

# THE NON-CRIMINALIZATION PRINCIPLE IN ACCORDANCE TO THE NEW BRAZILIAN MIGRATION LAW<sup>1</sup>

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**Abstract:** In the study of migration, one aspect that deserves special attention is the tendency of immigrant's criminalization by host countries and the mechanisms of international and domestic law to suppress such phenomenon. Hence, the purpose of this article is precisely to address these mechanisms and develop the theoretical construction of the "non-criminalization principle".

**Keywords:** migration - criminality - non-criminalization

## 1. INTRODUCTORY REMARKS:

In the study of migration, one aspect that deserves special attention is the tendency of immigrant's criminalization by host countries and the mechanisms of international and domestic law to suppress such phenomenon. Hence, the purpose of this article is precisely to address these mechanisms and develop the theoretical construction of the "non-criminalization principle", expressly provided for in Law No. 13,445, of May 24, 2017, in which its scope differs from the provisions of Law No. 9,474, from July 22, 1997 – Refugee Law – which does not extend to all migrations, as will be analyzed throughout this paper.

However, before that, it is necessary to clarify the meaning of some basic keywords: migration policy, forced migration, asylum and criminal policy.

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<sup>1</sup> Translated by Alexandre Sales Cabral Arlota

Migration policy is a set of measures adopted by a certain State to control the flow of people across its borders, as well as the residence of foreigners in its territory. As the world orderly follows in sovereign States, the immigrant is sometimes received as an invader, and other times as development promoter, in accordance with the State's interest in each moment. However, the State is not limited to the negative aspect of governmental authority over people in a given place, but it has another perspective of extreme importance, which is the protection and assistance of individuals.<sup>2</sup>

Migration policies tend to answer to worldwide requirements (human rights, respect for conventions, right to asylum), and also to multiple issues, such as the pressure of public opinion, security requirements, the belief of competitiveness in the business world and the desire to attract elites. This permanent contradiction results in a negotiated, discretionary right, which reflects in the migrant's daily treatment<sup>3</sup>, and in the difficulty itself to establish the contours of a "migration policy" in Brazil, either in the present or in the past, as verified from the concurrence of humanitarian aid policies and those related to the selection of good migratory flows.<sup>4</sup>

With regards to migrants, their traditional grouping is based on autonomy and vulnerability: (a) voluntary migrants, i.e., those who came to the country for economic and social reasons, such as the search for a better life and better work conditions; and (b) involuntary migrants (forced migration) - usually related to survival issues - in this grouping, refugees, stateless persons, asylum-seekers<sup>5</sup> and IDPs, among

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2 SICILIANO, André L. *Antes de discutir a Política Migratória brasileira: um ensaio conceitual*. University of São Paulo: International Relations Institute, 2012, p. 5.

3 WIHTOL WENDEN, Catherine. *Politiques migratoires injustes*. In: Cairn. Info. Projet 23-28. Waxés: Paris, 2013, p. 12.

4 Currently, the "survival" of a law from the Brazilian civil-military dictatorial period and the regulatory power of the National Immigration Council contribute to this "plasticity" and to the discussion of whether there is, or not, a Brazilian immigration policy. I stand for the position that it is possible to set a Brazilian immigration policy, even for its own "plasticity".

5 For many scholars, asylum and retreat are considered as synonyms. In some Latin American countries and in particular in Brazil, these terms entitle different institutions, with different characteristics, in spite of the common context in which they coexist: welcoming those who suffer persecution (at least in the classical concept of refuge) and therefore cannot continue to live in their place of residence or nationality. This welcoming context highlights the genre called "broad sense asylum", which is the set of institutions that secures the foreign host who cannot return to his/her place of residence or nationality, due to persecution without cause. Its species are: a) "political asylum", which is divided into "territorial asylum", "diplomatic asylum" and "military asylum" (Ramos, André de Carvalho. *Asilo e Refúgio: semelhanças, diferenças e perspectivas*. In: Ramos, A.C.; RODRIGUES, Gilberto; ALMEIDA, Guilherme Assis (eds.). *60 anos de ACNUR: perspectivas de futuro*. São Paulo: CL-A Cultural, 2011, p. 15); b) refuge, whose characteristics have been analyzed in other items of this paper, including

others can be included. However, forced migrations may occur due to environmental disasters, including the effective lack of rights (that could be either social, economic or cultural) which, in specific cases, can turn into the reason for forced migration.<sup>6</sup>

One of the criticisms of such classification is that the qualification of some migrations as forced suggests a category of voluntary migration, including automatically migration due to economic reasons, for example, the extreme disparity found in the international society, which is questionable.<sup>7</sup> Additionally, the categories above refer to vulnerable human groups that require protection from a State, to a greater or smaller extent for various reasons. Thus, the distinction between migrant groups is neither ontological nor unequivocal and should be constantly subject to criticism, in accordance with the worldwide changes towards migratory flows.<sup>8</sup>

The ordinary choice of (meaning) terms used to define the irregularities in migration is often made to establish certain political positions, since it makes value judgments and sets forth relations between such phenomenon and criminality levels. In addition, some authors claim that the term “illegal immigration” is incorrect in a semantic manner, since neither human mobility can be labeled as legal or illegal a priori, nor the entering in a country in disaccord with the procedure established in the frontier control legislation may be enough to label an individual as “illegal”.<sup>9</sup>

The term “irregular” has been proposed by several authors to avoid xenophobic connotations and the respective intolerance associated with the term “illegal”, aiming to assume a certain political neutrality.

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the aspects related to concession, due to serious and widespread violations of human rights or the requirement of persecution.

6 JUBILUT, Liliana Lyra. *Migrações e desenvolvimento*. In: AMARAL JÚNIOR, Albert (ed.). *Direito Internacional e desenvolvimento*. Barueri: Manole, 2005, p. 127-131.

7 JUBILUT L.L. Migration... In: AMARAL JÚNIOR, A. (ed.). *Direito...*, 2005, p. 131; MORAES, Thais Guedes Alcoforado of. O princípio da não devolução de refugiados à luz do Sistema Interamericano de Direitos Humanos. In: GALINDO, George Rodrigo Bandeira (ed.). *Migrações, deslocamentos e direitos humanos*. 1. ed. Brasília: IBDC; Research Group C&DI, 2015, p. 36. Furthermore, Bauman (2003) points out that, with the arrival of modernity, the very sense of injustice has changed, and today means “[...] to be left behind in the universal movement towards a life full of pleasures [...] since the proclamation of pleasure and happiness as the supreme purpose of life are a characteristic of today’s society, as well as the promise of those in power to ensure conditions that allow a continuous and persistent growth of the full pleasure and happiness available (Bauman, Zygmunt. *Comunidade: a busca por segurança no mundo atual*. Rio de Janeiro: Zahar, 2003, p 75-76).

8 MORAES, T. A., The principle... In: Galindo, G. *Migrações...*, 2015, p. 36.

9 GUIA, Maria João. *Crimigração, securitização e o Direito Penal do crimigrante*. In: **Revista Liberdades**. N. 11 - September/December, 2012. P. 90-120. São Paulo: Revista dos Tribunais, 2012, p. 109.

However, others argue that both terms have the same meaning, choosing different expressions, which vary in accordance with the specific violations made by the Migration Law.<sup>10</sup> For example, in relation to the lack of mandatory documentation, the terms “undocumented”, “no documents” or “unauthorized” should be the ones applied.

Undocumented, clandestine or illegal immigrants, according to the expression to which they are assigned, suffer discrimination twice: on one hand, their legal possibilities are very limited; on the other, their social vulnerability makes the struggle for their rights’ effectiveness almost impossible, and the impunity for such rights’ violation is usual.<sup>11</sup> According to Boaventura, this scenario is part of a transnational Third World of people that is expanding, although it does not establish an electoral constituency for the purposes of political processes at a national level, which moves in a “no man’s land” from a legal point of view and that vital experiences demonstrated by the dark side of a growing global economy whose iniquities are in part guaranteed by the existence of national frontiers<sup>12</sup> and the coercive powers of the states that the watch, ranging from administrative measures of compulsory withdrawal to the criminalization of immigration itself. Thus, they reveal the most profound contradictions among the exclusive powers of sovereignty and cosmopolitan politics of human rights to protect new transnational front vulnerability to new transnational impunity.<sup>13</sup>

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10 GUIA, op. cit., 2012, p. 71.

11 SANTOS, Boaventura de Sousa. *La Globalization del derecho. Los nuevos caminos de la Regulación y la emancipación*. Bogotá: Universidad Nacional de Colombia, Instituto de Servicios Legales Alternativos, 1998, p. 127.

12 Boundaries, in the sense of spatial limits delimiting a State’s territory, are not about to disappear, as well as the States themselves, which are still the major players in the international and global scene. This maintenance, on one hand, does not fail to be positive for democratization and for human’s expansion, since the demarcation is a guarantee against the Empire’s imperative totalitarianism, which also calls for border devices as barriers of exclusion, which also are no longer “margins” between the center dominated periphery. According to Rui Cunha Martins, the demarcation issue is “[...] when we do not produce it, it does not mean that this demarcation does not exist, or that we left the task to those who will eventually produce it with no democratic criteria, whether moral or totalitarian” (Martins, Rui Cunha. *O método da fronteira: radiografia histórica de um dispositivo contemporâneo (matrizes ibéricas e americanas)*). Coimbra: Almedina, 2008, p. 229). Still with regards to border maintenance: Bauman, Z. *Comunidade*, 2003, p. 21.

13 Forced migration is not only characterized by the State’s illegal practices, once it also violates the freedom to come and go, and also since they violate the human right to developed as an economic, social, cultural and inclusive political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in the development and distribution of the resulting benefits (JUBILUT, Liliana Lyra Migration and development. in : AMARAL JÚNIOR, Alberto (org) *Direito Internacional e Desenvolvimento*. Barueri: Manole , 2005, p 135).

A Criminal policy is a program that establishes the actions that should be considered as crimes and the public policies for enforcement and crime prevention and control of its consequences. Its elaboration is the means by which the State offers answers to the expectations, insecurity and the current conflicts in the social body in a certain historical context.<sup>14</sup> This is why the indiscriminate use of the criminal justice system is common, in order to allay public spirits and prevent the practice of behaviors labeled as deviant or even immigration itself, without taking into account that, by the very nature of its institutions (excluding, stigmatizing, symbolically and materially violent), it will not be able to, by itself, control migration flows, insecurities and maintain social peace.

## 2. FRAMING THE DISCUSSION CONCERNING NON-CRIMINALITY: CRIMINOLOGY MOBILITY OR “CRIMMIGRATION”

Nowadays, the analysis of migration’s criminalization ration has been carried <sup>15</sup> by scholars as “cimmigration” - or “mobility

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14 DIETER, Maurício Stegemann. *Política Criminal Atuarial: a Criminologia do fim da história*. Thesis (Doctor of Law - UFPR). Advisor: Prof. Dr. Juarez Cirino dos Santos. Curitiba: 2012, p. 12.

15 It is important to note that, in the first half of the twentieth century, for example, the **Chicago School** has developed a research regarding the connection between social disorganization in large urban centers - caused, among other factors, on the disordered “wave” of immigrants and the unforeseen process of assimilation and integration - and criminal behavior as a result of these phenomena. These studies have shown that immigration does not imply in crime increase, specially considering violent crimes (murder, robbery, rape and bodily harm). On the contrary, for example, Robert Sampson concluded that it is quite the opposite, *i.e.*, immigrants tend to commit fewer violent crimes. Thus, in the United States, immigration did not only contribute to crime increase, but it also contributed to its decrease. (SAMPSON, Robert J. **Rethinking crime and immigration**. In: Contexts, Vol 7, No. 1, pp 28-33. Yale: American Sociological Association, 2008). Sampson analyzed the immigrants’ integration process to their destination, as well as their deviant behavior, and concluded that the first generation tends to avoid such behavior, which may be due to the fear of deportation and stricter penalties. According to their studies, the first generation of immigrants practiced 45% less violent crimes than the third. With the same thesis: Rumbaut, Ruben G.; EWING, Walter A. **The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign- Born Men**. Immigration Policy Center: Washington DC, 2007. Available in: <<http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>>. Accessed on 24 April 2015. Also with the same thesis: GUIA, Maria João. *Imigrantes e Criminalidade Violenta em Portugal*, in 2010.

criminology”<sup>16</sup>, being the last denomination least used, although it prevails in Australia.

The “crimmigration” expression was created by Juliet Stumpf, in 2006 (Clark Law School, USA), to describe the migration’s criminalization in the United States.<sup>17</sup> Subsequently, Maria João Guia translated into Portuguese, and in 2011 published an article in the *Revista Liberdades* regarding migrant’s criminalization in Portugal.<sup>18</sup> Both authors manage a network of researchers, the CINETS, which monitors the relationship between migration policies and criminal policies in different locations around the world.<sup>19</sup>

Stumpf and Guia are based on the assumption that migration law and criminal law have several features in common, capable of generating obscuring practice between the two areas of law: both criminal legislation and the migration law promote the distinction between insiders and outsiders and therefore the two are inclusion and exclusion systems that distinguish categories of people (innocent versus guilty, admitted or excluded, legal or illegally).<sup>20</sup>

Suiting the previous theories to the Brazilian reality, “crimmigration” can be defined as: (a) the criminalization of the act of migrating, especially of undocumented immigration), highlighted in Europe and the United States; (b) but also the actual wide relationship between criminal and immigration policy: (i) the immigration law in the service of criminal law: the transfer to the administrative law of sanctions previously limited to criminal law (such as expulsion, that was a penalty in the Penal Code of 1890) and the use of typical criminal sanctions, such as prison; the Federal Police’s authority to admit the entry, stay and naturalization of individuals as well as to receive asylum claims; expulsion for individuals who have committed common crimes; (ii) the

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16 Pickering, Sharon; BOSWORTH, Mary; AAS, Katja. Forensic of mobility. In FRANCE, Leandro Ayres (ed.). *Criminology alternatives*. (In press).

17 STUMPF, Juliet. The Crimmigration Crisis: Immigrants, Crime and Sovereign Power. In: *American University Law Review*. Vol 56: 2, 2006, p. 367-419.

18 GUIA, Maria João. *Crimigração, securitização e o Direito Penal do crimigrante*. In: *Revista Liberdades*. N. 11 - September/December 2012. P. 90-120. São Paulo: Revista dos Tribunais, 2012, p. 109.

19 Available in: <http://www.crimmigrationcontrol.com/>.

20 According to Howard Becker, lead author on sociology of deviance from the 60s and 70s of the twentieth century, the *outsider* is the one that strays from the group rules, and, as these rules are created by society itself also the deviation is. The deviant is the one to which such label has been applied successfully, and deviant behavior is the one that people determine as such. People that are labeled “deviants” have in common, beyond that stigma, the experiences of being labeled that way. This “label” has rates, depending on who performs the deviation and those who feel harmed by it: the law itself is applied differently for each person, depending on the race, gender and economic status of both the offender and the victim (BECKER, Howard. **Outsiders: estudos de sociologia do desvio**. Rio de Janeiro: Zahar, 2008, p. 17-25).

criminal law as frontier control strengthening: the criminalization of the trafficking of immigrants, re-entry of expelled foreigners, among others.<sup>21</sup>

In this sense, it should be considered that immigration and criminal legislation often impose sanctions to the individual for the same offense: firstly, criminal detention and later expulsion or deportation, a result often more serious than prison and also submitted to a process. Often, the effects of immigration law are more serious than criminal law, such as expulsion with perpetual effects, the impossibility of immigration regularization due to criminal records, to the extent that the immigrant in this condition has almost no right.<sup>22</sup>

### **3. THE NON - CRIMINALIZATION IN INTERNATIONAL LAW:**

Regarding the United Nations system, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly of 1990, predicted an obligation for the States to grant to documented and undocumented migrant workers a range of civil, social and labor rights, which include, inter alia, justice, health and education access for children; the freedom of expression and worship; the right to participate in trade unions and to have labor rights equivalent to national workers. The key idea of this convention is simple: all migrant workers and their families should enjoy and exercise rights regardless of their immigration status.<sup>23</sup>

The Convention also establishes the right to the due legal process in criminal matters (article 18): the presumption of innocence (which also applies to provisional release, since the presumption of innocence cannot lead to early implementation of penalty); right to communicate

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21 The development of the concept of “crimmigration” in Brazil is located in: MORAES, Ana Luisa Zago. *Crimigração: a relação entre política migratória e política criminal*. Thesis (Doctor). Graduate Program in Criminal Science. Porto Alegre: PUCRS, 2016. Available in: <http://www.capes.gov.br/images/stories/download/pct/2016/Mencoes-Honrosas/Direito-Ana-Moraes.PDF>

22 MORAES, Ana Luisa Zago. *Crimigração*.... 2016.

23 UNITED NATIONS. **Rights of All the Migrant Workers and Members of their Families**, the endowed by the UN General Assembly by resolution No. 45/158 from December 18<sup>th</sup>, 1990. In: BRAZIL. Message to the National Congress No. 696 from December 13, 2010. Available in: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=489652>>. Accessed on April 8, 2017. The Convention entered into force on July 1<sup>st</sup>, 2003, 13 years after its approval by the UN General Assembly, when the 22<sup>nd</sup> ratification instrument was obtained, being all of those arising from developing States and least developed States, with the exception of Turkey. Actually, currently it is the human rights treaty with the lowest number of ratifications: there are 48 States, none of those being major immigrant receiving countries. In addition, Brazil has not yet performed its internalization task and will not host it with a constitutional amendment (*emenda constitucional*) status.

in a language which he/she understands, the nature and reason of the charge; right to have the time and resources needed to be judged within a reasonable time; right to full defense, which entails producing evidence, to communicate and be accompanied by a lawyer of his choice and, if so, to be defended by a counsel paid by the State, free of charge, if he/she has not sufficient incomes to pay; to benefit from the free assistance of an interpreter if he/she does not understand or speak the language used by the court; to not produce evidence against itself; to appeal against a decision to a higher court; compensation in the event of a judicial error; not to be prosecuted for the same fact for which he/she has already been acquitted or convicted.

The Convention, in its article 56, forbids the expulsion of migrant workers, excepting the reasons defined in the national law and without prejudice to the aforementioned guarantees. It adds that regarding the possibility to expel a migrant worker or a member of his family it shall be taken into account humanitarian reasons and the period of residence of the concerned person, until that moment in the employment State. Article 22 provides that people cannot be subject to collective expulsion measures and that each case must be examined and decided individually by the competent authority in accordance with the law. It also adds that the written and justified decision shall be communicated to those who are interested in a language that they can understand, including the possibility to appeal with a suspensive effect, unless national security requires, and if the decision is not from a judicial and definitive authority. In addition, if the already executed expulsion decision is subsequently annulled, compensation shall apply.

The American Convention on Human Rights, of November 22, 1969, for the purpose of which “[...] a person is every human being” (article 1, item 2), establishes mechanisms for the prohibition of cruel, inhuman or degrading treatment or punishment (article 5, item 2), of arbitrary prison (article 7, item 3), and provides for various guarantees (Article 8). In article 22, it also reproduces the right of every person to leave his country, adding that the foreigner who has entered legally may be expelled only in “[...] compliance with a decision adopted in accordance with the law.” In the same article, prohibited the collective expulsion of foreigners and predicted the impossibility of expulsion or delivery to another country, whether or not the origin, “[...] where the right to live or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion” and such seal is identified with the non-refoulement principle.<sup>24</sup>

In a regional manner, the Inter-American Court of Human Rights,

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<sup>24</sup> Failure to return (non- refoulement) set forth in the Status of Refugees’ Convention of 1951 (art. 33) and simultaneously in the United Nations Convention against Torture (art. 3) and the American Convention of Rights Human (art. 22.8 and 9).

when challenged by Mexico, in 2002, to express its limits regarding the right of States to establish their migration policies and labor rights of undocumented migrants, has helped to build this response. In the Advisory Opinion No. 18/03, the Court mentioned being the obligation of States to determine their migration policies solely in the light of international instruments to protect human rights, and the principles of equality and non - discrimination, which are part of jus domain cogens. Additionally, the distinctions between nationals and migrants, whether documented or undocumented, should be objective, proportionate and reasonable.<sup>25</sup> Thus, it pointed limits on migration policies and concluded that the irregular immigration status is not a limiting factor nor is able to weaken these principles.

In the report on migration in the United States, it recommended detention facilities near to urban centers, to ensure that the prisoners have access to legal defense, never in distant places, neither outside the national territory. Finally, the IACHR alleged that the State should eliminate the application of summary deportation for all people in vulnerable situations and asylum seekers to demonstrate well-founded fear at the time of his first interview, at the border or another entry point. Likewise, it recommended that the State should eliminate the summary deportation for immigrants approached 100 miles from the international border and 14 days after entering the country. In these cases, it said that the State should prove that the immigrant was less than 14 days in the country, not the other way around. In addition, even if it consented to deportation, the prisoner should be given the opportunity to consult a Public Defender or lawyer before giving his definitive consent.<sup>26</sup>

In the Report on migrants' human rights, stateless persons, victims of human trafficking and internally displaced persons,<sup>27</sup> the Commission brought elements considered by the European Court of Human Rights and the UN Human Rights Committee at the time to consider the right of a person to remain in a State in which he is not a

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25 OEA. Inter-American Court of Human Rights. Advisory Opinion OC-18/03... 2003, § 161, p. 131 and § 168, p. 132.

26 ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. *Comisión Interamericana de los Derechos Humanos. Informe sobre inmigraciones en Estados Unidos: Detenciones y debido proceso* / Report on immigration in the United States: Detention and due process. OEA/ Ser.L/V/II. Doc. 78/10 30 diciembre 2010 Original: Inglés. Available in: <<http://www.cidh.org>> Accessed on June 30, 2014.

27 ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. *Comisión Interamericana de los Derechos Humanos. Derechos humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y estándares del Sistema Interamericano de Derechos Humanos*. OEA/ Ser.L/V/II. Doc 46/15 31. Diciembre 2015 Original: Español . Available in: <http://www.oas.org/es/cidh/informes/pdfs/MovilidadHumana.pdf> . Accessed on April 8, 2017.

national - elements to be weighed against the State's power to expel the foreigner, which are: (a) the age of the non-national immigrant when he emigrated to the receiving State; (b) the time of residence in the receiving country; (c) family ties in the receiving State; (d) the extent of damage to the family of the deportee by virtue of the deportation; (e) contributions to the society where he lives; (f) the extent of their bonds in their country of origin; (g) the ability to speak the main language of their country of origin; (h) the seriousness of the offense; (I) the age at the time the offense was committed; (j) the period elapsed since the committed offense; (l) evidence of rehabilitation after criminal activity; (m) the efforts made to obtain the nationality of the receiving State.<sup>28</sup>

#### **4. THE NON-CRIMINALIZATION PRINCIPLE IN THE NEW MIGRATION LAW:**

The non-criminalization is one of the principles expressly provided in article 3 of Law No. 13.445/2017: "The Brazilian migration policy is governed by the following principles: [...] III – non-criminalization of immigration." This principle suits the recommendations and reports of the Inter-American Commission of Human Rights above and is characteristic of migratory legislation aimed to protect human rights, overcoming the tightening security paradigm presented in the legislation, like the current Statute of the Foreigner.<sup>29</sup>

From the analysis of the new law, this principle can be divided into four subprinciples: (a) non-criminalization of migration; (b) non-discrimination in criminal proceedings and criminal enforcement of common crimes; (c) due legal process in the compulsory withdrawal measures; (d) non-imprisonment of migrants based on their legal status.

##### **a. The non-criminalization of migrations:**

Currently, the typical foreigners crimes are those already established before the end of the Brazilian civil-military dictatorship, like the re-entry of the person who was expelled, disciplined by article 338 of the Penal Code of 1940, and the crime of fraudulent foreign law

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28 OAS. *Derechos humanos de migrantes...* 2015, p. 177. The report concluded, in line with the studies of "cimmigration" above that, the immigration detention is a way of immigration criminalization and due to that, procedural safeguards shall be taken into account. He also added that the violation of immigration laws can never be alone, comparable to the violation of criminal laws, and that the first response to irregular migration can never be the arrest, since the measures of deprivation of liberty shall be restricted to situations that violate fundamental legal rights (OEA. *Derechos humanos de migrantes...* 2015, p. 191).

29 Regarding the Foreigner Statute, the immigration laws that preceded it and the presence of security - based paradigm: MORAES, Ana Luisa Zago. *Crimigração...*, 2016.

(article 309 of the Criminal Code) which provides “... to use the foreigner to enter or remain in the national territory, a name that is not his “.

In addition to the provision of two criminal types in the Code, the Statute of the Foreigner of 1980, in art. 125, when dealing with infractions and penalties, prescribes in its paragraph XII the crime of introduction of foreign clandestinely and the concealment of irregular foreigner (punished with imprisonment (*detenção*) penalty of one up to three years, and if the violator is a foreigner, punished with his/her expulsion); as provided in item XIII, it is also a crime making false statements under “[...] visa transformation process, registration, change of settlements, naturalization, or to obtain passport for foreigners, *laissez-passer*, or when required, exit visa”, (confinement (*reclusão*) of one up to five years and, if the violator is a foreigner, punished with his/her expulsion).

Finally, item XI of Article 125 sets forth that the violation of Articles 106 and 107 of the Statute constitutes a criminal penalty (punished with imprisonment (*detenção*) of one up to three years). The content of these articles deal with prohibitions which foreigners are subject to, including participate in the management or representation of unions or professional association, as well as of entities who supervise the exercise of regulated professions; provide religious assistance to institutions of collective detention, including prisons; own a Brazilian vessel, a newspapers company, or a Brazilian aircraft; hold permission to explore mineral resources, auctioneer or customs broker (Article 106). It also includes an express prohibition to engage in any political activity (items I, II and III of Article 107).

The aforementioned provisions cannot be considered incorporated by the Constitution of 1988, since the latter assured to foreigners the freedom of union association, the exercise of any work, occupation or profession (Article 5, item XIII), and the freedom of assembly (Article 5, item XVI), having also included the express provision of religious freedom (Article 5, item VI) and equal treatment between nationals and foreigners (Article 5 main clause).

It is certain, however, that if literally applying the provisions of Articles 106, 107 and 125, the immigrant will be charged, prosecuted and sentenced, and the final and unappealable condemnation court decision can lead to the expulsion and hence the prohibition of its re-entry. Thus, the maintenance of these provisions in the legal system creates insecurity for the immigrant, since, despite the unconstitutionality and the few police investigations initiated, even the investigations culminate in flagrant delicto arrests of immigrants who seek the regularization of immigration before the Federal Police.

In May 2016, a writ from the Federal Police was served upon the law professor of UFMG (Federal University of Minas Gerais), Maria

Rosario Barbato, an Italian citizen, to render a deposition about the supposed union and political activities, both prohibited by the Statute.<sup>30</sup>

That is the reason why the legislative bill PL 2516, in its Article 4, expressly revoked such impediments and provided the migrant with, further to the civil, social, cultural and economic rights and liberties, the right to freedom of movement in national territory, also the “right of assembly for peaceful purposes” and “the right of association, including those related to unions, for lawful purposes”.

With regard to criminal provisions, it provided new wording to the crime of “coyote”, criminalizing only those who promote the illegal entry of immigrant in order to obtain economic advantage (Article 232 of the Penal Code), with a minimum penalty of confinement (*reclusão*) of two years and a maximum of five, subsequently adding one-sixth to one-third of the crime is committed with violence or if the victim suffers from inhuman or degrading condition. This provision should be observed along with the Human Trafficking Law (Law No. 13,344/2016), which sets forth heavier penalties to the human trafficker - that is different, when the purpose is the transport of people, by means of serious threat or violence - permanent residence for victims in the national territory, regardless of their migratory status and collaboration in administrative, police or judicial procedure.

By the text of the legislative bill, the residence may be authorized, upon registration, to the person under one of the following situations: “XV - victim of human trafficking, slave labor or violation of right worsened by his/her migratory condition” (Article 25), in consonance with the guarantee of “IV - protective measures for victims and witnesses of crimes and rights violations” (Article 4).

It results from the non-criminalization principle, further to the revocation of criminal provisions for the simple fact of being a migrant, the recognition of the vulnerability of the irregular migrant, especially those who are a victim of human trafficking, but also those who suffered other violations of right worsened by their migratory condition.

#### **b. Non-discrimination in the criminal procedure and criminal enforcement of common crimes:**

This subprinciple is very important because the political and criminal tendencies in Brazil nowadays that reflect the most on criminalization of foreigners are not the crimes themselves, with court decisions that subject them to the negotiated justice, but other common

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30 BRAZIL. Justice Ministry. Regional Superintendence of the Federal Police in Minas Gerais. Craft n. 2827/2016 - IPL 0310 / 2016-4 SR / DPF / MG. Belo Horizonte, April 07, 2016. It is stated in the subpoena that the teacher “is a foreigner and is working in unions and political parties in the national territory, and should provide clarification in the interest of Justice.”

crimes and discrimination during the execution of the court decision (especially for foreigners arrested for drug trafficking).<sup>31</sup>

The amount of foreign people in deprivation of liberty in Brazil, mainly for drug trafficking, is also due to the difficulty of granting freedom in the course of the process of obtaining progression scheme and the conditional release due to the punitive culture related to drug trafficking, especially the international one, as previously analyzed.

In addition, it is ignored that the foreign prisoner has the same rights as the Brazilian one<sup>32</sup>, including the constitutional guarantee of access to justice and Public Defenders, the presumption of innocence, the right to work and the redemption through the work<sup>33</sup>, the right to study and the redemption through the study, the right to religious and worship freedom, health and hygiene, temporary exit, visitation, including conjugal visits, the translation to their native language and consular assistance. Foreigners are also entitled to progression regime and conditional release.

What occurs in practice, however, is the projection of the effects of the decree of expulsion on the day-to-day of the fulfillment of the court decision of non-national individuals, affecting the right to enjoy the progressive system of fulfillment of the court decision and anticipating its fulfillment and violating the principle of presumption of innocence by denying provisional release.<sup>34</sup> The classic position of the Federal Supreme Court and the Superior Court of Justice, in fact, is precisely in the sense of the impossibility of granting any form of progression in the execution of the court decision to the benefit of the foreigner sentenced of a criminal offense waiting for a possible expulsion already

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31 In 2014, according to São Paulo State Department of Penitentiary Administration's data, 81% of foreign nationals were arrested for drug trafficking (Law 11,343/2006), while only 13% patrimony, and 1.4%, crimes against life. The information was provided by the Press Office of the Secretariat of Penitentiary Administration on December 10<sup>th</sup>, 2014: 2,078 foreign prisoners (1,559 men and 519 women) in the State of São Paulo, in which 1,692 were arrested for the crime of drug trafficking (1,203 men and 484 women). At the national level, the total number of foreign prisoners in July 2013 was 3,191, and the percentage of prisoners for drug trafficking is approximately 90%. Available in: <<http://www.justica.gov.br/seus-direitos/politica-penal/acesso-a-informacao/estatisticas-prisional/anexos-sistema-prisional/total-brasil-junho-2013.pdf>>. Accessed in: December 8, 2014.

32 In addition to the constitutional and international law predictions mentioned in the previous section of this thesis, non-discrimination is one of the UNITED NATIONS' essential principles of the Minimum Rules for the Treatment of Prisoners. **Human Rights and Prisons: Trainer's Guide on Human Rights Training for Prison Officials.** United Nations: New York and Geneva, 2005).

33 In prisons where there are no workplaces, any other daily activity, constant and scheduled, should be considered for redress purposes, once it is the State's duty to provide work.

34 SOUZA, Artur de Brito Gueiros. *Presos estrangeiros no Brasil: aspectos jurídicos e criminológicos.* Rio de Janeiro: Lumen Juris, 2007, p. 206.

decreed, or in the course of a expulsion procedure in progress, under penalty of frustrating the very order of expulsion (using a “presumption of escape”) and to guarantee the progression to those who cannot work lawfully in Brazil.<sup>35</sup>

Contrary to this trend, there are recent judgments favorable to the regime progression of foreign prisoners. The Superior Court of Justice, by relaxing its traditional position, has already stated that the irregular status of a foreigner in the country is no circumstance in itself able to derogate the principle of equality between nationals and foreigners and “[...] the possibility of escape and, consequently, frustration of the expulsion decree does not justify the rejection of the request for progression to the half-open regime.”<sup>36</sup> Similarly, the Supreme Court, on some occasions, followed the understanding that the fact that the person sentenced for drug trafficking is a foreigner, in jail, does not own residence in the Country and is subject to an expulsion process, does

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35 CAHALI, Yussef Said. *Estatuto do Estrangeiro*. São Paulo: Saraiva, 1983, p. 218. The author brings several judgments from Brazil’s Federal Court of Justice (STF) and Superior Court of Justice (STJ) in this sense. Similarly, Artur de Brito Gueiros Souza comments, among other judgments, *habeas corpus* No. 56,311, in which STF decided that “... the foreigner must await full compliance with the court decision, without the right to progression to the semi-open conditions”. He added, regarding the conditional release, that one of the grounds for rejection is Decree-Law No. 4,865, dated of 1942, which prohibits the release of foreigners. It occurs that such Decree was tacitly revoked by the 1946 Constitution, and also due to the subsequent foreigner’s legislation (Decree-Law No. 941, 1969, later repealed by Law No. 6,815, of 1980), legislation that did not anticipate restriction to obtain deliverance or any other similar institute (SOUZA, A. B. G. *Presos...*, 2007, p. 207-227).

36 BRAZIL. Brazil’s Superior Court of Justice (STJ). *Habeas corpus* No. 219.017-SP, Rel. Min. Laurita Vaz, judged on 3/15/2012, reported in the information No. 493, period: March 12-23, 2012. In 2015, another decision was given in this same sense: “[...] 1. The progression of the punishment system, both national and foreign, should be guided by the respect of the dignity of the human person and with the compliance of the equality and individualization of punishment principles, with the evaluation of the objective and subjective criteria set forth in art. 112 of the LEP. 2. The benefit cannot therefore be denied by the mere fact that the offender is in an irregular situation in the country or even if there is a decree of expulsion issued against him, reasons which, in accordance with the settled case-law of this Court, do not they would be suitable for this purpose “(BRAZIL, Superior Court of Justice, *Habeas corpus* No. 309.825/ SP, Sixth Group, Minister Rogerio Schietti Cruz, Judged on 03/03/2015. In this same sense: “This Superior Court has consolidated an understanding in the sense that the foreigner’s irregular situation in the Country is not a circumstance capable of removing the equality principle between nationals and foreigners, which is why the existence of a proceeding or even a decree of expulsion for the foreigner’s disadvantage does not prevent the granting of the benefits of a progression regime or conditional release, since expulsion may occur, according to the national interest, after the punishment compliance, or even before that. “(HC 324.231 / SP, King REYNALDO SOARES DA FONSECA, QUINTA TURMA, judged on 09/09/2015, DJe 10/09/2015) 2. Unfounded Special Appeal (*Agravo Regimental improvido*). 321.157/SP, Rel. Minister NEFI CORDEIRO, SEXTA TURMA, judged on 04/05/2016, DJe 04/18/2016).

not constitute an obstacle to the court decision progression regime.<sup>37</sup>

Despite some favorable judgments, judges, in the lower court, usually deny the progression regime. One of the reasons for maintaining the closed prison system is that Article 114 of the Brazilian Penal Execution Law demands certain obligations for such progression, including that the prisoner should be working or prove his possibility to work immediately (item I).

The conditional release needs more requirements than progression, among them “[...] to obtain lawful occupation, within a reasonable time if it is fit for the job” (Arts. 131 and 132 of the Brazilian Penal Enforcement Law), which is why, as a rule, it is denied by the courts of the Country, under the argument that there is no possibility for the foreigner to perform lawful occupation and to establish residence for being irregular in the Country. In order to reverse this position, it is necessary, in addition to the jurisprudential changes the interaction between different institutions, in order to shelter immigrants in suitable places, to provide activities assimilated to “lawful occupation” and to enable them to provide for their own livelihood (transdisciplinary assistance).<sup>38</sup>

The same difficulty is found for the substitution of the deprivation of liberty by restriction of rights, a benefit usually denied by Brazilian judges and courts in cases of foreigners that were accused of drug trafficking. Brazil’s Federal Court of Justice has ruled that there is a restrictive penalty for such offense and, in the case of a foreigner convicted of this offense, it stated: “[...] why (i) has the enforcement of a court decision been established; (ii) there is no decree of expulsion to its disadvantage; and (iii) in the view of lower instances, it fulfills the requirements of art. 44.”<sup>39</sup>

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37 Previous said by Brazil’s Federal Court of Justice (STF): HC 97.147-MT, DJe 12/2/2010. Recently, STF also ruled: “[...] I - The foreigner’s exclusion from the progressive punishment system conflicts with several constitutional principles, especially the prevalence of human rights (Article 4, II) and isonomy Article 5), which prohibits any discrimination based in race, color, creed, religion, sex, age, origin and nationality. Precedent. II - Order granted to remove the regime progression seal to the patient, referring the case to the execution court, to verify the existence of the requirements of art. 112 of the LEP “(BRAZIL, Brazil’s Federal Court of Justice (STF), *Habeas corpus* No. 117878. Second Class, Rapporteur Mr. Ricardo Lewandowski, Judged on November 19, 2013. Electronic Case Dje-237. Published on December 03, 2013).

38 In São Paulo, the reception experience due to the work of *Instituto Terra, Trabalho e Cidadania (ITTC) – “Projeto Estrangeiras”* –, who has been allocating some women in the “Casa de Acolhida”, of the *Pastoral Carcerária* and the “Casa do Migrante”, which receives foreigners for the purpose of conditional release, has caused positive results (BRAZIL. *Relatório sobre a situação das pessoas estrangeiras presas no Brasil...*, 2014, p. 24-26).

39 BRAZIL. Brazil’s Superior Court of Justice (STJ). *Habeas corpus* No. 103,311. First Class. Rapporteur, Minister Luiz Fux. Judged on June 7, 2011. *Diário da Justiça*, Brasília, DF, June 29. 2011, *Ementa* Vol. 02553-01, p. 00086.

The access to the formal labor market requires egress assistance programs since it is very likely that the non-national will not have a previous job or the command of the language. It also requires documentation, such as the Brazilian Labor and Social Security Portfolio (CTPS) and the National Registry of Individuals (CPF) and, ultimately, the regular stay in Brazil. Likewise, such documents are required to formalize a contract for property rental and for other civil life activities. Thus, the requirements run into the seizure of passports when the offense is committed, as well as the unfeasibility of migratory regularization of the foreigner who commits a crime in Brazil.

One step in settling the issue and making it feasible to grant the benefits related to the progressive system of compliance with the court decision was Normative Resolution No. 110 of April 10, 2014, of the National Immigration Council, which authorized the granting of provisional residency, in particular, for the purpose of establishing equal conditions for the execution of court decisions by aliens.<sup>40</sup> The Resolution was regulated by Ordinance No. 6, dated of January 30, 2015, which provided that the Department of Foreigners will issue the provisional stay and that this does not depend on a judicial order, proving the condition of the foreign prisoner, and may be postulated by the Union Public Defender, regardless of power of attorney.<sup>41</sup> From the time of stay, the National Registry of Foreigners can be acquired and

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40 The Brazilian Normative Resolution No. 110, dated of April 10, 2014, published in the *Diário Oficial da União* No. 75, dated of April 22, 2014, states: “Art. 1. Brazil’s Ministry of Justice shall, by virtue of a judicial decision, grant temporary stay, in a special capacity, to foreigners in compliance with their court decision in Brazil. Sole paragraph. The stay referred to in the caput of this article will be linked to the compliance of the court decision or to the effectiveness of its expulsion. Art. 2 The granting of stay under this Resolution contemplates the rights and duties provided for in Law No. 6,815 of August 19, 1980, pursuant to the judicial decision. “

41 BRAZIL. National Secretary of Justice. Ordinance No. 6, January 30, 2015. *Diário Oficial da União* No. 22. Executive Power, Brasília, DF, February 2, 2015. According to the Ordinance, the Foreigners’ Department will grant provisional stay to foreigners who are defendants in criminal proceedings or are serving court decision in the national territory, and requires the following documents, according to art. 2: “I - judicial decision, in accordance with the first paragraph. II - original or authenticated copy of the foreign prisoner’s identification, which may be attested by any document proving his identity and nationality. III - address or location of the interested party indication”. According to the Ordinance, a judicial decision consists of a conviction or decision granting provisional release or alternative precautionary measures to imprisonment, conditional release or regime progression. The application protocol will be valid as evidence of immigration regularity until final decision, as well as used to allow the foreign prisoner to access complementary services and documentation, labor and tax, until the publication of the final decision on permanence in the *Diário Oficial da União* and subsequent RNE issuance. Adds art. 3o that “[...] the provisional stay may be permanently transformed in cases of family reunion”.

simplifying the issuance of the CTPS, the CPF and other documents necessary for life beyond prison.

Law No. 13,445/ 2017 confronts the issue and, as a corollary of non-criminalization, expressly provides, in its art. rt. 54, § 3:

*The expulsion processing in case of a common crime will not affect the progression of the regime, the compliance sentence, the conditional suspension of the proceeding, the commutation of the court decision or the granting of an alternative punishment, collective or individual pardon, amnesty or any benefits granted on equal terms to the Brazilian national.*

In relation to permanent residence, it also expressly provided that:

*Art. 57. Regulation shall provide for the special conditions of residence authorization to enable measures to re-socialize the immigrant and visitor in compliance with court decisions initiated or executed in the national territory.*

In addition to such measures, it is not ignored that the decriminalization of drugs, the effective implementation of custody hearings, full and free legal assistance by the Office of Public Defense and also consular assistance can also have consequences in the number of imprisonments and in the benefits regarding the regime progression. The latter is provided in arts. 5 and 36 of the Vienna Convention on Consular Relations of 1963, and Brazil, as part of the Convention, should simplify the performance of consular functions, including reporting the prison - except for asylum seekers or refugees, since they cannot enjoy the protection of its State, due to the persecution that motivated the asylum demand -, as well as receiving communications in the case of Brazilians arrested abroad.<sup>42</sup>

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42 Considering the importance of consular assistance and, at the same time, the difficulty of implementing prison communication to the Consulates or Embassies, the National Council of Justice (CNJ), after inspections in prisons - to be listed below - and of contact with the network of assistance to foreign prisoners, in São Paulo, the Brazilian **Resolution No. 162** of November 13, 2012, settling that the judicial authority should report the arrest of any foreign person to the diplomatic mission of his State of origin or, Ministry of Foreign Affairs and the Ministry of Justice within a maximum of five days. In the same way, it was determined the communication of decisions of regime progression, conditional release and extinction of criminal liability.

### **c. The due legal process in the compulsory withdrawal measures:**

The due process is a constitutional principle (art. 5, LIV, Constitution) and is also provided in various international treaties and there is no dispute as to its application to the immigration law as set forth above. Thus, the New Migration Law in its art. 46, expressly provided that the compulsory withdrawal measures preserve, “the provisions of Law No. 9,474 of July 22, 1997 and the instruments and mechanisms for protecting stateless or dealing with humanitarian situations, and other legal provisions, conventions, international treaties, and agreements.”

Law 13,445/2017 also provided for the “denial of collective expulsion or deportation practices” (article 3, XXII), in addition to the aforementioned right of freedom to move in national territory, adding the “right to leave, stay and to re-enter national territory, even while the application for residence is pending, the extension of stay or transformation of residence visa” (article 4, XV).

As for expulsion, it is expressly provided that it will be based on a procedure that guarantees the contradictory and full defense, and that the Union Public Defender will be notified of the expulsion proceedings’ initiation, if there is no established defender (article 58). It also added that the presumption of innocence also applies to the expulsion on the grounds that the expelling person whose case is pending a decision will be in a regular immigration situation (article 59).

Under the new law, the causes of expulsion will be limited and will be restricted to serious crimes, such as genocide, crime against humanity, war crime or crime of aggression, as defined by the Rome Statute, and a felony common crime deprivation of liberty, considering the seriousness and possibilities of resocialization in national territory (article 55), taking into account the recommendations of the IACHR. The inhibition of re-admission resulting from the expulsion, which was once perpetual, shall have a fixed term (article 55), complying with the determination of the term of validity of the measure of impediment linked to the effects of the expulsion regarding the proportionality in relation to the total term of the penalty and will never exceed twice its time (article 54, § 4).

The causes of non-expulsion are amplified beyond the current ones (Brazilian spouse or child) to also include those who have entered Brazil until the age of twelve, residing since then in the country; or is a person over seventy who has lived in the country for more than ten years, considering the seriousness and the basis for expulsion (article 55), also in response to the recommendations of the IACHR.

The new law brings the ultimate distinction between expulsion, restricted to convicted criminal and deportation, due to an administrative procedure in relation to the immigrant that is in an irregular migratory

situation in national territory (art. 50). However, it also requires due process regarding deportation, to explicitly state that its procedure must respect the contradictory and full defense (art. 48).

#### **d. The non-imprisonment of migrants based on their legal status:**

“Administrative” imprisonment, whether for expulsion purposes, for deportation purposes or even for repatriation - as are some arrests in the “Connector Zone” of the Guarulhos International Airport - is a practice that still occurs in Brazil and with small visibility precisely since it is an “administrative measure”.<sup>43</sup>

An example was the arrest, in Paraná, in November 2016, of three immigrants from the Republic of Guinea, one of them aged 17, who arrived in Brazil in the Porto Paranaguá and they were not given the opportunity to demand asylum. The journey of the Guineans lasted 14 days in the Atlantic Ocean, eleven of them were hidden in the helm of a ship with flags of Liberia and Philippines. The three immigrants were detained by the Federal Police, two of them sent to the Piraquara II State Penitentiary (PEP II), and the minor was sent to the Child Protection Agency. At no point was there any guidance regarding the request for shelter and shelter, and the detention for deportation purposes lasted almost two months, having been relaxed by judicial order in habeas corpus.<sup>44</sup>

This is why the importance of the legislative amendment that sets forth the need of the Federal Police Delegate to represent before the federal court the necessary measures to outcome the deportation or expulsion (article 48), as well as the revocation of the administrative detention for the purposes of expulsion and deportation.

## **5. FINAL REMARKS**

The International Refugee Law acts in the protection of the refugee from the moment they leave their place of residence, from one country to another, until the granting of the refuge in the host country and eventual termination<sup>45</sup>. In addition, Brazil has dawned as an emerging country in terms of admission and reception of refugees through various levels of protection: in addition to the ratification of the 1951 Convention related to the Status of Refugees and its 1967 Protocol (global system), it adhered to the Cartagena Declaration of 1984

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43 Some exemplary cases were presented in the PhD thesis: MORAES, Ana Luisa Zago de. *Crimigração...* 2016.

44 BRAZIL. Regional Federal Court of the 4<sup>th</sup> Region. Proceeding No. 5050940-70.2016.4.04.0000. Rapporteur, Judge Leandro Paulsen. Porto Alegre, December 2017.

45 RAMOS, A. C. *Curso...*, 2014, p.143.

(regional system)<sup>46</sup> and enacted Law 9,474 of 1997 (national level).<sup>47</sup>

Law 9.474 already provided the non-criminalization of refugees and asylum seekers in its arts. 8 and 10, in which, respectively, it determined that the irregular entry into national territory does not establish an obstacle to demand asylum to the competent authorities (Article 8), and that the request will suspend any administrative or criminal proceeding for irregular entry, filed against the requester and people from the family group that accompany them (article 10). It also adds that if the refugee status is recognized, the procedure will be filed, provided that it is demonstrated that the corresponding violation was determined by the same facts that justified the aforementioned recognition (article 10, § 1). In addition, it also provides for the non-return of the refugee or refugee applicant by providing that the refugee or asylum seeker will not be expelled (article 36) and, if it is for reasons of national security or public order, they cannot be sent to a country where life, liberty or physical integrity may be at risk (article 37).

Along with the protection of refugees are the mechanisms of complementary protection, a situation that was not even foreseen in the Brazilian legislation of the 80's, nor a target of public policies, and applicable, for example, to the Haitians who entered Brazil as of 2010. The mechanism, initially conditioned the entry quotas for Haitians

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46 The Cartagena Declaration, adopted by the “Colloquium of International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, from 19 to 22 November 1984, was inspired by the Convention of the Organization of American States African Union (now African Union) Convention on Refugees of 1969. The latter came into force in 1974 and established, for the first time, **the definition of a refugee**, which is considered as the one who, due to a scenario of serious human rights violations, was forced to leave his habitual residence to seek refuge in another State. The Cartagena Declaration, in its third item, established that this definition should, in addition to setting forth the elements of the 1951 Convention and the 1967 Protocol, it also contemplated as refugees people who have fled their countries since their life, security or liberty had been threatened by violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order (RAMOS, André de Carvalho. *Asilo e Refúgio: semelhanças, diferenças e perspectivas*. In: RAMOS, André de Carvalho; RODRIGUES, Gilberto; ALMEIDA, Guilherme Assis de (orgs.). *60 anos de ACNUR: perspectivas de futuro* - São Paulo: Editora CL-A Cultural, 2011, p. 26). Subsequently, and reaffirming its commitments, the Declaration of Brasilia for the Protection of Refugees and Stateless Persons in the Americas followed the Declaration of the Plan of Action of Brazil, which is intended to be a common roadmap for strengthening the protection and promotion of durable solutions for refugees, displaced persons and stateless persons in Latin America and the Caribbean, and a framework of cooperation and solidarity. The latter was adopted in the process celebrating the thirtieth anniversary of the Cartagena Declaration, on December 2 and 3, 2014, in Brasilia.

47 BRAZIL. Law No. 9,774, of July 22, 1997.

nationals,<sup>48</sup> was implemented by the Brazilian Normative Resolution No. 97 of January 12, 2012,<sup>49</sup> which provides the granting of a permanent visa as set forth in art. 16 of Law No. 6.815 of August 19, 1980, to the nationals of Haiti, whereas the National Committee for Refugees (CONARE) did not give them the refugee status.<sup>50</sup>

For forced migrants not recognized as refugees by the absence of the “persecution” element, art. 10 of the Refugee Statute and the non-criminalization principle, under Law 9.474 have not been applied, even by analogy. Hence the importance of affirming the non-criminalization principle of migrations in Brazil from international law and from the new migration law.

Thus, the ascending entry of immigrants into Brazil, whether if they are recognized as refugees, whether if they are recognized as economic migrants, in addition to adding more challenges to the Brazilian migration policy globally, it also requires the development of decriminalizing measures beyond the Refuge Law, like the non-criminalization principle and its consequences.

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48 The limitation of the monthly number of visas granted by the Brazilian Embassy in Tahiti was traced back to the quotas of *Era Vargas* and encouraged undocumented immigration and coyotes, causing many immigrants to cross borders by foot until reaching Acre.

49 BRAZIL. National Immigration Council. **Normative Resolution 97**, of January 12, 2012. Available in: <<http://portal.mte.gov.br/cni/>>. Accessed on August 20, 2015. Normative Resolution 117/2015 extended, until October 30, 2016, the validity of Normative Resolution No. 97.

50 The National Committee for Refugees (CONARE) sent the requests from Tahiti nationals, with the exception to individual cases, in which the well-founded fear of persecution, received between January 2010 and June 2011, to the National Immigration Council (CNIg), set forth in the Brazilian Normative Resolution No. 13 of March 23, 2007, to be analyzed based on the Brazilian Normative Resolution No. 27 of November 25, 1998, dealing with special situations and omissions.

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