

# Essay

## A Rights-based Assessment of the Temporary Protection Statute for Venezuelans in Colombia

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### ABSTRACT

Since 2015, the multidimensional crisis in Venezuela has resulted in massive emigration. Over 2.4 million Venezuelan refugees and migrants live in neighboring Colombia, and, in 2021, almost one million of them were undocumented.<sup>1</sup> Such exceptionally high numbers of migrants in irregular, precarious status led to the Colombian government's concerns about migration control, human rights, and social inclusion. In response, in March 2021, the government launched an ambitious regularization scheme, the Temporary Protection Statute for Venezuelan Migrants (TPSV), which is currently being implemented. This Essay first explores the extent to which Colombia's international human rights law obligations contributed to the creation of the TPSV. Second, it assesses how the scheme interacts with existing statuses used by Venezuelan migrants in Colombia. Third, it identifies concerns that the TPSV and its implementation raise under international law. By adopting the TPSV, the Colombian government took a significant step towards a rights-oriented approach to managing mixed migration. Yet, while the TPSV regulations are rife with human rights rhetoric, we raise questions about whether the scheme, in its totality, is compliant with international law.

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1. See *MIGRACIÓN COLOMBIA, Más de Dos Millones 477 Mil Venezolanos se Encuentran Radicados en Colombia y de Ellos, el 96% Busca Hacer Parte del Estatuto Temporal de Protección – Visibles* (July 19, 2022), <https://www.migracioncolombia.gov.co/noticias/mas-de-dos-millones-477-mil-venezolanos-se-encuentran-radicados-en-colombia-y-de-ellos-el-96-busca-hacer-parte-del-estatuto-temporal-de-proteccion-visibles>.

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## INTRODUCTION

Over the last seven years, more than six million Venezuelans have fled the country<sup>2</sup> due to the severe economic, political, and social crisis.<sup>3</sup> The reality of the Venezuelan exodus is one of mixed migration because of the “intertwined and multifaceted drivers of movement of [these] people [on the move],”<sup>4</sup> among them political persecution and systematic human rights violations, as well as the deterioration of socioeconomic conditions in the country.<sup>5</sup> The scale of the economic crisis in Venezuela is staggering: To give one indication of its scope, 2021 statistics indicate that 94.5 percent of people in Venezuela live below the poverty line,<sup>6</sup> compared with about twenty-five percent in 2012.<sup>7</sup> In light of these realities, the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNCHR) explicitly acknowledge the mixed character of Venezuelan emigration: In Colombia, they established a coordination platform aptly named the Interagency Group for Mixed Migration Flows (GIFMM).

Of the six million Venezuelans who have left their country, over 1.8 million people have settled in neighboring Colombia. During the first half of 2021, one million Venezuelans were undocumented or in irregular status, about 700,000 held temporary, two-year residence permits, and only 28,800 were registered asylum seekers.<sup>8</sup> The scale of migration has resulted in multidimensional

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2. See R4V, *Key Figures* (Jan. 10, 2022), <https://www.r4v.info/en/refugeeandmigrants>.

3. See Benjamin N. Gedan, *Venezuelan Migration: Is the Western Hemisphere Prepared for a Refugee Crisis?* 37 SAIS REV. INT’L AFFS. 37, 57 (2017).

4. See Global Migration Data Analysis Centre, *Mixed Migration*, INT’L ORG. FOR MIGRATION (Feb. 21, 2022), <https://www.migrationdataportal.org/themes/mixed-migration>.

5. See generally Inter-Am. Comm’n H.R., *Preliminary Observations and Recommendations of the Country Visit to Venezuela on Human Rights Implementation*, No. 106/2020 (May 8, 2020), <http://www.oas.org/es/cidh/prensa/comunicados/2020/106.asp>; AMNESTY INT’L, *Venezuela: Hunger, Punishment and Fear, the Formula for Repression used by Authorities under Nicolás Maduro* (Feb. 20, 2019), <https://www.amnesty.org/en/latest/news/2019/02/venezuela-hunger-punishment-and-fear-the-formula-for-repression-used-by-authorities-under-nicolas-maduro/>; WORLD HEALTH ORG. & PAN-AM. HEALTH ORG., *PAHO’s Response to Maintaining an Effective Technical Cooperation Agenda in Venezuela and Member States* (Sep. 5, 2018), <https://iris.paho.org/bitstream/handle/10665.2/49650/CD56-INF-12-e.pdf?sequence=1&isAllowed=y>.

6. ENCOVI – *Encuestas sobre Condiciones de Vida* has monitored living conditions in Venezuela since 2014. The project is conducted by three major Venezuelan universities: the University Simón Bolívar, the University Central de Venezuela, and the University Católica Andrés Bello. See *Encovi*, U. CATÓLICA ANDRÉS BELLO, <https://www.proyectoencovi.com/encovi-2021>.

7. See U.N. ECON. COMM’N FOR LAT. AM. & THE CARIBBEAN, *Social Panorama of Latin America 2014*, at 16 (2014), <https://www.cepal.org/en/publications/37627-social-panorama-latin-america-2014>.

8. See GRUPO INTERAGENCIAL SOBRE FLUJOS MIGRATORIOS MIXTOS EN COLOMBIA &

challenges for state institutions and migrants themselves.

In early 2021, in response to the presence of such exceptionally high numbers of migrants in irregular or precarious status—and to address concerns regarding migration control, human rights, and social inclusion—the Colombian government launched an ambitious regularization scheme: the Temporary Protection Statute for Venezuelan Migrants (TPSV).<sup>9</sup> This scheme, an exercise of the executive powers of the Colombian government, targets all Venezuelan migrants and asylum seekers who meet certain eligibility criteria, including irregular presence in the territory before January 31, 2021 and no pending administrative or criminal proceedings.<sup>10</sup> Despite the use of the word “protection” in the scheme’s title, which invokes notions of international refugee protection, the TPSV is essentially a mechanism of economic migrant regularization.<sup>11</sup>

The TPSV envisages a staged regularization process: First, online registration is required; second, the identity of applicants is verified in person; and third, after an assessment of eligibility criteria, successful applicants are issued a ten-year temporary protection permit (TPP), which allows its bearers to access the formal labor market, social protection programs, and comprehensive health care. Importantly, time spent holding a TPP will count towards eligibility for an R visa, a renewable residence visa that provides a pathway to indefinite stay in Colombia.<sup>12</sup> To date, 2.4 million Venezuelans have registered using the online regularization platform and around 1.5 million TPPs have been approved as of August 2022.<sup>13</sup>

Against this backdrop, this Essay first describes the extent to which Colombia’s international human rights law obligations contributed to the introduction of the TPSV. Second, it assesses how the TPSV interacts with other status categories. Finally, it identifies certain major international human rights and refugee law concerns that the TPSV regularization approach raises.

#### I. A REGULARIZATION SCHEME TO COMPLY WITH INTERNATIONAL HUMAN RIGHTS LAW

In February 2021, the Colombian government began publicizing the

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PLATAFORMA DE COORDINACIÓN INTERAGENCIAL PARA REFUGIADOS Y MIGRANTES DE VENEZUELA (GIFMM/R4V), *GIFMM Colombia: Resumen Situacional - Junio 2021*, <https://www.r4v.info/es/document/gifmm-colombia-resumen-situacional-junio-2021-es>; R4V, *Total Pending Asylum Claims per Country* (Dec. 31, 2021), <https://www.r4v.info/en/pending-asylum-claims>.

9. The TPSV is regulated by the Colombian Ministry of Foreign Affairs. *See* Por Medio del Cual se Adopta el Estatuto Temporal de Protección para Migrantes Venezolanos Bajo Régimen de Protección Temporal y se Dictan otras Disposiciones en Materia Migratoria, Decree No. 216/2021 (Mar. 1, 2021); Por la Cual se Implementa el Estatuto Temporal de Protección para Migrantes Venezolanos Adoptado por Medio del Decreto 216 de 2021, Res. No. 971/2021 (Apr. 28, 2021).

10. *See* Decree No. 216/2021, *supra* note 9, arts. 4, 8, 12; Res. No. 971/2021, *supra* note 9, arts. 2, 5, 6, 15, 16.

11. *See* Res. No. 971/2021, *supra* note 9, art. 11.

12. *See id.*, art. 11. The R visa is regulated by the Ministry of Foreign Affairs. *See* Res. No. 6045 (Aug. 2, 2017), art. 21.

13. *See* MIGRACIÓN COLOMBIA, *Visibles: Estatuto Temporal de Protección*, <https://www.migracioncolombia.gov.co/visibles>.

regularization scheme, insisting that the measure was meant to ensure “safe, orderly, and regular migration” and to guarantee the human rights of all migrants.<sup>14</sup> This conception of the TPSV is explicitly embedded in the preamble of the TPSV decree and its implementing resolution.<sup>15</sup>

It is undeniable that such a massive regularization scheme has a positive effect on the human rights of Venezuelans in Colombia. Indeed, holding regular migratory status is a precondition for enjoying a greater share of citizens’ rights at the domestic level, notably the right to work and to access social security. By committing to regularize the status of Venezuelans in Colombia, the government took a significant step towards a rights-oriented implementation of the Global Compact for Migration.<sup>16</sup> This commitment is also beneficial for migration control and the creation of “conducive conditions that enable all migrants to enrich our societies through their human, economic and social capacities.”<sup>17</sup>

Colombia’s serious legal commitment to international human rights law may help explain the enactment of the TPSV. Article 93 of the Colombian Constitution provides that ratified human rights treaties have legal primacy over domestic sources of law<sup>18</sup> and constitute standards for the interpretation of fundamental rights.<sup>19</sup> The primary role of international law in the domestic legal framework has long helped fill normative protection gaps for migrants arising from the absence of a comprehensive migration act in Colombian law. As a result, Colombia’s national case law on migrants’ rights has relied heavily on international treaties and jurisprudence.

The emphasis on human rights law in the preamble to the TPSV is therefore unsurprising, though there are some surprising omissions. The decree contains thirty-seven references to the realization of fundamental or international human rights for migrant adults and children, identifying the realization of these rights as key goals of the regularization scheme and as principles that prompted the adoption of the measure. In particular, the decree indicates that the TPSV is necessary to guarantee the rights and social integration of irregular migrants, to protect migrants from the risks of trafficking and other forms of abuse, and to comply with international law.<sup>20</sup> Specifically, the preamble features the International Convention on the Protection of the Rights of All Migrant Workers

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14. See Press Release, Canciller Claudia Blum, *El Estatuto de Protección Temporal a Migrantes Venezolanos Es una Decisión Histórica para la Región y el Mundo*, CANCELLERÍA (Feb. 8, 2021), <https://www.cancilleria.gov.co/newsroom/news/estatuto-proteccion-temporal-migrantes-venezolanos-decision-historica-region-mundo>. Blum stated that the TPSV will contribute to safe, orderly, and regular migration, echoing the language of the Global Compact. See G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018) [hereinafter Global Compact for Migration], [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/73/195](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195).

15. See Decree No. 216/2021, *supra* note 9, Preamble; Res. No. 971/2021, *supra* note 9, Preamble.

16. For the endorsement of the Global Compact for Migration, see Decree No. 216/2021, *supra* note 9, at 3; Res. No. 971/2021, *supra* note 9, at 2.

17. See Global Compact for Migration, *supra* note 14, ¶ 12.

18. See CONSTITUCIÓN POLÍTICA DE COLOMBIA (1991), art. 93.

19. See, e.g., Corte Constitucional de Colombia [Constitutional Court of Colombia] (CCC), Judgments T-006/2020, ¶ 1.2; C-355/2006, ¶ 8.4; SU-096/2018, ¶ 9; SU-677/2017, ¶ 18; T-239 de 2017, ¶ 90.

20. See Decree No. 216/2021, *supra* note 9, Preamble.

and Members of Their Families (ICMW) and the Convention on the Rights of the Child. Yet, the ICMW is not the most equality-oriented choice; several observers criticized it for “constitutionalizing” a rights divide between regular and irregular migrants.<sup>21</sup> Notably, the preamble makes no reference to the International Covenant on Economic Social and Cultural Rights or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights—even though these treaties are particularly relevant to the TPSV, given that the target of the scheme is the social and economic integration of migrants and refugees. Their absence is suggestive of the government’s willingness to treat the socioeconomic integration of migrant adults as a desired policy objective rather than as an obligation of treaties conferring socioeconomic rights.

The implementing resolution, developed and issued by Colombia’s migration management agency, Migración Colombia, also relies on human rights to contextualize the adoption of the TPSV.<sup>22</sup> The resolution focuses particularly on the importance of protecting the rights of the child and the right to dignified work for adults.<sup>23</sup> The rights of the child are subject to special protections in Colombia’s constitutional legal order, which may explain several provisions in the implementing resolution that allow for the early regularization of particularly vulnerable children, such as children enrolled in the school system and children who are in special care settings and reeducation procedures.<sup>24</sup> The many references to the right to work share a clear link with the pragmatic, instrumental purposes for which the TPSV was enacted. Ensuring that Venezuelan beneficiaries of the TPSV are able to access the formal employment sector, for example, in turn enables them to contribute to Colombian taxation and health care systems, thereby increasing inputs and decreasing costs for Colombia’s national and regional budgets.<sup>25</sup>

The TPSV has been praised by key international actors for facilitating the realization of human rights and the socioeconomic integration of Venezuelan migrants in Colombia. The IOM and the UNCHR, for example, have called the TPSV “a model of pragmatism and humanity.”<sup>26</sup> And, indeed, the TPSV improves in meaningful ways upon other statuses available under Colombian law. The next section situates the TPSV in that context.

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21. See Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* 311, 316 (Barbara Bogusz et al. eds., 2004).

22. See Res. No. 971/2021, *supra* note 9, Preamble.

23. See *id.*

24. See *id.* arts. 25-35.

25. See generally INT’L LABOUR ORG., *Reporte Mesas de Trabajo: Inclusión de los Migrantes Venezolanos en el Sistema de Protección Social Colombiano, 24-25 de Febrero, 2021* (March 2021), [https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-lima/documents/publication/wcms\\_816136.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-lima/documents/publication/wcms_816136.pdf).

26. See UNHCR/IOM, Press Release, *UNHCR and IOM Welcome Colombia’s Decision to Regularize Venezuelan Refugees and Migrants* (Feb. 8, 2021), <https://www.unhcr.org/news/press/2021/2/60214cf74/unhcr-iom-welcome-colombias-decision-regularize-venezuelan-refugees-migrants.html>.

## II. THE INTERACTION OF THE TPSV WITH EXISTING DOMESTIC STATUSES

The TPSV creates a new migrant category: Venezuelans with a ten-year TPP. This status is intended to replace asylum and the two-year residency permits that were specially created for Venezuelans.

Notably, the TPP is available not only to those Venezuelans who hold a legal status, but also the one million Venezuelans in irregular status.<sup>27</sup> The regularization of migrants in irregular status is particularly rights-empowering because access to employment, social rights, and justice are invariably linked to citizenship and immigration status. Consequently, regularization is “the most adequate solution to the issues faced by many of today’s undocumented migrants.”<sup>28</sup>

One important condition on eligibility for the TPSV is that irregular migrants must provide evidence that they were in Colombian territory on or before January 31, 2021.<sup>29</sup> However, this cutoff date leaves people who have irregularly entered the territory since then without access to a regularization scheme. While a potential amnesty for one million undocumented people is an exceptional and ambitious plan, it is important to bear in mind that the Venezuelan crisis and associated emigration are not expected to cease soon. Thus, while monumental in its scope, the scheme continues the national trend of adopting temporary migration policy measures that do not address the probability of future irregular entry.<sup>30</sup> The trend is not unique to Colombia: As Nicholas de Genova writes, every regularization has “an inherently episodic and strictly partial character that never eliminates the field of ‘illegality’ but rather . . . simply refines and reconstitutes that field for the ineligible who will remain undocumented along with all subsequent ‘illegal’ arrivals.”<sup>31</sup>

In addition to the irregular migrants who benefit from the regularization scheme, Venezuelans currently residing in Colombia who have or are about to renew the two-year, temporary stay permit—called a Special Permanence Permit (SPP)—and Venezuelans who enter Colombia regularly until May 2023 are also

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27. This Essay uses the terms “irregular” or “undocumented” to refer to those foreign nationals who do not comply with immigration law requirements for entry or stay in a country and are, therefore, susceptible to deportation. For a discussion of these terms, see Elspeth Guild, *Who Is an Irregular Migrant?*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS* (Barbara Bogusz et al. eds., 2004).

28. See Anna Błus, *Beyond the Walls of Paper: Undocumented Migrants, the Border and Human Rights*, 15 *EUROPEAN J. MIGRATION & L.* 413, 441 (2013).

29. See Decree No. 216/2021, *supra* note 9, art. 4; Res. No. 971/2021, *supra* note 9, art. 6.

30. Former temporary regularizations schemes included, for instance, the two-year Special Permanence Permit, the Permit for Entry and Permanence, the Special Permanence Permit for the Promotion of Formalization, and the Complementary Special Permanence Permit. See *Por la Cual se Establecen los Permisos de Ingreso y Permanencia, Permisos Temporales de Permanencia, y se Reglamenta el Tránsito Fronterizo en el territorio nacional*, Res. No. 1220/2016 (Aug. 12, 2016); *Por Medio de la Cual se Crea un Permiso Especial de Permanencia*, Res. No. 5797/2017 (July 25, 2017); *Por Medio de la Cual se Crea un Permiso Especial Complementario de Permanencia (PECP)*, Res. No. 3548/2019 (July 3, 2019); *Por el cual se adiciona la Sección 3 al Capítulo 8 del Título 6 de la Parte 2 del Libro 2 del Decreto 1072 de 2015, Decreto Único Reglamentario del Sector Trabajo, en lo Relacionado con la Creación de un Permiso Especial de Permanencia para el Fomento de la Formalización*, Decree No. 117/2020 (Jan. 28, 2020).

31. See Nicholas De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 *ANN. REV. ANTHROPOLOGY* 419, 429 (2002).

eligible for a TPP.<sup>32</sup> The TPSV offers distinct benefits even for these groups. The TPP granted under the TPSV is valid for ten years, making it much more durable than the SPP and, as a result, makes personal and economic life plans less precarious.<sup>33</sup> While the provision allowing Venezuelans who enter the country regularly (that is, by using a passport at a Colombian port of entry) after the announcement of the TPSV is valuable, obtaining a Venezuelan passport is financially and administratively impossible for many Venezuelans—a fact that may perpetuate illegality.

Venezuelan asylum seekers who meet the requirements for the TPSV are also eligible for a TPP. If successful in their application for a TPP, the asylum seeker must decide either to accept the TPP and rescind their asylum application or renounce the TPP and continue in the asylum system in the hope that their application will be successful.<sup>34</sup> Seeking asylum in Colombia is accompanied by numerous constraints. Asylum seekers cannot freely move throughout the country or obtain employment in Colombia until they are granted refugee status, a process that can take years.<sup>35</sup> As a result, many of the current asylum seekers may decide to pursue a TPP, despite the fact that they will not receive formal recognition as a refugee, opting instead to participate in a scheme that serves Venezuelans with a variety of motivations for emigrating from Venezuela. This reality reflects a governmental judgment: The Colombian government has preferred to treat all Venezuelans as economic migrants fleeing a humanitarian crisis rather than make efforts to strengthen the responsiveness of the national asylum system.<sup>36</sup>

Of course, this special scheme applies only to Venezuelans. Accordingly, other asylum seekers and migrants, such as Haitians or Cubans, may find themselves in similar situations of vulnerability, but they do not have the same access to straightforward and affordable forms of regularization in Colombia.<sup>37</sup> The following section explores the problems this reality presents for Colombia's international legal obligations.

### III. THE (IN)COMPLIANCE OF THE TPSV APPROACH WITH INTERNATIONAL

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32. See Decree No. 216/2021, *supra* note 9, art. 4(1) and (4).

33. As we discuss in Part III, *infra*, however, the fact that the TPSV can, in principle, be cancelled at any time does not grant full stability to prospective TPP holders.

34. See Decree No. 216/2021, *supra* note 9, art. 17, and Res. No. 971/2021, *supra* note 9, art. 1.

35. See *infra* notes 81-83.

36. See Part III, *infra*, on the (lack of) harmonization of the TPSV and the asylum system.

37. According to statistics from Migración Colombia, the Colombian migration agency, as of September 2021, there were approximately 14,000 Haitian migrants in Colombian territory, with few protection programs available to them. See MIGRACIÓN COLOMBIA, *En el Último Mes, Migración Colombia Ha Detectado Más de 34 Mil Migrantes Irregulares, una Cifra Equivalente al 51% del Total de Detecciones de este 2021* (Sept. 10, 2021), <https://www.migracioncolombia.gov.co/noticias/en-el-ultimo-mes-migracion-colombia-ha-detectado-mas-de-34-mil-migrantes-irregulares-una-cifra-equivalente-al-51-del-total-de-detecciones-de-este-2021>. Furthermore, 27,000 irregular migrants from Haiti, Cuba, Senegal, Ghana, Angola, Guinea, and Nepal were reported to have entered Colombia in September 2021. DW, *Colombia Reporta Ingreso Irregular de 27.000 Migrantes en un Mes* (Sept. 9, 2021), <https://www.dw.com/es/colombia-reporta-ingreso-irregular-de-27000-migrantes-en-un-mes/a-59149479>.

## OBLIGATIONS

The implementation of the TPSV will facilitate the enjoyment of human rights by successful applicants, but its approach raises concerns about compliance with international human rights law and asylum obligations. This section briefly examines some of these concerns, focusing on nondiscrimination on the basis of nationality, due process of law, certain affirmative obligations to promote and protect human rights of vulnerable people, and the neglect of the right to seek asylum.

*A. Nondiscrimination on the Basis of Nationality*

Favoring Venezuelan nationals with a special regularization scheme, thereby facilitating the realization of their human rights, is indeed a legitimate policy aim. Venezuelans currently account for more than three percent of the Colombian population and have fled dire humanitarian circumstances. Yet, the TPSV may conflict with the principle of nondiscrimination in human rights law. Discrimination, according to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), is defined as differential treatment in comparable situations on prohibited grounds, such as race or nationality, that has the effect of “impairing the recognition, enjoyment or exercise, on an equal footing, of human rights.”<sup>38</sup> Non-Venezuelan migrants may find themselves in similar conditions of multidimensional vulnerability but unable to obtain regular residence and robust enjoyment of a full suite of human rights. Whether a preference based on Venezuelan nationality is legitimate and proportional in international nondiscrimination law must be subject to debate and scrutiny.

While the prohibition of discrimination on the grounds of race constitutes a *jus cogens* norm,<sup>39</sup> distinctions drawn between migrants of different nationalities has been considered permissible in international law under certain circumstances. For instance, an early decision of the Inter-American Court of Human Rights held that a naturalization preference adopted by Costa Rica for nationals of Central American countries “has a legitimate purpose and . . . does not lead to situations which are contrary to justice” because nationals of these countries have a “closer historical, cultural and spiritual bonds with the people of Costa Rica.”<sup>40</sup> Although migration governance is internationally recognized as an area subject to sovereign regulation,<sup>41</sup> human rights obligations partly

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38. See International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art. 1(1), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 211; see also International Covenant on Civil and Political Rights (ICCPR) art. 2(2), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 2(2), *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

39. See INT'L L. COMM'N, *Draft Articles on the Responsibility of States for Wrongful Acts, with Commentaries*, 2 Y.B. INT'L L. COMM'N 31, 85 ¶ 5 (2001) (“[T]he peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”).

40. See Inter-Am. Ct. H.R., *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 (Jan. 19, 1984) ¶ 57–60.

41. This principle was recently reiterated in the Global Compact for Migration, *supra* note 14, ¶ 15. For further discussion of state sovereignty over migration, see Catherine Dauvergne, *Sovereignty*,



constrain that state power.<sup>42</sup> For example, Article 1(3) of the CERD provides that “nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”<sup>43</sup> The CERD Committee has clarified that differential treatment on the basis of nationality may constitute discrimination if immigration criteria “are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>44</sup> Although the U.N. Special Rapporteur on Racism specifies that these types of nationality-based distinctions must be “exceptional” to avoid constituting discrimination,<sup>45</sup> “international law provides little guidance to help states distinguish between permissible and impermissible goals, criteria, and means for immigrant selection.”<sup>46</sup>

In Colombia, no constitutional judgment has been rendered on the preferential treatment of Venezuelans to date, but—even before the adoption of the TPSV—a number of scholars have recommended that the state take measures targeting the needs of non-Venezuelan migrants as well.<sup>47</sup> The Constitutional Court of Colombia has, however, decided cases involving alleged discrimination between nationals and nonnationals and between regular and irregular migrants regarding the enjoyment of human rights. The Court held that differential treatment on the basis of nationality or legal status must be reasonable and proportionate in order to comply with the principle of equality and nondiscrimination.<sup>48</sup> The intensity of the equality test depends, *inter alia*, on the type of right at stake, the objective and reasonable character of the measure under scrutiny, and the potential violation of international human rights obligations wrought by the contested treatment.<sup>49</sup> Thus, the principle of nondiscrimination on the basis of nationality may provide a basis for litigation over the TPSV before the high courts.

### B. Due Process of Law

Second, inadequate opportunities to contest the denial or revocation of the TPP raise due process concerns under international law. While the TPSV scheme aims to regularize the status of Venezuelan migrants for ten years, the administrative decree that regulates it mentions the ability of the government to

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*Migration and the Rule of Law in Global Times*, 67 MODERN L. REV. 588, 590 (2004).

42. See, e.g., STEFANO ANGELERI, IRREGULAR MIGRANTS AND THE RIGHT TO HEALTH 17-68 (forthcoming 2022).

43. CERD, *supra* note 38, art. 1(3).

44. *Id.* at ¶ 4.

45. See E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), Rep. on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018), ¶ 16.

46. Liav Orgad, *When Is Immigration Selection Discriminatory?*, 115 AM. J. INT. L. UNBOUND 345, 349 (2021).

47. See generally, e.g., Carolina Moreno & Gracy Pelacani, *Corte Constitucional Colombiana: ¿Un Escenario Posible para el Experimentalismo Constitucional en Materia Migratoria?*, 5 LAT. AM. L. REV. 139, 139-57 (2020).

48. CCC, Judgment C-395/2002, ¶ 5.

49. CCC, Judgments C-070/2004, ¶ 5.1; T-250/2017, ¶ 147; T-956 de 2013, ¶ 15.

“terminate the effects of the [TPSV] at any time.”<sup>50</sup> This provision may jeopardize the legal certainty that regularized Venezuelans enjoy, potentially violating procedural rights guaranteed under international law. Furthermore, Migración Colombia may decide to deny or rescind individual permits for a number of reasons, including for relatively standardless reasons like being considered “inconvenient” or “a threat to national security.”<sup>51</sup> No administrative appeal of such a negative decision is possible.<sup>52</sup> Such administrative discretion and the lack of opportunity to submit an administrative appeal does not appear to comply with the right to due process of law as developed by the Inter-American Court of Human Rights, including with regard to irregular migrants.<sup>53</sup>

Due process requires that a person is enabled to effectively claim their rights, without discrimination on any personal grounds, vis-à-vis any state action or inaction that may affect them.<sup>54</sup> This applies to all proceedings concerning the “determination of [a person’s] rights and obligations of a civil, labor, fiscal, or any other nature,”<sup>55</sup> including administrative proceedings.<sup>56</sup> In compliance with international standards, the Constitutional Court of Colombia, in cases concerning migrant deportations, has also stressed the importance of the opportunity for review in administrative proceedings.<sup>57</sup>

### *C. Special Measures Targeting Migrants with Special Vulnerabilities*

Some migrants in situations of vulnerability may require special, affirmative efforts to ensure the enjoyment of their human rights.<sup>58</sup> The doctrine of substantive equality requires that people in disadvantaged positions should be prioritized in law and policymaking in order to facilitate the realization of their human rights.<sup>59</sup> The New York Declaration on Refugees and Migrants, for example, recognizes categories of vulnerability like “women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons,

50. Decree No. 216/2021, *supra* note 9, art. 2.

51. *Id.* at art. 15(3).

52. *Id.* at arts. 15(3)-(4).

53. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 121 (Sept. 17, 2003).

54. *See, e.g.*, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 117, 119 (Oct. 1, 1999); Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 97, 115 (Aug. 28, 2002); Advisory Opinion OC-18, *supra* note 53, ¶¶ 121, 122.

55. *See* American Convention on Human Rights, art. 8(1), *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143.

56. *See* Baena-Ricardo et al. v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 124 (Feb. 2, 2001); Ivcher Bronstein v. Perú, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 102 (Feb. 6, 2001); Tribunal Constitucional v. Perú, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 69 (Jan. 31, 2001); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 27 (Oct. 6, 1987).

57. *See, e.g.*, CCC, Judgment T-143/2019, ¶ 8, 9, and 16.

58. *See* INGRID NIFOSI-SUTTON, THE PROTECTION OF VULNERABLE GROUPS UNDER INTERNATIONAL HUMAN RIGHTS LAW (2017).

59. *See* SANDRA FREDMAN, DISCRIMINATION LAW 14-19 (2d ed., 2011).

persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.”<sup>60</sup> While the TPSV regulations address the needs of some such vulnerable groups, described below, a well-rounded approach to human rights-based policymaking should have encompassed more categories of people in vulnerable conditions for special treatment under the TPSV scheme.

The special treatment afforded to certain migrant children, pregnant women, persons with disabilities, and transgender communities are evidence of the adaptability of the TPSV scheme to Venezuelans who may experience particular vulnerabilities.<sup>61</sup> The special attention granted to children<sup>62</sup> is consistent with Colombia’s constitutional jurisprudence, which frequently employs international law on the protection of children as a basis for enforcing domestic protections.<sup>63</sup> Under the TPSV, some children are eligible for early processing of their applications, including children enrolled in the school system and those who are about to graduate, children who are in special care settings, and children who are in reeducation programs.<sup>64</sup> Early processing of their applications expedites their regularization and, consequently, the realization of their human rights. Additionally, children in these categories are also eligible to register for TPSV regularization until May 2031, as compared with the May 2022 and May 2023 deadlines for other Venezuelans.<sup>65</sup> The fact that these protections only apply to some children, however, appears to minimize the special vulnerability experienced by all children.

Other vulnerable groups are given different accommodations: People who are transgender are entitled to register for regularization with the name they recognize fitting their gender identity, if the latter is legally recognized by a notary.<sup>66</sup> Persons with disabilities, children, pregnant women, and the elderly are eligible and prioritized for appointments to collect their biometric data.<sup>67</sup>

#### *D. Creation of a Meaningful Legal Status*

Additionally, although the TPSV was created in part to ensure that Venezuelans have access to a legal status, it is possible that Venezuelans who are granted a TPP pursuant to the TPSV may nevertheless continue to experience the sorts of vulnerabilities typically associated with a *lack* of legal status. For instance, if banks, chambers of commerce, power companies, broadband

60. See New York Declaration on Refugees and Migrants, G.A. Res. 71.1, U.N. Doc. A/RES/71/1 (Sep. 16, 2016), at ¶ 23; Global Compact for Migration, *supra* note 14, Preamble, recital 7.

61. See Res. No. 971/21, *supra* note 9, arts. 7, 8 and Tit. IV and V.

62. See *id.* at Title IV.

63. See, e.g., CCC, Judgments T-215/1996, T-090/21, T-390/20, T-530/19, T-530/19, T-530/19, T-250/17, T-197/19; see also Beatriz Londoño, María Teresa Palacios & María Alejandra Lozano, *Nuevas Realidades de los Flujos Migratorios Hacia Colombia*, in MIGRACIÓN Y DERECHOS HUMANOS: EL CASO COLOMBIANO 2014-2018, at 11, 25 (Beatriz Londoño Toro & María Teresa Palacios Sanabria eds., 2019).

64. See Res. No. 971/21, *supra* note 9, art. 33.

65. See *id.* at arts. 25 and 26.

66. See *id.* at Title V.

67. See Res. No. 971/21, *supra* note 9, art. 7.

companies, or health care providers do not recognize the TPP as a valid document with which to register for their services, the TPP itself and the person's legal status are deprived of significance, despite *de jure* recognition of the status.<sup>68</sup> This state of affairs would jeopardize the socioeconomic integration of Venezuelans that the TPSV pursues and breach international obligations guaranteed by the ICMW.<sup>69</sup>

#### *E. Neglect of Domestic Refugee Protection*

Finally, the emphasis placed on the TPSV marginalizes Colombia's refugee recognition procedures, potentially jeopardizing the rights of prospective refugees and asylum seekers.

The Colombian Constitution includes the right to seek asylum,<sup>70</sup> and regulations establish the procedure for granting of refugee status.<sup>71</sup> Status is granted according to the definition contained in the Refugee Convention of 1951.<sup>72</sup> Colombia has also signed the Cartagena Declaration, which "includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by . . . massive violation of human rights or other circumstances which have seriously disturbed public order."<sup>73</sup> If applied, the political, social, and economic reality that Venezuelan migrants are fleeing might well *prima facie* qualify many of them as refugees in Colombia, as demanded by the Inter-American Commission.<sup>74</sup>

Despite the country's apparently favorable legal frameworks, the number of applications for asylum filed in Colombia is relatively low.<sup>75</sup> The most recent available statistics show that fewer than 700 people were granted refugee status in the first half of 2020 (sixty-seven percent of whom were Venezuelans), of more than 1.7 million Venezuelans who were living in Colombia.<sup>76</sup> By April

68. For instance, in informal interviews conducted by Angeleri with staff at the International Organization for Migration and Jesuit Refugee Council in February 2022, informants reported that many TPP holders encountered formal and administrative barriers (linked to the format of the TPP) which prevented their enrollment in the health care system.

69. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Part IV, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3.

70. *See id.* at art. 36.

71. *See* MINISTERIO DE RELACIONES EXTERIORES, Por Medio del Cual se Expide el Decreto Único Reglamentario del Sector Administrativo de Relaciones Exteriores, Decree No. 1067/2015 (May 26, 2015).

72. *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137; CCC, Judgments T-250/2017, ¶¶ 24, 139; C-186/1996, ¶ 3.2; T-704/2003, ¶ 2(b).

73. *See* Cartagena Declaration on Refugees, Title 3, ¶ 3, *opened for signature* Nov. 22, 1984. The Cartagena Declaration was incorporated in Decree No. 1067/2015, *supra* note 71, art. 2.2.3.1.1.1(a).

74. *See* Forced Migration of Venezuelans, Inter-Am. Comm'n H.R., Res. 2/2018 (Mar. 2, 2018), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-2-18-en.pdf>; U.N. HIGH COMM'R FOR REFUGEES, *Guidance Note on International Protection Considerations for Venezuelans* (May 21, 2019), <https://www.refworld.org/docid/5cd1950f4.html>.

75. According to the R4V portal, 971,170 asylum applications have been filed in the countries of the region. R4V, *supra* note 8. The portal indicates that 28,800 asylum applications are pending in Colombia. *Id.*

76. *See* U.N. HIGH COMM'R FOR REFUGEES, *Factsheet Colombia: January-December 2020*, at 1, [https://www.acnur.org/op/op\\_fs/6058c69d4/unhcr-colombia-fact-sheet-january-december-2020.html](https://www.acnur.org/op/op_fs/6058c69d4/unhcr-colombia-fact-sheet-january-december-2020.html).

2022, more than 2.4 million Venezuelans were registered in the TPSV scheme,<sup>77</sup> while there were only 28,800 pending asylum applications from Venezuelan nationals.<sup>78</sup> It is much easier to apply for a TPP pursuant to the TPSV than to undergo a refugee status determination process. First, applications for refugee status must be filed within sixty days of entering the country.<sup>79</sup> Second, status determination proceedings typically last two to three years or more, while the average duration of the TPP application process is roughly seven months.<sup>80</sup> Third, asylum seekers can neither freely move nor work in Colombia while their application is pending.<sup>81</sup> Fourth, asylum seekers must re-register every ninety days to maintain their status as asylum seekers.<sup>82</sup> For many Venezuelans, these limitations make it clearly preferable to pursue the TPP and jeopardize the implementation of the right to seek and obtain asylum as set forth in national and international law.

Despite the shortcomings of the refugee recognition system, the refugee protection system and TPSV procedures could have been more effectively harmonized. Unlike the TPSV scheme, which allows for the cancellation of status based on “inconvenience,” a grant of refugee status has much stricter criteria for withdrawal.<sup>83</sup> Therefore, revocation of a TPP without the chance to present an asylum claim could conceivably amount to a violation of the peremptory norm of *non-refoulement*.<sup>84</sup> Furthermore, once granted a TPP, asylum seekers must either decide whether they wish to continue with the asylum application and renounce the TPP or continue with the latter and withdraw from the asylum process.<sup>85</sup> Given the delay in obtaining decisions from public authorities regarding international protection and the limitations to asylum seekers’ rights, the TPP could have been designed as a temporary mechanism for asylum seekers, allowing them to enjoy key human rights, such as the right to work, while their refugee status recognition process is ongoing.<sup>86</sup> This approach would have allowed Venezuelans to benefit from the best aspects of both

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77. See MIGRACIÓN COLOMBIA, *supra* note 13.

78. See R4V, *supra* note 8.

79. See Decree No. 1067/2015, *supra* note 71, art. 2.2.3.1.6.1.

80. See, e.g., Gracy Pelacani et al., *Estatuto Temporal de Protección para Migrantes Venezolanos: Reflexiones de una Política de Regularización Migratoria* [Temporary Protection Statute for Venezuelan Migrant: Reflections on a Migrant Regularization Policy], Rep. No. 3-2021, at 31, CENTRO DE ESTUDIOS EN MIGRACIÓN, UNIVERSIDAD DE LOS ANDES (July 30, 2021), <https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf>; E-mail from the Ministerio de Relaciones Exteriores to the Legal Clinic on International Human Mobility at U. del Rosario (Mar. 1, 2021) (on file with author).

81. See Decree No. 1067/2015, *supra* note 71, arts. 2.2.1.11.5.1; 2.2.3.1.4.1.

82. See *id.* at art. 2.2.1.11.4.9.

83. Cf. Decree No. 1067/2015, *supra* note 71; Decree No. 216/2021, *supra* note 9.

84. See Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 225 (Aug. 19, 2014); Cartagena Declaration, *supra* note 73; CONSTITUCIÓN POLÍTICA DE COLOMBIA, *supra* note 18, art. 93.

85. See Decree No. 216/2021, *supra* note 9, art. 17.

86. See generally Cathryn Costello & Colm O’Cinneide, *The Right to Work of Asylum Seekers and Refugees*, ASILE Working Paper (May 10, 2021), [https://www.asileproject.eu/wp-content/uploads/2021/06/D4.1.CostelloOCinneide\\_RightToWorkASILE\\_10May2021\\_REVISIED.pdf](https://www.asileproject.eu/wp-content/uploads/2021/06/D4.1.CostelloOCinneide_RightToWorkASILE_10May2021_REVISIED.pdf).

schemes: Swift legal status and the right to work under the TPP, and the security of a durable status under Colombian refugee law.

#### CONCLUSION

By adopting the TPSV, the Colombian government took a significant step towards a rights-oriented approach to managing mixed migration. Yet, while the TPSV regulations are rife with human rights rhetoric, we raise questions about whether the scheme, in its totality, is compliant with international law. If Colombia and other states responding to massive mixed migration flows are to genuinely uphold human rights law, regularization schemes used to address those flows must be substantively and procedurally consistent with human rights law and respectful of refugee law.