Report for the UN Human Rights Committee-The situation of Migrants and Refugees in Chile

Jesuit Migrant Service of Chile

The Jesuit Migrant Service is a non-governmental organization, founded in 2010, after many years of serving the migrant community in the "Jesús Obrero" parish.

Our organization promotes and protects the dignity and human rights of migrants and refugees in Chile by advocating for their social inclusion process through multidimensional work and promoting for the recognition of diversity as a value for society.

1. Chilean context

The last estimation of the immigrant population in Chile was done by the National Institute of Statistics (INE) and the National Migration Service (SERMIG) in 2023. For the first time it considers people with regular status, along with people with no regular status, stating that as of December 2022, 1.625.074 foreign-born people were living in Chile, of which 6.6% have no legal status. Regarding their nationalities, they are mainly from Venezuela (32.8%), Peru (15.4%) and Colombia (11.7%).

2. Criminalization of Migration

Chile is currently politically very polarized, with immigration becoming a highly relevant issue for the local population, included in every political debate and intensely covered by the media.

According to the IPSOS-Espacio Público 2023 survey[1], immigration has been among the main problems Chile has faced in the last ten years.

There is a strong association between immigration and crime. The CEP survey (one of the country's main surveys, prepared by the Center for Public Studies), indicates that 69% of Chileans agree that immigrants increase crime rates[2].

In this context, there has been a tendency towards criminalization of migration in the public and political debate, with emphasis on irregular migration, reversing the progress that the new immigration law (21.325) meant in this regard in its article 9, stating the decriminalization of irregular migration and declaring that irregular migration did not constitute a crime, but an administrative infraction.

In particular, the criminalization of migration increases prejudices and negative stereotypes about migrants, making their integration difficult, and increasing the risk of violence against them.

[1] https://espaciopublico.cl/nuestro_trabajo/encuesta-espacio-publico-ipsos-2022-chilenas-y-chilenos-hoy/
[2] https://www.cepchile.cl/investigacion/inmigracion-y-delincuencia-ultimas-cifras/

2.1. *"Valencia" Criterion*[3]*:*

Since the murder of Policeman Palma at the hands of foreigners, this criterion was established by the National Prosecutor (hence his name), which instructs prosecutors to request pretrial detention for any immigrant who has been detained as a suspect of a crime and who does not have identity documentation.

The Courts have been accepting this criterion, including in their consideration if the person detained has non-expired identity documents, to decide about pretrial detention, independently of the seriousness of the crime committed by the person. It is well known the challenges that Venezuelan and Haitian populations have faced regarding obtaining identity documents and passports with no support from their consulates in Chile. At the same time, Congress is discussing a bill that seeks to establish the "Valencia criterion" as a mandate to judges in the criminal system.

Bulletin 15261-25 contains said bill, which proposes in paragraph 4: "*To decree pretrial detention, the court will understand that there is a risk of flight of the accused person when his identity is unknown, he lacks identity documents that provide a reliable account of his identity or he lacks the means to pay for his stay in the country during the investigation period*". This bill constitutes a violation of the equal protection clause in the Chilean Constitution (Article 19 number 2) as well as Article 24 of the American Convention of Human Rights.

It is necessary to take into account that pretrial detention constitutes the most serious precautionary measure in our criminal system. The judge takes into account certain considerations, such as the type of crime, how to preserve the success of the investigation, and the fact of having acted in a group or gang.

To establish an alternative for those immigrants who have no current identity document and at the same time as a way to prevent the application of pretrial detention in an abusive way for non-serious offenses committed by immigrants, avoiding greater overcrowding and prison overpopulation, added to the costs that this may entail for Chilean criminal system, we propose as a possible solution to use the biometric registration the Chilean government has promoted these last months. Considering the reality of hundreds of Venezuelan citizens for whom it is impossible to access identity documentation from their Consulate in Chile, it would be advisable that the efforts made by the Chilean government in registering them can be used to also preserve pretrial detention as a measure of last resort.

There is another bill discussion currently at Congress that seeks to resolve this using the figure of biometric enrollment, led by the Civil Registry. It is essential that when the justice system analyzes whether a person will be kept in pretrial detention, there may be alternative forms of identification that will permit the system to safeguard pretrial detention as a last resort for those people who are a certain threat to public safety.

2.2. *Criminalization of entry with no inspection in Chile*:

[3] El País, Noticia "*Los fiscales de Santiago de Chile pedirán la prisión preventiva de todos los extranjeros sin DNI vinculados a un delito"*. 7 de abril de 2023. Disponible en: https://elpais.com/chile/2023-04-07/los-fiscales-de-santiago-de-chile-pediran-la-prision-preventiva-de-todos-los-extranjeros-sin-din-vinculados-a-un-delito.html

The proposal of bill 15.261-25, means a setback concerning what was agreed upon in approving the new immigration law 21,325, which expressly establishes in Article 9 the principle of non-criminalization. "*No criminalization. Irregular migration does not constitute a crime*."

According to the proposed bill, entering without inspection would be considered a crime. As noted previously, this project contemplates establishing the valence criterion as law, modifying the regulation of pretrial detention, and contemplating a modification related to the refugee law.

The courts of justice have already expressed an important burden of reviewing immigration law cases. It is important to mention that Chile has no immigration courts. Considering this, criminal courts would face an overload of entering without inspection cases, with no new resources announced to face the prosecution of this new crime.

Regarding the impact of the modifications proposed by this project on the refugee law, as an exception to the punishment of entering without inspection, it is contemplated that "*it will not be applied to foreigners who meet the conditions to be recognized as refugees, as long as they come directly from the territory where their life or freedom is threatened*." There is no regional Safe Third Country agreement, and it ignores the reality of regional immigration, and the transit Venezuelans take to arrive in Chile. This ignores the possibility that a person transited countries that may be considered safe but where obtaining recognition of refugee status is not possible, or other reasons to fear for the safety of that person. As it will be explained when discussing international protection in Chile, unfortunately, this was also stated in a bill that has already been approved that has changed important aspects of Chilean Refugee Law.

3. <u>Removal Proceedings</u>.

According to Chilean law, a removal proceeding is now mandated to order a person to be removed from the country. The law establishes a list of conducts that are punished with removal, including entering without inspection. It also legally includes a list of considerations for the authority to evaluate to decide if a person should be removed from the country. Among those considerations, relatives in the country, if the person is working, and if the person has a criminal record should be considered. The authority in charge of deciding if someone should be removed is the National Service of Migration. In the previous law, there was no proceeding considered, so the person could get a removal order if their illegal entry into the country was discovered by the police.

Another positive aspect of the new law is that it prohibits collective expulsions. It is indicated in Article 130 that "*Foreigners and their family members may not be subject to collective expulsion measures, and each case must be analyzed and decided individually*."

However, even though the removal orders issued since February 2022 have effectively established instances for reviewing the personal circumstances of someone who may be removed, there are still risks of collective expulsions concerning immigrants who have a current removal order from the previous law (Decree Law 1094), since, there was no instance for the administration to review the case of a person who had been ordered removed. If someone who has an old removal order is detained, they may be removed

from the country with very short notice and with not enough time to present a judicial action as a habeas corpus for courts to review the legality of the removal order.

This has been seen in the context of biometric registration that has been promoted by the government of President Boric. This effort seeks to achieve a national registry aimed at foreigners over 18 years of age, who have entered Chile without inspection until May 30, 2023, and who currently live in the country. Confident that this information could be taken into account in a possible regularization process, civil society promoted the participation of people in said process.

Unfortunately, several people with current removal orders issued under the previous law (Decree Law 1094) were detained and removed from the country the following day of their detention. Of such cases, the Jesuit Migrant Service represented 7 people, including a woman with her minor son, who was detained before their removal, and where judicial actions did not stop their removal from the country so they never had due process with no opportunity for her case to be heard.

The case to which we are referring is of a Dominican woman, who was a domestic violence victim in Chile and whose son was attending school. On October 24th, 2023, the woman, who did not have a criminal record, and who is, as has been said, a mother and a domestic violence victim recognized by the State of Chile, attended with her minor child to the offices of the Chilean Investigative Police (PDI) located at Calle San Francisco No. 253, in Santiago, to carry out the biometric registration process that has been promoted by Chilean government. She aimed to fully comply with Chilean regulations and with the hope of being able to regularize her immigration status, after 5 years living in the country. In this context, she is detained along with her son, and after a few days, both of them are removed from the country, despite there being a judicial action to review the legality of the removal order.

At the same time, even though Law 21.325 promoted that the notice of the beginning of the removal proceeding and the removal order was supposed to be handed in person, understanding the difficulties that migrant and refugee populations have in maintaining a fixed address, or accessing internet, that was changed by Congress.

On August 18th, 2023, Law 21.589 was approved, which modifies Law 21.325, giving the possibility of notice of removal proceedings initiated being sent by certified mail to the last address registered by an immigrant or by email. This is quite sensitive as, once a person receives notice of removal proceeding, they only have ten days to present their circumstances to the Chilean authority.

The notice of the removal order, in turn, must be personally handed, however, in those cases in which it is not possible to do that because the person has not been found on two consecutive days and at different times, the official will proceed to certify such circumstance in the file and will send the notice by certified mail or email, when appropriate.

3.1. *Detention while in removal proceedings.*

On August 7th, 2023, Law No. 21.590 took effect as it was published in the Official Gazette. This bill modifies Law No. 21.325, extending the period of detention to remove a foreigner from the country when there is an administrative removal order. It is important to notice that administrative removal orders are the ones the National Migrant Service decides, as judicial removal orders are an alternative measure for serving

sentence where the judge can decide a convicted foreigner, instead of serving prison time for minor crimes, can, instead be removed from the country.

This entails complex consequences from the perspective of the equal protection clause (Article 19 number 2 of the Chilean Political Constitution), Article 7 of the Universal Declaration of Human Rights, and Article 2 of the American Convention of Human Rights.

To ensure there would be no constitutional issues if the extension of possible detention for administrative removal orders execution was approved, Congress passed an amendment to the constitution stating that in case of administrative removal orders, the period of possible detention before the needed intervention of a judge was of 5 days, instead of the 48 hours that applies to any other case. Thus, only foreigners (the only ones that can face removal proceedings) can be detained for a period longer than the 48 hours allowed by the Constitution before being in the presence of a judge.

What Article 19 number 7 indicates in this matter is the following:

"*...If the authority arrests or detains any person, it must, within the following forty-eight hours, notify the competent judge, placing the affected person in his or her presence. The judge may, by reasoned resolution, extend this period for up to five days, and up to ten days, if facts classified by law as terrorist conduct are investigated.*

This period of forty-eight hours will not be considered for carrying out administrative removal orders. In the latter case, it will be up to the law to set the maximum period, which may not, in any case, exceed five consecutive days."

Having made a constitutional amendment, it is impossible to review the unconstitutionality of the 5-day detention period for removal orders (as now established by law). This norm had been proposed in the legislative discussion before the approval of Law 21.325, but in response to a request presented by us and other organizations for a ruling from the Chilean Constitutional Court on its constitutionality, it was declared that it did not comply with equal protection clause as stated in the Constitution.

In this matter, it is urgent to prioritize the removal of those people who constitute a threat to public safety or that has recently arrived in the country, with no significant roots. It is also important that authorities involved in these proceedings can identify international protection needs and to also apply prioritization criteria, with technical training in these matters, so that the decisions comply with human rights standards and principles such as family reunification and the best interest of the child.

4. Asylum and Complementary Protection

In Chile, the recognition of asylee status is dramatically low. In the period between 2010 and 2022, of 26.985 applications, only 714 people were recognized as asylees, which corresponds to only 3% of the applications. In addition to those concerning facts, 28% of the requests have been rejected, while 69% are still pending with no decision yet[4].

[4] Jesuit Migrant Service, SJM (2023). Yearbook of migration statistics: Human Mobility in Chile: How do we move towards orderly, safe and regular migration? Santiago, Chile. P. 28.

Syria and Ukraine have a higher percentage of recognition, with 69% and 44% respectively, which is dramatically different from other nationality groups, especially from Latin America.

Added to the above are the barriers to accessing the asylee status recognition process. Although the Refugee and Asylum law is more than ten years old and is very progressive, its implementation has faced many difficulties, as people who have entered without inspection have many barriers.

In May 2023, after the over-judicialization of the asylee recognition process, overloading the Courts, the National Migration Service established a manual, as mandated by the Supreme Court to solve the difficulties people were facing trying to access the asylee process. This manual establishes a protocol to access the refugee/asylee status procedure. In this protocol, there are certain requirements with no legal basis. In our legal services program, we have identified several in which people get rejected from the National Migration Service to access the asylee/refugee recognition process as they do not comply with the manual requirements, although those requirements are not legal. In those cases, in which people do not attach certain documents, the decision states people have withdrawn their application, even though in the majority of the cases, the impossibility of attaching the required documents (such as a letter from the police stating they have entered without inspection) is because Chilean authorities are not providing those documents. So, although their applications are being assumed as withdrawn, the reality is that there is no expression of an intention of withdrawing but an impossibility of complying with several difficult formal requirements that do not depend on them.

Along with the 2023 manual, a bill has been recently approved, giving a legal basis to the formal requirements that the authority was asking to access the process, and also establishing a preliminary review of the case for a person to present their asylum case.

Among the several modifications of the Chilean Asylum/Refugee Law (20.430), some of them are a serious threat to Chilean obligations regarding international protection. Now there will be a seven-day period since arriving in Chile for a person to ask to be considered an asylee or a refugee. This is an extremely short deadline. There is an exception considered, but the majority of people seeking protection will be left out of it because they did not apply in the seven days since entering the country.

The new law also contemplates a safe third-country rule, although there is no regional coordination on this issue. Only those who, complying with the conditions established in the law, enter the country directly from the country in which their life or freedom is threatened will have the right to be recognized as asylees. They could have stayed in another country while transiting to arrive in Chile, but only for 60 days.

Finally, another relevant modification is that applicants will not be able to access a visa and work permit while in the preliminary stage of the asylee recognition process. One defense of this measure is that the law states that the preliminary stage has an extension of a maximum of 90 days. It is highly unlikely that Chilean authorities will be able to comply with that deadline, as many asylee/refugee recognition processes have been pending for several years. The excessive delays of the National Migration Service are well documented and known[5].

[5] Comptroller General of the Republic, Report N°718-2022 (2023).

The above is extremely worrying as Chile already has one of the smallest rates of recognition of asylum, and now it will become even harder to access the asylum recognition process. At the same time, this also poses a risk of complying with the non-refoulment principle, since it establishes that, if the refugee application is rejected, the applicant must voluntarily abandon the country, if there is no legal cause for them staying such as another visa, and if they do not abandon it voluntarily, they may be removed.

The complementary protection applicable to those whose asylum/refugee applications are rejected is one of the new legal institutions stated in Law 21.325 and was also developed in the National Migration Policy published on December 27, 2023. It states that to request complementary protection, the person must have been an asylee or refugee applicant and must sufficiently justify that, if they return to their home country their life, physical integrity, and/or personal freedom are at serious risk, given that they have been victims of domestic violence or violence based on gender or sexual orientation. There is a political decision to limit granting complementary protection to only these specific groups, which debilitates this new institution as a tool to give protection with a very inefficient asylee recognition system.

There is also a time limitation that will exclude an important group of people from accessing complementary protection, as only people who entered the asylee/refugee recognition process after the new immigration law entered into force, in February 2022, will be able to apply for it. It is important to state that 2020 and 2021 years recorded the highest number of formalized applications, with 1.628 and 3.867 applications, respectively, many of which are still pending, but once those people get rejection decisions, even if they comply with the requirement of have suffered gender or sexual violence, they will not be able to apply for this protection.

Just to get an idea of the rejection rates, in 2020, 2.069 applications were rejected and in 2021, that number was 3.082.

In 2022, although the National Migration Policy had not yet been published, the National Migration Service had received at least 12 applications for complementary protection. To illustrate how the asylee process works in practice, we represent a Cuban citizen who formally accessed the process in 2018, and received a rejection decision in 2023. After his rejection, he applied for Complementary Protection but received a notice of a decision of the authority in which it was stated that complementary protection could not be given as the law stated that the specific process for it should be established in the National Migration Policy. Only in December 2023, the National Migration Policy was approved. Currently, the aforementioned case would not qualify to request complementary protection, because his asylee recognition process was formalized in 2018 and also because it did not specifically involve a person who was a victim of domestic, gender, or sexual violence, but political persecution. This exemplifies the treatment asylum seekers get in Chile, with several barriers to accessing the asylum/refugee system and with long-delayed decisions, once a few can access it to finally get rejected with no other alternatives to get protection.

5. <u>Statelessness regarding children born in transit</u>

We are identifying many children born in their family´s transit to Chile as the final destination. In many cases, considering the lack of identity documents of the parents and the vulnerable conditions in which they travel, the only document the child has to prove their identity is hospital records regarding the birth

but no vital records and no birth certificates as there was no registration of that birth with the competent authority.

As the majority of the countries do not allow late registration of the birth by consular authorities, and request in-person appointments to do so, many families that have irregularly entered the country, and fear leaving as they will not be able to re-enter, several children are risking statelessness. The immigration law mandated a statelessness recognition process to be established in the National Immigration Policy, but this is something that is still pending as no progress has been reported on this issue.

6. Children´s visa

The new immigration law stated that children under 18 years old, regardless of their legal and their parents' legal status (and regardless of the way they entered the country) could access regularization.

This is an important conquer for Immigrant Children´s rights advocates, as we have observed in the last years, that many children have entered with no inspection, which was previously an issue in obtaining a visa. Firstly, we do not have accurate numbers of how many children have entered without inspection, as Police at the border, do not have a registry of these entries with specifications of the age of those who entered.

However, taking into account the information of the Chilean National Police (Carabineros de Chile), since the year 2017, there has been a sustained increase in the irregular crossing of the border by minors, with being 2021 the year in which the highest number of entries without inspection by children has been reported, tripling the entries of the year 2020.

Irregular entry of Children 2017-2022				
YEAR	**0-13**	**14-17**	**MINOR**	**TOTAL**
2017	12	3	0	15
2018	47	23	0	70
2019	53	29	0	82
2020	1.685	287	0	1.972
2021	5.252	890	0	6.142
JANUARY-MARCH 2022	3.075	605	112	3.792
TOTAL	10.124	1.837	112	12.073
SOURCE: SJM with information provided by Carabineros de Chile				

Unfortunately, Venezuelan children have been excluded from the regularization process, as an important number of them are not able to comply with the requirements of attaching a legalized copy of their birth certificate, or an identity document as a passport. As stated before, the Venezuelan consulate in Chile does not efficiently provide access to those services to their citizens.

The Chilean State should be able to provide means for those children to get a visa, as it is in their best interest to access regularization. If it raise concerns that there is no legalized birth certificate or identity documents, a process to register the families could be implemented, as the child should not be punished for not being able to obtain documents from their home country.

7. Border control and "stop and identify" policies in Chile

In the North of Chile, a constitutional exception was declared in February 2022, which has been continually renewed several times. In February 2023, Law No. 21.542 was published, which modifies the Constitution to allow the protection of critical infrastructure by the Army, in the event of serious or imminent danger. The border has been considered a critical infrastructure space. Likewise, Decree No. 78, came into force, delegating the protection of the border to the army, granting them various powers to carry out identity control, and searching of vehicles, luggage, or clothing of people crossing the border.

Regarding Chilean "stop and identify" policies, our Criminal Code was modified by incorporating the "immigration status control" requirement for foreigners who were subject to "stop-and-frisk" by the police. If the person cannot prove their regular immigration status, they will be registered and sent to police barracks. There have been concerns expressed about the possible discrimination that these measures can cause in police behavior regarding identity control.

Another measure to control the borders is expedited removal proceedings that have been conducted at the border, a new mechanism that was introduced in the new Immigration Law. This involves the return of the person to the point of entry at the border. Although we do not have large numbers of expedited removed people as Bolivia and Perú have presented constraints in receiving Venezuelans and other nationalities from the Chilean police at the border, it is still something to analyze, as there are fewer due process guarantees in these processes, but these should be known by policemen and military that are executing them at the border.

It is also important that police and authorities at the border are well trained to identify international protection needs at the border, so people can get orientation, as an example, as to how to apply for asylum, more now that there is a 7-day deadline once you enter, to do so.

Recommendations

- **Removal Proceedings:** authorities that are supervising removal proceedings and deciding if a person should be removed should get training regarding international protection. Also, it is proposed that the Chilean government establishes priorities in who should be removed from the country, prioritizing those people who are a threat to public safety, and those who have no roots in the country. As the courts of justice are overwhelmed by the need to review administrative decisions regarding removal orders, it may be convenient to see the possibility of establishing specialized immigration courts that could help have more efficient removal proceedings that comply with due process.

- **Criminalization of immigration:** the bill that states that entering without inspection is a crime should not be approved, this is a regression for the accomplishment of protecting immigrants' human rights in Chile, stating that irregular migration is not a crime. It is also important that the Chilean State finds a way of solving the lack of identity documents of foreigners facing criminal charges so that pretrial detention is not decided because of this, disregarding the seriousness of the offenses and crimes for which they are prosecuted. In that sense, the use of biometric registration or enrollment may be a way of preventing abusive use of pretrial detention in the case of the foreign-born population.

- **Asylum and international protection:** as there is a new, very brief, deadline to apply for asylum once a person enters the country, police at the border should be trained to identify international protection needs and allow people to safely access the asylum recognition process at the border. Regarding the safe third county rule, also stated in the new law that modifies the asylee/refugee law, regional coordination to ensure forced migration flows find protection should be promoted. As asylum recognition gets even more limited, as historically has been in Chile, the public policy decision of limiting complementary protection only to gender, domestic, and sexual violence should be reviewed.

- **Statelessness recognition process:** should be given urgency to give a solution to all those children born in transit that have no practical way of obtaining the recognition of their right to a nationality.

- **Regularization:** Venezuelan children should not be excluded from the regularization mechanism other children have successfully been accessing through the Chilean children´s visas that has put the best interest of migrant children first. There should be flexibility or special consideration for documents of Venezuelan children or efforts done in getting answers from the Venezuelan consulate in Chile should be led.

- **Regularization for irregular immigrants who have entered the country irregularly:** the last regularization process was in 2021, and only included people whose visas had expired. As the irregular migrant population increases, with all the problems irregular immigration causes to

countries and immigrants, a regularization process that includes people who have entered without inspection should be conducted, prioritizing families, people with special needs (medical treatments and other special needs) along requirements from the labor market.