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THE LEGAL INSTITUTE OF REFUGE: A STUDY ON CONTEMPORARY FORCED MIGRATION FLOWS AND THE INTERNATIONAL RESPONSIBILITY OF THE STATE IN THE PROTECTION OF REFUGEES

O INSTITUTO JURÍDICO DO REFÚGIO: UM ESTUDO DOS FLUXOS MIGRATÓRIOS FORÇADOS CONTEMPORÂNEOS E A RESPONSABILIDADE INTERNACIONAL DO ESTADO NA PROTEÇÃO DO REFUGIADO

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ABSTRACT

Objective: This article aims to study and analyze the legal institute of refuge, especially contemporary flows, making a parallel to the institute of international responsibility of the State in relation to the protection of refugees.

Methodology: The methodology used in the development of this study is the bibliographic research, through consultation of doctrines, texts, and scientific articles, as well as documentary research based on the reading of laws and jurisprudence and magazines related to the subject. The method adopted is the deductive approach.

Results: The findings of this study suggest that: (1) For an individual to be recognized as a refugee, two interdependent requirements must be fulfilled: Extraterritoriality and a well-founded fear of persecution on grounds of race, religion, nationality, social group, or political opinion; (2) Legal barriers have been created by States to make it difficult for refugees to enter the host countries through the enactment of domestic laws, decrees, and restrictive agreements for refugees, all with the aim of preventing

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their entry into safe territory or even with the aim of becoming a less attractive destination for refugees; (3) Most of the signatory countries of the 1951 Refugee Convention, just to comply with the protocols, limit themselves in a very superficial way, to offer the “floor” of their country for those who are recognized as refugees; (4) Opening the doors of a country to receive refugees has been seen as a problem for States, which in an individualistic and, above all, illegitimate way, seek subterfuges to keep them away from their borders.

Contributions: Within this context, the proposed study will focus on the analysis of the forced migration flows of people who become refugee, as well as the issue of the international responsibility of the State in the protection of refugees will be brought to the debate.

Keywords: Admission of Refugees; Internationally wrongful act; Civil and criminal liability.

RESUMO

Objetivo: *Este artigo tem como objetivo estudar e analisar o instituto jurídico do refúgio, especialmente os fluxos contemporâneos, fazendo um paralelo com o instituto de responsabilidade internacional do Estado em relação à proteção dos refugiados.*

Metodologia: *A metodologia utilizada no desenvolvimento deste estudo é a pesquisa bibliográfica, por meio de consulta de doutrinas, textos e artigos científicos, bem como pesquisa documental baseada na leitura de leis e jurisprudência e revistas relacionadas ao tema. O método adotado é a abordagem dedutiva.*

Resultados: *Os achados deste estudo sugerem que: (1) Para que um indivíduo seja reconhecido como refugiado, dois requisitos interdependentes devem ser preenchidos: extraterritorialidade e um fundado medo de perseguição por motivos de raça, religião, nacionalidade, grupo social ou opinião política; (2) Os Estados criaram barreiras legais para dificultar a entrada dos refugiados nos países de acolhimento através da promulgação de leis, decretos e acordos restritivos internos para os refugiados, tudo com o objetivo de impedir a sua entrada em território seguro ou mesmo com o objetivo de se tornar um destino menos atraente para os refugiados; (3) A maioria dos países signatários da Convenção sobre Refugiados de 1951, apenas para cumprir os protocolos, limita-se de forma muito superficial, a oferecer o "piso" de seu país para aqueles que são reconhecidos como refugiados; (4) Abrir as portas de um país para acolher refugiados tem sido visto como um problema para os Estados, que de forma individualista e, sobretudo, ilegítima, buscam subterfúgios para mantê-los longe de suas fronteiras.*

Contribuições: *Dentro deste contexto, o estudo proposto se concentrar-se-á na análise dos fluxos migratórios forçados de pessoas que se tornam refugiadas, bem*

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como a questão da responsabilidade internacional do Estado na proteção dos refugiados será trazida ao debate.

Palavras-Chave: *Admissão de Refugiados; Ato internacionalmente ilícito; Responsabilidade civil e criminal.*

1 INTRODUCTION

Migration has been present in the history of Europe and the world since ancient times. Persecutions, wars, human rights violations, poverty, abuses, political and social crises, climate change, and lack of opportunities have been some of the factors that daily motivate migration.

However, the topic addressed in this article does not refer to a simple or generic type of migration, it implies a model of migration forced by extreme conditions in which people are forced to leave their country in search of protection in another country.

It is not a change of country by choice, in search of better living conditions or opportunities, it is actually a forced change for reasons of survival. It is in this scenario that the sad reality experienced by millions of people around the world is brought to light.

The latest UNHCR report1, published in June 2022, points out that by May 2022, 89.3 million people are in conditions of refuge in humanity, including forced displacements in Ukraine, which were counted until 5/23/22, with this huge and disproportionate number being the largest in humanity since the World War II.

In this sense, the migratory flows observed in the reality currently experienced in the world are perennial, cyclical flows that erupt at any time, in smaller proportions, however, as it can be seen, with a tendency of increasing proportions, as what happened with the Haitians, who had to leave their country as a result of the earthquake that destroyed the country in 2010; the Syrians, who to this day flee the conflict that has lasted for more than a decade; the Rohingya people, who left Myanmar

[1]See: https://www.unhcr.org/62a9d1494/global-trends-report-2021

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in 2017 for Bangladesh; the more than 4 million Venezuelans who were forced to leave Venezuela as a result of political, social, and economic problems; and, recently, the intense migratory flow in Ukraine2 accounts for more than 7 million internally displaced persons and more than 6 million refugees.

It is important to recognize that all people are born with the right to receive equal treatment, with the same consideration and respect. In other words, even though all human beings are endowed with certain characteristics that distinguish them from other beings, they are still natural recipients of the same attention (APPIO, 2008, p. 195).

After the end of the World War II, the need to protect minorities was reinforced by the realization that there is a propensity of human beings to play the role of oppressor (APPIO, 2008, p. 196).

In this sense, it is necessary to conceptualize the term minorities as being:

> [...] certain classes of people who do not have access to the same political representation as other citizens, or who suffer historical and chronic discrimination due to characteristics essential to their personality that delimit their uniqueness in the social environment. (APPIO, 2008, p. 200, our translation).

Given this definition, we can observe that refugees are part of an easily identifiable minority; therefore, they are more susceptible to being victims of discrimination in all its forms and having their rights violated. Thus, it is imperative to recognize their greater vulnerability and, consequently, the need to guarantee them greater protection, especially by States.

Therefore, it is relevant to address in this article one of the biggest problems faced by refugees today, that is, the mechanisms created by some States to hinder the refugee's entry into their territories, through the adoption of a "closing borders" policy, in order to, in the end, verify if the posture adopted by these countries is compatible with the commitments assumed by them in the international scenario.

For a better explanation, it is necessary to bring, albeit in a simple way, the primary concept of the word refuge, namely, hiding place, a place where we hide from others so we cannot be seen or discovered. Refuge originates from the Latin *refugium*,

[2]Available at https://data.unhcr.org/en/situations/ukraine#_ga=2.33752291.39834148.1663602365-1243790894.1663602365.

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which means a place to be safe, or literally, to flee backwards (FRANCO FILHO, 2013, p.79).

At this point, it is important to mention that asylum and refuge are completely different legal institutions and, on this difference, Professor Mazzuoli states:

> On the other hand, while refuge is clearly humanitarian in nature, asylum is typically political in nature. Furthermore, while a well-founded fear of persecution suffices for the granting of the first, for the granting of the second, a concrete persecution (that is, already materialized) is necessary. Another difference lies in the fact that the granting of asylum is a discretionary measure of the State, while for the granting of refuge there are requirements (of international and internal order) to be observed, which, being complete, make the granting of refuge effective (MAZZUOLI, 2016, p. 828-829, our translation).

Even before the refuge was recognized as a properly legal institution, it has existed since biblical times, while the writings of this book narrate stories of people who were forced to leave their country as a result of persecution and, for this reason, sought shelter in a safe place. In this regard, Andrade emphasizes that:

> Man has lived, since the most remote times, with the fact of having to leave his native place because he has displeased his rulers, or the society in which he lives. The committed infraction gives rise, as a punishment on the part of those who hold power, to suspend the shelter of the defaulter who has, consequently, to seek the lost protection elsewhere. (ANDRADE, 1996, p. 8, our translation).

In the same sense, Pacífico adds that “The Bible recalls the history of the Holy Family (Joseph, Mary, and the Child Jesus), who were forced to leave their land and take refuge in Egypt to escape Herod” (PACÍFICO, 2010, p. 39, our translation).

From there we can see that the refuge has accompanied humanity since the beginning, albeit in a discreet way; however, it reaches greater dimensions, gaining a new format as the collectivity evolves in a broad sense.

This theme breaks out significantly, taking on a new guise, from the 1920s onwards due to the end of the World War I, intensifying with the emergence of the World War II, with the consequent massive and forced displacement of people in Europe.

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This intense movement aroused concern for these people in the international community, and from then on, the need to grant legal protection to this minority group of individuals, called refugees, was born.

Numerous and significant advances have been made since the initial granting of protection to refugees. However, refuge still presents itself as a problem of public and humanitarian order in the global, regional, and internal context, still lacking greater attention.

This article will take a more general approach to refuge, with its starting point being its recognition as a legal institute of protection, presenting its historical phase, followed by the global normative scenario, with the approval of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees and more recently, the Global Compact on Refugees, signed in December 2018 by the United Nations General Assembly.

Then, as a paradigm and example, the mechanisms created by the European Union countries and by the United States of America to hinder the entry of refugees in their territories will be presented, ending with a broad approach to the legal institute of the International Responsibility of the State in the face of the closing of borders by these States, to investigate whether there was an illicit international act that characterizes the International Responsibility of the State, subject to reparation, especially regarding the protection of refugees.

The methodology used will be bibliographic research, through consultation of doctrines, texts, and scientific articles, as well as documentary research supported by the reading of laws and judgments involving the subject. There will also be the consultation of statistical data from the UNHCR and websites, through a theoretical, interpretative, and historical analysis. The method adopted is the deductive approach.

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2 GLOBAL REGULATORY OVERVIEW OF THE REFUGE

First, it is important to highlight that through studies developed so far, it was found that the refuge already existed even before its normative recognition. In that regard:

> It can be said that the protection of refugees, in a coordinated manner, began through the activities of the League of Nations. This was primarily due to events that took place shortly before, during, and, especially, immediately after the World War I (ANDRADE, 1996, p. 20, our translation).

The League of Nations was an international organization created by the Treaty of Versailles in 1919, with the main premise of ensuring peace in the world. It was also responsible for overseeing committees created to deal with relevant international issues.

Despite the fact that the League of Nations Pact of 1920 (LIGA DAS NAÇÕES, 1920) did not expressly mention the protection of refugees, the reality experienced by European countries at that time, especially regarding mass displacement due to persecution suffered, caused by the end of the World War I, brought concern to the international community, which through the League of Nations created the Commission for refugees, which would take care of the specific issues of these people, notably through the refugee committee, led by Fridtjof Nansen, League's first High Commissioner for Refugees.

The protection given to refugees in this period was of a legal and not a humanitarian nature, and the refuge was seen as something transitory, arising naturally due to the end of the World War I; however, it became something increasingly common instead, while “[...] the groups of people seeking protection began to grow, and the concern for their fate began to be a subject of discussion in the League of Nations.” (ANDRADE, 1996, p. 23, our translation).

Giving this context, the importance of the League of Nations in the historical context of the legal protection of refugees is highlighted, as it was the concerns and

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performance of this international organization that gave rise to the concern and urgent need for the protection of these minorities in international law.

However, due to the emergence of new conflicts, especially with the outbreak of World War II, the League of Nations dissolved and to assume its functions, the United Nations (UN) was created in 1945. In its first session, the concern and need to create a new body dedicated exclusively to address the issue of refugees was submitted to the General Assembly.

Thus, even before the Universal Declaration of Human Rights was approved, on December 15, 1946, the UN General Assembly approved the creation of the International Refugee Organization (IRO), on a provisional basis. The main tasks of the IRO were:

> [...] to identify refugees, issue their documentation, assist with their needs, respond to repatriation requests, assist in their local integration, and intervene to obtain their resettlement in a third country when necessary. (SANTIAGO, 2003, p. 86, our translation).

However, even before the end of the IRO mandate, the UN General Assembly was already discussing who would take over its succession, while in order to effectively face the difficulties arising from the growing number of refugees at a global level, it was necessary to adopt criteria that are universally accepted.

And it was in the face of this concern that the Universal Declaration of Human Rights, of December 10, 1948 (ONU, 1948), proclaims in its article 14 that "[...] every person, victim of persecution, has the right to seek and to enjoy asylum in other countries." A year later, on 12/3/1949, the UN General Assembly created the United Nations High Commissioner for Refugees (UNHCR), granting this body the exclusive function of providing protection to these people.

At the beginning of its work, the UNHCR brought an innovative concept about refuge, granting this institute a humanitarian and apolitical character. In this spirit and seeking to understand this institute in depth, even for a more effective performance, a professor at the *"Centre d'Études de Politique Étrangère"* in Paris, Professor Jacques Vernant, was asked to carry out a study on the subject of refugees. Referred study:

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> [...] the problems of refugees in general, not limited to those that are under the protection of the UNHCR, are profound, which leads to the conclusion that the refugee crisis has, as its greatest evil, its repetitive and permanent character. (SANTIAGO, 2003, p. 88, our translation).

In view of this in-depth study, the need to pay greater attention to the refuge institute was evident, especially due to the reality experienced at that time. It was then that the UN General Assembly, on July 26, 1951, approved the Convention Relating to the Status of Refugees, considered by the UN as the Magna Carta of this legal institute.

3 1951 REFUGEE STATUS CONVENTION AND ITS 1967 PROTOCOL

The 1951 Convention (ONU, 1951), also known as the 1951 Convention Relating to the Status of Refugees, the Refugee Status Convention, and the 1951 Geneva Convention, was discussed and developed during a conference of plenipotentiaries in Geneva, in July 1951.

Considering that this conference took place outside the structure of the UN, other countries that were not part of this organization, but were interested in this theme, were able to participate in the writing of the text of the 1951 Convention, which used the very UNHCR status as an initial reference. Despite the fact that its writing was completed in July 1951, it only came into force in 1954 (ANDRADE, 2010, p. 776).

While the issues that would be covered by the Convention were discussed, there were differences between the participating countries. First, in relation to the *ratione temporis* competence of the 1951 Convention, as some countries defended that the refugee definition should be broad, without any time limit; others claimed that a time limit should be established for the recognition of a refugee, and in the end, the time limit was adopted in the normative text, under the justification that, in this way, it would be possible for States to measure the extent of their obligations.

Another divergence took place in relation to the geographical limit, as on the one hand, some States intended that the 1951 Convention could be applied to any

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refugee in the world and, on the other hand, the States understood that such an instrument should be applied only to European refugees, which were most in need of protection, the winning position that was incorporated into the Convention text. Therefore, at the end of the Plenipotentiary Conference, the full text of the 1951 Convention is derived from this and presents the concept of refugee in its first article.

As extracted from article 1 of the 1951 Convention, a refugee is anyone who:

> [...] as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (ONU, 1951).

In view of this concept, brought by the 1951 Convention, it appears that this instrument:

> [...] has established a temporal and geographical limitation, since the refugee status was restricted to events that occurred before January 1, 1951 on the European continent. This means that refugees were only recognized as such if they were as a result of episodes that occurred before January 1, 1951. Although applicable to thousands of people – since until the 1950s the majority of refugees were European – this definition proved to be ineffective over time. (PIOVESAN, 2003, p. 119, our translation).

Mass displacements were not limited to Europeans, while in countless other countries around the world, this phenomenon was repeated, perhaps with the same intensity, and people who were forced to leave their countries, for the same reasons stated in the article 1 of the 1951 Convention, remained lacking any protection for the simple fact of not being covered by the Status of Refugees due to the territorial and temporal limitation.

Giving this scenario, the international community realized the need to fill this gap, expanding the scope of the definition of refugees, the reason why the Protocol Relating to the Status of Refugees (ONU, 1967) was edited on January 31, 1967, which in its article 1 excludes the territorial and temporal delimitations that existed until then.

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Therefore, from the writing of the Protocol of 67, notably as provided in its article 1, § 2, not only the European affected by the events that took place before January 1, 1951 would be considered a refugee, but also any person in the world who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, was outside the country of their nationality, and who was unable or, owing to such fear, was unwilling to avail themselves of the protection of that country; or who, having no nationality and being outside the country where they had their habitual residence, as a result of these events, could not or, because of such fears, does not want to return to it (ONU, 1967).

In principle, for an individual to be recognized as a refugee, two interdependent requirements must be present, namely extraterritoriality and well-founded fear of persecution on grounds of race, religion, nationality, social group, or political opinions.

A refugee is not an ordinary foreigner, he is a foreigner who is at risk within his own country (FOSTER, 2014, p. 17) and, therefore, is forced to leave it.

The 1951 Convention and the 1967 Protocol, despite regulating the same theme, are independent and distinct documents. The latter, as seen, was created to eliminate the temporal and territorial limit previously established from the original text, extending the concept of refugee to non-Europeans. It is worth noting that it is perfectly possible for States to adhere to only one of them, which does not oblige them in face of the other not ratified, as it is also possible for them to adhere to both.

It is noteworthy that the 1951 Convention and the 1967 Protocol are global protective instruments that occupy the top of the pyramid in the legal institute of refuge, while the content of their texts was used as a parameter for the design of the other subsequent documents, which regulate refuge both at a regional level, as in the 1969 Organization of African Unity Refugee Convention and in the 1984 Cartagena Declaration on Refugees, and at the domestic level of States, as in the Brazilian law 9,474/97.

According to UNHCR data, 145 States are signatories to the 1951 Convention, 146 States are signatories to the 1967 Protocol, 142 States are signatories to both documents, and the number of signatories to one or the other document is 148 States.

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Finally, it should be noted that all the countries of the European Union are signatories of the 1951 Convention and of the 1967 Protocol, and the USA is only a signatory of the latter document, having acceded to it on November 1, 1968.

4 2018 GLOBAL COMPACT ON REFUGEES

Although the 1951 Convention and the 1967 Protocol have been important documents related to the protection of refugees, it is clear that this protection is neither efficient nor sufficient as, even though they brought minimal support to refugees, these documents were prepared for different realities, experienced 70 years ago and, as it can be seen, are not capable of inhibiting forced migration flows, precisely because they do not address the root cause of the problem. As such, in 2022 the number of refugees reached the figure of 89.3 million people.

Given the seriousness of forced migration flows, on December 17, 2018, the United Nations General Assembly adopted the Global Compact on Refugees[3], also known as the New York Declaration for Refugees and Migrants, through the efforts of UNHCR in particular with Member States, international organizations, refugees, civil society, the private sector, and researchers on the refuge theme.

Even though the Global Compact on Refugees is not a cogent and mandatory norm for the signatory States, it cannot be denied that it is a robust document in which it precisely provides for the structural division of responsibilities between States in an equitable manner, which, in other words, makes it clear that the problem of refuge belongs to everyone and not just to a few; therefore, the solutions to this global problem of a humanitarian nature cannot be obtained without the international assistance and effort of all States.

[3]Available at https://www.acnur.org/5c782d124#_ga=2.178906851.676776021.1664537568-1243790894.1663602365&_gac=1.20000074.1664538332.CjwKCAjwp9qZBhBkEiwAsYFsb21bHqXM2CTKGdJXjVYUfE55YTRMD_BIYnWfqVQwTjWy81yNXb-5oxoCuTgQAvD_BwE00000000000000000000

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The 2018 Global Compact presents itself as a manual, which outlines paths and plans to be followed by the governments of each State, by international organizations, and by other stakeholders in the cause, including private sectors, in order to ensure that all those involved in the reception of refugees can receive support from all, so that even if a particular country is not the host of refugees, it can also embrace the cause and give the necessary support, providing an opportunity for the individual forced to leave their country of origin to have a productive life.

The recent document under discussion aims to point out a new way of responding to forced migration flows, in order to go far beyond offering the "floor" of a country that receives the refugee, as the receiving country also has something to gain from the arrival of this or these individuals, in some sort of mutual and reciprocal benefit.

The Global Compact presents four main and essential objectives that involve the theme, which are: to alleviate pressures on host countries; increasing refugee self-reliance; expand access to third-country solutions; support conditions in countries of origin for a safe and dignified return.

Although Brazil joined the agreement in December 2018, in January 2019, President Jair Bolsonaro denounced Brazil's adherence to the Global Compact.[4]

5 MECHANISMS ADOPTED BY THE EUROPEAN UNION, USA, AND BRAZIL TO PREVENT THE ENTRY OF REFUGEES IN THEIR TERRITORIES

This topic will present cases in which States, through their representatives, have signed agreements, executive orders, or even filed lawsuits with the intention of limiting or even preventing the entry of refugees into their territories.

[4]Available at https://agenciabrasil.ebc.com.br/politica/noticia/2018-12/futuro-chanceler-diz-que-brasil-vai-deixar-pacto-global-de-migracao

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Especially in 2015, there was an unprecedented migration flow in Europe, notably, of people leaving Syria due to the civil war that affects that country to this day, in search of protection in neighboring countries, mainly Turkey, Lebanon, and Jordan.

However, given the great demand for these countries due to territorial logistics, they were no longer receiving refugees, who were forced to seek protection in European countries by crossing the Balkan route (land route), as well as by crossing the Mediterranean Sea, and Turkey was one of the main gateways to Europe.

The vast majority of these people entered European countries irregularly, mainly due to the urgency of leaving their country, not even being possible to arrange the necessary documentation for their proper entry.

In view of this context and in order to solve the problem of irregular migration and the massive flow of refugees moving towards European countries, an agreement was signed between the European Union and Turkey, called the EU-Turkey Statement (CONSELHO EUROPEU, 2016), published by the European Council on March 18, 2016.

The part of the agreement that is of interest to this study is the point where it was agreed that "[...] All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey" (CONSELHO EUROPEU, 2016).

In addition to this agreement, other different mechanisms were adopted by European countries, for what can be called an "international policy of closing borders," through the creation of physical barriers, such as the construction of border walls by the governments of Bulgaria and Hungary.

Within the EU, a restrictive interpretation of the term refugee was chosen in order to address the abusive use of asylum by working migrants. After the adoption of the Dublin Regulation and the Convention implementing the Schengen Agreement, a more restrictive concept of asylum was established, being understood as the international protection granted by a member state to a foreigner who requires refugee status, as defined in the Convention and in the Protocol (FERNÁNDEZ SÁNCHEZ, 2021, p. 327).

In this same sense, legal barriers were created, concerning the enactment of domestic laws, decrees, and agreements restricting refugees, all with the aim of

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preventing their entry into the European territory, or even with the aim of becoming a less attractive destination for refugees, as the example of a law passed by Denmark, which allows the confiscation of refugee property that is not considered essential, a procedure that has been reproduced in Switzerland and Germany.

In addition to adopting this stance in Europe, in a similar way, the USA, in the year 2017, tried to close its borders; President Donald J. Trump signed Executive Decrees No. 13,769, of January 27, 2017 (USA, 2017) and 13,780, of March 6, 2017 (USA, 2017a), documents entitled, *"Protecting the Nation from Foreign Terrorist Entry In to the United States."*

The content of these decrees that is of most relevance for this study is the suspension of the Refugee Admissions Program (USRAP) in the USA, for an indefinite period for refugees born in Syria – only in decree 13,769[5], and for a 120-day period for

[5] Section 5. Realignment of the United States Refugee Admissions Program for fiscal year 2017.
(a) The Secretary of State will suspend the United States Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.
(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.
(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.
(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.
(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest — including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when

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the other refugees, after which the program would be resumed, which would be restricted to citizens of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence jointly determined that it would not jeopardize the security and welfare of the United States.

Both decrees were the subject of numerous lawsuits in the U.S. Federal Courts, which were proposed by several States, seeking to declare the aforementioned executive orders unconstitutional and, consequently, prevent their execution. Therefore, this study will address two lawsuits proposed by the U.S. Federal Courts, which questioned the legality of both decrees.

As soon as Decree no. 13,769 went into effect, in January 2017, the States of Washington and Minnesota, filed a lawsuit in the U.S. District Court for the Western District of Washington, in Seattle, on January 30, 2017 (USA, 2017d), requesting a temporary restraining order, which sought the suspension of the aforementioned executive order, mainly due to its apparent unconstitutionality, which was duly recognized by federal judge James Robart.

The aforementioned decision was upheld by the United States Court of Appeals for the Ninth Circuit, following an appeal filed by President Donald J. Trump, Case No. 17-35105, with the suspension of the decree being maintained (USA, 2017e). After the decision of the Court of Appeals, no further appeals were filed; therefore, the case was shelved on March 17, 2017.

In view of this situation, a new decree was prepared, as previously mentioned, written under no. 13,780, which contained a few changes in relation to the previous

the person is already in transit and denying admission would cause undue hardship — and it would not pose a risk to the security or welfare of the United States.
(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.
(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions and shall devise a proposal to lawfully promote such involvement.

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one and even before its entry into force, it was already the subject of new lawsuits, which also questioned its unconstitutionality.

The State of Hawaii was the first to file for a temporary restraining order at the national level, requesting the suspension of the new decree, process CV.NO.17-00050 DKW-KSC (USA, 2017b), which was granted by the Honolulu Federal Judge Derrick K. Watson, on March 15, 2017, the day before its entry into force. Again, President Donald J. Trump appealed this decision to the United States Court of Appeals, case no. 17-15589 (USA, 2017c), and on 6/26/2017 the appeal was partially upheld by the court, which is why the U.S. Refugee Admissions Program remained suspended for a 120-day period.

It should be noted that, *a priori*, in both cases, the decrees were suspended, according to the judges' understanding. Firstly because of their patent illegality, unconstitutionality, while stigmatizing immigrants, refugees, and Muslims; and secondly because the arguments raised by the President Donald J. Trump were not enough to demonstrate the need to edit the aforementioned document, given that there was no evidence of the imminence of serious risks to the security of the United States.

Still on the restrictive policies that are illegally intended to make it difficult for refugees to enter countries, in 2018, due to the political, social, and economic crisis in Venezuela, millions of Venezuelan refugees sought shelter and protection in border countries, such as Brazil and Colombia.

Although Brazil is a signatory to the 1951 Convention and of the 1967 Protocol and, therefore, in view of the international commitments assumed, it should in fact receive people in refugee status; in 2018, during the intense flow of Venezuelan refugees, the Defender's Office and the Department of Public Prosecution filed a Public Civil Action against the state of Roraima, which was processed in the 1st Federal Court, case number 002879-92.2018.4.01.4200, claiming in court the closing of the border between Brazil and Venezuela, with the aim of preventing the entry of Venezuelans in refugee status in Brazil, precisely on the border of Roraima.

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Contrary to the international commitments assumed by Brazil with regarding the protection of refugees, in the aforementioned action, an injunction was handed down[6], which determined the suspension of admission and entry of Venezuelans.

The State of Roraima also filed an action at the Federal Supreme Court an **Original Civil Action No. 3121[7] claiming the** closing of the border, which was

[6]Available at https://www.conjur.com.br/dl/juiz-proibe-entrada-venezuelanos.pdf

[7]Case records examined. In this original civil action, filed by the State of Roraima against the Federal Government, the defendant presents an incidental request for the suspension of Decree No. 25,681/2018 of Roraima State, as well as its framework as an act that violates the dignity of justice, with the sanctions provided for in procedural legislation (event 197). The defendant argues that, among the various requests made in the complaint, the plaintiff State intends to obtain advance protection so that "it is compelled to temporarily close the Brazil-Venezuela border in order to prevent the disorderly immigration flow from producing more devastating effects on Brazilians and foreigner residents in the State of Roraima; or that is compelled to limit the entry of Venezuelan refugees to an amount compatible with the capacity of the Brazilian State to receive and provide for the basic needs of such foreigners, until the resulting social and economic impacts resulting from the thousands of foreigners who are in the State of Roraima are minimized and corrected". It reports that, notwithstanding the regular progress of the present case, with the summons, holding of an attempted conciliation hearing and gathering of documents, the plaintiff State edited, on 8.1.2018, Decree No. 25,681/2018, which "advances on the merits of this demand, interfering with issues that are the subject of controversy and that may potentially imply a reduction in the provision of services by the State of Roraima to Venezuelan immigrants, in addition to substantiating interference with federal competences, configuring an act that violates jurisdiction." According to the defendant, the aforementioned Decree "deals with the problem of refugees coming from Venezuela," a theme that "intersects with the cause of action contained in this action" and "aims to minimize or eliminate the problems arising from the immigration of Venezuelans." It states that articles 1, 2, and 3 are unconstitutional, due to the notorious purpose of joining the activities carried out by the Federal Government specifically when they allow "a regime of special action of the security forces (article 1) to enable the inspection of the migratory and customs flow through the control of people, luggage, and vehicles through the Tax Office in the Municipality of Pacaraima (article 2) in order to overcome the alleged inefficiency of federal actions in border control," as well as when, by its article 3, it seeks to "restrict the access of Venezuelan immigrants to public services of state competence" such as "to health, education, and public security, due to the person's foreigner status." It points out that the state regulation violates articles 1, III, 3, IV, 4, 5, caput, 21, XXII; 144, caput and § 1, III, 196 and 205 of the Federal Constitution, as well as articles 3, I, II, VI, IX, X, XI, XII, XVI, XX and XXII, 4, I, II, VIII, IX, X and XV, § 1, of Law no. 13,445/2017 (Migration Law) and also the "Agreement on Travel Documents of the MERCOSUR Party States and Associated States," approved by CMC Decision on 8/18, to which Brazil and Venezuela joined. The issue of the Decree is a matter of an illegal innovation of the factual and legal context under which the dispute will be resolved before this Supreme Court, justifying its suspension, as well as its framing, as an act that threatens the dignity of justice with the respective sanctions, pursuant to art. 77, VI, §§ 1 and 2, of the Civil Procedure Code. On this claim, I brought Federal Attorney General's manifestation, who, pointing out the unconstitutionality, opined for the suspension of the Decree (event 209). It is the report. What I have decided is. This is an original civil action brought by the State of Roraima, in which, in the context of urgent relief, in addition to the "temporary closure of the Brazil-Venezuela border" and the "immediate transfer of resources," orders for the Federal Government to act "in the Brazil/Venezuela border area, in order to prevent the disorderly migratory flow from producing more devastating effects on Brazilian society, specifically in the State of Roraima, forcing the Union to promote administrative measures in the area of police control, health, and sanitary surveillance, under the penalty of maintaining the unwanted disturbance

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of the Federative Pact and an unconstitutional critical state of affairs" (event 1, p. 35). The claim deducted, as observed, is complex, as it involves the analysis of the degree of responsibility and commitment of each of the parties on the sensitive topic of human refuge. There was an attempt to conciliate the issues where applicable, excluding the issue of "closing the border," on which I gave a negative decision (event 206). Despite the lack of success, so far, the conciliation, the matter remains judicialized in this process. There was the presentation of new documents by the plaintiff and defendant (events XXXXX-41 and 144-94), with the opening of the contradictory on the matter (event 196), which is now awaited, with the case in its regular course. Moreover, it must be noted that the issue involves a factual situation in constant evolution, requiring, of course, successive measures by the Executive Branch, within its sphere of action, to solve the problems that arise at each moment. However, it should be noted that the initial request is intended to oblige the defendant to promote "administrative measures in the area of police control, health, and sanitary surveillance." In fact, as the Federal Government argued, from the analysis, albeit perfunctory, of Decree no. 25,681/2018 of the State of Roraima, of 8.1.2018 (event 198), whose abstract objective is the "special action of public security forces and other public agents of the State of Roraima as a result of the migratory flow of foreigners in the territory of the State of Roraima," highlights a set of actions in these same areas, that is, security (art. 1), "control of people, luggage, vehicles, as well as verification of documentation necessary for transit and permanence in the national territory" (art. 2), "access of Brazilian and foreign citizens to consultations, exams, urgency and emergency care and surgeries" (art. 3, II), "access to public services by Brazilian and foreign citizens" (art. 3, III), as well as restriction of access, by Venezuelans, to all public services, providing that "for access to public services offered by the Government of the State of Roraima to foreigners, with the exception of urgencies and emergencies, it is necessary to present a valid passport, except for individuals from Argentina, Paraguay, and Uruguay, who enjoy the rights and prerogatives of Mercosur, and who can present a valid identity document" (art. 3, sole paragraph). The Decree also covers executive measures directly aimed at the permanence of foreigners in the national territory, providing that "those foreign citizens who practice acts contrary to the principles and objectives set forth in the Federal Constitution and the Constitution of the State of Roraima, including the violation of fundamental rights guaranteed to Brazilian citizens, such as the right to life, physical integrity, property, among others, are subject to applicable legal norms, and the responsible police authority must adopt the necessary measures for deportation or expulsion procedures" (art. 5). Without going into the merits as to the illegality, unconstitutionality, or even violation of international treaties, care is clearly taken to establish alternative restrictive measures for foreigners, especially Venezuelans, aimed at the attempt to reduce the migratory flow. In a perfunctory analysis, I reiterate, of a state norm, brought to these records incidentally by the defendant, there is evidence it is an act not only capable of undermining the principles under examination in the present proceeding, but also of substantially altering the state of fact and of right and, obliquely, to provide the results desired by the plaintiff. The Code of Civil Procedure provides (emphasis added): "Art. 77. In addition to others provided for in this Code, are duties of the parties, their attorneys, and all those who, in any way, participate in the process: [...] IV - accurately comply with jurisdictional decisions, of a provisional or final nature, and not create obstacles to its implementation; [...] VI - not to practice illegal innovation in the de facto state of the litigious asset or right. § 1 In the cases of items IV and VI, the judge will warn any of the persons mentioned in the caput that their conduct may be punished as an act that violates the dignity of justice. § 2 The violation of the provisions of items IV and VI constitutes an act that violates the dignity of justice, and the judge must, without prejudice to the applicable criminal, civil, and procedural sanctions, apply a fine of up to twenty percent of the value of the case to the responsible party, in accordance with with the severity of the conduct. [...] § 7º Recognized the violation of the provisions of item VI, the judge will determine the restoration of the previous state, and may also prohibit the party from speaking in the case file until the purge of the attack, without prejudice to the application of § 2. [...] Art. 139. The judge will direct the process in accordance with the provisions of this Code, being responsible for: [...] III - prevent or repress any act contrary to the dignity of justice and reject merely postponing postulations; IV - determine all inductive, coercive, mandatory, or subrogation measures necessary to ensure compliance with a court order, including in actions that have as their object a pecuniary benefit." The effective recognition of the act as an attack on the dignity of justice obviously requires the defense

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rejected by the Brazilian Constitutional Court, as it was contrary to Brazilian legislation and to the treaties ratified by Brazil.

We can see, from the above, that, although countries internationally assume the commitment to receive refugees through the signing of global pacts, these commitments assumed are not always respected, thus implying an affront to international law, especially in what concerns to the institute of international responsibility of the States, provided that in the face of the commissive or even omissive conduct of the States, they must answer for the committed errors.

opportunity. It follows from the previous decision that I expressed in these records (event 206), that the refusal to close the border is based on principles aimed at the full enjoyment of individual guarantees for migrants. From the reading of the reported State Decree, I extract evidence that its content may prevent such guarantees and interfere negatively in the full enjoyment of the rights, whose decision, although negative, seeks to protect. I believe the aforementioned Decree is a normative act whose effects, in addition to lasting over time, are daily produced. In other words, the commands contained therein will be carried out on a renewed daily basis. The permanence of the effects of an act that, eventually, may be recognized in these records as an attack on the dignity of justice, must not be tolerated, under the penalty of innocuity of the zeal for rights and values whose protection deserves safeguarding under the terms already established in the previous decision. Luiz Guilherme Marinoni, Sérgio Cruz Arenhart, and Daniel Mitidiero state, about combating an act that undermines the dignity of justice: "After the attack is verified, the judge must determine the return of things to their previous state. [..] The judge may even order under penalty of a coercive fine (art. 77, § 7, CPC) and use any other procedural technique that proves to be adequate for the provision of protection against the attack (art. 139, IV, CPC)." (Código de Processo Civil Comentado, 2ª Edição, Editora Revista dos Tribunais, p. 222, highlights added). Although the aforementioned Decree predates my decision, as I said, its effects are daily renewed. In view of these elements, in the presence of indications of the possibility of undue interference of the normative act in question, in the de facto state and in the rights under debate in these records, I suspend Decree no. 25,681/2018 of the State of Roraima, without prejudice to any discussion of its constitutionality through direct control in its own action. Finally, I consider that the natural difficulties arising from the facts raised in these records are already complex enough to involve people in a vulnerable situation. For these reasons, the parties are expected to avoid the warning referred to in art. 77, § 1 of the CPC, the most complete good faith, as required by art. 5 of the same CPC, especially in the case of legal entities governed by public law. I call the parties, once again, to the composition by the form of conciliation, which I do, not only for the legal duty to encourage it (art. 3, § 3 of the CPC), but to avoid that controversy exclusively existing in the field of the division of competences in the administrative sphere, overflows to increase the suffering of human beings. The State of Roraima is urgently summoned for acknowledgment and immediate compliance, as well as, if desired, to express its opinion within 30 (thirty) days on the incidental request submitted by the Federal Government (event 197). To be published. To subpoena. Brasília, August 8, 2018. Minister Rosa Weber Rapporteur (STF - ACO: 3121 RR - RORAIMA XXXXX-95.2018.1.00.0000, Rapporteur: Min. ROSA WEBER, Judgment Date: 08/08/2018, Publication Date: DJe-162 08/10/2018, our translation). Available at https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754212138

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6 MECHANISMS OF BORDER CLOSING FOR REFUGEES BEFORE THE LEGAL INSTITUTE OF THE INTERNATIONAL RESPONSIBILITY OF THE STATE

Having presented the cases above, which include a policy of closing borders, capable of hindering and even preventing the entry of asylum seekers into certain countries, it is necessary to discuss, albeit briefly, the International Responsibility of the State, with special emphasis on an analysis of this context against the general panorama of the refuge, also presented in the body of this study. About the subject:

> Just as the illicit acts committed by citizens – within the scope of the States' domestic law – deserve a due reprimand, the practice of an international illicit act, understood as any act that violates a rule of DIP, by a State in relation to the rights of another, it also generates the liability of the person causing the damage, in relation to that State against which the illicit act was committed. (MAZZUOLI, 2016, p. 615, our translation).

Therefore, for the International Responsibility of the State to be configured, the presence of certain essential elements is necessary, namely, the practice of an illicit act, as being one that affronts a norm of the rights of people: A general principle, a customary rule, a treaty provision in force, among other species; imputability, that is, the action or omission characterized as unlawful must be imputed to a State or an international organization, and as a last element, the existence of damage, which becomes essential for the characterization of the international responsibility of the State (REZEK , 2000, pp. 262-262).

It should be mentioned that the international responsibility practically ignores criminal responsibility, which only takes place in International Law, exceptionally, in cases of genocide, war crimes, and crimes against humanity; occurrences that will give rise to the personal responsibility of the individual before the International Criminal Court (MAZZUOLI, 2016, p. 617-618).

Analyzing the agreement signed between the European Union and Turkey, in the light of the legal institute of International Responsibility of the State, it can be seen that, when European countries return migrants who enter their countries irregularly to Turkey, they are practicing an international illicit act, while, as signatory countries of

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the 1951 Convention and the 1967 Protocol, they would be prohibited from returning anyone who enters their territories with refugee status, in honor of the principle of the *jus cogens* norm of *non – refoulement*.

Therefore, even if the individual who is in a situation of refuge irregularly enters in a country in which he seeks protection, he cannot be returned, under penalty of the country that returned him being held internationally responsible for the offense committed, since all the essential elements for the characterization of the international responsibility of the State, notably, illicit act, imputability, and damage, are present.

As if that was not the case, this peculiarity of the agreement remains contradictory, especially because the European Union has been hindering Turkey's entry into the economic bloc due to the history of human rights violations by the Turkish State (PARLAMENTO EUROPEU, 2016), being somewhat innocuous to believe that Turkey would function as a safe third country, capable of effectively receiving refugees.

Likewise, the executive order issued by US President Donald J. Trump mentioned above, who suspended for a 120-day period, from June 26, 2017, the Refugee Admissions Program in the country, affronts the commitments assumed by him in the international scenario, while as a signatory of the 1967 Protocol, he would have the duty to receive in its territory any and all individual asylum seekers.

We can understand that even if the then US president was partially successful in his demand by succeeding in suspending this program, there is no doubt that he committed an illicit act due to the breach of a commitment assumed through his accession to a treaty.

It should be noted that this position once adopted by the then president of the USA even contradicts his Magna Carta, while the most important principle of the American constitutional system is equity (fairness), that is, the citizen's right to a treatment with equal consideration and respect (APPIO, 2008, p.198), a principle that is explicitly violated in the aforementioned executive orders. About the subject:

> In this context, international refugee law begins to deal with new problems, which go beyond the hitherto common pattern of mere analysis of the subsumption of concrete cases to the requirements provided for in the 1951 Convention, at the same time as the political will of States to receive new refugees decreases. From the combination of these factors, several public

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> policies result whose main objective is the repulsion of migrants and the protection of borders, violating the obligations internationally contracted. (SILVA JUNIOR, 2010, p. 78, our translation).

Therefore, even though the aforementioned countries are signatories of the 1951 Convention and the 1967 Protocol, the violations of the internationally assumed commitments regarding the protection of refugees becomes evident and, consequently, subject to future reparation.

It is worth remembering that in a similar case, Bolivia, a signatory country of the 1951 Convention and its 1967 Protocol, was condemned by the Inter-American Court of Human Rights on 02/13/2013 (CIDH, 2015), for the expulsion of the *Pacheco Tineo* family to their country of origin, Peru.

The members of this family were summarily, and without any fair reason, returned to the country, where their lives were at risk, in total contradiction to the established principle considered as a *jus cogens* norm of *non-refoulement*, stated in article 33 of the 1951 Convention.

The Brazilian case, in a slightly different context, showed an isolated interest of a certain region of Brazil in closing the border, contradicting the commitments internationally assumed. However, the Brazilian Supreme Court acted assertively and in total respect for the norms and conventions signed by the Brazilian State.

What can be observed is that in the face of evident violations of the 1951 Convention and its 1967 Protocol, the judiciary has made an effort to enforce the international commitments assumed by States as a way of protecting the rights and guarantees of refugees.

7 CONCLUSIONS

In the development of the present study, we have observed that the refuge institute, in general, has achieved progress since its threshold. However, it cannot be denied that there have been some setbacks, apparently arising from the growing number of asylum seekers and refugees around the world in recent years. In the face

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of the chaos installed by the massive, forced displacements, and as observed, States began to create mechanisms to prevent the entry of these individuals into their borders, in a patent way of circumventing the commitments made internationally.

Therefore, we can observe that a large part of the signatory countries of the 1951 Convention and the 1967 Protocol, and just to comply with the protocols, only offers (in a very superficial way) the "floor" of their country for those who are recognized as refugees; however, it does not provide a minimum condition for a dignified stay, nor does it seek to guarantee the rights granted to them by the global instruments of protection.

Apparently, opening the doors of a country to receive refugees has been seen as a problem for States, which, in an individualistic and, above all, illegitimate way, seek subterfuges to keep them away from their borders.

Deplores the fact that States choose to invest billions in the creation of border walls, or even spend exorbitant amounts with other States, in order to legitimize them as perfect recipients of refugees, as a way of exporting to these countries the individuals who would be their own responsibility.

If, on the other hand, all the money spent on this sordid policy of “closing borders” was converted in favor of an admission worthy of the refugee, surely the crisis installed throughout the world would not have reached high proportions.

However, the reality presented in the face of all the events that involve the theme today revolves around convenience, and not because of a humanitarian context, whereas if it is opportune for the State to receive refugees in its territory, it will do so. Otherwise, it will close its doors, all at its own discretion, leaving it clear that economic issues will always prevail over others.

In view of this situation, the refuge institute seems to be starting to detach from its exclusively administrative nature, starting to walk, still incipiently, towards its judicialization, which was demonstrated in this study; while the issues involving this theme have reached the courts through different contours.

Therefore, it is recalled that the individual, who is forced to flee his country for reasons beyond his control, leaves behind not only his homeland, but everything that belongs to him, especially his family, the heritage, his culture, in short, a whole history.

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It is as if they have to bury one life to start another one, and the only thing left for them is hope.

And it is precisely for these relevant reasons that they must be granted the minimum of protection and dignified reception, especially by the States, which have this legal duty.

Given this context, it is necessary to think that it is possible that any people, from all nations, might one day occupy the condition of refugee, especially in a world in constant transformation, and if so, we would embrace refuge in its genuine concept, especially with a humanitarian spirit, without allowing any other interest, especially economic ones, to override the human dignity of these minorities, who are also vulnerable.

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