social welfare'",[44] which they are entitled to regardless of whether they are migrants or not, as indicated in the section 3.4. on 'Asylum and refugees' of this Chapter.

Moreover, State agents cannot refuse to acknowledge the documents and identification provided by migrants, considering that for reasons similar to the ones just cited this leads to a situation of vulnerability – if children are the victims of this, the principle requiring taking into account their best interest would also be breached. Indeed, the Court has held that it is wrongful for State agents to fail:

[42] *Ibid.*
[43] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 231.
[44] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 269.

> "[T]o acknowledge the identity of the victims by not allowing them to identify themselves or not considering the documents they presented. This situation affected other rights, such as the right to a name, to recognition of juridical personality, and to nationality that, taken as a whole, impaired the right to identity. In addition, the Court considered that, in this case the State, by ignoring the documentation […] did not take the best interests of the child into consideration".[45]

In relation to migrant workers, on the other hand, the Court highlighted in the OC-18/03 *on Undocumented Migrants* the need to consider their vulnerability, regardless of their migratory *status*, and the correlative requirement of protecting them from threats to the enjoyment of their rights due, precisely, to that vulnerability. This logic be found, for instance, when the Court recognizes that there is a risk of labour exploitation. According to the IACtHR:

> "[I]t is not admissible for a State of employment to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them, taking advantage of their condition of vulnerability […] either by paying them lower wages, denying or limiting their enjoyment or exercise of one or more of their labor rights, or denying them the possibility of filing a complaint about the violation of their rights".[46]

Moreover, in the same OC-18/03 *on Undocumented Migrants* it was indicated that the salaries of migrant workers must be paid even when they have an irregular migration *status*, because by working for private parties or public ones they are automatically entitled to their payment, in light of applicable human rights standards, especially considering the horizontal effects of human rights law (*Drittwirkung*). According to them, protection of human rights is also required from the abuses of private actors. This explains why those workers have a right to access justice, since it permits them to present their respective claims. An example of an implication of this can be found in Article 25 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which "[i]t shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment". In the words of the Court itself:

> "The vulnerability of migrant workers as compared to national workers must be underscored […] Labor rights necessarily arise from the circumstance of being a worker […] A

[45] *Ibid.*, para. 274.
[46] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 170.

> person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition […] the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment […] the State and the individuals in a State are not obliged to offer employment to undocumented migrants […] However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers […] the obligation to respect human rights between individuals should be taken into consideration […] the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*) […] particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals".[47]

An important aspect to be found in the former quotation, besides the recognition of labour rights irrespective of migration status, is the Court's insistence on and confirmation of the applicability of human rights in private relations. This issue is discussed in somewhat greater detail in a later section.

3.2. – Migration and Nationality

The remarks of the IACtHR on the right to nationality are interesting for several reasons. If one examines its case-law on the matter of *status civitatis* in light of pronouncements on the pertinent aspects of the *corpus juris*, including the rights of individuals, children (migrants or with migrant parents) and the problems of statelessness, this is made all the more clear.

For instance, in the case *of the girls Yean and Bosico*, the Court pointed out that the right to nationality is non-derogable.[48] While this is expressed Article 27 ACHR, the Court has engaged in an analysis of its importance that may support the political decisions of the drafters of the Convention. Certainly, the Court has referred to the instrumentality of the right after considering that a nationality is sometimes required in order to enjoy certain social benefits, but also to have the possibility to request State protection in certain situations. Indeed, the Court has said that the "[I]mportance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is

[47] *Ibid.*, paras. 131-140.
[48] Case *of the girls Yean and Bosico*, *cit. supra* note 23, para. 136.

a requirement for the exercise of specific rights".[49]

Furthermore, for the IACtHR, nationality grants individuals a "minimal measure of legal protection in international relations through the link his nationality establishes between him and the State in question".[50] Due to its importance, the San José judges considered that, while it is up to the individual State to decide who is entitled to their nationality, there is a current limitation on this freedom, which seeks to ensure the equality – in terms of protection, for instance – of individuals.[51]

Accordingly, several things ensue. Firstly, there can be no discriminatory regulations on practices granting a nationality, considering that "States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights".[52] Secondly, no one can be deprived of their nationality arbitrarily, nor can its desired change be arbitrarily denied, as indicated in Article 20 ACHR. Thirdly, considering that lacking a nationality places individuals in a situation of vulnerability and deprives them of the possibility of "enjoying civil and political rights", States have "the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons".[53] Otherwise, according to the Court, States would breach the peremptory principle of equal and effective protection of the law and non-discrimination, which is breached not only when there is an intentional or "deliberate discrimination", but also when policies, regulations and practices have an impact that affects persons in a discriminatory manner even when "it is not possible to prove [a] discriminatory intention", as the IACtHR held in the case *of expelled Dominicans and Haitians*.[54] Fourthly, State Parties to the 1961 Convention on the Reduction of Statelessness are obliged to abide by it, as the Court reminded the Dominican Republic in 2005 in the case *of the girls Yean and Bosico*.[55]

Furthermore, it is forbidden to resort to notions that have a discriminatory impact on questions of who can be a national, such as certain local interpretations on the *status* of children of parents who were regarded as "foreigners in transit",

[49] *Ibid.*, para. 137.
[50] *Ibid.*, para. 139.
[51] *Ibid.*, paras. 140-141.
[52] *Ibid.*, para. 141.
[53] *Ibid.*, para. 142.
[54] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, paras. 263-264.
[55] Case *of the Girls Yean and Bosico*, *cit. supra* note 23, para. 143.

considering the IACtHR opinion according to which, in order to determine who was a national in accordance with domestic Dominican law, "[i]t is not possible to consider that people are in transit when they have lived for many years in a country where they have developed innumerable connections of all kinds".[56] After all, "States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause".[57]

Additionally, the Court has indicated that the migratory *status* of an individual cannot be a condition for obtaining a nationality, because such a *status* cannot justify the annulment of that nationality; that migratory *status* is not transmitted to children; and also, importantly, that "the fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born".[58] This is consistent with Article 20, para. 2, ACHR, according to which "[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality".

Moreover, in its decision in the case *Ivcher Bronstein*,[59] the Court also said that the freedom that States have in determining who are their nationals has been limited by the evolution of international law; and that the right to nationality is to be protected both when it is "acquired by birth, naturalization or some other means established in the law of the respective State", which is evidently applicable to individuals who once lacked the nationality of a given State, including those who migrated without the nationality of the host State. While nationality can be renounced to (or changed), as the ACHR and the Court have indicated, it cannot be revoked arbitrarily.

The Court found in that case, for instance, that the applicant's nationality had been annulled by State authorities despite the fact that renouncement was "the only way of losing it, according to the Peruvian Constitution", reason why it condemned the defendant State.[60] The San José judges further stated that the contravention of legality evinces arbitrary State actions in regard to nationality when the latter is revoked. In the words of the Court, the victim

[56] *Ibid.*, para. 153.
[57] *Ibid.*, para. 155.
[58] *Ibid.*, para. 156.
[59] IACtHR, *case of Ivcher Bronstein v. Peru (Merits, Reparations, and Costs)*, Judgment of 6 February 2001.
[60] *Ibid.*, paras. 88, 90, 95, 97.

> "[D]id not expressly renounce his nationality, which is the only way of losing it, according to the Peruvian Constitution, but was deprived of it when his nationality title, without which he was unable to exercise his rights as a Peruvian national, was annulled. Moreover, the procedure used to annul the nationality title did not comply with the provisions of domestic legislation […] Since this certificate was annulled in July 1997, 13 years after it had been granted, the State failed to comply with the provisions of its domestic legislation and arbitrarily deprived Mr. Ivcher of his nationality, violating Article 20(3) of the Convention […] Furthermore, the authorities who annulled Mr. Ivcher's nationality title did not have competence […] Mr. Ivcher Bronstein acquired Peruvian nationality through a "supreme resolution" of the President […] he lost his nationality as the result of a "'directorial resolution' of the Migration and Naturalization Directorate", which is undoubtedly of a lower rank than the authority that granted the corresponding right […] and, consequently, could not deprive the act of a superior of its effects […] this demonstrates the arbitrary character of the revocation of Mr. Ivcher's nationality, in violation of Article 20(3)".[61]

3.3. – The *non-refoulement* Principle

Article XXVII of the 1948 American Declaration of the Rights and Duties of Man, and Articles 22, paras. 7 and 8 ACHR, provide for the right of asylum and the *non-refoulement* principle. The former provision affirms that "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements". In turn, Article 22 ACHR affirms in para. 7 the right of a person to seek and be granted asylum in a foreign territory if she or he risks persecution for political offenses or related common crimes and, as indicated in para. 8, "[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions". In addition, Article 13 of the 1985 Inter-American Convention to Prevent and Punish Torture states that "Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State".[62]

[61] *Ibid.*, paras. 95-96.

[62] The prohibition of torture is provided also at Article 5, para. 2, ACHR, which reads "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived

Unlike what has happened with some other sensitive issues (e.g., violence against women),[63] in the Inter-American System of Human Rights no specific treaty has been drafted on migrants or situations of human mobility. Thus, the Court relied on the aforementioned provisions, and on international (general and treaty) law. In that sense, it is worth recalling UN treaties on human mobility to which the IACtHR has referred in its case-law, such as the 1951 Convention on Refugees its 1967 Protocol, the 1961 Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness, or the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

The relationship between Inter-American provisions (in particular, the ACHR) and other international law sources has been underlined in the case *Pacheco Tineo Family*, in which the Court expressed that

> "said Article 22(7) of the Convention indicates two criteria of an accumulative nature for the existence or exercise of this right: (a) '…in accordance with the legislation of the State …,' in other words, of the State in which asylum is requested, and (b) '… in accordance with […] international conventions.' This concept […] understood in conjunction with the recognition of the right to *non-refoulement* in Article 22(8), supports the interrelationship between the scope and content of these rights and international refugee law".[64]

Moreover, looking at specific situations, in its OC-21/14 *on Migrant Children* the Court added that "*Non-refoulement* is conceptualized as a principle that makes the right to seek and receive asylum effective and as an autonomous right established in the Convention as well as an obligation derived from the prohibition of torture and from other human rights norms and, in particular, the protection of the child".[65]

According to the IACtHR, apart from being provided for in several universal and regional treaties regarding directly or indirectly refugees,[66] the *non-refoulement*

of their liberty shall be treated with respect for the inherent dignity of the human person".

[63] See the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women '*Convention of Belém do Pará*', available at: <http://www.oas.org/en/iachr/mandate/Basics/belemdopara.asp>.

[64] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 142.

[65] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 45.

[66] As for regional treaties, see e.g. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, that gives expression in binding form to a number of important principles relating to asylum, including the principle of *non-refoulement*. According to Article III, para. 3, "No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be

principle has been widely accepted by States. In fact, the San José judges have affirmed – conclusion with which we agree – that "the prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum […] [and] is also a customary norm of international law".[67] The Court has said it several other times, as in the recent OC-25/18 *on the Right of Asylum*,[68] in which it also added that when a person to-be returned risks suffering torture or cruel, inhuman or degrading treatment, the principle under discussion becomes absolute. Likewise, and more extensively, in the previous OC-21/14 *on Migrant Children* the Court affirmed that

> "This principle seeks […] to ensure the effectiveness of the prohibition of torture in any circumstance and with regard to any person, without any discrimination. Since it is an obligation derived from the prohibition of torture, the principle of *non-refoulement* in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of *jus cogens*".[69]

It is worth adding that very recently the UN Committee against Torture affirmed the same.[70] To ensure the prohibition of expulsion *de qua*, the IACtHR has stressed that it protects refugees "regardless of their legal status or migratory situation in [a] State".[71]

When compared to general international refugee law, in the Inter-American System of Human Rights the *non-refoulement* principle takes on a particular meaning,[72] as it has a more extensive field of application *ratione personae*. While Article 33, para. 1, of the 1951 Convention addresses *non-refoulement* in relation to refugees, Article, para. 8, ACHR is addressed to every alien, and thus to "any person,

threatened for the reasons set out in Article 1, paragraphs 1 and 2."

[67] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 151.

[68] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, para. 179, recalling case *Pacheco Tineo Family*, *cit. supra* note 33, para. 151, and OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 211.

[69] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 225.

[70] Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 62nd session, 6 November – 6 December 2017, para. 9: "The principle of "non-refoulement" of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute". In that regard, see PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, Bari, 2019, p. 121, who refers to the evolutionary and coordinated interpretation of those two principles.

[71] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 152.

[72] OC-21/14 *on Migrant Children*, *cit. supra* note 2, paras. 216-217.

who is not a national of the State in question or who is not considered its national by the State based on its laws".[73] Moreover, the 1984 Cartagena Declaration on Refugees, a document adopted by a group of Latin American experts that the IACtHR has taken into account, affirms that, in light of the regional situation of human mobility,

> "[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".[74]

Even if the Declaration is not a direct source of international law, the IACtHR took it into due account in the OC-21/14 *on Migrant Children* and in following pronouncements in terms of both the reality it recognizes and how some States have referred to it in their domestic law, affirming as to the former aspect that

> "[T]he obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that originated it, but also meets the challenges of protection derived from other displacement patterns that currently take place. This criterion reflects a tendency to strengthen in the region a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident".[75]

Concerning the scope of application of the *non-refoulement* principle, the Court has posited that returning aliens to a country where they risk serious human rights violations is prohibited not only directly, but also indirectly. In the case *Pacheco Tineo Family* the Court reminded that States also have the obligation not to return a person to a country from which he may be returned where he suffers this risk, *i.e.* the "indirect refoulement".[76] Moreover it also reminded about the extraterritorial

[73] *Ibid.*, para. 218, and previously case *Pacheco Tineo Family*, *cit. supra* note 33, para. 135.

[74] *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 to 22 November 1984, conclusion n. 3.

[75] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para.79.

[76] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 153.

application of the *non-refoulement* principle in light of Article 1, para. 1, ACHR, which affirms that the States Parties undertake to respect the recognized rights and freedoms to all persons subject to their jurisdiction. In that sense, in the OC-21/14 *on Migrant Children* the San José judges stated that

> "[…] the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory. Consequently, the principle of *non-refoulement* can be invoked by any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State".[77]

Being connected to asylum – although also applicable to non-refugees – , the *non-refoulement* principle implies that a person cannot be expelled before an accurate analisys of his/her application to determine the refugee *status* or entitlement to complementary protection, in accordance with due process guarantees.[78] With regard to this aspect, the case *Pacheco Tineo Family* can be considered a leading case, even if in previous cases regarding the detention of non-citizens[79] the Court found the violation of the victim's the right to access to justice *ex* Articles 8 and 25 ACHR in relation to Article 1, para. 1, ACHR.[80] Still, in the case *Pacheco Tineo Family*, regarding the denial of the asylum request of a family with children and their expulsion from Bolivia to their country of origin, the Court ascertained the violation of the right to access to justice in relation to Article 22, para. 8, ACHR on the *non-refoulement* principle. The San José judges affirmed that

> "such persons cannot be turned back at the border or expelled without an adequate and individualized analysis of their application. Before returning anyone, States must ensure that

[77] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 221.

[78] Accordingly, see Committee against Torture, Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 62nd session, 6 November - 6 December 2017, para. 13 "Each case should be individually, impartially and independently examined by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards".

[79] IACtHR, *case of Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 7 September 2004; *case of Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 25 March 2017; finally, case *Vélez Loor*, *cit. supra* note 4.

[80] With regard to the "Right to Justice", as emerging from the combined reading of Articles 8 and 25 ACHR, see IBÁÑEZ RIVAS, "Artículo 8. Garantías Judiciales", in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotà, 2014, p. 207 ff., and ID., "Artículo 25. Protección judicial", *ibidem*, p. 606 ff.

> the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him".[81]

For this reason, the deportation of the victims was incompatible not only with the right to seek and to receive asylum, but also with the *non-refoulement* principle and with the right to be heard with due guarantees in judicial and/or administrative proceedings (Article 8 and 25 ACHR) that could culminate in their expulsion.

Similarly, in the OC-21/14 *on Migrant Children* the Court interpreted Article 22, para. 8, ACHR also in relation to other Convention provisions, access to justice included. The San José judges recalled that basic guarantees of due process must be ensured to aliens in administrative proceedings related to migratory *status*, and that their flagrant violation may result in the violation of the *non-refoulement* principle.[82] The Court added that even if in case of mass influx of persons individual determination may seem to be burdensome, States should guarantee access to protection from *refoulement* and basic humanitarian treatment, *i.e.* admitting asylum seekers within the territory, without discrimination, respecting the *non-refoulement* principles and non-rejection at borders, and granting appropriate international protection.[83]

Another implication of the *non-refoulement* principle is related to extradiction when an individual would risk his/her life or torture or inhumane treatment in a receiving State. The IACtHR first ruled on that issue in the case *Wong*, which involved an international fugitive wanted by the judicial authorities of Hong Kong and arrested and imprisoned in Peru. China asked for his extradiction on the basis of an extradition treaty with Peru, but the victim objected by asserting that, if extradited, he could risk the death penalty. Nevertheless, considering the circumstances of the case, the Court concluded that, if the indivual were extradited, Peru would not violate his rights to life and to personal integrity (Articles 4 and 5 ACHR) or the *non-refoulement* principle in relation to extradiction *ex* Article 13 of the 1985 Convention on torture. Nevertheless, the San José judges found Peru responsible for the violation of the victim's judicial guarantees, protected by Article 8, para. 1, ACHR, because the extradition process exceeded a reasonable time while he was in detention.

It is interesting to draw attention to what the Court affirmed with regard to the

[81] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 153.
[82] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 230.
[83] *Ibid.*, para. 262.

relationship between the request of extradition and the States obligation to ensure the rights to life and to humane treatment, together with the *non-refoulement* principle.

In fact, even if the ACHR does not prohibit the death penalty in absolute terms, since it is not forbidden for States that had it when the instrument enters into force for them – but only in the strict limits then existing – , the Court has affirmed that the relevant provisions have to be interpreted *pro homine* and in light of the due respect of specific procedural guarantees and the conditions of the States involved. Thus, States Parties that have abolished the death penalty cannot expel, deportate or extradite persons which can be reasonably sentenced to death, without requiring assurances or guarantees (such as affordable diplomatic ones) that the death sentence will not be imposed. Instead, those States that have not abolished that penalty may not return persons who run a real and foreseeable risk of being sentenced to death "unless this is for the most serious crimes for which the death penalty is currently imposed in the requested State Party".[84] Moreover, the latter States may not expel anyone who may risk that penalty for crimes that are not punished with the same punishment in their own jurisdiction, without requiring the necessary and sufficient guarantees that the death sentence will not be applied. In addition, the obligation to ensure the right to personal integrity, in conjunction with the *non-refoulement* principle, imposes on States the obligation not to extradite individuals risking a real, foreseeable and personal risk of suffering treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatments. Finally, coming back to the respect of judicial guarantees, States Parties cannot extradite or return individuals who risk suffering a flagrant denial of justice in the destination State.[85]

When analyzing if there is a risk, the Court has held that it is necessary to "examine the conditions in the destination country which are the grounds for the alleged risk, and compare the information presented with the standards derived from the American Convention".[86] Furthermore, the concrete danger in which someone is must be considered. According to the Court,

> "when analyzing a possible situation of risk in the destination country, it is not sufficient to refer to the general situation of human rights in the respective State, but rather it is necessary to demonstrate the particular circumstances of the person to be extradited that would

[84] Case *Wong*, *cit. supra* note 5, para. 134.
[85] *Ibid.*, paras. 126-128.
[86] *Ibid.*, para. 169.

> expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment if he is extradited, such as membership in a persecuted group, prior experience of torture or ill-treatment in the requesting State, and the type of offense for which he is sought, among other matters, depending on the specific circumstances in the destination country".[87]

As to specific risks from which protection must be given, the Court has said, for instance, that whenever an individual may be expelled somewhere where the imposition of death penalty is a possibility,

> "pursuant to the obligation to ensure the right to life, States that have abolished the death penalty may not expose an individual under their jurisdiction to the real and foreseeable risk of its application and, therefore, may not expel, by deportation or extradition, persons under their jurisdiction, if it can be reasonably anticipated that they may be sentenced to death, without requiring guarantees that the death sentence would not be carried out".[88]

The reference to guarantees is related with the opinion of the IACtHR that it is also necessary to examine if "diplomatic assurances" are satisfactory and trustworthy in a given case ("when assessing diplomatic assurances, the quality of the assurances and their reliability must be analyzed").[89] Hence, if someone is expelled when there is no risk, or if there are sufficient guarantees on protection from potential threats, the responsibility of a sending State would not be engaged, as flows from the Court's reasoning in the case *Wong*.[90]

It is worth mentioning that some remarks on the recent OC-25/18 *on the Right of Asylum*[91] recall and capitalize previous case-law on migrant issues and international pratice (e.g., the decisions adopted by the UN Human Rights Committee) in order to answer to the petition submitted by Ecuador. The ICtHR judges were asked to interpret Article 22, para. 7, ACHR and Article XXVII of the American Declaration, to clarify if they provide for the right to seek and receive asylum accordingly with

[87] *Ibid.*, para. 173.
[88] *Ibid.*, para. 134.
[89] *Ibid.*, paras. 177, 180.
[90] *Ibid.*, paras. 187-188.
[91] For some first comments on the OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, see CASTRO, "La Corte Interamericana se pronuncia sobre la muy golpeada institución del asilo", available at: <https://www.ambitojuridico.com/>, 31 August 2018, and ROA SÁNCHEZ, *cit. supra* note 6, p. 797 ff.

the different modalities, forms and categories developed in international law,[92] diplomatic asylum included, and which international obligations derive for the asylum State. After an overview of various modalities of asylum (territorial asylum, diplomatic asylum, and Latin American practices on asylum),[93] the Court reached the conclusion that the aforementioned provisions protect the right to seek and receive international protection in a foreign territory as a human right, including refugee *status*, accordingly in particular to the 1951 Geneva Convention and its 1967 Protocol, and also protect territorial asylum in accordance with regional conventions on asylum.

That being said, the novelty of the OC-25/18 *on the Right of Asylum* can be found in the expansion of the extraterritoriality of the *non-refoulement* principle with regard to legations. Although under general international law granting asylum is not considered a diplomatic or consular function, States are obliged to respect, through all authorities and agents – diplomatic agents included – the rights and freedoms recognized in the ACHR of all persons under their jurisdiction, without discrimination of any kind. This happens even when a person enters in a diplomatic mission in search of protection, because in that case the person is considered to be under that State's jurisdiction. In that hypothesis, some obligations arise from the *non-refoulement* principle. Firstly, individuals cannot be returned to another country where they risk an irreparable harm or to any non-safe State to which the persons may subsequently be indirectly refouled. Secondly, States have to evaluate through an interview the individual risk of an asylum seeker, "giving him or her due opportunity to state the reasons for the refusal of refoulement". This requires carrying out a preliminary assessment on such a risk and, if it is established, the respective person cannot be returned to the country of origin or to another country where the risk exists.[94]

On the other side, Article 22, para. 7, ACHR and Article XXVII of the American Declaration do not cover diplomatic asylum.[95] The San José judges remind that the will of States during the drafting the American Declaration and the ACHR was to exclude the diplomatic asylum as a protected right, maintaining its regulation in

[92] In particular, Article 14 para. 1 of the Universal Declaration of Human Rights and the 1951 Geneva Convention relating to the Status of Refugees and its New York Protocol of 1967.

[93] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 61 ff.

[94] *Ibid.*, para. 195, recalling OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 232, and case *Pacheco Tineo Family*, *cit. supra* note 33, para. 136.

[95] *Ibid.*, paras. 153 ff.

accordance with the Latin American conventions on asylum, *i.e.* leaving it in the domain of State prerogatives. In other words, even if the *diplomatic* asylum can be an effective mechanism to protect individuals from harms in countries suffering a difficult democratic life, it is still governed by international treaties and domestic legislation provisions, and it is a State prerogative to grant or deny it in specific situations.[96] Conversely, the so-called *territorial* asylum is not a mere State 'prerogative'. Furthermore, the logic that States are free to act, provided that human and refugee rights are not ignored, applies in relation to both sets of institutions. According to the Court, the subjective right of every human being to seek and be granted asylum oversomes the historical understanding of that institution as a "mere State prerogative".[97]

It is also worth commenting that the Court has said that, while in the exercise of its contentious jurisdiction it is normally required to examine allegations of violations that have allegedly already taken place, some flexibility must be permitted for it in the exercise of such jurisdiction, in order to empower the San José judges to analyze whether a potential expulsion from a country's territory would breach the guarantees pertaining to *non-refoulement*. In this regard, they have said that:

> "[I]t is not normally for this Court to pronounce on the existence of potential violations of the Convention. However, when the presumed victim claims that, if he is expelled or, in this case, extradited, he would be subject to treatment contrary to his rights to life and personal integrity, it is necessary to ensure his rights and to prevent the occurrence of grave and irreparable harm. Since the ultimate aim of the Convention is the international protection of human rights, it must be permissible to analyze this type of case before the violation takes place […] the Court must examine the State's responsibility conditionally [since the extradition has not occurred yet], in order to determine whether or not there would be a violation of the rights to life and personal integrity of the presumed victim should he be extradited".[98]

3.4. – Asylum and Refugees

The OC-25/18 *on the Right of Asylum* not only examined the *non-refoulement* principle, but also addressed other issues pertaining asylum and refugees, reason why it merits some further attention.

It was indicated some lines above that the Court distinguishes between diplomatic

[96] *Ibid.*, para. 154.
[97] *Ibid.*, para. 131.
[98] Case *Wong*, *cit. supra* note 5, para. 142.

and territorial asylum, holding that the former is not required by the regional customary or treaty law, whereas the latter is governed by Inter-American standards. In the advisory opinion, the Court examined the history of the decline of diplomatic asylum in Europe and the rise of the institution of extradition there, which was markedly in contrast to the increasing use and importance of the doctrine in Latin America, "as a response to frequent crises related to the incipient independence of Latin American states".[99] In spite of this, in the opinion of the Court, the recognition of diplomatic asylum is not present in the Inter-American instruments, and has even been excluded by virtue of the wording of their pertinent provisions and by persistent objections. Accordingly, its concession is something that States are free to give or not in a sovereign fashion, and there are no rules of interpretation that can be used to consider otherwise, reason why diplomatic asylum is governed by agreements or domestic legislation on the matter, and not by custom, according to the Court.[100]

Conversely, as can be said on the basis of pronouncements of the Court, references in the ACHR (Article 22, para. 7) and the 1948 American Declaration of the Rights and Duties of Man (Article XXVII) to a "foreign territory" indicate that the asylum they refer to is a territorial asylum and not a diplomatic one. This territorial asylum the Court refers to is, according to the OC-25/18 *on the Right of Asylum*, a protection granted by States to individuals present in their territory,[101] unlike the diplomatic one, where the interested individual is present in the State territory they pretend to flee from or in a third State's territory, being it required to respect the inviolability of diplomatic facilities where those individuals may be located.[102]

As to the protection of refugees, the Court highlights the fact that in the Americas, due to the adoption of the Cartagena Declaration on Refugees and the subsequent enactment of corresponding domestic legislation by some States, some OAS Member States are legally required to provide a protection that is greater than the one enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[103] According to said Declaration, the concept of refugees encompasses, in addition to those protected by such Convention and Protocol, "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human

[99] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 76-77.
[100] *Ibid.*, paras. 115, 147-163.
[101] *Ibid.*, para. 67.
[102] *Ibid.*, para. 106.
[103] *Ibid.*, paras. 68, 96, 129-130; OC-21/14 *on Migrant Children*, *cit. supra* note 2, paras. 77-79.

rights or other circumstances which have seriously disturbed public order". Accordingly, some States in the American region are required to recognize, as refugees, persons that do not meet the conditions set forth in the universal instruments but do find themselves in the circumstances just described. Having said this, the Court deems the definition(s) of refugees as "integral, which means that each and every one of the requirements set forth in the applicable instruments "must be met in order to obtain recognition".[104]

Apart from the identification of applicable definitions and the distinction between categories of asylum in the Americas, the IACtHR has stressed that the granting of asylum cannot be used to promote or cement the impunity of serious violations, because that would be a perversion of the institution of asylum itself and would be contrary to standards identified in the Court case-law addressing the requirements of how to deal with serious violations of human rights. Furthermore, when such serious violations are present, States are required to observe the principle *aut dedere aut judicare*.[105]

Another important consideration of the Court, referred to in the section on *non-refoulement*, is how this principle – which "applies to all refugees, even if they have not yet been deemed refugees by authorities"[106] and to some non-refugee migrants by virtue of the general obligations to respect and ensure the human rights of all individuals – must be observed also in an extraterritorial way. This means that when State agents have authority or control over individuals who may benefit from it, even if said agents and persons are not located within the State's territory, as may happen in the high seas; and also when actions take place in border areas or in "international transit zones", human rights must be respected.[107] Likewise, asylum seekers cannot be "rejected at the border without an adequate and individualized analysis of their requests with due guarantees".[108] Just as happens with geographical considerations, this requirement is also applicable regardless of what motivates a given expulsion or how the sending of someone abroad takes place, even if there has been a request of extradition, considering that possible risks of human rights violations must be evaluated. Such an examination ought to lead to an expulsion refusal if a given risk is

[104] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 75.
[105] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 91-92.
[106] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 210.
[107] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 171-177, 188.
[108] OC-21/*14 on Migrant Children*, *cit. supra* note 2, para. 81.

real.[109]

On the other hand, it must be noted that the Court has also said that even though States are not required, for instance, to grant asylum in a given case, individuals asking for it cannot be left in limbo indefinitely; and that States must take into account all of their international obligations and possibilities of acting, such as requesting safe passage to a third State or elsewhere making sure that the internationally-recognized human rights of individuals will be respected.[110]

In the OC-21/14 *on Migrant Children*, the IACtHR provided additional insights on the protection of refugees and those who claim a refugee *status*, which not only point towards responses to the effects of mass migration but also towards its causes. Additionally, it provided insights on dynamics of contemporary migration. For instance, the Court noted how complex migration dynamics sometimes involve both migrants and refugees travelling together.[111]

On the other hand, the Court considered that when facing "a mass influx of persons" that makes the "individual determination of refugee status […] generally impractical", if there is a "pressing need to provide protection and assistance, particularly when children are involved", States ought to refrain from returning asylum seekers by providing a *prima facie* protection to groups, without discrimination. Countries of origin, in turn, should try to "resolve and eliminate the causes of displacement" and ensure the possibility of "voluntary repatriation".[112]

Both considerations are important, because they go beyond the immediate request and individual decisions that may be difficult to make in certain situations. On the one hand, this opinion prevents States from invoking excuses on material difficulties when identifying refugees, by telling them that *prima facie* they should protect those who claim to have that *status* by means of a group or collective temporary recognition, lest persons with it are wrongly returned to places where their rights are at risk. Secondly, it tells States that the causes and roots of mass migration must be addressed, which is important because it refrains from only requiring State responses to its effects, by telling them that they must also deal with what causes mass migration, and that both host and also origin States have responsibilities.

[109] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 191, 196-197.
[110] *Ibid.*, para. 198.
[111] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 36.
[112] *Ibid.*, para. 262.

Additionally, the Court has insisted that Human Rights Law complements Refugee Law, as happens for instance in regard to the possibility of expelling refugees out of "national security or public order considerations" under refugee law. Indeed, under human rights law foreigners lawfully residing in the territory of a State may only be expelled after a decision observing certain legal conditions has been reached.[113] According to the Court, while refugee *status* first comes to mind when exploring issues on migration, "various sources of law", including international humanitarian law and human rights law, are also applicable.[114] Moreover, applicable "complementary protection mechanism[s]" may be called for under some circumstances – with human rights law demanding that basic needs are satisfied, regardless of migration *status*.[115] This logic can be found, for instance, in the Court's judgements in the case *Nadege Dorzema* (and others cases too), in which it said that

> "[E]mergency medical care must be provided at all times for irregular migrants; accordingly, the States must provide comprehensive health care taking into account the needs of vulnerable groups […] failure to register the entry into and exit from the health center, the lack of medical care for five seriously injured victims, and the failure to diagnose their condition and prescribe treatment, denote omissions in the attention that should have been provided to the injured in order to respect and ensure their right to personal integrity".[116]

Furthermore, when assessing whether individuals are persecuted, and how to better protect them and their rights, their specific circumstances and vulnerability must be analyzed by a State, lest ignoring their needs engages State responsibility. This can be seen, for instance, in the *Nadege Dorzema* case, in relation to which the Court concluded that "special protection was never provided to […], based on his condition as a minor, or to […], who was pregnant, situations that increased the violation of their physical, mental and moral integrity".[117] This requires, for instance, "taking into account the specific forms that child persecution may adopt", considering "age and gender"; and permitting children submitting "applications for recognition of refugee

[113] *Ibid.*, para. 270.
[114] *Ibid.*, paras. 37, 39.
[115] *Ibid.*, para. 96.
[116] Case *Nadege Dorzema*, *cit. supra* note 27, paras. 109-110.
[117] *Ibid.*, para. 110.

status in their own capacity".[118] Furthermore, children's confidentiality must be ensured; the individualized treatment of their requests must be carried out by virtue of the positive obligations that States have;[119] and deprivations of liberty that are *de facto* penalties or punitive sanctions "in the area of immigration control" are deemed as arbitrary and contrary to the ACHR.[120]

As to proceedings on the *status* of refugees, the general due process and remedies guarantees enshrined in Articles 8 and 25 ACHR are applicable, decisions must "expressly include the reasons" for it, and appeal is to be permitted.[121] In this regard, the Court cites the UNHCR to recall that "fair and efficient procedures for the determination of refugee *status* in order to ensure that refugees and other persons eligible for protection under international law are identified and granted protection".[122] Guarantees are thus instrumental to make sure that rights are recognized, that protection is given, and that prohibited conduct is not incurred in. Hence, they must also be observed in administrative and all other proceedings in which rights may be affected. In this sense, the Court added that

> "[O]wing to the nature of the rights that could be affected by an erroneous determination of the danger or an unfavorable answer, the guarantees of due process are applicable, as appropriate, to this type of proceeding, which is usually of an administrative character. Thus, any proceeding relating to the determination of the refugee *status* of a person entails an assessment and decision on the possible risk of affecting his most basic rights, such as life, and personal integrity and liberty".[123]

As to the applicable and pertinent due process guarantees, the Court has said that they include "the necessary facilities, including the services of a competent interpreter, as well as, if appropriate, access to legal assistance and representation", an objective examination by a proper authority and a "personal interview"; well-founded decisions; the protection of "the applicant's personal information and the application, and the principle of confidentiality"; information on how to appeal in case an applicant "is denied refugee status", and a reasonable period for that person

[118] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 80.
[119] *Ibid.*, para. 82.
[120] *Ibid.*, para. 147.
[121] *Ibid.*, paras. 246-247, 257.
[122] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 156.
[123] *Ibid.*, para. 157.

to appeal; the necessity that such an appeal has "suspensive effects and must allow the applicant in the country until the competent authority has adopted the required decision […] unless it can be shown that the request is manifestly unfounded"; and the effective availability of "certain judicial actions or remedies" when circumstances call for them, such as "for example, *amparo* or *habeas corpus*, that are rapid, adequate and effective to question the possible violation" of rights.[124]

If children are involved, proceedings must be adapted in ways that permit them to have real access to them and that ensure that their specific situation will be considered. In the words of the San José judges: "proceedings [must be] appropriate and safe for children in an environment that creates trust at all stages" – even in the event of denial of the recognition of refugee *status*, by seeking to "avoid or reduce any possible psychological stress or harm" – taking into account the child's best interests, providing special protection and care, avoiding undue delays, and adapting "proceedings on asylum or on the determination of refugee status, in order to provide children with a real access to these procedures, allowing their specific situation to be considered".[125] Moreover, decisions on asylum applications made by children must be expressed in ways that are comprehensible for them and make sure that an adequate representative is present and that decisions may be subject to questioning and appeals. For the Court,

> "the decision on the request taken by the competent authority as to whether the applicant is granted refugee status based on the factual and legal determinations must expressly include the reasons for the decision, in order to enable the applicant to exercise his right of appeal, if necessary. In addition, the decision must be communicated to the child in a language and manner appropriate to her or his age, and in the presence of the guardian, legal representative, and/or another support person. If refugee status is recognized, the competent authority should grant a document certifying this decision".[126]

Finally, it merits noting how, according to the Court, not only refugees but also other migrants, such as those receiving complementary protection, are entitled to rights such as non-devolution and others, which "should be *based on the needs of the applicant* and not on the type of international protection granted" (emphasis

[124] *Ibid.*, paras. 159-160.
[125] OC-21/14 *on Migrant Children*, *cit. supra* note 2, paras. 246-247, 254-256, 258, 261.
[126] *Ibid.*, para. 257.

added).[127] This rights-centered approach is a most welcome one that requires considering concrete risks that individuals are facing.

Additionally, it is worth noting that, in the case *Pacheco Tineo Family*, the Court made another important contribution in terms of indicating that, based on a proper interpretation of certain exclusion and negative clauses found in international refugee law, whenever someone is recognized as a refugee by a State, other States must afford that person such recognition, *i.e.* they should not refuse to treat that person according to the guarantees refugees have under international – and domestic, we might add – law. In the IACtHR's own words,

> "[O]nce a State has declared refugee status, this protects the person to whom this has been recognized beyond the borders of that State, so that other States that the said person enters must take into account this status when adopting any measure of a migratory character in his regard and, consequently, guarantee a duty of special care in the verification of this status and in the measures that it may adopt".[128]

3.5. – Mass Deportations

Two recent decisions reveal IACtHR considerations on mass deportations, one of which was rendered in the case *Nadege Dorzema* and another in the case *of expelled Dominicans and Haitians*. Both cases involved the Dominican Republic, which according to the International Organization for Migration is not only a country of emigrants, but also a migration destination and a transit country, especially from Haiti.[129] As the Court noted in its case-law on mass deportations, in the Dominican territory the Haitian population and individuals of Haitian descent live in conditions of poverty and marginality, and are discriminated against.[130]

The case *Nadege Dorzema*, decided in 2012, dealt with the entry of 30 Haitians in that State, the shooting and killing of some of them by military agents, the survivors' imprisonment and their transfer to the Haitian territory in exchange for money. The second case, decided in 2014, concerned the arbitrary arrest and summary ex-

[127] *Ibid.*, paras. 239-242.

[128] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 150.

[129] See the Country profile at <https://www.iom.int/countries/dominican-republic>.

[130] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, paras. 153 e 158, also recalling case *Nadege Dorzema*, *cit. supra* note 27, para 39.

pulsion of 26 Haitians and Dominicans of Haitian descent, and the adoption of discriminatory policies impeding the acquisition of the nationality for those individuals born in the Dominican Republic whose parents were not citizens.

While those cases not only addressed mass deportation – insofar as the Court found the violation of different AHCR provisions – [131] in both judgements the Court interpreted Article 22, para. 9, ACHR, according to which "The collective expulsion of aliens is prohibited". The "collective" nature of an expulsion was qualified in the case *Nadege Dorzema* as the return a number of aliens not founded on an objective analysis of the individual situation of each person, but based on arbitrariness.[132] In other words, the "collective" nature of an expulsion is not an issue related to the amount of returned aliens, but to the fact that they are expelled as a "group".

In addition to the requirement of them being individualized, the expulsion procedures of aliens must afford sufficient guarantees demonstrating that the personal circumstances of each person have been taken into account,[133] *i.e.* according with the basic guarantees of fair trials and with the prohibition to discriminate, among other requirements.[134] In that regard, in its OC-18/03 *on Undocumented Migrants* the Court stated that those guarantees have to be granted to all persons irrespective of their

[131] Over the violation of Article 22, para. 9, ACHR, in the case *Nadege Dorzema* the Court found the violation of the rights to life, personal integrity, personal liberty, fair trial, freedom of movement, and judicial protection, as well as for the breach of the duty to adapt its domestic law and not to discriminate. It's due mentioning that, with regard to the violation of the right to life (Article 4, para. 1, ACHR) to the detriment of killed persons and of the right to personal integrity for the survived migrants (Article 5, para. 1, ACHR), the Court ascertained the exceptional use of force by the agents involved in the facts and their following acquittal decided by the military criminal justice (with regard to this specific aspect, see DORREGO, "Límites al uso de la fuerza por agentes estatales. Derechos de los migrantes en procedimientos de expulsión", *Derechos Humanos*, Noviembre 2013, p. 129 ff.). In the case *of expelled Dominicans and Haitians*, *cit. supra* note 23, the Court held that the State violated the rights to juridical personality, name, nationality, personal liberty, privacy, fair trial, judicial protection, equal protection before the law, freedom of movement and residence, rights of the family, rights of the child, and equality and non-discrimination (for a brief comment, see INTERNATIONAL JUSTICE RESOURCE CENTER, "In the case of Dominican and Haitian People expelled v. the Dominican Republic, IACtHR finds multitude of human rights violations", 28 October 2014, available at: <https://ijrcenter.org>).

[132] Case *Nadege Dorzema*, *cit. supra* note 27, paras. 171 and 175.

[133] *Ibid.*

[134] Article 22, para. 6, ACHR, which states "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it", is aimed to prevent discriminatory and arbitrary expulsions. As noted by UPRIMNY YEPES and SÁNCHEZ DUQUE, "Artículo 22. Derecho de Circulación y de Residencia", in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotà, 2014, p. 531 ff., that provision guarantees that the freedom to circulate and to reside is supported by the States' duty to provide for guarantees just in relation to expulsion procedures.

migration *status*,[135] *i.e.* without any discrimination.[136] In fact, the Court acknowledged the

> "importance of legal aid in cases […] involving an alien who may not know the country's legal system and who is in a particularly vulnerable situation given the deprivation of liberty, which means that the recipient State must take into account the particular characteristics of the person's situation, so that the said person may have effective access to justice on equal terms".[137]

When the consequence of immigration proceedings in a State may entail the punitive (thus, arbitrary) deprivation of liberty[138] – as happened in the cases *Nadege Dorzema* and *of expelled Dominicans and Haitians* –, due process guarantees become of fundamental importance to prevent such abuse and, according to previous San José case-law, "free legal representation becomes an imperative for the interests

[135] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 121.

[136] *Ibid.*, para. 122 and case *Nadege Dorzema*, *cit. supra* note 27, para. 159.

[137] Case *Vélez Loor*, *cit. supra* note 4, para. 132.

[138] The previous IACtHR case-law (case *Vélez Loor*, *cit. supra* note 4, and OC-21/14 *on Migrant Children*, *cit. supra* note 2) already established the incompatibility with the ACHR of the punitive deprivation of liberty in order to control migratory flows, in particular those of an irregular nature. That being said, the detention of migrants for non-compliance with the immigration laws should only be used when necessary and proportionate in the specific case in order to ensure the appearance of the person in the immigration proceedings or to ensure the application of a deportation order, and only for the least possible time. Consequently, "immigration policies whose central focus is the obligatory detention of irregular migrants will be arbitrary, if the competent authorities do not verify, in each particular case and by an individualized evaluation, the possibility of using less restrictive measures that are effective to achieve those ends" (case *Vélez Loor*, *cit. supra* note 4, para. 171, and, on the same vein, case *Pacheco Tineo Family*, *cit. supra* note 33, para. 131). Moreover, a not arbitrary detention must the following requirements: its purpose is compatible with the ACHR; its appropriateness in light of the intended purpose; it has to be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists; and it's strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose. As for children, in OC-21/14 *on Migrant Children*, *cit. supra* note 2, the Court affirmed that "States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority" (para 160). On these aspects, see MEDINA QUIROGA, *The American convention on human rights: crucial rights and their theory and practice*, 2nd ed., Antwerpen, 2016 p. 230 ff. On OC-21/14, see also ALIVERTI, *cit. supra* note 6.

of justice".[139] In the OC-16/99 *on Consular Assistance* (and in the following case-law), the Court stressed the particular situation of imprisoned migrants

> "in a social and juridical milieu different from their own, and often in a language they do not know, [who] experience a condition of particular vulnerability, which the right to information on consular assistance […] seeks to remedy in such a way that the detained alien may enjoy a true opportunity for justice, and the benefit of the due process of law equal to those who do not have those disadvantages".[140]

As for the contents of minimum guarantees, in the case *Nadege Dorzema* the IACtHR – assertively relying on international law and practice – enumerated them as follows. Firstly, an alien has to be informed expressly and formally of the charges against him/her and the grounds for the expulsion or deportation, information about his/her rights included (e.g. the possibility of contesting the charges and of requesting and receiving consular assistance, legal assistance and, if needed, translation or interpretation). Moreover, in case of an unfavourable decision, the foreigner is entitled to present the case to the competent authority and to submit it for revision. Finally, expulsion may only be executed after notifying the decision.[141] On those grounds, the Court concluded that the Dominican Republic acted against migrants as a group, without individualizing them or giving them the differential treatment that they were entitled to as human beings, and failed to consider their protection needs. This represented a collective expulsion contrary to Article 22, para. 9, ACHR.

Finally, it is important to reflect on some remarks on the relationship between the prohibition of collective expulsion and the development of migrant standard protection laws in light of international law and practice. It has been rightly observed that the IACtHR case-law on collective expulsions particularly highlights the emergence of common universal standards on the respect and protection of migrants.[142] Certainly, in the decisions on both the cases *Nadege Dorzema* and *of expelled Domini-*

[139] Case *Vélez Loor*, *cit. supra* note 4, para. 146.

[140] See OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 121 and case *Vélez Loor*, *cit. supra* note 4, para. 152.

[141] Case *Nadege Dorzema*, *cit. supra* note 27, para. 175 and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 356.

[142] See OLMOS GIUPPONI, *cit. supra* note 6, p. 1492.

cans and Haitians there is a strong reliance on several (universal and regional) international human rights treaties[143] and on international practice, such as decisions of the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Office of the High Commissioner for Human Rights, and the European Court of Human Rights.

In that context, the reference to the works of the International Law Commission deserves a special mention, as it adopted (and submitted to the UN General Assembly) a draft of treaty on the expulsion of aliens in 2014.[144] Article 9 of the draft, on the prohibition of collective expulsion, affirms that "collective expulsion" means expulsion of aliens as a group, and also that a State may expel concomitantly the members of a group of aliens, but only following an assessment of each individual case. In addition, there are also Article 19, on the detention of aliens for the purposes of expulsion, or Article 26 on the procedural rights of foreigners subject to expulsion, widely recalled by the Court in the two cases analysed above.[145] They are, in essence, juridical contents that, under a *de jure condendo* perspective, both reflect the international law and practice on the protection of migrants and the homologous standards developed by the IACtHR.

3.6. – The Contributions of the IACtHR to the Delineation of the Duty of States to Protect Migrants from non-State Abuses

In addition to the States duty to "directly" respect human rights, according to Inter-American standards all migrants must be protected from non-State abuses, as was discussed in section 3.1, when citing the Inter-American Court's position on *Drittwirkung* and private employers. That protection is required even when migrants

[143] In particular, the Court recalled the provisions prohibiting collective expulsions contained in the 4th Protocol to the European Convention for the Protection of Fundamental Rights and Freedoms (Article 4), the African Charter on Human and Peoples' Rights (Article 12, para. 5), the Arab Charter on Human Rights (Article 26, para. 2), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 22, para. 1). See IACtHR, case *Nadege Dorzema*, *cit. supra* note 27, para. 170 ff. and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 361 ff.

[144] International Law Commission, *Expulsion of aliens*. Text and titles of draft articles 1 to 32, provisionally adopted on first reading by the Drafting Committee at the sixty-fourth session (UN Doc. A/CN.4/L.797), 24 May 2012.

[145] Case *Nadege Dorzema*, *cit. supra* note 27, para. 175 and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 355.

are not present in a State's territory in a manner that is consistent with its administrative or other applicable regulations. Due to the horizontal effects of human rights law, a negligent failure to do so engages State responsibility on the basis of what the duty to ensure with due diligence the enjoyment of human rights, found in Article 1, para.1, ACHR, requires States to do. Based on this, it is not only forbidden for States to discriminate against migrants, but they are also required to protect migrants from private abuses, considering that it is prohibited for States to "tolerate discriminatory situations that prejudice migrants".[146]

The legal requirement of providing State protection from non-State violations is not only a human rights demand. It is also present, among others, in Refugee Law itself. Indeed, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees indicates the following:

> "Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection".[147]

While the idea that migrants must be protected by States from non-State abuses as a matter of international law is not revolutionary and is based on basic international human rights obligations, its acknowledgment is nonetheless crucial, considering how frequently migrants are abused by non-State parties such as human traffickers or racist groups, and in contexts as those of smuggling, among others – without a doubt, these conducts, and others, are contrary to the full exercise of human rights guarantees and fundamental freedoms,[148] and are so troubling that the international society has developed instruments against them, such as the 2000 Protocol to

[146] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 119.

[147] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Re-edited, New York, 1992.

[148] OBOKATA, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the UN Convention against Transnational Organized adopted by the General Assembly in the same year. Indeed, the 2001 Durban Declaration recognizes that States must "establish regular monitoring of acts of racism, racial discrimination, xenophobia and related intolerance in the public and private sectors". Likewise, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination requires action against "racial discrimination by any persons, group or organization"; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families sets forth in Article 16 that migrant workers and their families are entitled to "effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions".

Furthermore, non-State abuses can be a cause leading to displacement and migration, and both home States must deal with them and host States protect from returning individuals to places where there is no protection against serious non-State threats. As the Court mentioned in OC-21/14 *on Migrant Children*:

> "[I]n addition to the traditional reasons for seeking refuge […] it is pertinent to be aware of the new factors that lead individuals and, in particular children, to be forcibly displaced from their countries of origin, among which transnational organized crime and the violence associated with the actions of non-State groups stand out".[149]

In regard to migrant children, the Court has also recognized the necessity of protecting them from potential non-State and State abuses, preventing[150] or responding to them – e.g. by investigating abuses – [151], for instance when saying that children should be separated from adults, because holding them in the same place creates conditions that "are extremely prejudicial for their development and makes them vulnerable before third parties who, because they are adults, may abuse of their dominant situation".[152]

State and State Actors under International Human Rights Law", *International Journal of Refugee Law*, vol. 17, 2005, pp. 394-395, 400-407; CARRILLO-SANTARELLI, *Direct International Human Rights Obligations of Non-state Actors: A Legal and Ethical Necessity*, Wolf Legal Publishers, 2017, p. 215.

[149] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 80.

[150] Case *Nadege Dorzema*, *cit. supra* note 27, para. 237.

[151] *Ibid.*

[152] *Ibid.*, para. 176.

3.7. – A Tension between Sovereignty and Limits on State Action in Relation to Migration Aspects?

Different issues related to the protection of the rights of migrants unavoidably impinge on the freedom of States to make decisions and policy choices, for instance in regards to allowing certain foreigners to remain on their territory, to require the payment of their salaries if they have worked without having the proper permits due to their irregular migration *status*, or concerning the decision of to whom the State will grant its nationality, which has been traditionally regarded as falling under the scope of the States sovereignty. Yet, while at first glance it may seem as if there is a tension between sovereignty and human rights considerations, in truth there is none, because sovereignty empowers States to act in a legal way, and acting contrary to human rights is unlawful, reason why the respective acts are neither truly sovereign nor endorsed by international law. It must be recognized that this is so in authoritarian times and when there are discourses of exclusion.

Apart from the fact that the main bodies of the Inter-American System of Human Rights must take into account the States' sovereign rights under *lex lata*, considering that regional Human Rights Law does not exist in a vacuum and must be interpreted, as far as possible, in harmony with other international legal developments,[153] in these troubled, partisan and incensed times we are living in, what supervisory bodies as the Court and the Commission say may have political repercussions and trigger reactions such as withdrawals from international instruments or institutional and financial support. Therefore, one could think that such bodies walk a thin line in order to neither abandon the defence of human rights nor to make decisions that are seen as legally incorrect in light of sovereignty that may bring about the ire of certain States. Facing this conundrum, the stance of the IACtHR has been quite interesting and assertive. This is so because the Court has adopted a legally sound position, according to which it is true that in migration, mobility, and nationality matters, States retain the power to make *certain* choices.

Nevertheless, the IACtHR has well argued that in many of those aspects international law has evolved and ended up regulating some of them in terms of setting forth core protections or lowest common denominators that cannot be ignored. If States make choices that go "below" such guarantees, contradicting them, then their inter-

[153] European Court of Human Rights, *Al-Adsani v. United Kingdom*, Application No. 35763/97, Judgment of 21 November 2001, para. 55.

national responsibility would be engaged. In the own words of the Court, "[t]he determination of who has a right to be a national continues to fall within a State's domestic jurisdiction. However, its discretional authority in this regard is gradually being *restricted with the evolution* of international law, to ensure a better protection of the individual" (emphasis added).[154] Likewise, the San José judges have argued that there is no obligation to employ undocumented migrants, but that if they are employed then their labour rights must be respected and guaranteed, as was mentioned above;[155] and that "[I]n the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants […] provided this is in accordance with measures to protect the human rights of all persons […] to comply with this requirement States may take different measures, such as granting or denying general work permits or permits for certain specific work, but they must establish mechanisms to ensure that this is done without discrimination".[156]

The Court has also said that while States may adopt migration policies, they must bear in mind the 'best interests of the child' principle when their decisions may limit their human rights. For instance, according to the San José judges

> "With regard to possible family separation for migratory reasons, the Court recalls that States have the authority to elaborate and execute their own immigration policies […] a measure of expulsion or deportation may have prejudicial effects on the life, well-being and development of the child, so […] his or her best interests should be an overriding consideration […] the legal separation of the child from his or her family is only admissible if it is duly justified by the best interests of the child, if it is exceptional and, insofar as possible, temporary".[157]

In spite of this necessity of certain measures being exceptional, the Court added that – sadly, to us, in a system still attaching too much importance to State interests instead of those of individuals – "the child's right to family life does not transcend *per se* the sovereign authority of the States Parties to implement their own immigration policies in conformity with human rights […] Convention on the Rights of the Child also refers to the possibility of family separation owing to the deportation of

[154] Case *of the girls Yean y Bosico*, *cit. supra* note 23, para. 140.
[155] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, paras. 135-136.
[156] *Ibid.*, para. 169.
[157] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 416.

one or both parents".[158] This State freedom, though, does not exist when States contravene legal frameworks, "basic procedural guarantees […] international obligations", do not seek "a lawful purpose", do not take any measures seeking "to facilitate family reunification", or engage in discrimination, event in which separation would be legally wrongful[159] – in other words, State freedom in the adoption and implementation of migratory policies has international legal and human rights limits.

Likewise, in the case *Vélez Loor*, the Court said, with very similar words, that "in the exercise of their authority to set immigration policies, States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention", adding that "although States enjoy a margin of discretion when determining their immigration policies, the goals of such policies should take into account respect for the human rights of migrants".[160] Interestingly, the San José judges do refer to a margin. However, they do not equate it with the doctrine of a 'margin of appreciation' as it is understood in Europe. Rather, the Court points towards an understanding of sovereign powers as existing on the condition that the international law is respected, as is described below.

Indeed, the IACtHR position coincides with the conception according to which, as flows from the Permanent Court of International Justice's decision in the case *Wimbledon*,[161] sovereignty does not equate with States having an unfettered power to make decisions. Instead, sovereignty refers to the powers and capacities States have and can exercise *in a manner that is compatible with international legality*.[162] This rule of law consideration underlies the train of thought of the IACtHR, and *a fortiori* provides an argument of consistency: if States demand the respect of the choices they can legally make, the least they can do is respect legality (and the legal developments on the protection of human dignity) themselves.

[158] *Ibid.*, para. 417.

[159] *Ibid.*, para. 418.

[160] Case *Vélez Loor*, *cit. supra* note 4, para. 97.

[161] Permanent Court of International Justice, *S.S. Wimbledon (U.K. v. Japan)*, Judgment of 17 August 1923.

[162] See NOLTE, "Sovereignty as Responsibility?", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 99, 2005, p. 389 ff. The author argued that, according to international case-law, one may describe sovereignty as being about "the liberty of a state within the limits of international law".

Hence, States are not, and should be no longer considered as, the only or preponderant subjects of international law. States and the law are social and political constructs, and, as flows from what Antonio Cançado has well said, they should serve human beings because, in his opinion, they instrumentally exist for them: "[t]he State, created by the human beings themselves, and composed by them, exists for them […] Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality".[163] Moreover, the Court has said, "[t]he goals of migratory policies should take into account respect for human rights".[164]

Considering the previous analysis, we conclude that an alleged tension between sovereignty and human rights of migrants and foreigners, no matter what some States suggest, and as flows from the IACtHR case-law – and other human rights bodies – does not truly exist in international legal terms. This is because, after all, the Court enforces the respect of (human rights) legality, and sovereignty presupposes the respect of that legality. Otherwise, States do not have any freedom whatsoever to contravene that legality – based on the dignity of human beings – and choices they make to the contrary would be unlawful. Furthermore, States must recall that "special measures to ensure the protection of the human rights of […] vulnerable groups" in migration contexts have been adopted at the international level.[165] It must also be noted that the Inter-American System of Human Rights does not use the doctrine of the margin of appreciation;[166] and that even in those regional systems that use, it must be borne in mind that discretion has limits.

4. – Final Remarks: Distilling the Essence of the IACtHR Case-law on Migrants

The analysis of the relevant case-law on the selected issues we have explored in this Chapter has shown a comprehensive picture of the *jus migrandi* as developed by the IACtHR, encompassing developments ranging from the fundamental OC-18/03 *on Undocumented Migrants* to the very recent OC-25/18 *on the Right of Asylum*, and

[163] IACtHR, *Condición Jurídica y Derechos Humanos del Niño*, Advisory Opinion OC-17/02 of 28 August 2002, Concurring Opinion of Judge A.A. Cançado Trindade, para. 19.

[164] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 168.

[165] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 59.

[166] CARRILLO-SANTARELLI, "La legitimidad como elemento crucial de la efectividad de pronunciamientos de la Corte Interamericana de Derechos Humanos ante casos complejos y desafíos regionales", *Revista general de derecho público comparado*, 2015/18, p. 1 ff.

passing through the OC-21/14 *on Migrant Children* and contentious-jurisdiction decisions. Moreover, a look "beyond the Court" has shown the IACHR's proactive role in the promotion of human rights in the Inter-American System of Human Rights. We reported the case of Venezuelan migrants and pertinent IACHR resolutions recalling (all) the OAS Member States' basic obligations, e.g. to recognize the refugee *status* and to respect the *non-refoulement* principle. That is a good example of how that OAS body can act in a preventive way, complementing, confirming, and strengthening the standard of protection of human rights judicially developed, even in relation to non-parties to the ACHR.

Definitely, with its case-law and developments, the Court and other OAS bodies have contributed by providing guidelines on the responses to migration, on the protection of the human rights of migrants, and on the prevention of factors that may lead to a worsening or eruption of migratory crises. Interestingly, those bodies have also stood up to human rights abuses against migrants coming from States as different in terms of power as the USA and Latin American States, thus disproving what some may believe as to the Inter-American System of Human Rights supposedly being only concerned with the latter and not daring to scrutinize USA violations. The Court and other OAS bodies have developed a case-law that, while responding to what happens in the region of the Americas, echoes pronouncements and the identification of issues that have been taking place elsewhere. The humane approach they have come up with, which is legally sound and based on principles similar to those of other regions, is likewise worth considering by other regional and universal human rights supervisory bodies – which have considered what the IACtHR has said in other fields already.[167]

That being said, when trying to distil the very essence or main points of the analysed case-law, some fundamental points emerge.

Firstly, migrants are vulnerable. They suffer from some unequal conditions when compared to nationals, and that calls for specifically considering their needs in human rights terms, beginning with an analysis of the basic rights (a) not to be discriminated against and (b) to equality before the law.

Secondly, specific demands of protection must be considered in relation to each migrant as well. For instance, in the OC-21/14 *on Migrant Children* the San José judges analyzed the *non-refoulement* principle as an autonomous right established in

[167] For instance, see European Court of Human Rights (Grand Chamber), *Margus v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, paras. 56-66, 131, 138.

the ACHR as well as an obligation derived from the prohibition of torture and other human rights provisions, also stressing that, when migrant children are involved, the need to interpret them in light of the children protection are entitled to.[168] In the same OC-21/14, the IACtHR affirmed that in proceedings on the refugees *status*, the general due process and remedies guarantees *ex* Articles 8 and 25 ACHR apply, and that if children are involved proceedings that are appropriate and safe for them must be ensured and processed in an adequate environment, avoiding any possible psychological stress or harm (e.g. in case of denial), always taking into account the best interests of the child principle.[169] In that regard, in the OC-21/14 it was said that "International migration is a complex phenomenon that may involve two or more States, including countries of origin, transit and destination, for both migrants and those seeking asylum or refugee *status*. In this context and, in particular, that of mixed migration flows that entail population movements of a diverse nature, the characteristics of and the reasons for the journey that children undertake by land, sea or air, to countries other than those of which they are nationals or where they habitually reside, may bespeak both persons who require international protection and others who are moving in search of better opportunities for diverse reasons, which may change during the course of the migratory process. This means that the needs and requirements for protection may vary widely".[170]

Thirdly, States must respect and ensure human rights provided for ACHR in benefit of every person under their jurisdiction, migrants included, even in the case of irregular entry and/or *status*. In some cases, the Inter-American standards of protection take on a particular meaning. For instance, concerning International Refugee Law elements, the *non-refoulement* principle has a wider field of application, considering that the Inter-American System of Human Rights protects all aliens under the jurisdiction of States in the region, and not only refugees.[171] This development is certainly welcome as it raises the level of protection of human rights in the Americas. From a general perspective, the same development is welcome also because it can influence other systems of protection of human rights. In fact, just as the IACtHR has adopted comparative analysis and cross-fertilization as hermeneutical tools to

[168] OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 45.
[169] *Ibid.*, *passim*.
[170] *Ibid.*, para. 36.
[171] *Ibid.*, paras. 216-217.

interpret the ACHR, taking advantage of international law and international practice, it is also worth reminding that other Courts and bodies have also taken note of the Inter-American practice and case-law as an interpretative tool[172] that may reflect the crystallization of legal standards. We think that this cross-fertilization dynamic in both ways represents a key element for the development of general and regional rules on the protection of migrants.

Fourthly, as was argued in the Chapter, a tension between sovereignty and limits on State action in relation to migration aspects does not really exist, due to the fact that sovereign decisions must respect human rights – and other – international legal obligations. Since the OC-18/13 on *Undocumented Migrants*, the Court has built a set of protection standards, progressively adding new indications on migrants' rights, depending on the specificities of each case and alleged violations of the ACHR. The result is the Inter-American *jus migrandi* in best part summarized in the OC-25/18 *on the Right of Asylum* and made up of limitations to the States' latitude when regulating and handling migratory flows and their effects. Just to point out an example, we can recall the employment of undocumented migrants: there is no obligation to employ them (*i.e.*, related to a sovereign decision on employment permits), but if they find a job, the duties to respect and guarantee their labour rights arise and bind the State involved both when labour takes place in private or public relations.[173]

In sum, migrants are rightfully recognized as human beings, as human and with

[172] *Ex multis*, see CAMARILLO GOVEA, "Convergencias y divergencias entre los sistemas europeo e interamericano de derechos humanos", *Revista Prolegómenos-Derechos y Valores*, 2016, p. 80 ff.; DI STASI, "La Corte interamericana e la Corte europea dei diritti dell'uomo: da un *trans-regional judicial dialogue* ad una cross-fertilization?", in ARROYO LANDA et al. (eds.), *Diritti e giurisprudenza. La Corte interamericana dei diritti umani e la Corte europea di Strasburgo*, Napoli, 2014, p. 1 ff.; GROPPI, LECIS COCCO-ORTU, "Le citazioni reciproche tra la Corte europea e la Corte interamericana dei diritti dell'uomo: dall'influenza al dialogo?", in MELICA et al. (eds.), *Studi in onore di Giuseppe De Vergottini*, Padova, 2015, p. 439 ff.; HENNEBEL, "Les Références Croisées Entre Les Juridictions Internationales Des Droits De L'Homme", en MARTENS et al. (eds.), *Le dialogue des Juges – Actes du colloque organisé le 28 avril 2006 à l'Université libre de Bruxelles*, Bruxelles, 2007, p. 16 ff. With specific regard to the influence of the case *Vélez Loor* on the EU Court of Justice decision in the case *El Didri* (Judgment of the Court, First Chamber, of 28 April 2011, Hassen El Dridi, alias Soufi Karim. Reference for a preliminary ruling: Corte d'appello di Trento – Italy C-61/11 PPU), see NICOLOSI, "The Treatment of Irregular Migrants in the Inter-American Human Rights and European Union Case law. Two Parallel Lines May even Meet", in HAECK et al. (eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge-Antwerp-Portland, 2015, p. 593 ff.

[173] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, paras. 135-136.

as much dignity as anyone else, and thus deserving and being entitled to the recognition of their equal dignity and worth, which do not depend on any factors different from human identity[174] such as the random place of birth or origin. As the Court has well pointed out,

> "The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity […] according to which '[a]ll human beings are born free and equal in dignity and rights'".[175]

Indeed, the dignity of all migrants without discrimination must be respected by States – and other actors – whenever they interact with migrants. In that regard, it's due to remind what the Court affirmed in the case *Pacheco Tineo Family*, *i.e.* that

> "under international law, certain limits have been developed to the application of migratory policies that impose, in proceedings on the expulsion or deportation of aliens, strict observance of the guarantees of due process, judicial protection and respect for human dignity, whatsoever the legal situation or migratory status of the migrant".[176]

Additionally, it is important to bear in mind that several circumstances may generate migration dynamics, which are sadly too often related to risks, vulnerability and abuses of rights. Moreover, the recognition of the equality and non-discrimination that all human beings are entitled to – as a matter of peremptory law, no less – [177] and the principle of legality underpin the *jus migrandi*, as has been well recognized by the IACtHR. It has well pointed out that several regimes, including human rights law, with their due process and other guarantees and freedoms, are applicable when examining the treatment of migrants. Whenever their rights may be affected, proper guarantees must be observed. Indeed, the San José judges have repeatedly held that due process must be guaranteed to everyone, regardless of their migratory status, because the broad scope of the intangible nature of due process applies not only *ratione materiae* but also *ratione personae* without discrimination, and also that States have the obligation to ensure this fundamental principle to their citizens and to any alien who is in their territory, without any discrimination based on their regular or

[174] CARRILLO-SANTARELLI, *cit. supra* note 148, pp. 45, 77-78.
[175] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 157.
[176] Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 129.
[177] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 101.

irregular presence, their nationality, race, gender or any other condition. That being said, and as was indicated previously in this Chapter, the Court has also held that, when considering the principle of equality and non-discrimination, it is

> "permissible for the State to grant a different treatment to documented migrants in relation to undocumented migrants, or to immigrants in relation nationals, 'provided that this treatment is reasonable, objective and proportionate, and does not harm human rights'".[178]

Finally, it's worth mentioning a further point regarding the analysed case-law. The consolidation of the Inter-American set of standards for the protection of migrants has much to contribute to international law and practice and deserves being studied by other regional systems and the UN system of protection of human rights. The potential multidirectional cross-fertilization represents a key element for the development and interpretation of standards on the protection of migrants, for instance in regard to the recognition of the principle of equality before the law and non-discrimination as a *jus cogens* one[179] or the identification of *non-refoulement* not only as treaty but also as found in customary law (even as a peremptory requirement if a person would torture or cruel, inhuman or degrading treatment if returned).[180] Those standards, furthermore, generate *erga omnes* legal effects. Additionally, the *raison d'être* of the rights and guarantees of migrants should never be forgotten. They ought to provide protection for all migrants, independently of their origin and destination, be them a group of Haitians crossing the Dominican border in search of a better life or those who, escaping from poverty and/or persecution, navigate the seas to reach the coasts of the EU Member States or Australia.

Inter-American practice and case-law may also be considered to declare international law. In that regard, under a *de jure condendo* perspective, the reliance made by the IACtHR on the works of the International Law Commission, which in 2014 adopted a draft of treaty on the expulsion of aliens,[181] deserves a special mention. In relation to mass deportation and other aspects, it takes into account the vulnerability of migrants (Article 15) and addresses elements of the protection and rights of mi-

[178] Case *of expelled Dominicans and Haitians*, *cit. supra* note 23, paras. 351, 402.

[179] OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 101.

[180] OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, para. 179.

[181] International Law Commission. *Expulsion of aliens*, *cit. supra* note 144 The Court made references to the draft in the case *Nadege Dorzema*, in the case *Pacheco Tineo Family*, in the case *of expelled Dominicans and Haitians* and, finally, in OC-21/14 *on Migrant Children*.

grants, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and the connected obligation to not expel an alien who may face the risk of such treatment (Articles 17 and 24). In some cases, the International Law Commission mentions, in its commentaries to Articles and with interpretative relevance, the IACtHR case-law and the IACHR practice, which are part of the Inter-American *jus migrandi* that likely had an influence on the writing of the draft and may also contribute to the future codification of international law,[182] being this evidence of the cross-fertilization we have referred to, and which more than justifies studying Inter-American developments and standards in different regions and levels of governance.

Interestingly, in December 2017, the United Nations General Assembly took note of the draft, acknowledged the comments expressed by Governments in the 6th Committee ("Legal questions"), and decided to include the item "Expulsion of aliens" in the provisional agenda of its 75th session (2020), with a view to examining, *inter alia*, the question of the form that might be given to the articles or "any other appropriate action".[183] Indeed, the future adoption of the draft by the UN General Assembly would represent a further and important step forward the codification of a general more comprehensive (universal, we could affirm) *jus migrandi* and would have an Inter-American footprint. Migration dynamics take place all over the world, and human beings are their protagonists who deserve the recognition of their dignity and the respect of the rights flowing from it.

[182] For instance, the International Law Commission referred to the case *Berenson* (IACtHR, *case of Lori Berenson Mejía v. Peru [Merits, Reparations, and Costs]*) in the commentary to Article 24 "Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment", in order to sustain the absolute character of the prohibition *de qua*. As for the IACHR practice, in the commentary to Article 29 "Readmission to the expelling State" some references regard its recommendation on the prohibition of arbitrary expulsions.

[183] United Nations, General Assembly, UN Doc. A/RES/72/117, adopted on 7 December 2017 at its 67th plenary meeting.