

Brazil's recognition of refugee status: normative, procedural, and political issues

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Introduction

Law 9.474/97 is the main norm pertaining to refugee protection in Brazil. It establishes the concept of refugee, states the rights of asylum seekers and refugees, and outlines the foundations of refugee status determination (RSD) in Brazil. 2022 marks the 25th anniversary of Law 9.474/97, which is the main national norm on refugees and the cornerstone of refugee protection in the country since 1997.

The enactment of Law 9.474/97 is part and parcel of Brazil's internal (re)democratization process following a civil-military dictatorship (1964-1985). The 1988 Constitution is the at the core of the country's efforts towards (re)democratization and foresees the right to asylum as one of the principles that govern Brazil's international relations, alongside, for instance, the prevalence of human rights and international cooperation. Brazil has also ratified several major International Human Rights treaties in this same period, for instance, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1992.

In terms of the refugee protection, Brazil has ratified historical regional treaties on diplomatic and territorial asylum¹ and was among the countries in the plenipotentiaries' conference that led to the adoption of the 1951 Convention on the Status of Refugees. Brazil has ratified and internalized the 1951 Convention in its legal system in 1961.² However, an internal procedure for RSD was only established with the enactment of Law 9.474/97 which has its basis on the constitutionally established right of asylum. The current domestic architecture of refugee protection in Brazil is formed by the constitutional right to asylum, by Law 9.474/97 which, by its turn, dialogues with other norms, such as legislation governing migration in general in the country; norms that establish humanitarian visas; and resolutions regarding RSD issued by the National Committee on Refugees (CONARE),³ which is the organ with a mandate for RSD in Brazil and with the oversight of refugee protection in Brazil.⁴

CONARE started issuing RSD decisions according to the procedures and criteria established in Law 9.474/97 in 1998. Until then, RSD applications were processed on an *ad hoc* basis, according to the 1951 Convention and 1967 Protocol with the support of UNHCR and civil society.⁵ It is relevant to note that until the early 2010s, there were fewer than 1000 RSD

¹ Five regional treaties on the right to asylum were adopted in the Americas from 1928 to 1954. The International Court of Justice's Asylum Case (*Colombia v. Peru*) decided in 1950 involves the interpretation of one of the historical treaties on political asylum. See Liliana Lyra Jubilut, Melissa Martins Casagrande, and Rachel de Oliveira Lopes, 'A Convenção Americana sobre Direitos Humanos e o Direito de Asilo na América Latina' in Alberto do Amaral Júnior, Flávia Piovesan, and Paula Monteiro Danese (eds), *50 Anos da Convenção Americana de Direitos Humanos – O Sistema Interamericano: Legado, Impacto e Perspectivas* (Editora Juspodivm 2020), 441-466.

² Brazil, *Decreto n. 50215, de 28 de janeiro de 1961*.

³ Liliana L Jubilut, 'Refugee Law and Protection in Brazil: a model in South America?' (2006) 19(1) *Journal of Refugee Studies* 22.

⁴ Liliana L Jubilut and Silvia M O S Apolinário 'Refugee Status Determination in Brazil: A Tripartite Enterprise' (2008) 25(2) *Refugee: Canada's Periodical on Refugees* 29. CONARE, 'O reconhecimento dos refugiados pelo Brasil: decisões comentadas do Conare' (2007).

⁵ José Henrique Fischel de Andrade, 'Aspectos Históricos da Proteção de Refugiados no Brasil (1951-1997)', in Liliana Lyra Jubilut and Gabriel Gualano de Godoy (eds), *Refúgio no Brasil: comentários à Lei 9.474/97* (Quartier Latin 2017), 41-80.

applications per year in Brazil.⁶ There was a significant increase in RSD applications from 2015 onwards in comparison to earlier periods, with an average of 44.059 RSD applications per year.⁷

Considering Brazil's normative framework and through the lenses of International Refugee Law and International Human Rights Law, this chapter aims to present and analyse normative, procedural, and political issues regarding the recognition of refugee status in Brazil, from the adoption of Law 9.474/97 onwards, including policies related to the context of the COVID-19 pandemic.

The chapter adopts a temporal framework, focussing on the current existing regime of RSD in the country, dialoguing with historical aspects when necessary for context. Its specific focus are refugees in Brazil rather than a broader migratory context. A panoramic view of the legal structure of Refugee Law in the country is followed by the assessment of Brazil's recognition of refugee status in light of International Refugee Law and International Human Rights Law. The chapter also adopts a structure in line with the phases of the movements of displacement: from entry into the country to the possibilities of inclusion as a refugee and the grounds for exclusion, as Brazil adopts an inclusion before exclusion logic for RSD.

The chapter is based on a document analysis of the publicly available applicable rules and regulations, as well as a literature review, considering literature regarding RSD in Brazil is incipient, the analysis is complemented whenever possible, with practical experience insights from the co-authors.

⁶ Brazil, Ministério da Justiça e Segurança Pública. 'Refúgio em Números' (1st ed, 2016) <<https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes>> accessed 28 June 2022.

⁷ Brazil, Ministério da Justiça e Segurança Pública. 'Refúgio em Números' (1st to 7th ed, 2016-2022). <<https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes>> accessed 28 June 2022.

The first section delves into the general framework of refugee protection in Brazil, detailing the applicable norms as well as institutions involved, especially in the context of RSD procedures. The second section outlines the legal requirements for entering Brazil, as well as the issue of irregular and illegal entry. The third topic explores the legal possibilities of recognition of refugee status in Brazil: recognition by the international criteria (1951 Refugee Convention and 1967 Protocol) and recognition by the regional criteria (1984 Cartagena Declaration), in addition to exclusion clauses. Then, the fourth section describes the practice of RSD recognition in Brazil, outlining the RSD procedure and its different forms (individual and group recognition), accompanied by data on RSD in Brazil. Lastly, the chapter assesses Brazil's domestic legislation in terms of admissibility of refugees from a three-fold perspective: (i) normative issues, (ii) procedural issues and (iii) political contexts and choices on admissibility.

1. Legal background of domestic refugee law in Brazil

The Brazilian legal architecture has Law 9.474/97 as its base. This law, known as Refugee Law, defines mechanisms for the implementation of the 1951 Refugee Convention in the country and outlines rights and duties for asylum seekers and refugees in the country. Brazil's 1988 Constitution guarantees the right to asylum as well as other rights applicable to non-nationals in the country. Moreover, other norms are also applicable such as Law 9.784/99, which generally establishes administrative procedures and is applicable to RSD procedures, as well as Law 13.445/17, known as Migration Law, applicable to all migrants in the country.. The sub-sections below explore these norms, which together form the legal architecture regarding refugee recognition and protection in Brazil.

1.1. The right of asylum and constitutional principles

The 1988 Constitution marks the country's (re)democratization process after more than twenty years of a civil-military dictatorship. The negotiations of the text of the Constitution had unprecedented popular participation. The Constitution is perceived as the document that restored a democratic and human rights-based approach to the rule of law in the country and recognized, to a certain extent, the country's plurality in many aspects and expressions.

The 1988 Constitution enumerates guiding principles for the country both domestically and internationally, these include, (i) human dignity (article 1(III), which has been considered, since the enactment of the Constitution, the guiding thread of human rights protection in the country; (ii) the principle of legality (article 5 (II)); (iii) the right to due process (article 5 (LV)); (iv) universal access to justice (article 5 (XXXV)); (v) the right to be judged by the competent authorities (article 5 (LIII)); (vi) the duty of authorities to justify decisions (article 93 (X)); (vii) duty of publicity of decisions (article 5 (LX) and article 93 (IX) and (X)); and (viii) the right to a reasonable length of proceedings (article 5 (LXXVIII)).

Additionally, the 1988 Constitution sets as principles of the Federated Republic of Brazil “*building a free, just and solidary society*” and “*to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.*”⁸ It also adds principles that guide the country's international relations, most notably, the “*prevalence of human rights*” and the “*granting of political asylum*”.⁹ Thus, the Brazilian Constitution serves as a foundation for refugee law in the country.¹⁰

⁸ Brazil, *Constituição da República Federativa do Brasil de 1988*, art 3.

⁹ Brazil, *Constituição da República Federativa do Brasil de 1988*, art 4 (II) and (X), respectively.

¹⁰ Liliana L Jubilut, ‘O Direito Internacional dos Refugiados e a sua aplicação no Ordenamento Jurídico Brasileiro’ (Método 2007).

1.2. Law 9.474 of 1997 on Refugees

As mentioned, Law 9.474/97 is the foundation for the protection of refugees in Brazil. Overall, this is a specific legislation that has established the procedures applicable to RSD in Brazil and created a national authority with a mandate to process RSD applications. The authority is the *Comitê Nacional para Refugiados*, known by its acronym in Portuguese, CONARE. Furthermore, Law 9.474/94 outlines provisions related to the criteria for recognition of refugee status, exclusion clauses, the suspension of pending extradition requests in case of RSD application until the status is determined, the cessation and loss of refugee status, as well as provisions on durable solutions (repatriation, local integration and resettlement).

Law 9.474/97 sets the rights of asylum seekers and refugees in the country. These include the right to a national identification document which includes their legal status, a work permit, a travel document, a residency permit, free access to the RSD application, and the guarantee that RSD procedures are free of charge and should be expedited considering the atypical situation of refugees.¹¹ Similarly, the law recognizes the principle of *non-refoulement* (i.e. that no one seeking refuge shall, under any circumstances, be returned to a territory where their life or liberty is at risk) and that the irregular entry in Brazilian territory shall not be an obstacle in seeking refugee status determination.¹²

The law creates CONARE, establishing its composition, structure and mandate. CONARE's mandate is three-fold: (i) to analyse and declare the recognition of refugee status, the cessation and the loss of refugee status; (ii) to steer and coordinate necessary actions relating to

¹¹ Brazil, *Lei n° 9.474, de 22 Julho de 1997* (Law 9.474/97), arts 6, 21, 42, and 47.

¹² Brazil, Law 9.474/97, arts 7 and 8, respectively.

assistance, legal support and overall refugee protection. CONARE's composition is tripartite. There are (i) representatives of State organs (such representatives of the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Labour, Ministry of Health, the Ministry of Education and Sport and the Federal Police, an organ under the purview of the Ministry of Justice, with voting rights , (ii) a civil society representative from an organization dedicated to refugees assistance and protection in the country, also with voting rights and (iii) a representative from the United Nations High Commissioner for Refugees (UNHCR), with right to speak but without the right to vote..¹³

As stated, the Federal Police, in addition to being a voting member of CONARE, is also responsible for border control in Brazil, and thus, responsible for the entry and exit of individuals in the country's territory. For this reason, it tends to be the first Brazilian organ and/or authority to interact with asylum seekers.¹⁴

It is relevant to note that civil society organizations have historically been active in RSD procedures, including before a formal institutional procedure was created by Law 9.474/97. For many years, civil society organizations were involved in conducting interviews with asylum seekers in the context of RSD procedures. On a broader sense, civil society has always held a central role in the process of welcoming asylum seekers and refugees in Brazil, both from a social perspective, for instance, supporting access to housing, health and education).) and from a legal perspective , supporting asylum seekers in in filling out the RSD application form, translating documents, among others).¹⁵

¹³ Brazil, Law 9.474/97, arts 12 and 14.

¹⁴ Liliana L Jubilut, 'O procedimento de concessão de refúgio no Brasil'

¹⁵ Liliana L Jubilut, 'O Direito Internacional dos Refugiados e a sua aplicação no Ordenamento Jurídico Brasileiro' (Método 2007).

It is also relevant to note that UNHCR is a member of CONARE with a right to speak, but not a right to vote. Historically, it has also been involved in RSD procedures preceding the creation of CONARE.¹⁶ Following CONARE's creation, UNHCR's involvement became focused on initiatives towards the strengthening of the national institutions and organizations focused on refugees. Examples of these initiatives are the Project of Cooperation with CONARE towards the analysis of decisions of asylum in Brazil in 2019¹⁷ and the Quality Assurance Initiative (QAI) in 2013¹⁸, monitoring and evaluating RSD procedures in the country.¹⁹

1.3. *Other norms applying to refugees in Brazil*

Other norms subsidiarily form the Brazilian framework of refugee protection. The main one being Law 13.445/2017, also known as the (New) Migration Law. This federal law provides for the rights, guarantees and duties of migrants in Brazil such as non-discrimination, a humanitarian approach to migration governance, the right to family reunification as well as social rights (education, labour, among others)²⁰.

¹⁶ José Fischel de Andrade and Adriana Marcolini, 'Brazil's Refugee Act: Model Refugee Law for Latin America' (2002) 12 *Forced Migration Review* 37.

¹⁷ Within the Project, the evaluation of decisions creates a public database that is available through an interactive online platform. This platform consolidates a series of information on asylum in Brazil, including disaggregated data, such as country of origin, gender, age and place where the RSD application was filed. *See Brazil, CONARE and UNHCR, Plataforma Interativa de Decisões sobre Refúgio no Brasil* <<https://app.powerbi.com/view?r=eyJrIjojNTQ4MTU0NGItYzNkMi00M2MwLWFhZWVtMDBiM2I1NWVjMTY5IiwidCI6ImU1YzYzM3OTgxLTY2NjQtNDEzNC04YTBlLTY1NDNkMmFmODBiZSIsImMiOiJh9>> accessed 30 May 2022.

¹⁸ The QAI initiative was created in October 2013, with the aim to enhance procedures within CONARE, making them fairer and more efficient. *See UNHCR 'Declaração do Brasil "Um Marco de Cooperação e Solidariedade Regional para Fortalecer a Proteção Internacional das Pessoas Refugiadas, Deslocadas e Apátridas na América Latina e no Caribe"' (2014)* <<https://www.acnur.org/cartagena30/pt-br/declaracao-e-plano-de-acao-do-brasil/>> accessed 01 June 2022.

¹⁹ Larissa Leite, 'O devido processo legal para o refúgio no Brasil' (DPhil thesis, *Universidade de São Paulo* 2014). Marcelo Haydu, 'O envolvimento do Brasil com a problemática dos refugiados: um breve histórico' (2009) 6 *Ponto e vírgula* 183.

²⁰ Brazil, *Lei nº 13.445, de 24 de Maio de 2017* (Law 13.445/2017), art 3.

Moreover, the (New) Migration Law regulates the entry, exit and stay of migrants in the country. For instance, it enumerates the visa modalities, residency permits, naturalization, deportation, expulsion and other migration-related matters.²¹ Procedurally, this law is also applicable to asylum seekers as long as their RSD procedures are ongoing.²²

Other applicable norms are the executive orders (or “*Resoluções Normativas*” - RNs) issued by CONARE. Since CONARE’s creation through Law 9.474/97, the institution has issued 33 RNs. Of those, 25 were directly related to RSD procedures. Similarly, the *Conselho Nacional de Imigração* (in Portuguese, National Immigration Council - CNIg) and the Executive branch of government also issue executive orders applying to asylum seekers and refugees in Brazil. Completing this framework are Law 13.684/2017 (on emergency assistance in the context of humanitarian crises) and Law 9.784/1999 (law on national administrative procedures).

Regarding the latter, Law 9.784/99 is also applicable to RSD procedures, as RSD is a procedure undertaken by an organ of the Executive branch of government, CONARE, by its turn an organ under the purview of the Ministry of Justice. Law 9.784/99 prescribes a series of principles granting rights to petitioners of such procedures, such as the principle of legality, purpose, fairness, proportionality, morality, ample defense rights, due process, legal certainty, public interest and efficiency (article 2); ethical standards of probity, decorum and good faith (article 2 (III) and (IV)); duties of communication related to the official disclosure and awareness of the acts within the procedure (article 2 (V) and (X), article 3 (II) and article 26); the possibility of being assisted, including by a lawyer (article 3 (IV)); the duty to justify every decision by

²¹ Tarciso D M Jardim, ‘A lei migratória e a inovação de paradigmas’ 12(12) Cadernos de Debates Refúgio, Migrações e Cidadania, 17.

²² Brazil, Law 9.474/1997, art 22.

administrative authorities (article 2, single paragraph); the attribution of the reviewing body of the decisions rendered in the first instance (articles 56-65), such as RSD by CONARE; and rules regarding timeframes and deadlines (article 66).

2. Schemes and requirements prior to arrival in Brazil

There are not many options for regular entry in Brazil. Common entry visas, such as tourist visas, can be hard to obtain when someone is intending to seek refuge elsewhere (either because of logistics, the lack of documents, lack of a return ticket in some instances or the lack of proof of means). In this context, through specific executive orders, Brazil offers the possibility of application for *ad hoc* humanitarian visas for those fleeing specific countries with armed conflict and/or protracted humanitarian crises. Such visas offer a safe and regular route for travel with the intent to seek asylum in Brazil.

Seeing as these visas are granted on an *ad hoc* basis, many people still need to enter the country irregularly, often involving some form of unlawful activity. In these cases, Law 9.474/97 offers a guarantee for asylum seekers by suspending any criminal or administrative procedure arising from their irregular entry into the country as soon as RSD procedures begin. Undue exceptions to this provision were witnessed while COVID-19related border restrictions were implemented, curtailing access to RSD applications, enforcing collective deportations and rendering those who crossed the borders unlawfully to be criminally, civil and administratively liable, creating a significant setback.

2.1. *Humanitarian visas and how they can benefit refugees*

Humanitarian visas were a solution found by Brazil to facilitate regular migration to certain vulnerable groups, who otherwise would not be able to reach the country's territory safely. They were originally adopted to address the migration flow from Haiti following the massive earthquake in the country in 2010. Since then, the Brazilian government took a similar approach and issued *ad hoc* humanitarian visas to facilitate the entry of people fleeing Syria, Afghanistan and, most recently, Ukraine. Albeit its limitations, it is a highly praised solution that can benefit refugees in reaching a safe country through regular means and safe routes.

These visas were introduced to address the unprecedented movement from Haiti to Brazil following a catastrophic earthquake in 2010. In the aftermath of the earthquake, many Haitians could not obtain a regular tourist visa to enter Brazil and ended up recurring to unsafe routes (e.g. through human smugglers).²³ The first step for granting humanitarian visas came from the National Immigration Council (CNIg) in 2011. At the time, CONARE would forward RSD applications of Haitians to CNIg, that began, by its turn, to grant humanitarian visas on the basis that these were “special” cases according to a provision from an executive order from 1998 still in force.²⁴ On 12 January 2012, CNIg took the decision to grant visas to Haitians on broader grounds, regulating it through an executive order, Instrução Normativa (IN) nº 97. Such visas were offered “*for humanitarian reasons*” - understood as “*those resulting from the deterioration of living conditions*

²³ Liliana L Jubilut, Camila S M de Andrade and André L Madureira, ‘Humanitarian visas: building on Brazil’s experience’ [2016] 53 *Forced Migration Review* 73.

²⁴ CNIg, *Resolução Normativa nº 27, de 25 de Novembro de 1998* <<https://www.legisweb.com.br/legislacao/?id=96401>> accessed 01 June 2022. See also UNHCR and Instituto Migrações e Direitos Humanos, ‘Cadernos de Debates 6: Refúgio, Migrações e Cidadania’ (Instituto Migrações e Direitos Humanos 2011).

*of the Haitian population due to the earthquake that took place in that country on 12 January 2010”.*²⁵

In 2013, the Brazilian government took a similar initiative with regards to those affected by the conflict in Syria. Considering the humanitarian crisis and the increase in RSD applications that followed the escalation of the conflict in Syria, CONARE adopted an executive order, Resolução Normativa (RN) n° 17 on 20 September 2013. This executive order authorized granting humanitarian visas to *“individuals affected by the armed conflict in the Syrian Arab Republic who manifest their wish to seek refuge in Brazil”*.²⁶ It is worth noting the broader definition adopted by this executive order when compared to its predecessor. Unlike CNIg’s IN n° 97, which only granted humanitarian visas to Haitians, this executive order was also applicable to non-Syrians and those living in neighbouring countries by the Syrian border, including stateless persons.²⁷ This meant that other minority groups (such as Palestinians and Kurds) have also benefited from the provision.²⁸

In the case of Haiti and Syria, these executive orders only granted an entry visa. Thus, they did not grant a residency permit, and, once in the country, different forms of regularization of stay had to be sought.²⁹ More recently, new executive orders were issued to facilitate the entry of those fleeing Afghanistan and Ukraine, with a built-in temporary residence permit (valid for two

²⁵ Brazil, CNIg, Resolução Normativa n° 97, de 12 de Janeiro de 2012 <https://dspace.mj.gov.br/bitstream/1/1541/1/REN_CNIG_2012_97.pdf> accessed 22 May 2022.

²⁶ CONARE, *Resolução Normativa CONARE n° 17 de 20/09/2013* <<https://www.legisweb.com.br/legislacao/?id=258708>> accessed 22 May 2022 (CONARE executive order n. 13), Art. 1°.

²⁷ CONARE, CONARE executive order n. 13, Art. 1°.

²⁸ Liliana L Jubilut, Camila S M de Andrade and André L Madureira, ‘Humanitarian visas: building on Brazil’s experience’ [2016] 53 Forced Migration Review 73.

²⁹ Liliana L Jubilut, Camila S M de Andrade and André L Madureira, ‘Humanitarian visas: building on Brazil’s experience’ [2016] 53 Forced Migration Review 73.

years).³⁰ This is likely an effect of the (New) Migration Law, in force since 2017, , which establishes a humanitarian approach to migration governance amongst Brazil’s migratory policies (art. 3, VI), and foresees temporary visas and residence permits on humanitarian grounds (articles 14, I, c and 30, I, c, respectively).³¹

The main advantage of such visas is that they offer a safe pathway to seek asylum in Brazil, granting a visa prior to their arrival in the country and allowing for regular migration routes. The procedure for such visas is considerably less complicated than other types of visas. Unlike the demands involved when applying for a tourist visa, humanitarian visas normally only require the filling out of a form, a valid travel document, proof of residence in the country of origin³² and proof of means to travel to Brazil.³³ CONARE’s RN n° 17 recognized the hardships faced by individuals when trying to enter Brazil, “including due to the impossibility of meeting the regularly demanded requirements for a visa”.³⁴

Albeit its shortcomings, humanitarian visas remain a helpful option to enter Brazil safely and regularly for those asylum seekers that have access to it. It should be noted, however, that humanitarian visas are granted through executive orders, which can lead to uncertainty and legal insecurity.³⁵ Similarly, the fact that such visas are granted in an *ad hoc* basis to certain contexts or

³⁰ Brasil, MJSP/MRE, *Portaria Interministerial MJSP/MRE n° 24, de 3 de setembro de 2021* (applicable to Afghans, stateless persons and those affected by the grave or imminent situation of institutional instability, grave violations of human rights or international humanitarian law in Afghanistan). Brasil, MJSP/MRE, *Portaria Interministerial MJSP/MRE n° 28, de 3 de março de 2022* (applicable to Ukrainian nationals or stateless persons affected or displaced by the armed conflict in Ukraine).

³¹ Brasil, Law 13.445/2017. *See also* Liliana L Jubilut and João C J Silva, ‘Trends in Brazil’s Practices of Refugee Protection: Promising Inspirations for the EU?’ (ASILE – Global Asylum Governance and the European Union’s Role, 20 December 2020) <<https://www.asileproject.eu/trends-in-brazils-practices-of-refugee-protection-promising-inspirations-for-the-eu/>> accessed 22 May 2022.

³² In the case of humanitarian visas granted to Haitians, for example.

³³ In the case of humanitarian visas granted to those fleeing Afghanistan and Ukraine, for example.

³⁴ Which granted humanitarian visas for those fleeing Syria in 2013.

³⁵ Liliana L Jubilut, Camila S M de Andrade and André L Madureira, ‘Humanitarian visas: building on Brazil’s experience’ [2016] 53 *Forced Migration Review* 73.

nationalities can be an issue, as they seem to be a violation of the principles of equality and non-discrimination.³⁶ Nevertheless, Brazil has been praised for the initiative of granting humanitarian visas, most notably for offering a safe route to those seeking international protection.

2.2. Possibility of irregular entry into the country

Those asylum seekers that do not have a right to a humanitarian visa find additional barriers to enter the country. Similar to those who have been granted a right to a humanitarian visa, these individuals can hardly qualify for other types of visa (*e.g.* due to the lack of sufficient documentation, access to a consulate, or lack of sufficient funds). Considering the limitations of obtaining a humanitarian visa and depending on the asylum seeker's background, they will have no option other than entering the country through other means.

However, whether an asylum seeker enters Brazil regularly or not cannot be considered as grounds for inadmissibility of RSD. Under Law 9.474/97, "*The irregular entry into the national territory does not constitute an impediment for the foreigner to seek refuge with the competent authorities*".³⁷ Additionally, the same law protects asylum seekers from any criminal or administrative procedure by suspending them once an RSD procedure is initiated, in line with article 31 of the 1951 Convention.³⁸ Article 10 prescribes that an RSD application "*will suspend any administrative or criminal procedure due to irregular entry, instituted against the petitioner*

³⁶ Liliana L Jubilut, Camila S M de Andrade and André L Madureira, 'Humanitarian visas: building on Brazil's experience' [2016] 53 Forced Migration Review 73.

³⁷ Law 9.474/97, art 8.

³⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 31(1): "*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*"

and accompanying persons of their family group.”³⁹ This includes deportation, an administrative decision under article 50 of Brazil’s Migration Law.⁴⁰ Once the RSD is concluded, and the refugee status recognized, such procedures will be archived.⁴¹

This is especially relevant when the lack of options for a safe and regular route to Brazil is considered, a reality that many asylum seekers face. By establishing provisions such as Law 9.474/97’s article 10, Brazil ensures that asylum seekers who enter the country irregularly will not be deprived of having the determination of their refugee status ascertained solely for this reason.

2.3. *Possibility of unlawful entry into the country*

Brazil does not adopt the concept of “unlawful entry”. Rather, it adopts the term “irregular entry” in its legal framework. Nevertheless, there are some forms of entry into Brazil’s territory that may breach the law or involve criminal activity, although this does not refer to asylum seekers themselves. Most recently, the COVID-19 related measures taken in Brazil regarding border control, (especially at the border with Venezuela) did not prevent many from entering the country, albeit through alternative means.

Both Law 9.474/97 (Refugee Law) and Law 13.445/17 (Migration Law) adopt the term “irregular”. The only exception is an amendment to the Brazilian Criminal Code, which included the crime of “promoting illegal migration”. This provision criminalizes those who facilitate, with

³⁹ Law 9.474/97, art 10.

⁴⁰ Brazil, Law 13.445/2017.

⁴¹ As long as they were instituted by the same facts that based RSD in the first place. *See* Brazil, Law 9.474/97, art 10 §1°. Under art 20 §2°, the Federal Police must first be notified of both the refugee claim and the decision concerning RSD, and shall inform the organs in which criminal and/or administrative procedures are ongoing.

the aim of obtaining financial gain, the illegal entry of a foreigner into national territory or of a Brazilian into a foreign territory.⁴²

There are forms of entry into Brazil's territory that will involve unlawful activity (for instance, with the use of false documents or through smugglers). In this case, this amendment to the Code criminalizes the actions of those facilitating the entry into Brazilian territory through unlawful means, but does not criminalize the conduct of migrants involved.

This is also the case when migratory flows are restricted unexpectedly. During the COVID-19 outbreak, Brazil has issued several executive orders restricting entry into the country or restricting entry through land borders.⁴³ In the case of executive order n° 652 (adopted on 25 January 2021), Brazil also restricted the entry of foreigners from Venezuela - including those with a residency permit and/or with Brazilian family members.⁴⁴ Those looking to enter Brazil from Venezuela continued to do so, even if through existing trails along the border and outside the control of the Brazilian Federal Police.⁴⁵

Additionally, the first of the executive orders issued on the onset of the COVID-19 pandemic (executive order n° 120) included a provision that those who breached these measures would be immediately deported and would be unable to apply for RSD determination, in addition to being criminally, civil, and administratively liable.⁴⁶ This is a significant setback from the rights

⁴² Brazil, *Decreto Lei n° 2.848 de 07 de Dezembro de 1940* (Brazilian Criminal Code), art 232-A.

⁴³ See Defensoria Pública da União, '1° Informe Defensorial: Relatório de monitoramento dos direitos humanos de pessoas migrantes e refugiadas em RR' (2021) <https://promocaodedireitoshumanos.dpu.def.br/wp-content/uploads/2021/05/Informe_Defensorial_Comite_Pacaraima.pdf> accessed 22 May 2022.

⁴⁴ Brazil, *Portaria n° 652, de 25 de Janeiro de 2021*, available at: <<https://www.in.gov.br/en/web/dou/-/portaria-n-652-de-25-de-janeiro-de-2021-300740786>> (last accessed on 22 May 2022).

⁴⁵ Defensoria Pública da União, '1° Informe Defensorial: Relatório de monitoramento dos direitos humanos de pessoas migrantes e refugiadas em RR' (2021) <https://promocaodedireitoshumanos.dpu.def.br/wp-content/uploads/2021/05/Informe_Defensorial_Comite_Pacaraima.pdf> accessed 22 May 2022.

⁴⁶ Brazil, *Portaria n° 120, de 17 de Março de 2020*, <<https://www.in.gov.br/en/web/dou/-/portaria-n-120-de-17-de-marco-de-2020-248564454>> accessed 22 May 2022.

set forward by Law 9.474/97. Those who crossed the border from Venezuela to Brazil while these executive orders were in force faced difficulties in regularizing their migratory status (when they were not asylum seekers) and were significantly more vulnerable, including to human trafficking.⁴⁷

3. Possibilities of recognition in Brazil

Brazil adopts an expanded approach for its definition of refugee and recognition of refugee status. While it adopts the international criteria from the 1951 Convention, Brazil also incorporated the expanded refugee definition that stems from the 1984 Cartagena Declaration.

Regarding exclusion clauses, Brazil adopts an “inclusion before exclusion” logic, meaning that RSD procedures will firstly assess whether an individual can be declared to be a refugee and then consider upon the application of exclusion clauses. Overall, Brazil has included the exclusion clauses under article 1(F) of the 1951 Convention, with some differences, which will be explored in this section.

3.1. Recognition by the international criteria of refugee status

Law 9.474/97 incorporates the 1951 Convention definition of refugee, as amended by 1967 Protocol relating to the Status of Refugees. In its article 1º, I, Brazil recognizes as refugees those who “*owing to well-founded fear of persecution for reasons of race, religion, nationality, social group or political opinions finds themselves outside their country of nationality and are unable or unwilling to avail themselves of the protection of that country*”. Article 1º, II adds that the

⁴⁷ See Defensoria Pública da União, ‘1º Informe Defensorial: Relatório de monitoramento dos direitos humanos de pessoas migrantes e refugiadas em RR’ (2021) <https://promocaodedireitoshumanos.dpu.def.br/wp-content/uploads/2021/05/Informe_Defensorial_Comite_Pacaraima.pdf> accessed 22 May 2022.

definition also encompasses those who “*not having a nationality and being outside the country of their former habitual residence, are unwilling or unable to return to it, due to the circumstances described in the previous item.*”

The nearly literal translation of article 1 (A)(2) of the 1951 Convention at the very beginning of Law 9.474/97 demonstrates that the international criteria is Brazil’s starting point in terms of refugee status. This is also seen through the several mentions of both the 1951 Convention and the 1967 Protocol throughout the legal text. For example, by stating it is the norm that defines mechanisms for the implementation of the 1951 Convention *and defining other provisions*”. Other references include articles 5 and 6, which grant refugees rights and duties prescribed both by Law 9.474/97 and by the 1951 Convention (as well as the 1967 Protocol).

However, the international criteria applied is not limited to the 1951 Convention and the 1967 Protocol. Under Law 9.474/97’s article 48, the law should be interpreted in harmony with the 1951 Convention and the 1967 Protocol, but also with the 1948 Universal Declaration of Human Rights “*and any other pertinent provision of international instruments on human rights protection to which the Brazilian government has committed to.*” On the latter, this would mean that Brazilian refugee law (including the criteria applied to recognize refugee status) should also be interpreted in harmony with instruments such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

3.2. Recognition by the regional criteria of refugee status

In addition to the international criteria, Brazil's Law 9.474/97 also includes an expanded definition, drawn from the 1984 Cartagena Declaration on Refugees (Cartagena Declaration). Article 1º, III also recognizes as refugees those who "*owing to the grave and generalized human rights violations, are forced to leave their country of nationality to seek refuge in another country*".

The 1984 Cartagena Declaration, in its turn, was responsible for creating a regional criteria and protection system for refugees in Latin America. It also complemented the existing framework of the 1951 Convention and earlier regional treaties on asylum, seeing as it did not entirely contemplate the regional scenario and the background of those forcibly displaced in Latin America.⁴⁸ Thus, the Declaration builds upon the pre-existing framework to include as refugees in its Conclusion n. 3 "*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 disturbed public order*".⁴⁹

The criteria presented by the Cartagena Declaration implies two elements. First, that there is a threat to life, safety, or freedom and, second, that this threat resulted from one of the grounds listed.⁵⁰ There are significant differences between the Brazilian criteria and the Declaration's 3rd Conclusion. For instance, Brazil adopts a more limited criteria regarding the grounds listed by Conclusion n° 3, referring solely to "*grave and generalized human rights violations*". Moreover, Law 9.474/97 does not require that either life, safety or freedom has been threatened. Such

⁴⁸ Liliana L Jubilut and Melissa M Casagrande, 'The Continued Pivotal Role of the 1951 Convention in Refugee Protection: evidences from dialogues with Latin American Refugee Law and the GCR' in Liliana L Jubilut *et al* (eds) *Direitos Humanos e Vulnerabilidade e o Direito Internacional dos Refugiados* (UFRR 2021), 485-492.

⁴⁹ Cartagena Declaration on Refugees (adopted on 22 November 1984), conclusion n° 3.

⁵⁰ Hector G Espiell, Sonia Picado and Leo V Lanza, 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America' (1990) 2(1) *International Journal of Refugee Law* 83, 9.

differences are understandable as States remained free to determine whether or how the Declaration's Conclusions would be incorporated into domestic legislation.⁵¹ However, even when compared to other examples in Latin America that have also adopted the regionally expanded definition of refugee – such as Colombia, Paraguay and Peru⁵² - the changes are significant and “Brazil has arguably most drastically varied the original wording proposed in the Cartagena Declaration.”⁵³

Nevertheless, Brazil still adopts an expanded approach to its criteria of RSD that includes the regional criteria as well as the international one. Law 9.474/97 builds upon the criteria presented by the 1951 Convention to also include “grave and generalized human rights violations” as a broader criterion, thus incorporating the 1984 Cartagena Declaration in its national legal framework.

3.3. *Exclusion clauses*

Brazil adopts an inclusion before exclusion logic for RSD. This means that, at first, the aforementioned criteria are applied to verify whether an individual could be considered a refugee and only afterwards there is an analysis of the potential application of an exclusion clause. It is

⁵¹ Liliana L Jubilut and Rachel O Lopes, ‘Forced Migration and Latin America: Peculiarities of a Peculiar Region in Refugee Protection’ (2018) 56 (2) *Archiv des Völkerrechts*.

⁵² 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 Legal and Protection Policy Research Series < <https://www.unhcr.org/protection/globalconsult/51c800fe9/32-cartagena-declaration-refugees-protection-people-fleeing-armed-conflict.html>> accessed 22 May 2022, 17.

⁵³ 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 Legal and Protection Policy Research Series < <https://www.unhcr.org/protection/globalconsult/51c800fe9/32-cartagena-declaration-refugees-protection-people-fleeing-armed-conflict.html>> accessed 22 May 2022, 17.

worth noting that the law itself does not mention this inclusion before exclusion logic. Rather, this is noticed by surveying the practice of RSD procedures in the country.⁵⁴

There are some differences between exclusion clauses adopted under Law 9.474/97 and the exclusion clauses of the 1951 Convention. First, while the Convention's article 1 (F) applies its exclusion clauses to "*any person with respect to whom there are serious reasons for considering that*", Brazil adopts a higher threshold by omitting this phrasing. Under Law 9.474/97 article 3º, only those who have in fact committed one of the acts included in the exclusion clauses may have those applied.⁵⁵

Second, Brazil adds two additional exclusion clauses. The first refers to persons who are already under the protection or assistance of organisms or institutions of the United Nations other than UNHCR⁵⁶ and the second relates to those who are already reside in Brazilian territory and have rights and obligations related to the status of Brazilian nationals.⁵⁷

Finally, Brazil adds to the list of crimes leading to exclusion of refugee status, the involvement in terrorist acts or drug trafficking.⁵⁸ The interpretation of this inclusion is twofold: on the one hand, it could be seen as an unlawful limitation of refugee status regarding the 1951 Convention; on the other hand, it can be regarded as "updating and specifying" the 1951 Convention, as both crimes can be understood as serious non-political crimes or acts contrary to the purposes and principles of the United Nations.⁵⁹

⁵⁴ For example, *see* UNHCR Brazil and CONARE, 'O reconhecimento dos refugiados pelo Brasil: Decisões comentadas do CONARE' (2007) <<https://www.corteidh.or.cr/tablas/24507.pdf>> accessed 25 May 2022, 53-54.

⁵⁵ Liliana L. Jubilut, 'Refuge Law and Protection in Brazil: a model in South America' (2006) 19(1) *Journal of Refugee Status* 22, 32.

⁵⁶ Brazil, Law 9.474/97, art 3 (I).

⁵⁷ Brazil, Law 9.474/97, art 3 (II).

⁵⁸ Brazil, Law 9.474/97, art 3 (III).

⁵⁹ Liliana L. Jubilut, 'Refuge Law and Protection in Brazil: a model in South America' (2006) 19(1) *Journal of Refugee Status* 22, 32.

The practice of exclusion clauses in Brazil is still murky. As it is the case with the practice of inclusion before exclusion logic, the procedural aspects of the application of exclusion clauses are not prescribed by law and accessibility to public information about procedural aspects of the application of exclusion clauses is fairly limited. While the Brazilian government publicizes some data on RSD procedures, the data on rejected RSD applications due to the lack of inclusion clauses or due to the application of exclusion clauses is aggregated and presented jointly..⁶⁰ This makes it difficult to assess the reality behind the application of exclusion clauses.

4. Practice of recognition in Brazil

RSD procedures in Brazil are primarily based on the norms described in section 1. Its central structure was mainly drawn through Law 9.474/97 and in the last 20 years it was primarily built through the executive orders issued by CONARE.⁶¹ This section describes the current model of RSD in Brazil, focusing on the models of individual and group recognition (the latter being specially developed for analysing RSD cases of Venezuelans in the country). Finally, this section presents the most recent data available relating to RSD in Brazil.

⁶⁰ See Brazil, MJSP, 'Refúgio em Números' <<https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes>> accessed 25 May 2022.

⁶¹ So far, as previously mentioned, CONARE has issued 25 executive orders regarding the procedure of RSD.

4.1. *The RSD procedure in Brazil*

The current RSD procedure in Brazil has essentially six consecutive phases: (i) preliminary phase; (ii) formal start of the procedure; (iii) evidence gathering; (iv) analysis; (v) appeals; and (vi) execution.⁶²

In the preliminary phase (i), the asylum seeker manifests its intent to file an RSD application. From this moment, asylum seekers have the right to obtain further information about the procedure and the right to *non-refoulement*.⁶³ The formal start of the procedure phase (ii) only occurs once the applicant fills an online Term of Request of the Recognition of Refugee Status through SISCONARE.⁶⁴ Through this Term, the claimant presents the reasons that justify their RSD application, as well as other data, including personal information. The applicant has the duty of keeping their information up to date for the duration of the procedure, as well as a duty to access the SISCONARE platform at least every 30 days to keep up to date with notifications regarding the RSD application procedure.⁶⁵

At the time and date scheduled through SISCONARE, the applicant must appear before a to one of the Federal Police unit to confirm the application and collect biometric data. This allows for the issuance of the provisional protocol, the official identification document for asylum seekers in Brazil which serves as legal identity, proof of application and authorizes provisional stay in the country until a final decision is reached in the RSD procedure. This document is issued individually for the claimant and is valid for one year, extendable for an equal period.⁶⁶ From its emission, the

⁶² Law 9.474/97 does not directly refer to this terminology. Rather, the authors present this terminology after a broad interpretation of its content.

⁶³ Law 9.474/97, arts 7 and 18.

⁶⁴ Online RSD application platform run by CONARE.

⁶⁵ Law 9.474/97, arts 9, 18, and 19. CONARE, *Resolução Normativa n° 29, de 14 de junho de 2019* (RN 29/2019), art 3.

⁶⁶ Law 9.474/97, art 21.

applicant has the right to obtain a provisional work permit and to be registered in the Natural Persons Register (known as CPF), the Brazilian equivalent of a social insurance number.⁶⁷ As mentioned in section 2, every administrative and criminal procedure due to the irregular entry in the country (if there are any) shall be suspended at this phase.⁶⁸

Then, the evidence gathering phase (iii) takes place. In this phase, those applying for the recognition of refugee status go through interviews about the situation which they described in their Term of Request of the Recognition of Refugee Status.⁶⁹ Notifications for these interviews are made through SISCONARE and they generally take place in person at CONARE's offices and its regional centres.⁷⁰

Following the interview, CONARE's eligibility officers draft a report on the case.⁷¹ This report is forwarded to a preparatory commission, prior to its analysis during the subsequent plenary session of CONARE's plenary, which by its turn, starts the analysis phase (iv). The preparatory commission is formed by CONARE representatives of the Ministries of Justice and Foreign Affairs, UNHCR and the CONARE civil society representative. After analysing the case, the preliminary commission forwards it to CONARE, making a recommendation on the RSD.⁷²

Once CONARE's plenary analyses the case, in the case of a negative decision there is still the possibility of the appeals phase (v). The applicant has 15 days from the date of notification of the decision to file an appeal to the Minister of Justice requesting for the revision of the decision.

⁶⁷ CONARE, art 5 (III)(c).

⁶⁸ Law 9.474/97, art 10 .

⁶⁹ Law 9.474/97, arts 11, 14, and 23-25

⁷⁰ Currently, CONARE has three regional centres (in São Paulo/SP, Rio de Janeiro/RJ, and Campinas/SP). Its main office is in Brasília/DF.

⁷¹ CONARE, RN 29/2019, art 6.

⁷² Liliana L Jubilut, 'O Direito Internacional dos Refugiados e a sua aplicação no Ordenamento Jurídico Brasileiro' (Método 2007).

In case this decision is also negative, the applicant is subject to the legislation applicable to foreigners in Brazil (Brazil's Migration Law).⁷³

In the case of a positive decision (either in first or second instance) the execution phase (vi) follows. Once there is the determination of refugee status, the refugee must sign a statement of responsibility. This grants them the right to issue an ID proving their legal status, a permanent work permit and a permanent travel document.⁷⁴

As mentioned in section 2, a positive decision also leads to any criminal or administrative procedures against the refugee due to irregular entry into the country to be archived, as long as they are related to the same facts justifying the determination of refugee status.⁷⁵

In this stage there are also the hypotheses of suspension, archiving and termination of RSD procedure. The hypotheses of suspension are related to omitted or special cases, or to humanitarian reasons forwarded to CNIg.⁷⁶ Whenever applicable, CONARE forwards cases to CNIg for examination, suspending the procedure within the organ.

Regarding archiving the procedure, its hypotheses are related to: a) failing to attend the interview to which the asylum seeker was notified, without a justification; b) failing to update personal data such as address with CONARE for more than 30 days following their last notification; c) failing to renew the provisional protocol (official ID for asylum seekers in Brazil) for more than 6 months after its expiration date.⁷⁷

⁷³ Law 9.474/97, arts 29-31.

⁷⁴ Law 9.474/97, arts 4, 6 and 28.

⁷⁵ Law 9.474/97, art 10 (1).

⁷⁶ CONARE, *Resolução Normativa nº 13, de 23 de março de 2007*. CONARE, *Resolução Normativa nº 18, de 30 de Abril de 2014*, art 14.

⁷⁷ CONARE, *Resolução Normativa nº 26, de 26 de março de 2018*, art 1º. CONARE, *Resolução Normativa nº 28, de 20 de dezembro de 2018 (RN 28/2018)*, art 1.

Finally, the hypotheses related to the termination of the procedure are related to: a) failing to renew the provisional protocol for more than 6 months after its expiration date (up to CONARE's discretion); b) failing to attend the interview, after providing a justification for unarchiving the procedure; c) death; d) being absent from Brazilian territory for two years; e) becoming a naturalized Brazilian citizen; f) presenting a second refugee claim after a negative decision regarding its merit, without presenting new facts or elements; and g) filing a withdraw request.⁷⁸

This is the regular model of RSD determination followed by CONARE in the cases of individual recognition. However, group recognitions developed mostly due to the significant movement of Venezuelans to Brazil has unique characteristics, outlined in the section below.

4.2. *The novel group recognition for Venezuelans*

Following the massive movement of Venezuelans to Brazil since 2015, there were two possibilities of regular stay in the country: (i) a residence permit valid for two years;⁷⁹ and (ii) RSD determination, at first on an individual basis, followed by a procedure for the declaration of their refugee status through group recognition.⁸⁰

Firstly, CONARE recognized on 17 June 2019 the situation of “grave and generalized human rights violations” in Venezuela⁸¹, thus enabling simplified and fastracked RSD procedures

⁷⁸ CONARE, RN 28/2018, art 2. CONARE, *Resolução Normativa n° 31, de 13 de Novembro de 2019* (RN 31/2019), art 1.

⁷⁹ Brazil, *Portaria Interministerial MJSP/MRE n° 9, de 14 de março de 2018*, revoked and replaced by *Portaria Interministerial MJSP/MRE n° 19, de 23 de março de 2021*.

⁸⁰ Liliana L Jubilut and João C J Silva, ‘Group Recognition of Venezuelans in Brazil: an adequate new model?’ (2020) 65 *Forced Migration Review* 42.

⁸¹ Brazil, MJSP, ‘Nota Técnica n.º 12/2019/CONARE’ (03 December 2019) <<https://www.refworld.org/es/type,LEGISLATION,,,5e349d774,0.html>> accessed 30 May 2022.

for Venezuelans.⁸² Thus, Brazil adopted a *prima facie* recognition procedure under which, once the Venezuelan nationality of applicant was established, , their refugee status was determined regardless of other phases of RSD procedures such as the interviews.

As such, the applicant (i) must have Venezuelan documentation proving their nationality (such as a passport or ID, even if expired); (ii) their last movement record must be the entry in the country; (iii) must have no objection against their name (e.g. no international alert relating to their name); (iv) must be over 18 years old; and (v) must not have a residence permit valid on national territory, in the terms of the Migration Law.⁸³

Venezuelan applicants that fulfil these requirements are determined *prima facie* refugees and have their procedure reference number (although not their names) publicized on official government channels, notifying them of the decision. In practice, many Venezuelan asylum seekers become aware of the positive decision at the Federal Police while renewing their provisional protocol. Those who fail to fulfil any of the aforementioned criteria (e.g. undocumented claimants) must follow the regular RSD procedure (*i.e.* having to go through the eligibility interview, for example).⁸⁴

The first group recognition took place in December 2019, with the recognition of 21,000 Venezuelans as refugees. Next, 17,000 Venezuelans were recognized as refugees in January 2020 and another 7,500 in August 2020.

⁸² See Brazil, MJSP, ‘Refúgio em Números 4ª Edição’ <https://www.acnur.org/portugues/wp-content/uploads/2019/07/Refugio-em-nu%CC%81meros_versa%CC%83o-23-de-julho-002.pdf> accessed 30 May 2022.

⁸³ Liliana L Jubilut and João C J Silva, ‘Group Recognition of Venezuelans in Brazil: an adequate new model?’ (2020) 65 *Forced Migration Review* 42.

⁸⁴ Liliana L Jubilut and João C J Silva, ‘Group Recognition of Venezuelans in Brazil: an adequate new model?’ (2020) 65 *Forced Migration Review* 42.

4.3. Data of Brazil's recognition of refugees

The data of Brazil's recognition of refugees can be accessed through different government databases, such as *Plataforma Interativa de decisões sobre a determinação da condição de refugiado no Brasil* (in partnership with UNHCR) and *Refúgio em Números*⁸⁵ (in partnership with the International Migration Observatory⁸⁶). Different methodologies have been used throughout the years by different stakeholders to gather data on RSD in Brazil. Data differs in different platforms and publications and has only recently become more widely available.

From 1998 to 2010, 3,904 persons were recognized as refugees in Brazil. From 2011 to 2015 this number doubled, 8,493 persons were recognized as refugees. There was a significant rise in RSD applications in the period between 2010 and 2015 with a total of 81,928 applications, mostly from Haitian nationals (about 48,371).⁸⁷

From 2016 until May 2022, CONARE has issued a total of 75,213 decisions of persons of 114 different nationalities, amongst those, the main nationality groups are Venezuelan (57,025), followed by Senegalese (3,487), Haitian (2,487) and Sirian (2,364). Out of this total of decisions issued by CONARE, the organ has recognized 54,004 RSD applicants as refugees, has rejected 8,990 applications and 11,827 applications were considered closed cases (9,657 of which through termination of the procedure and 2,170 due to the procedure being archived).⁸⁸

⁸⁵ Brazil, MJSP, 'Refúgio em Números' <<https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes>> accessed 30 May 2022.

⁸⁶ Observatory created through a cooperation agreement between the Ministry of Labour, CNIg and the University of Brasilia (UnB).

⁸⁷ Brazil, MJSP, 'Refúgio em Números' (1st edition) <https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes/anexos/refugio_em_numeros-1e.pdf> accessed 30 May 2022; Brazil, MJSP, 'Refúgio em Números' (2nd edition) <https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes/anexos/refugio_em_numeros-2e.pdf> accessed 30 May 2022.

⁸⁸ CONARE, MJSP and UNHCR, 'Decisões Plenária Conare' (interactive platform) <<https://app.powerbi.com/view?r=eyJrIjoibWVudC04YTBjLTUyNDk0MmFmODBiZSIsImMiOiJh9>> accessed 30 May 2022.

In terms of grounds leading to the recognition of refugee status in the period between 2016 and 2022, there is a significant prevalence of “grave and generalized human rights violation” (47,852), followed by “political opinion” (967), “particular social group” (607), “religion” (227), “race” (111), and “nationality” (59). From a gender perspective, 46,598 applications were filed by men and 28,615 by women. In terms of age, more than half of the applications are by individuals between the ages 30 and 59.⁸⁹

On a broader perspective regarding refugees in Brazil in the last decade, from 2011 to 2020 approximately 265,729 individuals sought refugee status in Brazil.⁹⁰ In this period, 94.3% of these individuals were recognized as refugees. However, there were over 190,000 RSD applications pending CONARE’s analysis by August 2020.⁹¹

5. Assessing Brazil's domestic refugee law in terms of admissibility

From the overview presented and through the lenses of International Human Rights and International Refugee Law, this section offers a critical analysis of Brazil’s domestic refugee law in terms of admissibility. The analysis presented is two-pronged: it regards both the physical admissibility into Brazilian territory and the admissibility of refugees regarding RSD procedures.

⁸⁹ CONARE, MJSP and UNHCR, ‘Decisões Plenária Conare’ (interactive platform) <[⁹⁰ Brazil, MJSP, ‘Refúgio em Números’ \(6th edition\) <\[https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes/anexos/refugio_em_numeros-6e-re.pdf\]\(https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/refugio-em-numeros-e-publicacoes/anexos/refugio_em_numeros-6e-re.pdf\)> accessed 30 May 2022.](https://app.powerbi.com/view?r=eyJrIjoiNTQ4MTU0NGItYzNkMi00M2MwLWFhZWVtMDEiM2I1NWVjMTY5IiwidCI6ImU1YzYzM3OTgxLTY2NjQtNDEzNC04YTBlLTY1NDNkMmFmODBiZSIsImMiOiJh9>” accessed 30 May 2022.</p></div><div data-bbox=)

⁹¹ Brazil, MJSP, ‘Conare concede status de refugiado a quase 8 mil venezuelanos’ (28 August 2020) <<https://www.gov.br/mj/pt-br/assuntos/noticias/conare-concede-status-de-refugiado-ha-quase-8-mil-venezuelanos>> accessed 30 May 2022.

5.1. Assessment of Normative issues in admissibility

Regarding the physical admissibility into Brazilian territory, Brazil has been internationally recognized for its migration policies which are based on humanitarian values, abide by human rights and have a compromise towards international cooperation.⁹² Humanitarian visas are at the core of these policies, which have already facilitated the safe journey and entry in Brazil of forced migrants from different nationalities, such as persons from Haiti, Siria, Afghanistan, and most recently Ukraine.⁹³

Moreover, the possibility of seeking refuge albeit an individual's irregular entry into the country (along with the suspension of any criminal or administrative procedures against them) is also a positive protection safeguard. A clear exception to this approach was the closure of borders in the context of the COVID-19 pandemic when a series of executive orders were issued that curtailed that right guaranteed through Law 9.474/97.⁹⁴

In parallel, and most specifically regarding admissibility of RSD procedures, at least from a normative perspective, it should be highlighted that there are no manifest obstacles to submitting

⁹² José H F de Andrade, 'Aspectos históricos, jurídicos e políticos da proteção de refugiados no Brasil (1951-1997)' (2015) X Anuário Brasileiro de Direito Internacional 132; Renato Z R Leão, 'O reconhecimento do refugiado no Brasil no início do Século XXI' in Luiz Paulo T F Barreto (ed), *Refúgio no Brasil: a proteção brasileira aos refugiados e seu impacto nas Américas* (ACNUR, Ministério da Justiça, 2010); Catherine Tinker, 'New trends in Migratory and Refugee Law in Brazil: the expanded refugee definition' (2015) 3 Panor.Braz.Law 143.

⁹³ Brazil, CNIg, Resolução Normativa nº 97, de 12 de Janeiro de 2012 <https://dspace.mj.gov.br/bitstream/1/1541/1/REN_CNIG_2012_97.pdf> accessed 22 May 2022 (applicable to Haitians); CONARE, *Resolução Normativa CONARE nº 17 de 20/09/2013* <<https://www.legisweb.com.br/legislacao/?id=258708>> accessed 22 May 2022 (applicable to those affected by the conflict in Syria); Brasil, MJSP/MRE, *Portaria Interministerial MJSP/MRE nº 24, de 3 de setembro de 2021* (applicable to Afghans, stateless persons and those affected by the grave or imminent situation of institutional instability, grave violations of human rights or international humanitarian law in Afghanistan); Brasil, MJSP/MRE, *Portaria Interministerial MJSP/MRE nº 28, de 3 de março de 2022* (applicable to Ukrainian nationals or stateless persons affected or displaced by the armed conflict in Ukraine).

⁹⁴ See Defensoria Pública da União, '1º Informe Defensorial: Relatório de monitoramento dos direitos humanos de pessoas migrantes e refugiadas em RR' (2021) <https://promocaodedireitoshumanos.dpu.def.br/wp-content/uploads/2021/05/Informe_Defensorial_Comite_Pacaraima.pdf> accessed 22 May 2022.

an RSD application . The procedure is free of charge and any non-national has the right to seek the determination of refugee status as long as they are in Brazilian territory⁹⁵. This is the case regardless of the applicant’s regular entry into the country, as mentioned above.

However, despite the absence of norms that limit formal access to RSD procedures (that is, admissibility issues to initiate a procedure), there might be practical limitations throughout the RSD procedure. Recent changes to the applicable law have created significant challenges for existing RSD procedures under analysis. An example is CONARE’s executive order n° 31/2020, which states that the granting of a residency permit obtained through alternative means offered within the scope of the Migration Law implies the tacit withdrawal of the RSD procedure, leading to its termination without analysis of the merit. Despite assuring significant gains regarding procedural efficiency (by decreasing the number of pending decisions),⁹⁶ in practice, this measure weakens the access to the right to seek refuge as well as the right to due process.⁹⁷ Ultimately, this measure also weakens the instruments of admissibility within RSD procedures by levelling it with other (less protective) migratory regularization alternatives.

Additionally, discussions related to the hypotheses of exclusion within the RSD procedure also raise important reflections on admissibility. As mentioned above, the “inclusion before exclusion” logic only exists on a procedural level, without any normative provisions on the matter offering greater clarity to this practice.⁹⁸

⁹⁵ Law 9.474/97, art 4.

⁹⁶ Brazil, MJSP, ‘CONARE simplifica tramitação de pedidos de refúgio’ (11 February 2020) <<https://www.gov.br/mj/pt-br/assuntos/noticias/conare-simplifica-tramitacao-de-pedidos-de-refugio>> accessed 31 May 2022.

⁹⁷ Inter-American Commission on Human Rights (IACHR), ‘Due process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection’ (2020) <<https://www.oas.org/en/iachr/reports/pdfs/DueProcess-EN.pdf>> accessed 31 May 2022.

⁹⁸ The applicable legal framework discussed in section one is completely silent on the matter. Law 9.474/97’s provisions on exclusion clauses merely set exclusion clauses themselves, without explaining the procedure for their

5.2. *Assessment of Procedural issues in admissibility*

Despite Brazil being highly praised for its receptiveness of migrants when they enter the country, there were past instances that illustrate a series of challenges.

During RSD procedures, there are noticeable challenges related to the admissibility from its very early stages. An example was the recent change of all RSD applications to an online model.⁹⁹ Regardless of the undeniable gains of this change to the institution of asylum in Brazil, most notably to celerity and data recording, the online format brings a series of procedural impasses with it. For instance, the (lack of) access to the internet, or matters related to language (considering that information within SISCONARE is only available in Portuguese).

Recent *prima facie* rejections of RSD applications have also jeopardized the quality and reliability of procedures. . As an example, in 2020, CONARE halted interviews for asylum seekers in cases that were perceived to be manifestly unfounded, contrary to guidelines established through manuals and national and international good practice on the matter.¹⁰⁰ After pressure from other public authorities and civil society demanding for the return of the interviews to all RSD applicants

application. Similarly, there are no executive orders by either CONARE nor other organs offering greater clarity on this.

⁹⁹ CONARE, RN 31/2019.

¹⁰⁰ Both relevant literature and international practice point towards to the necessity of the interviews, as a safe and fundamental space for refugees to expose their situation and narrate the reasons behind their refugee claim. *See* UNHCR ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’ (2003) <<https://www.refworld.org/docid/42d66dd84.html>> accessed 01 June 2022; UNHCR ‘A guide to international refugee protection and building state asylum systems - Handbook for Parliamentarians N° 27’ (2017) <<https://www.unhcr.org/3d4aba564.pdf>> accessed 01 June 2022. Martin Jones and France Houle ‘Building a better Refugee Status Determination System’ (2008) 25 (2) *Refugee* 3; David J Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’ (2014) 34 (1) *Refugee Survey Quarterly* 79.

on the basis of Brazilian law, as well as standards established in International Human Rights Law and International Refugee Law.¹⁰¹

Regarding the response from the Brazilian government to the massive movement from Venezuela, and despite the fact that it took action, a more adequate response should have been offered sooner. As a consequence, adequate admissibility mechanisms regarding the situation lived by Venezuelan asylum seekers in Brazil (*i.e.* group recognition) were only provided once their situation within Brazilian territory was at breaking point. Such a late response may have aggravated the situation.¹⁰²

Finally, regarding exclusion clauses within RSD procedures, it is worth highlighting the lack of data regarding its practical analysis. As mentioned, the data is presented along with other hypotheses (such as archiving or suspension). Thus, there is not a clear and broad comprehension upon the practice of exclusion clauses in Brazil.

5.3. *Assessment of political contexts and choices in admissibility*

Asylum policies tend to be considerably affected by political dynamics. In the Brazilian context, this can be perceived in different ways. Humanitarian visas, for instance, have been subject to criticism due to their *ad hoc* nature, as opposed to being granted in a broader and systemic manner within RSD legislation and policies. The *ad hoc* nature of these visas have several advantages (such as expedited decision-making), but such decisions are also considerably affected

¹⁰¹ Consultor Jurídico (CONJUR), ‘Indeferimento prima facie, uma triste inovação’ (2021) <<https://www.conjur.com.br/2021-fev-12/opiniao-indeferimento-prima-facie-triste-inovacao>> accessed 31 May 2022.

¹⁰² Natalia C O Tavares and Vinicius P Cabral, ‘The application of the Cartagena Declaration on Refugees to Venezuelans in Brazil: An analysis of the decision-making process by the National Committee for Refugees’ (2020) 5 *Revista Latinoamericana de Derecho* 121.

by the action and the political will of a given moment in time.¹⁰³ Even when only RSD procedures are under the magnifying glass, CONARE's decisions are also considerably subjected to political influence, as the Executive branch of government is overrepresented amongst CONARE's voting members.

Regarding RSD procedures, the closure of borders during the pandemic has also been tied to political factors - notably by elements of Brazil's external policy. At the time, Brazil was subject to harsh criticism for creating measures such as mass deportations, the impossibility to seek asylum and discrimination of those coming from Venezuela.¹⁰⁴ At the centre of it were allegations that Brazil would be using the pandemic to limit the rights of migrants, including asylum seekers in clear violation of the country's Constitution, as well as in violation of regional and global standards of protection.¹⁰⁵

¹⁰³ Liliana L Jubilut and João C J Silva, 'Trends in Brazil's Practices of Refugee Protection: Promising Inspirations for the EU?' (ASILE – Global Asylum Governance and the European Union's Role, 20 December 2020) <<https://www.asileproject.eu/trends-in-brazils-practices-of-refugee-protection-promising-inspirations-for-the-eu/>> accessed 22 May 2022.

¹⁰⁴ Conectas, 'Fechamento de fronteiras com punições desproporcionais pode agravar situação de refugiados' (20 March 2020) <<https://www.conectas.org/noticias/fechamento-de-fronteiras-com-punicoes-desproporcionais-pode-agravar-situacao-de-refugiados-alertam-especialistas/>> accessed 31 May 2022.

¹⁰⁵ See Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), arts VII-XI; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), arts 9-11, 14, 15, and 24-26; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992); arts 2, 7, 8, and 24; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), arts 6 and 7. See also IACtHR, *Case of Pacheco Tineo Family v. Bolivia*, judgment of 25 November 2013 (Ser C) No 272.

Conclusion

The overview on the admissibility process both in terms of physical admission and admission as a refugee in Brazil points to an overall positive reality. Brazil is in fact in a prominent position internationally, with migration policies recognized as innovative and mostly compliant with human rights and the rights of refugees.

For example, in terms of physical admission, Brazil has been praised for the practice of granting humanitarian visas, offering a safe option to those seeking asylum in the country. Additionally, Brazil recognises the right to seek asylum regardless of whether an individual has entered the country irregularly and prevents from punishing asylum seekers and refugees (both criminally and administratively) even when unlawful activity is involved in their entry. In terms of admission as refugees, Brazil adopts a broader concept of refugee than the one presented by the 1951 Convention, incorporating the innovative regional approach of the 1984 Cartagena Declaration that expands the definition of the 1951 Convention. Brazil's RSD procedures are accessible and overall are compliant to principles related to due process, besides offering alternatives in the case of unexpected movements of refugees (such as the group recognition of Venezuelans).

However, and although it is necessary to recognize both normative and procedural achievements and good practices, there is still much room for improvement in Brazil, for instance, a potential reform in the normative sources, with less reliance on executive orders as well as more transparency and accountability in the enactment of executive orders. This could potentially prevent violations such as the closure of borders or the rejection of an RSD application without the appropriate procedure including an eligibility interview.

It is crucial that Brazil adopts, in terms of policies regarding the protection of asylum seekers and refugees, measures that are broader, more structured, and less “reactive” to migratory phenomena (such as the case of Venezuelans), in order to ensure a more holistic approach to the protection of asylum seekers, refugees and other forced migrants in the country.