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Refugee Law and Protection in Brazil: a Model in South America?

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Brazil has been committed to International Refugee Law since the 1950s. For much of this period, however, the country was under a dictatorship which made the implementation of refugee protection precarious, although refugees and asylum seekers could count on the assistance of UNHCR and its implementing partners—NGOs connected to the Catholic Church which remain partners of UNHCR till today. Following re-democratization, Brazil has not only passed a specific law on refugees, but has evolved to become a resettlement country. These changes have led Brazil to be regarded as a model in refugee protection in South America. This paper aims to assess whether or not Brazil is fulfilling the said role by describing the evolution of refugee law and protection in the country.

Keywords: refugee law, refugee protection, Brazil

Introduction

Brazil's commitment to the protection of refugees dates from the beginning of the universalization of the rules on this institution in the early 1950s. However, for some two decades, there were no effective policies for the reception of refugees in Brazil. Such policies only emerged at the end of the 1970s.

Since then, and especially with the re-democratization of Brazil in the 1980s and the country's subsequent commitment to human rights at home and abroad, Brazil's activities on refugee protection have evolved considerably.

In 1997, the Refugee Act was passed (Law 9.474/97 of 22 July) and more recently Brazil has both become a country of resettlement and allowed the re-opening of an office of the United Nations High Commissioner for Refugees (UNHCR) on its territory. As a consequence of these changes, Brazil has started to be regarded as a model for the protection of refugees in South America, as stated by UNHCR itself:

> Nowadays, the countries in the region are at different stages of the process of internal consolidation of their international commitments. *Brazil became the regional leader with the approval of a refugee act in 1997* (ACNUR 2003: 8; author's translation, emphasis added).

This leadership role has been attributed to Brazil for two main reasons: the fact that the Brazilian Refugee Act was the first national law on the matter in the region,[2] and Brazil's political and economic importance in South America.

In view of this, the present paper aims: (1) to describe the development of refugee law and protection in Brazil and (2) to analyse whether or not Brazil is fulfilling its role as a model in South America regarding the protection of refugees. These two aims have a relevance which goes beyond the country and region themselves. The first goal is relevant in so far as an assessment of the development of refugee protection in Brazil has been missing from the broader international literature on Refugee Law and an analysis of the robustness of Brazil's system could contribute to international perceptions of refugee protection. The second aim, of assessing Brazil's role as a regional model, is important for more than the refugee protection aspects, since other countries in the region tend to look to Brazil when it comes to international relations in general and to the protection of refugees in particular. For example, they use the Brazilian law on refugees as a model when adopting internal regulations on the theme and some have been inspired by the practice of refugee protection in Brazil.

This status is due to the fact that Brazil views itself, and is often held by outsiders to be, a country with (1) continental dimensions; (2) peaceful relations with several neighbours; (3) a history of peace-building diplomacy; (4) linguistic unity in a multi-ethnic environment and (5) better results in the face of the challenge of development than the majority of countries in South America (Lafer 2004). Thus it is important to analyse the extent to which Brazil is playing a refugee protection role which is commensurate with its international and regional standing.

To achieve this twofold aim, this article is divided into three parts. The first part describes the historical process of the incorporation of International Refugee Law into Brazil's national legislation and political thinking. This historical overview covers the period from the early 1950s to 1988 when Brazil approved its current Constitution. This overview also explains the origins of UNHCR's initially difficult presence in Brazil, and shows that from the beginning, and in spite of the domestic politics of the time, Brazil played a leading role in the development of refugee protection in the South American region.

The second part explores three major issues for any analysis of whether Brazil in fact constitutes a legal model that can be followed in the protection of refugees across South America. The first issue is the current status of refugee law and protection in Brazil. The two key pieces of domestic legislation that regulate refugee law in Brazil (the 1988 Federal Constitution and the 1997 Refugee Act) are examined. The second major issue is the distinctions in understanding and practice in Brazil between 'domestic asylum' and 'refuge'. The final issue is the process of refugee status determination in Brazil.

The third part describes the most recent developments in refugee policy in Brazil, especially the previously mentioned re-opening of the office of UNHCR and the beginning of a resettlement programme.

The conclusion analyses the seemingly positive and negative aspects of the path followed by Brazil regarding refugee law and protection, specifically in the light of the question of its role as a model in South America.

The Beginning of Refugee Protection in Brazil

Brazil has been a country of immigrants since it was first colonized by the Portuguese in the sixteenth century. In spite of this, the treatment of foreigners has varied through the years, especially during the First and Second World Wars and the 24-year dictatorship (1964–1988).

Brazil ratified and incorporated the 1951 United Nations Convention on the Status of Refugees into its legal system in 1961 and the United Nations 1967 Protocol on the Status of Refugees in 1972; being therefore, the second country in South America to ratify the Convention and the fifth in the region to ratify the Protocol. Furthermore, it was, along with Venezuela, the first South American country to be part of the Executive Committee of UNHCR; both have been members of ExCom since 1958.

Despite this international commitment, Brazil's practice did not respect the international standards on refugee protection. An example of this was its maintenance of the 1951 Convention's geographic restriction (to apply to refugees from Europe only), despite having signed the 1967 Protocol which eliminates it (Fischel and Marcolini 2002a: 37). This was due to the fact that Brazil adopted international refugee law during the early years of the dictatorship when the government often signed treaties committing itself internationally but did not implement them or respect their provisions in its internal practice.

Initial conditions for implementation were, thus, far from ideal, especially because this period also saw significant displacements across South America, due to the persecution of populations following the establishment of non-democratic regimes, which led in turn to refugees. In this scenario a UNHCR office was needed and in 1977, UNHCR entered into an agreement with the Brazilian government for the establishment of an ad hoc office in Rio de Janeiro (ACNUR 1997).

Between 1977 and 1982 this office's activities within Brazil were virtually clandestine, with its main work involving the resettlement of South American refugees in other countries, often beyond the region. This was a result of the fact that the geographic restriction suited the military dictatorship of Brazil at the time, since it was unwilling to shelter people who were fleeing similar regimes in the region. Thus, Brazil only allowed these people to pass through its territory before being resettled in other States. About 20,000 Argentines, Bolivians, Chileans and Uruguayans were resettled from Brazil to Australia, Canada, Europe, New Zealand and the US (Fischel and Marcolini 2002a).

These high numbers were no inducement for Brazil to withdraw the geographic restriction in practice. Similarly, Brazil continued to refuse to recognize UNHCR as an official international organization (in fact a subsidiary organ of

the UN), highlighting the dictatorship's unwillingness to commit itself internally to international law.

During this period of almost clandestine activity, UNHCR was able to operate largely as a result of the support of domestic non-governmental organizations involved in human rights activities (Fischel and Marcolini 2002a: 37). These partners were three Catholic non-profit organizations: Comissão Justiça e Paz (Justice and Peace Commission), composed primarily of scholars and lawyers who worked on the legal aspects of the Catholic Church's humanitarian work with victims of human rights violations, including refugees; Cáritas Arquidiocesana do Rio de Janeiro (Archdiocesan Cáritas of Rio de Janeiro, or CARJ) and Cáritas Arquidiocesana de São Paulo (Archdiocesan Cáritas of São Paulo, or CASP)—two local branches of Caritas International, a confederation of 154 national Caritas organizations operating in 184 countries. These three organizations conducted refugee protection activities in two cities: São Paulo, where CASP and the Justice and Peace Commission were active,[3] and Rio de Janeiro, where CARJ was active.

These partnerships were of vital importance for UNHCR's work, as the Brazilian NGOs provided both legal and social assistance to refugees, making up for the previously mentioned limitations on the competence of UNHCR in the country at the time. An important result of these partnerships was the opportunity to make the practice of the geographic limitation more flexible, as 150 Vietnamese, some Cubans and 50 Baha'i families were received by Brazil as foreign residents. They were not recognized as refugees but were granted rights and protection. The Vietnamese, after some years, began to participate in a micro-credit project for the establishment of sewing workshops, which still operates today. This marked, in fact, the first local integration of refugees into Brazilian society.

The protection of refugees started to change slightly when the Brazilian government recognized UNHCR's status as an international organization in 1982 and when, in 1984, with the re-democratization of some Latin American countries, the repatriation of refugees began. After this date,

> non-European refugees were allowed to stay in Brazil for a period not limited by resettlement opportunities and were granted documentation issued by UNHCR and endorsed by the Federal Police. The national authorities indicated their understanding that the refugees were UNHCR's responsibility, not Brazil's (Fischel and Marcolini 2002a: 37–38).

The Protection of Refugees after Re-democratization

The 1988 Federal Constitution

Following re-democratization, many changes in refugee protection activities were introduced in quick succession. In 1989, the office of UNHCR was transferred to Brasilia and Brazil withdrew, not only formally but now practically,

its geographic limitation to the application of the Convention. In 1990, the reservations to articles 15 and 17 of the 1951 UN Convention, which together with the geographic restriction had been adopted by Brazil, were withdrawn. In 1991, the 394 Inter-Ministry Rule was elaborated, increasing the rights of refugees and establishing a specific administrative process for the granting of refugee status, involving both UNHCR, which analysed the individual cases, and the Brazilian Government, which gave the final decision on the matter. This was a result of three factors: the re-democratization of Brazil; the 1988 Federal Constitution; and the growing interest in human rights.

In general the procedure for determining refugee status was as follows: UNHCR interviewed the person seeking refugee status and elaborated a legal opinion recommending, or not, the granting of that status. This legal opinion was then sent to the Ministry of Foreign Affairs, which presented its view on the matter and sent it to the Ministry of Justice, which made the final decision. The decision was then published in the official gazette of the Brazilian government (*Diário Oficial da União*) and an official document was sent from UNHCR to CASP and CARJ, based on which, if the decision was positive, the Federal Police issued an identity document for the newly recognized refugee. The caseload at this time was small, around 200 (Fischel and Marcolini 2002a: 38).

In 1992, with the arrival of nearly 1,200 Angolans fleeing the civil war in their country, Brazil adopted a more flexible approach towards refugees. Brazil decided not to limit itself to the definition of the 1951 UN Convention and its 1967 Protocol, but to broaden the definition criteria to encompass the new refugees and allow for their protection. This marked the beginning of Brazil's use of a more comprehensive definition of refugee status, following the example of the Cartagena Declaration of 1984, which, in addition to the universal definition of refugees, stipulates that people fleeing their countries due to gross violations of human rights, foreign aggression, internal conflicts or other circumstances which threaten their lives, security or liberty are refugees.

The next step in Brazil's history of refugee protection was the elaboration of a Bill to create a specific Act on refugee status determination, which is the landmark of the present phase of International Refugee Law in Brazil. This law shows that Brazil has, after a precarious start, decided to commit itself to the cause of refugees, and is the main reason why Brazil is considered a model in the protection of refugees in South America.

The creation of a specific and comprehensive Act on refugee status determination would not have been possible without the existence of the 1988 Federal Constitution, which is the beacon of Brazilian re-democratization and, as a result, is extremely protective of human rights. Two analytical tracks need to be taken in order to discern the impact of the 1988 Federal Constitution on refugee protection: (1) the domestic provisions of the Constitution and (2) the Constitution's provisions for Brazil's external approach.

The 1988 Federal Constitution establishes the fundamental principles and core objectives by which Brazil must be guided in its national and international actions. They constitute the foundations and goals of all subsequent Brazilian legislation. Among these principles and objectives are the 'dignity of the human being' (Article 1) and the obligation to promote the welfare of all without discrimination (Article 3), as well as the prevalence of human rights and the concession of political asylum (Article 4, II and Article 4, X, respectively). In addition to this, Article 5 of the 1988 Federal Constitution establishes that all persons are equal before the law, without discrimination of any kind and assures the inviolability of the rights to life, to freedom, to equality, to safety and to property of Brazilians and resident foreigners alike. The 1988 Federal Constitution thus lays down the equality of rights of Brazilians and foreigners, including applicants for refugee status and refugees. On this basis, foreigners who seek refuge in Brazil find the Brazilian national juridical system with all its guarantees and obligations at their disposal.[4]

These principles and rules form, albeit indirectly, the legal foundations of the institution of refuge in the Brazilian juridical system. Refuge is thus understood to be a protection of human dignity based upon non-discrimination, as a branch of human rights and as a form of asylum.

Among the external provisions of the 1988 Federal Constitution, the most important for the present discussion are the provisions related to treaties, as such international agreements and conventions provide the basis of international refugee protection. In order for international treaties to take effect in Brazil—with all their impacts on national laws—legislative approval is required. This requirement is described as 'practical' as it is not directly expressed in the 1988 Federal Constitution but derives from jurisprudential interpretation—including decisions of the Supreme Court (Supremo Tribunal Federal)[5]—of three different articles of the Constitution (namely articles 21, 49 and 84).

On becoming part of the Brazilian legal system, a treaty acquires one of two distinct hierarchical positions: (1) an ordinary law or (2) a constitutional status, if both Houses of the Brazilian Congress have approved it with a quorum of three fifths of the votes. This second possibility is more recent as it was only incorporated into the 1988 Federal Constitution in December 2004 by the 45th Constitutional Amendment. Prior to this date all treaties were regarded as having the same force as an ordinary law. Some scholars had argued that where human rights are concerned international regulations should be given constitutional status—basing their position on Article 4, II (principle of prevalence of human rights) and Article 5, § 2 (which stipulates international treaties as a source of human rights) of the 1988 Federal Constitution (Piovesan 1996: 87–88)—or even, and as a matter of general application, should be higher in position than any internal legislation (Comparato 2001: 59; Hathaway 1991: 132).

This point is important to the study of International Refugee Law in Brazil in so far as all treaties already incorporated into the Brazilian legal system prior

to the 45th Constitutional Amendment, including the 1951 UN Convention and its 1967 Protocol, have the status of an ordinary law and are thus liable to change as a result of further domestic legislation. This situation can lead to tension between Brazilian law and practice and the international rules, making the implementation of the latter difficult and tending to widen the gap between the theoretical commitment to international law, and its actual practice in Brazil. As regards refugee protection, however, this problem has been minimized due to the establishment of a specific act on refugee status, incorporating international law directly into the Brazilian internal legal system.

The Refugee Act: Law 9.474/97

The Difference between Domestic Asylum and Refuge

Although there are certain international standards to be upheld, the implementation of refugee protection is a domestic affair in the hands of the individual states, which means that each state can create specific rules to improve their protection of refugees, adapting the international standards to local conditions (Article 5 of the 1951 UN Convention). It is in this context that Brazil passed a specific and exclusive act for refugees: Law 9.474 of 22 July 1997, hereafter referred to as the Refugee Act or the Act.

Having a specific act on refuge is positive, as it allows for a better correspondence between legal provisions, local conditions and the needs of refugees.

The exclusive character of this law is also significant since, analysing the list of countries which have signed the 1951 UN Convention and/or its 1967 Protocol, one finds that although the majority of states have national legislation on the subject, either by way of constitutional rules or by infra-constitutional legislation (Lauterpacht and Bethlehem 2001), most of these laws have one of two flaws. On the one hand many laws deal with the subject of refugees within the context of immigration legislation. Alternatively, some laws, as, for instance, to mention only South American states,[6] Chile's (Decree 1094, altered by Law 19.479 of 1996) and Venezuela's (Lei Organica sobre refugiados o refugiadas, asilados o asiladas of 3 October 2001), focus on asylum specifically which is important as, to the present day, in Brazil as in most Latin-American countries, domestic asylum and refuge remain two different legal institutions (Barreto n.d.; San Juan 2004; Fischel de Andrade 1998: 398, 400, Fischel de Andrade 2000: 82–84).

'Domestic asylum' and 'refuge' as understood and practised in South America are similar in that they share the same purpose: granting protection to individuals who fear persecution in their country of origin or habitual residence. Further similarities include their basis in respect for human rights and international solidarity and their humanitarian character. Besides this, both are currently founded on the same provision of International Law: article 14 of the Universal Declaration of Human Rights. Perhaps because of all these

similarities domestic asylum and refuge as understood in Latin America are commonly confused. The key differences between the two concepts are that:

Domestic asylum:

— dates back to ancient times;
— is a discretionary act of the state;
— does not have legal limitations regarding its concession;
— is limited to political persecution which has to exist in fact;
— can be granted inside the state of origin or residency of the person fleeing persecution;
— only allows for the possibility of living legally in a state and
— is based on a constitutive decision by the granting state (i.e. it is the decision by the state which makes the person being granted asylum an asylee).

Refuge, however:

— began in the early decades of the twentieth century;
— is regulated by international norms;
— has an international organization that supervises it (UNHCR);
— has limitations regarding its concession (exclusion clauses);
— is based on a well-founded fear of persecution for reasons of race, religion, nationality, social group or political opinion;
— can only be granted to people outside their state of origin (i.e. requires alienage)
— generates responsibilities regarding the protection of the refugee by the granting state and
— is granted by a declaratory decision (i.e. it is the situation in the country of origin or residence and not the decision of the state which makes a person a refugee).

The co-existence of these two institutions in Latin America can be explained by the fact that the states of this region, while desiring closer integration with the international community by incorporating international regulations on refuge, wanted and needed to maintain their tradition of granting protection to persecuted people who either lay outside the definition of a refugee according to the 1951 Convention or to whom granting refuge was not a wise political move.

This need derived from the historical political atmosphere of Latin America, which has only begun to change recently, and in which instability was a constant as dictatorships, coups and persecution were the norm throughout the region. These processes often victimized important political figures (e.g. presidents or prime ministers) whose continued presence in the country in question could mean either death to the individual or instability to the country. Their protection as 'Convention Refugees' was, most often, impossible (some fell under the exclusion clauses, for example) but they needed to be able to

leave their countries as an essential prerequisite to peace. Their human rights to life, security and fair trial when required also had to be respected. So, as these people could not be refugees according to the Convention (i.e. granted refuge) they needed an alternative form of protection (asylum) so that they themselves would be protected and security in the region could be established and maintained.

The granting of this form of asylum in the region was so important that regional conventions on the theme were established[7] even before the universal norms on refuge were created and the existence of an American International Law on it was advocated (see Haya de La Torre, 1950, International Court of Justice). This particular historical context means that two differently defined institutions of refuge and asylum still co-exist today as two distinct ways to protect human beings from persecution.

This co-existence has, however, both positive and negative aspects. On the one hand, a discretionary (and predominantly political) institution such as domestic asylum can preserve the humanitarian character of the institution of refuge, thereby shielding its application from politically motivated criticism. On the other hand, as there is some confusion about the roles of the two institutions (as for example always referring to refugees as political refugees, as the only cause of granting asylum is political persecution which is not the case for granting refuge) the adequate application of both can be put in jeopardy.

The process of asking for asylum in Brazil is completely different from that of refugee status determination and has a political rather than a juridical nature, which can be noted from the facts that there are no exclusion clauses for the concession of asylum and that the granting of asylum is in the competence of the President of Brazil. Consequently, the 1997 law refers only to 'refuge': the protection of refugees and their status determination, as there is a completely different set of rules and practice for asylum (which predate the regulations on refuge by approximately 150 years).

The Provisions of the Refugee Act

The Refugee Act is the result of the 1996 Human Rights National Programme. Its drafting process involved both the Brazilian government and representatives of UNHCR, demonstrating a political desire to create a national law in accordance with international standards. The Act deals with seven key issues:

— Title I stipulates the definition of refugees,
— Title II deals with entry into Brazilian territory and application for refugee status,
— Title III establishes the competence of the National Committee for Refugees (Comitê Nacional para Refugiados, hereafter referred to as CONARE), which is the organization responsible for deciding whether to grant refuge,
— Title IV specifies the rules for refugee status determination,

— Title V deals with the possibilities of expulsion and extradition,
— Title VI establishes the hypotheses of loss and cessation of refugee status,
— Title VII is related to durable solutions, and
— Title VIII stipulates the final provisions.

Definition of a Refugee. In defining a refugee, the Refugee Act adopts, in general, the same criteria as the 1951 UN Convention, in particular the classic definition of a refugee (Article 1, I and II) and the cessation clauses (Article 38). However, there are important differences between the universal Convention and the Brazilian law with regards to the exclusion clauses and the extension of the benefits of refuge.

With regard to the exclusion clauses, the Act adds to the 1951 UN Convention the possibility of denying refuge to people who have committed terrorism or are involved in drug trafficking (Article 3, III). This could be seen as an unlawful limitation of refugee status as it is not provided for in the Convention and Brazil did not make a reservation on the subject when ratifying it. However, it could also be regarded as updating and specifying the text of the 1951 UN Convention in so far as both terrorism and drug trafficking could fall under the category of serious non-political crimes or acts contrary to the purposes and principles of the UN, which are exclusion clauses provided for in the treaty, thus the Brazilian addition would not be going against International Refugee Law.

Furthermore, the Refugee Act has a provision which, it could be argued, is more in keeping with the concept of the rule of law than the 1951 UN Convention: under the Brazilian law, an exclusion clause can only be applied when the person asking for refugee status has actually committed an act which falls within the exclusion clauses and not when 'there are serious reasons for considering that' the person has done so, as stated in the Convention.

The Act is innovative in the extension of the benefit of refuge as it allows the family of the refugee in Brazil to receive refugee status (Article 2) and also broadens the classic definition of a refugee to include gross violations of human rights as a legitimate reason for granting refuge.[8] In this way, the 'spirit of Cartagena' is adopted, in a reference to the aforementioned more comprehensive definition of refugee status adopted in the Cartagena Declaration of 1984 (Article 1, III).

Regarding the 'spirit of Cartagena', Brazil was the second country in the region to include gross violations of human rights as a reason for granting refugee status in its internal legislation (Bolivia being the first, according to Article 2 of Supreme Decree 19640 of 4 July 1983) and the first one to do so in a domestic law. This inclusion demonstrates human solidarity, a consciousness of Brazil's international responsibility and a comprehension of the bonds of International Refugee Law and International Human Rights Law. These trends are reinforced by the provision of Article 48 of the Refugee Act which stipulates that this law has to be interpreted in keeping with the Universal Declaration

of Human Rights, the 1951 UN Convention and its 1967 Protocol, as well as any international Human Rights document to which Brazil is committed.

Entry and Application for Status. Regarding the entry of refugees into the country, the Refugee Act assures the possibility of making a request for refuge to any immigration authority (Article 7, preface) and the impossibility of deporting someone who has asked for refuge until the end of the refugee status determination procedure (Article 7, I). This is the domestic realization of the principle of *non-refoulement*.

The Act does not stipulate a maximum period for requesting refuge after entering Brazilian territory, as do other countries such as Peru (art. 13, Law 27.891, 2002) and Colombia (art. 6, Decree 2.450, 2002). The Act also establishes that an irregular entry does not prejudice the possibility of asking for refugee status (Article 8). This means that any criminal and administrative procedures arising from an illegal or irregular entry into Brazil, which could result in the deportation or expulsion of the alien due to the Foreigners Statute (Estatuto do Estrangeiro—Law 6.881/80), are halted until the end of the determination of refugee status (Article 10, preface and Titles I and II) and terminated in the event of a positive answer to the request for refugee status.

The Act also forbids the extradition of refugees and applicants for refugee status pending a decision on their cases, with the exception of cases where national security or a threat to public order are involved, in which case the refugee or applicant will not be sent to his/her country of origin or residence or to a place where his/her life, liberty or welfare may be in jeopardy.

CONARE. The Refugee Act establishes CONARE as the organ responsible for refugee status determination. In addition to its responsibility for first instance decisions on refugee status, CONARE is charged with guiding public policies to make protection, assistance and legal aid to refugees effective. This body is also responsible for the elaboration of normative instructions to clarify any aspect of the Act. CONARE is presided over by a representative of the Ministry of Justice, while the vice-president is a representative of the Ministry of Foreign Affairs. Other members of CONARE represent the Ministries of Health, Work and Labour and Education and Sports. There are also representatives of the Federal Police and of civil society (now represented by CASP) and UNHCR has voice-no-vote status. This makes CONARE the body with the broadest composition of any similar bodies in South America. In Ecuador, for example, the committee vested with responsibility for protecting refugees has only three members (art. 4, decree 3.301, 1992).

Still regarding composition, it is interesting to note that in most South American states, the organ responsible for the granting of refuge includes a representative from the national immigration authorities, which is not the

case in Brazil. In this way, Brazil avoids possible prejudice against economic migrants, particularly in time of economic downturn, being also directed against refugees, and Brazilian society at large gets a greater understanding of the particular status of refugees, leading to a stronger spirit of solidarity with their plight.

Another distinguishing characteristic of CONARE compared to similar organs in the region is that civil society, represented by an NGO that works with refugees, is not only present but is also entitled to vote. In other countries, these three trends (a representative of a non-governmental organization which works with refugees and is entitled to vote) are not present simultaneously. For example, in Argentina and Uruguay civil society is not represented; in Paraguay the representative of the NGO cannot vote and in Bolivia civil society is represented by the church and by Universidad Mayor de San Andres but there is no mention of the fact that these organs work or have to work with refugees.

The presence of civil society is extremely relevant as an international commitment by a country binds not only the government but also the society at large: involvement in the decision-making process is important as a means of sharing the responsibility for the actual protection of refugees between the government and civil society. An additional facet of this role is that civil society can exercise pressure on the government on behalf of refugees.

This broad composition has been both praised and criticized: praised for expanding the theme of refuge to all governmental organs, which would reflect on the lives of refugees, and criticized for the fact that, with rare exceptions, the majority of the representatives of these ministries are not qualified on the subject. CONARE decided to study a change in its composition to (1) invite representatives of other Ministries (e.g. the Ministry of Cities and the Ministry of Social Development) and (2) make the current members participate more actively.

The establishment of CONARE and its success in providing first decisions on refugee status determination (in addition to budgetary matters) were the reasons for the withdrawal of the office of UNHCR from Brazil, in 1998. This success, however, has not been repeated in its other two functions as to date there are no public policies regarding refugees in Brazil and the normative instructions approved by it are often more restrictive of the rights of refugees than the Refugee Act.

Cessation and Loss. The cessation clauses and the reasons for losing refugee status are stated in articles 38 and 39 of the Refugee Act. Cessation is legally possible because the granting of refuge is dependent on the objective situation in the state of origin or residence of the refugee. This situation can change and improve so that the need for protection disappears. Furthermore, misconduct on the part of the refugee could lead to loss of refugee status. 'Misconduct' is understood as gross violation of international law. Committing ordinary criminal offences is not listed in the Act as an exclusion clause, as is the case in most

national legislations in the South American states. If refugee status ceases or is lost, the individual is placed under the general system of rules for foreigners in Brazil, the aforementioned Foreigners Statute (Article 39).

In all the decisions on the non-application of refugee status, i.e. denial, cessation and loss, an appeal is possible (Article 40). This appeal is addressed to the Minister of Justice and has to be presented within 15 days of the date of the notification of the decision of CONARE to the applicant.

Initial Criticism of the Refugee Act. The Act stipulates that refugee status determination is free of charge and is a matter of urgency, but does not stipulate timeframes for government decisions on refuge as do other national legislations, for example in Paraguay. This is the first point in which it is found wanting in comparison with legislation in other South American countries. A second criticism of the Act is that it does not list the economic, cultural and social rights of refugees. This is especially relevant as, although the 1988 Federal Constitution establishes the equal rights of Brazilians and foreigners, in practice refugees find many constraints in accessing the labour market and higher education. A third point found wanting is that although the Act establishes the process of refugee status determination, there is no provision for refugee status determination in the event of a massive influx of refugees.

The Process of Refugee Status Determination in Brazil

As noted above, CONARE is responsible for determining refugee status in Brazil. The procedure leading to the granting of such status is as follows.

The first step is a deposition from the applicant to the Federal Police, which is entered into the Declaration Term (Termo de Declarações). This deposition contains:

— the personal identification data of the applicant,
— his/her civil status,
— the circumstances of entry into Brazil and
— a brief description of the reasons for which refuge is being asked.

Usually, when the plea for refuge involves a family only one deposition is required. The Declaration Term serves as the proof of the legal status of the person seeking refuge in Brazil and is their first documentation in the country.

Following this, the applicant is directed to a Refugee Centre operated by either CASP or CARJ. At the Refugee Centre a more detailed questionnaire must be completed. This questionnaire is used by CASP and CARJ in asking the Brazilian Government to grant the applicant another document: the Provisional Protocol (Protocolo Provisório). According to Article 21 of the Refugee Act the Provisional Protocol is provided by the Federal Police after CONARE gives its authorization, is valid for 90 days, and is renewed for as

long as the refugee status determination process continues, as it is the applicant's identity card in Brazil. The Act stipulates that every member of the family group asking for refuge is entitled to a Provisional Protocol, although in practice this seldom happens.

The Provisional Protocol is the basis for the provision of two further documents: a Labour and Social Welfare Card (Carteira de Trabalho e Previdência Social)—needed to find registered jobs and a Natural Person Registry (Cadastro de Pessoas Físicas)—an important document for financial purposes. This is unusual compared with other countries in the region which only provide people seeking refuge with identity cards, thus constraining their ability to integrate into society.

Two interviews follow the completion of the questionnaire. The first interview is with a lawyer who is trained and paid for by UNHCR. The lawyer elaborates a Legal Opinion on Eligibility (Parecer de Elegibilidade). This document will be the basis for decisions on any financial assistance. Although financial aid is limited, all applicants for refugee status are eligible to use the public health system, as well as public housing facilities (shelters), and to benefit from food price discounts with CASP's and CARJ's partners or from government food programmes. In line with the exclusive competence of the Brazilian Government to grant refuge in its territory, the second interview is with a representative from CONARE.

Significantly, the Refugee Act regards all the information provided by the applicant at any stage of the process of refugee status determination as confidential. This provision is not found in the majority of national legislations of the South American states but is extremely important in ensuring both the security of the individual and the confidence each applicant has in providing full details on his/her story.

After this interview the representative of CONARE reports his/her findings to the Preliminary Analysis Group (Grupo de Estudos Prévios), a sub-grouping of representatives of CONARE, consisting of the Ministry of Foreign Relations, UNHCR and, after 2004, an NGO representing Brazilian society. The NGO in the Preliminary Analysis Group is the Migration and Human Rights Institute (Instituto de Migrações e Direitos Humanos, hereafter referred to as IMDH), which as a result of an agreement with CASP[9] has established an orientation centre for the refugee population in Brasilia.[10] The establishment of this centre shows an increase in public interest in the refugee issue and helps to spread the work with refugees to other cities in Brazil.

The representatives of IMDH and UNHCR on the Preliminary Analysis Group receive the Legal Opinion on Eligibility from the lawyers at the Refugee Centres as a basis for their position in each case. UNHCR participates actively in the Preliminary Analysis Group, although it has a voice-no-vote status in CONARE. This might be seen as 'compensatory', and is also a peculiarity of Brazilian refugee law and protection in comparison to other states in the region.

The Preliminary Analysis Group elaborates an opinion recommending that refugee status be granted or refused. This opinion is then sent to the CONARE plenary, where it is discussed and the official decision on the case is taken. In the case of a positive decision by CONARE the refugee must register with the Federal Police, sign a Responsibility Term (Termo de Responsabilidade) and will receive official documentation as a refugee in Brazil. This official document is called the National Register of Foreigners (Registro Nacional de Estrageiros, RNE) and it proves that the refugee may lawfully reside permanently in Brazil due to his/her status as a refugee. The possession of an RNE based on refugee status for over six years enables the refugee to change his/her legal status in Brazil by requesting to become a permanent foreign resident.[11]

If CONARE's decision is negative, the applicant has 15 days after the official notification to either leave Brazil or present an appeal to the Minister of Justice, as mentioned above (articles 29, 31 and 41). The appeal process has suspensive effect on the requirement to leave (article 30).

If the decision on the appeal is negative the refugee status determination is over. In this case the applicant is not entitled to any documents provided by the Brazilian government and falls under the general system of rules for foreigners, being, therefore, subject to any compulsory measure of departure—deportation, expulsion or extradition (article 32). The compulsory measure of departure, however, cannot be to a place where the life or integrity of the applicant is still in jeopardy, which would violate the principle of *non-refoulement* (article 32). This may give rise to a contradictory situation as the government will neither deport the person to his/her country of origin or residence because of lack of security, nor does it recognize the person as a refugee and, hence, will not allow this person to stay legally in Brazil. This problem in addition to the three points found wanting earlier are the main weaknesses of the Act.

Another important point for reflection is that the procedure for determining refugee status in Brazil is entirely administrative and that the Refugee Act does not provide any possibility of recourse to the judicial system. It is said that a specific provision for access to the judicial system need not be mentioned in the law as it is implicit, on the basis that the 1988 Federal Constitution stipulates that laws cannot exclude from the appreciation of the judiciary any violation or possibility of violation of rights (Article 5, XXXV). However, as refugees are foreigners and are not familiar with the Brazilian legal system, the assurance of being able to take their cases to the judiciary seems relevant and a major aspect of the right to an effective remedy for violations of human rights. Besides this, if, in practice, the process is limited to CONARE it is limited to the Executive Branch, which is the most political branch of the state, and the very apolitical nature of the granting of refuge could be in jeopardy.

In spite of these flaws, and in comparison to the individual legislations of the other South American states, the Brazilian legislation still offers the

best combination for the protection of refugees. What is more, the majority of national laws on refugees in the region are more recent than the Brazilian Refugee Act, and are broadly inspired by it. All this leads to the conclusion that regarding its legal foundations, Brazil can be considered a model for refugee protection in South America. Whether the same model standard is maintained through innovative policies is analysed in the following section.

Recent Developments in International Refugee Law in Brazil

There have been two important recent developments on refugee law, policy and practice in Brazil. One is the establishment of a resettlement programme. The other is the re-establishment of UNHCR's presence in the country.

Resettlement

As UNHCR sought new or emerging countries of resettlement in the late 1990s (Fischel de Andrade and Marcolini 2002b), three factors made Brazil a potentially interesting place for a new resettlement programme. Firstly, Brazil had shown an interest in deepening its commitment to the protection of refugees. Secondly, it has, as described above, a well-thought-out and well-structured administrative process of refugee status determination. Thirdly, Brazil is a country of migrants with a vast territory and a history of tolerance, providing the basis for good opportunities for the integration of newcomers.

In light of this, and based on the UNHCR competence to sign special agreements (Zieck 1998), a Macro Agreement for the Resettlement of Refugees in Brazil (based on article 46 of the Refugee Act) was negotiated and signed in 1999. This agreement defined the criteria and the ways by which this lasting solution would be implemented within Brazil. An initial commitment to the resettlement of 30 families outside the Rio–São Paulo axis (already in charge of the protection of refugees generally as described above) was established by the Brazilian government. In September 2001 a closed seminar was held in Rio de Janeiro to make official the willingness of the cities of Mogi das Cruzes (in the State of São Paulo), Natal (Rio Grande do Norte), Porto Alegre (Rio Grande do Sul) and Santa Maria Madelena (Rio de Janeiro) to begin the resettlement policy in Brazil.

A group of Afghan refugees was the first to be resettled. However, due to the terrorist attacks of September 11, 2001 on the United States and the political instability which followed in the region from which the refugees would come, their resettlement in Brazil was suspended. As a result only the city of Porto Alegre remained in the resettlement project and, on 12 April 2002, received 10 Afghans who had received initial protection in Iran before being resettled to Brazil. On 26 April of the same year, 13 other Afghans, who had initially sought protection in India, were also resettled. The resettled

refugees were assisted initially by a non-governmental organization—Central de Orientação e Encaminhamento (Orientation and Guidance Centre)—but the assistance programme was soon transferred to a Catholic organization called Sociedade Padre Antonio Vieira (the Father Antonio Vieira Society of the Company of Jesus) which is a current partner of UNHCR. All the resettled refugees had been selected, registered and accepted by CONARE prior to their arrival in Brazil.

Of the 23 refugees who were part of the first resettlement group in Brazil, 18 voluntarily requested repatriation, and returned to Afghanistan following the changes in the circumstances in that country. In spite of this, new groups of resettled refugees were received in 2004.

Also in 2004, the twentieth anniversary of the Cartagena Declaration was celebrated with meetings involving UNHCR, civil society and governments of Latin America. One goal of these meetings was to put forward proposals for new actions on refugee protection in the region. Brazil used this occasion to propose the concept of 'resettlement in solidarity' through which countries in the region (especially in South America) could offer their help to other countries in the region facing more difficult situations regarding refugees (Carneiro 2005). Ecuador and Costa Rica are two of the countries in need of particular assistance in this area as they have large numbers of refugees and forced migrants from Colombia. As a result of this proposal the main group of resettled refugees received by Brazil in 2004 was made up of Colombian refugees from Ecuador (although resettlement arrivals in 2004 also included individuals who had been refugees in Cuba). The Brazilian government approved the resettlement of 97 people, but only 75 people arrived and were resettled in 12 cities across the country.[12]

In the first half of 2005, 14 other people out of the 97 already approved arrived; two other cases were discussed and resettled immediately due to security reasons and 30 people have been approved to be resettled and are expected to arrive in Brazil shortly at the time of writing. All of them are Colombian refugees. There has also been an increase in the number of cities receiving resettled refugees and the total number is now 15 with the prospect of three more cities joining the programme in 2006.[13] UNHCR has been supported in this expansion of the resettlement programme in Brazil by Cáritas Brasileira in the State of São Paulo, the Núcleo de Estudos Brasileiros (Brazilian Studies Centre) in the State of Rio Grande do Norte, and the aforementioned IMDH and the Father Antonio Vieira Society of the Company of Jesus. This brief description shows that resettlement is becoming an established practice of refugee protection in Brazil.

In light of this it can be said that, once again, Brazil has played a leading role in the region, not only in establishing a resettlement programme but also introducing new concepts and approaches to improve refugee protection in South America, which are already being followed by other countries (especially Chile).

Re-opening of the Office of UNHCR in Brazil

As previously mentioned, UNHCR established an office in Brazil in the late 1970s and remained in the country till 1998. Before its departure from Brazil, the UNHCR office was subordinate to a UNHCR regional office located in Buenos Aires (Argentina): the Regional Office for the Southern part of South America. After the closure of its office in Brazil, the implementing partners (i.e. CARJ and CASP) started to report directly to the regional office. A UNHCR representative remained in Brazil, though with more limited power.

With Brazil becoming a resettlement country and in recognition of its good practice regarding refugee law, UNHCR decided to re-establish itself in the country. The UNHCR office was reopened in March 2004 and has already proved valuable. Geographical proximity has brought the work of UNHCR closer to the work of the implementing partners and has improved the position of UNHCR in CONARE. It also has brought UNHCR closer to the Brazilian government as a whole, allowing greater UNHCR involvement in the politics regarding refugees.

The presence of UNHCR in Brazil has also created greater opportunities for information campaigns among the general public. In this area two important initiatives should be mentioned: the first is the establishment of Sergio Vieira de Mello Chairs in universities. UNHCR aims to use these Chairs to expand education in International Humanitarian Law and International Refugee Law as well as stimulate the access of refugees to higher education, while honouring a Brazilian international servant, killed in Baghdad, who started his work in UNHCR. The second activity is the organization of workshops for the Federal Police and general public in cities on Brazil's borders, to help ensure the upholding of the right to request refuge. The re-opening of the UNHCR office in Brazil has also facilitated negotiations on current projects, among which resettlement, and projects for the near future (especially a project of access to credit for refugees, which could, in the long run, benefit the local community as well).

For all these reasons it can be said that, as in the legal aspects, Brazil has evolved into a model for refugee protection in South America in regard to policy as well.

Conclusion

The practice of International Refugee Law in Brazil has evolved considerably since the establishment of the Refugee Act. From a country which only accepted refugees from Europe, which did not recognize UNHCR as an international organization, which forced refugees from the region to be resettled elsewhere in the world and its own nationals to plead for refugee status abroad, Brazil has become, over a period of 30 years, a receiver of refugees (with approximately 3,500 refugees of over 65 nationalities) and is proposing new approaches for the protection of refugees in South America.

As things currently stand, the protection of refugees in Brazil has some positive and some negative aspects. The negative aspects are mainly:

— the lack of a deadline for the government to decide the requests for refuge;
— the lack of stipulation of economic, social and cultural rights in its specific law for refugees;
— the lack of provisions for refugee status determination in the event of massive influx of refugees;
— the fact that the organ vested with the responsibility of first decisions on refuge—CONARE—is within the Executive Branch of the State, which can lead to political bias;
— the fact that access to the judicial system is not stated explicitly in the specific law for refugees, and
— the lack of public policies for refugees.

On the other hand the positive aspects are:

— the existence of a specific and exclusive law for refugees;
— respect for the minimum international standards of International Refugee Law (e.g. the principle of non-refoulement);
— a broad definition of the concept of refugee;
— the absence of a time limit for requesting refugee status once inside Brazil;
— a comprehensive process of refugee status determination regulated by law;
— the broad composition of CONARE encompassing representatives of all organs related to the integration of refugees, as well as a representative of civil society and of UNHCR as a voice-no-vote member, and the fact that CONARE specifically does not include a representative of the organ responsible for immigration to Brazil;
— the granting of documents to applicants for refugee status;
— permission for applicants for refugee status to work;
— the idea and practice of resettlement in solidarity;
— the constant public information effort and
— the important role played by civil society in all phases of the protection of refugees (decision-making/protection, assistance and local integration).

Analysing the positive and negative aspects, one sees that the positive outweigh the negative, and that the negative aspects have not, thus far, jeopardized refugee protection in Brazil. Furthermore, many positive aspects are innovations by Brazil in comparison to the countries of the region. On this basis Brazil can be seen as a model in South America regarding refugee protection. This role can be justified by Brazil's demonstration of a humane position with regard to refugee protection in comparison to the logic that has been operating in the contemporary world. This can be seen both in its inclusion of traditional and new actors in the decision-making process concerning refugee status determination, as well as in the local integration of refugees and in the newly established resettlement programme.

One could explain this position in a realistic light: as Brazil receives a small number of refugees, the issue is not yet regarded as a 'refugee problem'. However, whatever the reasons for doing so, Brazil is adopting a post-westphalian logic in the only way to ensure real protection to refugees and to fulfil its international legal commitment. This is the most conspicuous and relevant aspect.

After its re-democratization, the openness and political will to continually improve its policies and laws regarding the protection of refugees not only have been a constant in Brazil but seem to be spreading to the general public, which may lead to more progress in the area. Brazil, therefore, is proving that it is possible to combine governmental needs and the offer of protection and integration to those in need—relying especially on tolerance—and is also showing a consciousness of the need to comply with the international obligation of solidarity and protection of human beings. This, in spite of the existing flaws in its refugee protection system, makes Brazil a model in South America, and, as a consequence, a contributor to the evolution of International Refugee Law and protection at large.

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1. Since this paper was accepted for publication the author has left the Refugee Centre to pursue an LL.M. at New York University. Her current address is 10 Hanover Square, apt. 6M, New York, NY 10005, USA.
2. Both Argentina and Bolivia passed internal regulations on the creation of an organ vested with the responsibility of granting refugee status prior to Brazil. However, these are not laws and do not tackle the defining aspects of refugee status (in the case of Argentina) nor the rights and duties of refugees (in both cases); therefore, Brazil was the first country in the region to have a comprehensive internal law on refuge.

3. The involvement of the São Paulo Catholic Church with refugees was based on the ideals of the former Cardinal-Archbishop of São Paulo, Dom Paulo Evaristo Arns, who was decorated with the Nansen medal for his work with refugees in 1985.
4. This is the commonly accepted extensive interpretation of the wording of Article 5 vis-à-vis the establishment of the principle of human dignity in Article 1, by which it is understood that equality before the law and, therefore, equality of rights, includes all foreigners and not only those who reside in Brazil, as every human being has an inherent dignity. There are, however, limitations on some rights of foreigners in Brazil, especially political rights, allowed for by the Federal Constitution and therefore regarded as legal. Any limitation of the rights of foreigners that is not based on the provisions of the Constitution is illegal in Brazil.
5. Mainly the Recurso Extraordinario 80.004 (extraordinary appeal 80.004); the Carta Rogatória 8.279 (rogatory letter 8.279) and the decision on the Ação Direta de Inconstitucionalidade 1.490-3 (direct actions of unconstitutionality 1.490-3).
6. As one of the aims of this paper is to show the relevance of Brazil as a regional model in refugee protection, all comparisons among laws will be made with the states of South America. The national legislations on refuge analysed followed the official list of national legislation on the UNHCR web page for Latin America (www.acnur.org).
7. As, for instance, the Convention on Asylum (Habana, 1928); the Convention on Political Asylum (Montevideo, 1933); the Declaration of Rights and Duties of Men on Territorial Asylum (IX Pan-American Conference, 1948); the Convention on Political Asylum (Montevideo, 1939) and the Convention on Diplomatic Asylum (Caracas, 1954).
8. While the majority of Brazilian scholars understand that this posture resulted merely in an extension of the definition of refugee status, a new theory proposes that, in fact, the adoption of more comprehensive criteria for granting refuge means a completely new approach to the definition of refugee status. This new theory is based on the idea that there has been a change of focus in the definition criteria of refugee status, as the traditional definition relies on the causes of persecution and the definition proposed by the Cartagena Declaration focuses on the objective situation of the country of origin.
9. This agreement was made possible due to a new partnership between CASP and the Secretaria Especial dos Direitos Humanos da Presidência da República (Special Office of Human Rights of the Presidency, hereafter referred to as SEDH/PR) which began in January 2004 and increased the budget of CASP with personnel, allowing, therefore, the transfer of funds to IMDH.
10. The intention of entering into a similar agreement has been signed between CASP and Cáritas Diocesana de Santos (Diocesan Caritas of Santos). The establishment of this centre is, at the time of writing, waiting for an answer to funding requests to SEDH/PR. The need to have centres in Brasilia and in Santos derives from the fact that the former is the capital of Brazil and the city where CONARE functions (as well as all State Ministries) and the latter is the biggest port of Brazil and, therefore, the gateway for many applicants for refugee status. It is important to note, though, that the centres do not tackle refugee status determination processes (which rest with CASP and CARJ) and are only in charge of orientation and guidance to improve aid to refugees and applicants in their cities.
11. Permanent foreign residents have, in theory, a stable permanence in Brazil whereas, due to the cessation clauses, refugees could have their status withdrawn in the event

that the objective situation of the country of origin or residence changes substantially. However, in practice, the Brazilian government has never withdrawn its protection based on the cessation of refugee status. It is possible to combine both statuses (permanent foreign resident and refugee) in which case the individual can benefit from a more comprehensive protection.

12. The cities are: Bento Gonçalves, Caxias do Sul, Porto Alegre, Santa Maria, all in Rio Grande do Sul; Campinas, Guararema, Jundiai, São José dos Campos, Taubaté, all in São Paulo; Lajes, Natal, and Poço Branco, all in Rio Grande do Norte.
13. The other cities already in the programme are: Passo Fundo, Rio Grande do Sul; São Leopoldo, Rio Grande do Sul; and Tremembé, São Paulo. The probable new cities of resettlement will be Vitória, Espírito Santo; Vila Velha, Espírito Santo; and Gravataí, Rio Grande do Sul.

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