

Migrants and Refugees: Resolutions Of the Inter -American Court Of Human Rights

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Abstract: We expose the human rights violations to migrants and refugees from the resolutions and advisory opinions issued by the Inter-American Court of Human rights in three different parts: firstly, the refugees and migrants, concepts, children, asylum. In the second part, it is analysed minimum rights of migrants and refugees such as integrity and personal freedom, access to justice, due process, non-discrimination and consular assistance. On the third part, it would be discussed the compensation of damages, including capacitation programs and public media campaigns.

Keywords : asylum, imprisonment, inter-american court of human rights, migrants and refugees.

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I. INTRODUCTION

Due to the massive movement of people in Latin America because of the wellness concentration in a few number of the population; a wide and savage competence; unemployment; the lack of respect to human rights; the destruction of the environment; hunger; the undernourishment; general violence; fear; the corruption; and the presence of politicians in organized crime; the slowness of the national justice that sometimes represents the delay of procurement and national justice administration, becoming impunity of justice in Latin America that the Inter-American Court of Human Rights solves the cases in a subsidiary manner and by means of advisory opinions regarding the human rights of the refugees and migrants. We expose the most important criteria, either about violations to human rights to these vulnerable groups, we explain the legal reasoning, and motivations that fulfil the protection of these human rights.

II. REFUGEES AND MIGRANTS

Currently, the concepts of migrant and refugees might be confused due to the increasing number of forced migrations. Migrant is a concept that covers the individual (immigrant) that leaves one country with the purpose to move to another one and get established there, as well as the immigrant that goes to another country with the intention to be resident there. (IACHR, Advisory Opinion OC-18/03).

In the case of the refugee it is provided in article 1 of the 1951 Convention Relating to the Status of Refugee, modified by the Protocol of 1967 that a refugee is a person who:

- As a result of well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,
- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (IACHR, Case Tibi v. Ecuador, para 144).

Differently to common migration, refugees based their displacement on persecution motives as established by the resolution cited, they move from one country to the other, in search of protecting their personal integrity and life. This contrast between migrant and refugee allows the International Law the inclusion of specific rights for individuals considered refugees to protect them in the country where they obtained such condition, because the contrary would permit an extreme vulnerability in relation with their rights.

It is important to mention that once the condition of refugee has been determined, it would not end unless one of the clauses of cessation of article 1 of the Convention of Refugees exist. Additionally, a strict procedure of recognition by the State where the refugee is and the other States is necessary (IACHR, Case Tibi

v. Ecuador). For the recognition of refugee to be valid it has to have the elements of inclusion, specifically: a) be outside the country of origin, it means the country of nationality or of habitual residence of the stateless; b) have well-founded fear; of c) being persecuted d) for reasons of race, religion, nationality, membership of a particular social group or political opinion, e) as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (IACHR, Advisory Opinion OC-21/14).

2.1. CHILDREN

Likewise, it is important to interpret the request and condition of a refugee in favour of children accompanied or not to obtain asylum without restriction. The State is bound to clearly explain the children how to request and obtain asylum according to article 22.7 of the American Convention (IACHR, Advisory Opinion OC-21/14) since the children are not safe from the consequences of the bad treatment caused by the forced migration, such as organized transnational crime and violence associated with these groups. That is why the State has an obligation to carry out an early identification of the children that run away due to the fear of being forcibly recruited by the organized crime or armed conflict. The right to request asylum in the State includes:

- (i) to allow children to request asylum or refugee status, which consequently means they may not be rejected at the border without an adequate and individualized analysis of their requests with due guarantees by the respective procedure;
- (ii) not to return children to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk; and
- (iii) to grant international protection 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 (IACHR, Advisory Opinion 21/14 para 81)

The age and gender should be elements to consider when interpreting the request and condition of a refugee, regarding the minors, the girls that are under vulnerability because of their gender by means of a cultural, economic or judicial situation.

On the other side, the decision to be adopted by the competent authority in regards with the request of recognition or not of the refugee condition should be founded and communicated in a language according to the age and development of the kid. In case of recognising the condition of refugee, the issuance of the corresponding document about the migratory condition of the one requesting constitutes a safeguard as it concedes the necessary rights to avoid expulsion or return.

2.2. ASYLUM

The right to request asylum is conformed by the corpus iuris that was firstly codified by the Treaty of International Criminal Law in 1889, until the adoption of the Convention on Territorial Asylum and the Convention on Diplomatic Asylum, both of 1954. The American Declaration of Rights and Duties of Man in 1948, established on its article XXVII the right of asylum. Lately, the Convention Relating to the Status of Refugees of 1951, was approved as law framework to treat the situation of the refugees as consequence of the Second World War. On the other side, the American Convention of 1969 establishes the right of every person to look and obtain asylum as provided in article 22.7 (IACHR, 2013, Case Family Pacheco Tineo v. Bolivia)

The inclusion of the right to request and obtain asylum in different international treaties and the creation of Protocols over the same issue in America have allowed that this right becomes of general interest as they are necessary to protect subjective rights to guarantee every person, including children, the opportunity to request and obtain asylum. (IACHR, Advisory Opinion OC-21/14)

The identification of the need of protection allows that the procedures contain measures of individually protection and depending on each individual situation, together with the corresponding amendments for the superior interest of the child, the participation of the children and the right to be heard during the whole administrative or judicial procedure where they are involved. The procedures of needs identification constitute the positive obligation of the State as the refugee may enjoy the corresponding assistance and support and of their rights.

In case of children, it is necessary to consider special measures according to their age and development, such as the legal representation that shall be free of cost, and have the requested specialization. During the process it is of the essence the participation of the children in the communicative dynamic, to express their opinions, to participate on a personal interview to execute their right to be heard, specially when they can't give an interview it would be mandatory to implement non verbal communication methods so their right is not obstructed. The interview should be done in adequate environment according to the needs and safety of the children.

Likewise "none Contracting State should, by expulsion or return, put in any way a refugee in the borders of the territories where their life or freedom are in danger for reasons of their race, religion, nationality, membership of a particular social group or political opinion" (Convention Relating to the Status of Refugees

article 33.2). The State has the obligation to protect the personal integrity of the refugee, as well to guarantee the accomplishment of the principle of no return through positive measures. Violations to the rights of due process come with the violation of the principle of no return, which is the main reason of the positive measures.

III. MINIMUM RIGHTS OF MIGRANTS AND REFUGEES

3.1. INTEGRITY AND PERSONAL FREEDOM

The right of personal integrity is provided in article 5 of the American Convention and the Court establishes the importance of on time medical support, as well as the access of this help in marginal areas. It establishes also that is necessary the separation of the retained persons in migratory situations from the ones condemned by criminal crimes due to the nature of their confinement in a migratory situation, and the later should remain the less time possible. (IACHR, 2010 Case Vélez Looz V. Panamá). Regarding the principle of separation of underage if they are children not with the company of an adult, they should stay in a different place than adults and if it is children with adults, they should stay with their families except in cases of a higher interest of the kid. (IACHR, Advisory Opinion OC-21/14)

The right of personal freedom is constituted in article 7 of the American Convention and the Court establishes that in confinements it should be respected the rights of such article. The confinement measures according to the principle of no arbitrary detentions would have the object of the detention for reasons of safety and public order that under interpretation should be during the less time possible and only when it is strictly necessary. The Court establishes that the confinement exclusively for migratory situations is arbitrary.

Is a State obligation to inform the reasons of the arrest to the migrant when this takes place and it would be provided such information through a comprehensive language according to the age and condition of the person detained.

One cause of violations to human rights of migrants is the non existence of rights in the legal framework of the country they are and the arbitrary of the development of the procedure in case of imprisonment of persons. That is why is of the essence to present the detained person to a competent judicial authority that would allow the right to be heard and determine the validity of the detention, such authority must be impartial and independent.

The right to access to justice is established in article 8 and 25 of the American Convention, where the Court has pronounced itself mentioning that "States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status" (Advisory Opinion OC-18/03 para 107.). Alongside with the above, the right to access to information should be guarantee above to than formally, it should go to reality than administrative situation. Persons should be guaranteed:

(a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation. This notice must include information on their rights, such as: (i) the possibility of explaining their reasons and contesting the charges against them, and (ii) the possibility of requesting and receiving consular assistance, legal advice and, if appropriate, translation or interpretation services; (b) if an unfavorable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual expulsion decision, which must be duly reasoned pursuant to the law. (IACHR, CASE OF EXPELLED DOMINICANS AND HAITIANS v. DOMINICAN REPUBLIC, para 356.)

These minimum guarantees assure the right to justice access without discrimination, expedite and on time in equality conditions as well to include the requirements for the detentions under a legal frame procuring the confinement during the less time possible. the possibility to request diplomatic assistance and a translator allow the person to freely and without discrimination exercise his/her right to access to justice.

3.2. DUE PROCESS

- a) They must guarantee the applicant the necessary facilities, including the services of a competent interpreter, as well as, if appropriate, access to legal assistance and representation, in order to submit their request to the authorities. Thus, the applicant must receive the necessary guidance concerning the procedure to be followed, in words and in a way that he can understand and, if appropriate, he should be given the opportunity to contact a UNHCR representative;
- b) The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority, and requires a personal interview
- c) The decisions adopted by the competent organs must be duly and expressly founded;
- d) In order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant's personal information and the application, and the principle of confidentiality;

e) If the applicant is denied refugee status, he should be provided with information on how to file an appeal under the prevailing system and granted a reasonable period for this, so that the decision adopted can be formally adopted, and

f) The appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded. (Case Of The Pacheco Tineo Family V. Plurinational State Of Bolivia, Para 159.)

The minimum rights of due process establish the following obligations to the States:

The right to an interpreter, objectivity, the basis of the decisions of the organs, data protection, reasonable time and the appeal of review or appeal constitute the minimum guarantees of due process to determine the refugee status within a framework of legality, in addition, the legislation of the refugee receiving State can be included to provide greater security in the process.

The due process in article 8 of the American Convention of Human Rights establish the guarantees that should be respected by the administrative organs that provide justice with respect to the cases of migratory sanctions.

The principle of non-discrimination must be present in order to ensure respect for the enjoyment of rights of migrants irrespective of the state of their immigration status within the conditions of procedural equality. (IACHR, 2010, Case Velez Loo v. Panamá.) Likewise, the adaptation of domestic law plays an important role since national legislation should provide for the officer to comply with the characteristics of impartiality and independence in order to be compatible with respect for the human rights of international law.

Every migrant, regardless of his or her immigration status, has the right to legal assistance by a legal professional, as this also gives the right to a defense, since it allows the person undergoing the process to have effective access to justice with the adequate technical defense, especially that the migrant person may not be aware of the legislation of the receiving State and thus place himself in a situation of vulnerability of his rights. With respect to minors, the State also has the obligation to provide specialized legal representation according to its age and development, while ensuring the best interests of the child (IACHR, Advisory Opinion OC-21/14) Through representation, the right to be heard through interviews must be sought, and the process must be carried out in an environment appropriate to the child's age, at all times carried out by personnel specialized in the profiles of minors.

These guarantees form part of the minimum guarantees available to migrants regardless of their immigration status, which are also complemented by consular assistance by the receiving State. The right of effective access to consular assistance provides for compensation measures that contribute to reducing or eliminating obstacles and deficiencies that impede or reduce effective defence. (Advisory Opinion OC-16/99)

The right of access to effective for consular assistance must be notified to the detained migrant from the moment he is deprived of his liberty before making his first statement, the notification will include his right to contact a family member, a lawyer or a consular officer. (IACHR, Case Tibi v. Ecuador). This right is found in article 36 of the Vienna Convention on Consular Relations and encloses the right to be notified of their rights and the right of consular assistance. Along with the above, the consular assistance should must be directed to the protection of the interests of the detainee, consular officials shall have the right to visit the national of the State and to organize his defense before the courts (IACHR, 2010, Case Vélez Loo v. Panama)

The right of effective access to consular assistance allows the detained person the enjoyment of his right to due process, as well as providing him with the minimum guarantees that any detained migrant has, regardless of their immigration status.

3.3. HARM REPARATION

The Court establishes as ways to repair harm:

1. The creation of programs training programs for public officials. The training of public officials is crucial to generate guarantees of non-repetition of facts. Such training and training programs will ensure that:

(a) that racial profiling never constitutes a reason for detention or expulsion; (b) strict observance of the guarantees of due process during any proceedings related to the expulsion or deportation of aliens; (c) that Dominican nationals are never, in any circumstance, expelled, and (d) that collective expulsions of aliens are never executed. (IACHR, CASE OF EXPELLED DOMINICANS AND HAITIANS v. DOMINICAN REPUBLIC, para 465)

Adequacy of internal regulations to conventional standards. Due to the recurrence of human rights violations, the Court considers it pertinent to adopt legal, administrative and other measures to prevent the occurrence of these violations as well as part of the State's obligation to fulfill its responsibilities in the American Convention on Human Rights. Likewise, the implementation of measures necessary to adopt establishments for persons detained for migratory issues to respect the principle of separation of persons

sentenced for criminal offenses ensuring the capacity of these establishments. (IACHR, 2010, Case Vélez Loor v. Panama)

2. To carry out campaigns in public media. The Court considers it pertinent to conduct public media campaigns on the rights of migrants in a regular and irregular situation (ICHR, 2012, Case Nadege Dorzema and others v. Dominican Republic) with the intention to make the population aware of this issue and thus to provide migrants with the information necessary for their process in the receiving State.

IV. CONCLUSION

First. The determination by the Inter-American Court of refugee "recognition" is important, because it confirms that it is not an act of creation of the right to be a refugee, but the finding of a fact that the condition has. The requirements to be refugees are: being outside your country; founded fear; threat or persecution; these may be for reasons of discrimination; and that he does not want to avail himself of the protection of his country.

Second. The Inter-American Court obliges States with respect to migrants and refugees: to clearly explain the right to request and receive children, since many of them flee from fear of forced recruitment due to armed conflict or organized crime; no return or expulsion may lead to a refugee at the border when his life or personal integrity is endangered; provide timely medical care; to separate migrants and refugees from persons accused of their possible responsibility for the commission of a crime; that custodial detention on grounds of security and public order must be exceptional and last for as short a time as possible; deprivation of liberty obliges the State to inform migrants and refugees of the reason for their detention, to be held by competent authority, to be heard, to be an impartial and independent authority and to meet the other minimum guarantees that these vulnerable groups must have; request and receive legal assistance, assistance in consulting, interpreting services, protection of their judicial guarantees, access to justice, and receiving duly substantiated and reasoned resolutions.

Third. Regarding to reparation of harm, it is envisaged as a preventive measure, as a guarantee of non-repetition, that training programs and mass campaigns on human rights and treatment for public officials involved in human rights violations and members of institutions linked to these vulnerable groups to such groups.

REFERENCES

- [1] Corte IDH, Condición jurídica y derechos de los migrantes indocumentados, Opinión Consultiva OC-18/03 de 17 de septiembre de 2003, Serie A No. 18, (2003).
- [2] Corte IDH, Caso Tibi Vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 7 de septiembre de 2004. Serie C No. 114, (2004).
- [3] Corte IDH, Derechos y garantías de niñas y niños en el contexto de la migración y/o en necesidad de protección internacional, Opinión Consultiva OC-21/14 de 19 de agosto de 2014, Serie A No. 21, (2014).
- [4] Corte IDH, Caso familia Pacheco Tineo Vs. Bolivia, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 25 de noviembre de 2013, Serie C No. 272, (2013).
- [5] Convención sobre el Estatuto de los Refugiados, artículo 33.2, adoptado en Ginebra, Suiza, el 18 de julio de 1951, adhesión de México el 7 de junio de 2000 y decreto promulgatorio DOF el 25 de agosto de 2000.
- [6] Corte IDH, Caso Vélez Loor Vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 23 de noviembre de 2010, Serie C No. 218, (2010).
- [7] Corte IDH, Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 28 de agosto de 2014, Serie C No. 282 (2014).
- [8] Corte IDH, El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal, Opinión Consultiva OC-16/99 de 1 de octubre de 1999, Serie A No. 16.

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