



Political and Legal Responses to Human Mobility in South America in the Context of the Covid-19 Crisis. More Fuel for the Fire?

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During the XXI century, South America has been the epicenter of vibrant discussions on human mobility. A new vocabulary emerged with legal principles such as the non-criminalization of irregular migration or the right to migrate as a fundamental right taking central stage. The combination of the arrival of COVID-19 together with the important emigration of Venezuelans in the region, as well as economic and political crisis are putting into question some of these advances and present a complex scenario of migration governance in the region for the years to come.

Keywords: South America, MERCOSUR residence agreement, venezuelan emigration, COVID – 19, irregular migration

INTRODUCTION

In the XXI century, South America adopted distinctive policies and vocabulary in the area of migration. This approach emphasized migrants' rights, the non-criminalization of migration and the "right to migrate" in fora such as the South American Conference on Migration. However, the arrival of Covid-19 coincided with a very delicate moment in which most of the region was already experiencing an economic, political and social crisis and where the emigration of circa five million Venezuelans, mostly to other countries in South America, had dramatically altered the migration picture in the region.

The objective of this article is to explain how the political and legal responses to the Covid-19 crisis in South America in the first semester of 2020 have affected human mobility. We position these political and legal responses within a wider context of a multidimensional crisis, and we propose possible future political and legal developments. The sources for this article are national and regional legislation, statistics for migration and mobility, and specialized literature. This also builds from the authors' previous work on South American migration governance (Acosta and Freier, 2015; Brumat and Acosta, 2019; Brumat, 2020a; Acosta, 2018).

This article is divided into three parts. In the first one, we describe the general context in the region before Covid-19 arrived: we address the policies and legislation that were developed in the early XXI century, as well as the political, social and economic crisis that ensued since 2015. We particularly focus on the Venezuelan emigration as a destabilizing factor. The second part addresses the political and legal responses to the Covid-19 crisis as well as their legal and political consequences and effects on mobility. Taking all these factors into account, the third part proposes three possible scenarios for the future.

SOUTH AMERICA BEFORE COVID-19

During the XXI century, South America has been the epicenter of vibrant discussions on human mobility¹. A new vocabulary emerged with legal principles such as the non-criminalization of irregular migration or the right to migrate as a fundamental right taking central stage in fora such as the South American Conference on Migration—a regional consultative process involving all countries in the region and adopting yearly non-legally binding declarations (Acosta, 2018). These animated debates were facilitated by the fact that most countries in the region had large numbers of emigrants, particularly in the United States and Spain, coupled with center-left governments that presented the protection of the rights of their nationals abroad as a central aspect of their international agenda (Acosta and Freier, 2018). Whilst South America had been the second largest recipient of newcomers, after the USA, during the great European migrations taking place between the 1870s and 1930, non-national populations at home were statistically insignificant in comparative global terms at the dawn of the new century².

This new vocabulary also found its way into laws. The MERCOSUR Residence Agreement revolutionized mobility in South America. Implemented in 2009, the Agreement provides that any national of a MERCOSUR or Associate Member State may reside and work, as well as access other rights, for a period of 2 years in a host State. After 2 years, the temporary residence permit may be transformed into a permanent one if the person proves legitimate means of living for himself or herself and any family members. All countries in South America (i.e., not just MERCOSUR countries) have ratified the agreement and apply it with the exception of Venezuela, Surinam and Guyana³. By 2016, 2.7 million residence permits had been granted under the agreement in the countries implementing it (IOM, 2018). In the first years of the XXI century, migration became an issue that reinforced South American regionalism (Margheritis, 2013).

By the time COVID-19 hit South America in 2020, this general and sketchy picture had been subject to various political, economic and mobility pressures since at least 2015. These pressures aroused from what seemed to be an improvement of the social and economic situation in the first decade and a half of the XXI century. During that period, South America experienced sustained economic growth, facilitated by increasing international prices of commodities, its main exports (ECLAC, 2009, 2013). This growth allowed for a reduction in income inequality and extreme poverty as well as the inclusion of vast sectors of the society into the formal workforce. Between 2002–2017, the middle income population in Latin America increased

by 65%, while poverty was reduced by 40% (ECLAC, 2019b, p. 29). Economic expansion and social policies enhanced the popularity of the so-called “pink tide” governments. By 2015 though, increased commodity price volatility led to an economic slowdown particularly affecting its three largest powerhouses: Brazil, Argentina and Venezuela (ECLAC, 2016, 2019a).

With the economy worsening in 2015, it became clear that the social policies of the early 2000s had not been sufficient to reverse the inequalities characterizing the region. Partly as a consequence of this, center-right and right-wing politicians returned to power. This included Macri in Argentina (2015), Temer in Brazil (2016, following the impeachment of Dilma Rousseff) or Piñera in Chile (2018) and heralded a shift in the economic and social policies in the region. The “turn to the right” was completed with the arrival to Brazil’s presidency in January 2019 of Jair Bolsonaro, a far-right politician and a vociferous opponent of migrants’ rights. Chile rejected the adoption of the Global Compact on Migration while Brazil withdrew from it right after Bolsonaro took office.

Venezuela deserves further attention. Since 2014, the country is undergoing a profound social, political and economic crisis with rampant inflation (IMF, 2020), severe food and health insecurity (FAO, 2019) and increased criminality having the second highest murder rate in the world (WB, 2020). This extreme situation has sparked mass protests since 2018 and prompted the largest forced displacement in Latin American history with 4.5 million Venezuelans emigrating between 2015 and early 2020 (UNHCR IOM, 2020). This was unprecedented since Venezuela had never been an origin country but rather a destination one.

Most of the 5.2 million Venezuelans residing abroad in early 2020 did so in other South American states—notably Colombia, Peru, Chile, Ecuador, Brazil and Argentina, in that order. Legal and political responses to the arrival of Venezuelans have been mostly adopted at the national level, and regional cooperation on the issue has been scarce, with the exception of the Quito Process—an *ad hoc* meeting of governments in the region adopting non-binding declarations about Venezuelan emigration (Acosta et al., 2019; Brumat, 2020b). These responses can be categorized into five groups with some countries falling into more than one of them. Firstly, Argentina, Brazil, Ecuador, and Uruguay have extended regional free movement provisions to incorporate Venezuelans thus offering them a right of residence. Particularly in the Ecuadorian case, the requirements to access a temporary permit were difficult to meet and left many in an irregular situation. Thus, a second response has been to launch regularization processes in Bolivia, Chile, Ecuador, and more recently in October 2020 in Peru. A third legal tool, mostly used by Brazil—and to a much lesser extent by Bolivia and Paraguay—has been to recognize Venezuelans as refugees under the extended definition enshrined in the Cartagena declaration (Acosta and Sartoretto, 2020). Fourthly, Chile, Colombia, Paraguay, and Peru introduced special temporary residence permits, with Colombia offering a new round of such permits in October 2020. Finally, and particularly as the situation aggravated, Chile, Ecuador and Peru decided to introduce visa requirements for Venezuelans, a step that had been first taken outside

¹South America in this paper refers to ten countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela. Due to their different historical and colonial past, and to their lower participation in regional integration processes, Guyana and Surinam are not incorporated in this analysis.

²By 2015, the 10 countries in the region had 5.6 million non-nationals representing 1.3% of the total population. By contrast, they had more than 10.8 million emigrants, amounting to 2.6% of the total population (Acosta, 2018, p. 14).

³Chile has not ratified it with a national law. It applies it to nationals of Argentina, Bolivia, Brazil, Paraguay, and Uruguay through an administrative regulation “Oficio Circular 26456” of 2009. See IOM (2018).

South America by Panama already in 2017 (Acosta et al., 2019).

The Venezuelan crisis has also affected regional integration. Following tensions between Argentina and Brazil, on the one hand, and the Venezuelan government, on the other, the country was suspended in 2017 in its membership of the Common Market of the South (MERCOSUR) (Briceño-Ruiz, 2018). South American regionalism was further weakened when all countries—with the exception of Guyana, Surinam, and Venezuela—left or suspended their membership in the Union of South American Nations (UNASUR). UNASUR was then replaced by PROSUR⁴, a mere coordination and dialogue forum at presidential level embodying the right-wing governments' preferences for more fragile and less ambitious forms of cooperation (Sanahuja, 2019). The Pacific Alliance, another regional organization including Mexico, Colombia, Peru, and Chile has never truly advanced on migration issues with the exception of establishing a visa-free area among its Members.

By the end of 2019, South America was undergoing several deep crises: an economic recession, a multidimensional crisis in Venezuela with consequences for the whole region, and massive protests confronting widespread social inequalities in places like Bolivia, Chile, Colombia or Ecuador (Faúndes, 2019; Billion and Ventura, 2020). It is within this context that COVID-19 made its appearance in the region further affecting mobility, the economy and the distribution of resources. At the time of writing in July 2020, South America had been severely hit by the pandemic with Brazil having the second highest number of confirmed cases in the world after the US, and Chile, Ecuador and Peru also confronting major outbreaks (Horton, 2020).

COVID-19 AND HUMAN MOBILITY IN SOUTH AMERICA

Covid-19 has arrived at a time when there was already a major multilevel crisis of governance in South America. Its relationship with mobility is clear at all levels. At the subnational level, some cities in countries like Brazil or Peru that experienced a large inflow of Venezuelans in a short period of time started feeling pressure for the provision of public services including health services. This has led in some instances to social tensions and episodes of xenophobic violence (Koechlin and Eguren, 2018; Freier and Parent, 2019b). At the national level, various governments already had low levels of public approval, which limits their legitimacy to act in emergencies⁵. Added to this, economic difficulties have made it harder to access international credit and, therefore, fewer possibilities of strengthening their health systems. Consequently, strict quarantines and lockdowns have emerged as the main option to prevent national health systems from collapsing. At the regional level, the weakening of UNASUR, which was the only organization that had developed

relatively successful regional policies and cooperation in the area of health (Riggirozzi, 2020), means that there is no common institutional framework with policy expertise to adopt shared responses to the health crisis.

In principle, national responses have been constrained by international law. The American Convention on Human Rights is the most important instrument at regional level overseeing the protection of fundamental rights and freedoms (American Convention on Human Rights, 1969). The duo Inter-American Commission and Inter-American Court of Human Rights are responsible for supervising its compliance. Whilst state parties might suspend some of its guarantees in times of emergency, they need to inform, in accordance with article 27 of the American Convention, the Secretary General of the Organization of American States. Emergency powers have a long tradition in South America and have been unacceptably abused since the XIX century (Negretto and Aguilar Rivera, 1999). This is the result of several factors such as the prominent powers of Executives and that others have debated (Gargarella, 2013). During the last three decades though, emergency powers had only been sparingly used during. With the arrival of COVID-19, all South American countries – with the exception of Brazil, Guyana and Uruguay—have availed themselves of a possibility that, even if affecting the entire population, might have a larger impact on vulnerable groups (OAS, 2020).

Undocumented migrants have been particularly distressed by COVID-19. In countries such as Colombia, Ecuador and Peru, the number of migrants in an irregular situation has skyrocketed with the arrival of Venezuelans. For example in Peru, the mechanisms for obtaining residence were suspended in 2018 and the introduction of visa requirements the year after led to an increase in the number of irregular entries (Freier and Parent, 2019a). In Colombia, despite the adoption of new regularization mechanisms in early 2020, 56% of the estimated 1.8 million Venezuelan nationals were undocumented by April 2020 (Migración Colombia, 2020). As recognized by the Inter-American Court, undocumented migrants are often in situations of great vulnerability, particularly when their employment is precarious and takes place in the informal economy (Inter-American Court of Human Rights, 2003). Some countries have put in place some measures to avoid protracted situations of irregularity. Ecuador extended the period to apply for a residence permit under the regularization that had been launched in 2019 (Presidencia de la República del Ecuador, 2020). The respect for the best interests of the child also led Ecuador to establish another regularization procedure for parents of Ecuadorian nationals who had entered into the country irregularly (República del Ecuador, 2020). Similarly in Colombia, the principle of the best interest of the child played an instrumental role in the introduction of an exception to the normal rules for obtaining nationality. Despite the absence of absolute *ius soli* in Colombia, the new rules allowed children of Venezuelan citizens to become Colombian nationals upon birth in the territory (Castro, 2020).

Unlike in the European Union or in the USA, detention and expulsion are not major issues in South America (Acosta, 2018). However, the increase in the xenophobic discourse is worrisome. In Chile, for example, immigration debates have centered on the

⁴Forum for the Progress and Development of South America.

⁵For instance, after the massive protests in Chile, the approval rating of Sebastián Piñera was below 10% [see Mella Polanco (2020)]. The management of the COVID-19 pandemic by Bolsonaro is also weakening him and his approval ratings are around 30% [see Belmonte Martín (2020)].

adoption of a new law to modify Chile's out-dated Pinochet-era immigration law from 1975. Its current President, Sebastian Piñera, had presented his vision for Chile's migration policy as one that allows to "tidying up the house we share" and which "combats irregular migration" (Prensa Presidencia, 2018). A draft bill had remained under debate in Congress since 2018. However, on 29 April 2020 the government requested the discussion of the bill through an accelerated procedure despite, or rather precisely because, it was expected that the COVID context would benefit the adoption of a harsher final text. Also within the COVID context, the Chilean government attempted to implement what was labeled as a humanitarian return plan. Migrants who were in a vulnerable situation in Chile and who availed themselves of such plan would agree to a 9 years prohibition of entry. The Supreme Court ruled that this was contrary to the right reside, enter, and leave any country freely as established in Article 19 of its Constitution and, one could add, Article 22 of the American Convention on Human Rights (Corte Suprema de Chile, 2020).

Any measures adopted under emergency powers need to be justified, proportional and temporary. One of the most important restrictions in some countries—notably Argentina, Bolivia, Ecuador, and Paraguay—relates to the right to return to one's own country, something that has been limited for both nationals and permanent residents⁶. Border closures have also limited the right to apply for asylum in various countries such as Brazil (Brazil, Portaria 2, 20 March, 2020).

The responses to the COVID-19 crisis are intensifying a trend that has been taking place since the mid-2010s: the power increase of "securitist" actors (Brumat et al., 2018), particularly the military. In order to enforce quarantines and border closures, many countries have militarized their borders and even cities, particularly during curfews, thus militarizing immobility (Verdes-Montenegro, 2020).

Government responses to COVID-19 are also creating some paradoxical consequences, such as new types of mobility. As the economic situation worsens, many people are deciding to return to their home countries or cities. The most extreme case of this are Venezuelans. The UNHCR estimates that more than 50,000 people have returned to Venezuela since February 2020, despite the need to take a risky trip back home (UNHCR, 2020). Once in Venezuela, they have to quarantine in unhealthy conditions and they face government persecution (Bolívar, 2020). There are also new types of internal mobility. As many people can no longer afford to stay in cities, many are moving back to rural areas, for example in Peru (Chávez Yacila and Turkewitz, 2020). These trips are usually done in buses or by foot, in ways that do not ensure physical distance, which paradoxically increases the risk of contagion of COVID-19.

PROSPECTS FOR THE FUTURE

South America finds itself at a crossroads with important consequences for mobility and the rights of migrants. The fact that most migrants in the region happen to be South

American nationals does facilitate policy and legal responses. However, a clearer distinction has started to emerge in some countries between Venezuelans, on the one hand, and other South Americans, on the other.

It is important to understand that South Americans on the move often find themselves in transitional legal statuses. For example, a South American might be an asylum seeker, later obtain a residence permit as a regional citizen only to then find himself in an irregular situation (Acosta 2018, Chapter. 7). Interestingly, despite the fact that most nationality laws can be characterized as moderately open to naturalization in comparative perspective—including the general acceptance of dual citizenship everywhere except in Paraguay—the number of those naturalizing remains very low (Acosta, 2020). In the present circumstances, these transitions affect most dramatically Venezuelans who represent the largest number of those moving in the region, and will remain so for the foreseeable future.

We envisage three likely developments. First, the MERCOSUR Residence Agreement will continue to facilitate mobility and access to rights in the region. The Residence Agreement is one of the main successes and longer-term policies in the history of South American regional integration (Mondelli, 2017) because it has proved to have institutional "lock-in" effects (Simmons, 2009; Börzel, 2016). Even in countries such as Ecuador or Peru, where the political discourse on migration has been securitized, its continuity is not in question. We can thus argue that COVID-19 has not as of today affected the most important regional free movement norm.

Second, recent legalizations in Bolivia, Chile, Ecuador or Peru confirm the preference by South American states in favor of regularization as a tool to manage undocumented migration, in cases where the MERCOSUR Residence Agreement is not enough (e.g., because the migrants who are undocumented are not covered under the agreement). The non-criminalization of irregular migrants will continue to be an important element guiding state action with detention and expulsion playing a marginal role when compare to the EU or the USA. This is part of a distinctive regional position in the migration agenda that South American countries have developed in the last 12 years and they strongly sustain in international forums, including in the negotiations leading to the adoption of the Global Compact on Migration (Brumat and Acosta, 2019).

Third, the economic and political consequences of the COVID-19 crisis may emphasize existing securitization trends in the region (Brumat et al., 2018). As the economic situation becomes more precarious and millions of people fall below the poverty line (ECLAC FAO, 2020), the situation of Venezuelans, one of the most vulnerable groups of migrants, could get worse. In Peru for instance, a new draft bill, which arrival to Congress is pending, proposes their expulsion once their temporary permits expired (Blouin et al., 2020). The economic consequences of COVID-19 are presented as the rationale behind such choice (Proyecto de Ley 5359, 25 May, 2020). Whilst its adoption is doubtful, it is significant in how it represents a shift from the migration bills that had been adopted and debated in the region in the XXI century. Chile, Colombia and Ecuador are also debating amendments of their legal frameworks. These

⁶The measures suspending various guarantees adopted by all states can be found at (OEA, 2020).

amendments, if approved, would contradict and even regress many of the human-rights-oriented policies adopted in the early XXI century. However, we have to bear in mind that the coexistence of “securitist” and “human rights-oriented” policy approaches to migration characterizes regional governance in South America (Acosta, 2018; Brumat, 2020a; Brumat et al., 2018). The prevalence of one of the two approaches depends on the political orientation of the governments that are in office and the power position of various actors at domestic level. This organic juxtaposition between restrictive and open attitudes toward non-nationals represents a historical trend in South America, which finds its roots in the early stages of the construction of the new nations since the beginning of the XIX century (Acosta, 2018).

Mobility has been at the center of the government responses to the COVID-19 crisis in South America. These responses have been adopted with increasingly limited resources due to the economic, social and political constraints that the region was already experiencing before the pandemic arrived. This, together with the rise of governmental and non-governmental actors whose interests are more aligned with security issues, is enforcing

changes toward restrictive migration policies and new types of both, mobility and immobility. But at the same time, these policy responses coexist with longer-term regional policies “locking-in” certain rights for migrants, such as the MERCOSUR Residence Agreement. In all the countries, the governance of migration is not any longer a purely state affair. Numerous actors have emerged including academics, civil society, and domestic courts. This makes the future governance of mobility in South America richer and more complex and a site of multilevel contestation and accommodation.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author/s.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct and intellectual contribution to the work, and approved it for publication.

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Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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