Humanitarian Visas as a Means of Protection amid the Contemporary Forced Migration Flows - Exploring Brazil's Application

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Acknowledgements:

I would like to express my gratitude to every person that contributed to my participation at the VU’s LLM Program on International Migration and Refugee Law and to the realization of this research. First to my family, that have always supported me through my whole life, which was not different during this period in Amsterdam. I would also like to specially thank my supervisor, Professor T. P. Spijkerboer, who has always been available to provide me important orientation and very elucidative feedbacks, even when we were in different hemispheres of the globe. To conclude, I would like to thank my colleagues and friends from the Masters, that shared with me expectations, anguishes and hopes along the year, and also the other professors and general staff from the program, that were always very helpful and solicitous during my studies at the VU.

“Injustice anywhere is a threat to justice everywhere.”

1 Martin Luther King Jr., "Letter from Birmingham Jail", 1963.
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1. Introduction

The international treaty that established the framework for refugees’ rights protection, the 1951 Convention Relating to the Refugee Status,\(^2\) was signed in consequence of a global conflict that generated high numbers of forcibly displaced people around the world, the WWII. Today, there are even more forcibly displaced people worldwide,\(^3\) with these individuals seeking protection for different reasons. Some still remain inside of their countries, while others have the necessity of leaving their nations’ territory, with many of the forcibly displaced migrants that form the contemporary forced migration flows not fitting into the classic definition of refugee that was established by the 1951 Geneva Convention and complemented by the 1967 Protocol.\(^4\) Nevertheless, these migrants are still vulnerable, requiring protection of their fundamental human rights, which their national governments are unable to assure them anymore. Sometimes, there is just no other option, otherwise than having to leave home and go to another country, a possible host State, searching for protection.

In a time with a historical record number of forcibly displaced people, it is increasingly important that International States make use of different legal instruments of complementary protection, aiming to expand the range of their protection mechanisms and offer humanitarian shelter for the highest possible number of migrants in need.\(^5\) These other legal instruments can enhance the States’ obligation to protect forcibly displaced migrants beyond the limits established by the original refugee definition brought by the Geneva Convention and the subsequent Protocol, while also decreasing the number of human rights violations that such migrants suffer while in transit to another country. In this context, one legal instrument of complementary protection that is currently underused by the international community and could have its use more exploited is the humanitarian visa. These visas have a flexible application that can bridge a variety of protection gaps in the international refugee and human rights protection system, with the possibility of creating a legal and safe pathway for migrants to arrive at a host State without being exposed to the risk of suffering further human rights violations during their journeys. Consequently, this type of visa is also an important weapon to


\(^{5}\) “Dealing with the arrival of increased number of migrants in a way that combines States’ interests and migrants’ needs have been challenging, and the availability of legal pathways for migration have been scarce.” Liliana Jubilut, “Humanitarian Alternative Pathways for Protection for Forced Migrants in Latin America”, 117-122, in “Migration Research Leader's Syndicate: Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration” (IOM, 2017) p. 117 https://publications.iom.int/system/files/pdf/migration_research_leaders_syndicate.pdf> accessed 14 March 2019.
combat the actions of migrant smugglers. This visa can also offer protection to migrants that do not initially fit into a refugee status recognition; therefore, its application can represent an important alternative protection for International States to complement the protection initially established by the main international treaties that regulate refugees’ rights.

Brazil, in the first years of this decade, started to receive large migration flows, which were exceptional to the country’s parameters. It began with the Haitians, after that an earthquake devastated their country in 2010. Brazil was not used to host a large number of forced migrants or refugees, and, even after the approval of Federal Law No. 9.474/97, which made the Brazilian legal framework formally suitable to host and protect migrants and refugees arriving in the country, the Brazilian State still lacked the practical experience of actually having to regulate such a large migration flow. With the Haitian flow to Brazil increasing week after week, and with a significant number of these migrants suffering several human rights violations on their way, the Brazilian State had to formulate a legal remedy to regulate the flow. As a result, the country decided to offer them a special humanitarian visa, which triggered an innovative humanitarian visa policy, that was later further expanded twice since that first experience: to refugees from the Syrian War and to Venezuelans. The Brazilian Humanitarian Visa Policy, by consequence, deeply influenced the country’s general migration policy, even resulting into a new Federal Migration Law.

1.1 Objectives, Methodology and Outline

This research defends the thesis that humanitarian visas must be used more frequently by International States, so as to decrease the human rights violations of forcibly displaced migrants and refugees that form the contemporary forced migration flows. Different possibilities of protection that this instrument offers are demonstrated through the analysis of the humanitarian visa policy recently applied by the Brazilian State. By analyzing the creation and development of Brazil’s Humanitarian Visa Policy, it can be appreciated how this instrument can be better used by the international community to protect the human rights of forcibly displaced migrants and refugees, and rightly help to regulate contemporary forced migration flows. Therefore, the main aim of this research is to clarify the questions of how and why Brazil implemented humanitarian visas to regulate the exceptional migration flows that have entered the country since the beginning of this decade, with the purpose of understanding, through such analysis, how humanitarian visas can be better used to expand the protection of refugees and other forcibly displaced migrants amid the contemporary forced migration flows.

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To that end, this research will explain the reasons that led Brazil to establish the use of humanitarian visas to regulate the Haitian migration flow, and afterwards, the causes that led Brazil to expand this policy. Also, it will be explained how the Brazilian State adopted this instrument into its legal framework, permeated by a critical analysis of Brazil’s application of the humanitarian visa and its impact on the general Brazilian migration policy. Then, the research is concluded with remarks about the lessons that can be absorbed from this recent Brazilian practice. The relevance of this research lies in the increasing emergence of forced and mixed8 migration flows, on the occurrence of several human rights violations while forcibly displaced migrants are in route to reach another country’s territory in search of protection, and on the fact that the use of humanitarian visas can benefit these migrants by offering different protective solutions. This instrument can be used as a legal pathway for asylum seekers to safely reach a host State and then apply for refugee status recognition, whenever so entitled, thereby avoiding human rights violations on their way. At the same time, it can be used to expand the State’s obligation of granting protection to migrants that do not initially fit into the classic definition of refugee. By understanding how Brazil differently applied the humanitarian visa to Haitians, refugees from the Syrian War and Venezuelans, through the analysis of the Brazilian Humanitarian Visa Policy’s timeline, the present research will also clarify how this instrument can combine its protection with a refugee status recognition system, while, likewise, highlighting the importance of recognizing the refugee status whenever the migrant is entitled to it.

The methodology implemented to achieve these objectives is a qualitative doctrinal legal research, combined with a descriptive and critical analysis of the content described.9 The research will examine the Brazilian legal framework that regulates migration and refugee issues, critically analyze how the Brazilian State adopted the humanitarian visa policy to regulate each of the exceptional migration flows that recently arrived in the country, interpret what was the legacy of this instrument’s use for the general Brazilian migration policy and remark on the main lessons to be learned about the use of this instrument. The aim of the methodology adopted is exploratory, and it was chosen with the purpose of providing more information on a migration issue that should be better examined, critically analyzing the content exposed and drawing practical conclusions from it. To better understand humanitarian visas through the analysis of the Brazilian experience with this instrument, and to complement the analysis of the facts regarding the Haitian, Syrian and Venezuelan migrations, this research will analyze the most relevant international and national legislations in the field of Human Rights, Migration and Refugee Law concerning the Brazilian Humanitarian Visa Policy, and the most important literature produced regarding this subject in Brazil and worldwide. The main national

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legislations analyzed will be the Foreigners Statute,\textsuperscript{10} the Federal Law No. 9.474/97, the Normative Resolutions that led to the establishment of the Brazilian Humanitarian Visa Policy and the new Federal Migration Law.\textsuperscript{11} The main international legislation discussed will be the 1984 Cartagena Declaration, and the literature explored will derive from international migration experts’ writings, migration and human rights specialists’ books, academic research, and reports from NGOs, national states, international organizations and the media.

The argument will be presented in six chapters, with this first chapter being introductory. The second chapter will provide considerations about mechanisms of complementary protection, and, more specifically, humanitarian visas, followed by the presentation of the Brazilian legal framework regarding migration and refuge. The third chapter will explain why Brazil initially decided to adopt humanitarian visas to regulate the Haitian migration flow, how the Brazilian authorities adapted this instrument into Brazil’s legal framework and discuss whether the Haitians could have been recognized as refugees, according to the Brazilian legislation at the time. The fourth chapter will analyze how Brazil used humanitarian visas with refugees that fled the Syrian war, and what were the differences and similarities between that scenario and the application of this instrument with the Haitians, highlighting the change in the Federal Government that occurred on that period. Then, the fifth chapter will analyze how this instrument was used to regulate the arrival of Venezuelans in Brazil, and how the use of humanitarian visas helped to reshape the Brazilian migration policy, culminating in the approval of a new Federal Migration Law. To conclude, the sixth chapter will finalize the critical analysis of the Brazilian Humanitarian Visa Policy, making recommendations and observations about the positive and negative lessons that can be extracted from the Brazilian experience with humanitarian visas.

2. The Humanitarian Visa as an Instrument of Complementary Protection and the Brazilian Legal Framework to Deal with Migration

This chapter will present, firstly, considerations about the mechanisms of complementary protection. These mechanisms are capable of expanding the State’s obligation of protection beyond the definitions established by the classic international treaties concerning Refugee Law. In this context, one legal instrument that can be used to expand this protection is the humanitarian visa, which can bridge current protection gaps in different situations, and which Brazil decided to use to regulate exceptional migration flows. The concluding section of the chapter will then present an overview of the Brazilian legal framework on migration and refuge issues when Brazil’s Humanitarian Visa Policy first started.


2.1 Complementary Protection and Humanitarian Visas

There is no absolute definition for the term *complementary protection*. As the UNHCR clarifies, “the term *complementary protection* isn’t a term defined in any international instrument. The term has emerged over the last decades, as a description of the increasingly-apparent phenomenon in industrialized countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by States to describe such forms of protection in their territory, including any attached to immigration status, varying enormously: ‘subsidiary protection’, ‘humanitarian protection’ and ‘temporary asylum’”. Just like the term *complementary protection*, there is no definition that definitively unifies the humanitarian visa concept. From the States’ practice, it can be observed that it is a special visa, given at the State’s discretion, specifically on humanitarian grounds, issuing permission to enter and stay within its territory temporarily. Therefore, the first section of this chapter will provide some considerations about mechanisms of complementary protection, followed by further considerations on humanitarian visas.

2.1.1 Considerations about Mechanisms of Complementary Protection

After the establishment of the 1951 Geneva Convention\textsuperscript{13} and the 1967 Protocol,\textsuperscript{14} which are the main international treaties regarding Refugee Law, other international agreements regarding refugee rights were signed worldwide, with regional scope: first, the 1969 OAU Refugee Convention;\textsuperscript{15} then, the 1984 Cartagena Declaration,\textsuperscript{16} later signed in Latin America. These treaties expanded the original international concept of refugee,\textsuperscript{17} in order to broaden its range of protection and the State’s obligation towards the *non-refoulement* principle\textsuperscript{18} within forced migration flows. The IOM defines forced migration as “a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes.”\textsuperscript{19}


\textsuperscript{16} Cartagena Declaration on Refugees (adopted 22 November 1984). (hereafter Cartagena Declaration).

\textsuperscript{17} Liliana Lyra Jubilut, “The International Refugee Law and its Application into the Brazilian Juridical Framework” (1st edn, Editora Método 2007) p. 89 (hereafter Jubilut, "The International Refugee Law").

\textsuperscript{18} The *non-refoulement* principle is the cornerstone of refugee protection, as established by the 1951 Geneva Convention. Article 33(1) of the 1951 Geneva Convention states that “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention (n13).

Castles complements it with the idea that not all reasons that cause forced migrations are currently recognized on international legislations as motives that characterize a refugee status recognition. Within this idea, according to McAdam, "complementary protection" corresponds to the sheltering granted by International States based on the necessity of protection outside the boundaries of the 1951 Convention. It can be granted on the form of human rights treaties or general humanitarian principles, as offering assistance to migrants that are escaping situations of generalized violence. Several practices carried out by International States over the past few decades have generated countless migrants that need international protection of their human rights in the form of asylum, even though not fitting the Geneva Convention definition of refugee. However, at the same time, returning to their country of origin would expose these migrants to the risk of having their human rights violated yet again. Thus, to protect these migrants, the international community have developed various legal practices of complementary protection, in the form of international treaties, courts' practice and legal instruments, which, in turn, has resulted in an expansion of the obligation to protect the non-refoulement principle beyond the original refugee definition.

Therefore, other international instruments, as well as the practice of international courts, have strengthened the protection of the non-refoulement principle. Article 7 of the ICCPR, through an interpretation of extraterritorial prohibition of torture, relates refoulement to torture, by stating that a State indirectly commits torture if it transfers an individual to a country where that person is subjected to torture or cruel, inhuman and degrading treatment. More explicitly, Article No. 3 (1) of the Convention Against Torture expressly establishes that no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Article No. 3 of the ECHR has also been applied by the ECtHR as a dispositive to protect refugees and asylum seekers against refoulement, because the Court considers that this article can provide effective protection against all forms of return to places where there is a risk of that individual being subjected

24 McAdam, "Complementary Protection".
27 Convention Against Torture and Other Cruel, Inhuman or Degradating Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987).
to torture, or to inhuman and degrading treatment. The ECtHR has decided that both extradition and expulsion violate Article No. 3 of the Convention if there are reasonable grounds to believe that there is a real risk that the individual, if returned, would be subjected to torture or inhuman and degrading treatment in that country. The non-refoulement principle was also strengthened by the ECHR Protocols abolishing the death penalty and by Article 19(2) of the EU Charter of Fundamental Rights.

In the last years, International States had already recognized the necessity of “expanding the number and range of legal pathways available for refugees” in the 2016 New York Declaration for Refugees and Migrants, which was made concrete at the 2018 Global Compact on Refugees, where it was concluded that “other pathways for the admission of persons with international protection needs can facilitate access to protection and/or solutions. There is a need to ensure that such pathways are made available on a more systematic, organized, sustainable and gender-responsive basis, and that they contain appropriate protection safeguards.” In addition, the Compact acknowledges that these complementary legal pathways could include “humanitarian visas, humanitarian corridors and other humanitarian admission programs.”

2.1.2 Considerations about Humanitarian Visas

Humanitarian visas can work both as a legal and safe way for refugees to arrive at their destination, and also as a protection to migrants that may not fit into the classic refugee definition. Thus, this visa is a complementary protection instrument that allows States to expand their obligations of non-refoulement, based on principles of human rights. This visa can be issued at the host countries’ embassies at the countries of origin and at neighboring countries, thereby facilitating the transit of forcibly displaced migrants. As a result, humanitarian visas can be an important tool to support the international refugee protection regime in times when existing external border control mechanisms

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30 Soering v The United Kingdom App no 14038/88 (ECtHR, 7 July 1989).  
31 Chahal v The United Kingdom App no 22414/93 (ECtHR, 15 November 1996).  
32 Molnar, “The Principle of non-refoulement” (n26).  
33 Protocols nº 6 (adopted 28 April 1983) and 13 (adopted 3 May 2002), ECHR (n28).  
36 Global Compact on Refugees, Item 94.  
37 Item 95, Global Compact on Refugees (n36).  
38 McAdam, “Complementary Protection” (n22).  
39 “These include excessively formal immigration requirements, carrier sanctions, pre-entry clearance and other offshore border controls. There are also physical obstacles such as fences, walls, closed borders, and pushbacks.” Frances Nicholson and Judith Kumín, “A Guide to International Refugee Protection and Building State Asylum Systems” (UNHCR, 2017) p. 75.
sometimes hinder the refugees' access to possible host country's territories.\textsuperscript{40} Therefore, this visa, able of being defined as a tool of complementary protection,\textsuperscript{41} facilitates the mobility of forcibly displaced migrants, both in term of admissions policies and by making their access route to host countries safer.

This instrument has been used before, with different and specific applications according to the interest of the applying State. There are precedents of use in several countries, such as Canada,\textsuperscript{42} Australia,\textsuperscript{43} Chile,\textsuperscript{44} Switzerland\textsuperscript{45} and individually by countries from the European Union.\textsuperscript{46} Within the scope of the European Union, the common use of this instrument has been debated over the last few decades. The EU Visa Code allows Member States to issue humanitarian visas with limited territorial validity,\textsuperscript{47} in 2009, the European Commission also recognized the importance of using this instrument.\textsuperscript{48} Over the past years, institutions in the European Union have been debating the idea of establishing a harmonized regime for humanitarian visas, and, since 2014, at least sixteen EU Member States have or have had some form of scheme to issue humanitarian visas,\textsuperscript{49} which underscores that a significant number of Member States already recognize

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\textsuperscript{44} In Chile, there are sparse cases of Humanitarian Visas being issued for human-trafficking victims Stephanie Hepburn and Rita J. Simon, "Human Trafficking around the World: Hidden in Plain Sight" (1st edn, Columbia University Press, 2013) p. 36.


\textsuperscript{46} In spite of the fact that, in comparison with the possibilities that it represents, this instrument is still underused within the EU. Red Cross, "Humanitarian Visas in Practice" <https://redcross.eu/projects/humanitarian-visas-in-practice> accessed 19 April 2019 (hereafter Red Cross, "Humanitarian Visas").

\textsuperscript{47} Issued exceptionally when “the Member State considers it necessary, on humanitarian grounds, for reasons of national interest or because of international obligations.” Article No. 25, "EU Visa Code" (adopted 13 July 2009, entered into force 25 October 2009).

\textsuperscript{48} Acknowledging that “access to protection and adherence to the principle of non-refoulement must be assured. In this context, new forms of responsibility for protection might be considered. Procedures for protected entry and the issuing of humanitarian visas should be facilitated, including calling on the aid of diplomatic representations or any other structure set up within the framework of a global mobility management strategy.” Communication from the Commission to the European Parliament and the Council, "An Area of Freedom, Security and Justice Serving the Citizen" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0062> accessed 12 March 2019.

humanitarian visas as a valid legal pathway.\textsuperscript{50} Within the EU’s scope, the extraterritorial use of humanitarian visas, making an initial assessment of the refugees intending to come, could also facilitate a more equal distribution of the asylum-seekers amongst Member States.\textsuperscript{51}

Nevertheless, the question of issuing humanitarian visas in the European Union is still a moot point. Making a restrictive interpretation about the Member States’ responsibility and obligation regarding this instrument, the CJEU ruled, in judgment C-638/16,\textsuperscript{52} that a Syrian family’s application for a humanitarian visa in the Belgian embassy in Lebanon was a matter of national law only.\textsuperscript{53} More recently, the European Parliament approved Resolution No. 2018/2271,\textsuperscript{54} offering recommendations regarding the establishment of a common European humanitarian visa system. The adoption of this resolution can represent a great progress in the field, as migrants in need of protection do not currently have legal official EU-wide channels to enter the European Union territory, thus triggering the protection mechanisms under the CEAS and ensuring that Member States will meet their international obligations of human rights protection for asylum seekers.\textsuperscript{55} As a result, the establishment of a common humanitarian visa system may offer a solution to help this current lack of protection during the migrants’ journey into EU’s territory and contribute to address some of the human rights violations surrounding it.\textsuperscript{56}


\textsuperscript{52} X and X vs. État Belge, App No 638/16 (CJEU, 7 March 2017).

\textsuperscript{53} Advocate General Mengozzi, in contrast, recommended that the Grand Chamber should have concluded that, in this type of case, Member States are deemed to be acting within the scope of EU Law, and are obliged to respect the rights guaranteed by the European Charter when they deal with a short-term visa application. However, instead, the decision “accedes to the “flood gate” argument advanced by the Commission and national governments”, limiting the possibilities of protection that humanitarian visas can offer. Caoimhe Sheridan and Amanda Taylor, “Looking like a cat, walking like a cat, sounding like a cat but actually being a dog: What the X and X judgment means for the scope of the EU Charter?” (EDAL, 2017) <https://www.asylumlawdatabase.eu/en/journal/looking-cat-walking-cat-sounding-cat-actually-being-dog-what-x-and-x-judgment-means-scope-eu> accessed 19 October 2018.


\textsuperscript{56} “Humanitarian visas allowing people to travel legally to a European Union States in order to lodge an asylum claim at arrival are never delivered by European embassies, though they exist in European law. In order to reach the territory of Europe and lodge an asylum claim, refugees have no choice but to do what migrants do: either obtain a visa for any other purpose (work, study, family reunion or tourism) or travel with no visa and resort to the services of a migrant smuggler. (…) Should have resettlement and humanitarian visas been used, refugee movements to the European Union would have taken place in a legal, orderly manner, at lower costs but not necessarily larger scale, and Europe would have respected its founding principles of human rights and protection.” Philippe Fargues, "Four Decades of Cross-Mediterranean Undocumented Migration to Europe - A Review of the Evidence" (IOM, 2017) p. 19 <http://cadmus.eui.eu/bitstream/handle/1814/51084/four_decades_of_cross_mediterranean.pdf?sequence =1&isAllowed=y> accessed 17 January 2019.
The extraterritorial use of humanitarian visas can also help to prevent the entrance of “irregular migrants”, because the visa would present a possibility of making an initial assessment of their legal status before the migrants’ travel to the possible host country, creating an accessible and legal channel for them to reach it, also decreasing the effects of migrant smuggling.\(^{57}\) This could consequently also mean a reduction of administrative costs\(^{58}\) of surveillance and border control, as well as costs concerning detention, return assistance, forced removal and relating frustrated refugee status applicants that cannot be returned to their country of origin.\(^{59}\) By this reasoning, besides expanding the range of protection systems and protect forced displaced migrants from human rights violations and deaths,\(^{60}\) the use of humanitarian visas would also ensure administrative and financial benefits to the States making use of it.

Therefore, the application of humanitarian visas is a State’s discretionary act, that chooses who will benefit from it. These visas can protect migrants during their journey, also contributing to the expansion of State’s obligation to protect beyond the limits imposed by the main Refugee Law international treaties. These visas are able of expiring, being amended or being revoked, depending on the political will of the government at hand.\(^{61}\) This means that this instrument does not offer the same kind of strong and continuous protection as the recognition of refugee status does. In spite of that, it can still fill important gaps of protection within the international migration system.

### 2.2 The Brazilian Legal Framework to Regulate Migration

Brazil was represented at the 1951 Geneva Convention,\(^{62}\) but failed to internalize it into its internal juridical framework before 1964.\(^{63}\) In 1980, aiming to regulate the legal situation of foreigners living in Brazil and future arrivals, but, with the main intention of protecting national interests, the military government promulgated Federal Law No.

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57 “Denying access to the global mobility infrastructure has led to a shadow mobility infrastructure, in which human smuggling can flourish”. Spijkerboer, “The Global Mobility Infrastructure” (n40).

58 In 2016, a year with high levels of the migration to the EU, it was estimated that Refugees and migrants were spending over a billion euro per year to reach Europe’s territory, including the amounts payed to smugglers, and the cost of deportations from the EU was also close to a billion euro per year. Noll and Gammeltoft, “Humanitarian Visas” (n51), p. 2.

59 Ibid.

60 In a period of around 25 years, since 1993, the number of migrants that lost their lives trying to reach only the European territory was close to 35,000. Thomas Spijkerboer, “High risk, high return: How Europe’s policies play into the hands of people-smugglers” (The Guardian, 20 June 2018) <https://www.theguardian.com/world/commentisfree/2018/jun/20/how-europe-policies-accelerate-people-smuggling> accessed 30 October 2018.


which became known as the “Foreigners Statute.” This legislation would regulate all types of migration in Brazil for decades, classifying all foreigners as the same group, without any differentiation between refugees and any other kind of immigrants. Having been issued by a military dictatorial government, this law's main perspective was viewed to national security, in detriment of human rights principles, placing all foreigners as potential threats to the national sovereignty. Nonetheless, the promulgation of this law instituted the National Council for Migration – CNIG –, a specific governmental body that is still today the country’s official institution for dealing with migration issues.

The situation of refugee rights protection in Brazil would start to change in 1984, with the signing of the Cartagena Declaration on Refugees. The countries of Latin America decided to extend the concept of refugee, in order to broaden the protection of the 1951 Convention to deal with the local particularities of forced displacement. In Article 3, Paragraph III, the declaration states that “the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes, as refugees, persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disrupted public order.” Since then, this concept has been consecrated in the region by its reaffirmation in the most important regional agreements in the field. Although not legally binding, the Cartagena

66 In its article nº 2, it expressly says that the objective of that law was to protect interests of national security, and even defend the position of the national worker. Article 2, The Foreigners Statute (n10).
68 The Foreigners Statute (n64).
70 To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes, as refugees, persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disrupted public order". Article 3, Paragraph III, Cartagena Declaration on Refugees (adopted 22 November 1984).
71 The San Salvador Protocol (adopted 17 November 1988), the San Jose Declaration on Refugees and Displaced Persons (adopted 7 December 1994), the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (adopted 16 November 2004) and the Brasilia
Declaration rapidly became Customary Law in the region, influencing all Latin American countries to later officially adopt the extended concept of refugee through internal legislations. With the countries in the region adopting this concept, the focus on refugee status recognition changed from the analysis of individual persecution to the objective situation in the country of origin, thus achieving a wider scope of human rights protection.

As stated above, the official recognition of the extended concept of refugee in Brazil came through Federal Law No. 9.474/1997. Regulating specifically refuge issues, this law was also responsible for incorporating the 1951 Geneva Convention and the 1967 Protocol into national legislation. The law established the Brazilian definition of refugee, combining elements from both the classic refugee definition, in the first paragraph of Article 1, and from the Cartagena Declaration’s definition, in the third paragraph, expressly stating that will be recognized as refugees “who, because of massive and generalized violations of human rights, is forcibly obliged to leave his national country in order to seek protection in other country.” As Jubilut recognizes, this act officially internalized the extended definition of refugee present in the Cartagena Declaration, stating that “this Federal Law (...) officially adopted the extended concept of refugee (...) while also embracing within this institute people who escape from severe and generalized human rights violations.”

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72 As Brazil also did with the enactment of Federal Law No. 9.474/97.
73 Jubilut, "The International Refugee Law" (n17), p. 135.
74 "The regional refugee definition was a shift in focus from the subjective and individualized element—fear of persecution of the 1951 Convention—to the objective elements leading to flight: ‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’. In the regional context, this shift allowed for greater expediency in awarding protection and facilitated work with different population groups to search for solutions. Less concerned with individual refugee status determination procedures, the main purpose was to offer a point of reference that justified humanitarian engagement.” Michael Reed-Hurtado, The Cartagena Declaration on Refugees and The Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (2013) UNHCR, in Giuliana Redin and Luis Augusto Bittencourt Minchola, "International Protection of Force Migrants and Brazil's Agenda" (Monções, 2015) p. 25 <http://ojs.ufgd.edu.br/index.php/moncoes/article/view/4296/2340> accessed 16 May 2019.
77 "Will be recognized as refugee all individuals that:
I - 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;
II - Who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it;
III - Who, because of massive and generalized violations of human rights, is forcibly obliged to leave his national country in order to seek protection in other country". Article 1, Federal Law No. 9.474/97 (n75).
78 Jubilut, "The International Refugee Law" (n17), p. 176.
of CONARE, the Federal Governmental Body that still today is responsible for dealing with all refuge related issues in the country.

Therefore, migration and refuge in Brazil are mainly regulated by three Brazilian Federal Ministries: first, the Ministry of Justice, besides being responsible for applying the competent law, is where are located CONARE and the federal police, which, in turn, is responsible for patrolling the country’s borders and registering the individuals entering the national territory. The second, the Ministry of Labor, has the duty of issuing visas for foreign workers and where it is also where CNIG is located, the body that is responsible for general migration issues. Third, the Ministry of Foreign Affairs, in charge of issuing visas and representing Brazil’s policies outside its borders. In terms of legislation, there was two federal laws that regulated all types of migration and refugee issues in the country: the Foreigners Statute, dealing with migration issues and very conservative, and Federal Law No. 9.474/97, dealing with refuge issues, which incorporated into the Brazilian legal framework an extended concept of refugee, based on the Cartagena Declaration. This was the Brazilian legal framework to deal with migration and refuge in January of 2010, when Haiti’s land started to shake.

3.

The Application of the Humanitarian Visa to the Haitians

This chapter will present Brazil’s first experience applying humanitarian visas, that was to the Haitian migrants. The first section will describe the reasons why the Haitian migration started, and how the Brazilian State decided to initially constitute the application of the humanitarian visa. This will be followed by a discussion of the characteristics of the humanitarian visa applied in Brazil that make this visa an instrument of complementary protection. Then, the next section will present a critical analysis of this first humanitarian visa application, assessing if the Brazilian legal framework at disposal could have entitled the Haitian migrants a refugee status recognition. In conclusion, the last section of the chapter will present the reasons why theirs refugee status were not recognized, and what consequences this denial entailed to their protection in Brazil.

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80 Although located at the Justice Ministry, CONARE’s decision committee is composed by members of the Justice Ministry, the Ministry of Foreign Affairs, the Labor Ministry, the Health Ministry, the Education Ministry, the Federal Police, the Caritas Arquidiocesana (NGO) and the UNHCR. The decision on the recognition of refugee status is a declaratory act, thus merely declaring the right that the individual already holds. In the event of denial, the individual can appeal within fifteen days to the Ministry of Justice.

3.1 The Application of the Humanitarian Visa as an Instrument of Complementary Protection

The Haitians started to migrate to Brazil after their country entered in a situation of generalized human rights violations, in consequence of a devastating earthquake and the incapacity of the Haitian Government to protect its citizens. The Brazilian authorities, after an assessment of their situation, didn’t recognize the Haitians as refugees. In spite of this non-recognition, the country didn’t close its borders, and, instead, decided to apply humanitarian visas to regulate the flow and protect them during their route. Therefore, the first section of this chapter will describe the practical application of this visa, and, further, its characterization as an instrument of complementary protection.

3.1.1 The Practical Application of the Humanitarian Visa with the Haitians

Haiti is located in the Caribbean Sea, sharing an island with the Dominican Republic and being one of the poorest countries in the world. With a population of around ten million people, 60% of the Haitians are undernourished, and half of the people live with less than U$1 per day. Haiti has always suffered with natural disasters and political instability, having endured over two centuries of complex political strife, successive coups d'état, authoritarian governments and international interventions, that have left the country with weak institutions, largely unresponsive to the needs of the population. In 2003, the government of dictator Jean-Bertrand Aristide came to an end, starting yet another period of deep political instability. In 2004, the UN decided to create a "peacekeeping mission" called MINUSTAH to help stabilize the country, which Brazil was appointed to lead. Then, after five years, in January of 2010, a catastrophic earthquake completely devastated the country.

It is estimated that more than 230,000 Haitians have lost their lives because of the earthquake, and over one and a half million people lost their homes. The earthquake

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89 Pallardy, "Haiti Earthquake" (N87).
destroyed schools, hospitals, courts, prisons and even the presidential palace. After the disaster, with the Haitian State shattered, the number of human rights violations in the country intensified significantly. Severe epidemics of cholera and HIV spread within the population and the rates of kidnappings, rapes and murders increased dramatically. With Haiti in such conditions, where the population did not have their rights protected by the Haitian State anymore, Haitians had no other option, and started to seek protection elsewhere.

Haitian migration had traditionally moved towards the north (United States, France and Canada) and to the Dominican Republic. However, propelled by a series of different factors, a new trend of migration down south gained strength in that period, especially in Brazil. Still, the first main factor that influenced the Haitian flow to Brazil was the fact that thousands of Haitians who had first fled the country in search of protection after the earthquake did not find humanitarian response in the countries where Haitians traditionally took shelter, with France and the U.S. initially refusing to offer them protection, claiming that they did not legally qualify as refugees under the 1951 Refugee Convention. In 2011, Human Rights Watch highlighted the severity of the living conditions in Haiti, stating that "the situation after the earthquake has exacerbated

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95 Brazil was in a good economic moment, and was going to host big international events, like the 2014 World Cup and the 2016 Olympic Games.
96 Both countries took precautions to avoid the possibility of a mass "irregular" migration of Haitians to their territories; the US imposed a naval blockade around its shores and France toughened up its migration policy with Haitians at its overseas departments in the Caribbean Sea, even with later forced deportations of immigrants back to Haiti from Guadelupe. Diana Thomaz, "Post-disaster Haitian Migration" (FMR, 2013) p. 35
102 Brazil was in a good economic moment, and was going to host big international events, like the 2014 World Cup and the 2016 Olympic Games.
103 Both countries took precautions to avoid the possibility of a mass "irregular" migration of Haitians to their territories; the US imposed a naval blockade around its shores and France toughened up its migration policy with Haitians at its overseas departments in the Caribbean Sea, even with later forced deportations of immigrants back to Haiti from Guadelupe. Diana Thomaz, "Post-disaster Haitian Migration" (FMR, 2013) p. 35
Haiti’s chronic human rights problems, including violence against women, inhumane prison conditions, and vulnerability of children. […] Already weak, the diminished capacity of the State since the disaster continues to significantly undermine its ability to safeguard fundamental human rights.” 97 Also in 2011, alerting to the terrible conditions that Haiti was experiencing in that period, Antonio Guterres, 98 jointly with Navanethem Pillay, 99 made an extra appeal for International States to offer humanitarian shelter to the Haitians. 100

As mentioned before, after frustrated attempts of migration towards the U.S. and France, Haitians started to seek protection in Brazil. The main problems faced in this process were that the journey was very long, expensive, and, in most cases, made in subhuman conditions. 101 These journeys were mostly organized by smugglers, and each Haitian had to pay around of U$ 2.000,00. 102 Even paying, Haitians were far from being safe, with the majority of them falling victim to human rights violations on their way to much-hoped-for safety. 103 As Godoy defines it, the reception of the Haitians in Brazil went through three different stages. 104 At first, they had their situation analyzed by CONARE, that did not consider them to be refugees. In this moment, Brazilian authorities considered that these first applications would not be exceptions, because of Haiti’s situation, and that the requests coming from Haitians would only grow in the coming months, so they decided to create a broader common solution for the migration flow. After CONARE’s rejection, the Haitians’ situation was then analyzed by CNIG, which evaluated the possibilities of protection under the Foreigners Statute. After this period of a decisional limbo, the last stage was CNIG finally elaborating the humanitarian complementary protection solution, suggesting the creation of a humanitarian visa.

As observed, CONARE decided that the Haitians were not to be recognized as refugees, thus ignoring Haiti’s situation of generalized human rights violations, a condition that fell

98 Then the United Nations High Commissioner for Refugees and now the U.N. Secretary-General.
99 Then the United Nations High Commissioner for Human Rights.
100 Guterres and Pillay jointly stated at the time: “the Haitian State keeps debilitated by the earthquake and still cannot assure for vulnerable people, with health problems or victims of abuse and human rights violations, that they will get the adequate assistance that they need.” Stephanie Nebehay, “UN Urges Countries to Extend Permits for Haitians” (Reuters, 21 June 2011) <https://www.reuters.com/article/us-haiti-refugees-idUSTRE75K41D20110621> accessed 21 August 2018.
101 The main route for Haitians to Brazil included passing through Dominic Republic, sea crossing, Venezuela, Colombia, Ecuador and Peru, before entering into the Brazilian territory through the middle of the Amazon Forest.
under Brazil’s adopted definition of refugee. After the denial, CONARE transferred the
Haitians’ issue to CNIG,105 the official Brazilian institution to deal with regular migration.
From that point, and once the Haitians described the human rights violations that they
had been subject to, both in Haiti and on their way to Brazil, CNIG decided to propose to
the Federal Government, for the first time in the country’s history, the creation of a special
visa to be given on humanitarian grounds, because the Foreigners Statute did not
provide for this possibility. Then, trying to balance national interests with the level of
protection that the Haitians needed, the Federal Government decided to accept CNIG’s
recommendation and to apply with the Haitians a different legal instrument, ad hoc, that
could make them safe during their journey and also allow them to enter and stay legally
in the country, as the visa was to serve as a subsequent residence visa. Finally, in
January 2012, Resolution No. 97/2012106 was promulgated, thereby officially
establishing the Brazilian Humanitarian Visa Policy.

In the preamble of the resolution, CNIG lists the official goals of its establishment.107
Humanitarian visas became officially valid from the moment the resolution was
promulgated, and they were initially issued by the Brazilian embassy in Port-au-Prince.
The legal means that Brazil used to create the visa was to adapt one of the existing visas
in the Foreigners Statue that was given especially to highly qualified foreign workers,108
and grant it to the Haitians exceptionally “for humanitarian reasons.”109 This was the first
time that this visa was granted on such grounds,110 and this measure would be valid
specifically for Haitians.111 The humanitarian visa would not only be the legal instrument
to protect the Haitians on their way to Brazil, but would also be the law that would regulate
their further residence. Obtaining the visa meant they were immediately entitled to a
national identity number and a national work permit. The first article of the resolution
defined that the visa for the Haitians would last five years,112 and the second article
defined that Brazil could only issue a limited number of these visas,113 1.200 per year in
total.114 The Brazilian Government officially declared that their intention with this measure

105 The possibility of CONARE sending to CNIG possible cases of failed requests for the recognition of
refugee status, but that could still need, for any reason, to stay at the country, was first established by the
107 “Control of migrant smugglers and human rights violations, the legal regulation of the Haitian flow and
and the regularization of the legal status of the Haitians that were already in the country and from the ones soon
to arrive”. Preamble, Normative Resolution No. 97/2012 (n106).
109 Article 1, Normative Resolution No. 97/2012 (n106).
110 Isaias Albertin de Moraes, Carlos Alberto Alencar de Andrade and Beatriz Rodrigues Bessa Mattos, “The
Haitian Migration to Brazil: Causes and Challenges” (Conjuntura Austral, 2013) p. 104-105
111 Article 1, Normative Resolution No. 97/2012 (n106).
112 Ibid.
113 Article 2, Normative Resolution No. 97/2012 (n106).
114 The Brazilian Government officially stated that one of the reasons for limiting the number of visas issued
was not fomenting a Haitian diaspora. Other reasons for this limitation were the lack of structure from the
was not only to legally regulate the migration flow that was already occurring, but also to fight human-trafficking, as Dilma Rousseff\textsuperscript{115} stated during her visit to Haiti.\textsuperscript{116} To be granted this visa, the Haitians had to prove their nationality by presenting a valid passport, an identity document or some other concrete proof, and then pay the amount of U$200.00.\textsuperscript{117} When a Haitian migrant arrived at the Brazilian border, the Federal Police would make an initial assessment and directly issue a request protocol that already assured them some immediate rights.\textsuperscript{118} The Federal Police then sent their documentation to CNIG, which proceeded to finish the analysis and make the final decision as to whether to grant the humanitarian visa. If granted, the visa would be valid as a residence visa for five years.

In the following year, with the Haitian diaspora even bigger, the resolution was emended to remove the limit number of visas that could be issued, because the amount was too low to truly address the problem.\textsuperscript{119} In this amendment, the issuance of humanitarian visas was also extended for Brazil’s embassies in transit countries.\textsuperscript{120} At the end of 2011, there were around 4,000 Haitians in Brazil. This estimated number changed to 20,000 in 2013, 55,000 in 2014 and 65,000 in 2015.\textsuperscript{121} At the end of 2017, at least 88,000 Haitians were living in Brazil,\textsuperscript{122} and, by April of 2018, more than 60,000 humanitarian visas had already been officially granted.\textsuperscript{123} However, the Haitian migration to Brazil had started to

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\textsuperscript{115} The Brazilian President at the time.

\textsuperscript{116} “We have to combat the criminals that take advantage from the vulnerability of these families, exposing them to inhume conditions during this travel, besides of overcharging and stealing them. I reaffirm our double propose with the humanitarian visa policy: assure a legal access for the Haitians going to Brazil, at the same time, safe and with dignity, so that’s why we have to fight smuggling”. Dilma Rousseff, “Presidential Speech” Port Prince (01 February 2012) <http://www.itamaraty.gov.br/pt-BR/discursos-artigos-e-entrevistas-categoria/presidente-da-republica-federativa-do-brasil/discursos/4696-discursoda-presidente-da-republica-dilma-rousseff-durante-cerimonia-de-apresentacao-do-contingente-brasileiro-da-missao-das-nacoes-unidas-para-a-estabilizacao-do-haiti-porto-principe-haiti-01-02-12> accessed 15 July 2018.


\textsuperscript{118} Such as access to the labor market and the possibility of having a national identity number, p. 151, Ibid.


\textsuperscript{120} Such as Ecuador, Peru and Colombia.

\textsuperscript{121}Fernandes and Faria, “The Humanitarian Visa” (n117).

\textsuperscript{122} Claudimira Bartoloto and Marcelo Santos, “The Brazilian Migration Policy to Deal with Big Migration Flows: Considerations over the Haitians’ Case” (Huellas de la Migración, 2018) p. 49 <https://huellasdelamigracion.uaemex.mx/article/view/10884/9093> accessed 17 October 2018.

decrease since 2016, especially after Brazil started experiencing an economic crisis. The Haitians faced problems when integrating into Brazilian society, and integration is an integral part of any complete migration policy. Zolberg states that a migration policy must be understood as an “agglomerate of governmental actions with the aim of regulating the entrance, exit, permanence and integration of foreigners in its national territory.”

Corroborating this idea, Meyers categorizes migration policies into two different sub-divisions. The first is the policy of regulation and migration control, which includes all rules and legal procedures regarding the first contact of the immigrant and the analysis of his admission into the country. The second are the policies for integration, which deal with the conditions that are available for these immigrants to adequately reside in the country. These conditions include access to work, public health, education, housing and general social assistance.

It was challenging for the Brazilian Government to offer an adequate integration to the Haitians. The cities that received significant numbers of Haitians did not have the structure or financial resources to host and integrate them perfectly. The Federal Government had neither sufficient financial resources nor practical experience to adequately deal with this flow, which was evidenced by the lack of support from the government to the Haitian migrants after their arrival. For example, the government failed to offer Portuguese lessons, and to create mechanisms to bring these individuals into the national labor market, nor provided them any housing support or general assistance after granting them the visa.

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124 According to Brazil’s Observatory of International Migration, in 2016, already 23% less Haitians have entered Brazil, in comparison to 2014, the peak of the migration. G1 DF, "Influx of Immigrants Reduced 23% in the Past Two Years" (Globo, 13 December 2017) <https://g1.globo.com/politica/noticia/entrada-de-imigrantes-no-brasil-caiu-23-em-dois-anos-efeito-da-crise-politica-e-economica-diz-estudo.ghtml> accessed 23 February 2019.

125 Ibid.


129 "The State should not emphasize the whole migration policy only in one direction, like the regularization of the immigration status, but also think about the establishment of public policies that allow the integration of the Haitians into the Brazilian society”. p. 65, Ibid.

130 After they acquired their identity and labor documents, all their integration process, from that point on, was made by volunteer institutions of civil society. These volunteer institutions helped the Haitians in learning...
3.1.2. The Humanitarian Visa as an Instrument of Complementary Protection

Brazil’s initiative of developing the humanitarian visa policy can be seen as an example of a country using an instrument of complementary protection to assure the protection of fundamental rights to migrants that do not fit into the classic definition of refugee. Brazil, despite not recognizing the Haitians as refugees, still offered them humanitarian shelter, expanding its protection range and including migrants not recognized as refugees. The use of other legal mechanisms to protect the rights of migrants that do not fit into the definition of refugee shows exactly the importance that instruments of complementary protection can have, because, in spite of declining the Haitians’ initial request for refugee status, the Brazilian State did recognize that they needed protection, and offered them a humanitarian solution for their urgent problem.

Supporting this idea, Godoy links this Brazilian policy to McAdam’s concept of complementary protection. The author states that “complementary protection refers to legal measures that aim to protect those migrants that do not initially qualify for the protection offered by the refugee definition”,131 thus assuring the rights of migrants that are still vulnerable. It is often the case that migrants that do not fit into the definition of refugee remain unprotected. In spite of not being recognized as refugees, the Haitians still formed a vulnerable group of migrants who were suffering serious human rights violations, and therefore needed some kind of urgent protection. As the humanitarian visa offered to the Haitians also became their residence permit, it linked their stay and protection only to Brazilian national laws, unlike what would have happened if they had been recognized as refugees. In a refugee status recognition, the protection is linked with both domestic and international laws, which grants a higher level of protection.

For this reason, Silva, Fernandez and Severo reinforce that solutions of complementary protection should only be adopted after an analysis of the possibility of a refugee status recognition is made, and all possibilities in that sense are exhausted.132 Brazil made this analysis, and it was only after this analysis that the country decided to offer a legal instrument of complementary protection. Regarding the visa, Godoy summarizes it emphasizing that “the humanitarian visa was, in practice, a permanence visa granted to the Haitian nationals that were in need of humanitarian protection, but not considered to be included within the definition of refugee.”133 Despite denying refugee status, Brazil did not close its borders to the Haitians, presenting a solution that respected the non-refoulement principle and allowed them to safely and legally enter and stay in the country.

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131 Godoy, “Haitians Case” (n104) p. 49.
133 Godoy, “Haitians Case” (n104) p. 63.
In summary, the humanitarian visa was the dispositive with which Brazil protected the Haitians after having denied them their refugee status requests. Brazil found a legal means within its internal legislation by adapting a different already existing kind of visa to be especially given on humanitarian grounds. It is important that International States use different legal tools to protect forcibly displaced migrants in need, even if not recognizing such migrants as refugees. Nevertheless, this assessment must always be made, because a refugee status recognition entails a higher level of protection.

3.2 Considerations About the Legal Status of the Haitians in Brazil

As observed, although Brazil offered humanitarian protection for the Haitians, the country failed to recognize them as refugees. At that time, after the approval of Federal Law No. 9.474/97, the Brazilian juridical framework already contained the elements for this recognition, that would assure them a higher level of protection. In this concluding section of the chapter, it will be analyzed the reasons why Brazil could have recognized the Haitians as refugees, and what were the causes and consequences of this non-recognition.

3.2.1. The Legal Status of the Haitians in Brazil

When Brazil decided to establish the humanitarian visa, much were discussed as to whether the Brazilian State should have recognized the Haitians as refugees, based on the extended concept of refugee implemented after the adoption of Federal Law 9.474/97. The own UNHCR had recognized, in 2005, that subsection III of the first article in this Brazilian law indicated that the Brazilian refugee definition was considered to apply to “situations of armed conflict and generalized violence.” In the same research, it was also highlighted that Brazil’s legislation “do not distinguish between refugees recognized under the 1951 Convention-inspired criteria and those qualifying under the other elements in their national refugee definitions when it comes to the formal status and accompanying treatment provided to such individuals.”

134 Article 15, the Foreigners Statute (n108).
135 *Refugee status is defined in section 1 of Refugee Law No. 9474/97. Sub-sections (i) and (ii) incorporate the refugee definition in Article 1A(2) of the 1951 Definition, while sub-section (iii) reflects some of the language found in the third conclusion of the 1984 Cartagena Declaration: persons obliged to leave their country of nationality to seek refuge elsewhere because of ‘serious and generalized violations of human rights.’ In practice, it seems that subsection (iii) is also considered to apply to situations of armed conflict and generalized violence”. Ruma Madal, “Legal and Protection Policy Research Series - Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)” (UNCHR, 01 June 2005) p. 68 <https://www.unhcr.org/protect/PROTECTION/435df0aa2.pdf> accessed 15 August 2018.
136 *Ecuador, Brazil, South Africa and Tanzania do not distinguish between refugees recognized under the 1951 Convention-inspired criteria and those qualifying under the other elements in their national refugee definitions when it comes to the formal status and accompanying treatment provided to such individuals. Whilst this is required as a result of international obligations in OAU Convention countries, this is not the case in Ecuador and Brazil, where the similar needs of all recognized refugees (as advocated by the Cartagena Declaration) are nevertheless acknowledged. Ruma Madal, “Legal and Protection Policy Research Series - Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)” (UNCHR, 01 June 2005) p. 38 <https://www.unhcr.org/protect/PROTECTION/435df0aa2.pdf> accessed 15 August 2018.
In practice, the Brazilian authorities made a restrictive interpretation of the legislation, concluding that, in cases like that of the Haitians, the element of individual persecution would be necessary for a refugee status recognition. Regarding this reason, however, it is important to highlight that Article 1, Paragraph III of Federal Law No. 9.474/97 assures the recognition of refugee status to forcibly displaced migrants fleeing scenarios due to massive and generalized human rights violations, stepping away from the individual analysis of the subjective element of well-founded fear of persecution. In that sense, Jubilut affirms that, since the promulgation of Federal Law No. 9.474/97, “the Brazilian juridical framework adopted the broad definition in order to understand situations of massive and generalized human rights violations as a factor of refugee status recognition.” From this perspective, since the promulgation of the above-mentioned legislation, in cases involving countries where it has been verified that there is an existing situation of massive and generalized human rights violations, the element of well-founded fear of individual persecution would no longer be required to recognize the refugee status.

The humanitarian visa was important to protect a vulnerable group of migrants that needed urgent protection, but, at the same time, the protection offered by this instrument did not match the level of protection granted by a refugee status recognition. By adopting this visa, Brazil linked the protection of the Haitians only to its internal legislation, thereby preserving the State’s authority over the flow in name of the best national interests, yet in detriment of linking their protection to internationally-established legislation, as the recognition of the refugee status would have done. Hence, it is possible to affirm that, although the application of the humanitarian visa to the Haitians in Brazil fulfilled their urgent demands for protection, they should have been recognized as refugees, at least in a later moment, so as to broaden their protection. This way, the solution of adopting this visa to rule the entry and stay of the Haitians in Brazil was a concession act made by the Brazilian State to the Haitians, instead of simply recognizing their right and declaring them refugees, as, based on Paragraph III, Article 1 of Federal Law No. 9.474/97, should have been the case.

The Brazilian experience with the humanitarian visa and the Haitians illustrates that, even in countries where an expanded definition of refugee exists, the recognition of those migrants’ status is not just automatic, depending also on the political will of the State at hand. With the Haitian migration to Brazil, the country missed the opportunity of putting their internal definition of refugee into practice by extending this

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138 Godoy, “Haitians Case” (n104) p. 62.

139 III - Who, because of massive and generalized violations of human rights, is forcibly obliged to leave his national country in order to seek protection in other country”. Article 1, III, Federal Law No. 9.474/97.


141 Ibid, p. 191.
status to the Haitians. Instead, Brazil used an instrument of complementary protection to regulate their stay in the country. Instruments of complementary protection are very important to offer new solutions to protect migrants in need. Nevertheless, a possible refugee status recognition must always be favored, even if only at a later stage of the reception policy. The refugee concept adopted by Brazil after the promulgation of Federal Law No. 9.474/97 represented one step further from the classic definition of refugee, based on the refugee definition granted by the Cartagena Declaration. Notwithstanding, Brazil missed the opportunity to apply this definition in practice, and opted for protecting the Haitians under a humanitarian visa, balancing the regulation of the flow with other national interests.

As a consequence, this experience also illustrates how complementary protection instruments can be used to protect fundamental rights of forcibly migrants while they are still in transit to a host State, as Brazil did, and also to protect the fundamental rights of special groups of migrants that are suffering human rights violations and yet do not fit into the definition of refugee. However, in this situation, Brazil should have later recognized the Haitians as refugees, because this would have offered them a higher level of security and because the country already had the legal framework to do so.

3.2.2. Reasons and Consequences of the Non-Recognition of their Status as Refugees

The Haitians suffered with a situation of massive and generalized human rights violations in their country, and, as pointed earlier, being a victim of a situation of generalized human rights violation is a condition for a refugee status recognition in Brazil. The mere presence of a UN peace force led by Brazil in Haiti since 2004 reinforces the idea that Haiti was already struggling to sustain the fundamental human rights of its citizens even before the earthquake, and this situation dramatically worsened when the country was hit by the disaster of 2010, leaving no question as to the massive and generalized human rights violations situation there. Interestingly, one of the reasons that influenced the Brazilian decision to not recognize the Haitians as refugees may have been, at least unofficially, Brazil’s reluctance to admit a situation of massive and generalized human rights violations in a country where it had been leading a peace mission with relevant military presence since 2004. Therefore, besides aiming to preserve its authority over the flow, Brazil also wanted to avoid recognizing a situation of generalized and massive human rights violations in Haiti. Therefore, the Brazilian Government made a restrictive interpretation of its internal legislation and did not recognized the Haitians as refugees. The human rights violations in Haiti were highly propelled by the earthquake, which was

evidenced by the permanent crime scenario and the disease surges that followed the natural disaster and threatened the Haitians’ human rights, creating a generalized violence situation with violations which the Haitian State had no power to control nor protect its citizens from.

There are also practical differences between a refugee status recognition and the protection of the Haitians under the humanitarian visa. One first is the right of permanence in Brazil without time limitations. The humanitarian visa was initially valid for five years, being renewable at the end of this period, at the Brazilian State’s discretion. Furthermore, this visa, adopted by a discretionary act, could be changed or even later revoked by Brazil’s Government. If the Federal Government changed within this period, through elections, or even though an impeachment, as actually occurred in 2016, the whole policy could be cancelled, exposing its volatility. Another practical difference between the protection granted by a humanitarian visa and that by the recognition of refugee status regards extraditions and expulsions. Owing to the non-refoulement principle, refugees can never be extradited back to their country if still in danger of having their human rights violated there, and refugees cannot be just expelled by their host countries either. Brazil respected the non-refoulement principle when adopted the humanitarian visa policy, but as the creation of the humanitarian visa was a discretionary act purely regulated by the Brazilian State, the possibility of its revocation meant that the Haitians did not enjoy the same level of assurance that the refugee status would have granted them against being sent back to their home country or against being expelled.

In practice, not recognizing the Haitians as refugees limited their protection and their “legal-political treatment” exclusively to a conservative and outdated national legislation, the Foreigners Statute. As a result, the adoption of the policy of issuing humanitarian visas with the Haitians can be praised as to its intention of creating a safe and legal pathway for these migrants to come to Brazil, but, on the other hand, it is possible to criticize the legal normative categorization of the Haitians in the country under the humanitarian visa after their entrance and during their stay, because the ruling was restrictive of rights when in comparison with a refugee status recognition. In this context, the recognition of the refugee status generates an obligation for the State to protect, bonded to an international core of human rights and refugee laws, while the categorization of the Haitians under the humanitarian visa ruling gave Brazil the option of regulating the Haitian migration flow according to the country’s will.

Therefore, to conclude, the creation of the Humanitarian Visa Policy was the Brazilian answer to regulate the Haitian migration flow after not recognizing them as refugees. This was the country’s first experience with this instrument, and this policy would still be further developed. At the time this policy started, its creation and establishment were essential to address the urgent needs that the Haitians had at that moment, but, based

145 With the exceptions brought by Article 1 (f) and Article 33 (2) of the 1951 Geneva Convention. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
146 With the exception brought by Article 32 of the 1951 Geneva Convention.
on Brazil’s own legislation, the Haitians should have been later recognized as refugees. Nevertheless, it cannot be disputed that the sudden arrival of the Haitians in Brazil represented the greatest challenge in the field of migration that the country had ever had to deal with since the consequences of WWII, and that the start of the Humanitarian Visa Policy also helped to accelerate the discussions about the approval of a new National Migration Law.

4.
The Application of the Humanitarian Visa to the Refugees from the Syrian War

This chapter will present the second Brazilian experience applying humanitarian visas, this time with refugees from the Syrian War. Firstly, the chapter will identify the reasons that led Brazil to expand its policy, followed by the description of the application of this visa for the second time. The second subchapter will present a critical analysis of how the humanitarian visa policy with refugees from Syria was harmed by the difficulties that Brazil experienced when attempting to integrate these refugees into Brazilian society. Then, the closing section of the chapter will explain how a change in the Federal Government affected the application of the visa, as well as the whole Brazilian migration policy.

4.1 Reasons for the Establishment of the Visa and its Practical Application

After the experience with the Haitians, Brazil, this time voluntarily, decided to extend its Humanitarian Visa Policy to the refugees from the Syrian war. However, the application of this visa was different from the previous, both in its reasons and in its juridical procedures. In the first section of this chapter, the reasons for the extension of the Brazilian Humanitarian Visa Policy will be explained, followed by the description of the visa’s practical application.

4.1.1 Reasons for the Application of the Visa

According to the UNHCR, there are over six million\textsuperscript{148} Syrians still internally displaced in the country, and more than five and a half million Syrian refugees officially registered in other countries. Most Syrian refugees stay in Syria’s neighboring countries. Turkey is the one that hosts the most, with more than 3.500.000, while Lebanon hosts around one million - approximately one in every four people in the country is a Syrian refugee. Jordan and Iraq, other countries bordering Syria, also currently host a significant number of

Syrian refugees.\textsuperscript{149} Considering EU countries, Germany and Sweden receive the biggest number, with the former hosting around 600,000\textsuperscript{150} and the latter around 100,000.\textsuperscript{151} The current total number of more than eleven million Syrians forcibly displaced accounts for around half of the country’s population before the war began.\textsuperscript{152} Syria is still the country that most produces forcibly displaced migrants in the world, and, having started in 2011, the Syrian War already has been going on for longer than WWII did.

By the end of 2013, after almost three years of conflict, Syria already had nine million people forcibly displaced, among refugees and internally displaced migrants.\textsuperscript{153} At that time, there were at least two million Syrians already officially registered as refugees in other countries.\textsuperscript{154} These figures, alongside Brazil’s aim of gaining more prominence in its international relations, were the main reasons that made the country decide to voluntarily extend the humanitarian visa policy to the refugees from the Syrian War. Within this context, Brazil found an opportunity to expand its experiment with the humanitarian visa, and, at the same time, gain more prominence within the UN. Gaining more evidence in the international scenario had been an aim of the Brazilian Government since the election of Lula, in 2002.\textsuperscript{155} The expansion of the Humanitarian Visa Policy, this time as a voluntary act, after the forced first experience with the Haitians, met this objective. Lula pursued the objective of Brazil becoming a more internationally recognized protagonist during his tenure as president. The country led regional UN Peace Missions,\textsuperscript{156} helped to form the BRICS,\textsuperscript{157} and also managed other movements of International Relations influence, like bringing the FIFA World Cup and the Summer Olympic Games to Brazil.\textsuperscript{158}

The Humanitarian Visa Policy that Brazil developed since 2012 was not initially part of the Brazilian project of more international prominence, even though the country already had military presence in Haiti by the time the earthquake struck. After the earthquake, Brazil did not immediately, or voluntarily, offered a humanitarian legal solution for the Haitian migration issue. The country was forced to create a legal solution for a migration


\textsuperscript{150} Phillip Connor, “Most displaced Syrians are in the Middle East, and about a million are in Europe” (Pew Research Center, 29 January 2018) <http://www.pewresearch.org/fact-tank/2018/01/29/where-displaced-syrians-have-resettled/> accessed 28 November 2018.

\textsuperscript{151} Ibid.


\textsuperscript{154} Ibid.

\textsuperscript{155} Ibid.

\textsuperscript{156} Dilma Rousseff’s predecessor and Political Party leader.

\textsuperscript{157} Such as the Minustah.


\textsuperscript{159} Because of these actions, in addition of other social achievements, made Lula finish his second mandate in 2010 with high levels of popularity, and Dilma Rousseff, from the same political party, was elected to follow his policies.
problem that became urgent after that the Haitians started to feel rejected by traditional
migration destinations and decided to go to Brazil in large scale, as analyzed in chapter
3. Still, the humanitarian visa for the Haitians was only approved after the refusal of their
refugee status applications, and the visa was still created with a limited number of
issuances per year. As the Haitian flow to Brazil only increased over the years, the
country had to adapt the policy to meet the reality. It was different with the refugees from
Syria, firstly because, after the experience with the Haitians, this time Brazil voluntarily
decided to offer this protection to them.

The refugees from Syria were suffering both individual persecution on the grounds
presented in the classic refugee definition, and also living in a situation of generalized
human rights violations as a result of the conditions of a country devastated by a conflict
of that magnitude. Therefore, they had no other option, but to leave their homes and
seek protection elsewhere, even if not individually persecuted. The conflict in Syria did
not only generate consequences to the Syrians, but also to the refugees and other
migrants that were already living in the country before the war had started. 159 As the war
is still ongoing in 2019, it is possible to presume that peace talks were far from successful
in 2013. At that time, the reception conditions of Syria’s neighboring countries, which
were already not ideal, were deteriorating even further. In this context, it was important
that other countries, different than those main traditional places of Syrian shelter, offered
other options of protection. Syrians and other people also living in the country were
suffering violations of their rights not only in Syria, but also while in transit from it. Similar
to the conditions that the Haitians were victims of while going to Brazil, but on a larger
scale, refugees escaping from Syria were also mostly in the hands of smugglers, and
vulnerable to different human rights violations in every route that they choose to take,
especially on the Mediterranean Sea, as widely reported. 160

One last relevant reason for Brazil to have offered help to the Syrian refugees was the
historical bound between former migrants from Syria and Lebanon that had already gone
to the country decades ago. Brazil received a significant number of refugees from Syria
and Lebanon, fleeing persecution from the Ottoman Empire, 161 at the end of the XIX and
beginning of the XX centuries. Syria was not completely independent yet, and both
communities got really close. Until 1939, a number close to 100.000 Syrians and
Lebanese had arrived in Brazil. 162

159 Prior to the beginning of the conflict, Syria used to host a considerable number of refugees itself. UNHCR,
April 2019.
160 James Crisp, "One in 18 Migrants Die Crossing the Mediterranean as Death Rates Soars amid Division
161 Ironically, they became generally known as “Turks” in the country, because their passports were still
issued by the Ottoman Empire.
162 Juliana Gomes Dornelas, "In America, Hope: Syrian and Lebanese and its Descendents in Juiz de Fora,
4.1.2 Practical Application of the Visa

Considering the human rights violations that the refugees escaping Syria were suffering, while also taking into consideration the historical bond between Brazil and migrants from that region and Brazil’s intention to expand its recent Humanitarian Visa Policy to gain more prominence in the international arena, Brazil decided to voluntarily offer shelter to the refugees coming from the Syrian War. As a result, in September of 2013, Normative Resolution No. 17/2013 was enacted, thereby officially establishing humanitarian visas for “all individuals forcibly displaced by the conflict in the Syrian Arab Republic.” In the preamble of the document, the Federal Government listed the official reasons for the establishment of the visa, that was mainly aimed to create a legal pathway for the refugees from the Syrian War to safely arrive, and then, once they were in Brazilian territory, they should apply for the refugee status recognition, on the grounds of the generalized human rights violations situation that had been established in the country after the war began. This time, the humanitarian visa was adapted from a regular tourism visa, and issued through the Brazilian embassies and consulates in capital cities of countries that were both close to Syria and hosting a good number of refugees.

Because of the critical situation in the Middle Eastern country, the Brazilian Government tried to facilitate the procedure for the visa to be issued, applying a prima facie recognition of the refugees that were living in Syria prior to the beginning of the conflict, and issuing the visa very quickly. The applicants just had to present a valid passport or residence document, or for those who did not have such documents, a laissez-passer could be issued especially for them to be able to travel to Brazil. After the migrants’ arrival, they were all oriented to apply for the refugee status recognition, via a special “fast track” procedure. Since the establishment of Normative Resolution No. 17, the

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164 This time, the resolution was created by CONARE, rather than by CNIG, because there was already an internal consensus that the migrants escaping the Syrian war would be recognized as refugees after their arrival in Brazil.
165 “Considering the historical laces that unites Syria and Brazil, where a significant number of Syrian descendants already live; considering the humanitarian crisis of big proportion resulting from the conflict in the country; considering the high number of refugees resulting from this conflict since its beginning; considering the difficulties that these individuals are facing while in search of a host state; considering the exceptionality of the circumstances present in Syria and the necessity of humanitarian help, in order to facilitate the travel to Brazil from those individuals escaping from that conflict and offer them access to refuge procedures, this Resolution authorizes the concession of a special visa, on humanitarian grounds, for those individuals forcibly displaced in result of the conflict in Syria.” Preamble and Art. I, Syrian Visa Normative (n163).
167 Such as Cairo, Amman, Istanbul, Bagdad and Beirut. The visa was not given inside Syrian territory because all official Brazilian representations in the country were deactivated in 2012, due to security concerns. Ibid.
168 Ibid.
169 Gilberto M. A. Rodrigues José Blanes Sala and Debora Corrêa de Siqueira, “Syrian Refugees in Brazil: Politicies of Protection and Integration” 309-324 in Rosana Baeninger (org.) South-South Migration (Unicamp, 2018) p. 321 <http://nempsic.paginas.ufsc.br/files/2015/02/LIVRO-MIGRA%C3%87%C3%95ES-
refugee status applications by the refugees that came from Syria had a 100% rate of acceptance,170 through a system that replaced the analysis of the element of individual persecution of each migrant’s case for the objective analysis of the factual situation of generalized human rights violations in Syria.

As mentioned, the procedure for the Syrians after their arrival in Brazil was for them to apply for the refugee status recognition. Therefore, immediately after the Syrians arrived, the Federal police would orientate the individual on the technical procedures to be taken after that point, and on the documents needed to present for the application. After the application, the migrant got a national identity number linked to his refugee status application. This application then went to CONARE, which would later interview the applicant and finish the process. As it can be observed, the main objective of the visa applied to the Syrians was to safely regulate their entrance in Brazil, and then, after the application and recognition of their refugee status, their stay would be regulated by all relevant national and international legislation regarding the protection of refugee rights, which assured them a higher level of protection than the Haitians had enjoyed.

Applying the humanitarian visa for the second time, Brazil tried to show that, after the first experience with this policy, the country was now in fact taking into consideration the objective situation of massive and generalized human rights violations in Syria as a criterion of refugee status recognition. By doing this, the Brazilian State took one step further in its policy, recognizing for the first time in fact and in practice the possibility of refugee status recognition on the grounds brought by article 1 paragraph III of Federal Law No. 9.474/97. The Brazilian Ministry of Justice corroborated this idea, affirming that the criteria of granting this special visa to the Syrians was the protection on humanitarian grounds by taking into consideration the factual situation of the conflict zone,171 with this Brazilian initiative also being praised by the UNHCR172 and specifically by Andrés Ramirez.173 The decision that created the humanitarian visas for the refugees from Syria was followed by CONARE’s Resolution No. 18174 in 2014, aimed at accelerating the

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172 The UN body stated that “the search of a solution for the people affected by the conflict in Syria required flexible and immediate answers, and that is why the UNHCR congratulates the Brazilian government for issuing Normative Resolution No. 17, given that this is a humanitarian and generous gesture that should be made an example.” UNHCR, “Syrians will have Humanitarian Visa in Brazil” (UNHCR, 24 September 2013) <https://www.acnur.org/portugues/2013/09/24/sirios-terao-visto-humanitario-para-entrar-no-brasil/> accessed 15 November 2018 (hereafter UNHCR, “Humanitarian Visa”).
173 UNHCR’s Representative in South America at the time. Ramirez added that “this Brazilian action sends an important humanitarian message to the whole international community. Brazil has established an open doors policy in the country for refugees coming from Syria. Despite the difficulty of travel because of Brazil’s geographic localization, it is a great example to be followed.” UNHCR, “Humanitarian Visa” (n. 172).
technical procedures for refugee requests. It was also later followed by Normative Resolution No. 20,\textsuperscript{175} which renewed the humanitarian visa for another two years.

Still in 2014, Brazil hosted the international conference that generated the Brazilian Declaration,\textsuperscript{176} aimed to expand the region’s policies of protection against human rights violations and to continue to find new solutions to protect refugees and forcibly displaced migrants,\textsuperscript{177} besides strengthening the already existent national and regional policies of local integration, resettlement and labor mobility.\textsuperscript{178} By January of 2015, Brazil had hosted and recognized as refugees around of 2.500 people escaping the Syrian conflict, thus becoming the second country that received most refugees from that country in the whole American continent.\textsuperscript{179} In 2015, the Brazilian Government also signed a cooperation agreement with the UNHCR to make the procedures for issuing humanitarian visas in the Brazilian representations in the Middle East even more effective.\textsuperscript{180} By the end of 2016, 3.772 Syrian refugees had applied for refugee status in Brazil.\textsuperscript{181}

In comparison to the Haitians, the Syrians received a different level of protection. Betts affirms that, when forcibly displaced migrants are not included in a definition of refugee, their level of protection is lower than in comparison with recognized refugees, because International States tend to apply special discretionary acts to regulate these flows according to their best interests and based on their sovereignty.\textsuperscript{182} These acts link the protection of these migrants to national legislation and make their protection more vulnerable to internal political decisions than would be if protected by an international normative security. Therefore, analyzing the application of the humanitarian visa with Haitians and Syrians, it is possible to understand that this instrument worked, both for Haitians and for Syrians, as a safe legal pathway into the Brazilian territory. The difference was that, after the Haitians arrived, Brazil did not recognize them as refugees, even though there was an internal legislation allowing it, while the country did grant refugee status to 100% of the applicants escaping from the Syrian War.


\textsuperscript{177} Ibid.

\textsuperscript{178} Ibid.


\textsuperscript{180} Rodrigues, Sala and Siqueira ”Syrian Refugees in Brazil” (n169), p. 314-315.

\textsuperscript{181} Andreia Verdelio, ”Number of Acknowledged refugees in Brazil grew 12% in 2016” (EBC, 20 June 2017) <http://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2017-06/numero-de-refugiados-reconhecidos-sobre-12-no-brasil-em-2016> accessed 15 February 2019 (hereafter Verdelio, ”Number of Refugees”).

4.2 The Integration Process of the Refugees from the Syrian War in Brazil and the Change in the Brazilian Federal Government

The migrants escaping from the Syrian War were recognized as refugees after their arrival in Brazil, but, as the Haitians, they also faced integration problems. In this section of the chapter, it will be analyzed how these issues influenced the outcome of the humanitarian visa application to the refugees from the Syrian conflict. During the evolution of this humanitarian visa's application, Brazil suffered a forced change on the Federal Government. Therefore, to conclude, this section of the chapter will also analyze how this change affected the visa's application, as well as the whole Brazilian migration policy.

4.2.1 Difficulties with the Integration Process

Although the migrants that came from Syria were recognized as refugees, they suffered one same problem that the Haitians did after arriving in Brazil: difficulties with integration. Notwithstanding, the new refugees were still coming from a very distant country, both geographically and culturally.

Crisp defines the ideal refugees’ integration process within three aspects: legal, economic and social. Briefly, from the legal point of view, refugees, after their status recognition, are entitled to several reception rights and prerogatives in the host State, as defined by the 1951 Refugee Convention. The second aspect addressed by the author is economic. The local labor market must be stimulated to hire them, so that they can regain their former professional condition and survive by their own work in the new country. The majority of the Syrian refugees who arrived in Brazil, with the appropriate age, had college level education, thanks to Syria’s former strong education system. It is the host State’s duty to create mechanisms to recognize the refugees’ academic and professional level, and provide them with opportunities to work and establish themselves on the local economy. Finally, there is the third aspect; social. The host State must assure means of protection against any kind of social or structural prejudice or exploitation that may happen. The refugees are already in a different country, usually without speaking the language and in a very vulnerable condition, so they must be extra protected. It is also the duty of the local government to provide language lessons and other inclusion actions so that the refugees arriving can better adapt into their new life.

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185 Calegari “Syrian Refugees in SP” (n170), p. 329.

186 Such as from working on slavery conditions, for example, as have happened. Fabiola Ortiz, “NGO Adverts, Syrians in Brazil may be Targeted by Work Exploitation Networks” (BBC News, 29 September 2015 <https://www.bbc.com/portuguese/noticias/2015/09/150929_sirios_exploracao_trabalho_focca> accessed 12 September 2018.
And refugees coming from Syria faced immense impediments, especially with communication. Overall, Brazilians generally only speak Portuguese, being English the second language most spoken. Syrians, on the other hand, are usually fluent in Arabic and most are also fluent in French. Yet, the very few official initiatives to teach Portuguese to the refugees were far from effective. Only 29% of the Syrian refugees in Brazil, even after having some language classes, considered their communication in Portuguese to be at least reasonable, with 63% of the whole group not having received any kind of study of the Portuguese language. Another practical difficulty that the refugees from the Syrian War faced in Brazil concerned their education. More than half of the refugees with at least eighteen years of age had college level studies, and would have been important for their integration to keep studying regularly after their arrival. However, the difficulties with the language and the lack of specialized support from the Brazilian State imposed further hardships for them when having their diplomas recognized, which complicated their possibilities of being hired for jobs suitable to their professional qualification. On the second semester of 2015, only 7% of the Syrians that had attempted to validate their diplomas had succeeded, with another 7% still in the process of validation. 14% of them had tried but were unsuccessful, and 62% of all refugees had no information as to how to do it and could not find assistance.

For this reason, the Syrian refugees in Brazil, including lawyers, doctors and engineers, had very restricted professional options, with the majority of them making and selling Arabic food informally on the streets, or working at Arabic themed restaurants.

Commenting on the issue of integration, Calegari and Justino attest that "the refugees that came from Syria are not free from the regular difficulties that migrants usually face, such as prejudice, language barriers and unemployment, because their protection in Brazil is only focused on legal matters, while the integration policy is being neglected, with the very few initiatives in that sense being inefficient." The government does assure them immediate access to free public services of health and education, but other than that, the practical help offered was just insufficient. In addition, since the second semester of 2014, refugees and other migrants living in Brazil started to feel the same effects as the Brazilians living in the country did: the first impacts of an economic recession. As a result, in that period, they also had to deal with increasing rates of

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187 71% of the whole group did not speak Portuguese. Calegari "Syrian Refugees in SP" (n170), p. 332.
188 Ibid.
189 Ibid, p. 332.
190 Ibid, p. 331.
191 Ibid.
193 Although Syrian refugees can access the Bolsa-Família Program, Brazil’s federal income transfer program, they needed to seek this right by themselves. Preliminary research conducted with Syrian refugees in São Paulo points that they are in need of wider assistance with work, language, housing and with the recognition of professional qualifications.
unemployment\textsuperscript{195} and urban violence.\textsuperscript{196} Therefore, after that the refugees arrived and obtained their basic documents, the government basically left them to their own devices. They mainly counted on the help of a minority from the civil society\textsuperscript{197} to integrate and help them to survive. All of this in a developing country that was totally different culturally from their own, with a very small Muslim community, high crime rates and a lack of experience hosting significant numbers of refugees, not to mention that Brazil was itself stepping into an economic crisis.

From 2015 to 2016, taking into consideration the integration difficulties that the migrants were facing to adapt in Brazil, the number of refugee status applications decreased 64\%.\textsuperscript{198} Some of the refugees that were already living in Brazil also opted to leave the country and seek protection on other countries in the region, where they would, at least, have some financial support from the government in the form of a monthly allowance and free housing.\textsuperscript{199} By these observations, it can be concluded that the Brazilian Government had failed to provide both the Syrian and the Haitians with proper integration after their arrival in the country. Whether officially recognized as refugees or not, all these migrants were living outside their countries, in extremely vulnerable conditions and without speaking the local language. It is important to point out once again that the integration of these migrants is a fundamental part of the shelter offered by any State. Therefore, although it can be concluded that Brazil had upgraded its legal procedures through the application of the humanitarian visa for the second time, with the migrants forcibly displaced by the conflict in Syria having been recognized as refugees, it is also clear that very few advances were made regarding their integration process, and that this fact contributed to hinder the humanitarian visa policy with them from being more successful.

\textbf{4.2.2 The Change in the Brazilian Federal Government}

In spite of these limitations and the deepening economic crisis, at the end of 2015, the Federal Government showed a firm intention to continue improving its internal reception conditions, with Dilma Rousseff starting a federal project that would initially invest around

\textsuperscript{195} Helder Ferreira and Elaine Marcial, "Violence and Public Security in 2023: Exploratory Scenarios and Prospective Planning" (IPEA, 2015) \url{http://repositorio.ipea.gov.br/bitstream/11058/5680/1/Viol%C3%A1ncia%20e%20seguran%C3%A7a%20em%202023_cen%C3%A1rios%20explorat%C3%B3rios%20e%20planejamento%20prospectivo.pdf} accessed 10 December 2018.

\textsuperscript{196} A statistic that exemplifies the level of urban violence in Brazil is that, between 2011 and 2015, more people were murdered in Brazil than in Syria, even with Syria experiencing the war. In that period, Brazil had a total of 278,839 people killed in the country, while, through the same time, Syria had a total of 256,124 murderers. O Dia, "Violent crimes kill more people in Brazil than the war in Syria" (O DIA, 28 October 2016) \url{https://odia.ig.com.br/_conteudo/brasil/2016-10-28/assassinatos-no-brasil-deixam-mais-mortos-que-guerra-na-siria.html} accessed 20 December 2018.

\textsuperscript{197} Calegari and Justino "Refugees: Right to Integration" (n192) p. 6.

\textsuperscript{198} Verdelio, "Number of refugees" (n181).

\textsuperscript{199} Some of the refugees that decided to leave Brazil even went to French Guiana, a poorer country, but that offered better reception conditions. Patricia Campos Melo, "With Crisis, Syrian Refugees are Leaving Brazil and Going to French Guiana" (Folha de São Paulo, 13 June 2016) \url{https://www1.folha.uol.com.br/culturapatriciacamposmello/2016/06/1777708-com-crise-sirios-trocam-brasil-pela-guiana-francesa.shtml} accessed 18 February 2019.
U$ 5 million to that end. Along with that, the Brazilian Government was in discussions with the UNHCR and the European Union to start a resettlement agreement with refugees that had fled the Syrian conflict and gone to Europe. In March of 2016, Brazil started to negotiate this agreement, more specifically with Germany, aiming at the transfer of Syrian refugee families that were staying in the country and willing to voluntarily move. The proposal of this agreement, which was to start in the second semester of 2016, predicted that Brazil would receive around 100.000 refugees over the first five years. While the intention of the agreement was good, the timing was not. In June of that year, Ms. Rousseff was ousted from the Brazilian Presidency, with Former Vice-President Michel Temer replacing her and cancelling the negotiations.

Dilma Rousseff’s second mandate was supposed to run until the end of 2018. However, in the middle of 2016, she was accused of having committed administrative crimes, and impeachment proceedings were brought forward by her opposition in Congress. Ms. Rousseff, just like Lula before her, was member of a center-leftist party that had been running the country successively since 2002. The country had experienced a great period of growth between 2005 and 2014, but since the end of that year, things had started to fall apart economically, and Ms. Rousseff was eventually impeached in 2016, with her vice-president, Michel Temer, succeeding her. Michel Temer was a member of a right-wing conservative party. Inevitably, the forced change of power in Brazil affected the directions that the government had been taking regarding international relations, and more specifically, migration. Temer had a different view about Brazil’s priorities and cancelled both the investment of U$ 5 million that Ms. Rousseff would make in the internal reception conditions of the country and the agreement that Brazil was working on with the UNHCR and the EU. He later also replaced the Minister of Justice, the Minister of International Affairs, the Minister of Labor and both the presidents of CONARE and CNIG.


Ironically, Michel Temer is descendent of a Syrian-Lebanese family, from the first generation of those migrants that came to the country in the end of the XIX century. Chico Marés, “Temer, the First Syrian-Lebanese descendent to become president in Brazil” (Gazeta do Povo, 02 May 2015) 

However, although still causing controversy, the general acceptance of the Brazilian population is that the impeachment was actually a forced coup d’etat. See: Ivana Jinkings, Kim Doria and Murilo Cleto (org.) “Why do we shout coup?” (1st edn, Boitempo 2016); Marcelo Braz, "The Coup on the Democratic Illusion and the Rise of Reactionary Conservatism", (Serviço Social e Sociedade, 2017) 85-103; and Glenn Greenwald, "Major new Brazil Events Expose the Fraud of Dilma’s Impeachment - and Temer’s Corruption" (The Intercept, 30 June 2016)
How the change in Brazil’s Government led to a change in the country’s migration policy is a perfect example of how insecure and volatile a migration policy can be when based on discretionary acts by the State. In this kind of policy, the federal government remains in maximum control over the migration flows, regulating it according to the best national interests. In Brazil’s case, the new government decided to maintain the Humanitarian Visa Policy at first, yet immediately suspended all the possibilities and projects that could expand it. However, it could have opted for revoking the policy entirely, thus affecting the Haitians much more than the refugees that escaped the Syrian conflict, because the latter group had been officially recognized as refugees, and, as such, had a much higher and much more secure level of protection. The sudden change in Brazil’s migration policy naturally disappointed the whole migration community in the country. Camila Asano, former director of Conectas, summarized the sentiment of the migration supporters by declaring that, despite the economic crisis which was the official reason alleged by the Federal Government to cut the investments in migration, the country still had a slim margin to actually expand its Humanitarian Visa Policy, arguing that the migrants could even help the country’s economy to grow again. The complaints did not work, but the direct attack from the new Federal Government mobilized the migration community in Brazil to concentrate on what, at that point, remained as its main objective: the approval of a new Federal Migration Law to replace the Foreigners Statute.

In spite of the change in the Federal Government, Brazil had recognized, until the end of 2017, a cumulated number of 10.145 refugees in the country. From this total, the Syrians represented 35%, being the biggest parcel. However, in 2017, only 832 new refugee requests were made, with only 310 of those with its recognition process finished. This sum exemplifies both the decrease in Syrian refugees seeking protection in Brazil and the limitations that the Brazilian State had while processing the refugee applications. The instability in internal politics, the lack of financial resources and the shortage of practical experience in hosting refugees, as had already happened with the Haitians, were all factors that contributed to the scarce overall support that the Brazilian Government offered to the Syrian refugees after their arrival. As evidenced by the decreasing number of refugee status applications in the following years, this difficulty to better integrate the refugees from Syria restricted the potential of the humanitarian visa experience with them.

In summary, the second Brazilian experience with humanitarian visas started in 2013 and was applied for those affected by the war in Syria. The Brazilian State voluntarily decided to offer the visa as an option for the Syrians safely and legally come to Brazil and then apply for refugee status recognition, which, in turn, granted the Syrians a higher level of protection than had been offered to the Haitians. In this second experience

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206 One of the biggest NGOs that helps to integrate refugees in the country.
applying the humanitarian visa, Brazil improved its legal proceedings towards refugee recognition, but still failed to provide better conditions for the refugees’ integration into the Brazilian society. The Federal Government’s original plan for the Syrians was to expand the Humanitarian Visa Policy and keep gaining more experience in the field by receiving more refugees through other means, such as the resettlement agreement with the European Union. However, the sudden change in the presidency suspended these plans, because the new president had a completely different view on migration. In spite of that, and the delay that Ms. Rousseff’s impeachment caused, the whole Humanitarian Visa Policy in Brazil, which started with the Haitians and was expanded with the refugees from the war in Syria, would still propel the country towards approving a new Migration Law.

5. The New Brazilian Migration Law and the Venezuelan Migration Flow to Brazil

This chapter will first present the new Brazilian Migration Law, which was approved in the context of the establishment and consolidation of the Humanitarian Visa Policy in the country. The new law replaced the former Foreigners Statute, and officially incorporated the humanitarian visa into the Brazilian legal framework. The second part will present the Venezuelan migration flow to Brazil, which currently represents the most significant challenge for the Brazilian migration authorities. The Venezuelan flow started months before the approval of the new Migration Law. Therefore, Brazil initially also issued a special humanitarian visa to regulate it. The Venezuelan flow is mixed, which caused the necessity of Brazil having to present different solutions for the different needs of the Venezuelan migration groups. Then, the conclusion of the chapter will explain how, after Brazil’s previous experiences, the country was able to offer a more structured protection for the Venezuelans, including the aspect of their integration.

5.1 The Approval of the New Migration Law and the Officialization of the Humanitarian Visa

For many years, all migration issues in Brazil were regulated by a legislation created by a military dictatorship, oriented to protect national interests over human rights. This fact started to change with the approval of Federal Law No. 9.474/97, and the emergence of Brazil’s Humanitarian Visa Policy helped to change this scenario even more, with the approval of a new Federal Migration Law in 2017. In this section of the chapter, it will be described how this new law was approved, its differences from the previous legislation and how it officially incorporated the humanitarian visa to Brazil’s formal juridical framework.
5.1.1 The Approval of the New Migration Law

The Foreigners Statue was still the official legislation regulating migration in Brazil in 2017. Then, in May, propelled by the Humanitarian Visa Policy and other political movements, a new Federal Migration Law was finally approved to replace the former legislation. Unlike the old legislation, the new law\(^{209}\) has its principles orientated from a human rights perspective, having also been designed to deal with the contemporary forced migration flows. Michel Temer, though holding a conservative view on migration issues, was being pressured for some months by the Senate and the Congress to approve this new law.\(^{210}\) In May, he finally approved it, but only after vetoes\(^{211}\) on eighteen of the original articles proposed.\(^{212}\)

The new Brazilian Migration Law, in its preamble, shares its official objective.\(^{213}\) This legislation was built based on a conjunction of international human rights norms, and, for this reason, it privileges its protection, being legally orientated by guiding principles such as the assurance and protection of every migrant’s human rights without any kind of discrimination to his or her migration status; the establishment of de-bureaucratized, fast and effective procedures of regularization of the legal status of every migrant living and coming to the country as an obligation of the State; non-criminalization of any kind of migration, including the impossibility of jailing any individual due to his migration status; and the judicial control that grants every migrant access to effective legal remedies for every legal decision that may have hindered his rights in the country.\(^{214}\) In spite of the presidential vetoes,\(^{215}\) the approval of the new legislation was praised by the migration supporters’ community, because it still represented a massive improvement in comparison to the previous statute. “The most important point is that the ideology that orientates the legislation has changed; now it has a humanitarian view, that is aimed to rights’ protection”,\(^{216}\) defined Bolzan de Morais.\(^{217}\)


\(^{210}\) At that point, Temer was not so politically strong to resist this pressure anymore, because he was already being investigated himself by corruption. In 2019, after his tenure as President, Temer was eventually arrested.


\(^{212}\) Vedovato and Spalonzi, Vetoes on the New Migration Law (n211) p.607.


\(^{214}\) All provisions from the Article 3 of The New Migration Law (n209).

\(^{215}\) Vedovato and Spalonzi, Vetoes on the New Migration Law (n211) p.607.

\(^{216}\) A Refugee Law Specialist and member of the special commission that worked with the Ministry of Justice on the creation of the law.
The new law already shows its human rights’ orientation through the nomenclature used in its text, recurring to the terms “migrant” or “visitor”. In contrast, the former Brazilian legislation, known precisely by the name of Foreigners Statute, rightly expressed, from the very beginning, also through its choice of word, its idea of national interests’ protection and national sovereignty preservation. Furthermore, the new Migration Law aimed to make the migrants’ rights as equal as possible to those of the nationals’, regardless of their legal condition in the country, having a principle of non-discrimination on different entrance procedures that the immigrants take to enter Brazil. Accordingly, after the new law’s approval, all immigrants living in the country are also now entitled to own private property, have equal access to the labor market and to public education, health and welfare systems, among other rights. The Migration Law also contains principles of non-discrimination, combating all kinds of homophobia, racism and xenophobia; non-criminalization of migration; respect to non-refoulement; family reunion and prohibition of collective expulsions. In addition, the new Migration Law introduces the recognition and protection of stateless people for the first time in the history of the country’s legal system. Regarding refugees’ rights, the new law defined that all provisions in Federal Law No. 9.474/97 must be respected and followed, reinforcing and validating this law even more.

5.1.2 The Humanitarian Visa Officially Incorporated into the Brazilian Legal Framework

Among other further improvements and advances, the new Migration Law, in its article 14, also officially internalized the humanitarian visa into the Brazilian legal framework. Article 14, c, III, 3º, defines that “visas for humanitarian shelter will apply to stateless people or to nationals of any other country in a situation of severe institutional instability, armed conflict, natural disaster, involved in massive and generalized human rights violations, or other hypotheses.” Consequently, the new Migration Law also increased the humanitarian visa’s scope. Before the promulgation of this law, humanitarian visas were special instruments created to regulate particular migration flows of specific nationalities. After the approval, the legal instrument became an official temporary visa, to be given on humanitarian grounds with wider range, and able of being requested by individuals of any nationality - and also by stateless people.

218 The former legislation only referred to such individuals as “foreigners”, from the Portuguese word *estrangeiro*, which in turn derives from the French term *étranger*. The origin of this term comes from the concept of stranger, and the existence of this outsider in a different state initially breaks the logic of rights acquisition that comes from the relation between nation and nationality. Therefore, the mere presence of this stranger already confronts in some degree the state’s sovereignty, as per Giorgio Agamben in “Homo Sacer: Sovereign Power and Bare Life” (2nd edn, UFMG ED, 2007).


220 Provisions from the Article 4 of the New Migration Law (n209).

221 Among others. Article 3, the New Migration Law (n209).

222 Article 1, § 1º, VI, the New Migration Law (n209).

223 Article 121, the New Migration Law (n209).

224 Article 14, the New Migration Law (n209).

225 Ibid.
The new Migration Law came into effect six months after its approval, when its regulatory decree was promulgated.226 The decree regulated the new Migration Law’s provisions, explaining the law’s practical procedures. Regarding the humanitarian visa’s issuing policy, the decree included the creation of a special committee with members from the Federal Ministries of Justice, Foreign Affairs and Labor to examine and decide on every visa request case.227 This committee was to be responsible for analyzing the migrant’s individual condition and the objective situation of his country of origin, while having the duty of making reports to the Ministers and to the President. After analyzing each case, if the committee determines that the migrant is entitled to a refugee status, the case is sent to CONARE for further appreciation. Otherwise, the case will be sent to CNIG.

Hence, after the approval of the new Brazilian Migration Law, the Brazilian legal framework to protect refugees and migrants was reorganized. If the applicant applies for a refugee status recognition, his case will be assessed by CONARE. If CONARE considers his situation as meeting the criteria defined by Federal Law No. 9.474/97, the applicant will have his request accepted. If CONARE determines that the case does not meet the refugee status recognition criteria, but that the applicant still needs humanitarian shelter, based on Article 14, c, III, of the new law, CONARE will make this recommendation when sending the case to CNIG, which will finish the applicant’s process. If the applicant decides to apply directly for the temporary humanitarian visa offered by Brazil’s new legislation, the case will be assessed by the special committee first, and then sent to the competent body, CONARE or CNIG, to finalize the analysis. Articles 10228 and 11229 of the new Migration Law provide for the instances in which visas will not be granted. This will basically happen if the applicant does not meet the requisites needed for the concession of the visa, or if the applicant meets one of the criteria established in article 45230 of the law, which sets the requisites that represent impeditive reasons for the entrance of any individual into Brazilian territory.

Regarding the integration of the new migrants into Brazilian society, the new law tried to improve the conditions offered by the country in comparison with the country’s practice with Haitians and Syrians. It established equality for the rights of migrants and Brazilians regarding access to every public policy of social rights made by the Brazilian State, assuring to the migrants a better social and labor inclusion.231 After the new law, the migrants also had the same rights as nationals regarding access to public schools,
universities and the public health system, and were even officially included into public financial distribution programs, such as the “Bolsa Família”. At the same time, the approval of the new Migration Law also incentivized the Federal Government to invest in better mechanisms to validate international diplomas and to increase the offering of free Portuguese classes to the new migrants coming to live permanently or temporarily in Brazil, making associations with public and private schools, universities and NGOs. Silvana Borges, talking about the new Migration Law and remembering the origin of the humanitarian visa in Brazil, affirmed that “the Brazilian State now has an official instrument to quickly respond to crisis situations that need urgent action. This policy started as a makeshift measure with the Haitians, and is now institutionalized, having become the perfect instrument to deal with cases of this kind of migration.”

Therefore, the new Brazilian Migration Law was approved in May 2017, and came into effect six months later, alongside its regulatory decree. The new law came in replacement of the Foreigners Statute, and, although approved with some vetoes, still represented a massive improvement in comparison with the former legislation. The new law has a human rights-based approach, which can be perceived by the nomenclature that its text uses to refer to individuals coming to Brazil and also by the principles that orient the new law’s structure and objectives, breaking away from the national security orientation of the Foreigners Statute. Among other advances, the new Migration Law also institutionalized the humanitarian visa that the Brazilian State had been applying since 2012.

5.2 The Venezuelan Migration Flow to Brazil

The Venezuelan migration flow to Brazil started in consequence of a deep political and economic crisis in Venezuela. Brazil shares borders with Venezuela, and this fact contributed even more to form a deeper mixed condition on this flow than was present on the previous movements described. For this reason, Brazil had to present different solutions to rightly protect the Venezuelans’ rights and regulate the flow. Therefore, in this section of the chapter, it will be analyzed the context of the Venezuelan exodus, followed by an analysis of the response of the Brazilian authorities to this new migration flow.

5.2.1 The Context of the Venezuelan Migration Flow

Venezuela, a country in the north of South America, with a population of more than thirty million people, is suffering with a deep political and economic crisis, which has led to the

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232 Initially aimed to help Brazilian families in poverty condition. Some other refugee families were already part of the program, but they had to seek this right through individual judicial actions.


234 Former Director of the Migration Department of the Federal Ministry of Justice.

radicalization of its nationals and violent conflicts between government supporters and opposition groups. The economic and political crisis in Venezuela started when Hugo Chávez,236 its former president and recent ideological leader, died in 2013. Nicolás Maduro, the next leader of the party, became president in 2014, the year when things started to go awry for the country.

Venezuela has the largest oil reserves in the world,237 which has been the country’s blessing and curse throughout its history.238 One major problem for the country was that the global price of oil only decreased in the last decade. In 2008, the peak of the Chávez Government, the price of the oil barrel was around U$ 120.00. Since 2014, the first year with Maduro as president, the price per barrel only decreased, having reached a very low point in 2016239, when the crisis in Venezuela started to intensify. This oscillation had a disastrous impact on the country’s economy, which lost its import and export capacity, becoming unable to sustain the last government’s social achievements.240 Because of the country’s dependence on the oil industry, Venezuela does not produce much items of basic need within its territory, thus depending on imports from neighboring countries like Brazil. As the economic crisis in the country increased, fundamental items like medicines, food and hygiene products started to disappear. With the economy’s hyperinflation241 and the lack of basic products, the population’s dissatisfaction kept growing, and conflicts between government supporters and opposition groups started, with heavy and violent repression. The opposition leaders started to be jailed or exiled,242 some media vehicles were closed243 and some opposition activists started to be persecuted, jailed, beaten or murdered by paramilitary groups unofficially linked to the government.244 The opposition forces also committed serious crimes, including

236 Chávez, very popular in his time as the country’s leader, had run a leftist and nationalist government that saw him stay fourteen years as Venezuela’s President.
238 Because of the abundance of oil in the territory, Venezuela has always suffered with foreign interests that generated instability inside the country. Being the country with the biggest oil reserves in the world also led Venezuela’s economy not to be diversified, and, in 2015, Venezuela’s oil dependency reached the level of 96% of Venezuela’s exports, with over 60% of the government revenues relying on the oil industry. Xian-Zhong Mu and Guang-Wen Hu, “Analysis of Venezuela’s Oil-Oriented Economy” (Petroleum Science, 2018) <https://link.springer.com/article/10.1007/s12182-018-0215-4> accessed 25 November 2018.
assassinations, and this internal war took the general condition of living to unsustainable levels in most parts of the country. In this context, most of Venezuelans had no other option, but to leave their homes and seek their basic rights protection in other countries.

As a consequence of its economic and political crisis, Venezuela started to deal with a massive migration exodus. Venezuelans started to leave their country because of the crisis in 2015, and, since the beginning of that year, more than three million have already left.\textsuperscript{245} Out of this number, around 2.4 million stayed in Venezuela's bordering countries in South and Central America,\textsuperscript{246} like Colombia, Peru and Brazil. Colombia, because of its geographical position and its historical relation with Venezuela,\textsuperscript{247} is the country hosting the highest number of Venezuelans,\textsuperscript{248} followed by Peru.\textsuperscript{249} At the end of 2018, the UN and the IOM predicted that another two million Venezuelans will leave the country by the end of 2019, totaling more than five million people outside Venezuela.\textsuperscript{250} Eduardo Stein, the especial UN representative covering the Venezuelan crisis, stated that “this Venezuelan exodus is an unprecedent movement, causing the biggest displacement of people in the region’s history.”\textsuperscript{251} The Venezuelan exodus started in 2015, and has been growing every year since. By Stein’s definition, the Venezuelan migration crisis represents “a humanitarian earthquake.”\textsuperscript{252}

5.2.2 The Solutions Adopted by Brazil to Regulate the Venezuelan Migration Flow

Venezuelans started to come to Brazil to seek protection mostly in 2016, and the flow has expanded exponentially since. The new Migration Law had not yet been approved at that point, and the Venezuelans’ situation had to be regulated, so the Brazilian Government decided to extend the humanitarian visa policy as a specific measure for the third and last time. In February of 2017, three months before the approval of the new Migration Law, Normative Resolution No.126/17\textsuperscript{253} was promulgated, with the objective of regulating the flow and offering humanitarian shelter to the ones in need.\textsuperscript{254} This


\textsuperscript{246} Ibid.

\textsuperscript{247} Because of the FARC Guerrillas in Colombia, for decades Venezuela was the country that most hosted Colombian refugees. Now, with the Venezuelan crisis, a significant number of these families are also going the other way around.

\textsuperscript{248} Today, the Colombians already host one million. UNHCR, “Number of refugees” (n245).

\textsuperscript{249} Ibid.

\textsuperscript{250} Colombia will be the most affected country by this exodus, being expected to host more than two million Venezuelans alone until the end of 2019. AFP, “UN predicts 5.3 million Venezuelans in 2019” (Exame Magazine, 14 December 2018) <https://exame.abril.com.br/mundo/ou-preve-53-milhoes-de-refugiados-em-venezuela-em-2019/> accessed 15 January 2019.


\textsuperscript{252} Ibid.


\textsuperscript{254} Although the visa was clearly intended to regulate the Venezuelan flow, as the resolution’s preamble establishes when states that the visa was created on consideration to the “migration flow on the north region”,
resolution was again issued by CNIG, because its idea was to complement the protection offered by the recognition of the refugee status of the Venezuelans entitled to it, that would be made directly by CONARE.

The migration flow coming from Venezuela was mixed, encompassing classic refugees escaping political persecution, refugees escaping a situation of generalized human rights violations, economic migrants in need of money or basic survival items, and even native indigenous people. All these groups had different needs of protection, and the Brazilian Government had to find a way to address them all. A significant number of the migrants arriving in Brazil lived close to the border between the two countries, so, the ones that wanted to remain close to home and needed a temporary protection, or would eventually not fit into a refugee definition, then applied for humanitarian visas. At the same time, there were those who wanted permanent protection, and were entitled to a refugee status recognition for the reasons mentioned earlier. Therefore, the Brazilian Government had to offer the adequate protection for them too. So, these migrants were oriented to apply for the refugee status recognition, that offers a higher and more permanent level of protection. Because of the mixed condition of the flow, the Brazilian Government had to present different possibilities of protection, either permanent or temporary, recognizing the refugee status of the Venezuelans entitled to it, by individual well-founded fear of persecution or by the situation of generalized human rights violations in most part of Venezuela, while also offering to the others the option of complementary humanitarian protection in the form of the humanitarian visa. As a result, since 2015, over 90,000 Venezuelans have entered in Brazil; out of this number, at least 65,000 have applied for refugee status recognition. The number of Venezuelan migrants going to Brazil before the approval of the new Migration Law was still very small, if compared to the level that the country received after the promulgation of the law, so, as soon as the new law was approved and came into effect, the Venezuelan migration flow became naturally regulated by it, which added all the benefits stated in the previous sub-chapter to their protection.

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258 Given that the Venezuelan crisis still looks far from an end, the UN’s expectation for 2019 is that the figures of Venezuelan migrants and refugees in Brazil will at least double by the end of the year, reaching over 200,000. The UN predicts that Brazil will need an investment of at least U$ 56 million to adequately deal with the new migrants that are about to arrive, and also to improve the hosting capacity of the Brazilian cities that receive migrants. Jamil Chade, “Number of Venezuelans in Brasil will Double in 2019, says UN” (Terra, 14 December 2018) <https://www.terra.com.br/noticias/brasil/nºmero-de-venezuelanos-no-brasil-praticamente-dobrara-em-2019-diz-onu.cc2e3f6954071803e35a7dfa3e1423f2vbi0a8av.html> accessed 15 January 2019.
Even taking the improvements into consideration, the government still faced practical reception problems when dealing with this new migration flow, because the country's economic crisis was deeper, and especially because the flow came through the northern part of the country.\textsuperscript{259} Generally speaking, the first reception conditions were not ideal, with insufficient room in shelters, hospitals and schools for the migrants. However, the Brazilian authorities tried to learn from its previous experiences, so, supported by the migration community in the country, they made an extra effort to better integrate the Venezuelans. The government, on municipal, state and federal levels, alongside the support of part of the congress and the senate, counting also with the local UNHCR's assistance, organized an action plan that was structured in three main steps: offer fast reception at the border, make an effective assessment of their legal condition and then propitiate an adequate integration, trying to fulfill the requisites of a complete migration policy.\textsuperscript{260}

Concerning the regulation of the flow and the assessment of their legal condition, Brazil combined the protection of the refugee status recognition with the humanitarian visa, as previously exposed. To improve the reception conditions, this time, the government took other several measures. Regarding the integration of the Venezuelans, the government took some actions they had failed to take with the Haitians and the Syrians. In association with the UNHCR, Brazil built new reception facilities in the main cities of the country, thereby enabling them to adequately host a significant number of migrants.\textsuperscript{261} The government now also provides food and basic daily items to some of the refugees, with these actions adding to the integration improvements that the new Migration Law had established since its promulgation, alongside language classes and the validation of international diplomas. The government also created internal resettlement programs,\textsuperscript{262} transferring the Venezuelans from the north region of Brazil to other cities better prepared to host them,\textsuperscript{263} while it also issued a Provisional Measure,\textsuperscript{264} allocating extra financial resources to the northern area of the country. Also, a “task force” of qualified professionals, specialized in humanitarian treatment, was sent to the region, in order to assist the migrants in different areas, including legal, educational and medical.\textsuperscript{265}

\textsuperscript{259} A region financially precarious and in the middle of the Amazon Forest.


\textsuperscript{265} Ibid.
lack of sufficient financial resources, added to the complexity of the Venezuelans migration movement to Brazil, were complicating factors for the Brazilian shelter policy, but the country, especially after the approval of the new Migration Law, still proved to be better prepared for this reception than it had been in the previous experiences of humanitarian shelter.

Therefore, the Venezuelan migration flow to Brazil is mixed, including different kinds of migrants, with each group having its specific needs of protection. Addressing all these different necessities proved to be a real challenge for the Brazilian Government, due to the complex nature of the flow and Brazil’s financial limitations. Some of them were entitled to a refugee status recognition, while others needed a more temporary protection. Brazil, this time, was more prepared to offer protection and to facilitate their integration, now duly supported by its practical experience since the arrival of the Haitians in 2012 and of the refugees from Syria in 2013, and later by the new Migration Law, approved in 2017. Since the approval of the new law, the new legislation naturally embraced the regulation of the Venezuelan flow, and the humanitarian visa applied to them became regulated by its terms.

6. Conclusion

After three different experiences in which Brazil applied humanitarian visas to specific large migration flows, it is important to reflect on this recent practice and draw lessons from the Brazilian policy. This issue is highly relevant, because daily examples are seen of serious human rights violations against forcibly displaced migrants and refugees. They face extorsion, smuggling, beatings and murderers. Thus, these instruments can have a very important role in helping to regulate the current forced migration flows worldwide.

Instruments of complementary protection, like humanitarian visas, ideally work by combining and complementing the protection offered by international and national legislations, with the objective of expanding the migrants’ rights to protection. The importance and flexibility of humanitarian visas, as well as how they can be used, can be observed by analyzing the Brazilian practice with this instrument, which evidenced its potential to protect the human rights of migrants and refugees in the context of the contemporary forced migration flows in different scenarios. As demonstrated in the third chapter herein, humanitarian visas can be used to protect forcibly displaced migrants even if not recognized as refugees, like Brazil did with the Haitians. However, an assessment of the migrants’ legal condition must always be made, and the possibility of recognizing the refugee status must always be prioritized, because it entitles a higher level of protection.

Another virtue of humanitarian visas is the possibility of their use as safe-conducts, creating legal pathways to a possible host country. This was one of the uses of the first Brazilian application of the humanitarian visa, with the Haitians, and this aspect of the visa was explored again when applied to the refugees from the Syrian War, as shown in

266 Souza and Silveira “The Venezuelan Migratory Flow” (n256), p.121-122.
the fourth chapter. In comparison with the Haitians’ application, the difference was that the forcibly displaced migrants coming from Syria were recognized as refugees after their arrival in Brazil. This time, in consequence of the war, Brazil recognized that Syria was experiencing a situation of massive and generalized human rights violations, which, according to Article 1, III, of Brazilian Federal Law No.9.474/97, is a condition to refugee status recognition. Hence, the humanitarian visa for the refugees from the Syrian War represented a legal and safe pathway for them to go to Brazil, where, after a final assessment, they were recognized as refugees, on the grounds of the massive and generalized situation of human rights violations in their country. The Venezuelan migration flow to Brazil, however, represented different challenges to the country and to the Humanitarian Visa Policy, as explained in the fifth chapter. Unlike Haiti and Syria, Venezuela shares borders with Brazil, and this fact contributed to the development of a deeper mixed condition regarding the Venezuelan migration flow. As the Venezuelan migration flow was constituted by several different migration groups, with different protection needs, Brazil had to present different solutions, therefore combining the protection offered by the humanitarian visa and the refugee status recognition.

As the humanitarian visas issued by Brazil had different applications and objectives, the visas were also implemented differently within the Brazilian legal framework. As observed in the third chapter, in order to regulate the Haitian flow already coming to the country, the humanitarian visa was created through a Normative Resolution issued by CNIG, after CONARE had failed to consider that the Haitians were entitled to refugee status recognitions. The humanitarian visa, in this case, was adapted from an already existent visa, aimed for highly skilled foreign workers, to be given for the first time on humanitarian grounds as an ad hoc measure, applied specially to the Haitian nationals.

The visa for the refugees escaping the Syrian War, as explained in the fourth chapter, was offered by the Brazilian State as a voluntary initiative, and was created through a Normative Resolution drafted by CONARE, already aiming to recognize them as refugees upon arrival in Brazil. This time around, the humanitarian visa was adapted from an existing tourism visa, and was issued through a de-bureaucratized procedure. It was structured as a safe-conduct aimed to create a legal option for these refugees to safely arrive in Brazil and subsequently have their refugee status recognized. In the fifth chapter, it was demonstrated that, like the visa for the Haitians, the humanitarian visa destined to help to regulate the Venezuelan migration flow was created by CNIG, and the Venezuelans that applied for a refugee status recognition had their cases directly assessed by CONARE. A few months after that the Humanitarian Visa Policy was extended to the Venezuelans, the new Brazilian Migration Law was approved, and the humanitarian visa was finally officially institutionalized into the Brazilian legal framework, extending its range and being able of being requested by individuals of any nationality, as well as stateless people, not depending on ad hoc government measures to be applied anymore.

Through the critical analysis of the Brazilian Humanitarian Visa Policy, it is possible to observe what practices of the Brazilian State are praiseworthy and also what the country could have done differently to fully explore the protection potentialities of this policy, drawing different lessons from it. As argued in the third chapter, the Haitians were entitled to a refugee status recognition after their arrival in the country, because the Brazilian
legislation at that time already contained a possibility of refugee status recognition on situations of massive and generalized human rights violations, as the one that Haiti was suffering, and because a refugee status recognition would have meant for them a higher level of protection. Furthermore, the protection offered by this recognition would not leave their protection dependent on the internal political situation of the country. Nevertheless, although Brazil failed to recognize the Haitians as refugees, the country did not close its borders, and still offered them humanitarian shelter, expanding its protection range to forcibly displaced migrants even if not recognized as refugees.

Later, Brazil recognized the refugee condition of the migrants fleeing the Syrian War, and this recognition of refugee status entitled them a higher level of protection, because it linked their protection to all relevant national and international legislation on human rights and refugee rights protection. And yet, the lack of investment and support through public policies of integration hindered this humanitarian visa application of hitting its full potential. As demonstrated in the fourth chapter, the difficulties in the integration of these refugees were evidenced through communication problems, different cultural habits and difficulty of having their academic and professional levels recognized. This reality, combined with the lack of financial support from the Brazilian State, made the visa requests from refugees fleeing Syria decrease over the last few years.

The Haitians had also suffered with integration difficulties, and these two experiences made Brazil become more prepared when the time came to integrate the Venezuelans. The legal procedures applied to the Haitians had already been improved on, and further improvement took place with the regulation of the Venezuelan flow, especially after the new Migration Law’s approval. With this last migration flow, and in spite of Brazil’s still fragile economic situation, there was also a reasonable improvement regarding the integration policies and the reception conditions, what hadn’t happened between the two previous experiences, which demonstrates the evolution of the Brazilian Humanitarian Visa Policy - from its first emergency application with the Haitians, in 2012, to its official internalization into the Brazilian legal framework through the new Federal Migration Law, in 2017.

As explained in the fifth chapter, the Brazilian Humanitarian Visa Policy propelled the approval of the new Federal Migration Law, that is oriented from a human rights perspective. The new Migration Law replaced the conservative legislation known as the Foreigners Statue, and also officialized the humanitarian visa into the Brazilian legal framework. In spite of the negative aspects of the Brazilian Humanitarian Visa Policy mentioned earlier, the Brazilian initiative must be praised, for exposing the possibility of protection of forcibly displaced migrants with humanitarian visas, even if not recognized as refugees, for creating new legal and safe ways to protect their rights from violations during their journeys to host countries and for showing how to combine in practice the protection offered by humanitarian visas and refugee status recognitions. Consequently, the analysis of the Brazilian Humanitarian Visa Policy demonstrates different possibilities of protection that this instrument offers, proving that its more frequent use can play a significant role in protecting forcibly displaced migrants’ and refugees’ rights within the contemporary forced migration flows.
Since the humanitarian visa has already been officialized into the Brazilian legal framework, the future challenges for the country regarding this practice lie in continuously improving reception conditions and integration policies in the country over the next years. As mentioned before, the Venezuelan crisis is far from its end. In fact, the Venezuelan migration exodus is expected to only expand over the upcoming months, representing the main challenge for the Brazilian migration authorities in the present and near future. For this reason, with the legal procedure of the humanitarian visa officially structured into the Brazilian legal framework through the new Federal Migration Law, it is fundamental that the Brazilian State keeps investing in its general reception conditions and integration policies, in order to keep expanding the potentialities of the country’s humanitarian visas to ensure that it is effective for migrants not only from Venezuela, but from all nationalities that may request this humanitarian protection in the future. For the parcel of the civil society that supports the migration cause in the country, it will be also important to observe the next steps of the new president regarding the subject, assuring that the provisions of the New Migration Law will be normally applied in the country.

As a result, from the arguments presented in this research, it is recommended that humanitarian visas become more frequently used by International States when regulating the current forced migration flows worldwide. These instruments can offer different possibilities of protection, protecting from human rights’ violations during a journey to a host State, facilitating their access to the State’s protection procedures, and also offering humanitarian shelter to forcibly displaced migrants who are in need of protection despite not fitting into a refugee status recognition. The safe-conduct model of the humanitarian visa applied by the Brazilian State to the refugees from the Syrian War, with their recognition as refugees upon arrival in the Brazilian territory, can be replicated by other International States also aiming to host refugees from Syria. Indeed, this type of visa ought to be used by all International States so as to protect forcibly displaced migrants and refugees escaping countries in a state of massive and generalized human rights violations, even if the migrant is not later recognized as a refugee, because this visa can represent both an extension of the protection or an access channel to the protection established by the main International Refugee Law treaties.

When applying public policies involving humanitarian visas to host forcibly displaced migrants, the assessment of their legal condition must be made, exploring the possibilities of this migrant being recognized as a refugee, so as to grant him a higher level of protection. With the purpose of making a humanitarian visa policy fully complete, as demonstrated in the fourth chapter, appropriate integration policies are also of fundamental importance to be included within the procedures of legal status determination, because a lack of support from the local government in this sense can

267 Jair Bolsonaro, an extreme right-wing politician that was a military captain during the last dictatorial period in the country.
268 Bolsonaro, who started his presidency period on the first day of 2019, with less than ten days officially as President had already withdrawn Brazil from the UN Global Compact for Migration, and was quoted saying that “the foreigners that by fortune are coming to Brazil must adapt to our laws, rules and habits, as well as learning to sing our national anthem and respect our culture. Not everyone enters in our house, and nor will be everyone that will enter Brazil because of an agreement signed by third parties and not by me.” Daniela Virgens, “The Challenge of Integration for Asylum Seekers and Humanitarian Visa Holders in Brazil” (UFRJ, 2019) p. 14 <https://revistas.ufrj.br/index.php/EspacoAberto/article/view/19066/13797> accessed 15 May 2019.
prevent a migration policy from being successful, and may even entail further human rights violations during their stay. Therefore, as demonstrated above by the analysis of the Brazilian Humanitarian Visa Policy, in the context of contemporary forced migration flows and the human rights violations that permeate these movements, it is imperative that International States start to make more use of humanitarian visas, because these instruments can effectively expand the protection offered to refugees and forcibly displaced migrants around the globe, having the potential of bridging protection gaps that exist on the traditional international Refugee Law treaties and in the customary practices of International States, decreasing the human rights violations of forcibly displaced migrants and refugees amid the contemporary forced migration flows worldwide.

In remembrance of the causes that originated the establishment of the first international treaties protecting refugees’ rights, it is a responsibility of the international community to continue to elaborate on the use of new legal instruments able to expand the protection of refugees’ and other forcibly displaced migrants’ human rights. In spite of some restrictive migration measures imposed by International States, and the human rights violations that forcibly displaced migrants and refugees suffer during their journey to a possible host State, it can be learned from the world’s history that, whilst there are wars and violent conflicts, with massive human rights violations, there will be people escaping from it. And these people will definitely continue to flee their homes and seek the protection of their fundamental basic human rights in some other place when in need, because, sometimes, there is just no other option.
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