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The migration emergency in the Darién Gap: U.S. measures and their compliance with international obligations

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Introduction

The history of humanity is, fundamentally, a history of movement. Since its origins, migration has emerged as an intrinsic phenomenon of the human condition: a vital and unstoppable impulse driven by the search for survival, security, and dignity. The journey has functioned as a primary instrument for adaptation and evolution, allowing the species to populate the globe, long before being a modern anomaly. In this sense, mobility is not an exception to the rule. Conversely, it is precisely because of its nature as an inherently human characteristic that migration represents one of the most critical focal points of international law. Not surprisingly, the origins of international human rights law lie in the protection of foreigners[1].

Nonetheless, the contemporary migratory phenomenon represents a critical nexus for modern international law, acting as an amplifier for the clash between State sovereignty and the universality of human rights. In an era marked by unprecedented global mobility, the management of migratory flows has ceased to be a mere administrative matter and has transformed into a profound ideological and legal battlefield. This thesis aims to investigate this tension by focusing on the Darién Gap route: a jungle isthmus between Colombia and Panama that has become the concrete symbol of the failure of protection policies and the victory of security-driven logic.

The landscape of Latin America has in fact experienced a radical transformation in its migratory movements during last decades, shifting from mainly emigration toward Europe or Northern America to a complex intraregional, transit or internal flows[2]. This scenario is the result of a structural convergence of political and economic instability, systemic violence and the increasing externalization of United States border policies[3]. This trend culminated in the unprecedented humanitarian emergency of 2023, where over 520,000 individuals, including significant groups from Haiti and Venezuela, traversed the Darién Gap[4]. As this jungle territory between Colombia and Panama becomes a focal point for Northward migration, especially seeking asylum in the United States, the increasingly restrictive policies adopted by U.S. administrations must be carefully taken under intense scrutiny. These measures pose significant legal challenges, questioning the equilibrium between national security interests and the fundamental guarantees enshrined in international law.

[1] P. PUSTORINO, *Introduction to International Human Rights Law*, 2019, p. 2.
[2] P. RIGGIROZZI AND C. QUILICONI, *Latin American migration governance: the politics of ambiguity and adhocracy*, in *International Affairs*, 2026, n. 102, p. 1.
[3] *Ibid.*
[4] Servicio Nacional de Migracion Panama, *Tránsito Irregular Por Darién 2023*, [https://www.migracion.gob.pa/wp-content/uploads/IRREGULARES-2010-2019-actualizado.pdf , accessed on 9th February 2026].

This thesis investigates the extent to which recent United States anti-migration and deterrence measures, specifically those aimed at obstructing flows from the Darién Gap, are consistent with international human rights and refugee law when examined through the lens of a permanent state of emergency. The central hypothesis of this analysis is that liberal democracies, led by the United States, have reframed the migratory phenomenon as a "national emergency" by invoking the discretionary powers inherent in the emergency paradigm. Consequently, the U.S. administration has adopted a border management model rooted in securitization and externalization, effectively transitioning the concept of emergency from a temporary event into a permanent governing legal framework. This process does not merely restrict migratory flows; it creates a grey zone where the fundamental rights of migrants are suspended in the name of national security.

The research will adopt a theoretical-legal approach, primarily based on a rigorous analysis of international and regional treaties. This will be complemented by an extensive review of secondary literature, with a particular focus on reports and documents issued by non-governmental organizations (NGOs) and independent international bodies, fundamental actors in describing the actual situation in the region and in denouncing the violations of human rights. Key sources will include UNHCR guidelines, reports from American Immigration Council regarding U.S. asylum and detention policies, and comprehensive field data provided by organizations such as Human Rights Watch and the International Organization for Migration (IOM). By synthesizing these diverse legal and empirical sources, the thesis aims to bridge the gap between formal normative frameworks and the practical reality of migration management, from the transit through the Darién Gap to the eventual arrival at the United States' border.

To address the research question and test the central hypothesis, this study is organized into four interconnected chapters that move from theoretical legal foundations to empirical analysis and, finally, to a critical legal assessment of current policies.

In Chapter 1, the research begins with the foundations of international law and its general principles regulating migration. It analyzes the complex regulatory framework defining the categories of migrants and refugees, highlighting the gaps within the Inter-American protection system. Particular attention is further given to the theory of the state of emergency and its degenerations, referring specifically to the conception of migration as a permanent state of emergency. A central component is in fact the "state of exception" theory, briefly comparing Kelsen's normativism with Schmitt's decisionism. Through this lens, the research demonstrates how the narrative of the migratory emergency is strategically utilized to justify a permanent state of emergency, eroding procedural guarantees that should remain inalienable. Through legal and theoretical analysis, this chapter

demonstrates how the narrative of a migratory emergency is utilized to justify the erosion of procedural guarantees that should be inalienable under universal and regional treaties.

Chapter 2 moves the analysis to the empirical level, exploring the geographical and social reality of the Darién Gap. Beyond the hostile morphology of the territory, it examines how the jungle itself has been instrumentalized as a natural deterrent**.** This chapter explores the dynamics of institutional and systemic violence within the Migration Reception Centers (ETRMs) and analyzes the Panamanian policy of *Flujo Controlado* (Controlled Flow). It reveals a profound gap between institutional rhetoric and the lived reality of migrants, where the absence of control and the involvement of actors like armed gangs in the area create spaces of impunity and grave human rights violations.

Chapter 3 scrutinizes the evolution of United States migration policies, tracing the trajectory of control measures from the first Trump administration through the Biden era. It focuses specifically on the two-fold strategy of limiting access to international protection and the so-called *externalization of border control* through bilateral agreements with transit countries like Panama and Colombia. This chapter argues that such policies do not stop migration but rather reconfigure it, creating zones of forced immobility and a *reverse flow* phenomenon, which exponentially increases the lethality of the routes and the vulnerability of migrants to exploitation.

Finally, Chapter 4 offers a critical legal synthesis, contrasting U.S. deterrence policies with international obligations, such as the principle of *non-refoulement* and the Convention Against Torture. It concludes by highlighting how the absence of binding jurisdiction of the Inter-American Court over the United States creates a zone of impunity that challenges the global legal order.

By employing an interdisciplinary approach that combines legal analysis, geopolitics, and humanitarian data, this thesis intends to prove that the Darién Gap is not just a physical obstacle, but the product of a deliberate political will that sacrifices human dignity at the altar of border surveillance.

Chapter 1 – Migration as a permanent state of emergency

1.1 Migration: definition of the international legal framework

Migration is a complex phenomenon of our times. Being at the center of public discussion, it also fuels the academic debate within international law. To construct a rigorous analysis of the phenomenon, it is first necessary to delineate a clear terminological ground. In this regard, it must be noted that there is no universally accepted definition for migration. According to the International Organization for Migration (IOM), a migrant can be defined as: "[…] a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons"[5]. The word is an umbrella term for many categories of people, both legally defined or not specifically determined by international law, among which there are, for instance, migrant workers, international students, smuggled migrants, and refugees[6].

The distinction between these different categories is not a mere linguistic exercise; indeed, it is fundamental for determining the international legal regime under which they are included and, consequently, the scope and the nature of the rights and protections – as well as the duties – they are entitled to. This differentiation is the result of a fragmented landscape of international instruments[7]: while some groups fall under the protection of general human rights treaties, others are subject to specialized regimes. Hence, for example, the protection of refugees is primarily governed by the 1951 Geneva Convention and its 1967 Protocol[8], while migrant workers find their specific legal basis in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)[9]. Other categories like international students or smuggled migrants are subject to different frameworks, including bilateral agreements or the Protocol of the UN Convention against Transnational Organized Crime[10].

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[5] International Organization for Migration (IOM), *Key Migration Terms,* in IOM UN Migration website. [https://www.iom.int/key-migration-terms . Accessed on 24th January 2026.]
[6] *Ibid.*
[7] V. CHETAIL, *International Migration Law,* 2019, p. 76.
[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[9] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.
[10] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

In order to proceed with the analysis, only specific categories of migrants will be described, in conjunction with the legal documents and the general principles whose purpose is to ensure the protection of their human rights. This choice follows a functional approach regarding the scope and aim of the study, namely the mixed migration flows of the Darién Gap. Therefore, the exclusion of other groups does not imply they are considered less significant in general terms, but rather that they fall outside the specific objective of this study.

1.1.1 General principles of international law

Despite its prismatic nature, the international system recognizes a core set of general principles of law that apply across all situations, transcending the specific categorization of individuals[11]. For what concerns the phenomenon of migration, these principles represent the minimum standard of rights to which all States are subjected.

In describing the migratory movement, the first step of human mobility is the moment in which the migrant leaves the country of origin. Notwithstanding the possibility to here stand the obvious, the international legal system has recognized the fundamental *right to leave*, which represents the basics for the development of international migration law[12]. The first step in recognizing freedom of movement was taken in article 13(2) of the Universal Declaration of Human Rights in 1948[13]. Nonetheless, the non-binding nature of the UN General Assembly (UNGA) resolution, at the time, made the statement more as a guiding beacon than an imposed duty upon States. However, over time, the principle has gained such international acceptance that the question of its customary nature has raised[14]. Advocates for such a consideration underline the fact that, during the *travaux preparatoirs,* the right to live was believed to be "a fundamental human right" by the majority of states' representatives, with the exception of the Union of Soviet Socialist Republics' (USSR)[15]. In any case, the right has been reaffirmed also in treaty norms, specifically in the International Covenant on Civil and Political Rights (ICCPR) in 1966, currently ratified by 172 states[16]. Article 12(2) establishes that: "everyone shall be free to leave any country, including his own". It is important to underline the first element of tension which characterizes the relationship between fundamental human rights and rights of States in international law. Article 12(3), in fact, determines a limit of the exercise of such a right in cases that "[…] are provided by law, are necessary to protect national security, public order (*ordre*

[11] V. CHETAIL, *cit.*, p. 76.
[12] V. CHETAIL, *cit.*, p. 77.
[13] Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III): art. 13(2): "Everyone has the right to leave any country, including his own, and to return to his country".
[14] V. CHETAIL, *cit.*, p. 79.
[15] *Ibid.*
[16] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

public), public health or morals or the rights and freedoms of others […]"[17]. Nonetheless, the scope of the right is considered inclusive, as confirmed by the Human Rights Committee, who stated some conditions to be respected in this regard: the right applies both to nationals and non-nationals; it is not connected to the lawfulness of the presence of an individual on the State territory; it is recognized for temporary or permanent sojourn; it prescribes a twofold obligation for the State, which shall not only prevent any for exercising the right, but also issue travel documents[18]. Another important requirement underlined by the HR Committee is the meeting for potential limitations for States of the test of proportionality and necessity, ensuring that such restrictions do not exceed what is strictly required to achieve their legitimate aim[19]. As effectively summarized by V. Chetail, the existence of a customary norm might be provided also by non-binding resolutions, especially those of the UNGA, if adopted by the broad majority[20]. Although these resolutions are not laws in a strict sense, the International Court of Justice (ICJ) has indeed explained that they can possess normative value. In practice, they serve to demonstrate the existence of *opinio juris*, that is, the conviction among States that a certain rule is both valid and necessary. This is particularly the case for the right to leave, which, widely established in non-binding legal instruments and international treaties, is considered as a customary norm by the international community, scholars and others international subjects.

A first contradiction in international migration law may arise when looking at another fundamental step of human mobility: the arrival of the migrant and, consequently, the *right to enter*. Part of the academia, in fact, highlights a possible friction of the application of the right to leave without a concrete obligation of admission to another country[21]. This gap exists as soon as international law focuses on guaranteeing the right for individuals to return to their country of origin, without conceiving the complexity of the international scenario, where people may move without the intention or, more often, the possibility to return. By recognizing the right to leave and to return, contemporary international norms omit any right to be admitted by another state during the two steps of human mobility, creating a normative asymmetry, where the freedom of movement is *de facto* not fully respected[22].

On the one hand, the right to enter, in fact, is recognized if applied to the individual's own country – national or residential – as determined by article 12(4) of ICCPR[23]; on the other hand, universal

[17] ICCPR: art. 12(3).
[18] UN Human Rights Committee (HRC), General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 8-9.
[19] UN HRC, *cit.,* para. 14.
[20] V. CHETAIL, *cit.*, p. 87.
[21] V. CHETAIL, *cit.,* p. 91.
[22] *Ibid.*
[23] ICCPR: art. 12(4): "No one shall be arbitrarily deprived of the right to enter his own country".

treaties on the matter are scarce in number and on the categories to which this right is granted, while regional treaties have vastly assumed a comprehensive and a more inclusive approach[24]. Apart from the ICCPR, another relevant multilateral document is the General Agreement on Trade in Services (GATS) and its Annex[25], dedicated to the exchange of services and people among countries. Even considering its broad territorial scope, it encounters at least three limits in regard to general migration: firstly, it concerns temporary movement of service providers, excluding employment or citizenship seekers; secondly, it leaves great discretionary powers to the State on the regulation of natural persons' entrance, leaving some ambiguity over the applicable measures; thirdly, the State decides the sectors for which opening the access to its territory and the specific conditions of such entrances[26]. Accordingly, the right to enter is highly maintained in the domestic sphere, prioritizing State sovereignty over individual rights.

In addition to the aforementioned, international migration law is shaped by two fundamental principles, which represent the cornerstone of the protection of migrants throughout their journey: the principles of *non-refoulement* and *family reunification*. These customary norms prohibit the rejection of individuals when such a refusal would result in a violation of fundamental rights, although they do not explicitly determine the specific means of implementation[27].

The principle of *non-refoulement* is broadly enshrined in different branches of international law, establishing a prohibition for all States to reject any individual whose life might be threatened, or who might face persecution, if removed to a territory where such risks exist[28]. The fact that treaties containing such a principle are almost universally ratified, along with the general practice of States and the wide expressed *opinion juris* make the principle of *non-refoulement* considerable as a customary international norm[29]. The principle represents the basis of international protection for migrants, recognizing that protection shall be guaranteed to any person who risks his or her life due to torture, inhuman or degrading treatment in case of return to the country of origin or any territory where safety is compromised.

The second column of international migration law is the principle of family reunification. It derives directly from the right to family life, which is highly recognized as a customary norm, as well as affirmed in article 23(1) of ICCPR, where family is defined as: "[…] the natural and fundamental

[24] V. CHETAIL, *cit,* p. 92.
[25] General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183.
[26] V. CHETAIL, *cit.,* p. 96.
[27] V. CHETAIL, *cit.*, p. 119.
[28] *Ibid.*
[29] *Ibid.*

group unit of society and is entitled to protection by society and the State"[30]. State's obligation is here of both positive and negative nature, since, other than actively protecting the family of individuals, it shall also prevent any interference in family life[31]. The safeguard of such a right might include family reunification as an instrument to guarantee the effective enjoyment of family, as affirmed by the HR Committee[32]. Even though considering family reunification as a customary norm has encountered fewer general states' acceptance, not only scholars have underlined its essential connection with the right to family, especially regarding vulnerable groups of people, namely unaccompanied minors[33]. The 1989 Convention on the Rights of the Child (CRC) contains such provisions in article 9(1) and article 10(1)[34]. It is affirmed that: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when […] such separation is necessary for the best interests of the child"[35]. As written by V. Chetail, to underscore the universal consensus surrounding this principle, it is interesting to note that a US Federal District Court issued that the best interest of the child must be considered in the immigration field as a customary principle codified in the CRC[36].
The significancy is given by the fact that the United States are the only UN country who did not take part to the treaty. The Convention establishes the *best interests of the child* as the paramount consideration in migration processes, prohibiting the arbitrary separation of families and imposing a procedural and substantive obligation on States to handle reunification applications in a "positive, humane, and expeditious manner"[37]. In practice, the norm suggests a presumption of approval for such requests, especially when no reasonable alternative for family unity exists elsewhere. Given the near-universal ratification of the CRC, this duty to facilitate family reunification for children is increasingly recognized as a norm of customary international law, limiting state discretion in the field of immigration control[38]. At the same time, the right does not seem to encounter a general duty of reunifying families, if children are not included in the equation[39].

[30] ICCPR: art. 23(1).
[31] ICCPR: art.17(1).
[32] HRC, General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, in Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 1990. UN Doc HRI/ GEN/ 1/ Rev.5, art 23, para 5.
[33] V. CHETAIL, *cit.*, p. 127.
[34] UN Convention on the Rights of the Child (CRC), 1989 art. 10(1): "[…] applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner".
[35] CRC: art. 9(1).
[36] V. CHETAIL, *cit.,* p. 127.
[37] CRC: art. 10(1).
[38] V. CHETAIL, *cit.*, p. 129.
[39] V. CHETAIL*, cit.,* p. 131.

Along with substantial principles of law, there are some procedural guarantees individuals shall enjoy during migration: the prohibition of arbitrary detention; the due process and the prohibition of collective removal of migrants; the right to human dignity and the principle of non-discrimination.

The *prohibition of arbitrary detention* is well-established in customary international law and codified in many treaties, and it applies to all deprivations of liberty, including detention for immigration, regardless of the documentation brought by the individuals; the principle has been largely reminded by UNGA resolutions, where alternative detention measures have been encouraged[40]. In parallel, detaining migrants does not imply automatically an arbitrariness of the State; conversely, it represents, as many noted, a paradox of the contemporary migration governance, characterized by state suppression of the right to liberty as the first instrument to deter and control migration[41]. Nonetheless, some minimum limitations to arbitrary detention have been established in international law to avoid the translation of such measures in absolute state power: firstly, the requirement of delineated legal basis, that is, the accordance and authorization by domestic law, in order to guarantee legal certainty; secondly, the respect of necessity, proportionality and reasonability of the detention measures in respect of the purpose to achieve; lastly, the provision of access to the court for the individual to counterargue his or her detention[42]. The restricting approach to the limitation of liberty is particularly applied in cases concerning minors, where alternative measures of migration management are strongly encouraged[43].

The second procedural guarantee to be respected is the *prohibition of collective removal of migrants*. In article 13 ICCPR it is stated that: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority"[44].

There are two noteworthy elements in the statement: the recognition of a right to a *due process* for the migrant, and the limitation of this article to migrants lawfully in the state territory, namely documented individuals. Notwithstanding, collective expulsion is generally absolutely prohibited under international law, as demonstrated both by the broad ratification of related treaties and non-

[40] V. CHETAIL, *cit.*, p. 133.
[41] *Ibid.*
[42] Global Compact for Safe, Orderly and Regular Migration, 2018. UNGA Res. 73/195, obj. 13, para. 29.
[43] V. CHETAIL, *cit.*, p. 136.
[44] ICCPR: art. 13.

signatory States behavior in compliance with the norm. This is particularly relevant for the protection of undocumented immigrants. The core purpose is in fact to ensure that forced expulsions are never carried out without an individual assessment, being otherwise directly linked with the *principle of non-discrimination:* a collective removal fails to consider and evaluate individual circumstances, consequently violating the customary requirement to treat any migrant's case with rigorous and non-discriminatory scrutiny[45]. It is to be highlighted that, according to regional legislation and jurisprudence, the principle must be respected even in cases of mass influx; any problem or difficulty in arrivals management cannot be presented as a justification for collective expulsion[46].

The last residual yet fundamental principles managing international migration is the *prohibition of torture or inhuman or degrading treatment or punishment* and the *right to life*. States, in fact, are obliged to carry out potential removals and expulsion of migrants always respecting their human dignity. The principle has such a customary nature that in some cases even the removal can constitute itself a degrading treatment – for example in particularly severe medical conditions or if based on racial discrimination[47]. The *right to life*, being considered a substantial customary rule and codified in numerous treaties – for instance in article 98 of the 1982 Convention of the Law of the Sea[48] –, is fundamental in regulating human mobility. When linked to forced expulsions, the protection of such right regulates that any coercive measure shall be used as a last remedy and in a strictly proportional manner to the resistance of the migrant; additionally, States must conduct impartial and independent inquiries on force abuses, ensuring prosecution of perpetrators[49].

1.1.2 Refugees

After delineating principles of law which generally apply without categorical differences, the presentation of fundamental international instruments in international migration law is necessary. In doing so, it is useful to describe such legal frameworks by associating them with each group of individuals they are addressed to.

The first category to be analyzed is the one of refugees. The specialized legal regime who regulates their protection is governed by two principal documents, namely the 1951 UN Geneva Convention

[45] V. CHETAIL, *cit.*, p. 139.
[46] Protocol n. 4 of the European Convention of Human Rights (ECHR): art. 4; American Convention on Human Rights (ACHR): art. 22(9).
[47] V. CHETAIL, *cit.,* p. 142-143.
[48] United Nations Convention on the Law of the Sea (UNCLOS), 1982: art. 98: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call".
[49] V. CHETAIL, *cit.*, p. 143-144.

on the Status of Refugees and its 1967 Protocol. They were constructed on a clear structure, based on three main elements: the definition of a refugee, the determination of the refugee status and the principle of *non-refoulement*, already mentioned before. These parameters expose the tension existing between the right of the state on borders control and its limits before the respect of human rights. Regarding the definition of refugees, it is clearly determined in article 1A(2) of the Convention: "[A]ny person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country […]"[50].

The definition presents some relevant features[51]. Firstly, it is selective, limiting the recognition of a refugee to specific circumstances. To be declared as such, the individual shall express the fear on reasonable grounds to be persecuted for a set of characteristics, that are ethnicity, creed, nationality, membership to a social group or political opinion; such declaration must be made outside the country of origin, as the individual is unable or unwilling to avail themselves of their country's protection both for it being the persecutor or it being uncapable of guaranteeing the protection from a third-party persecutor. It is important to underscore the relevance of the element of persecution, as it implies a deliberate act or intent by a specific actor, whether the State or a non-State entity. Consequently, refugee status is not granted for generalized life-threatening conditions, such as economic crises or natural disasters; rather, it requires a direct causal link between the individual's well-founded fear, and an intentional act of persecution based on the specific grounds established by international law[52]. Similarly, the territorial requirement represents a main obstacle to the international protection of migrants, since individuals must be outside of their own country to request refuge. The definition does not include internally displaced persons (IDPs), migrating due to natural disasters or extreme poverty, who are therefore not eligible for refuge[53].

The selectivity of the refugee definition is deepened by the subsequent paragraph C of article 1, establishing a set of situations under which such definition ceases to be applied[54]. The fact that some cessation clauses have been established demonstrates the second feature of the definition, that is temporariness[55]. In practice, refugees shall be protected by the State due to their particular vulnerable situation, but this obligation is interrupted as soon as such conditions stop to exist: if they return to

[50] Geneva Convention: art. 1, para. A2.
[51] V. CHETAIL, *cit.*, p. 170.
[52] V. CHETAIL, *cit.,* p. 171.
[53] V. CHETAIL, *cit.*, p. 175.
[54] Geneva Convention: art. 1, para. C.
[55] V. CHETAIL*, cit.,* p. 171.

their country and enjoy its protection; if they possess a new citizenship and the new State is able to protect them; if they moved to a precedent country where they can be granted protection from persecution; if the conditions for which they were persecuted are no longer in place – for example in case of a government change in their country. Additionally, the status of refugee is not granted to individuals who commit a crime against peace, a war crime or a crime against humanity, or to persons committing serious non-political crimes outside their country of refuge, or to those declared guilty of acts contrasting UN values and purposes[56].

Although the 1951 criteria appear restrictive, their application has been shaped by an evolutive interpretation of international law. This perspective acknowledges that the international situation, especially regarding human mobility, has fundamentally changed since the post-war era. Therefore, legal scholars, but also courts, read the traditional grounds of persecution in conjunction with modern human rights obligations, widening the protective scope to address more complex and systemic forms of harm and additional categories subjected to persecution – for example sexual orientation, not explicitly mentioned in the definition, but considered part of the membership of a particular social group[57]. Furthermore, several regional frameworks have expanded the refugee definition to better reflect contemporary crises. For example, in the context of interest for this analysis, namely Latin America, the 1984 Cartegena Declaration on Refugees represents a pivotal milestone[58]. It widened the scope of protection to individuals seeking refuge for generalized violence, foreign aggression, internal conflicts, massive violations of human rights, and other circumstances which seriously disturb public order[59]. Although it is a non-binding instrument, it has been included in domestic law by several signatory States, being considered a primary tool for migrants' protection in the region[60]. Looking at the object of this research, it is particularly relevant for the Darién Gap, as it offers a legal basis for protecting those displaced by systemic instability and socioeconomic collapse, even in the absence of targeted individual persecution.

After discussing the definition, it is important to examine the status of refugees. It implies a specialized regime of rights and duties for individuals, while imposing specific obligations that States must fulfill. The refugee's status is particularly significant since it provides an extensive protective framework, guaranteeing a more robust set of rights to the person, compared to the more precarious

[56] Geneva Convention: art. 1, para. F.
[57] V. CHETAIL, *cit.*, p. 172.
[58] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984.
[59] Cartagena Declaration: conclusion n. 3, para. 3.
[60] V. CHETAIL, *cit.*, p. 176.

legal position of other categories of migrants[61]. The recognition of such status is a declaratory act, meaning that the individual does not become a refugee after the State's evaluation, but he or she is recognized because of its refugee status. In practice, the person moves from a mere factual condition of vulnerability to the defined legal standing within the host State. According to the Geneva Convention, the set of rights and duties is not monolithic, but it depends on the fundamental nature of the right. While survival rights oblige national treatment to ensure respect of human dignity, integration rights of economic character are linked to the ordinary alien standard; this mechanism balances the refugee's needs with the host State's discretionary power over its own socio-economic infrastructure. The Convention identifies three levels of treatment: the highest degree of protection is guaranteed treating refugees as nationals, ensuring religious freedom (article 4), elementary education (article 22(1)), public relief and assistance (article 23), and labor legislation and security (article 24); the right of association (article 15) and the right to engage in wage-earning employment (article 17) are granted for refugees as the best-treated foreign nationals in the host country; the minimum safeguard provided for rights as for ordinary aliens concerns the acquisition of property (article 13), the exercise of liberal professions (article 19), housing (article 21), and higher education (article 22(2)).

Apart from the aforementioned standards, the Convention establishes absolute guarantees that shape the core of international protection. Article 33 affirms the principle of non-refoulement, prohibiting the return of an individual to a territory where their life or freedom would be threatened[62]; article 31 impedes States to impose criminal sanctions on refugees for their illegal entry or presence; articles 27 and 28 oblige States to provide administrative support to refugees, issuing identity and travel documents essential for their legal recognition and mobility.

A further specification to the principle of *non-refoulement* should be posed: it does not apply when two exceptions happen[63]. Firstly, individuals whom there are "reasonable grounds for regarding as a danger to the security of the country" can be denied refuge. Its purpose is safeguarding state institutions from highly exceptional threats, such as terrorism, espionage, or subversion. However, such provision must be interpreted restrictively, always by ensuring an adequate test of proportionality between the denial and the risk the State aims to avoid. Nonetheless, in state practice, the balance test of these two elements is more controversial[64]. Secondly, the refugee status may be denied in case of a criminal conviction by the host State, after the exhaustion of judicial remedies,

[61] V. CHETAIL, *cit.*, pp. 177-179.
[62] In addition, any reservation to the principle of *non-refoulement* is prohibited by art. 42(1) of the Geneva Convention.
[63] Geneva Convention: art. 33(2).
[64] V. CHETAIL, *cit.,* p. 189.

the commission of "particularly serious crimes", and the probability of a current and tangible danger to the community if granting refuge to the individual[65]. These exceptions reflect a pragmatic compromise between the imperative of human rights and the sovereign interest of States in maintaining national security and public order, which represents the constant tension between State's will of border control and the non-derogable duty to protect individuals whose lives are in danger.

In addition to the rights, the Convention also presents duties of refugees, highlighting the twofold relationship between States and refugees, where the former is obliged to grant protection, and reciprocally they shall respect domestic laws of the host State. Article 2 specifies that every refugee has determined duties toward the host State: they shall conform to domestic laws and regulations, as well as to public order measures[66].

A final interesting point to raise is the evident contradiction between the mandatory principle of *non-refoulement* and the absence of an international right to asylum for migrants. As effectively explained by Chetail, in fact, while the former is a negative notion which prohibits States to expel individuals to territories of persecution, the latter has a positive nature where States give permission to their own territory, a condition remaining a sovereign State prerogative[67]. However, this distinction is often artificial: to comply with the principle of *non-refoulement*, States are implicitly required to guarantee admission to asylum-seekers, at least on a temporary basis. This is particularly true when connected with article 31 of the Convention, which prohibits the penalization for irregular entry. The paradox creates a situation where there is a duty of admission, since they are obliged to not only refrain from collectively repelling individuals at the border but also to conduct an individual assessment of each claim, effectively constraining their sovereign prerogative through a mandatory procedural requirement.

To briefly summarize, while the status of refugees offers a solid protection mechanism for those fleeing persecution, it is a very specific legal path. Anyway, international migration does not concern only seeking safety; it is also about seeking opportunities. This is the reason for which another major category of migrants has been identified, namely migrant workers, whose rights are defined less by their need for protection and more by their role in the global labor market.

1.1.3 Migrant workers

Migrant workers represent another major category of international migration law, also considering their numerical relevance on the international scenario. The legislative framework dedicated to their

[65] *Ibid.*
[66] Geneva Convention: art. 2.
[67] V. CHETAIL, *cit.*, pp. 190-194.

protection is based on three normative pillars: the 1949 ILO Convention n. 97[68], the 1975 ILO Convention n. 143[69], and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)[70]. These instruments are not mutually exclusive, but they intervene in the international legal framework by complementing and reinforcing each other[71]. The first Convention focuses on regular migration management and on the principles of equal treatment; the second specifically addresses the rights of irregular migrant workers and envisages tools to combat abusive migrations; the last one is the most comprehensive treaty on migrant workers, extending protection to their families.

The ILO Convention n. 97 provided the first international definition on migrant workers, defined in article11(1): " […] the term migrant for employment means a person who migrates from one country to another with a view to being employment otherwise than on his own account and includes any person regularly admitted as a migrant for employment"[72].
There are many interesting elements. On the one hand, the definition is wide, providing protection for all individuals "with a view to being employed", formulating a prospective definition where the relevant condition is the individual will of seeking a job occupation in the State of destination, not the actual employment. The sufficient requirement is the intention to being employment to activate international protection; likewise, the temporal element is not considered as determinative for establishing such protection[73]. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has additionally stated that such definition may be applied to also refugees, being the two status not mutually excluding: it is possible for an individual to be both a migrant worker – and being protected for such situation – and a refugee from their country of origin – and being thus granted protection, as established by international law[74].

On the other hand, the definition narrows regarding the modalities in which the migrant enters the host country; it is, in fact, limited to "any person regularly admitted", excluding undocumented migrant workers. Additionally, the Convention does not apply neither to self-employed workers – the

[68] ILO Convention C097: Migration for Employment Convention (Revised) (Convention concerning Migration for Employment (Revised 1949)) (adopted 32nd Conference Session Geneva 1 July 1949, entered into force 22 January 1952) 120 UNTS 71.
[69] ILO Convention C143: Migrant Workers (Supplementary Provisions) Convention (Convention concerning Migrations in Abusive Condition and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 60th Conference Session Geneva 24 June 1975, entered into force 9 December 1978) 2220 UNTS 3.
[70] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).
[71] V. CHETAIL, *cit.,* p. 200.
[72] ILO Convention n. 97: art. 11(1).
[73] V. CHETAIL, *cit.*, p. 201.
[74] International Labour Conference, "Migrant Workers", n. 3, para. 43.

individual shall be employed – nor to specific categories enounced in article 11(2), namely frontier workers, short-term entry of members of the liberal professions and artistes; and seamen[75].

The ILO Convention n. 143 complemented the general framework by focusing on irregular migration in the light of contrasting abuse on irregular workers. For the first time, it was established that irregular migrants cannot be nullified for their entitlement to fundamental rights. Article 1 affirms that "[e]ach Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers", without specifying over their legal position on States' territory[76]. Similarly, article 9 establishes the right to equality of treatment for irregular migrant workers, obliging States to guarantee, in case of expulsion, past remuneration, social security and other benefits granted to nationals[77]. To ensure the enforcement of such rights, the legal framework guarantees the irregular worker's access to a competent body for dispute resolution[78]. Lastly, it provides art paragraph 3 that in case of expulsion, the migrant and his or her family should not be graved of its costs, which are considered duty of the State[79].

The most extensive document, however, is the ICRMW, adopted in the context of the United Nations in 1990, which represents the most ambitious instrument in the field by adopting a holistic, human-rights-centered perspective[80]. The first area of extension regards the definition envisaging migrant workers. Article 2(1) defines a migrant worker as: "[…] a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national"[81].

It enlarges the situations in which migrant workers shall be granted protection[82]. Firstly, the Convention makes no distinction between documented and undocumented migrants; in doing so, it acknowledges the inherent vulnerability often associated with irregular migrants, while simultaneously recognizing the complex reality of the contemporary labor market. Secondly, it includes any foreigner engaged in a remunerated activity, regardless of their original reason for entry, which might be tourism, family reunification, or even being born in the host state. Thirdly, it refers to "remunerated activities" in general, extending protection also to self-employed workers and those in the informal economy, as well as frontier and itinerant workers; this inclusion is crucial, as these categories represent some of the most vulnerable individuals within the global labor market. Lastly,

[75] ILO Convention n. 97: art. 11(2).
[76] ILO Convention n. 143: art. 1.
[77] ILO Convention n. 143: art. 9(1).
[78] ILO Convention n. 143. art. 9(2).
[79] ILO Convention n. 143: art. 9(3)
[80] V. CHETAIL, *cit.*, p. 219.
[81] ICRMW: art. 2(1).
[82] V. CHETAIL, *cit.*, p. 220.

the temporal scope of the protection is extended: while the ILO Conventions primarily focus on current or prospective employment, the ICRMW enlarges its reach also to past remunerative activities. When stating “has been engaged', the drafters ensured that individuals who have already left their host country remain protected under certain provisions of the Convention. This is further reinforced by article 1(2), which specifies that: “[t]he present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence”[83]. This integrated view ensures that rights are not lost in case of movement across borders or change of occupations.

Another field in which the Convention expanded international protection concerns the adoption of a comprehensive approach to State responsibility. Compared to previous documents, it emphasizes the duties of the State of origin, by imposing the obligation for States to provide effective consular protection, to facilitate the transfer of remittances, and to guarantee their nationals' right to vote and to return for durable reintegration[84].

It is relevant to underscore the critical safeguards against arbitrary State action restated by the Convention, particularly prohibiting collective expulsions, and providing some fundamental rights to migrant workers and their families. Article 22 of the ICRMW establishes a comprehensive set of procedural safeguards designed to prevent the arbitrary removal of migrant workers and their families[85].

The human-rights basis of the instrument is here evident in many elements. First, neither migrants nor their families shall be collectively expelled by the State; conversely, an individual assessment to establish such removal must be accomplished. Secondly, such decision shall be taken by a judicial authority in accordance with law, so that access to justice for migrant workers must be guaranteed, and the judgement must be issued without arbitrariness. Thirdly, the decision must be communicated to individuals in comprehensive language, so that they are able to completely understand. Fourthly, the person concerned is entitled to counterargue the expulsion and seek a review from the relevant authorities. Finally, if a judicial review reverses the initial decision to expel, the individual has the right to receive reparations for the harm caused by the unlawful removal. This framework ensures

[83] ICRMW: art. 1(1).
[84] ICRMW: art. 23; art. 47(1)(2); art. 41 (1)(2); art. 67(1)(2).
[85] ICRMW: art. 22.

that state sovereignty does not override human dignity, providing migrants with the legal protection necessary to challenge arbitrary treatment.

It is important to underline that the ICRMW does not establish a subjective right to immigration. Article 79, in fact, affirms that: "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention"[86]. This means that the power to admit or refuse non-citizens remains a sovereign prerogative of the State, excluding any legal claim on entrance into the State territory for the migrant, if he or she does not meet national admission requirements. However, the document binds the State to the aforementioned non-derogable obligations. In this sense, the ICRMW does not challenge the State's right to manage its borders, but it strictly regulates the standards according to which power is exercised, ensuring that sovereignty never translates into arbitrariness[87].

Despite its comprehensive nature, the legal framework concerning the protection of migrant workers faces other significant challenges regarding its global implementation. These three conventions, in fact, frequently are contrasted by the practices of destination States – above all the United States – which often have not ratified these instruments or limit their domestic effectiveness. While basic civil liberties are guaranteed by other international instruments, the specific labor standards of the ILO and the ICRMW often remain unfulfilled, creating a protection gap for migrants aiming at the States destination which are not signatories of the mentioned Conventions[88].

1.2 The regional framework: the Inter-American system of protection of human rights

Together with international legal instruments, the mechanism of protection for human rights is further guaranteed by the regional normative framework represented by the Organization of American States. The system is well-known for being particularly advanced in human rights protection, and it finds its legal grounds on two main documents: the 1948 American Declaration of the Rights and Duties of Man[89] and the 1969 American Convention of Human Rights[90]. Both issued in the auspices of the

[86] ICRMW: art. 79.
[87] V. CHETAIL, *cit.*, p. 240-245.
[88] *Ibid.*
[89] American Declaration Of The Rights And Duties Of Man (Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948).
[90] American Convention on Human Rights: Pact of San José, Costa Rica (Signed at San José, Costa Rica, on 22 November 1969).

OAS, they share a common goal of protecting human dignity; yet their legal nature and the level of state accountability they impose are fundamentally different.

The American Declaration serves as the primary source of international obligations for all Member States of the Organization. It has been adopted by all thirty-five Member States, which at the same time ratified the Charter of the OAS in 1948. Although originally conceived as a non-binding instrument of soft law, all States have agreed to respect the human rights identified in the Declaration. The perception of the legal relevance of the Declaration has led the Inter-American Commission on Human Rights (IACHR) to consider it as a binding set of standards for all OAS members, including those that have not ratified specific treaties[91]. In contrast, the American Convention on Human Rights, also known as Pact of San José, is a formal treaty imposing rigorous hard law obligations on its signatories. It provides a more detailed protective framework and establishes the contentious jurisdiction of the Inter-American Court of Human Rights. States that have ratified the Convention can be held legally accountable before the Court, which has the authority to issue binding sentences and mandate changes to domestic legislation, conversely, according to treaty norms, non-signatories or ratifying States do not recognize the legitimacy of the two organs in issuing reports or decisions; they thus are not bound to the decisions[92].

1.2.1 The Inter-American structure

The American Convention shaped the Inter-American system, creating a dual mechanism of protection of human rights: the quasi-jurisdictional organ of Inter-American Commission on Human Rights and the judicial body of the Inter-American Court of Human Rights. The Commission finds its primary mission in the promotion of the "observance and protection of human rights" across all OAS Member States, serving as the organization's specialized advisory body on these matters[93]. Guided by the *pro homine* principle, the IACHR adopts a progressive approach that prioritizes the most favorable protection for the individual. This ensures that international legal standards remain a living instrument, capable of responding to the complexities of the modern emergency scenario[94]. The Court, on the other hand, serves as the judicial arm of the system, which interprets and applies the American Convention. Its mandate is distinguished into contentious and advisory functions. Under the former function, currently recognized by twenty States, the Court issues legally binding judgments. However, its intervention is subsidiary; a case may only be brought before the Court if a State has failed to comply with the prior recommendations issued by the Commission. Together with

[91] Center for Global Law and Justice (CGLJ), *Advocacy before the Inter-American System*, 2014, p. 9.
[92] *Ibid.*
[93] OAS Charter: art. 106(1).
[94] CGLJ, *cit.*, p. 7.

its judicial role, the Court possesses a broad advisory jurisdiction, which allows it to provide authoritative interpretations of human rights obligations and treaty provisions upon request by an OAS Member State or organ[95]. These advisory opinions have been instrumental in defining the scope of human rights in the Americas, by listening to victims, ensuring the legitimacy of human rights norms, reporting violations, and intervening when domestic remedies failed to bring effective justice[96].

1.2.2 The protection of human rights under the Inter-American system

On a substantive level, the regional protection of human rights in the Americas can be found in an expansive *corpus juris* that obligates OAS Member States to guarantee a wide range of fundamental freedoms, adhering to international obligations, but also presenting an innovative framework. States must ensure the enjoyment of core civil and political rights, including the rights to life, personal liberty, and physical integrity[97]. This framework is further reinforced by rigorous standards for equality and due process, alongside rights to family unity, and judicial guarantees[98]. To address specific patterns of violation and the necessities of particularly vulnerable individuals, the Inter-American system has developed a series of specialized treaties[99]. This normative architecture is structured around several key pillars, namely the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons*;* The Protocol of San Salvador, expanding the obligations regarding economic and social rights, adopted together with the Protocol to Abolish the Death Penalty*;* the Convention of Belém do Pará, focused on violence against women; the Principles and Best Practices on the Protection of Persons Deprived of Liberty.

Regarding international migration law, The Inter-American Court has repeatedly increased the standards of protection for signatory States, providing detailed legal guidelines for safeguarding migrants human rights through its advisory jurisdiction. In particular, two advanced advisory opinions have concerned the prohibition of detention for minors and the substantial right to asylum: the Advisory Opinion OC-21/14 and Advisory Opinion OC-25/18[100]. The former question focuses on the rights of children, establishing that their status as minors must mandate the State's response rather

[95] CGLJ, *cit.*, 2014, p. 8.
[96] C. GROSSMAN, *The Inter-American System of Human Rights: Challenges for the Future*, in *Indiana Law Journal,* 2008, n. 83, p.1279.
[97] American Convention: art. 4(1), art. 5(1)(2).
[98] American Convention: art. 13, art. 7, art. 17, art. 8, art. 25.
[99] CGLJ, *cit.*, 2014, pp. 9-11.
[100] IACtHR, Advisory Opinion OC-21/14: *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19th August 2014, Series A No. 21; IACtHR, Advisory Opinion OC-25/18: *The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System*, 30th May 2018, Series A No. 25.

than its migratory policies[101]. Its significance is based on its origin as a collective request by Argentina, Brazil, Paraguay, and Uruguay, who sought to address the systemic criminalization and detention of migrant children[102]. The Court responded by clarifying that States shall abandon punitive logic; they are not merely required to provide generic protection, but they shall implement specific procedures to identify the needs of children, ensuring that the principle of *non-refoulement* and the right to family life are never violated for national interests over immigration enforcement[103]. Alternatives to detention have been defined as mandatory legal standards, and the Court directly challenged the "emergency" narratives which are often used by States to justify the deprivation of liberty for minors[104]. The Court deepened the principle of the *best interest of the child*, evaluating it as a non-derogable obligation[105]. Finally, the Court ruled that the detention of minors based solely on their migratory status or that of their parents is intrinsically disproportionate and arbitrary; it further clarified that States cannot invoke an emergency or issues over specialized facilities to justify the deprivation of liberty for children, as the protection of their fundamental rights must always take precedence over the administrative management of borders[106].

The Advisory Opinion OC-25/18 redefined the institution of asylum as an enforceable human right rather than a mere sovereign concession[107]. Its relevance lies in its direct challenge to the discretionary power of States, asserting that the right to seek and receive asylum is a fundamental guarantee that limits the political exception in migratory management[108]. The Court responded to the request by Ecuador by clarifying that the principle of *non-refoulement* constitutes a cornerstone of the Inter-American system; it established that States are prohibited from removing, expelling, or extraditing any individual whose life or integrity is at risk, regardless of their formal status as a refugee[109]. A crucial advancement of this ruling is the Court's stance on jurisdiction, which effectively addresses the legal vacuum often created at national borders during alleged crises; the Court ruled that protection obligations are triggered the moment States exercise authority or control over an individual, even if they have not yet entered the national territory[110]. This interpretation directly challenges the "emergency" practices of *push-back* and maritime interceptions, ensuring that human rights standards are not suspended in border areas[111]. Moreover, the Court deepened the procedural

[101] IACtHR, OC-21/14: para. 1-3.
[102] *Ibid.*
[103] IACtHR, OC-21/14: para. 261-262.
[104] IACtHR, OC-21/14: para. 154-158.
[105] *Ibid.*
[106] IACtHR, OC-21/14: para. 211, 225, 242, 262.
[107] IACtHR, OC-25/18.
[108] IACtHR, OC-25/18: para. 1-5.
[109] IACtHR, OC-25/18: para. 171-181.
[110] IACtHR, OC-25/18: para. 24-25, 185.
[111] IACtHR, OC-25/18: para. 186-190.

duties of States, evaluating the right to an individual assessment as a mandatory safeguard against collective expulsions[112]. Finally, the Court ruled that the right to asylum must be recognized as a subjective right of the individual, not an arbitrary decision of States; it further clarified that States cannot invoke national security or administrative necessities to justify the absence of fair and efficient asylum procedures, as the obligation to protect human dignity must always take precedence over the political border managements[113].

Notwithstanding the advance of the mechanism, its effectiveness is heavily challenged by the heterogeneous commitment of OAS members[114]. On the one hand, the system has faced significant withdrawals from the American Convention, most notably the one of Trinidad and Tobago in 1998 and that of Venezuela in 2013. On the other hand, the persistent refusal of the United States to ratify the Convention or adopt the broader refugee standards – presented in the 1984 Cartagena Declaration – creates a fragmented landscape of protection. This discrepancy is particularly critical in context of migration: while migrants may be protected by high regional standards in South and Central America, that are the countries of origin, they face a significantly more restrictive and security-centered legal regime as they approach their destination at Northern borders.

1.3 The state of emergency: from temporariness to permanency

The concept of a state of emergency represents a situation which might be seen as paradoxical: the idea of protecting the legal framework and the survival of a community through the suspension of the governing laws of that very system. Traditionally, this instrument has been considered as a parenthesis, an exceptional and brief period of rupture, which eventually would have led back the system to normalcy. Notwithstanding, this belief has been undermined by the state practice in the last decades: from the War on Terror to the transnational migratory crises, the state of emergency has stopped to be an exceptional event and became an ordinary method of management of political and social difficulties. In this context, it is important to analyze the constant tension between State sovereignty, claiming absolute discretionary power on crises resolution, and the respect for non-derogable human rights, which, by their very nature, should not be suspended, regardless of the emergency.

1.3.1 Definition of a state of emergency

The analysis of the transformation toward a so-called permanent state of emergency must necessarily begin by determining what was traditionally considered a state of emergency. A comprehensive

[112] IACtHR, OC-25/18: para. 135-140.
[113] IACtHR, OC-25/18: para. 113, 163, 197.
[114] C. GROSSMAN, *cit.*, 2008, pp. 1281-1282.

definition has been clarified by the International Law Association (ILA) in the Paris Standards, where the state of emergency is defined as: "(a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency. (b) The expression "public emergency" means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed"[115].

Specifically, the legal framework identifies several core elements that define a legitimate state of emergency. First, there must be a threat to the "life of the nation", a threshold that implies a danger to the very physical or political existence of the State[116]. Second, the emergency must be officially proclaimed, as a formal declaration is a prerequisite for the lawfulness of any subsequent derogation[117]. Third, for a crisis to qualify as a "public emergency", it must be exceptional, actual, and imminent, directly affecting the entire population and the organized life of the community[118]. Generally, it is the executive body which declares the state of emergency, with the consequence of being able to issue decrees in place of the legislative branch, with the rationale of responding more rapidly to the crisis, being those crises real, perceived or alleged[119]. The subsequent adopted measures depend on the type of emergencies, the national legal framework, political reasonings[120].

A fundamental implication of a declaration of a state of emergency is a systemic impact on democratic governance and the rule of law and negatively affect the enjoyment of individual human rights[121]. On the one hand, by their very nature, such measures run counter to the principles of separation of powers and parliamentary and judicial oversight of executive action; on the other hand, they interfere with the enjoyment of human rights by limiting their expression. With specific reference to human rights, derogation clauses are provided in cases of emergency in several treaties. However, such derogation is prohibited in cases of determined fundamental human rights, the so-called non-derogable rights.

Article 4 of the ICCPR establishes a rigorous legal framework for the temporary suspension of state obligations during periods of exceptional crisis[122]. According to the first paragraph, a State Party may only take measures derogating from the Covenant when a public emergency is officially proclaimed

[115] International Law Association, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, in *American Journal of International Law*, 1984, n. 79, p. 1073.
[116] O. GROSS AND F. NÌ AOLÀIN, *Law in times of crisis,* 2009, pp. 251-252.
[117] *Ibid.*
[118] *Ibid.*
[119] C. BINDER AND OTHERS, *Human Rights in Times of Emergency*, in *Oslo Law Review,* vol. 12, n. 1-2025, p. 3.
[120] *Ibid.*
[121] C. BINDER AND OTHERS*, cit.*, 2025, p. 4.
[122] ICCPR: art. 4.

and poses a direct threat to the life of the nation. Even under such circumstances, the exercise of this power is strictly governed by the principle of proportionality, meaning that any restrictive measures must be limited to the extent strictly required by the necessity of the situation. Furthermore, these actions must remain consistent with the State's other obligations under international law and are subject to a strict prohibition against discrimination based solely on race, color, sex, language, religion, or social origin. The second paragraph of article 4 introduces a fundamental safeguard by identifying a core of non-derogable rights that cannot be suspended under any circumstances, including war or supreme emergency[123]. This category includes the right to life (article 6), the prohibition of torture or cruel, inhuman, or degrading treatment (article 7), the prohibition of slavery and servitude (article 8, paragraphs 1 and 2), and the prohibition of imprisonment for debt (article 11). Additionally, the principles of non-retroactivity of criminal law (article 15), the right to recognition as a person before the law (article 16), and the freedom of thought, conscience, and religion (article 18) are considered absolute and exempt from any form of derogation[124]. Finally, the Covenant imposes a clear procedural obligation of transparency and international oversight: any State Party that invokes the right of derogation is required to immediately notify the other signatory states through the Secretary-General of the United Nations[125]. This communication must specify the particular provisions from which the state has deviated and provide the underlying justifications for such measures. To ensure the temporary nature of these emergency powers, the State is further obligated to submit a subsequent notification marking the exact date on which the state of emergency ends and the full application of the Covenant's provisions is restored.

After having restated the definition previously analyzed, the Convention presents the possibility to derogate some rights, insofar as such limitation is strictly required by the nature of the emergency and it is resolutive for the emergency. Additionally, it is explicitly prohibited to establish emergency measures which discriminate individuals because of ethnicity, sex, language, creed or social origin. The State is obliged to immediately communicate the derogation to the other parties of the Covenant and to determine the duration of such limitations, and to explain the reasoning behind the decision. The same shall happen at the end of the emergency.

As previously mentioned, some rights cannot be derogated, namely the right to life, the prohibition of torture, cruel, inhuman or degrading treatment, the prohibition of slavery and servitude, the prohibition of imprisonment for debts, the principle of legality, the equal recognition before the law,

[123] ICCPR: art. 4(2).
[124] *Ibid.*
[125] ICCPR: art. 4(3).

and the freedom of thought, conscience, and religion[126]. It is interesting to note that international human rights bodies have extended the interpretation of such clause. The UN Human Right Committee clarified that the distinction between derogable and non-derogable rights does not imply an absolute mandate for States to suspend the former at will; conversely, the Committee introduced a crucial interpretative shift, according to which any measure of derogation must undergo an objective and scrupulous assessment of proportionality, specifically the measure and consequent suspension of rights must be proportionate and necessary to address the emergency[127]. Most significantly, it argues that certain rights, even if not explicitly listed in Article 4(2) of the ICCPR, are considered having a *de facto* non-derogable status when they constitute peremptory norms of international law. Consequently, fundamental guarantees, such as the prohibition of arbitrary deprivation of liberty, the taking of hostages, and the essential elements of a fair trial – including the presumption of innocence – must be upheld under all circumstances. By linking the state of exception to the broader framework of international humanitarian law and *jus cogens*, the Committee prevented the Article 4 derogation clause from being invoked as a justification for systemic violations of human dignity[128].

1.3.2 Permanent state of emergency

Notwithstanding the rigorous international legal framework[129], contemporary State practice has witnessed a profound shift from the exception to norm. As argued by many scholars, we are currently observing a transition toward a permanent state of emergency[130]. In this paradigm, the emergency is no longer a temporary parenthesis used to restore normalcy, but a foundational method of governance. This normalization occurs through the gradual absorption of emergency powers into the ordinary legal system, effectively blurring the line between the rule of law and the state of exception[131].

According to Greene, the contemporary application of the emergency paradigm reveals a profound crisis in the traditional distinction between normalcy and exceptionality[132]. As mentioned before, the purpose of a state of emergency was its transitional nature, aimed at restoring the original *status quo* through temporary powers; however, the contradiction of a "permanent state of emergency" is being utilized by States, where extraordinary measures are not only perpetuated, but eventually entrenched into the ordinary legal framework[133].

[126] ICCPR: art. 6; art. 7; art. 8(1)(2); art. 11; art. 15; art. 16; art. 18.
[127] HR Committee, General Comment n. 29, para. 6-11.
[128] O. GROSS AND F. NÌ AOLÀIN, *cit.,* 2009, p. 259.
[129] *Ibid.*
[130] *Ibid.*
[131] O. GROSS AND F. NÌ AOLÀIN, *cit.,* p. 304.
[132] A. GREENE, *Permanent States of Emergency and the Rule of Law*, 2018, pp. 33-34.
[133] *Ibid.*

This gradual transformation is driven by a significant broadening of the emergency paradigm, which is increasingly applied to what can be defined as "quotidian" or "mundane crises", meaning situations which are framed as existential threat even if structural and regular, in order to justify a departure from standard legal norms[134]. In the current international scenario, the state of emergency is not necessarily triggered by an actual "threat to the life of the nation"; conversely, it arises from the subjective assessment and political narratives of decision-makers[135]. As a consequence, the emergency has become a governance instrument where sovereign decision frames the debate, rendering subsequent judicial or democratic scrutiny exceedingly difficult[136].

The debate about the legacy of state of emergency and the transformation of its temporary feature into a permanent emergency is highly present in the academic scenario, founding its roots in the philosophy of law throughout the 20th century. To understand this shift from exception to normalcy it is essential to analyze this framework through the historic intellectual clash between Hans Kelsen and Carl Schmitt, which can resume the difference between theory and practice[137]. As described before, a state of emergency was understood as a temporary parenthesis intended to restore order; nonetheless, its evolution into a permanent condition has generated a friction between two antithetical visions: on one hand, the idea of State as the legal framework, requiring to subject every act of force under the Rule of Law, as argued by Kelsen's normativism; on the other hand, the conceptualization of the State as the supreme power which acts during the state of emergency, claiming that political power will must prevail over the norm in moments of existential crisis, as affirmed by Schmitt's Decisionism[138].

From a Kelsenian perspective, the legal order is an exhaustive and self-contained system: he posits that every legal act must be traceable back to a superior norm within a hierarchical structure (*Stufentheorie*), eventually reaching the *Grundnorm* – acts as the ultimate transcendental-logical presupposition that transforms factual power into legal authority, ensuring that even emergency measures remain anchored to the hierarchy of norms[139]. Therefore, according to Kelsen there is nothing admissible outside the law: a state of emergency cannot be a lawless void: it must be *juridified,* meaning that it must be explicitly provided for, regulated, and limited by the Constitution itself[140]. Affirming that the State is nothing more than a centralized normative system, Kelsen

[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] R. LEELAPATANA, *The Kelsen-Schmitt debate and the use of emergency powers in political crises in Thailand*, 2018, pp. 16-27.
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*

eliminates the possibility of a *Raison d'État* existing independently of, or in opposition to, the law; in this view, any attempt to override legal obligations cannot be justified as a political necessity; rather, it must be diagnosed as a legal pathology[141].

Conversely, Carl Schmitt's political and legal theory represents a radical departure from liberal normativism, shifting the focus from the legal rule to the existential reality of political power[142]. At the center of his theory lies the concept of decisionism, famously framed in his definition of the sovereign as "he who decides on the exception"[143]. For Schmitt, the ultimate test of sovereignty is not found within the ordinary application of law, but in the independent authority to identify a state of emergency and to determine the necessary measures to address it[144]. Since the emergency is inherently unpredictable, it fundamentally evades the limits of any pre-established legal framework; as a consequence, during a crisis, the law recedes while the State remains, identified in the sovereign who possesses the authority to suspend the legal order to ensure the survival of the political entity[145].

These two contrasting theories find a perfect reflection in the contemporary debate on migration, which has become a primary contradiction between the theory of international law and the practice of States sovereignty. Although framed as an imminent emergency, this phenomenon has continued for over a decade, revealing a shift from a temporary crisis to a structural, permanent state of exception[146]. According to Agamben, the concept of "necessity" is determined to be "entirely subjective, relative to the aim that one wants to achieve"[147]. This perspective aligns profoundly with Schmittian decisionism: the emergency is not an external fact that the State suffers, but a condition that the Sovereign declares and wants to address[148]. Following his reasoning, the decision-maker is thus at the center of the state of emergency and not the objective situation itself[149]. This is particularly evident for what concerns the migration "emergency" experienced by European Union states since 2015, when migration has started to be envisaged as an existential threat and States began to perform political act that moves the migrant from the realm of legal protection to the realm of the Schmittian enemy[150]. Being utilized as a global approach to migration management in the last years, this framing is not designed to enable a humanitarian response, but to conceptualize them as a threat, thereby

[141] *Ibid.*
[142] *Ibid.*
[143] C. SCHMITT, *Political Theology: Four Chapters on the Concept of Sovereignty*, ed. 2005, p. 5.
[144] R. LEELAPATANA, *cit.,* 2018, pp. 16-27.
[145] *Ibid.*
[146] N. PANOU*, The paradoxes of the European migration "emergency"*, in *ADiM BLOG*, 2024, p. 2.
[147] G. AGAMBEN, *State of Exception*, trans. K. Attell, 2005, pp. 29–30.
[148] *Ibid.*
[149] *Ibid.*
[150] A. GREENE, *cit.*, 2018, pp. 69-70.

justifying the suspension of ordinary law through the limitation of international law and the closure of borders[151].

These theoretical claims find a practical evidences in the findings of the ILA Report, which analyzed the propensity of States to invoke a state of emergency in situations that did not pose a genuine threat to the life of the nation; furthermore, the report highlighted a troubling trend regarding the duration of these measures, which often proved to be neither temporary nor limited to the resolution of an imminent crisis[152]. This practice suggests a systemic departure from the traditional requirement of exceptionality as emergency powers are increasingly extended far beyond their original restorative purpose[153]. A primary distinction has been drawn by the Committee between *de jure* and *de facto* emergencies: the former are states of emergencies officially proclaimed in compliance with domestic constitutional provisions; the latter are states of emergencies describing situations where emergency powers are exercised without a formal declaration by the executive or on a specific emergency legal basis[154]. The absence of an official declaration of the emergency does not imply a legal vacuum, due to the persistent state practice of incorporating emergency measures in the ordinary legislation, transforming a *rule of law* scenario to a *rule by law*, where human rights are strictly limited by using norms which became the normalcy – defined by the CEHRL as "institutionalized emergencies"[155]. Secondly, the Committee distinguished *notified* and *non-notified* states of emergency: notification presumes formal communication with international parties stating the intention of the state to derogate some rights considered necessary to solve the emergency[156]. Such notification is a conditional requirement, becoming mandatory where States exercise their discretionary power to derogate from treaty obligations, including for sure human rights agreements[157].

From these differences, ILA Committee identified three categories of *de facto* emergencies: firstly, a *de facto* emergency that either fails to meet constitutional requirements for approval or extension, or is redirected to address issues unrelated to the original purpose; secondly, *de facto* emergencies where exceptional powers are permanently integrated into ordinary legislation, often in response to perceived or actual immediate threats to public safety and national security; thirdly, *de facto* states of emergency in which, despite the existence of factual emergencies factors and the adoption of extraordinary measure, the State refuses to declare such state[158]. In all three cases, the absence of a

[151] *Ibid.*
[152] International Law Association, *Committee on Human Rights in Times of Emergency*, 2020, p. 4, para. 14.
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] ILA, *cit.*, 2020, p. 5, para. 15.
[158] C. BINDER AND OTHERS, *cit.*, 2025, pp. 14-17.

transparent legal framework creates an unclear area that undermines international oversight and the protection of fundamental rights[159]. The analysis, in fact, has demonstrated that emergency measures negatively impact the enjoyment of virtually all internationally protected human rights, affecting both derogable and non-derogable norms. Although States rarely declare an explicit intention to restrict absolute protections, the abuse of emergency powers frequently leads to violations of the right to life and the prohibition of torture, often resulting from the excessive use of force by law enforcement or harsh conditions of detention and *refoulement*[160]. Simultaneously, personal liberty and the right to a fair trial are severely compromised when emergency regimes authorize arbitrary or preventive detention while striving individuals of essential due process guarantees, such as the right to legal representation and the right to be brought before an independent tribunal[161]. This pattern of interference extends further into the realm of civil liberties and collective protection: emergency measures often justify invasive surveillance that infringes upon the right to privacy and impose discriminatory restrictions that disproportionately target vulnerable groups based on their perceived connection to the crisis[162]. Fundamental freedoms, including expression, assembly, and movement, are routinely restrained through censorship and travel restrictions, which can even impede the right to seek asylum[163].

While being accurate and precise, the ILA report presents an inherent weakness: it describes States' practices by underlining the distance from an ideal type of emergency[164]. As underscored by Gross and Nì Aolàin, the premise that emergency powers can be comprehensively understood through a binary model of norm versus exception is fundamentally flawed. Such a static framework fails to capture the evolving reality of emergency regimes and proves inadequate for assessing how these powers are exercised or controlled. Far from being a fixed phenomenon, the nature of the emergency is inherently dynamic and transformative: by pursuing the myth of a fixed scheme in emergencies, scholars, courts, and international institutions fail to understand the reality of modern crises, producing theoretically correct but practically ineffective legal analysis[165].

This logic concerns also what states claim to be the reason for declaring emergency. States, in fact, have broadly extended the concept of emergency to phenomenon which were not traditionally considered as such, and that do not respect the requirement of briefness. In this regard, migration has

[159] *Ibid.*
[160] *Ibid.*
[161] C. BINDER AND OTHERS, *cit.*, 2025, pp. 13-14.
[162] *Ibid.*
[163] *Ibid.*
[164] O. GROSS AND F. NÌ AOLÀIN, *cit.,* 2009, pp. 317-318.
[165] *Ibid.*

been transformed both by public debate and into political discourse in a major threat to the survival of nations and thus invoked as a justification for declaring the state of emergency[166]. United States, for instance, declared on all administration's levels – city, state and federal – an "invasion" of asylum seekers and migrants, specifically referring to those from Southern America[167]. The context in which this rhetoric flourishes is characterized by populistic discourse which promises not only increased borders' security, but also a criminalization of human mobility and those supporting migrants. In order to do so, the executive often requires on the one hand the diversion of central funding toward emergency social services, and, on the other hand, the implementation of policies aimed at the systematic exclusion and repulsion of migratory flows at border[168].

As argued by several scholars, the state of emergency is, by its extraordinary nature, fundamentally vulnerable to executive overreach[169]. This vulnerability is precisely where the permanent state of emergency becomes problematic. In the modern context, States often maintain a *Kelsenian surface* of formal legality, by utilizing decrees and administrative orders, to enact a *Schmittian substantive power*. This results in a legal degeneration where the language of law is used to authorize its own suspension: when necessity is conceptualized as subjective, the decision-maker becomes the sole arbiter of reality, shaping reality and the situations on which law is applied[170]. Therefore, if an emergency becomes permanent, it leads to a dissociation between the norm, which remains valid on paper, such as human rights treaties, and its efficacy, which conversely is effectively nullified by emergency administrative legal instruments[171].

The state of emergency has been weaponized as a permanent instrument for crisis response. This trend is particularly evident in relation to complex phenomena such as migration, which, considering its enduring nature, cannot correctly be defined as an emergency[172]. The narrative of the "migration crisis" is constructed upon two fundamental paradoxes that challenge the classical constitutional definition of an "emergency"[173]. Firstly, there is the paradox of exceptionality: an emergency, by definition, must arise from an unpredictable event; on the contrary, migration is a structural and systemic phenomenon driven by documented geopolitical and climatic factors. Its apparent unpredictability is in reality the result of a deliberate institutional lack of structure designed to justify

[166] C. BINDER AND OTHERS, *cit.*, 2025, p. 12, para. 17.
[167] White House website, *Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States,* 2019. [Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States – The White House, accessed on 29th January 2026]
[168] C. BINDER AND OTHERS, *cit.*, 2025, pp. 12-13.
[169] *Ibid.*
[170] A. GREENE, *cit.*, 2018, pp. 44-45.
[171] *Ibid.*
[172] N. PANOU, *cit.*, 2024, p. 2.
[173] *Ibid.*

restrictive measures[174]. Second, a temporal paradox emerges while an emergency is inherently transitional, with the purpose of restoring normality, the persistence of exceptional measures over the last decade has transformed the exception into a permanent paradigm of government[175].

While the use of emergency measures fails to provide a long-term resolution to the issue, migrants continue to assist to a systematic violation of human rights. This paradox is especially visible within the American context: as described before, despite the highly advanced jurisprudence of the Inter-American system for the protection of human rights, its efficacy is severely undermined[176]. The failure of key destination States to ratify primary treaties concerning the jurisdiction of the Inter-American Court and Commission – which often corresponds to a similar absence of adherence to universal treaties on migrant workers – makes this protective framework largely ineffective[177]. Consequently, individuals remain vulnerable to the discretionary and often arbitrary power of the State.

Building upon this theoretical framework, the following chapter will describe and analyze one of the most significant migratory crises of recent years: the migratory routes through the Darién Gap and the pervasive lack of international protection for the fundamental rights of transiting migrants toward United States.

[174] *Ibid.*
[175] *Ibid.*
[176] E. NWOCHA, *Appraising the Frontiers and Limits of the Inter-American Human Rights System and Its Relevance to International Human Rights Law*, in *Beijing Law Review*, 2019, n. 10, pp. 178-195.
[177] *Ibid.*

Chapter 2 – Darién Gap: geopolitical and social context

2.1 Geographical context

2.1.1 Location and morphology of the Darién Gap

The Darién Gap is a rainforest located between the states of Panama and Colombia. It is well known for being the only possible connection between the Northern to the Southern part of the American continent. Yet, its popularity has to be conducted especially to its high dangerousness, consisting of more than sixty miles of dense rain forest, steep mountains, and vast swamps[178]. Over the past few years, it has become one of the most crossed paths in the world. Despite the risks, hundreds of thousands of migrants passed through the forest, often encountering illnesses, injuries and, at worst, death. Their objective is to reach as temporary residence or projected destination the states of Canada, Mexico and, more frequently, the United States of America.

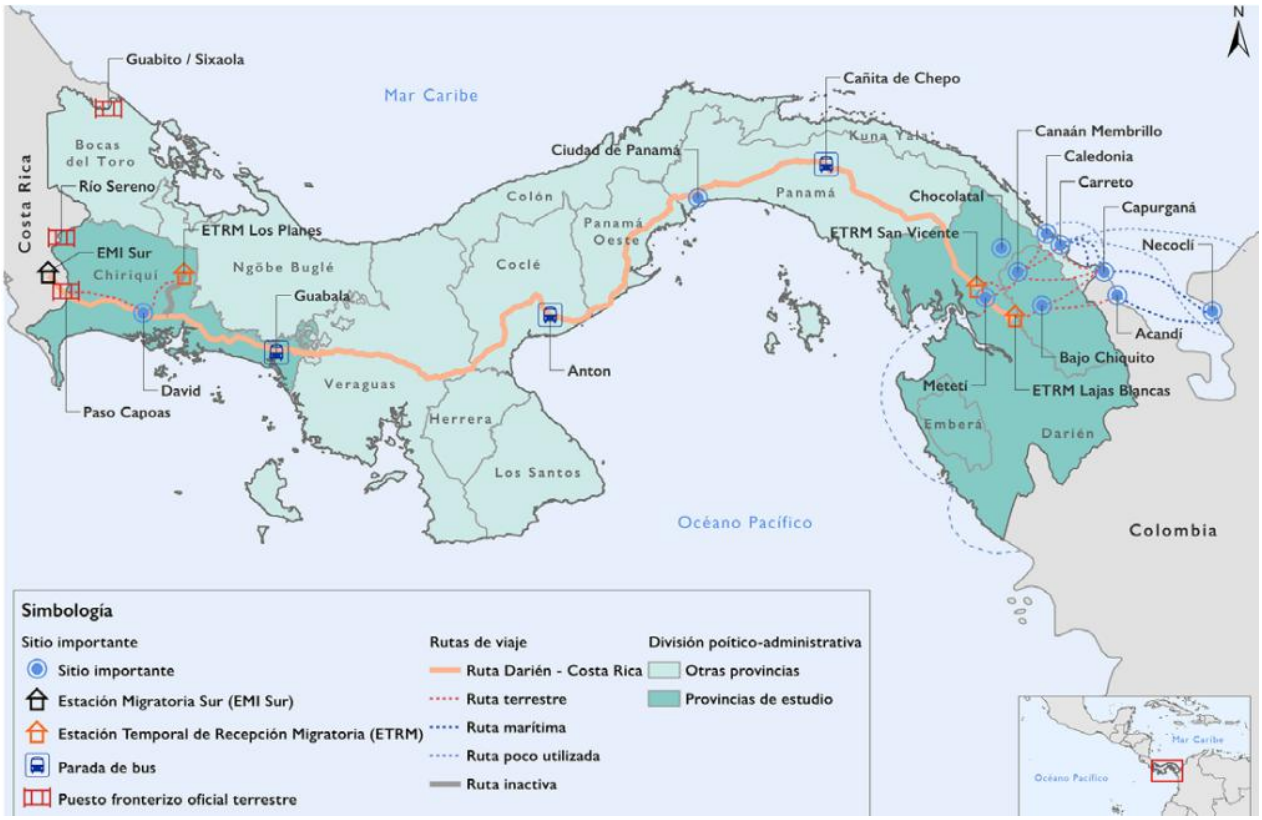

Figure 1: Map of the flows of migrant population in situation of mobility in Panama - IOM

The region consists of approximately one hundred kilometers of dense rain forest, steep mountains and vast swamps, which often trigger flooding and landslides. In addition to these severe

[178] D. ROY, *Crossing the Darién Gap: Migrants Risk Death on the Journey to the U.S.*, in *Council of Foreign Relations*, 2024. [https://www.cfr.org/article/crossing-darien-gap-migrants-risk-death-journey-us]

environmental conditions, numerous rivers with strong currents and the dangerous wildlife characterize the forest, with the presence of crocodiles and venomous snakes, as well as dangerous insects like mosquitos responsible for the transmission of malaria and dengue. The vegetation is particularly inhospitable, due to its density and harmful sharp spines, which may cause wounds and the consequently high possibility of infections[179].

2.1.2 The interruption of the Pan-American Highway

The American continent is connected by the so-called Pan-American Highway, a single route connecting Alaska to the *Tierra del Fuego*, Argentina. The negotiations on the construction began in 1920s; by 1937, fourteen countries, including the United States signed the so-called *Convention on the Pan-American Highway*[180]. The agreement established the responsibility of each state to achieve speedy construction of their respective sections of the route. The project, however, was never accomplished: by 1970s, most of the highway had been concluded, with the exception of Panama and Colombia, who shared the crucial responsibility of paving the Darién region[181]. Many relevant reasons for the event to never-happen had been raised: environmentalists and Indigenous people were concerned about the destruction caused by the erection of the highway of the sensitive habitat of the rainforest, as well as the inhabitants' ways of life[182]. The diffusion of a highly contagious disease was in fact affecting domestic animals and, consequently, the everyday life of the local communities[183]. Another concern was related to the possible facilitation of narcotics trafficking, a strong and rooted issue in the region between Panama and Colombia: the trust of the former state of Colombian administration and the dislike toward Colombian immigrants represented a high obstacle to the realization of the project[184]. Migration in the region is the last but certainly not the least theme of the public and political discussion concerning to the realization of the highway, whose construction would have created an easier way to pass irregularly through the area – many affirmed[185].

The discontinuity of the Highway in the Darién region has significant implications for patterns of human mobility: the absence of a paved and terrestrial corridor conducts irregular migration into a narrow space with insufficient lawful infrastructures. As a consequence, the area operates as a

[179] Britannica Encyclopedia, *Darién Gap,* 2026.
[180] No. 4354. Convention on the Pan-American Highway, Inter-American Conference for the Maintenance of Peace. Buenos Aires, December 23rd, 1936.
[181] MILLER, S. W., *Minding the Gap: Pan-Americanism's Highway, American Environmentalism, and Remembering the Failure to Close the Darién Gap*, in *Environmental History*, 2014, n. *19*(2), p. 192.
[182] *Ibid.*
[183] Britannica Enciclopedia, *cit.*, 2026.
[184] MILLER, S. W., *cit.,* 2014.
[185] MILLER, S. W., *cit.,* 2026, p. 193.

chokepoint, where migrants cannot bypass it without resorting to irregular crossing, while States cannot regulate transit without substantial logistical effort.

2.2 The actors in the region: states, international organizations, and armed groups

2.2.1 States: Colombia, Panama and the U.S.

Despite the peculiar environmental conditions, the Darién Gap occupies a strategic position in continental mobility. Its relevance lays not only for the directly involved states of Colombia and Panama, but also indirectly for the United States[186]. For Colombian administration it constitutes an outlet for migrants displaced from Venezuela or arriving via South America; for Panama, it represents *de facto a* border management zone; for the United States, it has become a key zone in the policy of externalized migration control. The mention of the latter is not to be considered as forced nor out of context: the U.S. play a significant role in managing the migrant flows and financing infrastructures and policies in the region, with the purpose of addressing the issue of asylum seeking. This triangular geopolitical configuration explains the reasons for which a solely domestic analysis would be lacking a coherent and comprehensive explanation of the phenomenon.

Colombia is particularly triggered by the migration flows, whose causes are numerous and differentiated, due to complex political and social situation, as well as degrading economic and security conditions. Most migrants arrive from Venezuela, Haiti and Ecuador; data of 2025 show that Colombia hosted more than 2.8 million Venezuelan migrants[187]. Its proximity to these countries explains the high number of individuals transiting from Colombia. Nonetheless, they are not seeking asylum in the state, rather passing through toward other destinations – namely North America. In fact, according to the latest IOM data, Colombian nationality has been the third most common, together with Angolan[188]. The domestic situation is not among the most stable in Latin America: continuous violence and insecurity deriving from the ongoing internal armed conflict matched with the stagnant economic market are leading thousands of Colombians moving to the United States[189]. Their decisive factor leading them to leave is the hope for better economic opportunities. UNHCR's data between 2012 and 2021 report an estimated departure without return of 1,984,569 Colombians, compared to

[186] D. ROY, *cit.*, 2024.
[187] Regional Inter-agency Coordination Platform for Refugees and Migrants from Venezuela (R4V), *Refugees and migrants from Venezuela*, 2025, pp. 1-2. [https://www.r4v.info/en/document/r4v-latin-america-and-caribbean-venezuelan-refugees-and-migrants-region-november-2025]
[188] International Organization for Migration – DTM Panama, *Flujo migrante en situación de Movilidad por las Américas, Darién, Panamá*. February 2025.
[189] D. ROY, *cit.*, 2024.

some 436,540 foreigners' arrival with no exit from the country[190]. Colombian citizens are facilitated in travelling north thanks to their visa-free entrance in Mexico, and if in better economic status, they can even fly to the border, skipping the Darién Gap[191]. Compared to its important effort in inclusion and integration of migrants, its direct policy engagement in the Darién region has been constrained by logistical, security, and institutional limitations, resulting in an absence of a robust, coordinated protection strategy for migrants in transit[192]. The Colombian authorities have periodically increased the presence of migration officials and coordinated with local agencies, such as the *Instituto Colombiano de Bienestar Familiar* (ICBF), to address humanitarian needs and safeguard vulnerable populations, particularly unaccompanied children[193]. However, the primary responsibility for managing the corridor's immediate risks and border flow has increasingly involved regional cooperation, notably with Panama and under pressure from external actors like the United States, which has pursued agreements aimed at curbing irregular transits and enhancing security measures[194]. As a result, Colombia's approach to the Darién Gap migration crisis reflects a pragmatic but insufficient act between protecting migrant rights, mitigating security and humanitarian crises in a remote frontier region, and engaging in multilateral efforts to regulate irregular migration flows across the Americas[195].

On the other hand, Panama administrations have adopted a different approach to migration issue, especially considering the different role played in the situation. The state, in fact, is concerned with the flow solely due to its location, without a relevant quota of citizens leaving the country. Panama is indeed one of the most dynamic but stable countries in the region, particularly regarding economic and political standards[196]. At the regional level, it consistently ranks among the countries with the highest GDP per capita in the hemisphere, though inequality and social disparities remain persistent[197]. Its strategic role in global supply chains, combined with its position as a venue for multilateral economic and diplomatic dialogues, reinforces Panama's status as a regional commercial and geopolitical bridge in Latin America[198]. Due to its stability, Panama has over time adopted a more

[190] S. BITAR, *Migration in Colombia and Public Policy Responses*, in *UNDP Latin America and the Caribbean Policy Documents Series*, 2022, UNDP LAC PDS n. 34, pp. 6-7.
[191] *Ibid.*
[192] M. RAPIDO RAGOZZINO, J. PAPPIER, *Neglected in the Jungle*, in *Human Rights Watch*, 2024, pp. 1-3.
[193] C. YATES, J. PAPPIER, *How the Treacherous Darien Gap Became a Migration Crossroads of the Americas*, in *Migration Policy Institute*, 2023.
[194] Govierno de Colombia, *Comunicado de prensa*, 5 june 2023. [https://www.cancilleria.gov.co/newsroom/news/comunicado-prensa-15]
[195] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, pp. 1-3.
[196] IDEA, *Democracy tracker*, 2025. [https://www.idea.int/democracytracker/country/panama]
[197] World Bank, *Panama overview*, 2025. [https://www.worldbank.org/ext/en/country/panama#tab-economy]
[198] D. MUFNOZ, M. LILIANA RIVERA, *Development of Panama as a logistics hub and the impact on Latin America,* 2011, p. 2.

structured, security-oriented and state-managed approach to migration flows transiting its side of the jungle corridor. Since the late 2015, Panama has implemented the Controlled Flow Operation (*Operación Flujo Controlado),* a mechanism through which the state systematically registers, shelters, screens and transports migrants from the Darién province toward its northern border with Costa Rica, thereby imposing a form of logistical control over a transit route that has otherwise remained irregular and extremely dangerous[199]. This operational model integrates public security, biometric identification, health checks and coordination with international agencies, reflecting Panama's strategy of managing migration not as an internal social issue, but rather as a transregional border governance problem. The Panamanian administration has simultaneously framed the crisis in terms of national security and public order, while stressing the need for regional cooperation and burden-sharing across the Americas. In particular, the current President Jose Mulino and his government have used the topic as an electoral campaign flag, which led him to electoral success. One of his first institutional acts was, indeed, an agreement with the United States aiming at reducing irregular flows, enhancing surveillance capabilities and expediting the transfer of migrants across Panamanian territory[200]. Although praised for its organizational capacity relative to other states in the region, Panama's strategy has also been criticized by humanitarian organizations for insufficient safeguards, overcrowded shelters and limited protection for vulnerable populations, particularly children and asylum seekers[201]. At the end, Panama's approach exemplifies a logistical and securitized governance model that prioritizes transit management and regional coordination, rather than long-term integration or domestic regularization.

The last state-actor in the Darién Gap region is the United States. Despite not being territorially involved in the flows, they are to be considered as relevant as the other two, both for their regional influence and for representing the destination of the majority of migrants. Prior to the Trump administration, U.S. engagement with migration through the Darién Gap was characterized by a comparatively low-salience, humanitarian, and development-oriented approach, in which the route was not yet conceptualized as a strategic security corridor nor as an extension of U.S. border governance[202]. Throughout the early 2000s and into the Obama era, Washington viewed irregular migration principally through the lens of its Southwest border with Mexico, while the Darién remained a peripheral transit space with limited geopolitical attention and modest migratory

[199] C. YATES, J. PAPPIER, *cit.*, 2023.
[200] A. ALVARADO, O. FAJARDO, CNN, *US and Panama sign agreement that aims to close the Darién Gap to 'illegal migrants',* 1 july 2024. [https://edition.cnn.com/2024/07/01/americas/panama-us-darien-migrants-agreement-intl-latam]
[201] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 47.
[202] T. SHIFF, Book Review of D. S. FITZGERALD*, Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers*, *Social Forces*, Volume 99, Issue 1, September 2020, pp. 1-2.

volumes[203]. When the issue began to surface toward the mid-2010s, especially due to the increasing transit of extracontinental migrants from Haiti, Cuba, Africa, and South Asia, the U.S. response did not immediately shift toward securitization. Instead, the Obama administration framed migration as a regional humanitarian challenge linked to structural drivers, such as violence, weak governance, poverty, and limited economic opportunities in Central America and the Caribbean; they chose to follow a tripartite approach, focusing on promoting prosperity and regional integration, strengthening governance, and improving security[204]. During this period, Washington sought to build capacity and resilience in transit and origin countries, particularly through the Alliance for Prosperity and the Central America Regional Security Initiative (CARSI), providing equipment, training and technical assistance to support law enforcement operations, as well as reinforcing long-term capacity of regional governments to address security challenges and contributing socio-political factors[205]. Although monitoring and information-sharing regarding the Darién intensified between 2015 and 2016, particularly regarding the coordination with Panama and Costa Rica, the United States did not yet seek to transform transit countries into pre-border filters nor impose bilateral agreements that would shift enforcement responsibilities southward[206]. Regional diplomacy instead revolved around notions of shared responsibility, multilateral coordination, and humanitarian management, consistent with Obama-era migration governance frameworks that emphasized balancing enforcement with protection[207].

The result was a model of cooperative and distributed migration governance rather than a hierarchical or delegated enforcement architecture. Yet, even if appealing on paper, this project lacked effectiveness, specifically given the national crises later emerged in Latin America: Venezuela, Ecuador, Haiti – merely to mention the most famous. The configuration was far from the defining features that would later characterize U.S. migration diplomacy under Trump: deterrence logics, enforcement externalization, securitized discourses, and burden-shifting onto Latin American states[208]. The Trump administration represents a clear inflection point in which migration – including flows originating in or transiting through the Darién – was reframed as a national security threat and geopolitical risk, catalyzing the shift toward border externalization, pre-screening, and bilateral

[203] D.S. MASSEY, J. DURAND, K.A. PREN, *Why Border Enforcement Backfired*, in AJS, March 2016.
[204] P. J. MEYER, C. RIBANDO SEELKE, Congressional Research Service, *U.S. Strategy for Engagement in Central America: Policy Issues for Congress*, 2015.
[205] P. J. MEYER, Congressional Research Service, *Central America Regional Security Initiative: Background and Policy Issues for Congress*, 2019, p. 2-3
[206] T. SHIFF, Book Review of D. S. FITZGERALD*, Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers*, *Social Forces*, Volume 99, Issue 1, September 2020, pp. 1-2.
[207] P. J. MEYER, C. RIBANDO SEELKE, *cit.*, 2015.
[208] *Ibid.*

enforcement agreements aimed at containing movement far from U.S. territory[209]. In this sense, the pre-Trump period can be understood both in historical contrast and as a necessary precursor to the later securitized turn: it generated the first forms of regional coordination without yet embedding them within the deterrence-based architecture that would define U.S. migration governance from 2017 onward[210].

2.2.2 UN agencies and non-governmental organizations (NGOs)

In absence of a structured and coordinated state structure in the Darién region, a relevant role in the area is played by international agencies and non-governmental organizations. United Nations agencies and humanitarian NGOs have significantly expanded their presence in the area over the past two decades, becoming pillars of assistance, protection, and transnational coordination in a context characterized by limited state presence, armed and criminal actors, a high rate of sexual violence and exploitation, and complex smuggling networks[211]. They act as central intermediaries in the production of information, the monitoring of cross-border human mobility, and the articulation of protection concerns within regional diplomatic frameworks. Their presence reflects the hybrid configuration of migration governance in the Americas, in which weak state capacity and uneven enforcement are supplemented, rather than replaced, by a constellation of international actors.

The International Organization for Migration (IOM) plays a central operational role in making migration through the Darién "legible" to policymakers. Through tools such as the Displacement Tracking Matrix (DTM), IOM systematically collects data on demographic composition, nationalities, motivations, routes, vulnerabilities, and onward intentions of migrants transiting the corridor. This informational function is not merely technical. It converts an irregular, semi-invisible flow into a form of bureaucratic knowledge that enables states to plan reception capacity, anticipate protection needs, and engage in cross-border coordination. Juxtaposed to governmental monitoring, IOM's data effectively constitutes the epistemic infrastructure of regional migration governance. In addition to data collection, IOM supports reception centers in Panama, facilitates voluntary return programs, and increasingly contributes to the "soft governance" of mobility through cooperation with security, public health, and border management authorities. It occupies a delicate position at the intersection of humanitarianism and migration control: its mission is "developing effective responses

[209] G. MARTINEZ, *Read the Full Transcript of President Trump's Oval Office Address on the Border Wall,* in TIME, 2019. [https://time.com/5497569/donald-trump-oval-office-address-transcript/]
[210] A.A. VOROPAI , E. VARPAHOVSKIS, *Comparison of Obama's and Trump's discourse on illegal migration through the prism of securitisation,* in *International relations and international law Journal*, n. 109(1):4-16, 2025, p.12-13.
[211] D. SÁNCHEZ, *Panama: "Most returning migrants had either been kidnapped or had witnessed violence"*, in Médecins Sans Frontières website, 2025. [https://www.doctorswithoutborders.ca/panama-most-returning-migrants-had-either-been-kidnapped-or-had-witnessed-violence/]

to the shifting dynamics of migration and, as such, is a key source of advice on migration policy and practice", guided by the principles "enshrined in the Charter of the United Nations, including upholding human rights for all. Respect for the rights, dignity and well-being of migrants remains paramount"[212]; yet, its intergovernmental feature is made explicit in its Constitution, affirming in article 1: "[…] arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them […]"[213], underlining the role as state support of the Organization, rather than an independent entity. This highlights its state-centric operational role rather than an independent protection mandate. Its activities, then, are embedded in policy institutions that often pursue deterrence.

The United Nations High Commissioner for Refugees (UNHCR)'s role in the Darién reflects a different mandate: protection rather than management. Chapter 1 of the General Provisions of its Statute states: "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities"[214]. The main purpose of the agency is providing "international protection […] to refugees by assisting Governments": the objective is limited to people seeking not asylum nor transit, but the recognition of the status of refugee; and the means of action is the assistance to governments involved in the region. UNHCR has indeed an intergovernmental character, being part of the UN system, and that requires assistance to the states, considering this approach as the most effective in protecting individuals. The jungle corridor contains a growing share of potential asylum seekers, including Venezuelans, Haitians, Cubans, Africans, and South Asians who aim to continue north toward the United States, as highlighted on several occasions in their *Mixed Movements Monitoring* reports. For UNHCR, the Darién embodies the archetype of a mixed migration route, in which refugees and economic migrants travel side-by-side under conditions that make the distinction both empirically difficult and legally fraught[215]. As described by UNHCR in the reports, their methodology is based on identification of persons with specific protection needs, legal counselling, referral to asylum systems in Panama and Colombia, and advocacy directed at states to uphold *non-refoulement*

[212] International Organization for Migration, *Mission* [https://www.iom.int/mission]
[213] IOM Constitution: art.1 Cost.
[214] Statute of the Office of the United Nations High Commissioner for Refugees*:* art. 1.
[215] UNHCR, *Darien Panama: Mixed Movements Monitoring January 2025,* [https://data.unhcr.org/en/documents/details/116212]

obligations. Given the consideration of Panama as a transit rather than a destination country, UNHCR's work exposes structural tensions in the international refugee regime: states with limited interest in long-term integration are nonetheless entry points for individuals with manifestly well-founded claims to international protection. UNHCR's operational presence underscores the insufficiency of national asylum procedures in the region and the mismatch between regional mobility dynamics and the architecture of refugee law[216].

In parallel with UN agencies, non-governmental organizations play crucial humanitarian and advocacy roles. As reported by *Médecins Sans Frontières* (MSF), one of the most active organizations in the region, their effort focused specifically on providing medical and psychological assistance to migrants heading to North America[217]. Between 2021 and 2024, MSF supplied over 171,000 consultations both to individuals in transit and Indigenous communities[218]. The NGO has changed and adapted their location according to alterations of the flows, settling down between two indigenous host communities, *Bajo Chiquito* and *Canaán Membrillo*, and the Temporary Migration Reception Stations (ETRM) built by the Panamanian government[219]. MSF has repeatedly described the Darién as a humanitarian emergency zone, documenting high levels of sexual violence, dehydration, disease, injuries, and disappearances. By treating medical cases and collecting testimonies, MSF makes visible a crisis that states have been reluctant to classify as such, thereby shaping international narratives about migrant vulnerability. Despite the relevant work carried on by MSF, particularly considering the lack of state support to the communities and the migrants, national authorities decided to withdraw the agreement with the organization, making impossible to continue the assistance in the area: in 2025 MSF ended all their activities in Panama, leaving the country[220]. This demonstrates a shift in state approach toward the Darién issue, from a limited but supporting effort to a clear closure of borders and interruption of access to national territories.

These actors work not only as humanitarian providers but also as "norm entrepreneurs" in a fragmented governance landscape. Through policy reports, regional conferences, and bilateral dialogue, they diffuse norms of protection, accountability, and responsibility-sharing, fostering soft regional integration through the diffusion of protection and accountability standards. In the Darién Gap, the synergy between IOM data and UNHCR frameworks has underpinned regional coordination

[216] UNHCR News, *As Darien crossings hit record, UNHCR's Clements urges greater international support* 2024 https://www.unhcr.ca/news/as-darien-crossings-hit-record-unhcrs-clements-urges-greater-international-support/
[217] Médecins Sans Frontières website, *Panama: MSF concludes assistance activities for migrants,* 29 October 2025. [https://www.doctorswithoutborders.ca/panama-msf-concludes-assistance-activities-for-migrants/]
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.*

mechanisms which, despite being constrained by national sovereignty and donor dependency, represent a *governance without government*. However, this involvement reveals a core paradox: involvement of UN agencies and NGOs reflects structural limits inherent in humanitarian governance[221]. As expressed by Riggirozzi and Quiliconi, their interventions mitigate suffering but do not challenge the broader architecture of migration control, which is shaped by the United States' externalization policies and Panama's transit management strategies. Indeed, humanitarian actors operate in tension with securitization and deterrence logics that push migrants into more dangerous terrain, thereby increasing the demand for humanitarian assistance. This paradox, in which humanitarian organizations become indispensable to the functioning of a restrictive migration regime, is a defining feature of the Darién: UN agencies cannot compel states to alter their enforcement priorities; NGOs lack the mandate to regulate borders[222]. Both operate within an international refugee regime deeply asymmetric, in which destination countries influence mobility patterns without absorbing proportional responsibility for protection.

2.2.3 Armed groups

An additional element to be considered for the analysis is the rooted presence and power of armed and criminal groups in the region, who are often connected with drug distribution[223]. The influence of Panama and Colombia's authorities is affected in the area, due to the fact that those groups represented for a consistent period the local management. Colombian guerrillas have used the Panama's side of the forest for regrouping and reorganization: the Revolutionary Armed Forces of Colombia (FARC) constitute the main example, maintaining camps of combat training in Darién until 2015, when a peace agreement between the Colombian government and the rebels was signed, after the Panamanian security forces (SENAFRONT) dismantled the bases[224]. The situation continues in the present days, with the Gaitanista Self-Defence Forces – the largest drug trafficking organization in Colombia – as well as gangs composed of Indigenous individuals, who have claimed and managed the territorial zones, imposing order on local populations and migrants by means of threats, intimidation, and coercive control[225]. As it will be explained more in depth in following sections,

[221] P. RIGGIROZZI, C. QUILICONI, *cit.*, 2022, p. 169-171.
[222] P. RIGGIROZZI, C. QUILICONI, *cit.*, 2022, p. 8.
[223] Crisis Group, *Bottleneck of the Americas: Crime and Migration in the Darién Gap*, report n. 104, 2023. [https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-central-america/102-bottleneck-americas-crime-and-migration]
[224] RCN Canal, *Policía panameña desmanteló campamento de las Farc en el Darién*, 18 January 2015. [https://www.noticiasrcn.com/internacional/policia-panamena-desmantelo-campamento-de-las-farc-en-el-darien-240396]
[225] Crisis Group, *cit.*, 2023.

those armed groups are responsible for relevant human rights violations and exposure to additional risks for migrants[226].

2.2.4 Indigenous communities

The unprecedented surge in migratory flows has profoundly altered the socio-economic and security landscape for the indigenous communities of the Darién, primarily the Emberá-Wounaan and Guna Yala[227]. From an economic perspective, the traditional subsistence activities, such as agriculture and fishing, have been largely supplanted by a sort of *migration economy*. In response to the state's inability to manage the transit, indigenous communities have emerged as primary, albeit informal, service providers for migrants[228]. These services range from basic logistics, such as boat transportation along the *Tuira* and *Chucunaque* rivers, to the provision of food, shelter, and rudimentary guides. In villages like *Bajo Chiquito* and *Canaán Membrillo* – often the first points of contact after the jungle crossing – the local population has organized to offer charging stations for mobile phones, basic medical supplies, and informal reception points. However, this provision of services is double-edged: while it represents a crucial form of *grassroots governance* that ensures the survival of migrants where international agencies have limited reach, it also blurs the lines between humanitarian assistance and profit-driven exploitation[229]. This indigenous-led service infrastructure has become an essential, yet precarious, component of the regional migration corridor, operating in a legal grey zone that reflects the *adhocracy* and the structural gaps of the Panamanian state's management strategies: a flexible and informal system of management of migration, rather than an organized and structured mechanism[230].

2.3 The migrant *identikit*

Understanding the governance of the Darién Gap requires a clear analysis of the heterogeneous migrant profiles that converge in this corridor. Far from being a monolithic flow, the "identikit" of those crossing the jungle has evolved from a predominantly regional movement into a globalized phenomenon. This demographic shift is characterized by a significant presence of extra-continental migrants and a growing number of family units, reflecting the diverse drivers of displacement – from political collapse and systemic violence to economic despair – that force individuals toward the region. This profile is constructed based on data provided by the International Organization for

[226] Mèdecins Sans Frontières Website, *Panama: Surviving the dangers of the Darién Gap*, 2021. [https://www.doctorswithoutborders.org/latest/panama-surviving-dangers-darien-gap]
[227] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 47.
[228] *Ibid.*
[229] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 48-49.
[230] P. RIGGIROZZI, C. QUILICONI, *cit.*, 2022, p. 167.

Migration (IOM), specifically through its last *Monitoreo de flujo de personas en movilidad por las Américas, Darién, Panamá*, referred to the period of February 2025, since it offers a comprehensive and systematic overview of migratory movements in the region[231].

The report is based on individual interviews with adult people; overall, IOM staff got information about 223 migrating individuals. Regarding their nationality, 81% was from Venezuela, followed by 4% from Peru, 3% from Angola and 3% of Colombia, as well as other countries with a minor quota.

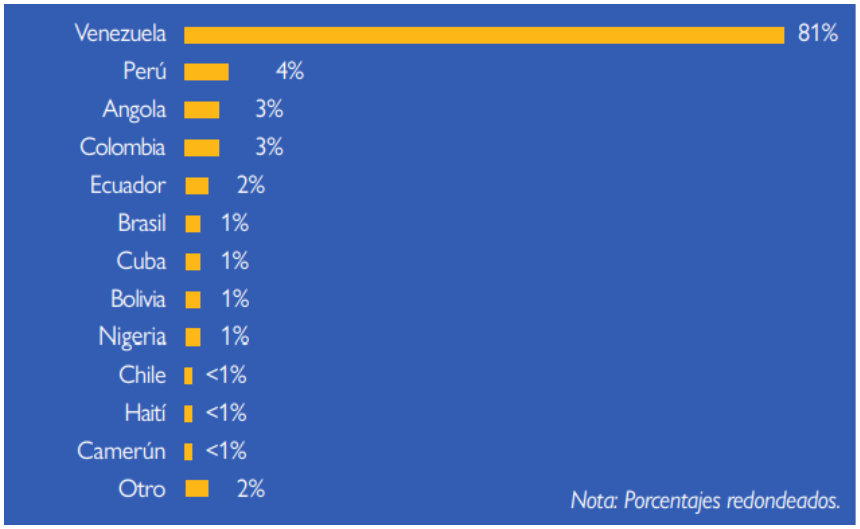

Figure 2: Nationality of interviewed individuals (adjusted percentages) – IOM

For what concerns the personal profile of the migrant, 53% has reported as male and 47% as female. Additionally, 28% of people in the group were minors, representing an increase compared to the previous reports. On average, adults were 33 years old, while the accompanied children were 8 years old. Considering the composition of the groups, 56% of individuals were travelling alone, data showing an increase of 12% in comparison to the previous period of analysis, while 42% travelled with relatives.

[231] International Organization for Migration (IOM), DTM Panama: *Flujo migrante en situación de Movilidad por las Américas, Darién, Panamá, Febrero 2025*, April 2025.

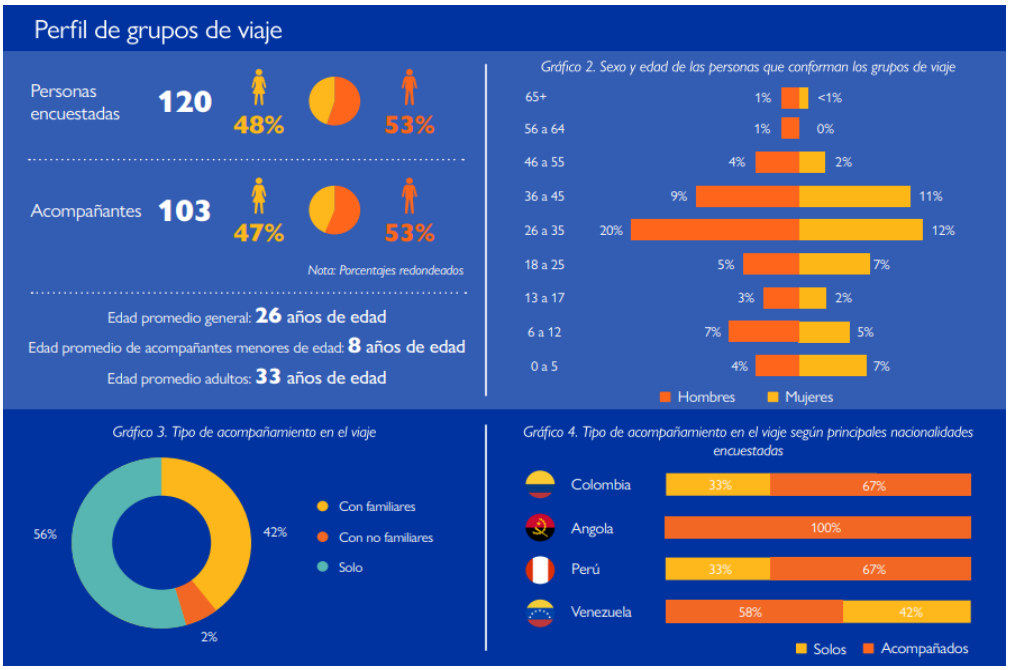

Figure 3: Overview of migrant travel group profiles, including age distribution, gender breakdown, and accompaniment patterns - IOM

Regarding the educational level, 68% of respondents reported completing upper secondary school, followed by university (12%), lower secondary (9%), and primary levels (7%), showing, maybe surprisingly, that 80% of migrants possess at least a high school diploma or a university degree.

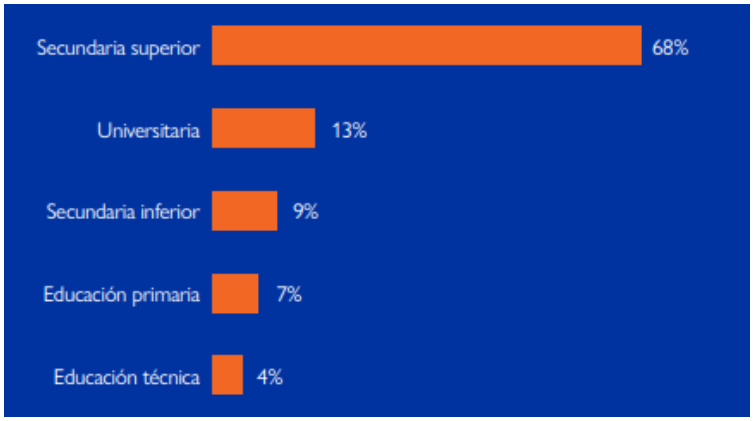

Figure 4: Level of education - IOM

This evidence suggests that the drivers of displacement are so systemic that they compel even skilled professionals to undertake one of the world's most dangerous routes.

Data concerning habitual residence reveals a significant trend of secondary migration: 61% of respondents had initiated regularization processes in their previous host countries, with an 85% success rate in obtaining legal status. This suggests that for these 20 individuals, legal regularity alone was insufficient to ensure long-term stability, eventually pushing them toward the Darién corridor. Among the individuals with a regular legal status, 59% were asylum seeker in the country of habitual residence, while 41% obtained the migratory status, with most frequence from the countries of Chile,

Peru and Colombia. In support of this data, 92% of those interviewed reported holding a nationality identity card, underscoring an exclusion from formal mobility, rather than identified individuals.

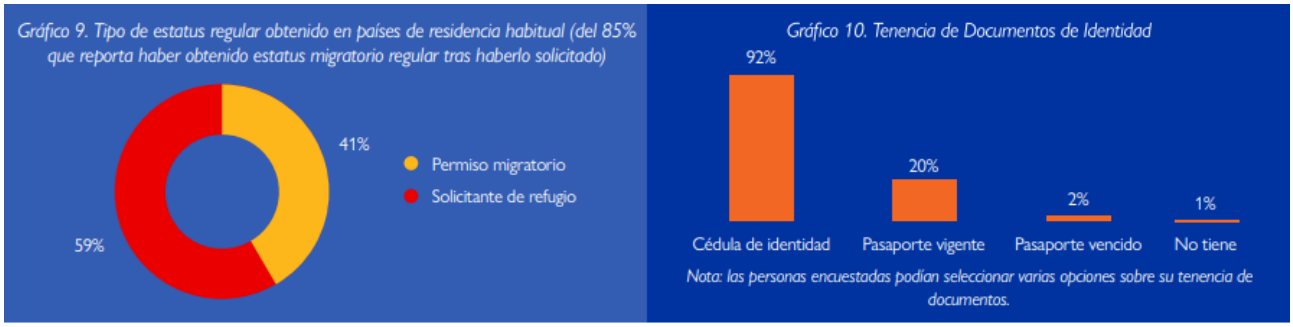

Figure 5: Status in the habitual residence country; Possessed identification document - IOM

Regarding the employment status of respondents prior to their journey, the trend of variability persists depending on whether the individual resided in their country of nationality or abroad. Among those living in their country of origin, 63% were employed, compared to 55% of those living elsewhere. Furthermore, 29% of those residing in their country of nationality were self-employed, whereas this figure rose to 36% for those living abroad. Finally, the unemployment rate for those who had been living in their country of nationality (8%) was slightly lower than for those residing in a different country (9%).

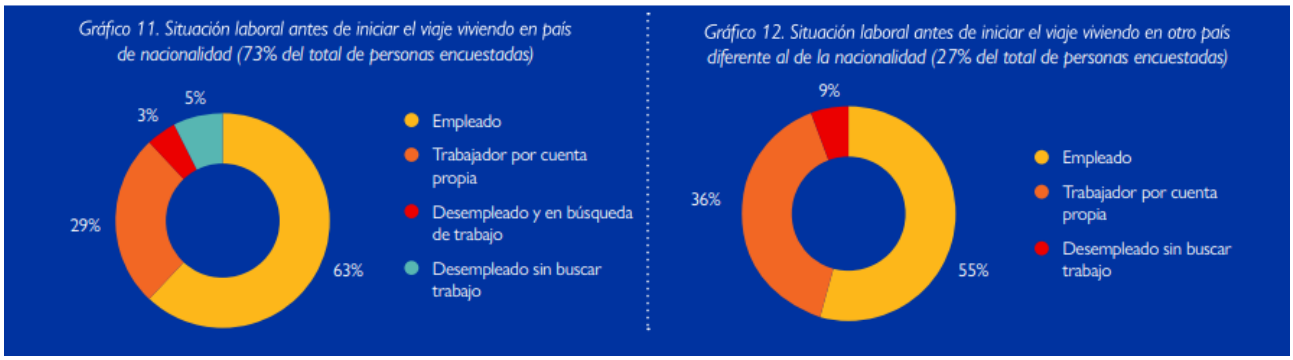

Figure 6: Employment situation in national state and in residential state - IOM

These statistics underscore that employment alone does not act as a deterrent to irregular migration: 95% reported not having sufficient income to cover their basic requirements.

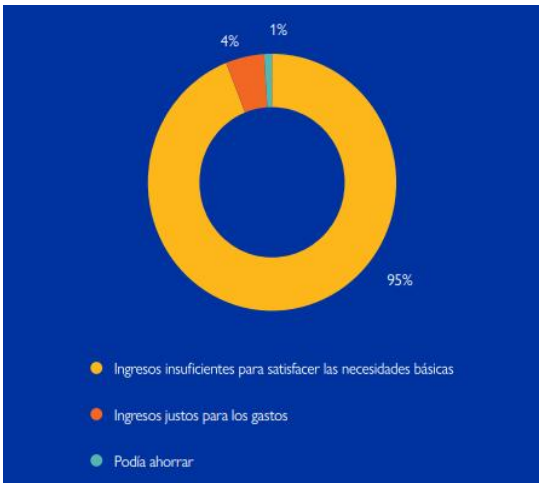

Figure 7: Consideration of the income level in national state - IOM

This figure is particularly striking when looking at the afore-mentioned high employment rates: it highlights a widespread condition of economic precariousness where even holding a job does not guarantee survival. For the vast majority of these individuals, the journey through the Darién represents a desperate attempt to escape a life of systemic deprivation that their current countries of residence failed to alleviate, heading to the United States.

If looking at the intended destination, 61% of those surveyed identify the United States as their primary goal, representing the lowest figure recorded for this destination in the past year. Additionally, 13% consider Mexico as their main destination, 5% opt for Costa Rica, and 20% identify "other" countries without further specification. Furthermore, 62 percent of respondents do not have an alternative destination, while 16% indicated Mexico as a backup, followed by Costa Rica (6%) and Canada (5%). Among the primary drivers for choosing a destination country, respondents highlighted favorable employment access (88%) and favorable socioeconomic conditions (89%) as the decisive factors, a further demonstration of the previous analysis.

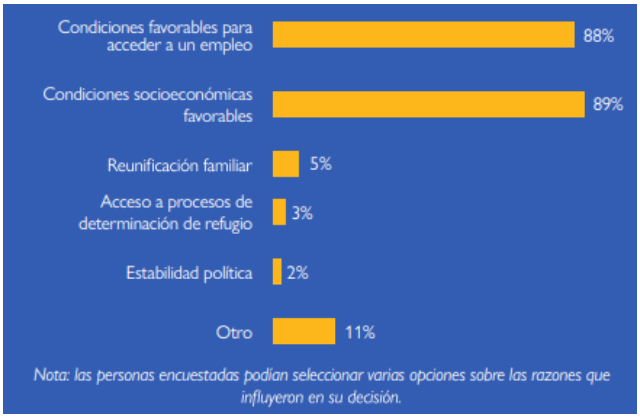

Figure 8: Factors or reasons influencing the decision of migrating toward the destination (with multiple selection) - IOM

The data underscores that the Darién crossing is perceived as the only viable path to escape the structural precariousness experienced in South American host countries, even when the primary destination (the U.S.) presents increasing legal and physical barriers.

Finally, economic and financial reasons (94%) were cited as the primary driver for leaving the country of origin, followed by political factors (26%), while regarding future aspirations, 58% of respondents expressed an intention to return to their home country, while 34% remained uncertain. This statistics reveal the enduring link to the homeland: the intention to return and the uncertainty on the future aspirations demonstrate that the journey through the Darién is not a project of voluntary uprooting, but rather a forced economic exile.

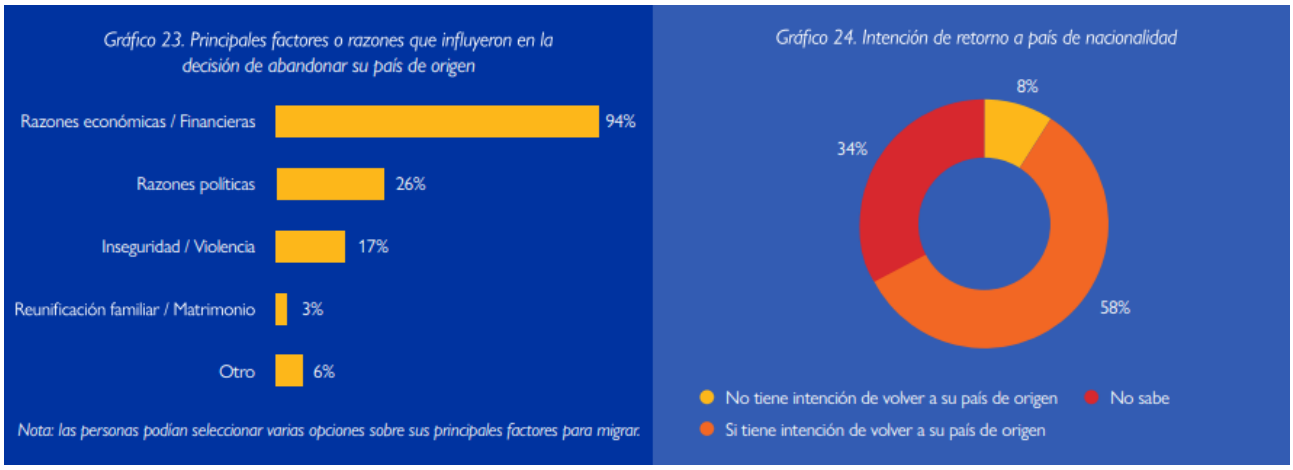

Figure 9: Relevant factors or reasons influencing the decision to leave the country of origin; Intention to return to the country of origin - IOM

In conclusion, the demographic profile emerging from IOM's data reveals a clear paradox that may challenge traditional migration stereotypes. The typical individual crossing the Darién Gap is a highly educated professional – definable as a *displaced middle class – who* possesses identity documents and has often already navigated formal regularization processes in other Latin American countries. However, the fact that the vast majority remain unable to meet basic needs despite their human capital underscores a profound crisis of regional governance. This *identikit* proves that current policies have turned legal regularity into formalism without substance: a formal status that grants residency but fails to provide the socio-economic integration necessary to prevent secondary displacement. Ultimately, the Darién corridor acts as a desperate outlet for a population that has been legally recognized but economically abandoned.

2.4 2.4 The route: risks and human rights violations

2.4.1 Description of the route

Individuals crossing the Darien region enter irregularly through different routes, characterized by differentiated costs, trajectories and duration. The length of the journey depends on several factors; generally, it takes at least ten days of travel, but time can vary according to different hydro-climatic conditions: during the wet season in Panama – namely from May to November – transiting the jungle may take additional time in comparison to the dry season. In the following section outlines the most relevant migratory routes; the pathways have been mapped through the collaborative efforts of local indigenous communities, humanitarian organizations, and development agencies currently active in the Darién Province[232].

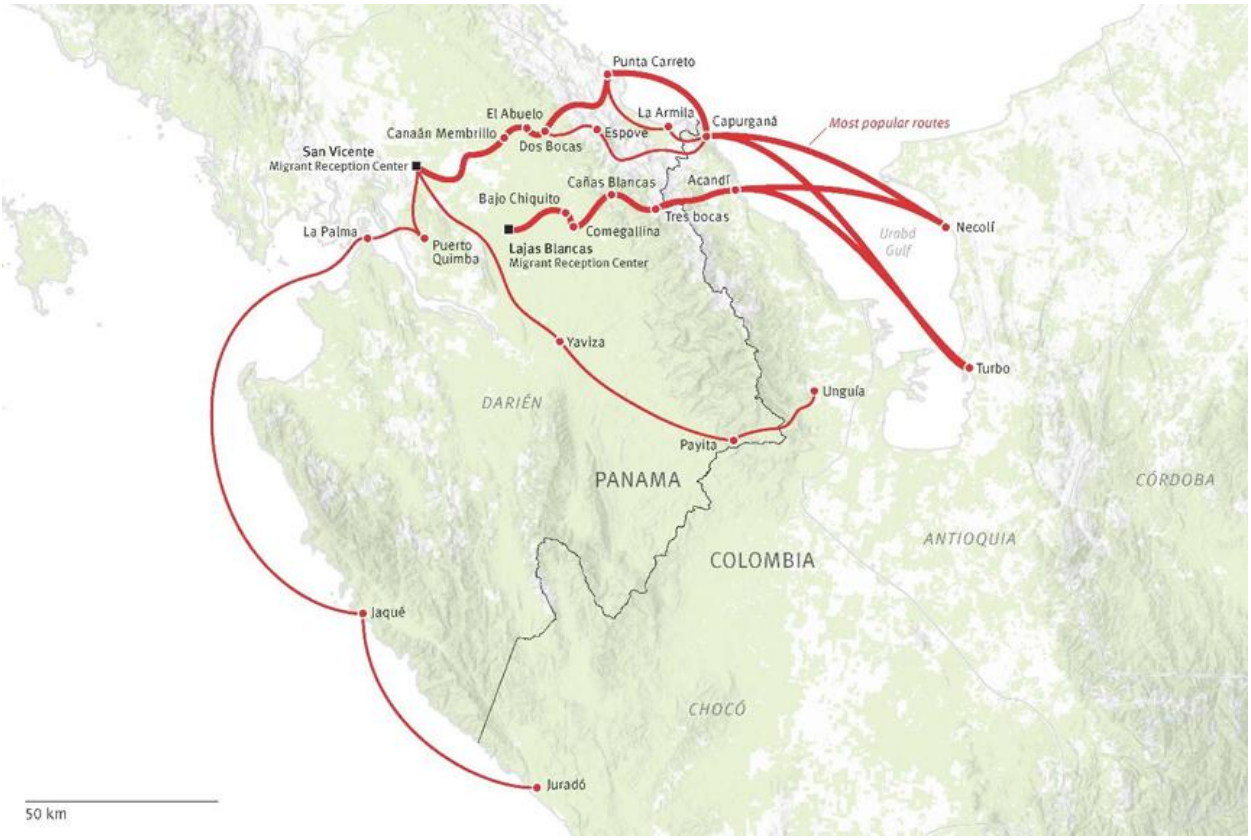

Figure 10: Routes used to cross the Darién – Human Right Watch

The most frequent route begins with a maritime departure from the Colombian municipalities of Necoclí or Turbo toward Acandí, in Colombia. From Acandí, the journey continues overland to Panama, specifically to Cañas Blancas and then to Come Gallina, also by land. Subsequently, migrants travel by *piragua* – a long, narrow dugout canoe – for approximately three hours to reach Bajo Chiquito on Panamanian soil. This community serves as the initial registration point for the

[232] International Organization for Migration (IOM), *cit.,* 2025, p. 2.

National Migration Service and the National Border Service (*SENAFRONT*); it is also the first location where state institutions such as the Public Ministry or the Ministry of Health are present. From this community, the transit proceeds via river in a *piragua* for four hours or more until reaching the Lajas Blancas Temporary Migration Reception Center (ETRM)[233].

An alternative, yet equally significant, transit corridor originates with a maritime leg from Colombia, particularly from Necoclí to Capurganá, serving as a secondary departure point in the Gulf of Urabá. Upon entering Panamanian territory, the route transitions into a demanding terrestrial trek toward Puerto Obaldía and Anachucuna, eventually reaching the transit locations of Quebrada Mingueza and Dos Bocas (Tacartí Camp**)**. A defining characteristic of this path is its heavy reliance on fluvial navigation toward Puerto Limón. This segment highlights the profound impact of seasonality on migratory logistics; depending on whether the transit occurs during the dry or wet season, the journey can double in duration – from three to six hours – due to the increased river discharge and fluctuating water levels. The final stage involves a coordinated transfer by bus from Puerto Limón to Buenos Aires in Panama, culminating at the Southern Migration Station (EMI SUR) in Costa Rica, where migrants are integrated into the formal processing system[234].

Unlike the more congested corridors of the Caribbean coast, the Pacific route, connecting Juradó (Colombia) to Jaqué (Panama) is primarily maritime. This path bypasses the dense interior of the rainforest; yet it remains subject to rigorous state surveillance upon arrival at Puerto Quimba. This transit point is crucial as it represents the Western side of the Panamanian border management system[235]. The subsequent overland transfer to the Lajas Blancas ETRM demonstrates how all disparate entry paths are eventually directed into a centralized "Controlled Flow" infrastructure, ensuring that even those arriving via the Pacific are consolidated into the same logistical processing pipeline: this involves health screenings and biometric registration before providing bus transportation directly to the border with Costa Rica, effectively facilitating a swift exit from Panamanian territory while minimizing local integration.

A fourth identified route involves a maritime departure from the Colombian municipality of Necoclí to Caledonia (Panama). This path represents a longer and, consequently, more expensive journey. Notably, this route bypasses the transit through the Darién National Park. According to testimonies from indigenous host communities and field observations by IOM personnel, this route is predominantly utilized by individuals of Asian origin, particularly from China and Afghanistan. From

[233] *Ibid*.
[234] *Ibid.*
[235] *Ibid.*

Caledonia, they proceed overland within Panama toward Chatí and Chocolatal, continuing to Zapallal before finally being mobilized to the Lajas Blancas ETRM[236].

2.4.2 Risks and human rights violations in the Darién Gap

The diversification of routes and the logistical complexity described in the previous section do not merely represent geographical pathways; they delineate a landscape of extreme vulnerability and systematic risk. While the mapping of these corridors provides a technical framework for understanding migratory flows, it is within the interstices of these very routes, particularly in the areas without state sovereignty and control, that the most severe humanitarian crises unfold[237]. The transition from one point to another is not a neutral passage but a descent into an environment where physical endurance is constantly pushed to its limits and where human rights are frequently violated[238]. Consequently, to fully comprehend the phenomenon of the Darién, it is essential to look beyond the logistical infrastructure of the *Controlled Flow* mechanism and examine the specific perils that characterize the daily reality of those in transit. The following analysis explores the dual nature of these dangers: the lethal unpredictability of the tropical environment and the structured violence imposed by the criminal actors who in practice govern the jungle's interior.

The first dimension of risk is inherently geographical. The Darién is not a managed border but a dense tropical rainforest where the terrain itself acts as a barrier. Migrants face extreme physical strain navigating the *Loma del Desaliento* (Hill of Despair), where steep elevations and mudslides cause frequent injuries, fractures, and exhaustion[239]. According to Human Rights Watch, environmental factors are a leading cause of disappearance; flash floods in the region frequently sweep away individuals during the wet season, often leading to unrecorded fatalities[240].

Beyond the immediate physical danger, the lack of access to basic needs creates a secondary health crisis. The absence of potable water and sanitation infrastructure leads to widespread gastrointestinal infections, severe dehydration, and vector-borne diseases[241]. In this context, the forest is not merely a setting but an active protagonist in the erosion of the migrants' physical integrity, particularly affecting children and the elderly who lack the resilience to withstand such prolonged environmental stress[242].

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[236] *Ibid.*
[237] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 30-31.
[238] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 14.
[239] Médecins Sans Frontières website, *cit.,* 2021.
[240] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 47.
[241] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 51-53.
[242] Médecins Sans Frontières website, *cit.,* 2021.

While environmental risks are significant, the most alarming threats are anthropogenic. Humanitarian organizations have repeatedly denounced the transformation of the Darién into a theater of systematic violence. Médecins Sans Frontières (MSF) has been the most vocal critic regarding the escalation of systematic sexual violence[243]. Their field data from 2023 and 2024 revealed a pattern of mass sexual violence used as a tool of terror and extortion by criminal gangs. These attacks often occur in specific lawless enclaves near the border, where armed groups intercept large groups of migrants. MSF's reports emphasize that these are not isolated incidents, but a systematic phenomenon facilitated by the total lack of security oversight in the jungle interior[244].

As highlighted by Human Rights Watch, the Gaitanist Self-Defense Forces (AGC) or *Clan del Golfo* treat migratory flow as a commodity[245]. Migrants are subjected to "exit taxes" and forced to pay for "guides" – the so-called *coyotes* – whose protection is often illusory. Those unable to pay are frequently victims of kidnapping, forced labor, or physical violence. The mayor's offices of the communities have limited capacity, and the Gulf Clan exercises control over large parts of the territory, engages in illegal economies, including drug trafficking, and commits serious abuses[246].

A core point of denunciation by international organizations is the protection gap created and pursued by state policies. They argue that the Panamanian and Colombian governments have prioritized the logistics of transit rather the actual protection of human rights[247]. This creates a contradiction: the State is highly visible at the end of the route through its Temporary Reception Centers to register and transport migrants but is completely absent during the most dangerous stages of the journey. By limiting its role to administrative tasks and transportation, the State leaves a power vacuum in the heart of the jungle. This selective presence effectively grants *de facto* impunity to criminal groups, allowing them to exploit, extort, and attack migrants without fear of legal consequences, especially since crimes remain mostly unpunished and uninvestigated[248]. Essentially, the State has become a manager of the flow rather than a protector of the people within it.

Migrants' conditions are further exacerbated by reported abuses of power by the national authorities commissioned of their protection. Human Rights Watch's report describes how the Panamanian border service (*SENAFRONT*) has been implicated in incidents of physical ill-treatment and verbal abuse within the Migration Reception Centers (ETRMs)[249]. Even more concerning are the allegations

[243] D. SÁNCHEZ, *cit.*, 2025.
[244] *Ibid.*
[245] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 34-35.
[246] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 31.
[247] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 2.
[248] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, p. 82.
[249] *Ibid.*

regarding sexual exploitation and harassment targeting women and girls. UN special rapporteurs and humanitarian workers reported a predatory environment where some officers have allegedly exchanged access to bus transportation, an essential resource for continuing the journey for sexual favors[250].

The report continues underlining that the lack of effective oversight mechanisms and the brief duration of the migrants' stay in Panama reinforce the environment of impunity[251]. Victims are often reluctant to file formal complaints due to their transit status or fear of retaliation, while the Ministry of Public Safety frequently denies receiving such reports. Although the creation of the Humanitarian Border Security Unit (USFROH) with the cooperation of the IOM in 2021 was intended to integrate human rights training into border management, the persistence of these "suspicious conducts" highlights a profound gap between institutional rhetoric and the lived reality of migrants. This internal violence within the ETRMs underscores that the policy of *Flujo Controlado* is not merely a logistical challenge but a space where power imbalances can lead to grave institutional human rights violations

[250] *Ibid.*
[251] *Ibid.*

Chapter 3 – U.S. antimigration measures and the consequences on the Darién Gap

3.1 USA antimigration measures

After having delineated the theoretical legal framework concerning international migration law and described the concrete situation in the Darién Gap, it is necessary to analyze the extent to which theory overlaps to practice. In particular, the policies adopted by Central American States – primarily Panama and Colombia – have been heavily influenced by the preeminent actor of the Darién route: the United States[252]. The restrictive evolution of U.S. migration measures has functioned as more than a mere domestic policy; it has tried to become a strategic tool of deterrence. Not only did they inspire some mechanisms of borders' closure and rejection of asylum seekers' requests but also have been codified through bilateral agreements between the administrations of the U.S. and those of the transit countries[253]. In other words: given the international legal framework previously discussed, how have the specific migration measures adopted by the United States reshaped the strategic role and humanitarian landscape of the Darién Gap?

In order to answer the question, the transformation of the U.S. approach to migratory influx from the Southern border will be presented, as well as the two lines of intervention, which are limitation of access for migrants to international protection and externalization of border control. A diachronic analysis of U.S. administrations' policies is not merely a chronological requirement, but a functional necessity for this research. The exponential growth and structural evolution of migratory flows through the Darién Gap are inextricably linked to the restrictive trajectory of U.S. border policies. By tracing the development of U.S. antimigration measures, it becomes evident that the Darién Gap has functioned as a geopolitical pressure outlet: being legal and traditional pathways systematically severed at the U.S.-Mexico border, the pressure was redistributed southward, transforming a previously impassable jungle into a compulsory transit corridor. As a consequence, analyzing the shift from Trump I to Biden, and the emerging perspectives of a second Trump term, is essential to demonstrate how the *bottleneck effect* in the Darién is a direct, though externalized, result of U.S. domestic and regional deterrence strategies. This is further demonstrated by migration flows' numbers: they accurately reflect the restrictive approach to the migration from the United States, with an outgrowing volume of individuals crossing the forest in response to the closure of other pathways.

[252] P. RIGGIROZZI AND C. QUINTILONI, *cit.*, 2026, n. 1, p. 183.
[253] O. BUENO AND C. MÜLLER, *The US seeks to remake cooperation on migration through bilateral agreements*, in *Mixed Migration Centre,* 2025.

3.1.1 Trump first mandate (2017 - 2020)

Donald Trump has been elected as President of the United States in 2016, having started his first mandate on the 20th of January 2017[254]. With regard to migration policies, this period was characterized by a "zero tolerance" paradigm and physical deterrence, involving measures that both restricted asylum eligibility criteria and obstructed the physical entry of migration flows.

Executive Order n. 13767

One of his first legal acts was Executive Order n. 13767[255]. The document presents the approach of migration management assumed by his administration and begins to construct the legal basis of the subsequent measures he adopted in the first term. This is particularly evident in the introductory section: it establishes the ideological and strategic foundation for a shift toward a more aggressive border enforcement regime, by framing the primary purpose through the lens of national security and sovereign responsibility[256]. Specifically, the President identifies four main critical justifications for imposing his restrictive policies: firstly, he defines the entry of "unauthorized aliens" not just as a mere administrative violation, but as a concrete "significant threat to public safety", rendering it a national security menace, emphasizing that the individual crossing without federal inspection represents a potential source of terrorism and criminal conduct; secondly, he considers the "recent surge of illegal immigration" as an unsustainable burden that "overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed", laying the foundations for the deployment of emergency executive powers to address such a systemic strain; thirdly, he deepens the threatening element by presuming an evident and almost inextricable connection between migration flows and transnational criminal organizations, and thus justifying the necessity of an increasing militarized and punitive response on the borders; lastly, by highlighting the failure of precedent administrations to respect the "basic sovereign responsibility" of securing the borders, he directs all executive agencies to utilize "all lawful means" to prevent illegal migration and to ensure that repatriation is conducted "swiftly, consistently, and humanely".

Section 2 outlines the policy to be adopted after the Order entered into force, mainly by establishing a rigid framework designed to minimize judicial delays and maximize enforcement[257]. It mandates the "immediate construction of a physical wall" as the cornerstone of the policy, where the Wall

[254] The American Presidency Project website, *Donald J. Trump (1st term)*, [https://www.presidency.ucsb.edu/people/president/donald-j-trump-1st-term , accessed on 4th February 2026]
[255] Executive Order n. 13767, *Border Security and Immigration Enforcement Improvements,* 25th January 2017.
[256] Executive Order n. 13767: section 1, *Purpose*.
[257] Executive Order n. 13767: section 2, *Policy.*

represents not only a jurisdictional boundary, but a specifically militarized barrier for intercepting transnational criminal activity and "illegal immigration"[258]. Then, a systemic use of detention is enounced, by implementing mandatory detention of all individuals suspected of immigration violations "pending further proceedings regarding those violations". This means that, without *ad hoc* interviews and regardless of potential refugees' status, individuals are detained while waiting for their judicial proceeding over the possibility to enter U.S. territory, transforming the irregular entry from an administrative violation to a criminal offense. This measure concretely ended the previous practice of *catch-and-release*, which provided the release of apprehended undocumented migrants into the U.S. interior while they await their court hearings, rather than holding them in mandatory detention[259]. An additional pillar of the Order is the acceleration of removals of illegal migrants, through two main phases: on the one hand, immigration authorities have to expedite determinations of individuals' claims of eligibility to remain in the United States; on the other hand, they have to promptly remove all those individuals whose legal claims have been lawfully rejected, after having imposed civil and criminal sanctions for their territorial violation. Finally, the policy encourages extensive cooperation between the federal and the national levels for empowering local law enforcement in illegal immigration control, so that it would align with federal immigration priorities[260]. After having posed the objective and the principles of the Order, the subsequent sections expose the operational framework.

On a physical dimension, public order represents the primary aim, traduced in complete operational control of the Southern border. The president issued the project and the immediate construction of a concrete barrier ("the Wall"), supported by the most technological advancements. On a financial level, the Secretary is in charge to identify the already existing federal funds and to structure long-term budgetary requests, in order to impose the Wall as a permanent priority. Finally, the reinforcement of logistic apparatus, by implementing the bureaucratic and repressive mechanism, serves as a management instrument for migration influxes on a large scale. Another key element is the centralization of proceedings: the assignment of asylum officers and immigration judges directly within detention facilities aims to expedite immigration justice[261]. This configuration drastically reduces the legal leeway for applicants, prioritizing the rapidity of rulings over a thorough case-by-case examination.

[258] *Ibid.*
[259] D. S. CAMERON, *The End Of "Catch-And-Release": Legal Challenges And Implications For Immigration Policy,* in *Journal of Gender, Justice & Race*, 9th March 2025, para. 1.
[260] Executive Order n. 13767: section 2, para. (e).
[261] Executive Order n. 13767: section 5-6.

The Order provides the enlargement of number of detention centers on the Mexican border, and the employment of five thousands of new agents of Border Patrol[262]. Some words about the role of Border Patrol in the U.S. immigration system should be spent, in an effort to provide the most comprehensive analysis of the mechanism. The U.S. Customs and Border Protection (CBP) unit operates as the primary enforcement actor of the Department of Homeland Security (DHS), among which the Border Patrol agency oversees "securing the nation's borders and coastal waters between ports of entry, preventing threats from entering the United States"[263]. Nonetheless, in controlling national borders from irregular entries, the agency has been historically criticized for its excessive use of force and violations of human rights[264]. Many argued the systemic poor accountability the agency provides over its actions; some reports have underscored the disproportionate use of deadly force by agents in situations where no mortal danger was present[265]. These issues are exacerbated by inconsistent and arbitrary reporting practices within the agency, which effectively obscure the true extent of abusive behavior. Numerous claims and empirical evidence suggest the use of violence as a persistent feature of border enforcement: firstly, certain migrant groups, especially Salvadoran and Venezuelans deportees, have been statistically more likely to experience physical abuse during arrest compared to native-born citizens; secondly, the persistence of such abuses is heavily attributes to the failure of an accurate data collection, which prevents the implementation of meaningful reforms; lastly, the spectrum of misconduct ranges from routine physical degrading treatment to documented cases of manifest murder, indicating a chronic crisis within the agency's culture and manner of behavior[266]. Additionally, the absence of a transparent and democratic oversight over its actions, as well as the lack of reliable information which protects systematic abuses both from legal and political consequences, render Border Patrol a particularly difficult agency to manage in compliance with fundamental and human rights[267]. The conduct of Border Patrol agents is in fact formally governed by a complex hierarchy of norms, primarily rooted in Title 8 of the U.S. Code, which grants broad powers to interrogate and arrest without a warrant within the "100-mile border zone"[268]. This statutory authority is theoretically constrained by the CBP Use of Force Policy and the National Standards on

[262] Executive Order n. 13767: section 5, 8.
[263] U.S. Customs and Border protection website, *U.S. Border Patrol*, [https://careers.cbp.gov/s/career-paths/usbp , accessed on 6th February 2026]
[264] G. CANTOR AND W. EWING, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, in *American Immigration Council*, 2017, p. 1.
[265] G. CANTOR AND W. EWING, *cit.*, p. 3.
[266] *Ibid.*
[267] *Ibid.*
[268] 8 U.S.C. § 1357 (2024). *Powers of immigration officers and employees*. Immigration and Nationality Act § 287.

Transport, Escort, Detention, and Search (TEDS)[269]. Nonetheless, the wide discretionary power afforded by these regulations, coupled with the "border search exception" to the Fourth Amendment, creates a legal grey area where systematic abuses often evade both judicial and democratic oversight[270].

Two further pillars relevant to defining the framework of Trump's subsequent measures are the *Return to territory* and the *externalization of borders*. The former consists of returning migrants with pending proceedings back to the country of origin – mostly from Mexico – while awaiting their "formal removal proceeding"; the latter introduces a geopolitical dimension aimed at ensuring the cooperation of neighboring countries: by requiring a detailed report on all economic, humanitarian, and military aid provided to Mexico over the last five years, the Order transforms foreign assistance into a diplomatic leverage[271]. Trump's first mandate was primarily focused on pushing migration flows back to Mexico, as the mass instrumentalization of the Darién Gap was far from reaching its maximum levels, and the route had not yet emerged as a primary transit corridor[272].

The Executive Order constitutes the foundation upon which Trump's first-term anti-immigration policies were built. Analyzing this period is crucial, as it explains the transformation of the Darién Gap from a secondary route used by few into the central migratory hub of recent years. The redirection of migratory flows toward the Darién Gap is the direct result of the externalization of border enforcement: as the U.S. pressured regional partners to implement stricter visa requirements and transit controls, traditional routes were effectively severed. This forced migrants to bypass official checkpoints and venture into unregulated geographical areas, namely Colombia, Ecuador and Panama. Consequently, the Darién Gap transitioned from a nearly impassable natural obstacle to a compulsory transit corridor, as it remained the only land bridge where state surveillance could be evaded, despite the extreme humanitarian cost.

The Zero Tolerance Policy

A pivotal shift in the U.S. immigration enforcement landscape occurred on May 7, 2018, when the Department of Justice (DOJ) under the Trump Administration officially implemented the "Zero

[269] U.S. Customs and Border Protection (CBP), *National Standards on Transport, Escort, Detention, and Search (TEDS)*, 2015; U.S. Customs and Border Protection (CBP), *CBP Use of Force Policy, Guidelines and Procedures Handbook*, 2021.
[270] G. CANTOR AND W. EWING, *cit.*, p. 3.
[271] Executive Order n. 13767: section 9.
[272] Servicio Nacional de Migracion Panama, *Tránsito Irregular Por Darién*, 2018. [https://www.migracion.gob.pa/wp-content/uploads/IRREGULARES-2010-2019-actualizado.pdf , accessed on 9th February 2026]

Tolerance" policy[273]. This initiative did not change directly statutory law; conversely, it represented a drastic shift in approaching enforcement of existing statutes, specifically provisions concerning the criminalization of irregular entry into the United States. Under this policy, the DOJ mandated the prosecution of all adult aliens who were apprehended crossing the border illegally, including those seeking asylum and those traveling with minor children. In contrast with previous administrations, which often managed family units through civil administrative proceedings, the *Zero Tolerance* policy eliminated exceptions for parents. Consequently, when parents were referred to for criminal prosecution and transferred to the custody of the Department of Justice, they were physically separated from their children[274]. Despite family separation not being the formal objective of the policy, it became a procedural consequence of the decision to prosecute adults: it established a systematic referral mechanism, according to which adults apprehended between ports of entry were diverted from administrative removal to criminal prosecution by the DOJ, regardless of their status as part of a family unit[275]. Since minor children cannot, legally-speaking, be held in criminal jails for adults, they were reclassified as Unaccompanied Alien Children (UAC); within seventy-two hours, these minors were transferred to the custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS). This legal mechanism resulted in the separation of thousands of children from their parents – calculated between 5,300 and 5,500 separated families[276] –, a practice that the administration justified as a necessary measure to adjust legal flaws and discourage fraudulent asylum claims.

The primary objective of the policy was deterrence: the rationale behind was to discourage Central American migration flows by signaling that entry into the U.S. would result in criminal charges and potential family separation[277]. Despite its brief tenure, abruptly halted by Executive Order on June 20, 2018[278], due to intense global pressure, the policy's long-term consequence was not the cessation of movement, but rather a profound paradigm shift toward the criminalization of asylum seekers. In the framework of this research, the *Zero Tolerance* policy serves as a critical case study of the manner in which domestic punitive measures catalyze regional migratory movements. The policy in fact effectively blurred the lines between administrative immigration management and criminal prosecution, treating asylum-seekers as criminal defendants from the moment of apprehension. The systemic increase of legal and personal costs for migrants in reaching the U.S. border was designed

[273] W. KANDEL, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, in *Congressional Research Service*, 2021, n. R45266, p. 1.
[274] *Ibid.*
[275] W. KANDEL, cit., p. 8.
[276] W. KANDEL, cit., p. 2.
[277] *Ibid.*
[278] Executive Order n. 13841: *Affording Congress an Opportunity To Address Family Separation.*

to limit arrivals from the South, specifically from Mexico. The resulting environment of heightened institutional risk did not stem the flows but rather redirected it toward unregulated geographical breaches.

Migrant Protection Protocols (MPP)

As a consequence to the *Zero Tolerance* policy, detention centers exponentially increased the number of detained individuals and family units, provoking a relevant issue of prison overcrowding. In order to address the problematic, the Migrant Protection Protocols (MPP), commonly named as the *Remain in Mexico* program, were inaugurated in January 2019[279]. The MPP realized the mandate issued in the aforementioned Order: it prescribed for non-Mexican individuals who arrived at the Southern border, through both official ports of entry and unrecognized ones, to be returned to Mexico for the duration of their immigration proceedings. Following this framework, migrants were issued a "Notice to Appear" – a form with the date of the judicial proceeding – and subsequently escorted back to Mexican territory, with instructions to return to a designated port of entry only for their scheduled court hearings[280].

The implications of the MPP for the migrant population were profound and multifaceted, characterized by what human rights organizations describe as a manufactured humanitarian crisis[281]. The externalization of danger and violence represented a first effect: due to the forced transferals of approximately seventy thousand individuals to Mexican border cities, the U.S. government effectively placed vulnerable populations in high-risk zones controlled by criminal cartels. As highlighted by several reports compiled by NGOs and associations for human rights, "severe human rights violations", including kidnapping, rape, and extortion affected individuals enrolled in the program[282]. Additionally, under the MPP, the decision to return individuals to Mexico was left to the discretion of CBP officers, leading to inconsistent applications of the policy[283]. This lack of uniformity often resulted in arbitrary family separations, where some members were expelled while others were permitted to pursue asylum within the United States. A second consequence was the creation of an insurmountable procedural hurdles that undermined the right to due process; residing in Mexico made it nearly impossible for migrants to secure U.S. legal counsel[284]. Furthermore,

[279] American Immigration Council, *The "Migrant Protection Protocols": an Explanation of the Remain in Mexico Program*, February 2024.
[280] *Ibid.*
[281] Human Rights Watch (HRW), *"We Can't Help You Here": US Returns of Asylum Seekers to Mexico*, 2019. ["We Can't Help You Here": US Returns of Asylum Seekers to Mexico | HRW , accessed on 9th February 2026]
[282] *Ibid.*
[283] American Immigration Council, *cit.*, p. 3.
[284] American Immigration Council, *cit.*, p. 1.

logistical challenges, such as absence of reliable transportation to ports of entry and the use of "tent courts", further decreased the likelihood of a fair asylum hearing[285].

Title 42

Title 42 is a section of the U.S. Code dealing with public health and welfare. Originally enacted in 1944, it permits to U.S. government the authority to prohibit individuals to enter the State while public health emergencies occur. Specifically, it grants the U.S. government the authority to prohibit the entry of individuals into the country during public health emergencies, such as an outbreak of a contagious disease. After the outbreak of the COVID-19 pandemic, Title 42 became the core instrument for U.S. immigration policy in response to the emergency[286]. In practice, the U.S. administration had the power to quickly remove migrants at the border, without granting the right to a court hearing or asylum process. The measure was effectively put in place by Trump's administration in March 2020, officially to prevent the spread of COVID-19 disease, especially at the beginning of the pandemic. As an effect, almost three million individuals were expelled from the borders between 2020 and 2023, rendering the policy as one of the most significant tools of last years for border enforcement[287]. Nonetheless, it faced intense criticism for its humanitarian impact, specifically regarding family separation and its inefficiency in border management. From a health perspective, experts dismissed the measure as an illegitimate public health tool, asserting that the objective of epidemic control could have been met through less restrictive alternative safeguards[288].

The measure was composed of two main directors: on the one hand, the border restrictions led to a relevant decline in number of individuals seeking asylum in the U.S. territory, causing many critics over its compliance with the 1951 Geneva Refugees Convention[289]; on the other hand, many migrants, regardless their vulnerable status, were deported without being able to enjoy a due process, facing risks to their lives when repatriated or sent back to Mexico. The evolution of Trump's anti-migration strategy shifted from the Migrant Protection Protocols to the implementation of Title 42, rendering the southern border *de facto* completely inaccessible. According to U.S. Customs and Border

[285] *Ibid.*
[286] Boundless, *Understanding Title 42 and What It Means For Immigration*, last update 24th January 2025. [https://www.boundless.com/immigration-resources/understanding-title-42-and-what-it-means-for-immigration , accessed on 10th February 2026]
[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*

Protection, this measure resulted in approximately 2.8 million expulsions, effectively transforming a health statute into a formidable tool of border exclusion[290].

After Trump's mandate concluded in 2021, the Darién Gap had been firmly transformed in the unavoidable crossing for those excluded by U.S. policies. The subsequent President Joe Biden took office promising a paradigm shift; yet his administration would have soon faced the reality that closing traditional routes had created a regional momentum that was increasingly difficult to reverse.

3.1.2 Biden's mandate (2021 - 2024)

Joe Biden became President of the United States on 20th January 2021[291]. Having succeeded against his rival Trump, his office was widely perceived as a turning point of the U.S. immigration policy, characterized by a commitment to restore a more humane and orderly system. Executive Order n. 13993 indeed represents the revision of the previous restrictive approach[292]. In Section 1, while underlining the historical role of immigrants in the U.S., it also affirms the priority to "protect national and border security", and simultaneously to "address the humanitarian challenges at the southern border, and ensure public health and safety"[293]. On a communication level, the shift in discourses and intentions are evident. Nevertheless, they coincided with an unprecedented surge in arrivals at the Southern border, transforming the humanitarian promise into a complex challenge of regional governance: in 2023, the crossings in the Darién Gap reached the extraordinary number of 520,085 individuals who irregularly passed through the region[294]. Despite a declaration of distance from the "Zero Tolerance" approach, Biden administration's response to the record-breaking migration flows was based on three main instruments, which eventually altered the right to asylum.

Firstly, the government kept Title 42 in effect until 2023, notwithstanding the pressures from civil society and immigrant rights advocates[295]. It justified its continuation through the explanations of public health emergency during the pandemic; it concurrently started to diminish the restrictiveness of the most aggressive applications, namely unaccompanied minors. Yet the systemic practice of removal of migrants remained a cornerstone of U.S. enforcement strategy during most of Biden's mandate. His administration was challenged also on a legal ground: in 2022, the U.S. Supreme Court intervened to temporarily keep the measure, after a litigation by many frontier States – such as Texas

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[290] B. DEBUSMANN JR., *Title 42: What is the immigration rule and why has it ended?*, in BBC, 12th May 2023, [https://www.bbc.com/news/world-us-canada-65477653 , accessed on 9th February 2026]
[291] The American Presidency Project, *Joseph R. Biden, Jr.* [https://www.presidency.ucsb.edu/people/president/joseph-r-biden-jr accessed on 9th February 2026]
[292] Executive Order n. 13993: *Revision of Civil Immigration Enforcement Policies and Priorities*, 20th January 2021.
[293] Executive Order n. 13993: section 1, *Policy.*
[294] Servicio Nacional de Migracion Panama, *Tránsito Irregular Por Darién*, 2023. [https://www.migracion.gob.pa/wp-content/uploads/IRREGULARES-X-DARIEN-2023.pdf , accessed on 10th February 2026]
[295] Boundless, *cit.*

and Arizona – which claimed that the elimination of the policy would extraordinarily stress national resources[296]. Between 2022 and 2023, Biden's government gradually began to reduce expulsion on the basis of Title 42, despite the backlashes of both Republicans and Democrats in Congress[297]. The formal expiration of the state of emergency for COVID-19 pandemic determined the termination of Title 42 application and a transition back to the Title 8 of U.S. Code, namely the Immigration and Nationality Act[298]. This return to traditional immigration mechanisms and expanded asylum processes was coupled with stricter enforcement elements and a use of technology for migrants' access in the territory[299].

Secondly, Biden's administration expanded the so-called CBP One App, introduced in 2020, to address undocumented migrants' requests of asylum[300]. It was a mechanism under which individuals without necessary documents to enter in U.S. territory could apply for scheduled appointments before Immigration authorities. CBP staff made inspections to migrants and provided, in case of positive results, the possibility for them to access the U.S. asylum process[301]. The app become the most relevant method to manage asylum requests and to control migration entries, and it permitted the administration to limit access though technology: it actually transformed the asylum access into a digital barrier for international protection requests, where not only the necessity to dispose of a technological instrument was required, but also a quota-based system was implemented, with a limited number of appointments for each port of entry[302]. On the first critical point, in fact, it must be explained that whoever applied for asylum without scheduling an appointment through CBP One App was generally considered as ineligible for the process, actually penalizing individuals who could not satisfy the app's requirements[303]. A second drawback was represented by the limitation for specific nationality-based programs: citizens from Cuba, Haiti, Nicaragua, and Venezuela (the so-called CHNV) could require humanitarian protection only through the App[304]. As a consequence, the possibility to successfully obtain a legal entry into U.S. port of entry was related to their access and interact with the digital mechanism, creating a *de facto* digital barrier. It is important to underline the conditions in which individuals from the Southern border arrived at the port of entries: they usually had crossed several States through difficult means of transportation and hard living conditions[305].

[296] *Ibid.*
[297] *Ibid.*
[298] Title 8 U.S.C., Immigration and Nationality Act, 1952.
[299] Boundless, *cit.*
[300] American Immigration Council, *CBP One: An Overview,* March 2025, p.1.
[301] *Ibid.*
[302] *Ibid.*
[303] *Ibid.*
[304] *Ibid.*
[305] Amnesty International, *Usa: Mandatory Use Of Cbp One Application Violates The Right To Seek Asylum*, May 2023, p. 7.

With a specific overview of the Darién Gap path, the conditions in which migrants arrived at U.S. soil were critical and technological devices could be lost or deteriorated due to the journey. The limitation to the only use of CBP App represented a relevant barrier to the access to asylum process.

Given the expiration of application of Title 42, Biden's government formulated the Circumvention of Lawful Pathways Rule in order to address the increasing migration flows from the Southern border, which entered into force exactly at the date of expiration of the previous policy[306]. Such instrument was designed to face the enormous number of individuals arriving at U.S. port of entries and to discourage utilizing illegal paths. It was defined as "an emergency measure" and its application was limited to twenty-four months after the entry into force, meaning until May 2025, but it would have continued to apply to those individuals also after its expiration. The policy was based on three lines of intervention: the encouragement for migrants to use lawful, safe and orderly processes to enter in the territory and other compliant States; the imposition for additional conditions to be eligible for asylum; the support for individuals non-compliant with asylum requirements for swiftly returning to their country of origin[307].

The core on which the law is based is the presumption of ineligibility for asylum if accessed through unlawful ports of entry[308]. The rule, in fact, did not impose an official ban on asylum; conversely, it established a rebuttable presumption of ineligibility: noncitizens who crossed the U.S. Southwest border after transiting through a third country were automatically presumed ineligible for asylum unless they had utilized a regular port of entry, such as the CBP One app. In particular, requests of asylum were considered inadmissible if individuals arrived without lawful processes, if they did not attend the appointment scheduled on CBP One App, or if they have been denied asylum from another country[309]. The last option slightly reduces the chances to obtain asylum, due to the presumption according to which, in the event that migrants did not seek asylum in a country of transit or if they were considered refugees in a third country, they would have been considered presumptively ineligible for getting the protection in the United States[310]. This means that whoever had passed through irregular entries or without required documentation would have considered as not having the right to seek asylum in the U.S., highly restricting the number of applications.

[306] Homeland Security, *Fact Sheet: Circumvention of Lawful Pathways Final Rule*, 11th May 2023. [https://www.dhs.gov/archive/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule , accessed on 10th February 2026]
[307] *Ibid.*
[308] *Ibid.*
[309] *Ibid.*
[310] *Ibid.*

The only safeguard for individuals was the rebuttal of ineligibility. They could demonstrate their right to asylum in case of specific exceptional conditions: a severe medical emergency; an extreme and imminent threat to life, or if victim of a severe form of trafficking[311]. Such rebuttable would have been conducted by the asylum officer through a Credible Fear Interview valuable by the immigration judge. Two scenarios would have been possible: if an asylum officer had determined that a noncitizen was exempt from the presumption, the case would have proceeded under traditional standards; if the migrant was considered failing to meet the necessary requirements, he or she would have been promptly removed[312]. To these strict limitations, some exceptions were identified (a part from unaccompanied children who were always excepted): the migrant was authorized by DHS-approved parole process; they used the CBP App to schedule an appointment or they provided proofs and explanations about the impossibility to access it – namely for language barriers, illiteracy or technical issues; they applied to asylum in a third country and were refused[313].

Synthesizing these elements, the evolution of Biden's immigration strategy reveals a profound tension between the goal of restoring a humane system and the perceived necessity of border deterrence. On the one hand, the termination of Title 42 represented a formal return to ordinary immigration law; on the other hand, it did not constitute a concrete right to asylum. Conversely, the introduction of the CBP One app and the *Circumvention of Lawful Pathways* rule have institutionalized a new model of border management based on pre-selection and digital compliance. Through the derivation of asylum eligibility from technological access and prior pursuit of protection in third countries, the administration created a tiered system of entry. This framework effectively shifts the burden of border enforcement onto the migrants themselves and the countries they traverse, transforming the journey toward the United States into a complex administrative obstacle that often disregarded the humanitarian realities of those fleeing through regions like the Darién Gap. Specifically, Biden's government approached the Southern immigration issue in the most critical period of the flows, due to the implementation of selective legal pathways which, even if offered hope to some, inadvertently catalyzed regional movement. With the establishment of nationality-specific parole programs and digital processing, the administration created a pull-effect for those seeking to reach the U.S. border to access these limited slots. Despite this, for those ineligible or unable to navigate the digital bureaucracy, the Darién Gap remained the only, increasingly treacherous though, alternative. As a consequence, rather than managing irregular migration, these policies shifted the flow's dynamics, concentrating thousands of desperate individuals in the jungle's bottleneck. As outlined thus far, this

[311] *Ibid.*
[312] *Ibid.*
[313] *Ibid.*

resulted in an unprecedented humanitarian crisis, as the infrastructures of transit countries of Panama and Colombia were overwhelmed by a population caught between the hope of new American policies and the reality of a restrictive regional border regime.

3.1.3 Trump's second mandate (2025 - present)

Donald Trump has been reelected as President of the United States after the elections in November 2024, and he took office for his second mandate on 20th January 2025[314]. If Trump's first term has been defined through the construction of physical and legal barriers at the border, his second has introduced an unprecedented phase of internal enforcement. The shift to a more aggressive approach toward immigration from the Southern border regards not only communication but also the interruption of any access to asylum in the U.S. territory[315].

The plan started from the first day of his office, when a series of Executive Orders were issued. His immigration policy's basis can be identified in four specific Executive Orders, which constitute the three main pillars of such a restrictive approach to migration.

Firstly, the institutionalization of the State of Emergency has been implemented: Trump's government, in fact, declared on 20th January 2025 the National Emergency regarding the Southern border[316]. More than a mere administrative directive, this document represents a sophisticated use of executive overreach, leveraging the National Emergencies Act to bypass standard congressional oversight and transform the border from a civilian frontier into a militarized zone of operations. It based the emergency status on the "invasion" from "foreign adversaries", which has presented risks of cartels, criminal gangs and terrorism, effectively conflating anyone arriving at the Southern border with these threats[317]. This act triggers two critical statutory powers: on the one hand, it authorizes the operational deployment of the military forces against such national threat, and, on the other hand, it overcomes Congressional budgeting power by invoking emergency military construction authority to fund the border wall and detention facilities, in order to address such an emergency[318]. Additionally, the previous administration's measures have been revoked, including the few legal pathways created, namely the CBP One App. Continuing over what may be called "invasion doctrine", on the same day

[314] The American Presidency Project, *Donald J. Trump (2nd Term)* [https://www.presidency.ucsb.edu/people/president/donald-j-trump-2nd-term accessed on 11th February 2026]
[315] American Immigration Council, *Mass Deportation: Analyzing the Trump Administration's Attacks on Immigrants, Democracy, and America*, 2025, pp. 12-13.
[316] The White House, *Declaring A National Emergency At The Southern Border Of The United States,* 20th January 2025. [https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/ accessed on 11th February 2026]
[317] *Ibid.*
[318] *Ibid.*

the Executive Order n. 14159 was issued[319]. Beyond its populist and instrumental function in constructing an "enemy" contrasting the "American people", the term "invasion" carries precise legal implications. Framing migration as a military-style incursion permits the administration to activate specific constitutional and statutory provisions, that are the *Invasion clause* of Article IV[320] and the *Alien Enemies Act* of 1798[321], which grant the Executive extraordinary powers to avoid standard judicial review and due process for noncitizens[322]. Under this framework, the Department of Defense is mandated to provide "total support" to the Department of Home Security, transforming military bases into temporary detention hubs and utilizing military aircraft for expedited repatriation flights[323].

Secondly, the external enforcement strategy has been constructed through both the Executive Order n. 14165 and the Executive Order n. 14161, which composes the structure of the practical intervention of Trump's antimigration policy. The former, after again mentioning the "large-scale invasion", identifies an inherent connection between the entry of illegal individuals on the U.S. territory and the issue of deadly narcotics. Subsequently, it establishes the necessity to protect the national border, stating that:

> "A nation without borders is not a nation, and the Federal Government must act with urgency and strength to end the threats posed by an unsecured border.
>
> One of my most important obligations is to protect the American people from the disastrous effects of unlawful mass migration and resettlement"[324].

Following the features of urgency and threat, the Order establishes the construction of a wall – as in Trump's first term –, the mandatory detention for whoever enters the U.S. territory without required documentation, and the restoration of the Migration Protection Protocols (MPP); in addition, the Order revoked all the Parole and humanitarian international protection programs established by the Biden's administration, creating a *de facto* impossible border to access for any migrant[325].

The latter, complementing the aggressive antimigration strategy, finds its primary purpose in transforming the U.S. immigration system from an administrative rule-based process to a national security-centered screening regime. There is a twofold objective: on the one hand, it aims to reduce the number of admissions by rendering the vetting process nearly impossible to access; on the other

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[319] Executive Order n. 14159: *Protecting the American People Against Invasion*.
[320] Constitution of the United States: article 4, section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion".
[321] Alien Enemies Act, ch. 66, 1 Stat. 577, entered into force in 1798.
[322] S. FERREIRA SANTOS, *What is the 1798 law that Trump used to deport migrants?,* in *BBC News*, 3rd September 2025 [https://www.bbc.com/news/articles/cy871w21d3vo , accessed on 11th February 2026]
[323] Executive Order n. 14159: section 9.
[324] Executive Order n. 14165: *Securing Our Borders;* Executive Order n. 14161: *Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats.*
[325] Executive Order n. 14165: sections 5, 6, 7.

hand, it intends to create a legal basis to exclude and remove individuals for their status, and not for their concrete actions. It is based, in fact, on the idea of contrasting "hostile attitudes toward its citizens, culture, government, institutions, or founding principle", mandating the immediate exclusion or removal of individuals whose values or beliefs are perceived as incompatible with American cultural and institutional foundations[326]. The rationale behind the rule is rooted in the concept of cultural securitization, arguing that traditional security checks already in place – criminal records or biometrics – are insufficient; it is deemed as necessary to reject any "hostile attitude" toward U.S. culture or institutions, being them seen as a threat to the national security and as a factor of incompatibility with the entry in the territory. In practice, the integrity of the State is seen as dependent on ideological alignment of those entering it and, consequently, justifying "extreme vetting" model, which functions as a preemptive defense mechanism against the "malevolent exploitation" of immigration laws[327]. This domestic screening is complemented by a broader geopolitical strategy, specifically through the re-establishment of the *Traver ban:* if a country is identified as "deficient" in information-sharing, the U.S. administration can suspend visa issuance for entire nationalities, creating an instrument that acts as a powerful deterrent for migrants from targeted regions. Critically, the Order's reach extends to aliens already present within the United States, particularly those who entered after January 20, 2021, that is during the Biden's term[328]; this retrospective mass vetting creates a state of permanent legal precariousness, as individuals can be retroactively deemed security threats under these new, stricter ideological standards.

The concluding pillar of this approach is the Mass Deportation Plan, based on Executive Order n. 14159 and on the Declaration of National Emergency[329]. It consists of the systematic termination of the Humanitarian Parole programs, namely those designated for nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV)[330]. The administration's project is based on a strict interpretation of INA legislation, arguing that the previous "mass parole" initiatives constituted an abuse of executive discretion, which should legally be reserved only for "urgent humanitarian reasons" on an individual, case-by-case basis. By ending these programs, the executive has effectively revoked legal protection from over 500,000 individuals, moving them from a status of lawful presence to one of immediate removal.

[326] Executive Order n. 14161: section 1(b).
[327] *Ibid.*
[328] Executive Order n. 14161: section 2(a).
[329] Executive Order n. 14159; The White House, *cit.*
[330] Executive Order n. 14159: section 16.

3.2 Externalization of border control

The U.S. strategy of border externalization has evolved into a sophisticated network of bilateral and multilateral agreements designed to move the responsibility for asylum and border enforcement toward transit nations, namely Panama and Colombia. Enlarging distant borders aims to neutralize migratory flows long before they reach the U.S. Southwest border through the following mechanisms, under the so-called *pull-back* logic, where the country of destination finances those of transit to block migrants before their entry in its territory[331].

3.2.1 The Asylum Cooperative Agreements (ACAs)

The first instrument was reached in 2019, during Trump's first mandate. The so-called Asylum Cooperative Agreements (ACAs), signed between the United States and the Northern Triangle countries, namely Guatemala, Honduras, and El Salvador, represented a fundamental pillar of the U.S. strategy for border externalization. These bilateral accords allowed U.S. immigration authorities to deport certain asylum seekers arriving at the Southern border back to these Central American nations, mandating that they seek protection there instead of in the United States[332]. Their legal structure is based on the *safe third country* principle, which, according to the Immigration Nationality Act of 1952, requires two essential conditions: the immigrant's life or freedom must not be threatened on account of race, religion, or political opinion, and they must have access to a "full and fair" asylum procedure[333]. Nonetheless, the implementation of ACAs has drawn severe criticism for failing to meet these statutory and international standards. Firstly, the States of El Salvador, Guatemala, and Honduras are characterized by some of the highest homicide rates in the world, largely due to the pervasive presence of transnational criminal gangs; these organizations create a hostile environment of persecution and extortion, meaning that asylum seekers are often returned to similar dangers they initially fled[334]. Secondly, these nations have not the necessary resources and infrastructure to guarantee "full and fair" legal procedures[335].

In practice, these pacts force migrants to seek asylum in the transiting countries, which are known for failing the stability and sufficient living conditions nor international protection. This policy effectively obscured U.S. accountability and transforms the right to asylum into a geographical and administrative process, contributing to what human rights organizations define as a manufactured

[331] V. KAPOGIANNI, S. MUTSVARA AND E. XANTHOPOULOU, *Border Externalisation: Pullback and Pushback Practices*, in *Refugee Law Initiative,* 2025, p. 12.
[332] Justice for Immigrants, *Asylum Cooperative Agreement Backgrounder*, 2020.
[333] *Ibid.*
[334] *Ibid.*
[335] *Ibid.*

humanitarian crisis along the regional migratory route[336]. Due to the many critical features of these agreements, Biden's administration formally suspended and revoked ACAs agreements on February 2021[337].

3.2.2 Safe Mobility Offices (Movilidad Segura) and Trilateral Agreement

With a view to orderly manage and control migration flows, Biden's administration instituted the instruments of Safe Mobility Offices, also known in Spanish as *Movilidad Segura,* to provide safe alternatives to irregular migration toward U.S. territory[338]. Since the formal announcement in April 2023, the program has been implemented through strategic partnerships in Colombia, Costa Rica, Guatemala, and Ecuador[339].

Far from traditional physical infrastructures or bureaucratic offices, the SMOs function primarily as centralized online mechanisms[340]. These digital platforms are managed by the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), coordinating with other partners. The transformation of migrants' process of refugee request to a virtual and remote framework, the SMO initiative confirms the approach of digitalization of border control structured during Biden's mandate, allowing the United States and its partners to filter and manage migratory flows within the transit regions of South and Central America.

A fundamental element in externalization of borders policy of the United States was the Trilateral Joint Statement, that was a declaration of common intent between Panama, Colombia and the United States. The unprecedented migration surge through the Darién Gap raised during Biden's term pushed his government and the transit countries to cooperate in addressing the migration crisis, moving beyond the simple humanitarian monitoring to establish a coordinated framework of active deterrence[341].

The project was constructed on three actions: dismantling of criminal networks through intensified intelligence sharing and joint law enforcement operations, specifically targeting transnational groups like the *Clan del Golfo* that profit from human smuggling; expanding lawful pathways, through the aforementioned Safe Mobility Offices (SMOs); institutionalizing physical closure and repatriation measures, through the combination of increased security patrols – like the SENAFRONT in Panama

[336] *Ibid.*
[337] U.S. Department of State, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras*, 6th February 2021.
[338] Mixed Migration Center, *Fact Sheet: What Are Safe Mobility Offices (Smos)?*, 2024.
[339] *Ibid.*
[340] *Ibid.*
[341] Homeland Security, *Trilateral Joint Statement,* 11th April 2023. [https://www.dhs.gov/archive/news/2023/04/11/trilateral-joint-statement , accessed on 12th February 2026]

– together with removal flights funded by the U.S. which return migrants directly to their home countries from the Darién Gap[342]. By leveraging diplomatic pressure and financial assistance, the United States incentivized Panama and Colombia to serve as *buffer states* for migration containment, extending U.S. migration control deep into the South American continent and attempting to transform the Darién Gap from a natural transit corridor into a fortified geopolitical barrier.

Notwithstanding the elimination of most of migration management instruments implemented by Biden's administration, Trump's government continued in putting diplomatic pressure and financing removal processes toward transiting States. The U.S. in fact started to finance training and military assistance to SENAFRONT in Panama, that is the armed force in charge to control and manage migration flows in the Darién Gap[343]. This cooperation has been reinforcing with the presidential elections in both countries: particularly relevant for this analysis is the relationship between Trump and Panama's President José Raúl Mulino, elected in 2024. In March 2025, in fact, three deportation flights from the U.S. transferred 299 migrants to Panama, as the Panamanian President has announced to welcome his country role as a "bridge" for deportees[344]. Additionally, U.S. Furthermore, in November 2025 Trump's office announced similar agreements with the governments of Canada, Guatemala, Honduras, Uganda, Belize, and Paraguay, announcing additional pacts to be reached in the future[345].

The current regional migration strategy has moved from a model of humanitarian transit to one of systematic containment, heavily influenced by U.S. interests and reinforced under the Mulino administration. The primary objective is to transform Panama into a regional obstacle stopping migratory flows before they reach Central American territory. Consequently, the Darién Gap is no longer treated merely as a geographical hazard, but as a militarized zone of deterrence where the goal is to neutralize transit toward the North through a combination of physical obstruction and deportation.

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[342] *Ibid.*

[343] MAJ. EVAN CAIN, *U.S. Invests More Than $3 Million to Strengthen Panama's Border Security and Regional Cooperation*, in *U.S. Southern Command*, 12th August 2025. [https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/4273395/us-invests-more-than-3-million-to-strengthen-panamas-border-security-and-region/ accessed on 12th February 2026]

[344] C. BARRÍA, S. VANEGAS AND A. BERMÚDEZ, *'Help us': Hundreds deported from US held in Panama hotel,* 19th February 2025. [https://www.bbc.com/news/articles/c3rndygqll7o , accessed on 12th February 2026]

[345] American Immigration Council, *Third-Country Removals in United States Immigration Policy*, December 2025, p. 3.

3.3 The Humanitarian costs of regional containment policies: the reverse flow

The systematic implementation of deterrence policies and bilateral enforcement agreements effectively obstructed the trajectory of migrants toward Northern border; migratory flows through the official channels of the Darién Gap have drastically collapsed as a direct result of the comprehensive blockade and the systematic closure of transit routes implemented by the authorities[346]. Nonetheless, migration flows have not disappeared; on the contrary, such aggressive policy triggered a precarious and unmonitored phenomenon known as *reverse flow*[347]. As the United States strengthens its externalized and rendered asylum requests inaccessible, thousands of migrants find themselves trapped in a geopolitical vacuum: they find themselves unable to advance toward the U.S. border due to intensified enforcement and unwilling or unable to return to their home countries due to persistent insecurity. As a consequence, many are forced to cross again the path, but on reverse, coming back through the Darién Gap toward South America[348].

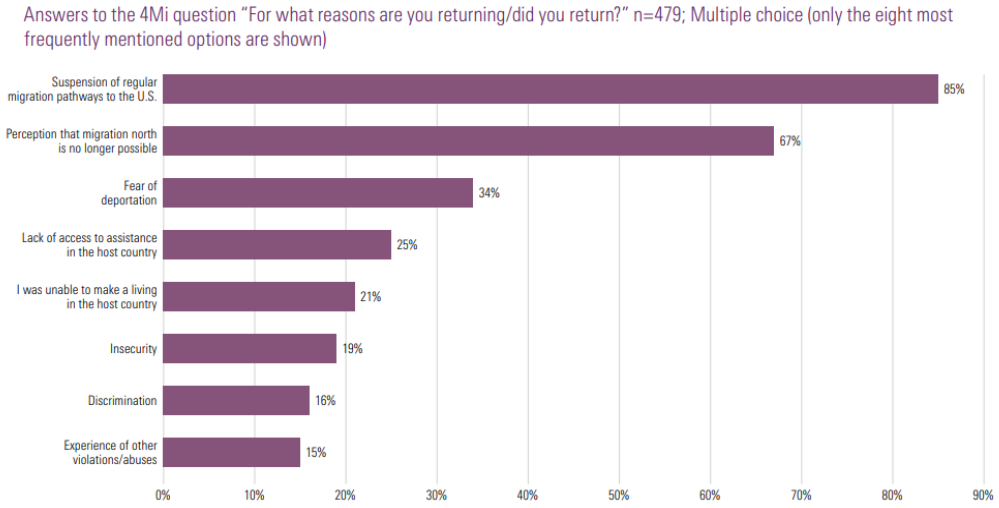

Figure 1: Reasons why refugees and migrants returned or were returning - Mixed Migration Centre

The journey is more dangerous than the initial, due to both the critical conditions in which migrants find themselves and the closure of official shelters and managed paths. This provides a flourishing

[346] Servicio Nacional de Migracion Panama, *Tránsito Irregular Por Darién*, 2025. [https://www.migracion.gob.pa/wp-content/uploads/IRREGULARES-POR-DARIEN-2025-2.pdf , accessed on 12th February 2026]
[347] M. DAVIER, *The challenges facing "invisible" reverse flow migrants in Panama*, in *The New Humanitarian*, 19th June 2025. [https://www.thenewhumanitarian.org/news-feature/2025/06/19/challenges-invisible-reverse-flow-migrantion-panama-americas accessed on 12th February 2026]
[348] *Ibid.*

environment for smugglers and armed gangs to control the territory[349]. Colombia's data show a quota of more than 7,000 individuals irregularly coming back during the first quarter of 2025[350].

Figure 2: Reverse irregular migrating flow - The New Humanitarian

For those individuals, the primary threat is concentrated in the maritime crossings on *chalupas,* that are overcrowded speedboats managed by smugglers who navigate high-risk routes to avoid naval authorities[351]. These vessels pose an extreme risk to vulnerable groups such as children and pregnant women, being often filled beyond capacity with luggage and passengers. Beyond the natural dangers of the sea, migrants face the constant threat of abandonment; according to Action Against Hunger, skippers frequently leave passengers on remote paths or islets due to the fear of being intercepted by law enforcement[352]. Furthermore, the reverse flow is governed by an exploitative economic barrier: with prices ranging between $220 and $280 per person for the passage from Panama to Colombia, many asylum seekers are constrained in small, resource-poor villages like Miramar[353]. This state of immobility increases their exposure to extortion and further violence, because they remain trapped in

[349] *Ibid.*
[350] Migracion Colombia, *Migrantes En Tránsito Irregular Enero-Abril 2025*. [https://unidad-administrativa-especial-migracion-colombia.micolombiadigital.gov.co/sites/unidad-administrativa-especial-migracion-colombia/content/files/001898/94861_reporte-mti-30-abr-2025.pdf , accessed on 12th February 2026]
[351] M. DAVIER, *cit.*
[352] *Ibid.*
[353] *Ibid.*

a geographical limbo without access to humanitarian aid or legal protection while they attempt to fund their return to a stable living condition[354].

The emergence of reverse flow as a secondary effect of U.S. and Panamanian antimigration measures demonstrates a critical erosion of the international protection framework. By reversely sealing the Darién Gap without offering viable alternatives, the current policy framework effectively negates the right to seek asylum, forcing individuals into a perilous retreat that doubles their exposure to violence and death, exposing them to a cycle of danger that does not end at the Northern border, but it repeats due to expedited removals. The data regarding maritime risks and the exploitation by smugglers reveal that externalization does not stop migration: it only increases its lethality. As the Darién becomes a site of forced immobility and recursive trauma, it represents a clear failure of regional cooperation based on a national security approach rather than a constructive project to address systematic causes of migration.

After having described the shift toward a securitized and externalized border, it is now necessary for this analysis to evaluate the legal legitimacy of these legal instruments. Consequently, the following chapter will be dedicated to analyzing the compliance of U.S. and regional anti-migration measures with established international obligations.

[354] *Ibid.*

Chapter 4 - From deterrence to violation: a legal analysis of the U.S. securitized approach

The national security approach of regional States, in particular of the United States, has profoundly shaped migration flows crossing the Darién Gap. As discussed in Chapter 2, the region has progressively evolved into a crucial migratory route. It represents one of the most alarming scenarios, where the risk to life arises not only from its geographical conformation but, more significantly, as a direct consequence of deliberate political choices and systematic international human rights violations. The restrictive approach in U.S. migration policy, characterized by the progressive securitization and externalization of border controls in the name of a state of emergency, represents more than a mere exercise of national sovereignty; it constitutes a profound challenge to the international legal order. Building upon the theoretical framework of international obligations discussed in Chapter 1 and the empirical reality of the Darién Gap and U.S. policies described in the Chapters 2 and 3, this final section aims to evaluate the legal legitimacy of such measures.

The structure of this chapter is designed to provide a comprehensive analysis of non-compliance of U.S. antimigration policies with the peremptory norms of international human rights law and the specific treaty obligations regarding international migration law, previously discussed in Chapter 1. Each specific policy will be directly associated with the international obligations deemed to be infringed within the scope of this study, moving from the violation of individual rights to the erosion of collective procedural guarantees. First, the analysis will focus on the *Zero Tolerance* policy and its collision with the right to family unity. Subsequently, the Migrant Protection Protocols (MPP) will be examined through the lens of the *non-refoulement* principle, followed by an assessment of Title 42 and the prohibition of collective expulsions. The chapter will then address the "emergency paradigm" as a justification for arbitrary detention, contrasting international standards of personal liberty. Finally, the focus will move to the externalization of borders, analyzing how U.S. influence over transit countries like Panama affects the right to leave and exposes migrants to treatment contrary to the prohibition of torture and inhuman or degrading treatment. Through the association of each policy to its corresponding legal violation, this final chapter aims to demonstrate that the most recent U.S. securitized approach does not only challenge international migration law, but systematically operates in breach of it, creating *de facto* an "institutionalized illegality" for those transiting.

4.1 *Zero Tolerance* policy and right to family

The implementation of the *Zero Tolerance* policy in April 2018 represents one of the most controversial manifestations of the U.S. securitized approach. It mandated the criminal prosecution of all adults crossing the border without authorization, and national authorities carried out the systemic and forced separation of thousands of children from their parents. From a legal standpoint, this measure represented the transformation of illegal immigration from a civil administrative offense to a criminal charge, where parents were separated from their children, violating the right to family unity and ignoring the principle of best interests of the child, subordinating them to the objective of migration deterrence. The policy eliminated exceptions of detention for parents traveling with children. This shift created a systematic referral mechanism, where adults were directed to criminal custody, while minors were reclassified as Unaccompanied Alien Children (UAC) and transferred to the Office of Refugee Resettlement (ORR)[355]. The measure resulted in the forced separation of over 5,300 families, a consequence that, while framed as a procedural necessity, served the broader objective of punitive deterrence: the goal pursued by the administration was to demonstrate the "institutional risk" of migration, in order to lead migrants to renounce starting the journey.

The legal assessment of the *Zero Tolerance* policy must be conducted against the framework of the right to family life, a cornerstone of international migration law recognized as a customary norm. Being considered a general principle of international law, this norm has found its primary codification in article 23(1) of the International Covenant on Civil and Political Rights (ICCPR), which defines the family as the "natural and fundamental group unit of society", entitled to a comprehensive protection by both the State and society[356]. Additionally, States obligations for this right are established as twofold in article 17(1) of the same Covenant, according to which they shall not only actively protect the family unit but also refrain from any arbitrary or unlawful interference in family life[357]. In this view, family reunification has been identified as the main functional instrument for the effective enjoyment of this right, as stated by the Human Rights Committee[358]. Notwithstanding the international debate about the recognition of family reunification as a customary norm, its inherent connection to the respect for the right to family unity is considered undeniable, and this is particularly true for what concerns vulnerable individuals like minors[359].

[355] W. KANDEL, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, in *Congressional Research Service*, 2021, n. R45266, p. 1.
[356] ICCPR: art. 23(1).
[357] ICCPR: art.17(1).
[358] HRC, General Comment No 19: art 23, para 5.
[359] V. CHETAIL, *cit.*, p. 127.

In this context, a highly relevant international instrument is the 1989 Convention on the Rights of the Child, serving as the main authoritative legal reference, specifically regarding the principle of the *best interest of the child*. This Convention is relevant for this assertation because, despite the United States being the sole UN member state which has not ratified the CRC, the principle has acquired a significant legal relevance even by U.S. Federal District Courts, as mentioned in Chapter 1[360]. The norm establishes an approach which acts in favor of family integrity, rendering any systematic policy of forced separation a manifest departure from international customary and treaty-based obligations.

As explained in Chapter 1, to be considered legitimate, a policy must be the least intrusive measure available to achieve a compelling State interest, according to the principles of reasonability, necessity and proportionality. These standards constitute well-established limits to state discretion under international law, ensuring that sovereign border control measures do not override peremptory human rights obligations[361]. If these standards are coupled with the prohibition of arbitrary interference and with the right to family, the systematic separation of children must be considered disproportionate to the administrative goal of border control, even if the U.S. argued that prosecution was a domestic necessity[362]. Subjecting all individuals who cross the border illegally to the same punitive measures without conducting a case-by-case analysis constitutes a manifest violation of the arbitrariness prohibition: migrants, in fact, were not subjected to an analysis of their conduct, but simply criminally prosecuted for their undocumented entry from the Southern border, linking their country of provenience to a certain criminal offence – namely drug dealing or smuggling. The disproportionate feature is particularly evident if considering the consequences of such measure, which caused the separation of thousands of family units. The fact that children were considered unaccompanied and transferred to the Office of Refugee Resettlement did not respect the best interests of the child, where, instead of considering alternative forms of detention or punishment for their parents, the U.S. policy stated the arbitrary separation of families, without giving sufficient information to the concerned individuals neither the possibility to rebut such decision. As a result, the *Zero Tolerance* policy cannot be considered as a reasonable, necessary and proportionate measure because it arbitrarily divided thousands of families, damaged children interests, and discriminated individuals not on the basis of actual criminal behavior, but on the presumption of their nationality as a threat for national security, together with the purpose of creating a deterrence instrument.

Another critical element in assessing the illegality of the *Zero Tolerance* policy is the recognition of the mixed nature of migration flows originating from or transiting through the Darién Gap. These

[360] *Ibid.*
[361] UN HRC, cit., para. 14; Global Compact for Safe, Orderly and Regular Migration, 2018: obj. 13, para. 2.
[362] ICCPR: art.17(1).

flows are not homogeneous but characterized by the complex composition of migrant workers and individuals fleeing persecution, violence, and systemic human rights violations who qualify as refugees under international law. Through the obligation of systematic criminal prosecution of all unauthorized entries, the U.S. authorities failed to distinguish between these categories. This indiscriminate penalization directly undermines the possibility for individuals to exercise their right to seek asylum and benefit from the subsequent international protections derived from refugee status. It is essential to emphasize that refugee status has a declaratory, not a constitutive, nature. This means that a person does not become a refugee because of recognition but that he or she is recognized because they are a refugee[363]. Under article 31 of the 1951 Refugee Convention, States are prohibited from penalizing refugees for their illegal entry, acknowledging that those in need of protection are often forced to bypass official channels[364]. In treating every border crosser as a criminal defendant from the moment of apprehension, the United States created a procedural barrier that inhibits the asylum process.

4.2 Migrant Protection Protocols and *non-refoulement*

While the previous policy focused on the criminalization of entry within U.S. territory, the Migrant Protection Protocols (MPP), implemented in January 2019 and known as *Remain in Mexico*, introduced a different systematic mechanism: the externalization of asylum management. Under the MPP, individuals arriving at the Southern border seeking asylum and pending their hearings were no longer detained or released into the U.S.; on the contrary, they were returned to Mexico to await their court dates. This restrictive system represented a critical contradiction to the principle of *non-refoulement*; such argument can be based on several empirical observations on the consequences of this measure.

Firstly, the removal of approximately 70,000 individuals to Mexico and other partner States exposed them to high-risk border cities, institutionalizing a manufactured humanitarian crisis[365]. Waiting for their judicial proceeding in those areas, such process endangered migrants in experiencing extreme violence, kidnapping, rape and torture – all situations which have been strongly considered as at least inhuman treatment by a long international jurisprudence[366]. The practice of removing individuals to territories in which they can be subjected to such violations of human rights is in clear contrast to the principle of *non-refoulement*. The norm is fundamentally enshrined across various branches of

[363] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2011, para. 28.
[364] Geneva Convention: art. 31.
[365] American Immigration Council, *cit.*, February 2024, p. 1.
[366] *Ibid.*

international law, imposing a categorical prohibition on States from rejecting or removing any individual to a territory where they may face persecution, threats to their life, or the risk of torture[367]. As cornerstone of international protection, it imposes that safety must be guaranteed to any individual who risks being subjected to torture or inhuman and degrading treatment. Concretely, such obligation of *non-refoulement* is not a mere negative duty to refrain from removal, but it possesses an inherent procedural dimension: to be effective, it requires States to provide a due process framework, including individualized assessments and access to legal counsel, to ensure that no person is returned to a territory where their fundamental rights are compromised. This is particularly true for refugees, whose Convention states in article 33 the principle of *non-refoulement* and in article 42(1) the absolute impossibility of reservation for such principle, prioritizing individual protection over State sovereignty[368]; additionally, expulsions are not permitted by the Geneva Convention on the basis of national security or public safety, and at most such decision must be taken guaranteeing due process to the refugee[369]. The United States, by ratifying 1967 Protocol, have accepted to recognize such principle and thus to be subjected to the norm. In addition to the Refugee Convention, the prohibition of *refoulement* is absolute under article 3 of the Convention against Torture (CAT), which has been ratified also by the United States[370]. This entails the obligation for the State to respect its norms, being subjected both to a substantive and a procedural mandate: it is required not only to refrain from deportation but also to conduct an individual assessment of the risks the individual faces in the country of return[371].

The implementation of the Migrant Protection Protocols (MPP) introduced a series of systemic failures that fundamentally undermined this international protection regime. The policy was in fact characterized by arbitrariness and insufficient screening procedures, which was characterized by a lack of transparency and proactive identification of vulnerabilities[372]. Following the initial protocol, CBP officers were not required to ask migrants if they feared return to Mexico; the "burden of the proof" was shifted entirely to the migrants, who had to actively express fear to trigger an interview[373]. Furthermore, the standard of proof which was required to avoid return – which was a "more likely than not" – was significantly higher than the "well-founded fear" standard usually applied in international asylum practice[374]. This procedural obstruction was further exacerbated by the concrete

[367] V. CHETAIL, *cit.*, p. 119.
[368] Geneva Convention: art. 33, art. 42(1).
[369] Geneva Convention: art. 32.
[370] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987),1465 UNTS 85: art. 3(1).
[371] V. CHETAIL, *cit.*, pp. 190-194.
[372] American Immigration Council, *cit.*, February 2024.
[373] *Ibid.*
[374] *Ibid.*

impossibility of securing legal representation: evidence shows that only 7.5% of individuals enrolled in the MPP managed to obtain legal counsel[375]. Without professional assistance, the chance to successfully demonstrate such a high evidentiary threshold while residing in a foreign and dangerous territory became an important barrier[376]. By impeding migrants from obtaining a substantial international protection, the State engaged in what many scholars and relevant jurisprudence define as *constructive refoulement*, that is a situation where procedural hurdles and the externalization of danger force individuals to abandon their search for protection[377]. This, coupled with the wide discretion granted to national officers, led to inconsistent applications of the law and arbitrary family separations at the border. Notwithstanding the instable socio-political situations of the countries of origin of migrants, they were not given the possibility to be interviewed individually and immediately be protected, but they were obliged to personally express the fear that a more likely possibility of persecution of life threat would occur in such countries.

4.3 Title 42 and prohibition of collective expulsions

As described in the previous chapter, in March 2020, under the pretext of containing the COVID-19 pandemic, the U.S. administration invoked Section 265 of Title 42 of the U.S. Code. This public health provision gave authorities the power to prohibit the entry of individuals from countries where communicable disease was present. Concretely, Title 42 was transformed into a powerful migration management tool that effectively suspended the right to seek asylum at the Southern border for over three years[378]. Through the weaponization of Title 42 to override the legal guarantees established in Title 8 for regular migration management, the U.S. government institutionalized a system of summary expulsions that lacked any individualized scrutiny[379]. Due to the abandonment of the credible fear framework established under Title 8, this policy entailed a manifest violation of the *prohibition of collective expulsion*, as it prevented vulnerable individuals from seeking protection against life-threatening risks without conducting individual scrutiny at their entry. CBP data show that 2.8 million individuals were removed from U.S. while Title 42 was in force[380].

The prohibition of collective expulsions constitutes one of the most relevant norms of international migration law, aiming to prevent States from treating migrants as an undifferentiated group[381]. This

[375] American Immigration Council, *cit.*, February 2024.
[376] *Ibid.*
[377] Y. NEGISHI, *Constructive Refoulement as Disguised Voluntary Return: The Internalised Externalisation of Migrants,* in *Netherlands International Law Review,* May 2024, p. 157.
[378] B. DEBUSMANN JR., *cit.*, 12th May 2023.
[379] *Ibid.*
[380] *Ibid.*
[381] V. CHETAIL, *cit.*, 2019, pp. 139-140.

rule is broadly enshrined in various international and regional instruments, such as Article 22(9) of the American Convention on Human Rights and Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR)[382]. The near-universal adherence to these principles, coupled with consistent State practice, suggests that the prohibition has attained the status of a customary international norm, binding even upon non-signatory States. The principle requires a rigorous case-by-case analysis for migrants arriving at borders; from a jurisprudential perspective, this standard is intrinsically linked to the principle of non-discrimination[383]. A collective removal intrinsically fails to evaluate the specific vulnerabilities and unique circumstances of each migrant, thus violating the customary obligation to treat every case with objective scrutiny. Under this framework, the legality of an expulsion depends on the State's ability to demonstrate that each individual case was examined on the merits, rather than being subjected to a blanket policy based on nationality or mode of entry.

Furthermore, as mentioned in Chapter 1, international jurisprudence, most notably from the Inter-American Court of Human Rights and the European Court of Human Rights, has consistently affirmed that the prohibition of collective expulsion is non-derogable, even in scenarios of mass influx[384]. Any administrative or logistical difficulty encountered in managing large-scale arrivals cannot serve as a legal justification for limiting these protections. Consequently, the use of emergency measures to carry out accelerated group removals represents a manifest violation of international migration law, as State sovereignty in border management must always be exercised in compliance with the fundamental rights of the individual.

Given those considerations, a test of necessity and proportionality can be done. It is relevant to note that the U.S. Supreme Court follows different standards for conducting such tripartite test in comparison to the international standards, as well-established in U.S. jurisprudence[385]. In the U.S. legal system, the evaluation of the necessity and proportionality of government actions is not a uniform process; conversely, it depends on the level of judicial scrutiny applied. The modern foundation for this differentiated approach can be found in Footnote 4 of *United States v. Carolene Products Co*[386]. It signaled a shift in the Supreme Court's role. While the Court would henceforth grant extreme deference to the government in economic matters, it established that a "more exacting judicial scrutiny" is required in three specific circumstances: firstly, when legislation appears to

[382] *Ibid.*
[383] *Ibid.*
[384] Protocol n. 4 of the European Convention of Human Rights (ECHR): art. 4; American Convention on Human Rights (ACHR): art. 22(9).
[385] U.S. Supreme Court: United States v. Carolene Products Co., 304 U.S. 144, 1938; Craig v. Boren, 429 U.S. 190, 1976.
[386] *Ibid.*

infringe upon fundamental rights explicitly protected by the Constitution; secondly, when laws restrict the very mechanisms – such as voting or freedom of expression – that allow citizens to bring about political change; thirdly, when a law is directed at groups, religious, national, or racial, who, due to prejudice, lack the political power to protect their interests within the democratic process. As a result of this doctrinal shift, the Supreme Court developed three distinct "tiers of scrutiny" to evaluate the constitutionality of State actions, from the least to the most demanding level. The Rational Basis Review is the most deferential and "lowest" standard: the Court operates under a strong presumption of constitutionality, simply requiring that a law be "rationally related" to a "legitimate governmental interest"[387]. In the context of migration management, for instance the invocation of Title 42, the government often argued for this standard by framing the issue as an administrative or national security matter, thereby avoiding a rigorous proportionality test. The Intermediate Scrutiny is instead applied primarily to gender-based classifications, and it requires the law to be "substantially related" to an "important governmental objective"[388]. Lastly, the Strict Scrutiny is the highest standard and the closest American equivalent to the international principle of proportionality and necessity: to successfully pass this test, the government must prove that the measure serves a "compelling state interest" and is "narrowly tailored" to achieve that goal using the "least restrictive means" possible[389].

As a result, the discrepancy between international standards of proportionality and the U.S. judicial tiers of scrutiny creates a legal vacuum. Consequently, a measure like Title 42 may be upheld as legitimate at the federal level under a deferential Rational Scrutiny review, and simultaneously it would likely fail the necessity and proportionality tests required by international human rights law.

If it is true that COVID-19 pandemic represented a global emergency mostly addressed through limitation of fundamental rights like reducing freedom of movement, many have argued the disproportionate and unreasonable approach of the Title 42 measure. Public health experts have expressed their dissent and concern about the policy in a widely supported letter directed to the Secretary of Department of Health and Human Services and to the Director of the Centers for Disease Control and Prevention[390]. They affirmed that the measure was not effective to address the pandemic and that limitations imposed only on asylum-seekers and migrants at the Southern border not only were inefficient but were especially discriminative toward specific nationalities. In particular, they

[387] U.S. Supreme Court: United States v. Carolene Products Co., 304 U.S. 144, 1938, Footnote 4, para. 1.
[388] U.S. Supreme Court: Craig v. Boren, 429 U.S. 190, 1976, section I.
[389] U.S. Supreme Court: United States v. Carolene Products Co., 304 U.S. 144, 1938, Footnote 4, para. 2.
[390] J. AMON, M. BASSETT, C. BEYRER, ET AL., *Letter to Alex Azar (Secretary of HHS) and Robert Redfield (Director of CDC) regarding Order Enabling Mass Expulsion of Asylum Seekers,* 18th May 2020.

highlighted that an individual's legal status provides no epidemiological rationale for denying admission: the Order justifies summary expulsions on the basis of the risk of viral transmission within Customs and Border Protection (CBP) centers; however, this argument ignores that rather than maintaining migrants in unsanitary structures, CBP could have exercised its discretionary power to grant humanitarian parole to adults and families, and to simultaneously facilitate the swift release of unaccompanied minors to sponsors or family members[391]. This demonstrates the violation of the prohibition of collective expulsion without reasonable, necessary and proportionate criteria, additionally considering the alternative measures indicated by the experts, such as imposing social distancing through demarcations or the use of outdoor and other areas for processing and promoting self-quarantine at destination location[392].

Such violation is further underscored by the fact that the absolute closure of borders and the practice of expedite removals were coherently not applied to all noncitizens, but only on undocumented migrants[393]. While, in fact, only vaccination was required if travelling with documents, Title 42 policy authorized expedite expulsion without any screening for asylum seekers[394]. This different treatment, underlined also through language – "travelers seeking entry" if documented, "migrants" if undocumented[395] –, was completely based on administration's discretion and arbitrariness, thus violating the prohibition of collective expulsions, inherently connected to the principle of non-discrimination and *non-refoulement*.

4.4 State of Emergency and arbitrary detention

The declaration of a National Emergency at the Southern Border on 20th January 2025 by Trump marks the final transformation of U.S. migration management approach, which moved from an administrative approach, passing through a criminalization of illegal entries to a wartime legal framework. This measure represents a well-constructed exercise of executive predominance, which utilizes the National Emergencies Act to override congressional oversight and rendering a civilian frontier into a militarized zone of operations.

The administration's reliance on the longstanding *invasion doctrine* – a legal theory rooted in late 19th-century jurisprudence that interprets large-scale unauthorized migration as a "constructive invasion" under Article IV of the Constitution – serves to reclassify immigration from a civil matter

[391] *Ibid.*
[392] *Ibid.*
[393] B. HARRINGTON, K. Y. SANTAMARIA, *COVID-19: Restrictions on Noncitizen Travel*, in *Congressional Research Service*, December 2021.
[394] *Ibid.*
[395] *Ibid.*

into a national security emergency[396]. When the Declaration of Emergency defined every migrant from the Southern border, including asylum-seekers, as national security threats, the Executive sought to activate the Invasion Clause of Article IV and, consequently, the *Alien Enemies Act* of 1798[397]. This 18th-century statute, originally formulated in the context of wars against foreign nations, gives the President extraordinary powers to apprehend and remove noncitizens without the standard protections of Title 8 – also known as Immigration National Act[398]. From a jurisprudential perspective, this constitutes a *de-judicialization* of border control: such policy effectively removed migration management from judicial oversight, consolidating unilateral authority within the Executive branch, replacing legal scrutiny on procedural and substantial guarantees with absolute executive discretion. The detention of migrants under this framework becomes inherently arbitrary, as it precludes individualized judicial review and the right to *habeas corpus*[399]. After an initial increase in judicial bond releases during first months of the policy, the expansion of mandatory detention drastically restricted this mechanism: immigration judges were deprived of their competence to grant release to individuals who entered between ports of entry[400]. Consequently, detainees were left with no possible legal choice to challenge their confinement other than through *habeas corpus* litigation.

As described in the previous Chapter, the National Emergency State put solid grounds for the construction of a systemic process of constant violation of the prohibition to arbitrary detention, characterized by militarized custody, erosion of due process and risks of torture and inhuman and degrading treatment in detention hubs. Executive Order 14159 mandated "total support" to the Department of Homeland Security, usually constituted of police forces, by the Department of Defense, provided of external military forces[401]. Such obligation lays in the picture of migration as a national threat, defined as an "invasion", which would require a military enforcement to be addressed. Being framed as an "urgent national threat", the mass influx of migrants from the South respects, according to the definition discussed, the requirements of a national state of emergency, which might theoretically justify the use of extraordinary measures and limitation of fundamental rights, from an absolute State-centric perspective[402]. Following this rationale, if migrants are considered as enemies or "adversaries" who are threatening the "life of the Nation", extreme instruments are seen as

[396] M. LINDSAY, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power,* 2010, pp. 37-40.
[397] Constitution of the United States: article 4, section 4.
[398] Title 8 U.S.C., Immigration and Nationality Act, 1952.
[399] American Immigration Council, *Immigration Detention Expansion in Trump's Second Term*, January 2026, p. 19.
[400] *Ibid.*
[401] Executive Order n. 14159: section 9.
[402] For the definition of a national emergency, see International Law Association, *cit.,* 1984.

necessary to preserve the existence of the United States, including violating their inherent human rights, for instance arbitrarily detaining them in military hubs.

The functional structure for pursuing this objective has been based on the other two Executive Orders, n. 12165 and n. 14161, which established mandatory detention of whoever illegally crosses U.S. territory, expedited removals of undocumented migrants through military aircrafts, and the revocation of the entire system of parole and humanitarian protection, not just in regards with the future, but with retroactive effects[403]. This precludes any right to asylum or international protection specifically to individuals from the Southern border, presuming an existing connection of those noncitizens with crimes of drug dealing, smuggling and human trafficking[404]. In particular, those civilians are detained in military bases temporarily transformed into detention centers, which by their very nature, lack transparency and control about detainees' living conditions and safeguard of their human rights[405]. Current detention is managed by ICE agency, which is the only authority in charge to decide if an immigrant is to be removed or released; after the entry into force of the aforementioned Executive Orders, the agency shifted toward third-country removals, and even individuals who were previously granted the so-called *withholding of removal* – a protection prohibiting deportation to their country of origin – are increasingly subjected to long-lasting detention waiting for an alternative destination[406]. These restrictive protocols have significantly undermined the possibility of obtaining release, creating unprecedented barriers to liberty, even for those officially recognized as subjected to persecution[407].

From the perspective of international law, the prohibition of arbitrary detention constitutes one of the pillars of customary norms, binding for all States without any distinction on the documentation or legal status of the individuals involved[408]. The rule is based on the objective of avoiding the stigma of arbitrariness, so that any deprivation of liberty must be subjected to a strict tripartite test: first, it must possess a delineated legal basis in domestic law to ensure legal certainty; second, it must satisfy the requirements of necessity, proportionality, and reasonableness in relation to its stated purpose; third, it must provide the individual with effective access to a court to challenge the lawfulness of their confinement[409]. This restrictive approach is particularly severe concerning minors, mandating

[403] Executive Order n. 14165: *Securing Our Borders;* Executive Order n. 14161: *Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats.*
[404] *Ibid.*
[405] Executive Order n. 14159: section 9.
[406] American Immigration Council, *cit.*, January 2026, p. 22.
[407] *Ibid.*
[408] V. CHETAIL, *cit.*, p. 133.
[409] *Ibid.*

non-custodial alternatives[410]. Following this legal framework, detention is never considered to be an ordinary administrative instrument, but it remains an *extrema ratio*. As a consequence, any transition to categorical or mandatory detention overriding individualized scrutiny and judicial control inherently violates these norms, breaching international human rights.

Conversely, the U.S. policy is based on the presumption of detention, rendering the mode of entry, and consequently the status of irregular migrant, a criterion to detain individuals, rather than any criminal behavior in which they engage – overturning a fundamental principle of general law[411]. This factor clearly violates the principle of non-discrimination, creating a category of individuals who are automatically criminalized, without conducting a case-by-case analysis, but on the sole basis of their geographical origin[412].

In order to subject the National State of Emergency and its subsequent Orders to a tripartite test, the criteria of necessity, proportionality and reasonableness must be assessed against the objective and the measures implemented by the Executive. Firstly, a measure is considered necessary to achieve its purpose only if the State lacks less restrictive alternatives that are equally effective in reaching the stated objective. In this specific context, such measures cannot be defined as necessary, given the fact mandatory detention has been established as the sole and exclusive instrument for border management; without an individualized assessment of any less intrusive means which could achieve the same security goals, such as community-based supervision or electronic monitoring, the policy transforms detention from a measure of last resort into an automatic administrative punishment. Secondly, the principle of proportionality is deemed to be respected if a balance between individual liberty deprivation and national interest is guaranteed. Concerning this case, transforming detention into a mandatory measure cannot be defined as in compliance with such principle, due to the indiscriminate violation of individual liberty with the objective of border management. It mandates the extreme condition of detention as a punitive tool which ignores vulnerabilities and singular circumstances. The primary objective of detention, in fact, has been shifted from a precautionary administrative measure intended to prevent flight risk under judicial supervision, to a punitive instrument aimed solely at penalizing migration. Finally, a measure is recognized as reasonable not only if it is lawful, but also if it is inherently just and predicated upon objective criteria and impartiality, while consistently upholding legal certainty. With regard to the analyzed policy, the norms can be defined as legal because they have been issued through a legal instrument, that is the Executive Order, but it cannot be considered reasonable, due to the absence of a defined duration of

[410] Global Compact for Safe, Orderly and Regular Migration, 2018, obj. 13, para. 29.
[411] American Immigration Council, *Immigration Detention Expansion in Trump's Second Term*, January 2026, p. 19.
[412] *Ibid.*

detention and judicial review. The fact that ICE is the only authorized actor to decide over detention renders the measure unreasonable, because it is not impartial: executive-only discretion renders the confinement unpredictable and, therefore, inherently arbitrary[413]. Particularly alarming is the increasing detention of minors, which serves as the cornerstone of institutionalized arbitrariness by prioritizing military custody over established international standards for non-custodial care[414].

Finally, if the status of refugees is taken into account, the 1951 Geneva Convention explicitly prohibits the criminal prosecution of asylum-seekers entered through illegal means, because it envisaged the difficulties encountered by refugees in escaping the persecution and threats to life from their country of origin, and it emphasized their necessity to be protected[415]. Given that, mandatory detention fails to recognize potential refugees and to protect them, because any individual assessment is put aside; such a policy cannot be considered being respectful of the international standards on refugees, whose codification by the U.S. can be found not only in the ratification of the 1967 Protocol of the Convention but also in the Refugee Act of 1980[416]. Nonetheless, while the Act aligned U.S. law with international standards regarding the definition of a refugee and the principle of *non-refoulement*, it failed to explicitly codify the prohibition of penalizing irregular entry set forth in article 31 of the 1951 Geneva Convention[417]. This statutory gap has been utilized to justify the treatment of unauthorized entry as a valid basis for mandatory detention, simultaneously violating the international principle that seeking asylum should not be criminalized.

4.5 Externalization of borders, right to leave and prohibition of torture and inhuman or degrading treatment

The current U.S. strategy of border externalization has evolved into a complex architecture of bilateral and multilateral agreements designed to move the responsibility for asylum and enforcement toward transit nations, primarily Panama and Colombia. As described in Chapter 3, this approach is known as the *pull-back* logic, where the country of destination finances transit states to act as buffers, blocking migratory flows long before they reach the physical borders of the United States. The primary example of this mechanism can be found to the Asylum Cooperative Agreements (ACAs) of 2019, which utilized the legal concept of the "safe third country" to mandate the deportation of asylum

[413] *Ibid.*
[414] R. PLANAS, *Why the Trump administration is detaining immigrant children – and what happens to them next,* in *The Guardian*, 24th January 2026. [https://www.theguardian.com/us-news/2026/jan/23/trump-administration-immigrant-kids-detention , accessed on 12th February 2026]
[415] 1951 Geneva Convention: art. 31.
[416] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 1980.
[417] 1951 Geneva Convention: art. 31.

seekers to Northern Triangle nations[418]. These countries, characterized by some of the highest homicide rates in the world and a lack of adequate legal infrastructure, often failed to provide the "full and fair" procedures required by both domestic and international standards. Although the Biden administration formally suspended these agreements in 2021, the subsequent implementation of Safe Mobility Offices (*Movilidad Segura*) represented a further evolution through the digitalization of border control, transforming the refugee request process into a technological filtering mechanism managed by international agencies in coordination with the State Department[419]. Under the 2025 National Emergency declaration, this system of externalization has been based on additional elements of militarized deterrence and trilateral agreements, namely through the Trilateral Joint Statement between the United States, Panama, and Colombia[420]. The Darién Gap was converted from a natural transit corridor into a geopolitical barrier, supported by U.S. military assistance and removal flights funded directly by U.S. budget[421].

From a legal perspective, this externalization challenges many international migration standards, in particular the customary right to leave and the prohibition of torture and inhuman or degrading treatment. Regarding the former, as explained in Chapter 1, article 13 of the UN Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights affirm that everyone has the right to leave his own country[422]. If international law recognizes for States broad discretion over entry, the practice of forced interception in third countries creates a normative asymmetry that undermines the freedom of movement: individuals formally possess the right to depart; yet their substantive exercise of that right is obstructed by third-party armed forces, such as Panama's SENAFRONT, acting as surrogates for the U.S. Executive[423]. For what concerns the prohibition of torture and inhuman or degrading treatment, the systemic reliance on forced removals to third countries without respecting minimum safety standards, expanded in 2025 to include nations such as Uganda and Paraguay, raises severe concerns regarding the violation of the principle of *non-refoulement* and the absolute prohibition of torture and inhuman or degrading treatment, especially if considered that the non-derogable nature of such norm. U.S., in fact, are signatories of the United Nations Convention Against Torture (UNCAT), which in article 2 stated the basis of the prohibition of torture[424]. Firstly, States shall take any measure in their power to prevent torture in territories under

[418] Justice for Immigrants, *cit.*, 2020.
[419] Mixed Migration Center, *cit.,* 2024.
[420] Homeland Security, *Trilateral Joint Statement,* 11th April 2023.
[421] *Ibid.*
[422] Universal Declaration of Human Rights: art. 13(2); ICCPR: art. 12.
[423] *Ibid.*
[424] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85: art. 2.

their jurisdiction; secondly, there are no exceptions to the respect of this norm, underlining its non-derogable feature; thirdly, following superior orders cannot be considered sufficient justification for torture[425].

This policy reveals a profound erosion of the statutory commitments established by the Refugee Act of 1980, which aimed to codify the obligation of non-return. When the judicial threshold to challenge their removal becomes inaccessible to migrants, the Executive effectively ignores the protections codified in domestic law. Moreover, by penalizing irregular entry through military confinement and externalized deterrence, such legal framework does not respect the spirit of article 31 of the 1951 Geneva Convention, which prohibits the criminalization of refugees based on their unauthorized arrival and which is considered one of the pillars of refugees' international protection principles[426]. The de-judicialization of these removals, characterized by a lack of individualized risk assessments, places individuals in a state of legal limbo, where the law merely codifies the executive discretion regarding national interests, without accounting for international protection obligations. Within this extraterritorial shadow zone, the risk of inhuman or degrading treatment becomes a systemic reality, as the U.S. strategically utilizes third countries to perform functions of deterrence, attempting to evade the legal accountability and ignoring its international obligations.

4.6 Conclusive remarks

The analysis conducted in this Chapter delineates a profound erosion of international migration law within the framework of United States migration management. The transition from an administrative approach to an extreme national security mechanism has transformed the border into a space where fundamental rights are systematically suspended and violated.

Through policies such as "Zero Tolerance" and the declaration of national emergencies, the U.S. has subordinated the right to family unity and the best interests of the child to punitive deterrence purposes. Additionally, instruments such as the Migrant Protection Protocols (MPP) and Title 42 have institutionalized a system of collective expulsions and procedural barriers. The imposition of prohibitive evidentiary thresholds has created a state of constructive refoulement, where migrants are forced to leave their search for protection due to the institutionalized dangers in transit or return territories. Furthermore, relying on 18th-century statutes and reinforcing the "invasion doctrine" has removed migration management from judicial oversight: when immigration judges are deprived of their competence and due process is restricted, the Executive branch has consolidated unilateral

[425] UNCAT: art. 2.
[426] Geneva Convention: art. 31.

authority, replacing legal scrutiny with absolute discretion. Finally, the strategy of border externalization, implemented through agreements with transit nations like Panama and Colombia, operates under a *pull-back* logic, which delegates enforcement to third parties; the U.S. seek to evade direct legal accountability, undermining the customary right to leave and the absolute prohibition of torture or inhuman treatment.

For this analysis to be comprehensive, it is relevant to underscore the criticality of the current international migration law, which results to be lacking effectiveness in its enforcement, specifically for States of destination, primarily the United States' position within the international and regional legal architecture. Regarding the former, the U.S. have signed few international treaties, which represent one of the most binding sources of law, as they are directly ratified by States, signifying a formal and voluntary commitment to be bound by their provisions. In the U.S. context, the ratification of instruments such as the 1967 Protocol relating to the Status of Refugees and the Convention Against Torture (CAT) creates a clear legal obligation to respect the principle of *non-refoulement* and to ensure procedural fairness. By violating these treaty-based mandates through executive discretion, the current policy does not merely disregard international recommendations but directly contravenes the very legal obligations that the State has formally decided to respect.

Furthermore, unlike other States in the hemisphere, the U.S. are not subject to the contentious jurisdiction of the Inter-American Court of Human Rights[427]. This absence of external, binding judicial oversight creates a significant legal vacuum: without the corrective mechanism of a supranational court to review the conventionality of its domestic policies, migrants remain victims of state-centric executive decisions, especially since the United States are the first country of destination for global migration[428]. Consequently, the securitized approach does not merely challenge international law but operates within a zone of impunity where the survival of the "life of the Nation" is used to justify the sacrifice of inalienable human rights.

This legal erosion is particularly evident in the management of mixed movements crossing the Darién Gap. As described in Chapter 2, this migratory flow is heterogenous, comprising both asylum seekers fleeing persecution and migrant workers driven by economic desperation. While the former may theoretically invoke the 1967 Protocol or the CAT, the latter fall into a *grey legal zone*: they are subject to systematic risks and violations, such as extortion, violence, and forced labor, yet they lack

[427] C. GROSSMAN, *cit.*, 2008, pp. 1281-1282.
[428] IOM, *Top 10 countries of destination of international migrants, 2010 2024.* [https://www.migrationdataportal.org/infographic/top-10-countries-destination-international-migrants-2010-2024 , accessed on 16th February 2026]

the shield of any specific treaty ratified by the United States[429]. Since the U.S. has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW), these individuals remain effectively "invisible" to the law. The thesis demonstrates how the rigidity of international legal categories renders individuals fleeing extreme poverty and systemic insecurity ineligible for refugee status, despite the life-threatening risks they endure. Driven by the need to escape armed gangs and economic collapse in their countries of origin, these migrants face inhuman treatment and pervasive violence during their journey through the Darién Gap, a danger exacerbated both by the treacherous natural environment and the presence of criminal actors[430]. Lastly, upon arrival, they remain trapped in a state of absolute legal vulnerability and uncertainty, as their basic human rights are sacrificed to the constant tightening of U.S. anti-migration policies and the arbitrary application of the *invasion doctrine*. The latter operates as a powerful tool of dehumanization by reclassifying the migrant from a person entitled to fundamental rights into a "constructive invader" or a national security threat[431]. By framing migration through a war lens, this doctrine strips individuals of their human dignity, justifying the suspension of individualized judicial review and the sacrifice of inalienable rights in favor of absolute executive discretion and sovereign defense[432].

In this context, the Darién Gap ceases to be merely a geographical trap to become the ultimate symbol of the legal void created by U.S. policy: a space where the extreme physical peril of mixed movements meets a system that deliberately ignores their humanity. Ultimately, it proves that when sovereign defense is invoked through martial terminology, the border effectively marks the end of the rule of law and the beginning of a zone of absolute impunity and null protection.

[429] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024.
[430] *Ibid.*
[431] M. LINDSAY, *cit.,* 2010, pp. 37-40.
[432] *Ibid.*

Conclusion

The thesis sough to examine whether recent United States anti-migration and deterrence measures, in particular those aimed at limiting Northward movement from the Darién Gap, can be reconciled with international human rights law and refugee law when interpreted through the lens of a permanent state of emergency. The central claim was that in last decades migration has been framed as a "national emergency", especially by United States, thereby normalizing exceptional forms of governance and turning emergency reasoning into a durable instrument of border control. In practice, this transformation created a "grey zone" in which rights remain formally intact and yet are progressively emptied of substance, above all through the erosion of procedural safeguards that make protections such as *non-refoulement* effectively enforceable.

The analysis conducted across the four chapters supports this hypothesis and clarifies its broader implications. It shows that the Darién Gap cannot be understood merely as a humanitarian tragedy shaped by geography and criminal violence, nor as a purely domestic U.S. policy problem. Rather, it is a regional and transnational legal-political configuration: a corridor where territorial dangers, transit-state containment, and U.S.-driven deterrence meet to form an "architecture of exclusion" that increasingly conflicts with international obligations.

At the theoretical level, Chapter 1 demonstrated that the "emergency" framing applied to migration implies a conceptual distortion: emergencies, as classically understood in constitutional and international law, presuppose exceptionality and temporariness; migration, by contrast, is a structural phenomenon shaped by enduring geopolitical and socio-economic drivers. This contrast has been highlighted through two paradoxes: an "exceptionality paradox" (migration is portrayed as unpredictable although it is largely foreseeable and recurrent) and a "temporal paradox" (exceptional measures persist and become ordinary governance)[433]. This theoretical section also explained how permanent emergency logic becomes legally operational. Contemporary States often preserve a surface of legality by using decrees, administrative orders, and formal lawful tools, while simultaneously expanding executive discretion, where the executive identifies the crisis, defines necessity, and measures proportionality according to political goals[434]. The result is the institutionalization of exception: legality becomes a language through which the suspension of ordinary rights is normalized. Eventually, Chapter 1 also clarified why procedural guarantees are the first and most frequent targets of emergency governance. International human rights law and refugee

[433] N. PANOU, *cit.*, 2024, p. 2
[434] G. AGAMBEN, *cit.*, 2005, pp. 29–30.

law are not enforced merely by declaring principles; they are implemented through mechanisms such as individual assessment, access to counsel, access to courts, judicial review, and effective remedies. When these procedural pillars are compressed, substantive rights are not necessarily repealed, but they become unreachable. This insight becomes decisive for interpreting later chapters: many U.S. policies function less as explicit denials of protection and more as procedural obstruction, producing outcomes that are incompatible with *non-refoulement* and due process even when the legal rhetoric claims compliance.

Chapter 2 moved the analysis from the conceptual to the empirical, showing why the Darién Gap has become a central symbol of contemporary migration governance. The region's morphology as a dense rainforest, rivers, swamps, steep terrain, wildlife, and extreme seasonality creates an intrinsically dangerous environment, while the interruption of the Pan-American Highway concentrates mobility into a narrow "chokepoint" where safe alternatives are limited[435]. However, the chapter's main conclusion is that the Darién is not simply dangerous by nature; it becomes dangerous as policy. The jungle in fact operates as a "naturalized deterrent": a barrier that States can exploit without explicitly using force, while the predictable exposure to harm becomes a functional element of broader containment strategies. The thesis further highlighted how migration management structures, including Panama's Controlled Flow logic and the operation of reception and transit infrastructures, exist in tension with the lived reality of migrants—especially where insufficient protection, impunity in remote areas, and the presence of armed or criminal actors generate systematic risks. A further important empirical finding is the profile of those crossing the Darién. The thesis drew on the described data to show that many migrants do not fit simplistic stereotypes: a significant portion can be identified as a displaced middle class, often documented and educated, whose movement reflects not a purely voluntary choice, but a forced "economic exile" driven by structural instability and the failures of regional integration[436]. This undermines narratives that treat migration as a criminal threat requiring exceptional containment and instead supports the thesis' broader point: the "emergency" frame is political, not descriptive.

Chapter 3 analyzed U.S. antimigration measures and demonstrated that U.S. policy functions as a regional driver: it shapes not only entry into U.S. territory but also the routes, risks, and governance choices of transit States such as Panama and Colombia. The chapter described the evolution from the Trump administration's *Zero tolerance* policy and physical deterrence to the continuation and adaptation of digital deterrence instruments under Biden, emphasizing a two-fold strategy: limiting

[435] M. RAPIDO RAGOZZINO, J. PAPPIER, *cit.*, 2024, pp. 1-3
[436] International Organization for Migration (IOM), DTM Panama, *cit.,* April 2025.

access to international protection and externalizing border control. The main conclusion is that such approach rarely eliminates mobility; it reshapes it. Restrictive policies in fact increase the costs of movement – financial, physical, and legal – therefore pushing migrants toward unregulated transits and exposing them to additional exploitation. This is particularly evident in the way U.S.-influenced regional enforcement produced forced immobility and, eventually, the *reverse flows* mechanism: migrants trapped by inaccessible asylum pathways and intensified enforcement may attempt to cross the Darién again in the opposite direction, expanding exposure to lethality rather than reducing irregular movement[437]. The broader implication is that a containment strategy framed as "orderly management" may in practice generate disorder and harm, while also displacing responsibility and costs to transit States with more limited institutional and financial capacity. This dynamic is central to the thesis's analysis of externalization: state power is exercised extraterritorially, while attribution of responsibility becomes increasingly complex and faded.

Lastly, Chapter 4 provided the legal core of the thesis, systematically associating specific U.S. policies with infringed international obligations. The main conclusion is that the securitized approach operates not as an occasional deviation but as a pattern of non-compliance, described in the study as an "institutionalized illegality" for migrants and asylum seekers.

Firstly, the analysis of the *Zero Tolerance* policy showed how criminalization of irregular entry produced systemic family separation and subordinated the best interests of the child to punitive deterrence objectives. Even where framed as a procedural consequence of prosecution, separation was a foreseeable, large-scale result of a policy designed to increase the "institutional risk" of migration as a deterrent message[438]. Following U.S. policies' evolution, the Migrant Protection Protocols (MPP) were analyzed through the lens of *non-refoulement* and due process: the thesis emphasized how the measure externalized danger by forcing asylum seekers to remain in precarious environments while waiting for proceedings and, simultaneously, rendering legal representation and evidence collection extremely difficult[439]. The heightened standard of proof, combined with the practical impossibility of obtaining legal counsel for most participants, produced a situation in which many migrants effectively could not access protection[440]. This supports the thesis' concept of *constructive refoulement*: not an explicit denial of protection, but a structure that compels abandonment of claims through procedural barriers and exposure to danger[441]. Moreover, the

[437] M. DAVIER, *cit.*, 19th June 2025.
[438] W. KANDEL, *cit.,* 2021, n. R45266, p. 1.
[439] American Immigration Council, *cit.*, February 2024.
[440] *Ibid.*
[441] Y. NEGISHI, *cit.,* May 2024, p. 157.

weaponization of public health law to bypass asylum procedures illustrated how emergency rhetoric can be operationalized to suspend individualized assessment[442]. The thesis underscored that summary expulsions without case-by-case scrutiny violate the prohibition of collective expulsion and the logic of non-discrimination embedded in individualized protection. Title 42 thus exemplified the emergency paradigm's procedural effect: human rights continue to exist as a matter of form, while their effective exercise is systematically impeded. The chapter further linked emergency framing to wider trends of *de-judicialization* and the expansion of executive power, showing how diminished judicial scrutiny and constrained remedies reinforce unilateral decision-making. In such a framework, law risks becoming a mere instrument for codifying national interests, rather than a constraint on arbitrary power oriented toward the protection of human dignity. Finally, the analysis of externalization of borders highlighted the ways in which bilateral and regional arrangements transform transit countries into buffer zones performing deterrent functions. This practice undermines the substantive exercise of the right to leave and amplifies exposure to ill-treatment by forcing interception or return without sufficient safety guarantees. It also raises grave concerns under the absolute prohibition of torture and inhuman or degrading treatment and the non-derogable dimension of *non-refoulement* obligations linked to such harms.

Beyond the evaluation of specific measures, the analysis reached an institutional conclusion: the persistence of this deterrence paradigm is reinforced by an accountability gap. The United States' selective engagement with international treaties and, most significantly, its non-submission to the contentious jurisdiction of the Inter-American Court of Human Rights weakens external, binding review. In a context where migrants' protection depends heavily on enforceable procedures and independent scrutiny, the absence of a supranational corrective mechanism creates conditions of structural impunity. This gap is significant because the permanent emergency paradigm operates by reducing the institutional spaces in which executive choices can be reviewed and legally contested; where the executive becomes the primary arbiter of necessity and proportionality and judicial oversight is circumscribed, international standards are progressively deprived of effectiveness. The thesis therefore suggests that the crisis is juridical as well as humanitarian and political: it evidences the weakening of international law's capacity to discipline state power at its point of greatest concentration, that is border enforcement.

To summarize, the research comes to three key conclusions. Firstly, the Darién Gap is not simply a geographical barrier but a political and legal product. Its dangers are not merely incidental: they are amplified and operationalized through regional containment strategies and dynamics of

[442] J. AMON, M. BASSETT, C. BEYRER, ET AL., *cit.*, 18th May 2020.

externalization. Secondly, the "permanent emergency" paradigm reconfigures migration governance around procedural erosion of human rights and international law. Rather than explicitly rejecting international obligations, States progressively erode the mechanisms through which those obligations are implemented, namely individualized assessment, access to counsel, effective remedies, and judicial review, thereby generating outcomes that conflict with core international principles. Thirdly, deterrence reshapes mobility and redistributes danger: instead of preventing migration, it displaces routes and raises the human cost, increasing lethality, fostering reverse flows, and shifting responsibilities onto transit States, while making accountability more diffuse and harder to enforce.

The thesis does not deny that States have legitimate interests in regulating borders. Its argument is that the emergency paradigm produces a false distinction between security and legality. International law already offers tools to govern mobility lawfully: proportionality, non-discrimination, individualized assessment, and effective remedies; it sets clear limits by safeguarding non-derogable protections, including the prohibition of torture and the corresponding *non-refoulement* obligations. Therefore, the central challenge is not theoretical but political and institutional: are democracies willing to treat migration as structural and to build governance that is rights-based, reviewable, and resistant to exceptionalism? If the emergency frame continues to prevail, the risk is a long-term erosion of the credibility of the international legal order: borders become spaces of selective legality, highly organized for exclusion but weakly organized for protection.

In conclusion, the Darién Gap demonstrates that when deterrence becomes strategy and emergency becomes normalcy, the cost is measured in fractured families, legal invisibility, and preventable suffering. The thesis argued that border spaces do not suspend the law: whenever state power is exercised, either on the territory or through externalized arrangements, international obligations remain engaged. Reaffirming this basic premise is essential not only to protect migrants, but also to safeguard the integrity of the international legal order, whose legitimacy ultimately rests on its ability to restrain power precisely where power is most inclined to invoke exception.

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