

Crimes and migratory status: “Crimes” of entry and the impossibility of return of Asylum Seekers in Brazil

Liliana L. Jubilut

Introduction

Brazil has a dual logical legal system in relations to foreigners: if, on the one hand, it has an outdated legislation in relation to foreigners in general (Law 6815/81 – Foreigner’s Statute), on the other, it has a praised law relating to the Status of Refugees (Law 9474/97) (Jubilut, 2006) and is regarded as regional leader on the topic (ACNUR, 2003)

This dual instance would not be problematic if it wasn’t for the fact that there are very limited opportunities for staying legally in Brazil in the general regime which pushes foreigners to apply for refugee status and thus become asylum seekers in Brazil.

Until recently this situation seemed to be manageable due to lack of knowledge regarding refugee status procedures and the rights that stem from it, and also the limited number of refugee status requests that the country received. However, especially since 2010, when a new migratory wave has begun the situation changed. This new scenario combines a few causes among which one has to highlight the earthquake in Haiti, the economic growth spur of Brazil and the fact that Brazil has started to both divulge itself more abroad and be the subject of news given that it was/is to play host to several world events (the World Youth Day, the FIFA World Cup and the Olympics).

Since 2010 and until 2013 the number of refugee status requests in Brazil increased 930% - from 566 to 5882, and with 8302 from January to October of 2014 - (ACNUR, 2014), and although the percentage of granted refugee status also arose (1240%), this means that the country had only 7289 refugees in October 2014 (Ibid).

This data is relevant given that the asking for refugee status in Brazil already grants several rights to the asylum seeker and protects him/her from being returned. This protection extends also to criminal procedures and may be seen as trying to avoid the criminalization of migratory status in the country.

1. Law 9474/97 and Criminal Procedures

Law 9474/97 has a triple function in relation to refugees in Brazil: 1- it establishes the legal definition that if met would grant refugee status in the country^{1,2} 2- it establishes the basis for the procedure of refugee status determination in Brazil³, and 3- it establishes the rights specific to refugee status that have to be observed in Brazil.

Titles II and V of Law 9474/97 establish the system of protection of refugees in Brazil. In relation to “crimes” of entry that would entail criminal procedures the main provisions are articles 7, 8, 10, 33, 34 and 36.

Article 7 relates to procedures of deportation, which in Brazil is the procedure for removal of foreigners that have entered or stayed in the country irregularly (Jubilut, Monaco 2010). It establishes that any foreigner can ask for refugee status in Brazil (caput⁴), and that if a foreigner is to be deported this can’t happen to a place where his life or liberty are threatened due to race, religion, nationality, social group or political opinion (paragraph 1⁵).

Completing the system of protection against deportation, article 8 states that irregular entering Brazil is not an obstacle to asking for refugee status in the country⁶. This means that if a person enters the country without a visa or a passport when one is needed this does not allow for them to

¹ “ Article 1. An individual shall be recognized as a refugee if:

I - due to well founded fears of persecution for reasons of race, religion, nationality, social group or political opinions, he or she is out of his or her country of nationality and cannot or does not wish to rely on the protection of such country:

II - having no nationality and being out of the country where he or she had previously retained permanent residence, cannot or does not wish to return to such country based on circumstances mentioned in item I above;

III - due to severe and generalized violation of human rights, he or she is compelled to leave his or her country of nationality to seek refuge in a different country”.

² All the translations of articles of Law 9474/97 are from the official translation of the Brazilian government for this document.

³ Articles 7, 8, 9, 10, 12, but mainly 17 to 32.

⁴ “Article 7 - A foreigner arriving in national territory may express his or her desire to request recognition as a refugee to any immigration authority at the border, who shall give the refugee the necessary information regarding the procedure for application”

⁵ “Article 7 - Paragraph One. In no case his or her deportation shall be effected to the border of a territory where his or her life or liberty is threatened by reasons of race, religion, nationality, social group or political opinion”.

⁶ “Article 8. Any irregular entrance into national territory shall not be an impediment for a foreigner to request refuge before competent authorities”.

be deported. It also means that if the person is already in the country, even if in an irregular situation, he/she can apply for refugee status. This is due to the combination of article 8 and the fact that Law 9474/97 does not establish a deadline for asking for refugee status in Brazil after the date of entering the country (Jubilut, 2006).

Even though said protection is in place and is respected most of the times – being one of the ways of implementing the principle of *non-refoulement* – there are reports of cases in which foreigners have been prevented from asking for refugee status and, in light of this, have not become asylum seekers and, consequentially, have not been protected by Law 9474/97. Those situations have, for instance, notoriously happened in the international airport in São Paulo⁷ (when the foreigners that are not admitted into the country are kept in a section called Conector). There are already initiatives in place to avoid this⁸, and the violations of *non-refoulement* remain topical not a systemic problem in Brazil.

If the person enters Brazil with a fake or fraudulent document the scope of analysis shifts from deportation to expulsion, another compulsory way of removing foreigners from the country. Expulsion, in Brazil, applies to the situations in which a foreigner has become a “threat to national security”. The wording stems from the logic of the dictatorship period in Brazil when Law 6815/80 was approved. Nowadays expulsion is the measure applied to in cases in which foreigners commit crimes in Brazil. (Jubilut, Monaco 2010). In general, the foreigner will be prosecuted and condemned, will serve his/her time in prison, and after that will be removed from the country (Ibid). The procedure involves a Presidential Decree and the foreigner can’t return to the country until this document is revoked – which might never happen. (Ibid)

There are a few examples of foreigners asking for refugee status to avoid expulsion. Most recently they have involved cases in which the foreigners have said that they have been threatened by drug lords in their country of origin and would be at risk if returned, and also of nationals from Syria

⁷ The gateway to half of the asylum seekers in Brazil in 2014, according to UNHCR (<http://www.acnur.org/t3/portugues/noticias/noticia/acordo-melhora-atendimento-a-refugiados-e-estrangeiros-no-aeroporto-de-guarulhos/>)

⁸ See, for instance, the agreement between UNHCR and the Brazilian government reported at <http://www.acnur.org/t3/portugues/noticias/noticia/acordo-melhora-atendimento-a-refugiados-e-estrangeiros-no-aeroporto-de-guarulhos/>

who were trying to enter Brazil or leave the country to Europe with fake documents⁹. The numbers of cases like this seem to be increasing, but this seems to be due much more to the fact that number of foreigners seeking Brazil is on the rise than to any systemic change or to any other fact.

However it has to be said that there are no official data on the numbers of this situation (or its increase) in Brazil. Actually there are no official data on any subject relating to criminalization of migrants or criminal law and refugees in the country. Even the Ministry of Justice does not have these numbers, even though recently they had started thinking of ways of not inserting asylum seekers into the criminal data system if they entered the country with false documents - given that even if the process is suspended pending the decision on the refugee status request, the mere fact that a process is opened can make the integration of this person more difficult – they have requested this information from civil society organizations, and the lack of data made the initiative not go further.

It has to be noted that both deportation and expulsion are regulated by Law 6815/80, and that Law 9474/97 only carves out exceptions to the general system for asylum seekers and for refugees.

It is also relevant to point out that the protection against removal in Brazil extends both to refugees and to asylum seekers, i.e. since the request for refugee status. This can be proved by looking into article 10 of Law 9474/97.

Article 10 furthers the protection to refugees but also to asylum seekers by establishing that any criminal or administrative processes due to circumstances of entering in Brazil are to be suspended once there is a request for refugee status (caput¹⁰). It goes on to state that if refugee status is granted all said processes are to be archived (paragraph 1¹¹).

⁹ These data was collected through requests for information with UNHCR, and Civil Society Organizations which work in Brazil by email and with an informal procedure.

¹⁰ “Article 10- A request, properly submitted under the previous Articles, shall suspend any administrative or criminal procedure caused by irregular entrance, brought against the requester and his or her accompanying family group”.

¹¹ “Article 10- Paragraph One. In case the condition of refugee is recognized, the procedure shall be canceled, provided it could be shown that the related infringement had been determined by the same facts justifying such recognition”.

In relation to expulsion article 36 prohibits this kind of procedure against a refugee, even if allowing for 2 exceptions: expulsion is possible due to national security or public order¹².

In the Brazilian legal system there is still another compulsory way of removing foreigners: extradition. This is a better known and standardized procedure of international criminal law cooperation aiming to send a foreigner that is in Brazil to another country so that he/she can be prosecuted for a crime or serve the sentence that he/she has been given (Jubilut, Monaco 2010). In this instance the crime happens outside of Brazil and has nothing to do with the foreigners stay in the country. However, Law 9474/97 also creates a system of protection against this compulsory removal for asylum seekers and refugees.

Article 33 establishes that the recognition of refugee status will stay any request for extradition¹³. It goes on to clarify that this is the case if the request for extraction is based on the same facts that have allowed for the recognition of refugee status. This seems an interesting point of the Brazilian legal system granted that, if the recognition of refugee status is done accordingly with national and international standards, an administrative decision (i.e. recognizing refugee status) can overpower a judicial process of extradition.

The most famous case in this regard involves Italy's request for extradition of Cesare Battisti, who had been granted refugee status in Brazil but had it removed by the Brazilian Supreme Court. Only after this removal – due to the opinion of the court that refugee status is a right with fixed criteria and that the criteria for refugee status determination was not met in his case – was the extradition even analyzed (and not granted in the end by the Brazilian Executive Branch).

Still in relation to extradition, it has to be noted that Law 9474/97 provides protection against the removal even for asylum seekers. This stems from article 34 which states that the request for refugee status will stay – until a definitive decision on said request- any pending process of

¹² “Article 36. A refugee regularly registered shall not be expelled from the national territory except for reasons of national security and public order”.

¹³ “Article 33. Recognition of a refugee condition shall cease the proceedings of any request for extradition based on the facts that have founded the granting of such refuge”.

extradition, whether it is administrative or judicial phase, if the request for extraction is based on the same facts that have allowed for the recognition of refugee status¹⁴.

This provision has led to several requests of refugee status during the course of extradition process as a way to try and stay in Brazil. The most famous case in this regard involves the Mexican singer Gloria Trevi, who had the extradition process stayed while her request for refugee status was analyzed. Once the latter request was denied then the former proceeded and she was extradited to Mexico.

By all this, once sees that Law 9747/97 has carved out exceptions to the Brazilian legal system, trying to increase the protection of refugees and asylum seekers and trying to avoid that “crimes” of entry could jeopardize the real chances of people needing protection to reach Brazil and/or to stay in the country.

2. Law 9474/97 and the impossibility of return

Besides the mentioned exceptions as ways of protection, Law 9474/97 also has a provision that would prevent that foreigners, even when deemed “undesirable”, are returned are removed to places where there are still risks. Article 37 of Law 9474/97 is the provision that would be more closely linked to the idea of “undesirable” and “unreturnable”.

Article 37 states that “*Expulsion of a refugee from the national territory shall not result in his or her withdrawal to a country where his or her life, liberty or physical integrity may be at risk, and shall only be effected upon satisfaction of his or her admission to a country where there are not risks of persecution*”.

The provision relates only to expulsion but fits the logic of the Law of trying to protecting refugees from compulsory removal. It seems that this article combined with article 7, paragraph 1 are the embodiment of the principle of *non-refoulement* in the Brazilian national legislation.

¹⁴ “Article 34. A request for refuge shall cease, until its final decision, any proceedings for extradition pending in administrative or judicial courts, based on the facts that have founded the granting of such refuge”.

If, on the one hand, they prevent unduly returns, on the other hand there are two shortcomings that need to be mentioned.

First, if a person has a real risk to his/her life or liberty (in the case of deportation), or to his/her life, liberty or physical integrity (in the case of expulsion), one can wonder how this person is not granted refugees status?

The only logical explanation within the system would be that the person is included in the exclusion clauses, presented both in the international refugee regime and on the Brazilian national law (article 3¹⁵). The problem with this fact is that the decisions of refugee status in Brazil (either for or against the recognition of the status) do not clearly state its reasoning. This means that there is no general way of knowing if an exclusion clause has been implemented, and that the reasoning of articles 37 and 7, paragraph 1 are not sound: if they have a risk and the government does not explain that they fell into the exception, how is one to know that he/she is not really a refugee or asylum seeker that needs to be protected against expulsion?

Second, it is not clear what happens to the foreigner if he/she are not granted refugee status in Brazil but also can't be deported or subjected to expulsion. Both articles state that they can't be sent to places where the risk still exist, and article 37 says that expulsion will only happen to a third country in which this risk does not exist. It seems, however, that this would involve serious diplomatic negotiations and it is doubtful that, with the limited numbers of foreigners in Brazil and even more limited numbers of foreigners that have to be removed but are "unreturnable", the government would have the will and resources to go through with it, or to be successful.

¹⁵ "Article 3. An individual shall not benefit from the condition of refugee if:

I - He or she already enjoys protection or assistance from an United Nations organism or institution, except the United Nations High Commissioner for Refugees -- UNHCR;

II - he or she is a resident in the national territory and enjoys rights and obligations related to the condition of Brazilian nationals;

III - he or she has committed crime against peace, crime of war, crime against humankind, hideous crime, participated in terrorist acts or drug trafficking;

IV - he or she is considered guilty of acts contrary to the purposes and principles of the United Nations."

In this event, the question of what would happen remains. Maybe another migratory solution – like having a child in Brazil. But in the current scenario these provisions open up the possibility of foreigners being “undesirable” but “unreturnable” in Brazil.

Conclusions

From all of this, one can see that on the one hand asylum seekers and refugees are granted especial protection against “crimes of entry”, situations that could criminalize a migratory status and/or prevent people needing protection of entering into Brazil, and also against being returned to places where there are still risks to their lives, integrity or liberty. But that on the other hand, the possibility of “undesirable but unreturnable” is real, and that there is not practical solution in place in the country.

This does not seem to be a real problem at the time, due to the limited numbers of foreigners asking for refugee status in Brazil, which although spiking, are not large compared to other countries. Maybe, though, it is better to think of this situation now, in this still controlled scenario, and come up with solutions that would balance the State’s need for security and the individual’s need for protection, instead of waiting for situations that could have no “good result” for any of the parts or even have no solution at all.

References

ACNUR/UNHCR. *Refugiados no Sul da América do Sul: Argentina, Bolívia, Brasil, Paraguai e Uruguai*, 2003.

ACNUR/UNHCR. *Dados sobre refúgio no Brasil 2010-2014*. Available at: <http://www.acnur.org/t3/portugues/recursos/estatisticas/dados-sobre-refugio-no-brasil/>

Jubilut, L. L. Refuge Law and Protection in Brazil: a model in South America. *Journal of Refugee Status*, v. 19, n. 1, March 2006. p. 22-44

Jubilut, L. L.; Monaco, G. G. C. *Direito Internacional Público*, 2010.