

**THE HANDLING OF THE HUMANITARIAN CRISIS
IN AFGHANISTAN BY THE U.S. LEGAL SYSTEM
IN COMPARISON WITH THE CENTRAL
AND LATIN AMERICAN SYSTEMS OF
PROTECTION**

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I INTRODUCTION

Nearly two decades after the 9/11 attacks and the arrival of the first American troops in Afghanistan, the United States completed its military withdrawal from the country on August 30th, 2021. On August 15, Taliban forces retook control of Kabul just hours after President Ashraf Ghani fled the country. Shocking images of people desperately trying to flee the capital, some of them attempting to cling to the U.S. Airforce plane taking off, sparked a debate around the international community's responsibility to protect Afghans threatened by the Taliban.

Afghanistan has experienced forty decades of war. Throughout this time, around six million Afghans have been displaced from their homes—2.9 million displaced within Afghanistan by December 2020 and 2.2 million refugees registered in Iran and Pakistan. Around 665,000 people were displaced in 2021 alone.¹ In the face of the deteriorating humanitarian situation, the United States, the biggest political player in the war in Afghanistan, reportedly evacuated approximately 120,000 people from the country² by September 2021, while simultaneously offering two legal instruments for Afghans seeking refuge in the United States: a Special Immigrant Visa

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1. *Afghanistan Emergency*, UNHCR, <https://www.unhcr.org/afghanistan-emergency.html> (last visited Nov. 15, 2021).

2. Glenn Kessler, *The Afghan Evacuation and the War – by the Numbers*, WASH. POST (Sept. 2, 2021), <https://www.washingtonpost.com/politics/2021/09/02/afghan-evacuation-war-by-numbers/>.

(SIV) and the Humanitarian Parole. These tools will be discussed in greater detail below.

To analyze the legal instruments devised by the United States to aid Afghans fleeing the country, it is helpful to consider the responses of other countries, as well as regional and international actors, to a crisis that concerns the global community. In recent years, Central and Latin America have witnessed challenging mobility crises, most significantly in Venezuela and Haiti. In response this region has, both nationally and collectively, been developing a system for the protection of migrants and refugees to complement national legal systems. One example is the Quito Process, an intergovernmental regional effort to handle the refugee crisis in Venezuela. The response has also extended to humanitarian crises beyond the region, such as those provoked by conflicts in Syria and Afghanistan. Brazil, for example, issued an executive order on September 3, 2021, to offer humanitarian visas to Afghans, stateless persons, and other people affected by the crisis in Afghanistan. Mexico and Colombia have also announced the use of humanitarian instruments for receiving Afghans in their territories.³

This article will describe and compare the instruments of protection offered by national, regional, and international systems in the following order. First, it will briefly describe the United States' use of the SIV and the Humanitarian Parole for Afghans. Second, it will present recent developments concerning Latin America's systems for protecting migrants and refugees, with specific attention given to the principle of non-refoulement and the idea of complementary protection for people not recognized as refugees. Third, it will examine in further detail Brazil's national legislation and its use of humanitarian visas, both as a domestic trend and as a reflection of a regionally coordinated approach. Fourth, this article will analyze international, regional, and national developments in the protection of migrants and refugees. Finally, this article will argue that the instruments used by the United States—SIV and the Humanitarian Parole—are insufficient for addressing

3. INSTITUTO NACIONAL DE MIGRACIÓN, INFORMACIÓN MIGRATORIA NACIONAL [National Immigration Information] (2021), <https://www.inm.gob.mx/gobmx/word/wp-content/uploads/2021/08/Tarjeta-Migratoria-260821.pdf>.

humanitarian crises such as the ongoing emergency in Afghanistan. Regional and international cooperative efforts are a better means of aiding the victims of humanitarian crises abroad.

II THE UNITED STATES AND THE USE OF THE SPECIAL IMMIGRANT VISA AND HUMANITARIAN PAROLE FOR AFGHAN CITIZENS

The United States has offered two very distinct legal mechanisms to aid Afghan refugees who have fled the 2001-2021 war: the SIV and Humanitarian Parole. Applicants of the SIV must have worked with or made contributions to the U.S. government under certain conditions for a minimum period of time, and they must have experienced a serious threat under the new regime as a consequence of their work. Humanitarian Parole, in turn, offers Afghans the possibility of temporary entry and stay in the United States for urgent humanitarian reasons, but requires a case-by-case analysis.

In 2009, Congress passed the Afghan Allies Protection Act, which offered the SIV to Afghans who worked or contributed to the U.S. government in Afghanistan and whose lives were threatened because of this work.⁴ The law was preceded by the Refugee Crisis in Iraq Act of 2007, which offered the SIV for Iraqis employed by the U.S. government in similar conditions but in the Iraq war crisis.⁵ Both acts were part of a political effort led by Senator Edward Kennedy to address the refugee crisis in the region.⁶ In July of 2021, the Emergency Security Supplemental Appropriations Act, Public Law 117-31, reduced the work requirements from two years to one year, added 8,000 additional visas, and extended the program until December 31, 2023, as a response to the U.S. withdrawal. Until December 19, 2014, the total granted was just 34,500.⁷ These numbers illustrate how low range this immigration tool is,

4. Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, § 602(b), 123 Stat. 524, 807 (2009).

5. Marianne Twu, *A Sanctuary for Those Who Serve: United States Iraqi Special Immigrant Visa Programs*, 35 N.C. J. INT'L L. 723, 736-737 (2010).

6. Nadia Abramson, *Wasting My Time in the Waiting Line: Solutions for Improving the Afghanistan and Iraq Special Immigrant Visa Programs*, 55 VA. J. INT'L L. 483, 488 (2015).

7. *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/>

even if the 2021 increase is taken into consideration, as it applies only to the small fraction of Afghans in urgent need who previously worked for the U.S. government. Additionally, it is a slow mechanism of relief because of its stage-by-stage approval procedures.⁸

The Humanitarian Parole was set forth in Section 212(d)(5) of The Immigration and Nationality Act. While originally developed as a temporary tool for non-immigrants, it could provide the only path through which Afghans who did not contribute to or work for the government are granted entry into the United States. The U.S. government describes a “parole” as an instrument by which individuals unable to enter the United States for other reasons can be admitted to the country for a certain period of time.⁹ The parole may be revoked at any time, and it does not constitute a path to any lawful immigration status.

Humanitarian Parole, which involves a series of conditions during processing, establishes a precarious relationship between the individuals and the state. The application process begins with a series of forms filled out to show urgent need. Applicants must prove they have a financial sponsor in the United States or can provide for themselves. Since the embassy in Kabul has been closed since August 31, 2021, eligible Afghans need to travel to a third country where there is an active U.S. embassy or consulate after the U.S. determines they are eligible for a humanitarian parole. Following the initial forms, a series of in-person proceedings ensue, including fingerprinting, medical screening at the applicant’s own cost, and other procedures which can result in several months of waiting in a third country.

Afghans granted humanitarian parole face additional challenges upon arrival in the United States. While Refugees and SIV holders are entitled to resettlement benefits such as health care, food stamps, and help finding a home, there is no such official assistance guaranteed for Afghans granted a humanitarian parole. The Executive branch depends on Congress to pass an additional law to provide similar support,

travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html#references (last visited Nov. 15, 2021).

8. Abramson, *supra* note 5, at 494-495.

9. 8 U.S.C. § 1182(d)(5).

while humanitarian and human rights organizations have so far depended on private resources to aid paroled Afghans.

Neither of the tools described above is sufficient to deal with the current crisis in Afghanistan. U.S. Secretary of Defense Lloyd Austin recently affirmed that the SIV is not well-suited to the urgency and volume of humanitarian needs in Afghanistan now.¹⁰ The media has been reporting many cases of translators and other direct contributors to the U.S. government that were left in Afghanistan in serious danger waiting for rescue through one of the legal instruments available to them. It is also clear from the description of the Humanitarian Parole that this instrument is ill-suited to address the escalation of the humanitarian crisis following the fall of the Afghan government and the United States' exit from the country.

III THE PRINCIPLE OF NON-REFOULEMENT AND THE IDEA OF COMPLEMENTARY PROTECTION EMBRACED BY CENTRAL AND LATIN AMERICAN COUNTRIES

The principle of non-refoulement guarantees to asylum and refugee seekers the right not to be returned to territories where their lives or freedom would be threatened for reasons related to race, religion, nationality, membership in a particular social group, or political opinion.¹¹ The right to non-refoulement has been recognized as customary international law, with its application deemed binding even if a state is not a party to the 1951 Convention and its 1967 Protocol.¹²

The principle of non-refoulement has a broader meaning in the Central and Latin American region, grounded on the Inter-American Court's interpretation of article 22(8) of the American Convention on Human Rights.¹³ The Inter-Ameri-

10. Jessica Donati, *Majority of Interpreters, Other U.S. Visa Applicants Were Left Behind in Afghanistan*, WALL ST. J. (Sept. 1, 2021), <https://www.wsj.com/articles/majority-of-interpreters-other-u-s-visa-applicants-were-left-behind-in-afghanistan-official-says-11630513321>.

11. Convention Relating to the Status of Refugees art. 33, Jul. 28, 1951, 189 U.N.T.S. 137.

12. See Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees ¶ 4 (Jan. 16, 2002), <https://www.unhcr.org/protection/globalconsult/3c2306cc4/declaration-states-parties-1951-convention-andor-its-1967-protocol-relating.html>.

13. Organization of American States, American Convention on Human Rights art. 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

can Court affirmed this principle is extended to aliens whose lives would be threatened if they were returned to their countries of nationality or residence, or a third country, for the reasons stated in article 22(8). The Inter-American Court, in *Pacheco Tineo Family v. Bolivia*, recognized the right to non-refoulement for any alien notwithstanding their legal or migration status in the country where they reside. Then, based on the *travaux préparatoires* of the ACHR, the Inter-American Court found it relevant that the initial proposal used the word “refugee” in connection to the principle of non-refoulement, but the final document substituted the word “alien.”¹⁴

Some countries in Central and South America have embraced a mechanism of complementary protection regarded by the Inter-American Court as a normative development consistent with the principle of non-refoulement.¹⁵ Even if a person does not meet the requirements for refugee status¹⁶ or regular migratory status, he or she is entitled to complementary forms of protection if returning to the country of origin or a third country represents a threat to the person’s life or freedom. This progressive development of the concept of non-refoulement aims for a more holistic protection of the person individually ascertained by the state. One of the instruments developed and used in the context of this expanded interpretation is the humanitarian visa.

14. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 79-86 (Aug. 19, 2014). See also Organization of American States [OAS], Cartagena Declaration on Refugees §§ III(3)-(5), Nov. 22, 1984, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

15. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, *supra* note 14, at n. 472 (mentioning some countries that have embraced this complementary protection mechanism offering humanitarian visas or similar instruments: Argentina, Brazil, Costa Rica, Honduras, Jamaica, Mexico, Nicaragua, Panama, Uruguay, Venezuela.).

16. Cartagena Declaration, *supra* note 14 (The Cartagena Declaration on Refugees adopts an expanded concept of refugee recognizing as such a situation of serious and generalized human rights violation as an objectively condition, not requiring a subjective analysis case-by-case).

IV THE IDEA OF COMPLEMENTARY PROTECTION AND THE USE OF HUMANITARIAN VISAS IN BRAZIL

In 2017, Brazil enacted a new immigration law, establishing a paradigm based on constitutional and human rights principles.¹⁷ The statute provides a non-exhaustive list of principles and rights enjoyed by migrants, among them the principles of non-discrimination, non-criminalization, equal access to public services, and the right to family reunion. The new immigration law solidifies Brazil's position in the global debate on immigration. It emphasizes that the well-being of foreigners is a matter of sustained state interest and that protecting aliens from violations of their rights and, to some extent, from populist discourse is an issue of domestic politics. Two of the law's protective measures are especially relevant when compared to the United States' response to Afghanistan's humanitarian crisis.

First, the new immigration law abandoned the concept of foreigners as strangers because strangers are often viewed as untrustworthy and potentially dangerous.¹⁸ Instead, the immigrant is seen as an equal to national citizens in the enjoyment of basic human rights. This new paradigm is consistent with the human rights system and is intended to allow immigrants not only to seek entry into the country, but also to stay and thrive.

Second, the new law incorporated the humanitarian visa as a favored instrument of public policy, solidifying a trend seen in Brazil over the last decade regarding the concession of humanitarian visas for Haitians (2012) and Syrians (2013). In September 2021, in the face of the humanitarian crisis in Afghanistan and within the context of the 2017 immigration law, Brazil enacted an executive order establishing humanitarian visas as a fast response through which people affected by the

17. Lei No. 13.445, de 24 de Maio de 2017, Diário Oficial da União [D.O.U.] de 25.05.2017 (Braz.).

18. Carolina Claro, *Do Estatuto do Estrangeiro à Lei de Migração: Avanços e Expectativas* [From the Foreign Statute to the New Migration Law: Progress and Expectations], 26 BOLETIM DE ECONOMIA E POLÍTICA INTERNACIONAL 41, 45-46 (2020) (Braz.).

Afghan crisis could seek protective measures in Brazil by making the proper requests through consulates and embassies.¹⁹

The granting of humanitarian visas aims to protect people beyond Afghan nationals and to offer a broad range of rights to stabilize the situation of the individual for a minimum period of time. This executive order, like the previous ones enacted for Haitians and Syrians, offers broad reception not only to Afghans, but also to stateless people and anyone else affected by the crisis. As part of the principle of equality between nationals and foreigners, humanitarian visa holders have universal access to the Brazilian public welfare system, including access to health, education, and welfare, in addition to specific programs for the socio-economic inclusion of migrants and refugees. Furthermore, people granted a humanitarian visa are allowed to reside in Brazil as temporary residents for two years while they apply for refugee status or other forms of humanitarian protection, find safe and legal residence elsewhere, or return to their home country if conditions change.

V TO WHAT EXTENT HAVE DOMESTIC LAWS BEEN AFFECTED BY THE INFLUENCES OF INTERNATIONAL LAW AND REGIONAL LAW?

The idea that a state determines, through its domestic laws, who is entitled to citizenship has not been abandoned, but it has been somewhat qualified by international and regional human rights law. Now, the sovereignty of the state is not the sole factor relevant in determining the members of a state's community and would not, in this view, shield the state if there emerged a comprehensive regime of international regional law.²⁰

In this context, the issuing of humanitarian visas is not only part of the assessment of national migration or humanitarian protection laws, but also part of a regional trend of protection, as exemplified by the above discussion of Central and Latin America's complementary protection. Because this is subject to further development, comparisons between interac-

19. Portaria Interministerial n. 24, de 3 de Setembro de 2021, Diário Oficial da União [D.O.U.] de 8.09.2021 (Braz.).

20. See Peter Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 694-695 (2011) (highlighting the necessity of reframing citizenship status as an individual right).

tions of national immigration law and regional and international instruments are the best path through which to outline patterns and expectations on the issuing of humanitarian visas and other instruments for the protection of migrants and refugees.

The new Brazilian immigration law, for example, draws from regional and international legal systems of protection. It reflects concerns with the human rights of immigrants already inscribed in the fundamental rights of the Brazilian constitution, and in the human rights recognized by international treaties. For example, Article 3 enshrines the right to family reunion, an idea that was informed by the special protection of the family given by the Brazilian Constitution and the principles of unity of the family contained in both the Universal Declaration of Human Rights of 1948 and the United Nations Covenant on Civil and Political Rights of 1966. The new immigration law provides migrants with fundamental rights independent of their migration status, a change from prior outdated legislation based mainly on national security interests.

In the Latin American regional context, the issuing of the Advisory Opinion OC-21/14 by the Inter-American Court, mentioned above, is a non-binding opinion that has influenced regional debates grappling with the idea of complementary protection and the issuing of legal instruments such as the humanitarian visa to protect people who do not necessarily qualify as refugees. The Brazil Declaration and Plan of Action by twenty-eight countries and three territories of Latin America and the Caribbean, adopted in 2014, highlights the complementary protection practices of states and the issuing of humanitarian visas as a good model adopted by states in the region.²¹

Another pertinent example is the Quito Process, a regional effort that started in 2018. It was developed to be a regional technical workspace with a series of meetings between

21. See Brazil Declaration and Plan of Action: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, Dec. 3, 2014, <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf> (stating an appreciation for “the good practices in the region of regulating complementary protection and the grant of humanitarian visas to people who may not necessarily qualify as refugees under the Convention, but who may also benefit from protection responses”).

Central and Latin American countries to articulate proper financial and institutional responses to the refugee crisis in Venezuela. These efforts gave rise to the Quito Declaration on Human Mobility of Venezuelan Citizens in the Region, which urges countries to strengthen the principle of migration governance and cooperation through both international organizations and direct contact between states. In May 2021, Brazil assumed the *pro tempore* Presidency of the Quito Process and will be leading the VIII Round of meetings, with the support of the UN Refugee Agency and the International Organization for Migration. The prior Rounds developed regional initiatives such as a proposal for a Regional Mobility card and Centers for Reception and Assistance to Migrants and Refugees.²²

In the domestic realm, two national immigration laws are worth mentioning in the case of the crisis in Venezuela²³ as examples of mutual influences and good practices in the regional realm. Facing increasing pressure from Venezuelans attempting to cross its northern border (a sparsely populated and economically challenged region), Brazil established a multi-institutional task force, Operation Welcome, for the reception of migrants and refugees. As a response to this special task force, Brazil estimates that 260,000 Venezuelan refugees and migrants live in the country today.²⁴ Colombia, which hosts 1.7 million Venezuelan migrants and refugees, has established a comprehensive program to mediate the situation of the one million undocumented Venezuelans, granting them a ten-year temporary protection status while they seek resident visas.²⁵

22. See generally Declaration of Quito on Human Mobility of Venezuela (Sep. 4, 2018), https://www.procesodequito.org/sites/g/files/tmzbdl466/files/2020-11/Quito%20Declaration%20ENG_0.pdf.

23. See *Venezuela Humanitarian Crisis*, UNHCR, <https://www.unrefugees.org/emergencies/venezuela/> (last visited Nov. 16, 2021) (providing a brief overview of the humanitarian crisis in Venezuela).

24. Brasil, Interiorização beneficia mais de 50 mil refugiados e migrantes da Venezuela no Brasil [Interiorization benefits more than 50,000 Venezuelan refugees and migrants in Brazil], UNHCR (Apr. 20, 2021), <https://www.acnur.org/portugues/2021/04/20/interiorizacao-beneficia-mais-de-50-mil-refugiados-e-migrantes-da-venezuela-no-brasil/>.

25. See generally CANCELLERÍA DE COLOMBIA, ABECÉ DEL ESTATUTO TEMPORAL DE PROTECCIÓN PARA MIGRANTES VENEZOLANOS [EXPLANATION OF THE TEMPORARY STATUTE FOR THE PROTECTION OF VENEZUELAN MIGRANTS], https:/

The European Union has also discussed the concession of humanitarian visas in response to immigrants and asylum seekers crossing the Mediterranean from North Africa and the Eastern Mediterranean, but with less of an emphasis toward integration and coordination. A legal debate on the Regulation (EC) No 810/2009 resulted in an understanding that states are free to decide this issue according to their national laws, eschewing a bloc-wide response system. The Council of the European Union discussed an amendment to the EU Visa Code to allow persons to apply for a humanitarian visa in any member state's embassy or consulate, which was later withdrawn. In 2017, the Court of Justice of the European Union ("the CJEU") ruled that member states were not obligated under the EU legislation to issue humanitarian visas, and therefore their national immigration law should prevail on this issue.²⁶ In the 2018 opinion *M.N. and Others v. Belgium*, the European Court of Human Rights affirmed that the E.U. law for long-stay visas was part of the scope of the member state's national laws, in tune with the CJEU position.²⁷

When compared to the above examples, the U.S. approach to the refugee crisis in Afghanistan does not seem to align with any legal protection systems at the international or regional levels. Instead, the SIV and Humanitarian Parole are overwhelmingly influenced by the historical immigration policies of the United States. While there are relevant political interactions between the United States and other states, those interactions are more focused on reaffirming U.S. national policies on immigration law rather than exchanging practices on the protection of vulnerable people in humanitarian crises. The lack of legal cooperation and consistent practices makes this a less stable and protective situation for Afghans and other people affected by the crisis in Afghanistan. There remains an open question on how the United States will legally and politically address both the allocation of the evacuated people and

/www.cancilleria.gov.co/sites/default/files/FOTOS2020/ok._esp_abc_es-tatuto_al_migrante_venezolano_05mar-2021.pdf (last visited Nov. 16, 2021).

26. C-638/16 PPU, X and X v. État Belge, 2017 ECLI:EU:C:2017:173.

27. M.N. and Others v. Belgium, App. no. 3599/18, ¶ 124 (Mar. 5, 2020), [https://hudoc.echr.coe.int/fre#{%22fulltext%22:\[%22m.n%20and%20others%20belgium%22\],%22documentcollectionid%22:\[%22DECI-SIONS%22\],%22itemid%22:\[%22001-202468%22\]}](https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22m.n%20and%20others%20belgium%22],%22documentcollectionid%22:[%22DECI-SIONS%22],%22itemid%22:[%22001-202468%22]}).

those still in Afghanistan waiting to be granted a special visa or humanitarian parole.

VI CONCLUSION

The crises in Afghanistan and Venezuela differ in many respects from the crisis in Afghanistan but can serve as points of comparison. Developing regional and national laws to protect people desperately trying to flee their place of residence is an evolutionary process. In the case of Afghanistan, the United States' legal handling of the crisis through the SVI and Humanitarian Parole is not sufficient to respond to a humanitarian crisis of this magnitude. Latin and Central America, however, provide an example of regional mechanisms of protection—mutual interaction between national and regional spheres, complementary protection, and the issuing of humanitarian visas—as well as the importance of these different levels of cooperation and development of common principles and legal mechanisms to deal with humanitarian crises like the one in course in the present. An isolated approach without regional and national coordinated efforts of other states offers less protection and stability to Afghans and other people affected by the crisis than the most modern developments of international law discussed here.