

# Pro bono support to realise the non-refoulement principle for Congolese refugee detained in the US

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'Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property.' 'No one shall be deprived of liberty or property without the due process of law.' 'The State shall provide full and gratuitous legal assistance to anyone who proves to have insufficient funds.' These are all Brazilian constitutional statements that guarantee fundamental rights. Their enforcement, however, depends on other variables.

A Congolese citizen, Mr L,<sup>1</sup> fled to Brazil to seek refuge from serious violations of human rights in the Democratic Republic of the Congo (DRC). His family was a victim of local government violence through political persecution and his father was murdered in his own house by the authorities. In 2016, Mr L was recognised as a refugee by the Comitê Nacional para os Refugiados or CONARE, the Brazilian government department responsible for receiving applications and approving refugee status, under the Ministry of Justice.

In 2017, Mr L went to the United States to seek better economic conditions. En route he lost all of his documents and was detained by US Customs and Border Protection despite explaining that he carried refugee status in Brazil.

According to a US ruling, foreign nationals detained under US immigration laws have the right to decide their deportation destination. Mr L said that that he would like to return to Brazil and that he could not go back to the DRC because of the political persecution he would face.

While countries have the right to deport illegal immigrants, the authorities have to ensure that returnees would not have their lives or freedom threatened if they were sent back to their countries of origin, pursuant to the international *non-refoulement* principle. However, a US immigration judge decided that Mr L would be deported to Brazil or, as a second option, the DRC.

Under international law, there are two permissible exceptions to the *non-refoulement* principle, which are set out in Article 33(2) of the 1951 Refugee Convention. A country is only allowed to turn away a refugee when: 1. there are reasonable grounds for regarding the refugee as a danger to the security of the country; or 2. if the refugee is convicted by a final judgment of a particularly serious crime.<sup>[2]</sup>

Instead of providing for Mr L's return to Brazil, the Brazilian Ministry of Justice department responsible for refugees affirmed that it would initiate a process of the loss of refugee status, pursuant to the allegation that the law was broken when Mr L left Brazilian territory without authorisation. In light of the department's indication, the Ministry of Foreign Affairs did not authorise the issuance of Mr L's travel documents for his return. The US immigration department therefore declared that if these circumstances were not solved in a few weeks, Mr L would be deported to the DRC.

By means of a cooperation agreement signed between Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados and Caritas in Rio de Janeiro (a renowned international organisation that historically acts in humanitarian crises), Mattos Filho filed a writ of mandamus against the Brazilian government requesting the issuance of Mr L's travel documents.

Mattos Filho maintained that states have *non-refoulement* obligations under international refugee and human rights law, whether treaty-based or part of customary international law, to protect people whose lives could be at serious risk in their country of origin. Additionally, Mattos Filho argued that refugees need access to a fair and efficient procedure in which to present their claims for protection; various branches of government have complementary responsibilities for establishing state migration systems and for providing protection and durable solutions to refugees.

In an unprecedented decision, Mattos Filho succeeded in obtaining an injunction to force the issuance of Mr L's return travel document within 24 hours by the immigration department of the Brazilian Ministry of Foreign Affairs. The judge recognised Brazil's obligation in granting the document in conformity with: 1. the international *non-refoulement* obligation; and 2. the human rights prevalence principle, which binds any administrative authority to conduct that prioritises the observance of human rights.

The decision emphasises the extraterritoriality of the *non-refoulement* principle and demonstrates that state actions – when concerning human rights – shall be both affirmative and constraining.

The contribution that legal professionals and law firms can make in humanitarian crises is clear, whether by litigating in favour of individuals and non-profit entities that have insufficient fund or through the support and articulation of strategic impact movements on the human rights agenda. Mattos Filho aims to contribute to expanding access to justice by offering, with human rights organisations, free legal services to the socially and economically vulnerable.

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<sup>11</sup> Mr L's identity is protected to not interfere with judicial process, which is ongoing in Brazil.

<sup>12</sup> United Nations High Commissioner for Refugees, *A guide to international refugee protection and building state asylum systems* (2017) [www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html?query=refugee](http://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html?query=refugee) accessed [date].