

# Constitutional protection in practice:

## *Venezuelan Nationals' right to health in the Colombian Constitutional Court's jurisprudence*

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## I. INTRODUCTION

In a sustained advocacy effort for the restoration of the rule of law in Venezuela, the International Commission of Jurists (ICJ) has monitored and documented the degradation of the rule of law, the lack of protection of human rights, and the deterioration of democratic institutions in the country over the past decade. The ICJ has evaluated the state of the justice system and documented threats, attacks, and obstacles to the fair and effective administration of justice and to accountability for human rights violations.<sup>1</sup>

The ICJ has also studied the impact of the humanitarian emergency in Venezuela on the enjoyment and exercise of economic, social and cultural rights.<sup>2</sup> For almost a decade, Venezuela has faced a humanitarian crisis, which has been described by the Inter-American Commission on Human Rights (IACHR) as “*complex, serious, multidimensional*”.<sup>3</sup> The humanitarian emergency includes hyperinflation and shortages or deficits in food, housing, health, education, transport and clothing.<sup>4</sup> In its 2023 annual report, the IACHR affirmed that, in the context of the humanitarian crisis, Venezuela has:

*“continued to experience high rates of poverty, inequality and food insecurity, in addition to a collapse of the healthcare system (...) characterized by persistent shortages and deficiencies in the supply of medicines, supplies, equipment, and medical treatments”*.<sup>5</sup>

The collapse of the healthcare system and the lack of work opportunities, among other things, have led to a massive emigration of Venezuelans. In late 2023, the UN Refugee Agency estimated that out of more than 7.7 million Venezuelans who had left the country, more than 6.5 million lived in Latin American and Caribbean countries.<sup>6</sup> Colombia hosts the largest number of Venezuelan refugees and migrants.<sup>7</sup> The Colombian migration authority (*Unidad Administrativa Especial Migración Colombia*) indicates that there were 2,811,734 Venezuelans living in Colombia as of May 2024.<sup>8</sup> Significantly, the majority of Venezuelans in Colombia have had their migration status regularized as a result of regulations in favour of Venezuelan nationals.<sup>9</sup> According to the latest available data, there were 2,349,686 Venezuelans in Colombia with a “regular migration status” or in “the process of regularization” in May 2024.

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<sup>1</sup> Since 2014, the ICJ has published nine reports on the deterioration of the rule of law and judicial independence in Venezuela: (i) Strengthening the Rule of Law in Venezuela (2014), available at: <https://bit.ly/3rTLM7u>; (ii) Venezuela: The Sunset of Rule of Law (2015), available at: <https://bit.ly/37SCv8W>; (iii) The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch (2017), available at: <https://bit.ly/3LqoQVa>; (iv) Achieving Justice for Gross Human Rights Violations in Venezuela (2017), available at: <https://bit.ly/37LJPTW>; (v) Venezuela: the judgment of civilians by military courts (2018), only available in Spanish at: <https://bit.ly/3JzrExA>; (vi) No Room for Debate The National Constituent Assembly and the Crumbling of the Rule of Law in Venezuela (2019), available at: <https://bit.ly/38sxdB4>; (vii) Judges on the Tightrope - Report on the Independence and Impartiality of the Judiciary in Venezuela (2021), available at: <https://bit.ly/3KnDbAx>; (viii) Lawyers under attack - Barriers to the legal profession in Venezuela (2022), available at: <https://bit.ly/3CuL2KA>; and (ix) No will for Justice in Venezuela: A Prosecutor's Office that fosters impunity (2024), available at: <https://bit.ly/4brkp9t>

<sup>2</sup> See the ICJ report: Hidden in broad daylight: The decline of public education in Venezuela (2014), available at: <https://bit.ly/3Koyjh2>

See also, ICJ op-eds: COVID-19 devastates an educational system already in crisis (2022), available at: <https://bit.ly/3fRMEq8>; Venezuela: lack of access to safe water aggravates the COVID-19 pandemic (2021), available at: <https://bit.ly/3D1TyT7>; Venezuela: indigenous peoples face deteriorating human rights situation due to mining, violence and COVID-19 pandemic (2021), available at: <https://bit.ly/3Mp3WqV>; Women facing health risks and gender-based violence in Venezuela (2020), available at: <https://bit.ly/3S4HapG>; The Right to Health of Venezuelans in Colombia: From Principle to Policy (Part 1) (2020), available at: <https://bit.ly/3fRBiCu>; The Right to Health of Venezuelans in Colombia: From Policy to Practice (Part 2) (2020), available at: <https://bit.ly/3rQ6Zil>

<sup>3</sup> Inter-American Commission on Human Rights, IACHR Presents Preliminary Observations and Recommendations Following Historic On-Site Visit to Monitor the Human Rights Situation in Venezuela, 8 May 2020. Available at: <https://bit.ly/3HIoEkT>

See also: Inter-American Commission on Human Rights, Annual Report 2023, Chapter IV, B. Venezuela, para 94. Available at: <https://www.oas.org/en/IACHR/reports/IA.asp?Year=2023>

<sup>4</sup> In this regard, see, for instance: Inter-American Commission on Human Rights, Annual Report 2016, Chapter IV, B. Venezuela, para 31 and ff. Available at: <https://www.oas.org/en/IACHR/reports/IA.asp?Year=2017> See also: HumVenezuela, Venezuela in Complex Humanitarian Emergency: Collapse and Gaps of Social Deprivation in Communities, June 2023. Available at: <https://bit.ly/49JKPCu>

<sup>5</sup> Inter-American Commission on Human Rights, Annual Report 2023, Chapter IV, B. Venezuela, para 94 and 98. Available at: [https://www.oas.org/en/iachr/docs/annual/2023/chapters/IA2023\\_Cap\\_4B\\_Venezuela\\_ENG.PDF](https://www.oas.org/en/iachr/docs/annual/2023/chapters/IA2023_Cap_4B_Venezuela_ENG.PDF)

<sup>6</sup> UN Refugee Agency, Venezuela situation, available at: <https://bit.ly/3Ld8Fw2>

<sup>7</sup> It is worth noting that the Constitutional Court has mentioned that Venezuelan migration is the first massive migration that Colombia has received. See: Corte Constitucional, Sentencia T-404 de 2021, para 64.

<sup>8</sup> Unidad Administrativa Especial Migración Colombia, Informe de migrantes venezolanos(os) en Colombia, Mayo de 2024, August 2024, page 6. Available at: <https://bit.ly/4dEDNAE>

<sup>9</sup> For instance, the national government created a special resident permit for Venezuelans (*Permiso Especial de Permanencia*) in 2017, which is a valid document for accessing health care through the country's health system. For more on this subject, see [Resolución 5797 de 2017](#) and [Resolución 3015 de 2017](#). Similarly, in 2021, the national government

The majority of Venezuelans (2,282,247) enjoy “a regular migration status”, thanks to a “Temporary Protection Permit” (*Permiso por Protección Temporal, PPT*).<sup>10</sup> The PPT allows Venezuelans to work and carry out any legal activity in Colombia until 30 May 2031. By that time, Venezuelans in Colombia are expected to fulfil the requirements and obtain a regular residence permit.<sup>11</sup> More recently, in December 2024, the Colombian government created a special visa for Venezuelans who entered the country before 4 December 2024<sup>12</sup>. The visa is valid for two years. After that time, Venezuelans would be expected to apply for another type of visa.<sup>13</sup> This new visa may allow more Venezuelans to regularize their “migration status”.

Venezuelans with “regular migration status” in Colombia can register for and have access to all the care, services, facilities, and goods available on the Colombian health system.<sup>14</sup> Therefore, by law, since the overwhelming majority of Venezuelans in Colombia have “regular migration status”, they should also have access to the health system. In reality, however, a significant number of Venezuelans, despite their “regularized migration status”, are not registered in the Colombian health system. According to a survey conducted in 2023 by the National Statistics Department (*Departamento Administrativo Nacional de Estadísticas*), among 6,239 Venezuelans living in 23 Colombian cities, 74 percent of whom had “regular migration status”, as much as 66.1 percent of them were not registered in the Colombian health system.<sup>15</sup> There are many reasons for this, including a lack of knowledge of Colombian health regulations and a lack of time to engage in the process of registration.<sup>16</sup>

Venezuelans with “irregular migration status” are in a more precarious situation since the Colombian legal framework only guarantees them access to emergency health services.<sup>17</sup> Crucially, although the majority of Venezuelans in Colombia have “regular migration status”, this situation may change in the future. The temporary protection permit (PPT) is only available to Venezuelans who had entered Colombia by 31 January 2021,<sup>18</sup> and the special visa is for those who had entered Colombia by 4 December 2024. Otherwise, there is no other mechanism to allow Venezuelans who entered “irregularly” after 5 December 2024 to regularize their “migration status”.<sup>19</sup> It also remains to be seen how easy it will be for Venezuelans with a PPT and those with the special visa to obtain a regular residence permit or a long-term visa.

Making matters worse, the Colombian authorities, including health institutions and judges, do not always have sufficient knowledge of migration and health laws that guarantee different aspects of the right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name (the right to health hereafter) of Venezuelan nationals. In addition, a lack of administrative coordination among health institutions and authorities has created delays in Venezuelans accessing health services. In the context of reviewing decisions on amparo actions (*acciones de tutela*) filed by Venezuelan nationals before judges and tribunals seeking to ensure respect for their right to health, the Colombian Constitutional Court has acknowledged as much.<sup>20</sup>

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also created a “Temporary Protection Statute for Venezuelan Migrants” (Estatuto Temporal de Protección para Migrantes Venezolanos) to help Venezuelans in Colombia to regularize their migration status. Notably, the Statute created a Temporary Protection Permit (*Permiso por Protección Temporal*), which is a valid document for accessing health care through the country’s health system. In this regard, see: [Decreto 216 de 2021](#) and [Resolución 971 de 2021](#), and [Resolución 572 de 2022](#). For a summary of the Colombian framework regarding Venezuelan Migrants (in Spanish), see: Konrad Adenauer Foundation and International Organization for Migration, *Estudio del impacto fiscal de la migración Venezolana en Colombia: Realidad vs Potencial*, 2024, page 24 and f.f. Available at: <https://bit.ly/4eXx1b0> See, also: *Dejusticia, Derecho a la atención en salud para las personas migrantes en situación irregular en Colombia: entre estándares normativos y barreras prácticas*, 2024, page 15 and ff. Available at: <https://bit.ly/3xOCJuQ>

<sup>10</sup> See: [Resolución 971 de 2021](#), Articles 14 and 20.

<sup>11</sup> See: Ministerio de Relaciones Exteriores de Colombia, *Abecé del Estatuto Temporal de Protección para Migrantes Venezolanos*, 2021, page 1. Available at: <https://bit.ly/4fJngqJ>

<sup>12</sup> On this topic see: Ministerio de Relaciones Exteriores, *Resolución 12509 de 2024*. Available at: <https://acortar.link/dB8DTQ>

<sup>13</sup> *Resolución 12509 de 2024*, article 3.

<sup>14</sup> See section “B. Colombian laws on the right to health” of Chapter III of this document. See also section “B. Access to health services for persons with regular migration status” in Chapter IV of this document.

<sup>15</sup> Departamento Administrativo Nacional de Estadísticas, *Encuesta Pulso de la Migración, Información sexta ronda (agosto - septiembre 2023)*, Presentación, December 2023, page 29. Available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/encuesta-pulso-de-la-migracion-epm>

<sup>16</sup> Departamento Administrativo Nacional de Estadísticas, *Encuesta Pulso de la Migración, Información sexta ronda (agosto - septiembre 2023)*, Presentación, December 2023, page 32. Available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/encuesta-pulso-de-la-migracion-epm>

<sup>17</sup> See section “B. Colombian laws on the right to health” of Chapter III of this document. See also section “C. Access to health services for persons with irregular migration status” in Chapter IV of this document.

<sup>18</sup> See: [Resolución 971 de 2021](#), Article 2.

<sup>19</sup> On this point see: *Dejusticia, Derecho a la atención en salud para las personas migrantes en situación irregular en Colombia: entre estándares normativos y barreras prácticas*, 2024, page 11. Available at: <https://bit.ly/3xOCJuQ>

<sup>20</sup> See, for instance: Corte Constitucional, *Sentencia T-178 de 2019*, para 24, 28, and 39; *Sentencia T-576 de 2019*.

This briefing paper examines the jurisprudence of the Colombian Constitutional Court on the right to health of Venezuelan nationals. It is based on an in-depth review of 37 Constitutional Court's decisions, 35 of which related to Venezuelan nationals.<sup>21</sup> With one exception,<sup>22</sup> all decisions reviewed arise from amparo actions filed by Venezuelan nationals based in different cities and towns in Colombia. In this regard, under Article 86 of the 1991 Colombian Constitution, the Constitutional Court has the discretionary power to review decisions on amparo actions handed down by any judge or tribunal. With respect to the right to health of Venezuelan nationals, the Court has used this power to: (i) establish jurisprudential rules on how constitutional rights must be protected; and (ii) order specific measures to guarantee the constitutional rights of the person who filed the amparo action.

In most of the decisions reviewed, at the time of the filing of the amparo action, the persons who filed such action had "irregular migration status". However, by the time the Court came to examine their case, some had already "regularized their migration status". The Court has, therefore, had the opportunity to determine the rights of Venezuelan nationals some of whom had a "regular" and some an "irregular" migration status. None of the decisions reviewed concerns a person with refugee status.

This briefing paper contains four sections. The **first section** outlines Colombia's international law obligations in relation to the right to health. The **second section** provides a brief overview of some elements of the constitutional and legal framework enshrining the right to health. Given that Colombia has a wide range of laws, decrees, regulations and policies relating to the right to health, the section focuses on those provisions that are essential for understanding the jurisprudence of the Constitutional Court on the right to health of Venezuelan nationals. The **third section** offers an overview of the jurisprudence of the Constitutional Court on the right to health of Venezuelan nationals. This includes jurisprudence on access to the Colombian health system, the nature and elements of emergency health services, and the provision of treatment for catastrophic illnesses. The **fourth section** concludes with recommendations to the Colombian authorities on how to ensure the right to health of Venezuelan nationals.

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<sup>21</sup> The exceptions are the Sentence C-834 de 2007 and the Sentence T-314 de 2016. In Sentence C-834 de 2007, the Court reviewed the constitutionality of the word "Colombians" in Article 1 of Law 789 of 2002, which is one of the laws that regulate the health system in Colombia. In Sentence T-314 de 2016, the Court reviewed the case of an Argentinean man with "irregular migration status".

<sup>22</sup> Corte Constitucional, Sentencia C-384 de 2007.

## II. INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHT TO HEALTH<sup>23</sup>

The right to health is guaranteed under international law by a range of treaties. As a State party to universal and regional human rights treaties, Colombia is bound to respect, protect, and fulfill the right to health. Such treaties place obligations on States to take measures necessary to ensure the full enjoyment of the right to health for all persons without discrimination on prohibited grounds.<sup>24</sup> The right to health, therefore, places obligations on the Colombian government with respect to refugees, asylum seekers, stateless people and migrants, irrespective of their status in the country. These treaties engage the responsibility of all public authorities, whether from the executive, legislative, or judicial branches of government,<sup>25</sup> to take measures to ensure that healthcare, goods and services are accessible, available and affordable for refugees, asylum seekers, stateless people and migrants. Colombia has a legal obligation to give effect to these human rights obligations through the enactment and implementation of domestic laws, policies, plans and practices.

### A. International Covenant on Economic, Social and Cultural Rights

Colombia is a State Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>26</sup> Article 12 of which guarantees to everyone the right to the “*highest attainable standard of physical and mental health*”. The same right is also guaranteed in a range of other treaties by which Colombia is bound,<sup>27</sup> including the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>28</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>29</sup> the Convention on the Rights of the Child,<sup>30</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>31</sup>

Article 12 of the ICESCR requires States to take a range of specific measures to ensure the full realization of the right to health, including measures to reduce stillbirth-rate and infant mortality; ensure the healthy development of children; improve environmental and industrial hygiene; prevent, treat, and control epidemic, endemic, occupational and other diseases; and ensure access to all medical service and medical attention in the event of sickness.

The Committee on Economic, Social and Cultural Rights (CESCR)’s jurisprudence has clarified that States have both “immediate” obligations and “progressive” obligations with respect to all ESC rights, including the right to health. With respect to the latter, States’ immediate obligations under Article 12 of ICESCR include:

**a. Ensuring immediate access to at the very least the “minimum essential level” of health services, facilities and goods.** Among others, this covers:

- i. Providing “*access to health facilities, goods and services on a non-discriminatory basis*”.<sup>32</sup>
- ii. Providing “*access to essential drugs*”,<sup>33</sup> including medicines and other treatments.
- iii. Ensuring “*equitable distribution of all health, goods and services*”.<sup>34</sup>
- iv. Providing “*immunization against the major infectious diseases occurring in the community*”,<sup>35</sup> including through the administering of vaccines.

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<sup>23</sup> This section is based on Chapter II, “International Human Rights Law and Standards,” of the ICJ briefing paper “Vaccines are Not Enough: How Failure to Protect Human Rights Compromised Chile’s COVID-19 Response”, 2021. Available at: <https://bit.ly/3zcJ6Zc> See, also: International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020, page 15 and ff available at: <https://bit.ly/3f4GhfO>

<sup>24</sup> Such as age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status.

<sup>25</sup> Vienna Convention on the Law of Treaties, articles 27 and 46.

<sup>26</sup> OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/>

<sup>27</sup> See: OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/>

<sup>28</sup> Article 5 (4)(iv).

<sup>29</sup> Article 12.

<sup>30</sup> Article 24.

<sup>31</sup> Article 28, 43 (e) and 45 (c).

<sup>32</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, para 43(a).

<sup>33</sup> *Ibid.*, para 43 (d).

<sup>34</sup> *Ibid.*, para 43 (e).

<sup>35</sup> *Ibid.*, para 44 (b).



- v. Taking "*measures to prevent, treat and control epidemic and endemic diseases*,"<sup>36</sup> which requires ready accessibility to diagnostics, medicines, vaccines, treatments, and all other necessary health goods and services.<sup>37</sup>
- vi. Providing "*education and access to information concerning the main health problems in the community, including methods of preventing and controlling them*".<sup>38</sup>

**b. Ensuring that health services, facilities and goods are available to all without discrimination.**

The right to health should be guaranteed without discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation, or other status.<sup>39</sup> Similarly, States must refrain from denying or limiting equal access to health goods, facilities and services on discriminatory grounds prohibited under international law. In particular, equal access should be guaranteed to those from the most marginalized sections of the population, including prisoners, detainees, minorities, asylum-seekers, and migrants with irregular migration status.<sup>40</sup> In addition, the right to health should be accessible without discrimination "*even in times of severe resource constraints*".<sup>41</sup>

The States also have an obligation to abstain from "*imposing discriminatory practices relating to women's health status and need*."<sup>42</sup> Regarding sexual and reproductive health legislation, policies and programmes, States should seek to prevent and combat "*discrimination, stigmatization and negative stereotyping that hinder access to sexual and reproductive health*";<sup>43</sup> particularly in the case of sectors of the population disproportionately affected by intersectional discrimination in relation to sexual and reproductive health, such as prisoners, refugees, stateless persons, asylum seekers, and migrants with irregular migration status.<sup>44</sup>

**c. Avoiding any retrogressive steps decreasing existing access to health.** Retrogressive measures, which decrease access to existing health services, goods and facilities, are presumed to be violations of the right to health. Such measures may only be taken on the "*most careful consideration of all alternatives*".<sup>45</sup> States have a burden to show that retrogressive measures "*are duly justified*".<sup>46</sup>

**d. Taking steps towards realizing the right to health in full, even if some aspects are achieved in a progressive manner.** Legislative, judicial, administrative, financial, educational, social and other measures must be adopted to pursue the full realization of the right to health.

The CESCR has also underscored that all health goods, facilities and services must be available, accessible, acceptable and of adequate quality.<sup>47</sup> Additionally, the right to health must be realized by States individually and "*through international assistance and cooperation, especially economic and technical, to the maximum of its available resources*".<sup>48</sup>

<sup>36</sup> Ibid., para 44 (c).

<sup>37</sup> In this regard, it should be noted that article 12 explicitly sets out that the full realization of the right to health requires that States take all necessary measures to ensure the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" and create conditions "which would assure to all medical service and medical attention in the event of sickness".

<sup>38</sup> Ibid., para 44 (d).

<sup>39</sup> International Covenant of Economic, Social and Cultural Rights, Article 2; UN Committee on Economic, Social and Cultural Rights, General Comment NO. 20: Non-discrimination in economic, social and cultural rights, paras. 15-35.

<sup>40</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, para 19 and 34.

<sup>41</sup> Ibid., para 18.

<sup>42</sup> Ibid., para 34.

<sup>43</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 22: The right to sexual and reproductive health, E/C.12/GC/22, 2 May 2016, para 31.

<sup>44</sup> Ibid., para 31.

<sup>45</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, para 32.

<sup>46</sup> Ibid., para 32.

<sup>47</sup> Ibid., para 12.

<sup>48</sup> International Covenant of Economic, Social and Cultural Rights, Article 2(1).

See also: International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020, page 27 and ff available at: <https://bit.ly/3f4GhfO>; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://bit.ly/3f8GuPf>; De Schutter et al "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" *Human Rights Quarterly* 34 (2012) 1084–1169, available at: <https://bit.ly/3xliZZL>

## B. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights indirectly protects the right to health through the right to life (Article 6), which is understood as a right to *"life with dignity."*<sup>49</sup> Pursuant to their legal obligation to guarantee the right to life, the Human Rights Committee has authoritatively held that States have an obligation to provide access to existing health services when the lack of access *"would expose a person to a reasonably foreseeable risk that can result in loss of life."*<sup>50</sup>

The Human Rights Committee has also affirmed that States cannot *"make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants."*<sup>51</sup> Consequently, when it comes to access to health services necessary to prevent the loss of life or irreversible and adverse health consequences for migrants with "irregular migration status", States must ensure that they take measures, including legislative ones, to provide them with *"access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life"*.<sup>52</sup>

## C. Inter-American Human Rights System

In the inter-American human rights system, the general obligations of States regarding the right to health are laid down in the American Convention on Human Rights (ACHR) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

### American Convention on Human Rights

The ACHR does not provide details on economic, social, and cultural rights (ESCR), including the right to health. Only Article 26 of the ACHR refers to ESCR, providing that States parties have an obligation to take measures to achieve *"progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States."*

The Inter-American Court of Human Rights (IACtHR) has affirmed that Article 26 establishes States' binding legal obligations regarding ESCR.<sup>53</sup> Therefore, ESCR are justiciable rights under the ACHR.<sup>54</sup> Furthermore, the IACtHR has found that Article 26 establishes not only "progressive" obligations but also "immediate" obligations with which States must comply.<sup>55</sup> This jurisprudence of the IACtHR concerning States' immediate obligations require the adoption of effective, adequate, deliberate and concrete measures to guarantee access to and full realization of ESCR without discrimination.<sup>56</sup>

The IACtHR has defined the scope and content of the right to health in ways that are consistent with the CESCR's jurisprudence on the right to health under the ICESCR.<sup>57</sup> For example, the IACtHR has held that the right to health is *"essential for the satisfactory exercise of the other human rights, and everyone has the right to enjoy the highest attainable standard of health that allows them to live with dignity"*.<sup>58</sup> The IACtHR has also found that the right to health covers physical and mental health, as well as social well-

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<sup>49</sup> Human Rights Committee, General Comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 3.

<sup>50</sup> Human Rights Committee, Views concerning communication No. 2348/2014, Toussaint v. Canada, CCPR/C/123/D/2348/2014, 30 August 2018, para 11.3.

<sup>51</sup> *Ibid.*, para 11.7.

<sup>52</sup> *Ibid.*, para 13.

<sup>53</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 103.

<sup>54</sup> Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 75 and ff.

<sup>55</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 104; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 98.

<sup>56</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 104.

<sup>57</sup> For instance, see: <sup>57</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C No. 349, para 120 and ff.

<sup>58</sup> Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of March 26, 2021, Series C No. 423, para 100 and 101.

See, also: Inter-American Court of Human Rights, *Case of Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 2, 2021, Series C No. 441, para 184.

being.<sup>59</sup> In addition, the IACtHR has held that access to medicines is an indispensable part of the right to enjoy the highest attainable standard of health.<sup>60</sup>

The IACtHR has determined that the States' general obligation regarding the right to health is to "*ensure access to essential health services, ensuring effective and quality medical services, and to promote the improvement of the population's health*".<sup>61</sup> It has also emphasized that health services must be provided in accordance with the principles of availability, accessibility, acceptability and quality.<sup>62</sup> In addition, the IACtHR has underscored the States' obligation to guarantee access to health services without discrimination.<sup>63</sup>

Regarding the domestic implementation of the right to health, the IACtHR has also held that States must take measures to ensure the effective regulation of the provision of public and private health services.<sup>64</sup> States must also implement national programmes aimed at providing quality health services.<sup>65</sup> Concerning children, the IACtHR has held that States must ensure that the legal framework establishes that State entities and private actors do not interfere with the right of children to enjoy the highest attainable standard of health.<sup>66</sup>

The IACtHR has also underscored that States must pay particular attention to the fulfillment of the right to health of persons and groups living in "vulnerable" and "marginalized situations".<sup>67</sup> For instance, concerning migrants with "irregular migration status", the Court has held that States have an obligation to provide them with emergency health care services at all times and without discrimination.<sup>68</sup>

### Protocol of San Salvador

The right to health is specifically guaranteed under Article 10 of the Protocol of San Salvador. Article 10 defines the right to health as "*the enjoyment of the highest level of physical, mental and social well-being*." It also establishes health as a public good and sets out that States must take measures in the following areas:

- a. Primary health care, that is, essential health care made available to all individuals and families in the community;*
- b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;*

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<sup>59</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C No. 349, para 118; Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of March 26, 2021, Series C No. 423, para 100 and 101; Inter-American Court of Human Rights, *Case of Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 2, 2021, Series C No. 441, para 184.

<sup>60</sup> Inter-American Court of Human Rights, *Case of Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 1, 2015, Series C No. 298, para 194.

<sup>61</sup> Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment of March 26, 2021, Series C No. 423, para 100 and 101.

<sup>62</sup> Inter-American Court of Human Rights, *Case of Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 2, 2021, Series C No. 441, para 185; Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of March 26, 2021, Series C No. 423, para 100 and 101.

<sup>63</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C No. 349, para 122.

<sup>64</sup> Inter-American Court of Human Rights, *Case of Ximenes Lopes v. Brazil*, Merits, Reparations, and Costs, Judgment of July 4, 2006, Series C No. 149, para 89, 90, and 98; Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C No. 349, para 119; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 106; Inter-American Court of Human Rights, *Case of Hernández v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 22, 2019, Series C No. 395, para 77.

<sup>65</sup> Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C No. 349, para 119; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 106; Inter-American Court of Human Rights, *Case of Hernández v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 22, 2019, Series C No. 395, para 77.

<sup>66</sup> Inter-American Court of Human Rights, *Case of Vera Rojas et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of October 1, 2021, Series C No. 439, para 108.

<sup>67</sup> Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 107; Inter-American Court of Human Rights, *Case of Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 2, 2021, Series C No. 441, para 185.

<sup>68</sup> Inter-American Court of Human Rights, *Case of Ximenes Lopes v. Brazil*, Merits, Reparations, and Costs, Judgment of July 4, 2006, Series C No. 149, para 96; Inter-American Court of Human Rights, *Case of Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs, Judgment of October 24, 2012, Series C No. 251, para 108.

- c. Universal immunization against the principal infectious diseases;*
- d. Prevention and treatment of endemic, occupational, and other diseases;*
- e. Education of the population on the prevention and treatment of health problems, and*
- f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”*

The Working Group to Examine the Periodic Reports of the State Parties to the Protocol of San Salvador has indicated that the Protocol requires that the right to health is fulfilled through the development of a health system. At minimum, such a health system “*should ensure access to primary health care and the progressive development of a system that provides coverage to the country’s entire population.*”<sup>69</sup>

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<sup>69</sup> Working Group to Examine the National Reports Envisioned in the Protocol of San Salvador, Progress indicators for measuring rights under the Protocol of San Salvador, 2015, para 66. Available at: <https://www.oas.org/en/sare/social-inclusion/protocol-ssv/indicators.asp>

### III. THE RIGHT TO HEALTH IN THE COLOMBIAN CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

The Colombian constitutional and legislative framework guarantees the right to health in several instruments, including the 1991 Constitution, Law 100 of 1993, Law 1438 of 2011 and Law 1751 of 2015. This legal framework establishes that health is an autonomous and fundamental right of everyone, as well as a public service. The legal framework also regulates access to health services, facilities and goods through a variety of laws and policies. In addition, the jurisprudence of the Constitutional Court has been fundamental in interpreting the scope of constitutional and other legal provisions.

#### A. Colombian Constitution

The right to health is mainly enshrined in Article 49 of the 1991 Colombian Constitution.<sup>70</sup> Article 49 states that health services are public services under the responsibility of the State. Consequently, the State has a duty to organize, manage and regulate health services. This Article also guarantees access to health services for the promotion, protection and restoration of health to everyone. In addition, the Article does not establish any restrictions on access to health services on the basis of nationality or legal/migratory status in Colombia.<sup>71</sup>

Article 356 of the Constitution stipulates that local and regional authorities are responsible for fulfilling the right to health and must prioritize funding health services with the resources they receive from the national government. In addition, Article 356 establishes that these authorities must aim to extend service coverage, especially for people living in poverty.

Regarding children, Article 44 of the Constitution states that their fundamental rights include the right to health. This Article also enshrines the principles of the best interests of the child, and the primacy of children's rights over the rights of others. Similarly, Article 50 of the Constitution establishes that children under the age of one, who are not covered by social security, have the right to free medical care in all public health institutions.

Articles 4, 13 and 100 of the Constitution are relevant to foreign nationals. Article 4 determines that foreign nationals, as well as Colombian nationals, have the duty to comply with the Colombian Constitution and the law. Article 13 establishes that everyone is equal before the law, enshrines the right to equality and prohibits discrimination on a range of listed grounds, including "national origin." Article 13 also requires the State to "*especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances*" and to sanction the "*abuses or ill-treatment*" of such persons.

Article 100 of the Constitution establishes that foreign nationals enjoy the same civil rights as Colombians. However, their civil rights can be restricted for reasons of public order. According to Article 100, only Colombians can exercise political rights, but the law may grant foreigners residing in Colombia the right to vote in municipal elections. The Article made no mention of economic, social or cultural rights, but it says foreigners enjoy the same "guarantees" as Colombians.

#### B. Colombian laws on the right to health

The right to health is enshrined in a wide range of laws, decrees, and regulations that address different aspects and components necessary for its realization, including the structure of the Colombian health system and health institutions. The key legal provisions on the right to health are contained in Law 100 of 1993 (*Ley 100 de 1993*),<sup>72</sup> Law 1438 of 2011 (*Ley 1438 de 2011*),<sup>73</sup> and Law 1751 of 2015 (*Ley 1751 de 2015*).<sup>74</sup> Other key provisions are established in Decree 780 of 2016 (*Decreto 780 de 2016*).<sup>75</sup>

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<sup>70</sup> The 1991 Colombian Constitution is available in English at: <https://bit.ly/3WgiorZ>.

<sup>71</sup> On this subject, See: Corte Constitucional, Sentencia T-210 de 2018, para 5; Sentencia T-274 de 2021, para 61; Sentencia T-300 de 2022, para 81.

<sup>72</sup> The Law (in Spanish) is available at: [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_0100\\_1993.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_0100_1993.html)

<sup>73</sup> The Law (in Spanish) is available at: [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1438\\_2011.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1438_2011.html)

<sup>74</sup> The Law (in Spanish) is available at: [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1751\\_2015.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1751_2015.html)

<sup>75</sup> The Decree (in Spanish) is available at: <https://bit.ly/453QUIO>

### **B.1. Nature and content of the right to health**

Concerning the nature of the right to health, Article 2 of Law 1751 of 2015 establishes that it is a fundamental and autonomous right. This was a milestone strongly influenced by developments in the jurisprudence of the Constitutional Court.<sup>76</sup> On this point, it is worth noting that the “Chapter of Fundamental Rights” of the 1991 Constitution contains only civil and political rights. As a consequence, during the 1990s and early 2000s, the Constitutional Court considered only civil and political rights as fundamental rights. Moreover, the early jurisprudence of the Constitutional Court denied the use of the amparo action (*acción de tutela*) to guarantee the right to health when a person’s life was not at risk. The reason was that the amparo action was established in Article 86 of the Constitution as a mechanism to protect and guarantee fundamental rights. Ultimately, the Court gradually modified its jurisprudence and held that all rights under the 1991 Constitution were fundamental no matter the chapter in which they were enshrined and, therefore, justiciable in an autonomous manner.<sup>77</sup>

Regarding the content of the right to health, Article 2 of Law 1751 of 2015 indicates that the right to health includes access to quality health services in a timely and effective manner for the preservation, improvement and promotion of health. It also sets out the State’s obligation to adopt policies to ensure equal treatment in accessing all types of health services. Article 6 of Law 1751 of 2015 establishes the essential elements of the right to health in almost equivalent terms to those used by the CESCR in its General Comment 14:<sup>78</sup> availability, acceptability, acceptability, quality and professional suitability.

### **B.2. Colombian health system**

Law 100 of 1993 creates the current Colombian health system. In accordance with the 1991 Constitution, Article 152 of Law 100 of 1993 reaffirms that health is an essential public service under the responsibility of the State. Similarly, Articles 154 and 156(a) of Law 100 of 1993 establish that the State must direct, regulate, coordinate and oversee the health system.

Notably, Law 100 of 1993 aims to guarantee universal access to health services. In this regard, Article 156 of Law 100 of 1993 establishes that all people residing in Colombia must be enrolled in the health system.<sup>79</sup> Enrollment in the health system requires payment to access its services. When persons cannot afford to pay their enrollment, the State pays through subsidies.

Access to health services is provided by enrolling in one of two health schemes created by Article 157 of Law 100 of 1993. One is a contributory scheme (*regimen contributivo*) for those with an employment contract, public servants, retired persons and self-employed people who can afford to pay. The other is a subsidized scheme (*regimen subsidiado*) for those who cannot afford to pay.

Regarding persons who are not enrolled in either of the two schemes, Article 32 of Law 1438 of 2011 establishes that health services must be provided even if the person who requires a service cannot afford to pay and is not enrolled in the health system. In these situations, enrolment in the subsidized scheme must occur.<sup>80</sup> Article 32 of Law 1438 of 2011 applies only to Colombian residents, that is, Colombians who live in the country and foreign nationals with a residence permit.<sup>81</sup>

### **B.3. Emergency health services**

With regard to emergency services, Article 10(b) of Law 1751 of 2015 stipulates that such services must be provided to all persons without any requirement for documentation or payment.<sup>82</sup> In relation to this provision, Decree 866 of 2017 (*Decreto 866 de 2017*)<sup>83</sup> states that it applies to nationals from neighbouring countries (*nacionales de países fronterizos*). In addition, Article 2.5.3.2.2 of Decree 780 of 2016 establishes that all health institutions must provide initial emergency health services (stabilization of vital signs), regardless of the socio-economic situation of the person who needs the service.

<sup>76</sup> In particular, see: Corte Constitucional, Sentencia T-859 de 2003 and Sentencia T-760 de 2008.

<sup>77</sup> On this point, see for instance: Corte Constitucional, Sentencia T-1041 de 2006 and T-160 de 2011.

<sup>78</sup> On this point, see: UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, para 12.

<sup>79</sup> On this subject, also see: Article 32 of Law 1438 of 2011.

<sup>80</sup> The Constitutional Court has ruled that regional and local authorities are obliged to carry out the enrolment procedure. See: Corte Constitucional, Sentencia T-314 de 2016, para 24; Sentencia SU-677 de 2017, para 45 and 47; Sentencia T-705 de 2017, para 4.4 and 4.5; Sentencia T-210 de 2018, para 10.

<sup>81</sup> The requirements for a residence visa are established in Articles 89 and ff of [Resolución 5477 de 2022](#).

<sup>82</sup> In the same topic, see Article 14 of Law 1751 of 2015, Article 168 of Law 100 of 1993, and Article 20 of Law 1122 of 2007.

<sup>83</sup> The Decree (in Spanish) is available at: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=81836>

## Classification of emergency services

Article 2.5.3.2.3 of Decree 780 of 2016 contains key definitions of emergency services:

**Emergency:** “the alteration of a person's physical and/or mental integrity, caused by trauma or disease of any etiology, that creates a need for immediate and effective medical care to reduce the risk of disability and death”.

**Initial emergency attention:** “all actions taken to stabilize the vital signs of a person with an emergency pathology, to make an initial diagnosis, and to identify for them an immediate destination, taking as a basis the level of care and the degree of complexity of the entity providing the initial emergency attention, in accordance with ethical principles and standards that govern the actions and behaviour of health personnel”.

**Emergency attention:** “set of actions carried out by a duly trained health team with the necessary material resources to meet the demand for care generated by emergencies”.

### B.4. Access to the health system for people who are not Colombian nationals

When it comes to access to the health system, although Law 100 of 1993 refers to Colombian residents, when regulating the health system, Article 2.1.3.5 of Decree 780 of 2016 requires a valid identity document for enrollment in the healthcare system. In the case of those who are not Colombian nationals, Article 2.1.3.5 establishes that valid documents for the purposes of enrollment include: (i) foreigner' identity cards issued by the Colombian government (*cédula de extranjería*), (ii) passports, (iii) diplomatic cards, (iv) or “safe-conduct for temporary residency” (*salvoconductos de permanencia*). In the case of Venezuelan nationals, the National Government has also created additional valid documents, such as the Special Resident Permit (*Permiso Especial de Permanencia*),<sup>84</sup> and the Temporary Protection Permit (*Permiso por Protección Temporal*).<sup>85</sup>

As a result, persons with an “irregular migration status”<sup>86</sup> cannot enroll in the Colombian health system. The exception to this rule is newborns present in Colombia. Article 2.1.3.11 of Decree 780 of 2016 sets out that when a child is born, and the parents are not part of the health system, the child must be enrolled in the subsidized scheme.

### B.5. Venezuelan nationals

Regarding the right to health of “Venezuelan migrants”, the Colombian Ministry of Health issued an “instruction document” in 2017 (Circular 025 de 2017)<sup>87</sup> to governors, mayors and directors of institutions providing health services. The Circular recognizes the presence of many Venezuelan migrants in Colombia as well as the universal character of the right to health. The Circular orders regional, local and district authorities to assess the situation of Venezuelan migrants and to take measures to guarantee the right to health, in particular, for women, pregnant women, children, older adults and persons with disabilities. Among other things, the document establishes that the Venezuelan migrant population must have access to emergency services, which includes services in cases of sexual violence.<sup>88</sup>

Similarly, in 2018, the Colombian Ministry of Health published a document entitled “Health Sector Response Plan to the Migration Phenomenon” (*Plan de Respuesta del Sector Salud al Fenómeno Migratorio*).<sup>89</sup> The Plan provides an overview of the migration situation in the country, the relevant Colombian legal framework on the right to health in the case of migrants, and the different responsibilities of State actors in fulfilling the right to health. Among other things, it emphasizes that pregnant women and children are priority groups for health services.<sup>90</sup> The document also reaffirms that Venezuelans with “regular migration status” can enroll in the health system under the contributory or subsidized scheme.<sup>91</sup>

<sup>84</sup> See: [Resolución 5797 de 2017](#) and [Resolución 3015 de 2017](#).

<sup>85</sup> See: [Decreto 216 de 2021](#), [Resolución 971 de 2021](#), and [Resolución 572 de 2022](#).

<sup>86</sup> Article 2.2.1.11.2.12. of Decree 1067 of 2015 establishes the criteria for considering a foreigner's permanence in Colombia to be irregular. The Decree (in Spanish) is available here: [https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto\\_1067\\_2015.htm](https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm)

<sup>87</sup> The *Circular* (in Spanish) is available at: <https://bit.ly/4aYmIAd>

<sup>88</sup> Circular 025 de 2017, para 2.1.

<sup>89</sup> The document (in Spanish) is available at: <https://bit.ly/3RTDnxS>

<sup>90</sup> Ministerio de Salud y Protección Social, Plan de Respuesta del Sector Salud al Fenómeno Migratorio, 2018, page 14.

<sup>91</sup> Ministerio de Salud y Protección Social, Plan de Respuesta del Sector Salud al Fenómeno Migratorio, 2018, page 33.

## C. Some general aspects of the constitutional jurisprudence on the right to health

The Constitutional Court has played a central role in defining and interpreting the critical elements pivotal for the realization of the right to health. These include elements relating to the nature and content of the right to health, special measures in favour of certain sectors of the population, and the application of international human rights treaties.

### C.1. Nature and content of the right to health

The Constitutional Court has stated that the right to health is a fundamental, autonomous and inalienable right.<sup>92</sup> The Court has also held that the right to health is a structural component of human dignity.<sup>93</sup> For the Court, the right to health covers not only health care but also the “*enjoyment of a full range of facilities, goods, services, and conditions necessary to attain the highest attainable standard of health*”.<sup>94</sup>

### C.2. Guiding principles for the provision of health services

Article 49 of the Constitution establishes that the State must follow the principles of efficiency, universality and solidarity in providing health services. The Constitutional Court has also established that health services should follow the principle of integrality (*integralidad*). The Constitutional Court has defined the content of these principles, which are considered the guiding principles for the provision of health services.<sup>95</sup>

According to the Constitutional Court, the *principle of universality* means that health services are available to everyone on the Colombian territory at all stages of life.<sup>96</sup> Consequently, access to health services is granted even individuals who cannot pay for those services.<sup>97</sup> For the Court, the *principle of solidarity* relates to the duty of all members of society to contribute to the objectives of the State and to the protection of the human rights of others, especially those who are in a vulnerable situation and cannot exercise their rights on their own.<sup>98</sup> The *principle of integrality* means that medical treatments are comprehensive. Therefore, persons must have access to all medical treatments, tests, procedures and medicines necessary to restore their health.<sup>99</sup> This is without prejudice to the fact that persons must fulfill certain requirements and comply with some duties to access health services, such as enrolling in the health system and pay financial contributions for access to health services in the cases established by law.<sup>100</sup>

### C.3. Children

Applying Article 44 of the Constitution, the Constitutional Court has indicated that children should be guaranteed a higher level of protection for their right to health and access to health services in health institutions. In this regard, the Court has emphasized that any delay or refusal to provide medical services could have an irreversible effect on a child’s medical condition and, therefore, negatively affect their development.<sup>101</sup> Additionally, the Constitutional Court has ruled that Article 50 of the Constitution guarantees newborn children’s access to the highest possible level of health care.<sup>102</sup>

In the case of children with disabilities, the Constitutional Court found that the State has an obligation to provide health services without discrimination. The Court has also ruled that children with disabilities must receive comprehensive, specialized and adequate medical treatment. The Court has ordered similar

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<sup>92</sup> See: Corte Constitucional, Sentencia T-417 de 2022, para 47.

<sup>93</sup> See: Corte Constitucional, Sentencia T-232 de 2022, para 16.

<sup>94</sup> Corte Constitucional, Sentencia T-178 de 2019, para 13 (free translation).

<sup>95</sup> Article 49 of the Constitution establishes that the State has a duty to organize, manage, and regulate health services. To this end, the Article determines that the State must follow the principles of efficiency, universality, and solidarity. The Constitutional Court has also established that health services should follow the principle of integrality (*integralidad*). See: Corte Constitucional, Sentencia T-456 de 2023, para 4.1.

<sup>96</sup> See: Corte Constitucional, Sentencia T-417 de 2022, para 49; Sentencia T-456 de 2023, para 4.3.

<sup>97</sup> See: Corte Constitucional, Sentencia T-456 de 2023, para 4.3.

<sup>98</sup> See: Corte Constitucional, Sentencia T- 210 de 2018, para 46; Sentencia T-417 de 2022, para 48; Sentencia T-456 de 2023.

<sup>99</sup> See: Corte Constitucional, Sentencia T-705 de 2017, para 3.4; Sentencia T-417 de 2022, para 50; Sentencia T-456 de 2023, para 4.2.

<sup>100</sup> See: Corte Constitucional, Sentencia T-417 de 2002, para 50.

<sup>101</sup> See: Corte Constitucional, Sentencia T-336 de 2022, para 25.

<sup>102</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 65; Sentencia T-178 de 2019, para 14; Sentencia T-145 de 2023, para 201.



protection to be provided in the case of children with degenerative, progressive and catastrophic illness<sup>103</sup> (*enfermedades catastróficas*).<sup>104</sup>

#### **C.4. Emergency health care**

With regard to emergency health care, the Constitutional Court has stated that appropriate emergency health care, from a human rights-based approach, requires “*the use of all necessary and available means to stabilize the patient's state of health, to preserve their life and to meet their basic needs*”.<sup>105</sup> Therefore, emergency health care goes beyond the stabilization of vital signs and may include treatment of “catastrophic illnesses”, interventions, and other health care and services requested by treating doctors as urgent to preserve a person’s life and health.<sup>106</sup> It also includes a minimum level of follow-up by the treating doctors.<sup>107</sup>

For the Constitutional Court, the concept of “emergency” must be understood from the perspective that the protection of a person’s life involves not only the elimination of the risk of death but also the overcoming of all circumstances that affect the quality of life and health. In other words, the concept of “emergency” requires consideration of the preservation of dignified living conditions through the protection of health.<sup>108</sup>

The Court has also established that emergency health care includes the “*use of health technologies to prevent critical, permanent or future consequences resulting from physical, functional or mental impairments that endanger the life or functionality of a person*”.<sup>109</sup> Similarly, the Court has held that emergency health care includes transfer to another health care facility when a facility does not have the resources or means to stabilize and save a person's life.<sup>110</sup>

Additionally, the Court has said that access to emergency health care includes preventive and collective measures with a public health approach.<sup>111</sup> Consequently, emergency health care services include the provision of vaccines and treatment for direct contact diseases.<sup>112</sup>

A final point to consider is that the Constitutional Court has stated that the provision of accommodation, food and transport for patients to receive medical treatment in a town or city other than their place of residence does not fall within the definition of emergency health care.<sup>113</sup> The Court has also ruled that emergency health care does not require the provision of medicines once the health emergency has ended and the treating doctor has not established that their continued provision is necessary as an emergency measure.<sup>114</sup>

#### **C.5. International human rights treaties**

The Constitutional Court has largely reaffirmed the content and scope of the right to health as guaranteed by international human rights law and standards.<sup>115</sup> In particular, the Court has acknowledged that Article 12 of ICESCR contains the most comprehensive entrenchment of the right to health at the international level.<sup>116</sup> The Court has also referenced the jurisprudence of the CESCR.<sup>117</sup> Similarly, the Court has

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<sup>103</sup> See: Corte Constitucional, Sentencia T-705 de 2017, para 3.3 and 3.5; Sentencia T-390 de 2020.

<sup>104</sup> The Constitutional Court has not defined what it considers to be a catastrophic illness. In Colombian legislation, a definition of catastrophic illness can be found in Article 17 of Resolution 5261 of 1994 ([Resolución 5261 de 1994](#)). This Article establishes that these illnesses “are characterized by low cost-effectiveness in changing a prognosis” and that their treatment has a high cost. The Article cites cancer and AIDS, among others, as examples of catastrophic diseases.

<sup>105</sup> Corte Constitucional, Sentencia, T 417 de 2022, para 60 (free translation).

See, also: Corte Constitucional, Sentencia T-705 de 2017, para 5.10; Sentencia T-348 de 2018, para 4.6.2; Sentencia T-263 de 2021, para 3.3; Sentencia 404 de 2021, para 291.

<sup>106</sup> See: Corte Constitucional, Sentencia T- 197 de 2019, para 2.1.

Sentencia T-452 de 2019, para 51(d); Sentencia T-263 de 2021, para 3.3; Sentencia, T 417 de 2022, para 60.

<sup>107</sup> See: Corte Constitucional, Sentencia T-450 de 2021, para 130.

<sup>108</sup> See: Corte Constitucional, Sentencia T-197 de 2019, para 2.2; Sentencia T-263 de 2021.

<sup>109</sup> See: Corte Constitucional, Auto 436 de 2024, para 14 (free translation).

See, also: Corte Constitucional, Sentencia T-415 de 2021, para 18.

<sup>110</sup> See: Corte Constitucional, Sentencia T-705 de 2017, para 5.10; Sentencia T-239 de 2017, para 74; Sentencia T-348 de 2018, para 4.6.2.

<sup>111</sup> See: Corte Constitucional, Sentencia T-246 de 2020, para 21 (iv); Sentencia T-210 de 2018, para 40.

<sup>112</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 40.

<sup>113</sup> See: Corte Constitucional, Sentencia T-705 de 2017, para 6; Sentencia T-348 de 2018, para 4.6.2.

<sup>114</sup> See: Corte Constitucional, Sentencia T-239 de 2017, para 100 (iii); Sentencia T-348 de 2018, para 4.6.2 and 4.6.3; Sentencia T-246 de 2020, para 20; Auto 436 de 2024, para 11.

<sup>115</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 12; Sentencia T-011 de 2024, para 38.

<sup>116</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 12.

<sup>117</sup> In particular, the Court has mentioned General Comment 14: The right to the highest attainable standard of health.

See: Corte Constitucional, Sentencia T-210 de 2018, para 12, 17, 18, and 21; Sentencia T-452 de 2019, para 29; Sentencia T-450 de 2021, para 104; Sentencia T-011 de 2024, para 38.

mentioned the Convention on the Rights of the Child,<sup>118</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>119</sup>

The Court's position is consistent with Article 93 of the Constitution, which requires that the human rights guaranteed by the Constitution be interpreted in accordance with human rights treaties by which Colombia is bound.

Finally, although the Constitution makes no reference to immediate and progressive obligations in relation to the right to health, the Constitutional Court has held that such distinct obligations do exist in terms of the constitutionally guaranteed right to health. As examples of immediate obligations, the Court has mentioned (i) the obligation set out in Article 50 of the Constitution on access to health services for children under the age of one; (ii) access to information before medical procedures; and (iii) access to emergency health services for all.

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<sup>118</sup> In particular, the Court has cited Article 3, which enshrines the principle of the best interests of the child at the international level. The Court has also referred to Article 24, which establishes the right of children to health. See: Corte Constitucional, Sentencia T-390 de 2020; Corte Constitucional, Sentencia T-450 de 2021, para 104; Sentencia T-145 de 2023, para 163; Sentencia T-344 de 2022, para 77; Sentencia T-336 de 2022, para 26.

<sup>119</sup> The Court has mentioned Article 28, which establishes that migrant workers and members of their families cannot be denied emergency medical care "*by reason of any irregularity with regard to stay or employment.*" See: Corte Constitucional, Sentencia T-300 de 2022, para 103.

## IV. Constitutional jurisprudence on the right to health of Venezuelan nationals in Colombia

In multiple decisions, the Colombian Constitutional Court has recognized the grave human rights crisis in Venezuela, which has led to a massive forced exodus of people from the country.<sup>120</sup> More specifically, the Court has acknowledged that one of the rights more affected by the crisis is the right to health of Venezuelans, particularly Venezuelan children.<sup>121</sup> Similarly, the Court has underscored that Venezuelan nationals women are in a particularly “vulnerable situation”. Among other things, the Court mentioned the risk of serious gynecological health problems and the fact that some women are single heads of household and primary breadwinners for their families.<sup>122</sup>

Due to the massive forced migration of Venezuelans to Colombia, the Court has stated that some Colombian states, cities and towns are, in turn, facing a humanitarian emergency.<sup>123</sup> The Court has also recognized that national, regional and local authorities have taken significant measures to guarantee access to health services for non-nationals and to enroll them in the Colombian health system.<sup>124</sup> At the same time, the Court has also highlighted that Colombia did not have humanitarian visas or special visas to allow Venezuelans to enter and remain in Colombia.<sup>125</sup> Similarly, the Court has recognized that Venezuelans face obstacles in obtaining a passport due to administrative barriers and costs. This situation seriously affects the possibility of entering Colombia in a manner considered “legal” under domestic law.<sup>126</sup>

As detailed below, the Constitutional Court has guaranteed the right to health of Venezuelan nationals, particularly in the case of individuals and groups considered to be subject to special constitutional protection (*sujetos de especial protección constitucional*), such as children, pregnant women, and persons with chronic diseases. However, the Court has also ruled that persons with “irregular migration status” may only have access to “emergency health care services” and do not have a right to be registered in the Colombian health system.

### A. Difference in treatment based on nationality and migration status

Grounding its approach primarily on Article 100 of the Constitution, the Constitutional Court has ruled that the differential treatment between nationals and non-nationals is valid and constitutional.<sup>127</sup> For instance, the Court has held that Colombian law may impose requirements and limits on the residence of non-nationals in the country.<sup>128</sup> The Court has also upheld the constitutionality of different rules on access to the organ transplant waiting list for non-nationals who do not have a resident permit in Colombia.<sup>129</sup>

The Court has also made it clear that the State’s obligation to guarantee some of the fundamental rights of persons with “irregular migration status” is limited.<sup>130</sup> In this regard, the Court has stated that persons with “irregular migration status” must be treated equally with Colombian nationals within “certain limits of reasonableness” (*ciertos límites de razonabilidad*).<sup>131</sup>

On the one hand, the Court has reaffirmed that non-nationals must be treated in “equal conditions” (*condiciones de igualdad*) with Colombians.<sup>132</sup> On the other hand, the Court has held that differential treatment on the basis of nationality is only lawful where there are “sufficient constitutional reasons”

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<sup>120</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 36 and 37; Sentencia T-178 de 2019, para 9; Sentencia T-371 de 2023, para 58 and 101; Sentencia T-456 de 2023, para 4.6.

<sup>121</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 44 and 45; Sentencia T-371 de 2023, para 58; Sentencia T-456 de 2023, para 4.6.

<sup>122</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 53.

<sup>123</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 41; Sentencia T-197 de 2019, para 3.3

<sup>124</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 41, Sentencia T-210 de 2018, para 34, and 42; Sentencia T-178 de 2019, para 10; Sentencia T-371 de 2023, para 62; Sentencia T-300 de 2022, para 100; Sentencia T-011 de 2024, para 42 and 46.

<sup>125</sup> The first special visa for Venezuelans was created in December 2024.

<sup>126</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 28, 29, and 30; Sentencia T-300 de 2022, para 96.

<sup>127</sup> See: Corte Constitucional, Sentencia T-239 de 2017, para 58; Sentencia T-210 de 2018, para 14 and 15, T-145 de 2023, para 166; Sentencia T-456 de 2023, para 6.2

<sup>128</sup> See: Corte Constitucional, Sentencia C-834 de 2007; Sentencia T-452 de 2019, para 38; Sentencia T-145 de 2023, para 168.

<sup>129</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 55, 56 and 81.

<sup>130</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 49.

<sup>131</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 49.

<sup>132</sup> See: Corte Constitucional, Sentencia T-314 de 2016, para 31.

(*suficientes razones constitucionales*) to justify it.<sup>133</sup> If there are no “sufficient constitutional reasons”, a different treatment of nationals and non-nationals amounts to discrimination and, as such, it is unconstitutional.

The Court has given further guidance on some of the criteria to be considered in determining whether different treatment on the grounds of nationality has occurred with “sufficient constitutional reasons”:<sup>134</sup>

- i. With respect to foreign nationals, including those with “irregular migration status”, legislators must respect their fundamental rights, as enshrined in the 1991 Constitution and treaties by which Colombia is bound.
- ii. The law cannot restrict fundamental rights enshrined in the 1991 Constitution and in human rights treaties on nationality grounds. This is because fundamental rights are universal and inherent to human beings.
- iii. The manner in which the right to equality between nationals and foreign nationals must be guaranteed is not the same for all human rights. Therefore, when authorities seek to regulate an issue, they must assess which specific human rights are implicated and the proposed way of regulating the issue at stake before establishing how strict an equality test must be.
- iv. Differential treatment must be justified in different factual circumstances and serve an objective and reasonable purpose. There must also be proportionality between the differential treatment and the purpose pursued by the regulatory measures in question.
- v. A difference in treatment must be reasonable and objective, with constitutional justification.

Along the same lines, to guarantee the human dignity of foreign nationals, the Constitutional Court has declared that all foreigners have the right to a “minimum of care” (*mínimo de atención*) from the State in cases of need or emergency to meet their basic and primary needs.<sup>135</sup> The Court has also established that lawmakers are forbidden from enacting laws that prevent non-nationals from accessing “minimum services” (*prestaciones mínimas*), particularly those laws related to health services, as these are guaranteed by the 1991 Constitution and human rights treaties.<sup>136</sup>

The Court has found that access to comprehensive health services for all migrant populations, including those with “irregular migration status”, can be achieved progressively.<sup>137</sup> In coming to this conclusion, the Court has noted the complexity of the measures to be taken by the national government and the resource intensity required to extend the coverage of health services to all.<sup>138</sup> The Court has also highlighted the structural problems that currently affect the Colombian health system as an additional justification for allowing only the progressive realization of the right to health of Venezuelans with “irregular migration status”, finding that placing too much pressure on the country’s already overburdened health system could cause significant problems.<sup>139</sup>

#### **A.1. Difference in treatment between foreign nationals “with regular” and “irregular migration” status in terms of access to health care services**

Due to the legislation mentioned above,<sup>140</sup> foreigner nationals with “irregular migration status” cannot enroll in the health system, and therefore, they do not have access to comprehensive health services, facilities, and goods provided by the health system. The Court has found that this difference in treatment between those with “regular migration status” and those with “irregular migration status” is justified. For the Court, the justification is the failure of persons with “irregular status” to regularize their migration status. On this point, the Court has stressed that foreigner nationals have an obligation to comply with the Colombian legal framework, as established in Article 4 of the 1991 Colombian Constitution.<sup>141</sup> In return, foreigners have the

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<sup>133</sup> See: Corte Constitucional, Sentencia C-834 de 2007; Sentencia T-210 de 2018, para 14; Sentencia T-145 de 2023, para 167.

<sup>134</sup> See: Corte Constitucional, Sentencia C-834 de 2007; Sentencia T 210 de 2018, para 14 and 39; Sentencia T-452 de 2019, para 38; Sentencia T-300 de 2022, para 88, 89, 90, and 91.

<sup>135</sup> See: Corte Constitucional, Sentencia C-834 de 2007; Sentencia T-314 de 2016, para 30; Sentencia SU-677 de 2017, para 46; Sentencia T-705 de 2017, para 5.5; Sentencia T-210 de 2018, para 15; Sentencia T-348 de 2018, para 4.5.1.

<sup>136</sup> See: Corte Constitucional, Sentencia C-834 de 2007, Sentencia T-348 de 2018, para 4.5.1.

<sup>137</sup> See: Corte Constitucional, Sentencia C-834 de 2007; Sentencia T-210 de 2018, para 15; Sentencia T-197 de 2019, para 3.3.

<sup>138</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 40.

<sup>139</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 40.

<sup>140</sup> See Section B, “Colombian laws on the right to health” of Chapter II of this document.

<sup>141</sup> See: Corte Constitucional, Sentencia T-705 de 2017, para 5.5.

right to enjoy the same guarantees as Colombians, as set out in Article 100 of the Constitution. In other words, the exercise of rights is linked to the fulfillment of certain obligations.<sup>142</sup>

It follows, according to the Court, that persons with “irregular migration status” are failing to comply with their obligation to “regularize their migration status”, which would allow them to have a valid identity document and be able to enroll in the Colombian health system. In other words, they have the duty to “regularize their migration status” to comply with the requirements to enroll in the health system and access all its services, facilities, and goods.<sup>143</sup>

The Court has affirmed this reasoning in multiple decisions. Moreover, the Court does not consider the “regularization of migration status” to be a mere formality. On the contrary, the Court has held that this obligation originates from the “duty of co-responsibility” (*deber de corresponsabilidad*) by which the enjoyment of rights requires the fulfillment of correlative duties.<sup>144</sup>

### The situation of Venezuelan nationals with “irregular migration status” and the adoption of some measures in their favour

Despite taking this position, the Constitutional Court has recognized that Venezuelan nationals find it very difficult to comply with migration regulations and the requirements to enroll in the health system.<sup>145</sup> In this regard, the Court has highlighted the economic hardship Venezuelans face in Colombia, including the fact that many do not have a permanent place to live, which illustrates their precarious living conditions in the country.<sup>146</sup> Furthermore, the Court has stated that “migrants” may experience situations of discrimination, vulnerability and exclusion.<sup>147</sup> Therefore, the Court has considered them “subjects of special constitutional protection”.<sup>148</sup> Despite this recognition, the Court has maintained that limited access to health services for Venezuelan nationals with “irregular migration status” has a reasonable and objective aim and is, therefore, constitutional.<sup>149</sup>

To alleviate the situation, the Court has asked the national government to review the current legislation and remove provisions that impose a disproportionate burden on persons with “irregular migration status”.<sup>150</sup> Justifying its request to the national government, the Court has highlighted that, under the ICESCR and the Salvador Protocol, the Colombian State has the duty to use “*the maximum of its available resources*” to fully realize the right to health.<sup>151</sup>

The Court has also called on national, regional and local authorities to coordinate their efforts to advance the realization of the right to health of “migrants”.<sup>152</sup> In addition, the Court has considered that the authorities have a duty to provide guidance to Venezuelan nationals on the procedure for registering with the health system.<sup>153</sup>

In the same vein, in some cases, the Court has ordered national authorities to provide legal assistance to Venezuelan NATIONALS with “irregular migration status”. For instance, in a case in which the Court identified the vulnerability of a Venezuelan who was a person living with HIV and had an “irregular migration status”, the Court ordered the Office of the Ombudsperson to provide legal assistance to help them “regularize their migration status” and enroll in the health system.<sup>154</sup>

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<sup>142</sup> See: Corte Constitucional, Sentencia T-314 de 2016, para 29; Sentencia T-210 de 2018, para 31; Sentencia T-517 de 2020, para 41 and 43; Sentencia T-011 de 2024, para 41.

<sup>143</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 27; Sentencia T-210 de 2018, para 11; Sentencia T-348 de 2018, para 4.5.1; Sentencia T-517 de 2020, para 44 and 45; Sentencia T-404 de 2021, para 280; Sentencia T-274 de 2021, para 69; Sentencia T-417 de 2022, para 57; Sentencia T-552 de 2023, para 37; Sentencia T-556 de 2023, para 146 and 157; Sentencia T-209 de 2024, para 64; Auto 436 de 2024, para 11.

<sup>144</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 44 and 70; Sentencia T-284 de 2022, para 6.1; Sentencia T-011 de 2024, para 40.

<sup>145</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 31.

<sup>146</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 31.

<sup>147</sup> See: Corte Constitucional, Sentencia T-178 de 2019, para 12; Sentencia T-300 de 2022, para 106; Sentencia T-371 de 2023, para 61 and 101.

<sup>148</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 43.

<sup>149</sup> See: Corte Constitucional, Sentencia T-300 de 2022, para 106.

<sup>150</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 40 and 41.

<sup>151</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 47.

<sup>152</sup> See: Corte Constitucional, Sentencia T-417 de 2022, para 61.

<sup>153</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 72.

<sup>154</sup> See: Corte Constitucional, Sentencia T-348 de 2018, para 4.6.3.

In a similar vein, see also: Corte Constitucional, Sentencia T-232 de 2022, para 34; Sentencia T-556 de 2023, para 146, 200, and 208.

Similarly, in the case of a Venezuelan woman with “irregular migration status” who was a victim of gender-based violence, the Court ordered the Office of the Ombudsperson to provide her with legal assistance to ensure continued access to mental health treatment if she decided to change her residence and live in another Colombian state. This order was made in light of the tendency of “migrants with irregular migration status” to change their place of residence.<sup>155</sup>

In another case, the Court ordered the Colombian migration authority (*Unidad Administrativa Especial Migración Colombia*) to advise a single mother with a teenage daughter with disabilities on how to regularize her daughter's migration situation, a necessary step to enroll the teenager in the health system.<sup>156</sup>

## B. Access to health services for persons with “regular migration status”

As explained above,<sup>157</sup> Article 2.1.3.5 of Decree 780 of 2016 sets out that enrollment in the health system is only possible for those in possession of a valid identity document. In line with this, the Constitutional Court has confirmed that Venezuelans “with regular migration status”, who would thereby have access to such a valid identity document, have the right to access health services, facilities and goods under the same conditions as Colombian citizens and non-nationals “with permanent residence status” (*permanencia regular*).<sup>158</sup>

In a specific case involving a child “with regular migration status” but without permanent residence status, the Constitutional Court declared an “exception of unconstitutionality” (*excepción de inconstitucionalidad*) to the application of Article 10 of Law 1805 of 2016 (Ley 1805 de 2016),<sup>159</sup> which prohibits non-resident foreigners from being placed on an organ transplant waiting list.<sup>160</sup> The Court held that although the Article was constitutional, its application in this case would lead to an unconstitutional result. Among other things, the Court considered that the case concerned a Venezuelan child who had left Venezuela with his family to seek medical treatment for his illness (liver failure) due to the collapse of the Venezuelan health system. The Court also highlighted the vulnerability and economic hardship faced by the child’s family in Colombia.<sup>161</sup>

### **Exemption for non-Colombians without permanent resident status to be included on organ transplant lists**

#### **(Sentencia T-371 de 2023)**

##### **Facts**

In December 2020, “MASG”, a Venezuelan woman, entered Colombia with “JMCS”, her 12-year-old son, who had a severe hepatic disease. In May 2021, “JMCS” was diagnosed with liver failure in a hospital located in Cucuta, a Colombian city on the Venezuelan border. In March 2022, due to the lack of specialists in Cucuta to properly treat his illness, “MASG” and “JMCS” moved to Bogota, the capital of Colombia.

Upon their arrival in Bogota, “MASG” regularized “JMCS”'s migration situation through a “Temporary Protection Permit” (*Permiso por Protección Temporal*, PPT). The PPT allowed “MASG” to enroll “JMCS” in the Colombian health system in the subsidized scheme in April 2022.

In Bogota, “JMCS” received medical attention and was hospitalized multiple times. The doctors treating him determined that “JMCS” was likely a candidate for an organ transplant. The doctors ordered a diagnosis by a hepatologist and organ transplant specialists. Despite these medical orders, “MASG” was informed that her son could not be included on the transplant list due to the prohibition established in Article 10 of Law 1805 of 2016. This Article prohibits non-resident foreigners from being placed on a waiting list for an organ transplant, with some exceptions.<sup>162</sup>

In November 2021, since “JMCS”'s health kept deteriorating, “MASG” filed an *amparo* action asking for the protection of her son's rights to life and health. In the *amparo* action, she requested the judge to order the inclusion of “JMCS” on the transplant list. The judges at the first and second instance rejected the request, based on the prohibition of Law 1805 of 2016.

<sup>155</sup> See: Corte Constitucional, Auto 436 de 2024, para 27.

<sup>156</sup> See: Corte Constitucional, Sentencia T-106 de 2022, para 60.

Also, see: Corte Constitucional, Sentencia T-246 de 2020, para 37; Sentencia T-263 de 2021; Sentencia T-415 de 2021, para 43.

<sup>157</sup> See Section B, “Colombian laws on the right to health” of Chapter II of this document.

<sup>158</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 84.

<sup>159</sup> The Law (in Spanish) is available at: [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1805\\_2016.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1805_2016.html)

<sup>160</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 106.

<sup>161</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 99.

<sup>162</sup> The exceptions are: (i) the organ donor is the spouse or permanent partner of the recipient; (ii) the organ donor is a relative of the recipient within the fourth degree of consanguinity or the second degree of affinity; and (iii) the Ministry of Health authorizes the transplant on the basis that there are sufficient organs to meet national needs.

### **Constitutional Court's reasoning**

First, the Court affirmed that the difference in treatment between Colombian residents and non-residents<sup>163</sup> on accessing organ transplant lists is intended to (i) prohibit organ tourism, since it is a practice that encourages organ trafficking and affects the possibility of Colombian residents obtaining an organ they need; and (i) non-residents are not subject to the same obligations as nationals and residents, such as paying financial contributions to the Colombian health system. In addition, it is possible to limit or even deny the exercise of some rights to foreigners on the grounds of public order.<sup>164</sup>

Secondly, regarding the specific situation of "JMCS", the Court decided to consider humanitarian reasons to address the case. For the Court, on the one hand, "JMCS" enjoys special constitutional protection because he was a child, and he was in a "situation of defencelessness and vulnerability" (*situación de indefensión y vulnerabilidad*) due to his illness. On the other hand, he was in Colombia in the context of a "massive migration" of Venezuelans.<sup>165</sup>

Considering the particular situation of "JMCS", the Court decided not to apply the prohibition of Article 10 of Law 1805 of 2016. For the Court, although the Article is constitutional, in the case of "JMCS", the prohibition was against the Constitution. As a result, the Court declared an "exception of unconstitutionality" (*excepción de inconstitucionalidad*).<sup>166</sup>

The Court justified its decision considering that "JMCS" (i) did not enter the country with the objective of skipping the waiting list for a transplant in Venezuela or buying an organ in Colombia; (ii) entered the country to receive the medical treatment he cannot receive in Venezuela; (iii) treating doctors in Colombia concluded he needed an organ transplant after multiple tests and treatments.<sup>167</sup> The Court also argued that this case was exceptional and called for the adoption of a humanitarian approach by the State and society.<sup>168</sup>

The Court also highlighted that Venezuelans have faced a humanitarian crisis in their country and in Colombia. In Venezuela, there has been a collapse of the health system, which includes the suspension of the organ transplant programme since 2017. In Colombia, they have faced discrimination, threats, abuses, exploitation and lack of access to basic services, including health, education, food, and housing. This situation has affected "MASG" and "JMCS", who are in a vulnerable situation in Colombia due to the lack of economic resources and the obstacles they have faced in accessing medical care.<sup>169</sup>

Additionally, the Court underscored that "JMCS" has a "special migration status", which made evident he did not want to avoid the prohibition of Article 10 of Law 1805 of 2016.<sup>170</sup> Similarly, the Court recognized that "JMCS" could not meet the requirements to request a residence visa until 2027. Therefore, he did not currently have the option to become a permanent resident of Colombia.<sup>171</sup> A final reason listed by the Court was the constitutional principles of the best interests of the child and the primacy of children's rights.<sup>172</sup>

### **Orders**

The Constitutional Court ordered the medical institutions responsible for "JMCS"'s medical care to carry out all medical tests to determine the viability of an organ transplant and, if necessary, include him on the organ transplant list. In that case, the position of "JMCS" on the list would depend on technical-scientific criteria.

## **C. Access to health services for persons with "irregular migration status"**

As explained above,<sup>173</sup> people with "irregular migration status" cannot enroll in the Colombian health system. Colombian legislation only guarantees their right to access emergency health care services. As explained below, the Constitutional Court has not only guaranteed this right but also clarified the content and scope of emergency health care services. In addition, the Constitutional Court has guaranteed access to other medical services to people "with irregular migration status" and has established special measures in favour of children "with irregular migration status".

<sup>163</sup> The "Colombian residents" category includes Colombian nationals and foreign nationals with regular residence permits. Therefore, it is possible that other foreign nationals have a "regular migration status" but are not considered Colombian residents. This is the situation of Venezuelans with temporary protection permits.

<sup>164</sup> *ibid.*, para 56.

<sup>165</sup> *Ibid.*, para 95.

<sup>166</sup> *Ibid.*, para 106.

<sup>167</sup> *ibid.*, para 99.

<sup>168</sup> *ibid.*, para 100.

<sup>169</sup> *ibid.*, para 101.

<sup>170</sup> *ibid.*, para 102.

<sup>171</sup> *ibid.*, para 94 and 103.

<sup>172</sup> *ibid.*, para 104.

<sup>173</sup> See section B.4., "Access to the health system for people who are not Colombian nationals" of chapter II of this document.

### C.1. Access to basic health care

The Constitutional Court has established that people “with irregular migration status” have the right to access “basic health care” (*atención básica en salud*) and emergency health care services.<sup>174</sup> The Constitutional Court has not defined what constitutes “basic health care”, but it has stated that this care is aimed at (i) avoiding an increase in the cost of the health system, (ii) preventing emergencies, and (iii) providing care in cases that will unavoidably become emergencies.<sup>175</sup>

### C.2. Access to emergency health care services<sup>176</sup>

In accordance with Colombian legislation,<sup>177</sup> the Court has confirmed that people “with irregular migration status” have the right to access emergency health care services.<sup>178</sup> The Court has stated that access to those services guarantees the right to a life with dignity and the right to personal integrity of persons “with irregular migration status” in Colombia.<sup>179</sup> With respect to Venezuelan nationals, the Court has said that Colombia has a “heightened solidarity” obligation (“*deber se solidaridad cualificado*”) to provide emergency health services.<sup>180</sup>

Concerning initial health care emergency services, the Constitutional Court has ruled that both public and private institutions cannot deny such services on the grounds that a person is not enrolled in the health system or has an “irregular migration status”.<sup>181</sup> Additionally, the Court has stated that once the emergency situation has ceased, “the foreigner” must obtain a health insurance and meet the requirements for enrolment in the health system.<sup>182</sup>

#### The expansion of emergency health care in cases of catastrophic or serious diseases

The Court has held that emergency health care may include medical interventions or procedures if necessary to preserve a person’s life or health.<sup>183</sup> The Court has ruled that emergency health services may cover the treatment of catastrophic illnesses,<sup>184</sup> such as cancer<sup>185</sup> or chronic kidney disease<sup>186</sup>, to guarantee the right to life and the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment (Articles 11 and 12 of the 1991 Constitution).<sup>187</sup> More specifically, the Constitutional Court has established that persons “with irregular migration status” can access health services if the following conditions are met:<sup>188</sup>

- i. The person suffers from a catastrophic illness.
- ii. There is a risk to the life and personal integrity of the person.
- iii. There is a medical determination of the need to access health services issued by the treating doctor.

Along the same lines, regarding cases of catastrophic illness, the Court has also guaranteed the right to a diagnosis for people “with irregular migration status”.<sup>189</sup> In particular, the Court has held that when a person “with irregular migration status” has a serious illness that is known to the health system, the authorities have a special duty to act diligently as part of their obligations under the right to health.<sup>190</sup> This duty means

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<sup>174</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 48 and 49.

<sup>175</sup> *ibid.*, para 48.

<sup>176</sup> Regarding general aspects of access to health emergency services, see section C, “Some general aspects of the constitutional jurisprudence on the right to health” of chapter III of this document.

<sup>177</sup> See section B, “Colombian laws on the right to health”, of chapter II of this document.

<sup>178</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 49; Sentencia T-705 de 2017, para 5.9; Sentencia T-210 de 2018, para 36; Sentencia T-348 de 2018, para 4.5.4; Sentencia T-517 de 2020, para 53; Sentencia T-336 de 2022, para 35; Sentencia T-417 de 2022, para 58; Sentencia T-552 de 2023, para 38; Sentencia T-556 de 2023, para 161; Sentencia T-011 de 2024, para 47; Sentencia T-209 de 2024, para 65; Auto A-436 de 2024, para 11.

<sup>179</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 49; Sentencia T-420 de 2018, para 40.

<sup>180</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 56; Sentencia T-197 de 2019, para 2.2.

<sup>181</sup> See: Corte Constitucional, Sentencia T-025 de 2019; Sentencia T-263 de 2021, para 3.1

<sup>182</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 54; Sentencia T-274 de 2021, para 74; Sentencia T-284 de 2022, para 6.2.

<sup>183</sup> See: Corte Constitucional, Sentencia T-417 de 2022, para 54.

<sup>184</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 74; Sentencia T-011 de 2024, para 48.

<sup>185</sup> See: Corte Constitucional, Sentencia T-210 de 2018, para 52; Sentencia T-274 de 2021, para 82 and 85; Sentencia T-556 de 2023, para 151; Sentencia T-209 de 2024, para 66.

<sup>186</sup> See: Corte Constitucional, Sentencia T-300 de 2022, para 135 and 136.

<sup>187</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 54.

<sup>188</sup> See: Corte Constitucional, Sentencia T-025 de 2019, Sentencia T-517 de 2020, para 54; Sentencia T-274 de 2021, para 74; Sentencia T-415 de 2021, para 17; Sentencia T-284 de 2022, para 6.2; Sentencia T-145 de 2023, para 200; Sentencia T-552 de 2023, para 38 and 39; Sentencia T-209 de 2024, para 66 and 67; Auto 436 de 2024, para 11.

<sup>189</sup> See: Corte Constitucional, Sentencia T-415 de 2021, para 21.

<sup>190</sup> See: Corte Constitucional, Sentencia T-415 de 2021, para 22.



that a diagnosis must be reached, and necessary and urgent medical treatment must be provided.<sup>191</sup> In addition, this duty implies an *ex officio* action to prevent an aggravation of any serious disease.<sup>192</sup>

In the case of women, the Court has called for medical services to be provided with a gender-sensitive approach.<sup>193</sup> Furthermore, in the case of women with cancer, the Court has urged authorities to bear in mind that women “with irregular migration status” may start medical treatment for breast and endometrial cancer at an advanced stage. It is, therefore, necessary to have guidelines and specific procedures in place to deal with such cases.<sup>194</sup>

## **Emergency health care services for cancer of a person “with irregular migration status”**

### **(Sentencia T-274 de 2021)**

#### **Facts**

In May 2019, a Venezuelan woman in her forties, entered Colombia. A couple of months later, she noticed a fetid odor in her urine. However, she did not go to the doctor and decided to use home remedies because she was not enrolled in the Colombian health system due to her “irregular migration status”.

In March 2020, after saving money, she paid for a private appointment with a gynecologist. The gynecologist diagnosed her with a cancerous tumour. In April 2020, she went to a private hospital, where after some medical tests, it was confirmed that she had cervical cancer stage II-B. At the hospital, she was told that due to the advanced stage of her disease, it was not possible to remove the tumour by surgery. Therefore, she would need radiotherapy or chemotherapy.

She began to suffer from heavy vaginal bleeding and fever, but was not admitted to hospital because of her weak immune system and the risk of contracting COVID-19. Eventually, in May 2020, she was admitted to a public hospital in Bogota, where the diagnosis of cancer was confirmed. The doctors at the public hospital recommended that she go to a public health centre specializing in cancer treatment in Bogota. Later that month, she went to the public health centre to seek medical attention. The centre refused to provide her with medical treatment, arguing that she needed “safe-conduct for temporary residency” (*salvoconductos de permanencia*), a temporary migration document valid for up to 60 days.<sup>195</sup>

In June 2020, she obtained the safe-conduct for permanence. However, the centre refused to treat her because her treatment was expensive. The centre told her she needed to be enrolled in the Colombian health system.

In July 2020, she filed an *amparo* action asking for the protection of her right to health in connection with her right to life. In the *amparo* action, she asked the centre to provide her with medical care. She also requested to be enrolled in the Colombian health system. By the time she had filed the *amparo* action, her safe-conduct for permanence had expired, and she had not been able to enroll in the Colombian health system. The judge found that her rights had not been violated. The judge considered that she had access to emergency services and that there was no evidence that she had been denied enrollment in the health system.

In early 2021, the Constitutional Court decided to review the woman’s *amparo* action. In July 2021, the Court received information that her cancer had been stage IV-B since July 2020 and that she needed palliative care.

#### **Constitutional Court’s reasoning**

The Court found that the centre had violated the woman’s right to health by denying her comprehensive medical treatment because she did not have a safe-conduct for permanence and was not registered in the Colombian health system.<sup>196</sup>

In justifying its decision, the Court stated that, although the general rule was that people had to regularize their migration situation and enroll in the health system in order to receive comprehensive medical care, there were extreme and exceptional situations where it was possible to extend medical care beyond basic emergency health services. This happened when people “with irregular migration status” suffered from serious or catastrophic illnesses, such as cancer.<sup>197</sup>

<sup>191</sup> See: Corte Constitucional, Sentencia T-415 de 2021, para 22, 42, and 51.

<sup>192</sup> See: Corte Constitucional, Sentencia T-415 de 2021, para 22.

<sup>193</sup> See: Corte Constitucional, Sentencia T-556 de 2023, para 198.

<sup>194</sup> See: Corte Constitucional, Sentencia T-556 de 2023, para 198.

<sup>195</sup> This temporary migration document allows a foreigner in Colombia to regularize their migration situation temporarily (up to 60 days). The aim is for the person to apply for a visa during this period. See: <https://bit.ly/4773b02>

<sup>196</sup> See: Corte Constitucional, Sentencia T-274 de 2021, para 79.

<sup>197</sup> *ibid.*, para 82.

Reiterating its jurisprudence, the Court found that in this case, all the conditions were met for extending the health emergency services to cover medical treatment or interventions: (i) she was diagnosed with a catastrophic disease; (ii) the advanced stage of her disease put her life at risk; and (iii) there is a medical concept of the need to start a treatment.<sup>198</sup>

The Court also ruled that it could not order the woman to be included in the Colombian health system. The Court stated that she had a duty to comply with the requirements “to regularize her migration situation” in order to be able to enroll in the health system. The Court found that she had not taken any action to fulfill this duty.<sup>199</sup>

### **Orders**

The Court ordered the centre to provide all emergency health services related to woman’s cancer if she agreed to receive them. Those services also required a doctor’s order stating they were urgent. In addition, the Court ordered the centre to consider her need for palliative care as her health had deteriorated and provide her with all the information and services she needed.

The Court also urged the woman to take the necessary steps to be able to enroll in the Colombian health system.

### **C.3. Children**

The Constitutional Court has ruled that all children must be registered in the health system, regardless of their nationality or “migration status”.<sup>200</sup> They must also have comprehensive access to health care services, facilities and goods, not just emergency health care services,<sup>201</sup> even if they are not enrolled in the health system.<sup>202</sup> For the Court, the constitutional principles of the best interests of the child, the primacy of children's rights over the rights of others, solidarity, and human dignity must be applied to secure access to health services for all children.<sup>203</sup> In addition, the Court has held that children should not have to bear the consequences of their parents’ negligence in “not regularizing their migratory situation”.<sup>204</sup>

In the case of children born in Colombia to parents “with irregular migration status”, the Court has ruled that the parents cannot “transmit” the “irregular migration status” to their offspring.<sup>205</sup> In this regard, the Court has ordered the National Civil Registry Office (*Registraduría Nacional del Estado Civil*) to register the births of children with parents “with irregular migration status”<sup>206</sup> and issue a birth certificate (*registro civil de nacimiento*), which is a valid document by which such children can be enrolled in the health system.<sup>207</sup> Similarly, in the case of children “with irregular migration status”, the Court has ruled that they cannot be required “to regularize their migratory situation” to receive the medical treatment they need.<sup>208</sup>

### **C.4. Access to other health care services**

The Constitutional Court has expanded the scenarios in which people “with irregular migration status” can access health care services beyond emergency services. The Court has established that people “with irregular migration status” must have access to:

- i. Preventive health care services with a view to preventing risks to public health (vaccines and medical care for direct contact diseases) when required. These services should be provided until the person is enrolled in the health system.<sup>209</sup>

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<sup>198</sup> *ibid.*, para 85.

<sup>199</sup> *Ibid.*, para 90 and 91.

<sup>200</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 27; Sentencia T-178 de 2019, para 34; Sentencia T-390 de 2020; Sentencia T-417 de 2022, para 56.

<sup>201</sup> See: Corte Constitucional, Sentencia T-106 de 2022, para 31 and 35; Sentencia T-284 de 2022, para 8.12; Sentencia T-371 de 2023, para 77 and 78.

<sup>202</sup> See: Corte Constitucional, Sentencia T-106 de 2022, para 65; Auto 081 de 2022, para 29; Sentencia T-336 de 2022, para 50.

<sup>203</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 77.

<sup>204</sup> See: Corte Constitucional, Sentencia T-390 de 2020; Sentencia T-415 de 2021, para 47; Sentencia T-450 de 2021, para 132; Auto 081 de 2022, para 24; Sentencia T-106 de 2022, para 32, 33, and 59; Sentencia T-336 de 2022, para 44.

<sup>205</sup> See: Corte Constitucional, Sentencia T-178 de 2019, para 34.

<sup>206</sup> There is no *ius solis* in Colombia. Children are not automatically considered Colombians simply because they are born on Colombian soil. One of the parents must be Colombian or have permanent residency. On this point, see Article 96 of Colombian Constitution.

<sup>207</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 27.

<sup>208</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 76.

<sup>209</sup> See: Corte Constitucional, Auto 436 de 2024, para 11.

- ii. Mental health services when considered urgent.<sup>210</sup> This includes cases where there is a risk of suicide<sup>211</sup> or a serious risk to mental health, such as in cases of gender-based violence.<sup>212</sup>

## **Access to mental health care services for women with irregular migration status who are victims of gender-based violence and**

**(Auto 436 de 2024)**

### **Facts**

In 2018, a Venezuelan woman entered Colombia “illegally” along with her three children, her sister and her partner. She left Venezuela due to the humanitarian, social and economic crisis. Before and after entering Colombia, she was a victim of gender-based violence perpetrated by her partner, who was also the father of her children. The violence she suffered included (i) not being allowed to work, (ii) physical, psychological and sexual violence, (iii) constant surveillance, and (iv) not being allowed to leave the house, even “to regularize her migration situation” in Colombia. She eventually managed to escape from her partner and no longer lived with him. She also filed a criminal complaint against him for domestic violence.

The gender-based violence she suffered caused her severe psychological harm and affected her life plans. She had attempted suicide and was afraid to leave her home. She also suffered from depression. In addition, she had not been able “to regularize her migration situation” through a “Temporary Protection Permit” (*Permiso por Protección Temporal*, PPT) because she missed the deadlines set by the Colombian government to apply for a PPT.

In April 2023, she submitted a petition to the Colombian migration authority requesting that she be granted an extension to apply for a PPT in light of her personal situation. The migration authority denied her request, arguing that it had to comply with Colombian law.

In August 2023, she filed an *amparo* action against the Colombian migration authority. She argued that the Colombian migration authority’s decision violated her rights to life with dignity, to equality, and to a life free of violence in connection with her rights to work and health. The first instance judge ruled that the Colombian migration authority did not violate her rights. The judge argued that she had the duty to comply with Colombian migration legislation. The second instance judge considered that the Colombian migration authority did not apply a gender approach to solve her request. Consequently, the judge ordered the Colombian migration authority to issue a new decision taking into account the woman’s personal situation.

At the beginning of 2024, when the Constitutional Court began to examine the case, the woman was not receiving medical care in the city where she lived due to her “migration status”. However, the doctors who had seen her had confirmed the severe psychological effects of the gender-based violence she had suffered for almost 20 years. In addition, the Court established that she worked as a street vendor, but her economic situation was also precarious. She wanted to find another job, but her “migration status” was an obstacle.

At the time of writing, the Constitutional Court has not handed down a sentence but has issued interim precautionary measures in favour of the woman.

### **Constitutional Court’s reasoning for issuing interim precautionary measures**

The Court concluded that the woman’s rights to health, life, and personal integrity were at risk as a result of the psychological harm she had suffered, particularly in view of her suicidal thoughts. As a result, the Court ordered the Colombian State where she lived to provide her with urgent mental health services.<sup>213</sup> The Court held that it was possible to order mental health measures for people “with irregular migration status” as a part of the emergency services.<sup>214</sup>

The Court considered that it could not determine the treatment that the woman needed. However, there was scientific evidence that women who suffered from gender-based violence needed mental health services. Among others, they can develop different “mental illnesses”, such as depression, post-traumatic stress, and schizophrenia. They also have a higher risk of suicide.<sup>215</sup>

### **Orders**

The Court ordered the Colombian state where she lived to provide her with psychological and psychiatric health services. The Court made clear that the woman must receive a diagnosis of her mental health. The Court also stated that these services must include access to medication, if necessary.

In addition, the Court ordered the Office of the Ombudsperson to provide her with legal assistance to ensure her continued access to mental health treatment if she decided to change her place of residence and live in

<sup>210</sup> *ibid.*, para 13 and 15.

<sup>211</sup> *ibid.*, para 15.

<sup>212</sup> *ibid.*, para 17 and ff.

<sup>213</sup> *Ibid.*, para 9.

<sup>214</sup> *ibid.*, para 15 and 16.

<sup>215</sup> *ibid.*, para 19 and 20.

another Colombian state. Finally, the Court ordered the Ministry of Health to ensure that she would continue to have access to mental health treatment in any Colombian State to which she moved.

### **C.5. Pregnancy care**

The Constitutional Court has ruled that pregnant women and girls “with irregular migration status” must receive free prenatal care and assistance during childbirth,<sup>216</sup> especially if they are under the age of 18 years.<sup>217</sup> The Court has provided several reasons to justify access to pregnancy care regardless of “migration status”.

The Court has stated that, while pregnancy cannot be considered an emergency, it might give rise to the need for urgent medical care.<sup>218</sup> In the case of girls “with irregular migration status”, the Court has highlighted that lack of access to prenatal care violates the constitutional principles of solidarity, human dignity, the best interests of the child, and the primacy of children's rights over the rights of others.<sup>219</sup>

The Constitutional Court has also highlighted the physical and psychological consequences of pregnancy to justify access to obstetric care. The Court has also taken into account the particular situation of a woman who is part of “the massive irregular migration of Venezuelans” and lives in a situation of extreme poverty.<sup>220</sup> Similarly, the Court has pointed out that access to prenatal care services can help prevent the death of the mother, the fetus, and the baby.<sup>221</sup>

In the same vein, the Court has ordered health institutions to guarantee access to medical services for newborn children whose mothers have “irregular migration status”.<sup>222</sup> In this regard, in a specific case, the Court ordered the Colombian Institute of Family Welfare (*Instituto Colombiano de Bienestar Familiar*) to provide a mother with legal advice on how to enroll her newborn child in the health system.<sup>223</sup>

### **Pregnancy care for women “with irregular migration status”**

#### **(Sentencia SU-677 de 2017)**

#### **Facts**

In March 2016, a Venezuelan couple, a woman and a man, entered Colombia “illegally”. The woman was four months pregnant, and the man was blind. In Colombia, they went to a hospital located in the state of Arauca (a Colombian state on the Venezuelan border) to ask for pregnancy care on multiple occasions, but the hospital denied the care due to their “irregular migration status”. The hospital informed the couple they needed to pay to access health services, including for the delivery of their baby.

In July 2016, the man filed an *amparo* action asking for the protection of the rights to life, health and personal integrity of her wife, who, by then, was six months pregnant. He requested the judge to order the hospital to provide maternity care and to attend the birth of her wife. The judge denied the request, arguing that people “with irregular migration status” have the duty “to regularize their migration situation” to be able to enroll in the Colombian health system. The judge also affirmed that since it was not a high-risk pregnancy, there was no irreparable situation to prevent with the *amparo* action.

By the time the Constitutional Court reviewed the case in early 2017, the daughter of the couple was already born. The couple had to pay for maternal care. Initially, the hospital also charged them for the delivery of their daughter. However, after the birth, the hospital decided not to charge them due to the intervention of a third person. The couple’s daughter was not enrolled in the health system when she was born but was enrolled after the Constitutional Court issued an interim precautionary measure in March 2017 ordering that this be done. In addition, the National Civil Registry Office (*Registraduría Nacional del Estado Civil*) did not issue a birth certificate immediately but only three months after the birth of the couple’s daughter.

#### **Constitutional Court’s reasoning**

<sup>216</sup> See: Corte Constitucional, Sentencia T-371 de 2023, para 78.

<sup>217</sup> See: Corte Constitucional, Sentencia T-145 de 2023, para 201.

<sup>218</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 57 and 63; Sentencia T-145 de 2023, para 201; T-344 de 2022, para 70.

<sup>219</sup> See: Corte Constitucional, Sentencia T-344 de 2022, para 72.

<sup>220</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 57 and 61; Sentencia T-344 de 2022, para 73.

<sup>221</sup> See: Corte Constitucional, Sentencia SU-677 de 2017, para 58.

<sup>222</sup> See: Corte Constitucional, Sentencia T-344 de 2022, para 79.

<sup>223</sup> *ibid.*, para 79.

Although any possible violation of rights alleged in the *amparo* action had already ceased, the Court decided to determine whether the hospital had violated the woman's and her daughter's rights.<sup>224</sup> In this regard, the Court concluded that the hospital had violated the woman's and her daughter's rights to a life with dignity and to personal integrity.<sup>225</sup>

To justify its decision, the Court considered that although the woman's pregnancy was not an emergency, she required urgent attention due to (i) the physical and psychological consequences of being pregnant, (ii) being part of "a massive irregular migration of Venezuelans", and (iii) living in extreme poverty in a part of Colombia facing a humanitarian emergency due to "the massive immigration of Venezuelans".<sup>226</sup> Citing Colombia's high maternal and neonatal mortality rates, the Court also pointed out that the lack of pregnancy care could lead to the death of the mother, the fetus, and the baby.<sup>227</sup>

Additionally, the Court considered that the hospital violated the woman's rights when she and her husband were charged fees for the delivery of her daughter. For the Court, this situation caused additional stress to the mother since she could not afford to pay for this health service. The fact that the hospital later decided not to charge them did not eliminate the stress she had felt.<sup>228</sup>

Regarding the couple's daughter, the Constitutional Court ruled that the hospital had violated its legal obligation to register her in the Colombian health system. The Court stressed that the hospital knew that the couple were not registered in the Colombian health system and, therefore, could not register their child.<sup>229</sup> On this issue, the Court emphasized the constitutional obligation, enshrined in Article 50 of the Constitution, to ensure that newborn children have access to the highest level of health care.<sup>230</sup>

The Court also pointed out that the hospital had failed to take into account several factors that placed the couple's daughter in a situation of increased vulnerability. These factors were (i) the humanitarian crisis in the part of the country where she lived, (ii) her parents' "irregular migration situation", (iii) her parents' situation of extreme poverty, and (iv) her mother's lack of prenatal care.<sup>231</sup> In addition, the Court considered that the hospital did not consider that the child was a subject of special constitutional protection.<sup>232</sup>

#### **Orders**

The Court warned the hospital not to repeat in the future the acts that had triggered the *amparo* action. To do so, the hospital must apply the Court's jurisprudence on access to basic health care services and emergency health services for people "with irregular migration status".

The Court also warned the National Civil Registry Office not to delay or refuse to issue birth certificates to children of people "with irregular migration status".

#### **D. HIV treatment and care**

The Constitutional Court has stated that the protection of persons living with HIV impacts the fulfillment of multiple rights, including reproductive rights and the right not to be discriminated against.<sup>233</sup> The Court has also acknowledged that persons living with HIV have historically been stigmatized and discriminated against due to social prejudice and the impact of HIV on public health. For these reasons, they are subjects of special constitutional protection.<sup>234</sup>

In the case of "migrants", the Constitutional Court has highlighted that the "migrant population" is one of the groups with a high level of risk of HIV infection. The Court has also received information on an increase in the prevalence of HIV in the "migrant population" in Colombia.<sup>235</sup> On this basis, the Court has called on the Ministry of Health to develop a policy to prevent HIV transmission among people "with irregular migration status".<sup>236</sup> For the Court, this policy is essential to protecting the right to health of this population and the host population and reducing costs to the health system.<sup>237</sup>

<sup>224</sup> Corte Constitucional, Sentencia SU-677 de 2017, para 14.

<sup>225</sup> *ibid.*, para 55 and f.f.

<sup>226</sup> *ibid.*, para 57 and 61.

<sup>227</sup> *ibid.*, para 58 and f.f.

<sup>228</sup> *ibid.*, para 62.

<sup>229</sup> *ibid.*, para 64.

<sup>230</sup> *ibid.*, para 65.

<sup>231</sup> *ibid.*, para 65.

<sup>232</sup> *ibid.*, para 66.

<sup>233</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 57 and 59.

<sup>234</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 58; Sentencia T-415 de 2021, para 40; Sentencia T-011 de 2024, para 50.

<sup>235</sup> See: Corte Constitucional, Sentencia T-496 de 2020, para 32.

<sup>236</sup> See: Corte Constitucional, Sentencia T-496 de 2020, para 40.

<sup>237</sup> See: Corte Constitucional, Sentencia T-496 de 2020, para 44.

Regarding access to HIV treatment, the Constitutional Court has reiterated that foreigners with permanent residence status who are registered in the health system have access to HIV treatment.<sup>238</sup> The Court has emphasized that access to the treatment must be provided without discrimination on the grounds of gender identity, health status, or the fact that a person is a "migrant".<sup>239</sup> In addition, the Court has ordered that if a person's health and/or economic situation makes it impossible to collect HIV medicines from a medical facility, they should be delivered to the person's home by prior arrangement with the person.<sup>240</sup>

The Constitutional Court's jurisprudence regarding persons "with irregular migration status" has not been uniform. In some sentences, the Court has held that HIV is no longer a catastrophic disease, as such, because of the scientific advances in its treatment.<sup>241</sup> Consequently, in principle, access to HIV treatment cannot be featured in the list of exceptions entitling people "with irregular migration status" to receive medical services beyond emergency health care services.<sup>242</sup> On this basis, the Court has denied an asymptomatic person "with irregular migration status" with HIV access to HIV treatment.<sup>243</sup>

Along these lines, the Constitutional Court has established, in a number of judgments, that access to HIV treatment for persons "with irregular migration status" depends on the fulfillment of the following conditions:<sup>244</sup>

- (i) There is a catastrophic state of health due to HIV.
- (ii) There is a medical determination for the need for the treatment issued by the treating doctor.
- (iii) There is a risk to the life or personal integrity of the person if they do not receive HIV medication.

By contrast, in other decisions, the Constitutional Court has held that HIV is itself a catastrophic disease.<sup>245</sup> In that regard, for instance, in a decision, the Constitutional Court stated that the continuity of antiretroviral treatment should be guaranteed even for persons "with irregular migration status".<sup>246</sup> Otherwise, for the Court, it is allowed a "*type of experimental activity that affects the dignity of the person*" ("*especie de actividad experimental que afecta la dignidad de la persona*").<sup>247</sup> In another decision, the Court found that denying access to HIV treatment not only violates a person's human rights to life and health but also undermines public health policies to prevent HIV in "migrant and host populations".<sup>248</sup>

In no decision has the Constitutional Court acknowledged a contradiction in its jurisprudence or a change in its jurisprudence. It should also be noted that Law 972 of 2005 (Ley 972 de 2005)<sup>249</sup> explicitly describes "HIV/AIDS" as a catastrophic illness.

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<sup>238</sup> See: Corte Constitucional, Sentencia T-456 de 2023, para 7.8.

<sup>239</sup> See: Corte Constitucional, Sentencia T-456 de 2023, para 7.8.

<sup>240</sup> See: Corte Constitucional, Sentencia T-456 de 2023, para 7.9.

<sup>241</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 61.

<sup>242</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 65; Sentencia T-417 de 2022, para 55.

<sup>243</sup> See: Corte Constitucional, Sentencia T-348 de 2018, para 4.6.3

<sup>244</sup> See: Corte Constitucional, Sentencia T-517 de 2020, para 68.

<sup>245</sup> See: Corte Constitucional, Sentencia T-025 de 2019; Sentencia T-246 de 2020, para 35; Sentencia T-415 de 2021, para 39 and 41; Sentencia T-011 de 2024, para 51 and 85.

<sup>246</sup> See: Corte Constitucional, Sentencia T-011 de 2024, para 83.

<sup>247</sup> Corte Constitucional, Sentencia T-011 de 2024, para 83 (free translation).

<sup>248</sup> See: Corte Constitucional, Sentencia T-246 de 2020, para 28; Sentencia T-496 de 2020, para 33.

<sup>249</sup> The Law (in Spanish) is available here: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=17080>

## V. CONCLUSIONS AND RECOMMENDATIONS

Colombia has not been indifferent to the massive forced exodus of Venezuelans, and executive, legislative and judicial authorities have taken significant measures to protect the human rights of Venezuelans. In particular, the role of the Constitutional Court has been paramount in improving the scope of protection of the right to health of Venezuelans, especially children and those with catastrophic illnesses. The Court has also contributed to the application of the legislation in favour of Venezuelans. Nevertheless, gaps remain in the protection of the right to health of Venezuelans in Colombia.

First, **the Colombian authorities have failed to comply with the constitutional and legal framework on the right to health for Venezuelan nationals.** In a significant number of the Constitutional Court's rulings, the Court concluded that the framework had not been taken into account or correctly applied, resulting in violations of the right to health and the right to life of Venezuelans.

In this regard, for instance, the Constitutional Court has repeatedly found that the Colombian authorities are failing to guarantee access to emergency health services for people "with irregular migration status", despite the existence of a clear legal obligation to do so. It is also concerning that the authorities are not applying the jurisprudence of the Constitutional Court, which has repeatedly reiterated the scope and elements of emergency health care services. Even more concerning, the lack of application of the jurisprudence goes beyond health authorities and institutions. It also includes judges who have ruled on *amparo* action cases at the first and second instance levels. In multiple decisions reviewed, the Court overturned judges' decisions denying access to a medical service as part of emergency health care.

Another glaring failure is the flagrant lack of application of the special constitutional and legal protection regarding the right to health of children. Despite the existence of a specific constitutional provision guaranteeing comprehensive and full access to health care services for all children under the age of one (Article 50 of the 1991 Constitution), the Constitutional Court has had to order measures to protect newborn children born of parents "with an irregular migration status".

The consequences of this failure by the Colombian authorities have been devastating for the realization of the right to health of Venezuelans, especially for those "with irregular migration status". In some cases, by the time the Constitutional Court ruled that there had been a violation of the right to health and ordered access to medical services, the person who filed the *amparo* action had already suffered irreversible consequences to their health or quality of life or both. This is often the case where the lack of medical attention severely aggravates a disease or makes it fatal.

The failure to apply the constitutional and legal framework correctly, as well as the jurisprudence of the Constitutional Court, has also resulted in a situation where the right to health of Venezuelans is not guaranteed to all of them equally. On the contrary, it depends on several circumstances, such as filing an *amparo* action before a judge familiar with the jurisprudence of the Constitutional Court and a person's knowledge of their rights.

Second, despite the Colombian authorities' formal recognition of the plight of Venezuelans, the current legislation and jurisprudence do not provide for the full realization of the right to health of Venezuelans. This is because the measures and orders adopted do not translate into access to health services, facilities and goods for Venezuelans on an equal basis with Colombians. The differential treatment faced by those "with an irregular migratory status" in accessing health care does not seem to be consistent with international human rights law and standards in respect of non-citizens access to health, according to which such treatment shall be reasonable, objective, proportionate and shall not harm human rights. The negative impact of such deviations from international human rights law and standards is significantly compounded by the serious difficulties faced by migrants in regularizing their status and stay in Colombia.

In this regard, the Court's reasoning that the enjoyment of the right to health depends on the fulfillment of a duty ("the regularization of migration status") violates Colombia's international law obligations in respect of the right to health. Indeed, such reasoning contradicts the inalienable and inherent nature of human rights and fails to facilitate the implementation of measures that would allow people "with irregular migration status" access to the Colombian health care system. If the current restrictions are deemed constitutional, the effect is that there is no constitutional obligation to change the situation in favour of people "with irregular status".

The Court has not considered in depth either the practical barriers that Venezuelans face "to regularizing their migration status", including precarious living conditions, lack of time due to family and work constraints, the complexity of the "migration system", and the payment of administrative costs or fines for

remaining in the country "with irregular migration status". Consequently, despite the fact that the Court has acknowledged the social and economic barriers faced by the Venezuelans, the Court's reasoning conveys the wrong idea that "regularizing the migration status" is a duty that Venezuelans can certainly comply with.

Regarding the current legal legislation and public policies on the right to health of Venezuelans, despite significant progress, they still do not adequately address their situation. In particular, there are two critical areas that have not been addressed. The first area is the lack of significant steps to expand access to health services, facilities, and goods for Venezuelans "with irregular migration status". Unfortunately, in the short term, they are unlikely to have access to all the comprehensive services the Colombian health system provides. The Constitutional Court has played an important role in perpetuating this situation since, as mentioned above, it has ruled that it is possible to progressively expand the enjoyment of the different elements of the right to health for people "with irregular migration status". This also violates Colombia's obligation to guarantee the right to health services on a non-discriminatory basis.

The second area is the lack of measures to provide the majority of Venezuelans with "a definitive regular migration status". As mentioned in the introduction, most Venezuelans have a regular migration status based on a "temporary protection permit", the "Temporary Protection Permit" (*Permiso por Protección Temporal, PPT*), which expires in May 2031. Similarly, the special visa for Venezuelans is only valid for two years. There have been no comprehensive adjustments to make it easier for Venezuelans to obtain a more permanent migration status, such as waiving the financial costs of the issue of a long-term visa or a foreigner's identity card.

Although the new special visa for Venezuelans may allow those who have entered the country after 31 January 2021 and before 4 December 2024 to "regularize their migration status", this measure does not take into account the ongoing social, economic and political situation in Venezuela and the fact that more Venezuelans are likely to leave the country. Therefore, it is likely that a segment of Venezuelans will not be able to obtain "a regular migration status", which also means that they will not have any possibility to enroll in the Colombian health care system.

In light of the above, the national government should take measures to:

1. Ensure that all Venezuelans in the country, regardless of their "migration situation", enjoy the highest attainable standard of physical and mental health. This requires the removal of unreasonable legal restrictions on the enrolment of persons "with irregular migration status" in the health system.
2. Respond to the Constitutional Court's call to review current legislation and remove provisions that place a disproportionate burden on foreign nationals. This should include a review of migration laws and regulations.
3. Seek international cooperation and assistance to guarantee the right to health of all Venezuelans in accordance with Colombia's international human rights obligations.

The Ministry of Health should:

1. Lead an assessment and adopt measures to overcome the current practical barriers that Venezuelans face in accessing health services, facilities, and goods. This assessment should consider the special needs of some sectors of the population, such as women, persons with disabilities, and persons with catastrophic diseases. It is also important that the assessment considers the lack of coordination among national, regional, and local authorities, as identified by the Constitutional Court. In addition, the assessment should guarantee the meaningful participation of Venezuelans and their organizations.
2. Ensure that health institutions and authorities have a comprehensive knowledge of the Constitutional and legal framework and the jurisprudence of the Constitutional Court in favour of Venezuelans.
3. Respond to the Constitutional Court's request to develop public policies to prevent HIV transmission and prevalence among people "with irregular migration status" and to address cases where people seek medical care for chronic diseases in advanced stages.
4. Respond to the Constitutional Court's call to ensure that women living in poverty and women "with irregular migration status" receive medical attention in a gender-responsive manner in the cases of delayed access to medical treatment for breast and endometrial cancer.
5. Lead a government strategy to increase the knowledge of the content of the right to health among Venezuelans.

The Ministry of Justice should take measures to:



1. Ensure the provision of a broad spectrum of legal services to Venezuelans regarding access to health services and enrolment in Colombian health services. This should be done in coordination with relevant State institutions, including the Office of the Ombudsperson, the Colombian migration authority, and the Colombian Institute of Family Welfare.

For its part, the Constitutional Court should:

1. Take a more proactive role in ensuring that all judges are familiar with its jurisprudence on the right to health of Venezuelans. To this end, the Court should promote the inclusion of its jurisprudence in the academic curriculum offered to judges by the judiciary services.
2. Align all its jurisprudence with Colombia's international human rights obligations on the right to health. In particular, the Court should change its jurisprudence asserting that access to the Colombian health system can permissibly be linked to a duty for people "to regularize their own migration status".

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