

ASYLUM IN MESOAMERICA

ACCESSING INTERNATIONAL PROTECTION IN MEXICO AND GUATEMALA

I. Introduction

II. Availability of International Protection in Mexico

A. Overview of the Mexico Legal System for International Protection

1. Legal Framework
2. Applying for Refugee Status
3. Detention
4. Protection-Seeker Rights and Implementation Inadequacies
 - a. Confidentiality, Documentation, and Access to Legal Representation
 - b. Family Unity and Access to Benefits, Education, and Employment

B. Systemic Barriers to Asylum and Refugee Status

1. Limited application of the Cartagena Declaration
2. Backlog of Cases before the COMAR
3. Additional Barriers for Child Protection-Seekers
4. Discrimination in Access to Rights
5. Restrictions on Residence and Movement
6. Violence and Torture Against Protection-Seekers, Human Rights Activists, and Journalists

C. Conclusion

III. Availability of International Protection in Guatemala

A. Overview of the Guatemalan System for International Protection

1. Applicable Legal Framework
2. Procedures for Accessing Refugee Status

B. Refugee and Protection-Seeker Rights: Assessing Barriers to International Protection

1. Access to Refugee Application Process
2. Right to Identity Documents and Right to Travel
3. Right to Work and to Non-discrimination
4. Confidentiality, Access to Counsel, and Interpretation
5. Temporary Care and Shelter, Detention, and Non-Refoulement
6. Right to Education and Family Reunification
7. Deterioration of the Rule of Law

C. Conclusion

IV. Overall Conclusions

About the Authors

The Center for Justice and International Law (CEJIL) is an international non-governmental organization specialized in the use of international human rights law. CEJIL along with partner organizations, represents victims of human rights violations in the Americas, and takes cases to the Inter-American Commission and the Inter-American Court of Human Rights so that damages can be repaired and policy or legal reforms can be carried out so these violations do not occur again. CEJIL meets, discuss, generates and shares information in order to raise awareness about endemic human rights problems and finds solutions, with the goal of fostering the creation of public policies that respect human rights throughout the region.

The International Human Rights Law Clinic (“IHRLC”) is one of twelve law clinics within the Clinical Program at the American University, Washington College of Law. IHRLC offers student attorneys the opportunity to represent non-U.S. citizens and organizations working to defend the human rights of non-U.S. citizens in a broad range of settings, including regional and international bodies, U.S. federal and state courts, and immigration court. The collaboration with the co-author in producing this report exemplifies IHRLC’s commitment to giving students the opportunity to represent non-U.S. citizens and non-profit organizations working to defend the human rights of foreign nationals in the U.S. and abroad.

Acknowledgements

This report is a collaborative effort of CEJIL and IHRLC. The following IHRLC students contributed substantially to this report: Lucia Canton, Raymond Navarro, Juliana Carvajal Yepes, Andrew Johnson, Amanda Grau, Jaclyn Lahr, Lauren LaVare, and Alexis Rossetti. Professors Anita Sinha, Director of the IHRLC, Anne Schaufele, IHRLC Practitioner-in-Residence, and Lindsay M. Harris, Visiting Professor with the IHRLC in Fall 2020, supervised these students and along with Gabriela Oviedo-Perhavec and Kavita Kapur, staff of CEJIL, who made significant contributions to this report.

The team adapted to the unprecedented challenges of COVID-19 to bring this research to the public at a critical time. We hope that this report is a resource to those who seek to understand the asylum systems of Mexico and Guatemala, and use it to lend support to migrants in need of protection.

I. Introduction

The Asylum in Mesoamerica Report (“Report”) is a dynamic resource that investigates the practical availability of international protection to refugees and protection-seekers in Mexico and Guatemala. It outlines the legal framework for asylum in both countries¹ to show the current reality of accessing international protection including the law itself, barriers to access, and day-to-day experiences of individuals within these systems. The importance of understanding these realities has increased exponentially due to rapidly evolving migration policies and ongoing humanitarian crises. This Report adds context to the existing knowledge of the asylum frameworks in Mexico and Guatemala by presenting the current legal framework in each country in conjunction with the actual experiences of protection seekers and stakeholders.

In 1951, the Convention Relating to the Status of Refugees (hereinafter the 1951 Convention) established international protection for any person:

“who, 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.”²

Although the application of the 1951 Convention was expanded through the adoption of the 1967 Protocol, the original definition has remained the same.³ The 1951 Convention and subsequent 1967 Protocol codified norms around the protection of those escaping persecution. It created the international legal framework that signatories must follow to enact domestic laws that comply with the minimum protection guaranteed to non-citizen persons seeking protection within their borders.

Regional initiatives in the Americas complemented these international legal developments to respond to the specific refugee flows in the region.⁴ In the Americas, by 1984 a majority of states adopted the Cartagena Declaration.⁵ The Cartagena Declaration expanded the 1951 Convention definition of a refugee:

¹While the concept of asylum can be broadly defined, in this Report we use the term to refer to the granting of international protection to refugees. In that sense, “asylum systems” refers to the sets of procedures established in order to process claims for international protection. For a detailed discussion of asylum, see the Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection. Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A.) No. 25, May 30, 2018.

²Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

³Id.

⁴See e.g., Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

⁵Cartagena Declaration on Refugees, Refugee Legal Aid Information, <https://www.refugeelaidinformation.org/cartagena-declaration-refugees>

“...refugees persons [are those] who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁶

The Inter-American system has developed jurisprudence on state obligations to protection seekers under both the 1951 Convention and the Cartagena Declaration. For example, the “right to seek and receive asylum” has been interpreted by the Inter-American Court of Human Rights to require states to recognize refugee status defined by the United Nations instruments, like the 1951 Convention, and asylum as set out by regional conventions.⁷ The Court understands the right to asylum extends to all persons that fall within the Cartagena Declaration’s expanded definition.⁸

There are an estimated 26 million refugees globally.⁹ The profile of migrants accessing asylum systems in the Americas continues to change, partly due to an adaptation of new migration policies across the globe.¹⁰ Mexico’s proximity to Honduras, El Salvador, and Guatemala, commonly referred to as the “Northern Triangle,” makes it an increasingly critical country of asylum for persons fleeing violence.¹¹ The new Administration in the United States is making changes at its U.S.-Mexico border, including revoking regional agreements that have impacted migration flows in the region.¹²

The Guatemalan asylum system has become increasingly important given the changing regional cooperative agreements and anticipated change in migration flows. Compared to Mexico, there is a relative lack of information on effectiveness of Guatemala’s asylum system as a whole. The changing migration flows in and through Guatemala are exposing new details about its capacity to process asylum claims.

⁶Compare Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984 [hereinafter Cartagena Declaration], with Refugee Convention, *supra* note 2. See also, Marissa Esthimer, Protecting the Forcibly Displaced: Latin America’s Evolving Refugee and Asylum Framework, Migration Policy Institute (Jan. 14, 2016), <https://www.migrationpolicy.org/article/protecting-forcibly-displaced-latin-america-evolving-refugee-and-asylum-framework>.

⁷The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection, *supra* note 1, para. 132.
⁸*Id.*

⁹Amnesty Int’l, Refugees, Asylum-seekers and Migrants, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>.

¹⁰Caitlyn Yates, As More Migrants from Africa and Asia Arrive in Latin America, Governments Seek Orderly and Controlled Pathways, Migration Policy Institute (Oct. 22, 2019), <https://www.migrationpolicy.org/article/extracontinental-migrants-latin-america>.

¹¹Helen Kerwin, The Mexican Asylum System in Regional Context, 33 Md. J. Int’l L. 290, 291-292 (2018), <https://digitalcommons.law.umaryland.edu/mjil/vol33/iss1/13>; see also, UN High Commissioner for Refugees (UNHCR), Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection (Mar. 13 2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full->.

¹²Exec. Order No. 14010: Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267 (Feb. 2, 2021), <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>

The COVID-19 global pandemic has heightened the already high risks protection seekers face. The Inter-American Commission on Human Rights (“Commission” or “IACHR”) raised concerns early on in the pandemic about the state responses to the public health crisis disproportionately effecting migrants and protection seekers, especially in conjunction with the Trump administration’s highly restrictive Migrant Protection Protocols (MPP, or the “Remain in Mexico” policy).¹³ In its adopted measures for human rights during the pandemic, the Commission flags that all responses to the pandemic must conform with general principles of international law and the Inter-American human rights standards.¹⁴ State responses to the pandemic have created new barriers to protection-seekers. In many cases, state responses have created new or more onerous barriers with dire consequences for protection seekers.¹⁵

In this context, the asylum systems in Mexico and Guatemala have become increasingly critical to the rest of the region. In early 2019, the U.S. implemented the MPP, which required protection-seekers to wait for the adjudication of their U.S. asylum claims while physically in Mexico.¹⁶ MPP has been criticized as a violation of the international refugee protection framework.¹⁷ Protection-seekers also contend with Safe Third Country Agreements (ACAs).¹⁸ For example, the ACA signed between the U.S. and Guatemala allowed the U.S. to transfer protection seekers arriving at the U.S. border to Guatemala to seek asylum there instead.¹⁹

In light of all of these changes, this Report closely examines the Mexican and Guatemalan asylum systems. Our objective is to provide a holistic overview of the asylum systems each of these states. Part II of this Report discusses the availability of international protection in Mexico. It also walks through the legal process for protection seekers and details the human rights abuses that result from deficiencies in the Mexican system. Part II describes the conditions in prolonged detention and the rights protection-seekers are promised, but are often denied, in the Mexican system. Lastly, it reviews the

¹³Press Release, Inter-Am. Comm’n H.R. (IACHR). The IACHR urges States to protect the human rights of migrants, refugees and displaced persons in the face of the COVID-19 pandemic (Apr. 17, 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/077.asp.

¹⁴Inter-Am. Comm’n H.R. Res. 1/2020. (Apr. 10, 2020), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

¹⁵Marcia Vera Espinoza, Gisela P. Zapata, Luciana Gandini, Mobility in Immobility: Latin American Migrants Trapped Amid COVID-19, *Open Democracy* (May 26, 2020), <https://www.opendemocracy.net/en/democraciaabierta/mobility-immobility-latin-american-migrants-trapped-amid-covid-19/>.

¹⁶Press Release, U.S. Dep’t of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>; See also, Vanessa Ceceña, Service Committee, Dismantling Asylum: A Year Into the Migrant Protection Protocols, *American Friends*, 23-24 (Jan. 2020), https://www.afsc.org/sites/default/files/documents/MPP_Final_Jan2020-300hi.pdf.

¹⁷See, e.g., Press Release, Am. Civil Liberties Union (ACLU), Groups File Lawsuit Against Trump Policy that Forces the Return of Asylum Seekers to Mexico (Feb. 14, 2019), <https://www.aclu.org/press-releases/groups-file-lawsuit-against-trump-policy-forces-return-asylum-seekers-mexico>; see also, Press Release, UNHCR, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (July 15, 2019), <https://www.unhcr.org/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.

¹⁸Susan Gzesh, “Safe Third Country” Agreements with Mexico and Guatemala Would Be Unlawful, *Just Security* (July 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/>.

¹⁹Agreement Between the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, Guat.-U.S., at July 26, 2019, T.I.A.S. 19-1115; see, e.g., U.S. Dep’t of Homeland Sec., Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf

systemic barriers protection-seekers face in Mexico when applying for refugee status and resident status. Part III addresses the same topics as in Part II, but in the context of the Guatemalan system.. Finally, Part IV offers summary conclusions on the overall availability of international protection in Mexico and Guatemala, and offers recommendations to strengthen the asylum systems in both countries.

This Report's methodology combines research with qualitative data. To contextualize the legal frameworks for protection-seekers in Mexico and Guatemala, the research teams conducted interviews with persons who have either applied for and or been granted asylum, or who attempted to seek asylum, in the two countries. The teams also interviewed experts, both government or non-governmental organization (NGO) staff who work with protection seekers. Originally, the interviews in Guatemala were to take place as part of a fieldwork study., COVID-19 made fieldwork not feasible, and the research teams pivoted to conducted interviews virtually, identifying interviewees through referrals from CEJIL's contacts. Some of the interviewees' identities have been altered for their protection.

II. Availability of International Protection in Mexico

Mexico has a detailed legal asylum framework on paper, but various practical issues hinder protection-seekers' ability to access the rights granted by the law. As of the publication of this Report, Mexico continues to struggle to improve access to asylum within its borders. The reality in Mexico shows that the legal framework struggles to support the changing flows of protection-seekers and refugees. The state's response to the COVID-19 pandemic has decreased the processing capacity of asylum claims and closed migrant shelters, contributing to protection seekers as frequent targets of violent crime and extortion.²⁰ On the ground, incidents of racism and xenophobia against migrants has risen to affect almost half of the migrant population.²¹ The population of protection seekers in Mexico includes those who are attempting to enter the U.S. to seek asylum but have been returned to their countries of origin or forced to remain in Mexico.

Section A describes in detail the Mexican international protection system, the rights afforded to protection seekers, the inconsistencies and gaps in implementation, and

²⁰Laura Gottesdiener & Lizbeth Diaz, In Mexico, Shattered Shelters Hit Migrants As Pandemic Rages, Reuters, (Jan. 4, 2021), <https://www.reuters.com/article/us-usa-immigration-mexico-coronavirus/in-mexico-shattered-shelters-hit-migrants-as-pandemic-rages-idUSKBN2991CX>

²¹Trends in the Impact of COVID-19 on Refugees and Migrants in Guatemala and Mexico, Mixed Migration Centre (Feb. 2021), https://mixedmigration.org/wp-content/uploads/2021/02/161_trends_impact_COVID-19_Guatemala_Mexico.pdf.

the harm protection seekers experience as a result. Section B describes systemic barriers to asylum or refugee status in Mexico, and the ramifications experienced by protection-seekers. Section C draws overall conclusions based on Mexico's failure to adequately implement its own international protection system.

A. Overview of the Mexican System for International Protection

Beginning in 1984, the Mexican government and the United Nations High Commissioner for Refugees (UNHCR, or ACNUR by its Spanish acronym) have worked together to meet the needs of refugees.²² The UNHCR has been involved with Mexico's asylum system in various capacities over the years, but most recently it supported Mexico's participation in the Comprehensive Refugee Response Framework (CRRF, or MIRPS by its Spanish acronym).²³ Mexico's participation in these initiatives helped develop its current legal framework. In 2000, Mexico acceded to the 1951 Convention and the 1967 Protocol, with certain reservations and an interpretive declaration.²⁴ Currently, Mexico's reservations to Articles 17 (2) (a-c)²⁵, 26 and 31.²⁶ of the 1951 Convention remain in effect.²⁷

Similarly, the interpretive declaration with respect to both Article 1 of 1951 Convention and Article 1 of the 1967 Protocol remains in effect today.²⁸ Beginning in 2011, the Mexican government announced constitutional reforms that Mexican officials said, "represent[ed] the broadest expansion of rights since the adoption of the current Constitution."²⁹ According to the Inter-American Commission on Human Rights, these reforms operated to "rais[e] to the constitutional level all human rights norms contained in treaties signed by the Mexican State."³⁰

²²Global Report 2000 Mexico, UNHCR, 439 (June 30, 2000).

²³UNHCR, MIRPS: Comprehensive Regional Protection and Solutions Framework (2017), <https://www.acnur.org/5b50db084.pdf>; see also, Rachel Schmidtke, A New Way Forward: Strengthening the Protection Landscape in Mexico, Refugees International (Nov. 12, 2020), <https://www.refugeesinternational.org/reports/2020/11/9/a-new-way-forward-strengthening-the-protection-landscape-in-mexico?> (noting that UNHCR primarily supports COMAR through the MIRPS initiative).

²⁴UNHCR, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: 3rd Cycle, 31st Session Mexico (July, 2018), <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMXUNContributionsS31.aspx>.

²⁵Refugee Convention, supra note 2, Reservations (reservation against the automatic extension of work permit obligations to refugees meeting either 17 (2) (a), 17 (2) (b) or, 17 (2) (c)).

²⁶Id. (Reserving the right to assign, in contemplation of its National legislation, the residence of refugees within its territory and to establish the condition for moving within that territory).

²⁷See also, UNHCR, Mexico Withdraws Reservations to Refugee and Stateless Conventions (Feb. 11, 2014), <https://www.unhcr.org/en-us/news/briefing/2014/2/52fa05e79/mexico-withdraws-reservations-refugee-statelessness-conventions.html> (commending the withdrawal of Mexico's original reservations to article 32 of the Refugee Convention and article 31 of the 1954 Convention Relating to the Status of Stateless Persons).

²⁸Refugee Convention, supra note 2, Reservations ("It will always be the task of the Government of Mexico to determine and grant, in accordance with its legal provisions in force, refugee status, without prejudice to the definition of a refugee provided for under article 1 of the Convention and article 1 of its Protocol.").

²⁹Inter-Am. Comm'n H.R. The Human Rights Situation in Mexico. OEA/Ser.L/V/II, Doc. 44/15. Dec. 31, 2015, para.75.

³⁰Id.

There are two agencies who implement the country’s international protection framework: the National Institute of Migration (Instituto Nacional de Migración, or INM), and the Mexican Commission for Refugees, als (Comisión Mexicana de Ayuda a Refugiados, or COMAR). The INM is the federal body responsible for border operations migration documents and flows, both regular and irregular.³¹ COMAR is responsible for the processing of applications requesting recognition of refugee status.³²

COMAR has offices in the following cities: Mexico City, Acayucan, Tenosique, Tapachula, Monterrey, Palenque, and Tijuana.³³ The INM has an additional 32 offices, one in every state, across the country.³⁴ Adiscussion of these agencies and the barriers to access is detailed later in this report.

Offices of the Mexican Commission for Refugees (COMAR)



Author: Comisión Mexicana de Ayuda a Refugiados

The following sections provide an overview of the asylum system in Mexico, including the legal framework, the procedures and processes for accessing asylum, and potential obstacles or gaps in accessing asylum protection.

³¹Amnesty Int’l., Mexico: Overlooked, Underprotected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum (Jan. 23, 2018), <https://www.refworld.org/docid/5a69e3c34.html>.
³²Schmidtke, supra note 23.
³³UNHCR, COMAR Contact, <https://help.unhcr.org/mexico/en/where-to-seek-help/contacta-a-la-comar/>
³⁴Schmidtke, supra note 23; see also, Instituto Nacional de Migración [INM], Horario y Oficinas del INM, Gobierno de México (Jan. 6, 2019) (Mex.), <https://www.gob.mx/inm/acciones-y-programas/horario-y-oficinas-del-inm;>

1. Legal Framework

The Mexican Constitution guarantees the right to seek and receive asylum.³⁵ It specifies that the recognition of refugee status shall be conducted in accordance with international treaties while statutes regulate its application and exceptions.³⁶ The Migration Act (Ley de Migración), adopted in 2011 and amended in 2020, is the operational foundation of Mexico's current asylum system.³⁷ The 2011 Law on Refugees, Complementary Protection and Political Asylum (hereinafter "2011 Migration Act") is the main source of domestic law which provides for international protection.³⁸

The 2011 Migration Act was modified by a series of amendments in 2014³⁹ and in 2020, and together with its accompanying regulations, it now contains specific criteria and norms that govern access to international protection.⁴⁰ The 2014 General Law on the Rights of Children and Adolescents establishes additional guarantees related to the principle of non-refoulement, protections for the best interests of children, and due process in migration-related procedures.⁴¹

The 2011 Migratory Act's Article 13 establishes three categories of eligibility for refugee status:

(1) those who, having a well-founded fear of persecution based on race, religion, nationality, gender, membership in a particular social group or political opinions, are outside of their country of nationality (or in the case of stateless persons, of their country of habitual residence) and cannot, or due to said fears, are unwilling to avail themselves of the protection of that country;⁴²

³⁵Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021, art. 11, para. 2, (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf.

³⁶Id.

³⁷Ley de Migración [Migratory Act], Diario Oficial de la Federación [DOF] 25-05-2011, art. 6-15 (Mex.), f, http://www.diputados.gob.mx/LeyesBiblio/ref/Imigra/LMigra_orig_25may11.pdf, translated in Federal Official Gazette, Secretaría de Gobernación (May 25, 2011), https://www.albany.edu/~rk289758/documents/Ley_de_Migracion_en_Ingles.pdf; Decreto por el que se Reforma el Artículo 93 de la Ley de Migración [Reform of article 93 of the Immigration Law, Diario Oficial de la Federación [DOF] 13-04-2020 (Mex.), https://www.dof.gob.mx/nota_detalle.php?codigo=5591525&fecha=13/04/2020.

³⁸Ley Sobre Refugiados, Protección Complementaria y Asilo Político [Law on Refugees, Complementary Protection and Political Asylum], Diario Oficial de la Federación [DOF] 27-10-2011, última reforma publicada DOF 30-10-2014 (Mex.), https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados__Proteccion_Complementaria_y_Asilo_Politico.pdf translated in Global Regulation, Law on Refugees, Complementary Protection and Political Asylum (Oct. 30, 2014), <https://www.global-regulation.com/translation/mexico/560381/law-on-refugees%252c-complementary-protection-and-political-asylum.html>

³⁹Id.

⁴⁰Id.

⁴¹Ley General de los Derechos de Niñas, Niños, y Adolescentes [LGDNNA] [General Law of the Rights of Children and Youth], Diario Oficial de la Federación [DOF] 04-12-2014, última reforma publicada DOF 20-06-2018, <https://perma.cc/BLR4-6PX3>; see also, United Nations Children's Fund (UNICEF), Annual Report 2014, https://www.unicef.org/about/annualreport/files/Mexico_Annual_Report_2014.pdf (noting UNICEF worked with Mexican officials to ensure the law complied with international standards).

⁴²Law on Refugees, Complementary Protection and Political Asylum art. 13 (Mex.); see also, Reglamento de la Ley Sobre Refugiados y Protección Complementaria [Regulations of the Law on Refugees, Complementary Protection and Political Asylum] art. 4. I-VI, Diario Oficial de la Federación [DOF] 21-02-2012 (Mex.) http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LRPC.pdf

(2) those who have fled from their country of origin because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights, or other circumstances which have seriously disturbed public order;⁴³

(3) those who, due to circumstances that have arisen in their country of origin, or activities in which they have participated, during their time in Mexican territory, have a well-founded fear of persecution on account of race, religion, nationality, gender, membership in a particular social group or political opinion, or whose life, security or liberty could be threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.⁴⁴

Article 13 incorporates the international law definition of refugee into Mexico's domestic law⁴⁵ It separately specifies the availability of protection for refugees *sur place*, those who have become refugees after arriving in Mexico, and simultaneously expands the bases for eligibility beyond the 1951 Refugee Convention.⁴⁶ For example, Article 13 adds gender as an independent basis for seeking asylum.⁴⁷ This provision also incorporates the Cartagena Declaration's expanded definition of a refugee, converting it into a binding domestic legal obligation in Mexico.⁴⁸

The regulations implementing asylum access clarify which forms of persecution may give rise to an asylum claim in Mexico.⁴⁹ Primarily, a well-founded fear of persecution must be based on acts or facts that constitute violations of fundamental human rights, whether because of their nature or their recurrence.⁵⁰ They may include but are not limited to:

1. Acts of physical or psychological violence, sexual violence;

⁴³Id.

⁴⁴Id.

⁴⁵Kerwin, *supra* note 11, at 293-294; see also, UNHCR, UNHCR Welcomes New Refugee Law in Mexico, January 28, 2011, <https://www.unhcr.org/en-us/news/briefing/2011/1/4d42bdf19/unhcr-welcomes-new-refugee-law-mexico.html>. (affirming that the 2011 Law on Refugees, Complementary Protection, and Political Asylum is compliant with international standards).

⁴⁶Law on Refugees, Complementary Protection and Political Asylum, art. 13 (Mex.); see also, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of refugee, para. 94-96, HCR/IP/4/ENG/REV.1., <https://www.unhcr.org/4d93528a9.pdf> (defining *sur place* refugee claims).

⁴⁷Compare Law on Refugees, Complementary Protection and Political Asylum, art. 13 (III) (Mex.), (including gender as a basis for supporting persecution claims), with, Refugee Convention, *supra* note 2, art. 1(2) (defining only race, religion, nationality, membership of a particular social group or political opinion as the bases for persecution claims).

⁴⁸Law on Refugees, Complementary Protection and Political Asylum, art. 13 (III) (Mex.), (adopting expanded definition seen in Cartagena Declaration); see also, Kerwin, *supra* note 11, at 294-295. (noting there is no legal difference between refugees recognized under the 1951 Convention and the Cartagena Declaration).

⁴⁹Regulations of the Law on Refugees, Complementary Protection and Political Asylum, art. 6 (Mex.).

⁵⁰Id. art. 5.

2. Legislative, administrative, or judicial measures that have either an apparent or practical discriminatory effect;
3. Being prosecuted or penalized in a disproportionate or seriously discriminatory manner;
4. Denial of judicial protection that creates unduly severe or highly discriminatory penalties; or
5. A series of concurrent measures that constitute persecution.⁵¹

The regulations do not require the facts forming the basis for an application for protection be based on the applicant's personal experiences.⁵² As one example, beginning in 2016, COMAR began to use the Cartagena Declaration's "massive violations of human rights" subsection as the basis for recognition of Venezuelan refugee claims.⁵³

The 2011 Migratory Act differentiates between the granting of refugee status, governed by Article 13,⁵⁴ and political asylum, regulated by other provisions of that same law.⁵⁵ Political asylum in this instance refers to:

Protection granted by the Mexican State to a foreigner who it considers is persecuted for political motives or crimes, or for common crimes that are connected to political motives, whose life, liberty, or security is in danger. The protection may be requested by diplomatic or territorial channels.⁵⁶

As a result, in Mexican law and practice, the term "asylum" refers to this concept of political asylum, defined in Article 2 (I) of the 2011 Migratory Act, and is not used to refer to those who seek or acquire protection as refugees, which is defined in Article 13 (I-III) of the same law.⁵⁷

Article 15 of the same law establishes the Ministry of the Interior (Secretaría de Gobernación) as the governing body over applications for refugee status.⁵⁸ It requires that the Ministry seeks the opinion of the Ministry of External Relations in all cases prior to making the final refugee status determination.⁵⁹

⁵¹Id. art. 6.

⁵²Id. art. 5.

⁵³Kerwin, *supra* note 11, at 295.

⁵⁴Law on Refugees, Complementary Protection and Political Asylum art. 13 (I-III) (Mex.).

⁵⁵Id. art. 2 (I).

⁵⁶Id.; see also, Centro por la Justicia y el Derecho Internacional (CEJIL). 1.Ficha Técnica Sobre El Derecho a Buscar y Recibir Asilo, <https://www.cejil.org/sites/default/files/ficha1.pdf> <https://acnur.org/fileadmin/Documentos/BDL/2017/11216.pdf> (explaining that "asylum" previously was only used to reference political or diplomatic asylum whereas political refugee referred to the the protection granted to a person within the State's territory).

⁵⁷Law on Refugees, Complementary Protection and Political Asylum art. 2 (I) (Mex.); id. art. 13 (I-III).

⁵⁸Id. art. 15.

⁵⁹Id. art.15 (1).

Article 16 governs the granting of a separate category of international protection known as “complementary protection.”⁶⁰ Complementary protection is granted when the definition laid out in Article 28 is met:

Those who do not enter within the categories established in Article 13 [refugee status], but who require protection in order to avoid being returned to the territory of another country where their life is in danger or where there are well-founded reasons to believe that they would be in danger of being submitted to torture or other cruel, inhuman or degrading treatment or punishment.⁶¹

A person who is granted refugee status or complementary protection becomes a permanent resident in Mexico.⁶² In the cases of both refugee status and complementary protection, Mexican law places certain limits based on the underlying basis of protection. Specifically, persons who are seeking refugee status are barred from the protection if they have:

1. Committed crimes against peace, genocide, crimes against humanity or war crimes, as defined in international law;
2. Committed a serious crime outside of Mexico, before entering the country; or
3. Those who have committed acts contrary to the purposes and principles of the United Nations are barred from accessing these protected statuses.⁶³

Along similar lines, a person who has already been granted complementary protection can only have that protection withdrawn in two cases:

1. In cases where the individual conceals or falsifies information provided; or
2. If the circumstances which motivates the grant of complementary protection disappear.⁶⁴

The law also contains various scenarios that terminate refugee status.⁶⁵ The same provisions obligate refugees and beneficiaries of complementary protection to inform the Ministry of the Interior of any intent to return to their country of origin.⁶⁶

⁶⁰Id. art. 16 (I-IV).

⁶¹Id. art. 28.

⁶²Id. art. 48.

⁶³Id. art. 27.

⁶⁴Id. art. 32.

⁶⁵Id. art. 51.

⁶⁶Id. art. 51.

Among these scenarios, Article 33 of the 2011 Migratory Law terminates refugee status when changed circumstances in the country of origin defeat the previously established element of fear to return to one's country of origin.⁶⁷ Even in the case of changed circumstances, the applicant can overcome the withdrawal procedure by demonstrating they should maintain their protected status based on the gravity of the past persecution or because they can reestablish a well-founded fear of persecution despite the changed circumstances.⁶⁸

If a refugee commits any crimes or acts while residing in Mexico that would bar their access to the protected status upon entry, their status may be rescinded.⁶⁹ With respect to rescission, the Mexican authorities may annul a decision to recognize an individual as a refugee where there is reliable evidence that the applicant hid or falsified information in their initial application and where if the falsified information had been known at the time of adjudication, it would have led to the denial of that application.⁷⁰

Mexican law also provides for suspension of these protected statuses in cases where an individual leaves the country. If the beneficiary of either refugee protection or complementary protection leaves Mexico and seeks asylum or similar status in another country, the Mexican authorities may suspend their protected status in Mexico.⁷¹

Notably, Mexican law guarantees refugee protection to those recognized as refugees by another country but who were unable to enjoy effective protection in that country.⁷² If an individual, recognized as a refugee by another country, enters Mexico irregularly, the Mexican authorities must conduct an analysis of whether or not that person had access to effective protection in the country that recognized them as a refugee.⁷³ If the Mexican authorities determine there was effective protection available, that refugee would be ordered to depart Mexico but has the right to appeal that decision within fifteen days.⁷⁴

⁶⁷Id. art. 33 (I).

⁶⁸Id. art. 33.

⁶⁹Id. art. 34.

⁷⁰Id. art. 35.

⁷¹Id. art. 35.

⁷²Id. art. 46.

⁷³Id. art. 46.

⁷⁴Id. art. 47.

2. Applying for Refugee Status and Asylum

Every foreign person in the national territory has the right to seek recognition as a refugee, which must be submitted to COMAR or INM. The right can only be asserted within thirty days of entering the country.⁷⁵

COMAR is the primary agency mandated to implement Mexico's refugee response.⁷⁶ It was created through a presidential decree in 1980; combining representation from multiple sections of government.⁷⁷ By statute, COMAR has about three months to analyze each application for refugee status and if the application is denied, may take an additional two weeks to assess whether the applicant qualifies for complementary protection.⁷⁸ COMAR's asylum officers are responsible for the review of these applications.⁷⁹

Applicants may also file with the relevant offices of the INM.⁸⁰ The INM is a decentralized part of the federal administration whose mission is to protect the rights of migrants and foreigners.⁸¹ Regardless of which office the individual files their application with, applications must be submitted within thirty days, counted from the date of entry into the country.⁸² With respect to *sur place* claims for protection, the thirty-day period is counted from the date that the applicant learns of the facts that renders them eligible for such status.⁸³ If the applicant is unable to present the application in the relevant time period, then the time will run from when it became "materially possible" to submit the application to either authority.⁸⁴

However, filing through COMAR or INM is fraught with procedural deficiencies. Merely accessing a COMAR office is a barrier for protection seekers.⁸⁵ Given that COMAR offices are only in a handful of states, so claims outside of those areas have to be initially presented to the INM. From there, they are transferred to the COMAR Mexico City office or adjudicated by mobile field units.⁸⁶ This slows down application processing for

⁷⁵Procedimiento para ser Reconocido como Refugiado en México, Comisión Mexicana de Ayuda a Refugiados (COMAR), (Feb. 29, 2016), <https://www.gob.mx/comar/acciones-y-programas/procedimiento-para-ser-reconocido-como-refugiado-en-mexico>.

⁷⁶Schmidtke, *supra* note 23.

⁷⁷La Creacion de COMAR, COMAR, http://www.comar.gob.mx/es/COMAR/La_creacion_de_la_COMAR (last visited Sept. 8, 2021).

⁷⁸Reglamento de la Ley de Migración [Regulations of the Immigration Law] art. 45, Diario Oficial de la Federación [DOF] 28-09-2012, últimas reformas DOF 23-05-2014. (Mex.); see also, Sergio Alejandro Rea Granados, "Retos Actuales en la Implementación de la Ley Sobre Refugiados y Protección Complementaria En México: Identificación, Admisión y Acceso Al Procedimiento de Asilo," [Current Challenges in the Implementation of the Law on Refugees and Complementary Protection in Mexico: Identification, Admission, and Access to the Asylum Procedure] *Anuario Mexicano de Derecho Internacional*, vol. XVI, pp. 373-400 (2016), <https://www.sciencedirect.com/science/article/pii/S1870465417300119>.

⁷⁹Marco Normativo en Materia de Refugiados, COMAR Gobierno de México, <http://www.gob.mx/comar/documentos/marco-juridico-en-materia-de-refugiados> (consultado en Sept. 11, 2021).

⁸⁰Procedimiento para ser Reconocido como Refugiado en México, COMAR Gobierno de México, <https://www.gob.mx/comar/acciones-y-programas/procedimiento-para-ser-reconocido-como-refugiado-en-mexico> (consultado en Sept. 11, 2021).

⁸¹¿Qué Hacemos?, INM Gobierno de México, <https://www.gob.mx/inm/que-hacemos> (consultado en Sept. 11, 2021).

⁸²Law on Refugees, Complementary Protection and Political Asylum art. 18; see also, Guía del proceso de solicitud de refugio en COMAR, COMAR Gobierno de México, <https://www.gob.mx/comar/es/videos/guia-del-proceso-de-solicitud-de-refugio-en-comar> (last visited Sept. 11, 2021).

⁸³Law on Refugees, Complementary Protection and Political Asylum art. 18 (Mex.).

⁸⁴*Id.*; see also Regulations of the Law on Refugees, Complementary Protection and Political Asylum art. 19 (Mex.).

⁸⁵Kerwin, *supra* note 11, at 293-295.

⁸⁶See *id.* at 297-299.

refugee status.⁸⁷ Unless they are lucky enough to be located near a COMAR office, applicants must have their eligibility interviews by telephone, making it challenging for an applicant to effectively address complex case issues.⁸⁸

INM officials, a critical component of check-ins and receiving and transmitting documents, regularly provide erroneous legal advice to protection-seekers because of lack of training.⁸⁹ As an immigration enforcement agency, INM's role is inherently prejudiced.⁹⁰ Its agents refuse to initiate refugee status determination procedures or process humanitarian visa requests for applicants.⁹¹ Worse still, NGOs report that INM officials deceitfully inform applicants that they must be physically present at a COMAR office to be recognized as a refugee.⁹²

The law also recognizes the possibility for verbal requests for refugee status, including with the assistance of an interpreter, if necessary, in the event that a written application is impossible.⁹³ However, verbal requests for recognition of refugee status and all related manifestations by the applicant must be recorded in a written record.⁹⁴ The written application for asylum, typically submitted while in detention, must state the reasons for the application with complete and true identifying information and supporting evidence.⁹⁵

If there are derivative beneficiaries, the application should include documentary evidence of the family relationship.⁹⁶ In the case of children under eighteen, the applicant must demonstrate the family link by presenting birth certificates.⁹⁷ The applicant may submit supporting evidence at any point before the Ministry of the Interior issues its decision.⁹⁸ Additionally, the applicant may refuse to request the cooperation of their country of origin, including requesting the certification or legalization of documents by those authorities.⁹⁹

⁸⁷Asylum Access, Mexican Asylum System for U.S. Immigration Lawyers FAQ, (2019), <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf>.

⁸⁸Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), Diagnóstico sobre el acceso al procedimiento para el reconocimiento de la condición de refugiado en México, 36 (2014), <https://www.acnur.org/fileadmin/Documentos/Publicaciones/2015/9898.pdf>.

⁸⁹Id.

⁹⁰Amnesty Int'l, *supra* note, at 8.

⁹¹Sin Fronteras, Evolución y Retos del Asilo en México 59 (2016), https://sinfronteras.org.mx/wp-content/uploads/2018/12/InformeAsilo_2016_WEB_02.pdf.

⁹²ACNUR, *supra* note 89, p. 35-37.

⁹³Law on Refugees, Complementary Protection and Political Asylum art. 18 (Mex); see also, Regulations of the Law on Refugees, Complementary Protection and Political Asylum art. 17 (Mex.) (adding that if someone is unable to submit their application in written form then they are entitled to a competent public servant who will function as an interpreter or translator).

⁹⁴Law on Refugees, Complementary Protection and Political Asylum art. 18 (Mex).

⁹⁵Id. Art. 23.

⁹⁶Id. Art. 12.

⁹⁷Id.

⁹⁸Id. Art. 23.

⁹⁹Id. Art. 57.

Once a written application is filed, the applicant proceeds to an interview.¹⁰⁰ The initial interview takes place upon submission of the application, and requires the principal and derivative applicants to the reasons for requesting protection and other qualifying information.¹⁰¹

The second interview is a more detailed personal interview with the applicant, who may be accompanied by a legal representative.¹⁰² The purpose of the interview is to gather information that facilitates the analysis of the application.¹⁰³ During the interview, the Ministry of the Interior considers the social and cultural context of the applicant's origins, as well as his or her age, gender, and other particular circumstances.¹⁰⁴ The law provides for access to a interpreter as well as other specialists necessary to facilitate communication with the applicant in cases in which that support is necessary.¹⁰⁵

There are serious due process concerns with the interview process. Some are recorded, but it is far more common for COMAR officials to merely review the interview notes they take themselves.¹⁰⁶ Officers rely on memory, rather than a transcript, as the basis for their final decision.¹⁰⁷ COMAR regularly performs interviews just a few days before the forty-five day window for adjudication runs out, leading experts to believe that COMAR is reaching its eligibility decisions largely on the basis of the intake forms, rather than on the interviews themselves.¹⁰⁸

According to the 2011 Migratory Act, the Ministry of the Interior must issue an individualized, reasoned and justified decisions within forty-five days of receiving the application.¹⁰⁹ That period may be renewed once, for an additional forty-five days, if:

1. There is a lack of information of facts that the application is based on;
2. A lack of translators or other specialists to facilitate communication with the applicant;
3. The impossibility of conducting interviews due to the health of the applicant;

¹⁰⁰Id. Art. 41; Regulations of the Law on Refugees, Complementary Protection and Political Asylum art 27.

¹⁰¹ACNUR, ¿Como solicitar ser refugiado en Mexico?, <https://help.unhcr.org/mexico/como-solicitar-la-condicion-de-refugiado-en-mexico/> (consultado en Sept. 8, 2021).

¹⁰²Law on Refugees, Complementary Protection and Political Asylum art. 21.

¹⁰³Id. art. 23.

¹⁰⁴Id.

¹⁰⁵Law on Refugees, Complementary Protection and Political Asylum art. 29 (Mex.); Regulations of the Law on Refugees, Complementary Protection and Political Asylum art. 27 (Mex.).

¹⁰⁶Kerwin, *supra* note 11, at 301.

¹⁰⁷Id.

¹⁰⁸Id..

¹⁰⁹Law on Refugees, Complementary Protection and Political Asylum art. 45.

4. Request by the applicant to provide additional information that supports the application; or
5. Any other circumstance caused by chance or force majeure that makes it impossible for the Ministry of the Interior to adequately conduct the procedure.¹¹⁰

The Migration Act requires that the decision must be communicated to the applicant in writing and the authorities should ensure that the applicant understands the decision.¹¹¹ However, as this Report details infra section 3, this is rarely the case in practice.

Additionally, if the relevant authorities determine that the applicant does not meet the definition of a refugee, they must evaluate the case for eligibility for complementary protection.¹¹² A decision to grant complementary protection should be communicated in the same decision reached in the refugee status determination procedure.¹¹³ In this sense, it is the government's burden to analyze all the potential grounds for protection and to issue a well-reasoned decision explaining the rationale for a grant or denial of any individual petition in a manner the applicant can understand.¹¹⁴

As part of its evaluation of each application, the relevant authorities must request information from the Ministry of External Relations as to the prevailing conditions in the country of origin, as well as other information from other government agencies.¹¹⁵ However, the Ministry of External Relations and other relevant agencies have only fifteen days to respond, and their failure to do so is construed as a lack of opinion or information.¹¹⁶

If the decision is favorable to the applicant, the Ministry of the Interior issues the migration document that regularizes the status of the applicant.¹¹⁷ It automatically confers to the individual the status of permanent resident.¹¹⁸ If the application is denied, the individual has fifteen days from receiving the notice of the decision to present an administrative appeal.¹¹⁹ If an appeal for review is granted, COMAR has ninety calendar days to adjudicate the appeal.¹²⁰ If COMAR denies the appeal, the applicant has the right to present a judicial appeal before a judge.¹²¹

¹¹⁰Id. Art. 24.

¹¹¹Id. Art. 25.

¹¹²Id. Art. 29.

¹¹³Id. Art. 30.

¹¹⁴Asylum Access, Mexican Asylum System for U.S. Immigration Lawyers FAQ, (2019), <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf>, supra note 87, at 2.

¹¹⁵Law on Refugees, Complementary Protection and Political Asylum art. 24.

¹¹⁶Id.

¹¹⁷Id. art. 25.

¹¹⁸Id.

¹¹⁹Id.

¹²⁰ACNUR, supra note 102.

¹²¹Id.

Throughout the determination process, the applicant may proceed pro se or with legal representation.¹²² The application for refugee status is free of charge.¹²³ While in typical circumstances adjudication of protection claims is an individual process, Mexican law permits the Ministry of the Interior to make group determination of refugee status in cases of the arrival en masse of a group of persons where it concludes the entire group meets the requirements of the status.¹²⁴

While the application is pending, the applicant must physically appear before a COMAR office on a weekly basis to sign a register which serves to guarantee that they remain in the locality where the procedure was initiated.¹²⁵ If an applicant fails to appear for two consecutive weeks, the application is considered abandoned.¹²⁶

¹²²Law on Refugees, Complementary Protection and Political Asylum art. 21 (Mex.).

¹²³Id. Art. 18.

¹²⁴Id. Art. 26.

¹²⁵Id. Art. 21.

¹²⁶Id.

The IACHR interviewed Sam, an asylum seeker who fled his African home with the help of a friend. His name has been changed to protect his identity. Sam reported that without knowing Spanish, it was practically impossible to seek asylum in Mexico so he crossed into the United States. Detained for three and a half months in Mexico, he lived in a small, crowded room with other detainees. The room had no sunlight or bed to sleep on. Sam and the others slept on the cold tile floor. Mexican authorities did not provide soap, toothbrushes, toothpaste, or medication. There was no running water. Just one toilet stood in the middle of the room. Detainees could not shower. African detainees were frequently discriminated against. Guards laughed at them for their race and ethnicity. They forced detainees listen to long speeches in Spanish, and if detainees fell asleep, they were regularly hit.

“No one there knew what was happening,” Sam said. “It was like the world has forgotten you. The day they released me I wasn’t aware, I had given up because I had seen people [detainees] there for one year, one year and a half, two years. Along [the way to the United States border] I have seen a lot of people die, a fellow [African] who had two kids died at the border. I’ve seen many people die. So, if you make it and you are safe from what is happening in your country, then you just have to appreciate it.”

SOURCE: Telephone Interview with an anonymous protection-seeker from an African country, Nov. 9, 2020 (on file with authors).

3. Detention

In Mexico, all people without regular immigration status are automatically detained, as stated in the 2011 Migration Law.¹²⁷ The law technically limits initial detention of persons without regular status to fifteen working days,¹²⁸ which can be extended to sixty working days.¹²⁹ The vast majority of people are detained for months or years, however, in a blatant disregard for the law.¹³⁰ Even children are detained, despite the fact that in November 2020 Mexico reformed its legislation and prohibited the detention of children.¹³¹

¹²⁷Migratory Act, art. 68 (Mex.).

¹²⁸Id. Ch. VI, Art. 111.

¹²⁹Id.

¹³⁰Human Rights First, *Dangerous Territory: Mexico Still Not Safe for Refugees*, 5 (July, 2017), <https://www.humanrightsfirst.org/sites/default/files/HRF-Mexico-Asylum-System-rep.pdf>.

¹³¹Press Release, UNHCR, *Welcomes Mexico’s reforms to protect rights of child refugees and asylum-seekers*, Jan. 15, 2021, <https://www.unhcr.org/news/press/2021/1/6001cf0b2ed/unhcr-welcomes-mexicos-reforms-protect-rights-child-refugees-asylum-seekers.html>; see also, Colectivo de Observación y Monitoreo de Derechos Humanos en el Sureste Mexicano, *Hacinamiento y detención ilegal de niñas, niños y adolescentes y sus familias: verdaderos resultados de los “operativos humanitarios” en la frontera sur de México coordinados por el INM, Caravana Migrante*, (Marzo 26, 2021), http://caravanamigrante.iberomx.org/uploads/monitoreos_pdf/4cbe93d90dad8cab02b8cc38862c4a66.pdf

The INM's detention policy, "is an automatic measure not properly justified in individual cases based on necessity and reasonableness."¹³² As a result, detention is arbitrary under international law because, according to the UNHCR, a person is not officially charged and there are no legal safeguards in place.¹³³ The Law on Refugees, Complementary Protection and Political Asylum expressly instructs that the Ministry of the Interior should only adopt strictly necessary detention measures in each case, yet widespread detention exists.¹³⁴

In 2017, the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families noted that migrants are not sufficiently informed of the grounds for their detention or their rights and available remedies.¹³⁵ The Committee emphasized concern that migrants who seek available remedies may be indefinitely detained as a result, despite Mexico's legal prohibitions on indefinite detention of migrants.¹³⁶

The United Nations Working Group on Arbitrary Detention observed that any complaint could lead to the prolongation of the detention and reprisals by migration officials.¹³⁷ These circumstances added to the failure of the Mexican authorities to respect the basic principles that govern the detention of migrants, constitute arbitrary detentions and affect the right to seek asylum.¹³⁸

Persons who are detained in an immigration detention center (Estación Migratoria) can verbally express their intention to request protection to the facility's authorities, who usually are INM officials.¹³⁹ However, Human Rights First reported that detention in Mexico is used to punish people who request protection and deter people who express fear of returning to their country from applying at all.¹⁴⁰

¹³²UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families (UN CMW), Concluding observations on the 3rd periodic report of Mexico, para. 39, U.N. Doc. CMW/C/MEX/CO/3 (2017),

¹³³UNHCR, Committee Against Torture Reviews the Report of Mexico (Apr. 26, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24528&LangID=E>.

¹³⁴Law on Refugees, Complementary Protection and Political Asylum art. 20.

¹³⁵UN CMW, *supra* note 133; see also, Consejo Ciudadano del Instituto de Migración, *Personas en Detención Migratoria en México, Misión de Monitoreo de Estaciones Migratorias y Estancias Provisionales del Instituto Nacional de Migración*, p. 10-12 (Julio, 2017) https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MEX/INT_CESCR_CSS_MEX_28755_S.pdf

¹³⁶UN CMW, *supra* note 133; see also Press Release, Asylum Access, *El Instituto Nacional de Migración Restringe el Acceso al Programa "Alternativas al Alojamiento" y Criminaliza a las Personas Solicitantes de Asilo* (Feb. 12, 2021), <https://asylumaccess.org/el-instituto-nacional-de-migracion-restringe-el-acceso-al-programa-alternativas-al-alojamiento-y-criminaliza-a-las-personas-solicitantes-de-asilo/>.

¹³⁷UN Human Rights Council, Working Group on Arbitrary Detention, *Opinion N. 54/2019 concerning José de la Paz Ferman Cruz y Aren Boyazhyan (México)*, para. 151, UN Doc. UN A/HRC/WGAD/2019/54 (2020).

¹³⁸*Id.* para. 150, 153, 155.

¹³⁹Law on Refugees, Complementary Protection and Political Asylum art. 21, para. 3 (Mex.) (whichever authority has knowledge of a request for refugee status must immediately notify by writing the Secretary of Foreign Relations); see also, Kerwin, *supra* note 11, at 298.

¹⁴⁰Human Rights First, *supra* note 131; see also Centro de Derechos Humanos Fray Matías de Córdoba AC, et al, *Derechos Cautivos: La situación de las personas migrantes y sujetas a protección internacional en los centros de detención migratoria: siete experiencias de monitoreo desde la sociedad civil* 90-91, 111 (2015), <https://sinfronteras.org.mx/docs/inf/inf-derechos-cautivos.pdf>.

Immigration officials abuse detainees to dissuade them from claiming asylum or refugee status or convince them to accept voluntary deportation.¹⁴¹ Those who pursue asylum or refugee claims while in custody are held for months or longer.¹⁴² Further, if a protection-seeker tries to appeal an unfavorable decision, the lack of protections against indefinite detention in that specific instance creates a legal loophole.¹⁴³

Protection-seekers detained by Mexican immigration officers prior to filing an asylum or refugee application must pursue their protection cases while they are detained in migration centers. One human rights monitor explained that those held in Estaciones Migratorias essentially have two choices: to “agree” to deportation, or remain detained in atrocious conditions.¹⁴⁴ INM reported in September 2019 that it was busing dozens of protection-seekers over 1,000 miles to Tapachula, near the Guatemalan border, essentially cutting them off from U.S. legal aid.¹⁴⁵

Beyond prolonged detention, protection-seekers in these facilities face a range of abuses, including overcrowding and lack of medical care. After interviewing 50 detained migrants, a 2015 study by the Coalition Against Torture and Impunity (CCTI) found 94 percent suffered abuse while detained.¹⁴⁶ In April of 2019, the UN Committee Against Torture again expressed concerns about endemic torture in Mexican detention facilities.¹⁴⁷ Detention center conditions often rise to the level of cruel, inhuman, and degrading treatment.¹⁴⁸ Facilities are wildly overcrowded – in a visit to a center in Chiapas, Edgar Corzo Sosa, Rapporteur for Migrant Issues at the National Human Rights Commission, documented that 400 detainees were being held in a space meant for 80.¹⁴⁹

Since the COVID-19 pandemic, the situation has only grown more dire.¹⁵⁰ Detainee protests, some violent, broke out in March 2020 in five detention centers against overcrowding and unhygienic conditions that put them at risk of contracting the virus.¹⁵¹

¹⁴¹Kerwin, *supra* note 11, at 307-308.

¹⁴²Human Rights First *supra* note 131, at 2.

¹⁴³UN, Concluding observations on the seventh periodic report of Mexico, UN Doc. UN CAT/C/MEX/CO/7, (2019).

¹⁴⁴Human Rights First, *supra* note 143.

¹⁴⁵Human Rights First, Orders From Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy, 14 (Oct. 2019) <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

¹⁴⁶Human Rights First, *supra* note 143.

¹⁴⁷UNHCR, Committee Against Torture Reviews the Report of Mexico, (Apr. 26, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24528&LangID=E>.

¹⁴⁸UN - CMW, *supra* note 133, para. 41.

¹⁴⁹Overflowing Toilets, Bedbugs and High Heat: Inside Mexico's Migrant Detention Centers, N.Y. Times (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/world/americas/mexico-migration-conditions.html>

¹⁵⁰Mexico, Global Detention Project (June 3, 2020), <https://www.globaldetentionproject.org/countries/americas/mexico>.

¹⁵¹Human Rights Watch, Mexico: Free Detained Migrants Amid Pandemic, (Apr. 14, 2020), <https://www.hrw.org/news/2020/04/14/mexico-free-detained-migrants-amid-pandemic>; Frida Sanchez, Migrantes prenden fuego en albergue; hay 9 lesionados, La Razon (Abril 04, 2020), <https://www.razon.com.mx/estados/para-evitar-deportacion-migrantes-se-amotinan-en-refugio-de-piedras-negras/>.

In response, INM began releasing people and abandoning them at the closed Guatemalan border.¹⁵² In April 2021, Mexico, the United States, Guatemala, and Honduras signed bi-lateral agreements to increase the militarized security at the borders to prevent migration.¹⁵³

Article 6 of the 2011 Migratory Law establishes protection from refoulement for refugees, protection-seekers, and beneficiaries of complementary protection.¹⁵⁴ Specifically, it provides that no asylum-seeker or refugee can be rejected at the border or returned to the territory of another country where their life would be at risk or where they would be in danger of being tortured, or subjected to cruel, inhuman, or degrading treatment or punishment.¹⁵⁵

Despite non-refoulement requirements, the 2011 Migratory law appears to exclude the use of a protection claim as a defense to avoid deportation or other adverse immigration consequences.¹⁵⁶ Article 21 states that the presentation for a request for refugee status does not eliminate the legal effects of measures that were decided prior to the application.¹⁵⁷ This could lead to the removal of an individual who is entitled to protection.

The INM is required to guarantee Mexico's obligation of non-refoulement by identifying, referring, and avoiding the deportation of individuals who may need international protection in Mexico.¹⁵⁸ However, because INM is an immigration enforcement agency, protection-seekers fear being detained and deported when approaching an INM official.¹⁵⁹

¹⁵²Human Rights Watch, *supra* note 152.

¹⁵³Biden Strikes International Deal in Bid to Stop Migrants Reaching US Border, *The Guardian*, Apr. 12, 2021, <https://www.theguardian.com/us-news/2021/apr/12/biden-migration-security-deal-mexico-guatemala-honduras>.

¹⁵⁴Law on Refugees, Complementary Protection and Political Asylum art. 6 (Mex.).

¹⁵⁵*Id.*; see also, Refugee Convention, *supra* note 2, art. 33 (principles of non-refoulement).

¹⁵⁶Law on Refugees, Complementary Protection and Political Asylum (Mex.).

¹⁵⁷*Id.* art. 21.

¹⁵⁸Kerwin, *supra* note 11, at 307.

¹⁵⁹ACNUR, *supra* note 89.

4. Protection-Seeker Rights

Under the 2011 Migratory Law, applicants hold temporary visitor status while their asylum or refugee applications are pending.¹⁶⁰ With a certificate confirming that the application for protection is under review, known as a *Constancia*,¹⁶¹ the applicant may separately request the status of temporary visitor for humanitarian reasons. The law requires that all applicants for refugee status and their dependents are provided with a document confirming that their application is in process.¹⁶² While all protection-seekers are eligible for this status, it is not automatic and is only valid for up to one year, subject to renewal.¹⁶³

Persons recognized as refugees or granted complementary protection in Mexico are granted permanent residence in Mexico.¹⁶⁴ Additionally, those recognized as refugees or granted complementary protection are exempt from paying any official fees related to immigration applications and services.¹⁶⁵ Finally, Article 86 on the 2011 Migratory Law provides a path to citizenship.¹⁶⁶ To start the naturalization process, applicants must be at least eighteen years old and have been permanent residents for either two years, if a national of Latin America or the Iberian peninsula, or five years, if a national of any other country.¹⁶⁷

a. Confidentiality, Documentation, and Access to Legal Representation

The 2011 Migratory Law provides that once an application has been filed, no authority can provide information about or notify the diplomatic or consular authorities of the applicant's country of origin.¹⁶⁸ The only exception to this rule is when the applicant expressly consents to the Mexican authorities making such contact.¹⁶⁹

If a protection-seeker is granted refugee status, the Ministry of the Interior is supposed to issue documentation that regularizes the status of the applicant.¹⁷⁰

¹⁶⁰Law on Refugees, Complementary Protection and Political Asylum art. 73.

¹⁶¹UNHCR, How to Apply for Refugee Status in Mexico, <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/> (last visited Sept.8, 2021).

¹⁶²Law on Refugees, Complementary Protection and Political Asylum art. 22; Schmidtke, *supra* note 23,

¹⁶³UNHCR, *supra* note 162.

¹⁶⁴Law on Refugees, Complementary Protection and Political Asylum art. 48 (Mex.).

¹⁶⁵*Id.* art. 50.

¹⁶⁶Regulations of the Law on Refugees, Complementary Protection and Political Asylum art. 86 (Mex.).

¹⁶⁷ACNUR, Derechos de las personas solicitantes de la condición de refugiado, refugiadas y con protección complementaria en Mexico, https://static.help.unhcr.org/wp-content/uploads/sites/22/2019/05/22155818/Tarjetas-de-Derechos_Full.pdf#_ga=2.176590885.1634933011.1595094641-37990067.1594137525.

¹⁶⁸Law on Refugees, Complementary Protection and Political Asylum art.21 (Mex.).

¹⁶⁹*Id.*

¹⁷⁰*Id.* Art. 25.

This document automatically confers to the individual the status of permanent resident.¹⁷¹ With documentation, those with refugee status are, by law, conferred the same rights as Mexican citizens.¹⁷²

In practice, refugees instead face rampant discrimination, violations of their rights, and mistreatment, including torture.¹⁷³ Even with documentation, refugees are unable to receive the benefits they are entitled to by law. Mexican authorities ignore the documentation and refuse to acknowledge refugees' rights, both willfully and due to ignorance. In many cases, authorities do not recognize COMAR-issued documents.¹⁷⁴ For instance, when seeking education, many institutions do not accept COMAR documents and instead require school documents from the refugee's country of origin.¹⁷⁵

Moreover, for 90 days, protection-seekers also have access to health care and can enroll in the public health insurance policy without documentation.¹⁷⁶ However, if the government fails to issue documentation within those 90 days, then refugees must go without healthcare, even if they were granted legal status.¹⁷⁷ The same thing occurs to refugees with legal status, who are denied access to the appropriate documentation (a Unique Population Registry Code or Clave Única de Registro de Población- CURP).¹⁷⁸

Protection-seekers in Mexico have the right to receive information on the relevant procedures and the rights involved in the process.¹⁷⁹ According to Article 19 of the 2011 Migratory Law, the information should be clear, timely, and free of charge.¹⁸⁰ Mexico does not provide free legal representation to individuals in migration-related procedures, leaving migrants to navigate the complex system on their own.¹⁸¹

Some might be fortunate enough to be represented by one of the few NGOs that provide legal assistance to protection-seekers or, even more rarely, benefit from the assistance of their consulates.¹⁸²

¹⁷¹Id.

¹⁷²Id. Art. 44.

¹⁷³U.N. Special Rapporteur on Torture, Center of Hum. Rts. Fray Matías de Córdova, Migration Aff. Programme Iberoamerican Univ., Social and Institutional Justification of Torture and Ill-Treatment in Immigration Detention Centres in Mexico, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 6, (June, 2020), <https://www.ohchr.org/Documents/Issues/Torture/Call/NGOs/CDHFMC.pdf>.

¹⁷⁴Nancy Pérez García, Los Retos de la Población Refugiada en México, Sin Fronteras, (Marzo 23, 2017), <https://english.sinfronteras.org.mx/los-retos-de-la-poblacion-refugiada-en-mexico/>

¹⁷⁵Id.

¹⁷⁶ACNUR, supra note 89.

¹⁷⁷Reglamento de la Ley General de Salud en Materia de Protección Social en Salud [Regulations of the General Health Law Regarding Social Protection], Diario Oficial de la Federación [DOF] 05-04-2004, última reforma publicada DOF 17-12-2014, Art. 42 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGS_MPSS_171214.pdf.

¹⁷⁷Id.

¹⁷⁸ACNUR, supra note 89.

¹⁷⁹Law on Refugees, Complementary Protection and Political Asylum art.19 (Mex.).

¹⁸⁰Id.

¹⁸¹Rea Granados, supra note 79.

¹⁸²Id.

Although protection applicants have the right to be accompanied by legal representation during eligibility interviews, they are sometimes told when scheduling their interviews that they cannot be accompanied by counsel.¹⁸³

The 2011 Migratory Law does guarantee that the applicant, even if detained in an Estación Migratoria, should have guaranteed access to communication with their legal representative if they have one.¹⁸⁴ If the applicant is detained but does not have legal representation, the Ministry of Interior must guarantee that the person can communicate with a trusted individual.¹⁸⁵

Attorneys, however, reported being unable to access detained clients.¹⁸⁶ Burdensome procedures for recognizing legal representation before COMAR and INM prevent attorneys from visiting their clients or appearing during clients' first asylum or refugee interviews.¹⁸⁷

b. Family Unity and Access to Benefits, Education, and Employment

Mexican law guarantees family unity in multiple provisions. The 2011 Migratory Law's Article 9 guarantees protection of the organization and development of the family during the application for refugee status.¹⁸⁸ Additionally, Article 12 establishes derivative refugee status for:

The spouse, common-law partner, children, blood relatives up to the fourth degree of the principal applicant, and blood relatives up to the second degree of the spouse or common-law partner of the principal applicant, provided that these persons are economically dependent on the principal applicant.¹⁸⁹

Such derivative refugee status is available when the eligible relatives are present in Mexican territory and when there is documentary proof of the family relationship and dependence.¹⁹⁰ In the absence of such documentary evidence, the law provides for the review of alternative forms of proof including the declaration of the principal applicant.¹⁹¹ Additionally, the law establishes that Mexican authorities may authorize entry of derivative relatives into the country if the person holding refugee status demonstrates the capacity to economically support their relatives.¹⁹²

¹⁸³Alejandra Macías Delgadillo, *Personas Solicitantes de Asilo y Refugiadas*, Sin Fronteras 19, (Nov. 2012), <https://sinfronteras.org.mx/wp-content/uploads/2018/12/Personas-solicitantes-de-asilo-y-refugiadas.-La-figura-en-México..pdf>.

¹⁸⁴*Id.* art. 21.

¹⁸⁵*Id.*

¹⁸⁶Human Rights First, *supra* note 131, at. 7.

¹⁸⁷*Id.*

¹⁸⁸Law on Refugees, Complementary Protection and Political Asylum art. 9 (Mex.).

¹⁸⁹*Id.* Art. 12.

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²*Id.* Art. 58.

The 2011 Migratory Law establishes institutional assistance available to persons during the refugee status determination procedure.¹⁹³ Institutional assistance includes integration support, identity and travel documentation, job training, health services, family reunification support, and the ability to naturalize.¹⁹⁴ Article 20 states that the Ministry of the Interior must make that assistance available to support applicants that require special attention, namely:

Children and adolescents, pregnant women, the elderly, disabled persons, persons with chronic illnesses, victims of serious abuse, and any other person who might be considered to be in a situation of vulnerability according to relevant law.¹⁹⁵

The 2011 Migratory Law establishes that refugees should enjoy the same rights and guarantees enjoyed by Mexican citizens, established in the Mexican Constitution along with human rights agreements ratified by Mexico.¹⁹⁶ Specifically, Article 44 provides that refugees should receive support from public institutions:

To exercise and received respect of their rights, receive health services, receive education and, where relevant, recognition of their right to education, the right to work in any legal activity permitted by the relevant laws the right to obtain an identity and travel document issued by the Ministry of External Relations, to request family reunification, and to obtain a document that confirms the permanent resident status.¹⁹⁷

Although the law grants the same rights to refugees and asylees as Mexican citizens, they rarely reap the benefits of those protections. In June 2020, OHCHR noted that both the United Nations and the Inter-American Human Rights system reported rampant discrimination, human rights violations, and ill-treatment, including torture, of migrants and refugees in Mexico.¹⁹⁸

For instance, although protection-seekers are legally entitled to work permits,¹⁹⁹ they rarely exercise this right because they do not know that they have that right and permits are difficult to access.²⁰⁰ Moreover, COMAR does not regularly inform applicants about organizations that provide employment assistance to refugees.²⁰¹

¹⁹³Id. Art. 44, Art. 54-58.

¹⁹⁴Coordinación General de la Comisión Mexicana de Ayuda a Refugiados, Asistencia Institucional, COMAR Secretaría de Gobierno, 1-3. (access Sept. 11, 2021).

¹⁹⁵Law on Refugees, Complementary Protection and Political Asylum art. 20.

¹⁹⁶d. Art. 44.

¹⁹⁷Id.

¹⁹⁸U.N. Special Rapporteur on Torture et al., supra note 175

¹⁹⁹Migratory Act (Mex.).

²⁰⁰ACNUR, supra note 89.

²⁰¹Id.

In order to obtain and maintain their work permits, protection seekers must take time out of their days to wait in line for weekly check-ins with COMAR or the INM. This severely limits the options for stable and well-paid work; these individuals cannot maintain a regular schedule without the risk of abandoning their requests for refugee status.²⁰² After obtaining documentation, protection-seekers face employers who are unfamiliar with refugee identity documents and work authorization and discriminate them upon their status.²⁰³

There are also language barriers that affect protection-seekers' ability to access benefits, education, and employment. Many do not speak Spanish fluently – some speak Indigenous languages, Haitian Creole, or come from African or Asian countries.²⁰⁴ The asylum and refugee process must be conducted in a language the protection-seeker understands, but this requirement is routinely ignored and interpreters are rarely provided.²⁰⁵

With respect to access to health care, although the Regulations to the Health Law enable any person to enroll in the public health insurance policy without the need to present documentation, this coverage is limited to 90 days.²⁰⁶ After 90 days, if the government fails to issue the needed documents, the protection-seeker will go without medical care.²⁰⁷ Identity and travel documents the Ministry of External Relations issues or the immigration form are supposed to demonstrate regular immigration status, but are ignored.²⁰⁸ COMAR-issued documentation is not recognized by many educational institutions, making it difficult for refugees to register for and pursue education.²⁰⁹ In addition, refugees are often told that they must bring school documents from their countries of origin, which are impossible to obtain because they fled persecution and left them behind.²¹⁰

Additionally, access to other rights, benefits, and services is hindered by local and federal public administration bodies or other service entities, such as banks, that are unfamiliar with immigration-related identity documents.²¹¹

²⁰²*Id.*

²⁰³Macías Delgado, *supra* note 183, at 20.

²⁰⁴Asylum Access, *supra* note 88, at 6.

²⁰⁵*Id.*

²⁰⁶Regulations of the General Health Law Regarding Social Protection, art. 42 (Mex.).

²⁰⁷*Id.*

²⁰⁸Macías Delgado, *supra* note 183, at 20.

²⁰⁹Pérez García, *supra* note 176.

²¹⁰*Id.*

²¹¹Kerwin, *supra* note 11, at 290.

B. Systemic Barriers to Asylum and Refugee Status

1. Limited Application of the Cartagena Declaration

As discussed in *supra* part II.A.1, the expanded definition of a refugee contained in the Cartagena Declaration has been incorporated into Mexican law.²¹² In practice, however, access to protection based on these criteria is only available once authorities make a determination regarding conditions in a refugee's country of origin.²¹³ For example, the Mexican government indicated to UNHCR that it will apply the Cartagena Definition to all Honduran and Salvadoran protection-seekers. This implies *prima facie* recognition that these countries are plagued by generalized violence or massive human rights violations. Ostensibly, this would allow individuals from either country to immediately access protection if they demonstrate: (1) their nationality; (2) that they fled because of violence or human rights violations; and (3) that they are not subject to grounds for exclusion.²¹⁴ In reality, accessing protection under the Cartagena Declaration has been far more complicated.

The system for determining the safety of origin countries is biased and results in harmful decisions. The UN Committee on the Rights of Migrant Workers expressed deep concern at the increased removal rates of persons from El Salvador, Guatemala and Honduras.²¹⁵ Migrants are coerced into accepting voluntary deportation under threats of prolonged detention and abuse.²¹⁶ They frequently do not have access to legal assistance or adequate information.²¹⁷ There are no other alternative paths to regularization, which leads to many applicants abandoning their pursuit of refugee status.²¹⁸ In reality, accessing protection under the Cartagena Declaration has been far more complicated. The Committee also noted that return measures are “ordered without proper investigation of the possible risks to the person's life and physical integrity in the country of origin.”²¹⁹ COMAR adjudicators often deny asylum on the erroneous assumption that individuals can safely relocate within their home countries, such as Honduras or El Salvador, to avoid persecutors.²²⁰

²¹²See generally, Cartagena Declaration on Refugees, *supra* note 5 (reporting that Mexico was the first country to incorporate the Cartagena Declaration into domestic law).

²¹³Kerwin, *supra* note 11, at 290.

²¹⁴Asylum Access, *supra* note 88. The Mexican government has indicated to the United Nations High Commissioner for Refugees (UNHCR) that it will apply the definition in the Cartagena Declaration to all Honduran and Salvadoran asylum seekers. This implies a *prima facie* recognition that these countries are plagued by widespread violence and massive human rights violations. Therefore, an asylum seeker from these countries need only show: (i) that they are from that country; (ii) that they left their country due to violence or human rights violations and (iii) that they were not excluded for committing serious crime or human rights violations in their country of origin.

²¹⁵UN CMW, *supra* note 133, para. 43.

²¹⁶Kerwin, *supra* note 11, at 308.

²¹⁷UN CMW, *supra* note 222.

²¹⁸*Id.*

²¹⁹*Id.*

²²⁰Human Rights First, *supra* note 131, at. 7.

Additionally, in the analysis of the merits, COMAR repeatedly fails to take into account the expanded definition of a refugee in the Cartagena Declaration, despite the provision's inclusion in the domestic legal framework.²²¹ Other documented due process shortcomings include telephonic instead of face-to-face interviews, failing to conduct interviews of family members, conducting studies of the country of origin through unofficial sources, and a lack of qualified interpreters.²²²

Civil society and international organizations' advocacy prompted the Mexican government to establish a program facilitating the release of protection-seekers from detention centers to civil society shelters. Between July 2016 and December 2017, over 1,900 protection-seekers benefited from this program, according to the UNHCR.²²³ However, the authorities have very few efforts to comply with this program. These create uncertainty and protection gaps for detainees and the organizations accompanying them.²²⁴

2. Backlog of Cases before the COMAR

The Mexican government introduced the refugee protection system administered and adjudicated by COMAR in 2011.²²⁵ The number of petitions presented annually since then has increased by more than 1,000 percent, from 752 in 2011.²²⁶ to 14,596 in 2017, fueling concerns about growing backlogs.²²⁷ Protection requests exploded to 66,915 in 2019.²²⁸ and, in just the first three months of 2020, there were almost 17,800 new asylum claims,²²⁹ further exacerbating the detention crisis, discussed in Section II.A.3.

COMAR's extremely limited geographic reach is accompanied by insufficient staff to respond to protection applications²³⁰ Until late 2016, there were fewer than 20 COMAR officials in Mexico.²³¹ Now, there are reportedly between 30 and 40 officials who adjudicate asylum cases²³² In 2017, the UN provided funding to allow COMAR to hire 29 new staff members, but the rapidly increasing caseload means the agency continues to lack sufficient resources to handle the volume of cases.²³³

²²¹Sin Fronteras, *supra* note 92., at 19.

²²²*Id.*

²²³UNHCR, *supra* note 24., at 5.

²²⁴*Id.*

²²⁵Kerwin, *supra* note 11, at 290.

²²⁶*Id.*, at 300-301.

²²⁷Comisión Nacional de los Derechos Humanos (CNDH), Press Release: La CNDH hace un llamado urgente al gobierno federal ante el posible colapso del sistema de protección a refugiados en México [CNDH urgently calls on the federal government given the possible collapse of the refugee protection system in Mexico], (Feb. 25, 2018), http://www.cndh.org.mx/sites/all/doc/Comunicados/2018/Com_2018_046.pdf.

²²⁸The migratory phenomenon that the country is going through caused an increase of 125.8 percent in refugee applications, since in 2018 26,631 applications were received from people for refugee status, while at the end of 2019 they totaled 66,915. See Silvia Arellano, En 2019, peticiones de refugio aumentaron 182% por crisis migratoria: Comar, Milenio, (Jan. 1, 2021), <https://www.milenio.com/politica/crisis-migratoria-solicitudes-asilo-aumentaron-2019-comar>.

²²⁹UNHCR. Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico, (Apr. 28, 2020), <https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html>.

²³⁰Kerwin, *supra* note 11, at 308.

²³¹*Id.*

²³²*Id.*

²³³Human Rights First, *supra* note 131, at 6.

In October 2017, COMAR took the unprecedented step of stopping all asylum and refugee applications due to the lack of resources.²³⁴ Protection-seekers were banned from applying for safety in Mexico for over a year.²³⁵ The Mexican Commission for the Defense and Protection of Human Rights (CMDPDH), a human rights NGO, filed a lawsuit against COMAR for suspending its terms.²³⁶ In April 2018, a judge ruled that Mexico was violating its own constitution by failing to comply with international commitments to migrant protection and that COMAR was ordered to resume accepting applications immediately.²³⁷

Because of budgetary restrictions, COMAR cannot hire or train the needed staff to expeditiously and thoroughly review applications in line with Mexican law.²³⁸ COMAR officials are overworked. At the end of October 2019, there were 63,860 applicants awaiting determinations of refugee status.²³⁹ Of that total, 13,089 had applied in 2018 and were still waiting for a decision.²⁴⁰ Between January 2018 and October 2019, approximately 10,000 applicants abandoned their requests for protection after waiting an average of 164 days without receiving a final decision.²⁴¹ This is due to myriad reasons, such as prolonged detention, threats of indefinite detention, and abuse.²⁴² By March 2020, there were 17,202 solicitations for refugee status in Mexico, approximately 5,300 more than the same time in March 2019.²⁴³

²³⁴Dan Kosten, Mexico's Asylum System is Inadequate, National Immigration Forum (Oct. 28, 2019), <https://immigrationforum.org/article/mexicos-asylum-system-is-inadequate/>.

²³⁵*Id.*

²³⁶Carlos Heras Rodriguez, América Latina, El difícil refugio en México, El Salto Diario, (June 18, 2018), <https://www.elsaltodiario.com/america-latina/el-dificil-refugio-en-mexico>.

²³⁷*Id.*

²³⁸Asylum Access *supra* note 88, at 7.

²³⁹Asylum Access, Press Release: Cifras nuevas de la COMAR demuestran que hay más de 13.000 solicitantes de asilo esperando decisiones desde 2018 (Jan.8, 2020), <https://asylumaccess.org/cifras-nuevas-de-la-comar-demuestran-que-hay-mas-de-13-000-solicitantes-de-asilo-esperando-decisiones-desde-2018/>.

²⁴⁰*Id.*

²⁴¹*Id.*

²⁴²Kerwin, *supra* note 11, at 311.

²⁴³COMAR, Estadísticas de solicitantes de la condición de refugiado en México, Gobierno de México (Apr. 1, 2020), <https://www.gob.mx/comar/articulos/estadisticas-de-solicitantes-de-la-condicion-de-refugiado-en-mexico>.

3. Additional Barriers for Child Protection-Seekers²⁴⁴

The detention of children contradicts Mexico's National Child Rights Law, which prohibits the detention of unaccompanied and accompanied migrant children.²⁴⁵ International agencies, nonetheless, have confirmed the routine administrative detention of child migrants in Mexico.²⁴⁶ Many children are referred to detention centers (Estaciones Migratorias) or to closed shelter environments that effectively constitute detention.²⁴⁷ In fact, detention of migrant children and adolescents in Mexico increased by 900 percent between 2011 and 2016, according to the UN Committee on Migrant Workers.²⁴⁸

In November 2020, Mexican Congress approved a reform to prohibit immigration detention for children.²⁴⁹ This reform went into effect on January 11, 2021 but its implementation during the COVID-19 pandemic has been problematic and confusing.²⁵⁰ In practice, children continue to be detained in closed shelters until they are forcibly returned to their countries of origin.²⁵¹

INM officials who apprehend unaccompanied children frequently fail to fulfill their duty to inform them of their right to apply for protection.²⁵² Officials do not treat children's verbal requests for protection as sufficient requests for the recognition of refugee status.²⁵³ The INM has Child Protection Officers (Oficiales de Prorección a la Infancia - OPI) responsible for examining a child's potential protection claims and carrying out trained assessments of children's best interests.²⁵⁴ However, most immigrant children never come into contact with OPIs while they are detained,²⁵⁵ in part because OPIs are overworked and not adequately trained in explaining the legal process to or otherwise supporting traumatized children.²⁵⁶

²⁴⁴The term is used to refer to both child refugees and asylum seekers.

²⁴⁵Reglamento de la Ley General de los Derechos de Niñas, Niños y Adolescentes, Diario Oficial de la Federación, [DOF] 02-12-2015, art. 111. (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5418303&fecha=02/12/2015.

²⁴⁶Human Rights First, *supra* note 131, at 9.

²⁴⁷Amnesty Int'l., *Pushed Into Harm's Way: forced return of unaccompanied migrant children to danger by the USA and Mexico*, 9 (June 11, 2021), <https://www.amnestyusa.org/wp-content/uploads/2021/06/PUSHED-INTO-HARMS-WAY.pdf>.

²⁴⁸UN CMW, *supra* note 133, at para. 37.

²⁴⁹UNHCR, *supra* note 132.

²⁵⁰Institute for Women in Migration (MUMI) et al. *Implementation of the Mexican Legal Reforms that Prohibit Detention of Accompanied and Unaccompanied Migrant Children* (Mar. 2021), <https://imumi.org/wp-content/uploads/2021/03/Asylum-migrant-children-march-2021.pdf>.

²⁵¹Amnesty Int'l., *supra* note 255.

²⁵²Rea Granados, *supra* note 79, at 383-386.

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵*Id.*

²⁵⁶Georgetown Law Human Rights Institute, *The Cost of Stemming the Tide: How Immigration Enforcement Practices in Southern Mexico Limit Migrant Children's Access to International Protection* 55 (Apr. 13, 2015), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf.

Another challenge with the best interest determinations (BIDs) of children has to do with the structure of the INM itself. The law places OPIs within INM, the agency in charge of immigration enforcement. This means the agency focuses more on detention and deportation than the actual needs of children, distorting the OPI's neutrality and capacity to conduct BIDs with impartiality.²⁵⁷

Even if a child is properly screened, they do not always explain in detail why they left their countries of origin, especially if they do not know that OPIs are different from INM agents.²⁵⁸ Children are traumatized from being detained, as studies show that detained children in custody have an increased risk of developing depression, post-traumatic stress disorder, and anxiety disorders because of detention.²⁵⁹ Further, children are unable to adequately focus or process information provided to them or answer questions asked of them,²⁶⁰ therefore simply not understanding what they are told.²⁶¹

The consistent lack of legal advice and other assistance for children seeking protection leaves these kids to navigate the Mexican protection system themselves.²⁶² Few children are fortunate enough to be represented by one of the few NGOs providing legal assistance to protection-seekers.²⁶³ The application and resolution processes for refugee status are not designed to be child-friendly, putting these traumatized children in an impossible situation.²⁶⁴

Migrant children should be transferred to shelters operated by the National System for Integral Family Development (Desarrollo Integral de la Familia - DIF), but instead routinely are being held in detention centers.²⁶⁵ This requirement can be circumvented only when no space is available in any nearby federal, state, or local DIF shelter or if children are accompanied and are to stay in detention at the Estación Migratoria with family members.²⁶⁶ In practice, however, detention in an Estación Migratoria is usually the first response.

²⁵⁷Id.

²⁵⁸Rea Granados, *supra* note 79.

²⁵⁹Julie M. Linton, Marsha Griffin, and Alan J. Shapiro, Detention of Immigrant Children, *Pediatrics*, 139, (May 2017), <https://doi.org/10.1542/peds.2017-0483>; Sarah Mares, Mental Health Consequences of Detaining Children and Families Who Seek Asylum: A Scoping Review, *European Child & Adolescent Psychiatry* (September 2020), <https://doi.org/10.1007/s00787-020-01629-x>.

²⁶⁰Georgetown Law Human Rights Institute, *supra* note 256.

²⁶¹Id.

²⁶²Human Rights Watch, Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children 71-78 (Mar. 31, 2016), <https://www.hrw.org/es/report/2016/03/31/puertas-cerradas/el-fracaso-de-mexico-en-la-proteccion-de-ninos-refugiados-y>.

²⁶³Georgetown Law Human Rights Institute, *supra* note 256.

²⁶⁴Id.

²⁶⁵Human Rights Watch, *supra* note 270, at 80.

²⁶⁶Georgetown Law Human Rights Institute, *supra* note 256.

Children also report that INM officials tell them that applying for protections will result in their detention being prolonged while their cases are being evaluated.²⁶⁷ Human rights organizations documented instances in which children and parents decided not to submit an application, or withdrew their ongoing evaluations, to avoid remaining in custody.²⁶⁸

While in INM facilities or DIF centers, children are denied freedom of movement and do not attend school.²⁶⁹ Although children are guaranteed the right to rest, play, and engage in activities under the UN Convention on the Rights of the Child, detained migrant children are these denied opportunities.²⁷⁰ Detention centers do not meet minimum space and conditions requirements to ensure safe environments for children.²⁷¹ Time for outdoor recreation is restricted, and in many cases not allowed at all.²⁷²

4. Discrimination in Access to Rights

The UN Committee on Migrant Workers noted “reports of increasing xenophobia in social and institutional contexts” in September 2017 leading to discrimination against migrants and protection-seekers.²⁷³ In June 2020, OHCHR noted that both the United Nations and the Inter-American Human Rights system reported rampant discrimination, human rights violations, and ill-treatment, including torture, of migrants and refugees in Mexico.²⁷⁴ This discrimination is visible in the difficulties that many protection-seekers face when trying to exercise their rights as guaranteed by Mexican law.

When a vulnerable applicant has been provisionally admitted into Mexico or is being held in an Estación Migratoria, the Ministry of the Interior must analyze which measures would best serve the applicant, in conformity with the specifics of each case.²⁷⁵ With regard to children and adolescents, there should be a best interest of the child determination.²⁷⁶

²⁶⁷Id. at 49.

²⁶⁸Id., at 61-63.

²⁶⁹Georgetown Law Human Rights Institute, *supra* note 256.

²⁷⁰Consejo Ciudadano del Instituto Nacional de Migración, *Personas en Detención Migratoria en México: Misión de Monitoreo de Estaciones Migratorias y Estancias Provisionales del Instituto Nacional de Migración 140* (July 2017), https://www.gob.mx/cms/uploads/attachment/file/281218/CCINM-Informe_Final_Monitoreo.pdf.

²⁷¹Id.

²⁷²Id. at 141

²⁷³UN CMW, *supra* note 133, at para. 25.

²⁷⁴U.N. Special Rapporteur on Torture et al., *supra* note 175.

²⁷⁵Law on Refugees, Complementary Protection and Political Asylum art. 20 (Mex.).

²⁷⁶Id.

In practice, these laws do little to protect vulnerable groups. To avoid detention, almost all women and LGBTQI+ people enter Mexico by avoiding migration paths that avoid the inspection and apprehension by immigration officials.²⁷⁷ The routes include towns that often are remote, exposing them to high risks of assault and sexual and gender-based violence.²⁷⁸

The UNHCR found that migrant, asylum-seeking, and refugee women are vulnerable to violence in Mexico because of their national origin and legal status, despite the protection framework.²⁷⁹ Irregular migration status reduces access to services and justice. Public health and immigration authorities tend to be unaware of the rights that asylum-seeking and refugee women and girls are entitled to in Mexico.²⁸⁰

5. Restrictions on Residence and Movement

The 2011 Migratory Law authorizes the Ministry of the Interior to restrict the residence of applicants for protection, refugees or those granted complementary protection.²⁸¹

Protection-seekers are provided a temporary document that confirms their application is pending. According to the COMAR, that document is valid for 45 business days and indicates the Mexican state that the applicant must remain in while their status is determined.²⁸² Protection-seekers are barred from leaving the Mexican state in which they presented their application without authorization from COMAR or until they receive a positive adjudication of their application.²⁸³

Authorization for transfer of an application within Mexico is generally only permitted for personal safety reasons or with proof of relation to a family member in another part of the country who can demonstrate the ability to financially support the applicant.²⁸⁴ Because most applications for protection are presented along the southern and northern borders, this restrictive policy often forces vulnerable applicants to remain in situations where they are exposed to risks.²⁸⁵

²⁷⁷UNHCR, *supra* note 24, at 4.

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰*Id.*

²⁸¹Law on Refugees, Complementary Protection and Political Asylum art. 49 (Mex.).

²⁸²*Id.*

²⁸³Kerwin, *supra* note 11, at 310.

²⁸⁴*Id.*

²⁸⁵Asylum Access, *supra* note 88, at 5.

The southern border region is economically poor, has poor infrastructure, and fewer job opportunities than the rest of the country.²⁸⁶ There is also a significant Central American gang presence along with other agents of persecution in the southern states.²⁸⁷ The northern border states are plagued by violent crime, kidnappings, and drug cartels.²⁸⁸ In both parts of Mexico, with a significant backlog of case adjudication, protection-seekers face prolonged dangerous and even unlivable living conditions.²⁸⁹

6. Violence and Torture Against Protection-Seekers, Human Rights Activists, and Journalists

The Human Rights Committee 2019 Concluding Observations Report documented numerous severe risks for migrants and protection-seekers in Mexico.²⁹⁰ Overall, a continued rise in the rates of homicide and extrajudicial killings place everyone at heightened risk.²⁹¹ For migrants specifically, the Committee found credible reports of migrants, especially those with irregular status, being subjected to torture, serious physical abuse, enforced disappearances, extortion, trafficking, and murder.²⁹²

The Los Angeles Times reported on a 35-year-old Salvadoran man who was brutally murdered in December 2019 while waiting in Tijuana for an outcome in his U.S. asylum case.²⁹³ Trapped in the city for over seven months because of the U.S. Migrant Protection Protocols (MPP), the man and his family told U.S. officials repeatedly that they were not safe in Tijuana, but were sent back anyway. In the first six months of 2019, reported kidnappings in Ciudad Juárez rose by one hundred percent.²⁹⁴ In late July 2019, a Cuban protection-seeker was stabbed to death in the city as they waited, per the U.S. metering policy, to be among the limited number of people allowed into the United States each day.²⁹⁵ Their were names listed among thousands of others on a metering list. While this type of violence against migrants in Mexico is not new, the region's new migration patterns and policies raise the stakes for protection-seekers in Mexico.²⁹⁶

²⁸⁶Id.

²⁸⁷Id.

²⁸⁸Id.

²⁸⁹Id.

²⁹⁰Human Rights Committee, Concluding Observations on the sixth periodic report of Mexico, U.N. Doc. UN CCPR/C/MEX/CO/6, para. 32 (2019).

²⁹¹Id., at para.18.

²⁹²Id., at para 32.

²⁹³Wendy Fry, Central American Migrant Who Sought U.S. Asylum Slain in Tijuana, Los Angeles Times, (Dec. 12, 2019), <https://www.latimes.com/california/story/2019-12-12/attorney-central-american-in-mpp-program-murdered-in-tijuana>.

²⁹⁴Human Rights First, Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process 1 (Aug. 2019), <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

²⁹⁵The Center for U.S. Mexican Studies & The Strauss Center for International Security Law, Metering & Covid-19, at 3 (Apr. 2020), https://usmex.ucsd.edu/_files/MeteringCovid-19.pdf.

²⁹⁶See U.N. Human Rights Committee, *supra* note 298; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Mission to Mexico, U.N. Doc. A/HRC/26/36/Add.1, para. 72, 74 (Apr. 28, 2014); see also Mexico Travel Advisory, U.S. Dept. of State (Sept. 8, 2020) (advising U.S. citizens to not travel to Colima, Guerrero, Michoacán, Sinaloa, or Tamaulipas states due to crime).

The Mexican judicial system has not been able to overcome the “twin crises of atrocity and impunity.”²⁹⁷

Migrant shelters and populations remain primary targets for the highly organized criminal organizations operating in Mexico and across the Mexico-U.S. border.²⁹⁸ TWhen attacked, migrants are afraid to bring cases to the police and when they do, they lack access to legal representation.²⁹⁹ As an example, the UNHCR credits the low reporting of violence against women, despite the reality that 7 out of every 10 migrant women are survivors of violence, on the lack of access to legal representation.³⁰⁰

Protection-seekers in Mexico face acute risks of murder, kidnapping, disappearance, sexual assault, trafficking, and other grave abuses.³⁰¹ They are targeted not only due to their inherent vulnerabilities as refugees and migrants, but also because of their nationality, race, gender, sexual orientation, and gender identity.³⁰² In 2017, Mexico’s National Commission on Human Rights (Comisión Nacional de los Derechos Humanos – CNDH) issued a report on mass graves in Mexico, which documented 312 registered deaths and disappearances of migrants in 2017.³⁰³

In 2019, the Human Rights Committee expressed concern about the numerous assaults and fatal attacks on human rights defenders and journalists.³⁰⁴ Just the year before, Amnesty International reported that 75% of INM detainees were not informed of their right to seek asylum.³⁰⁵ Amnesty International surveyed nearly 300 persons who had been detained by INM field agents, and found only 10 cases where protection-seekers were properly informed of their rights.³⁰⁶

²⁹⁷Open Society Justice Initiative, *Corruption That Kills: Why Mexico Needs an International Mechanism to Combat Impunity* 52 (2018), <https://www.justiceinitiative.org/uploads/5071ab37-003f-46b1-9e1f-700bbdae34a3/corruption-that-kills-en-20180502.pdf>.

²⁹⁸*Id.*, at 44.

²⁹⁹Human Rights First, *Marking One Year of the Horrific “Remain in Mexico” Policy- Over 800 Violent Attacks on Asylum-Seekers* (Jan. 22, 2020), <https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers>.

³⁰⁰UNHCR, *supra* note 24, at 4.

³⁰¹Human Rights First, *supra* note 131, at 3.

³⁰²*Id.* at 2.

³⁰³*Id.* at 3.

³⁰⁴UN Concluding observations on the seventh periodic report of Mexico, Doc. UN CAT/C/MEX/CO/7, (2019). para. 62.

³⁰⁵Amnesty Int’l, *Mexico: Overlooked, Underprotected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum* (Jan.2018)5,23, <https://www.refworld.org/docid/5a69e3c34.html>.

³⁰⁶*Id.* at 10, 23

The UN Committee on Migrant Workers expressed in 2017 its particular concern about violations of the rights of migrant activists.³⁰⁷ They reported that this sub-group “are subjected to violence and threats by organized crime groups and trafficking networks, sometimes in collusion with the authorities” Immigration officials, including government and private security forces that handle migration control activities, themselves reportedly harassed and attempted to delegitimize the work of these activists.³⁰⁸

In a September 2019 report, Frontline Defenders, Red TDT and PRAMI described more than 40 instances in Mexico of harassment, threats, or violent acts against migrant shelters or against human rights defenders working with migrants.³⁰⁹ The report describes multiple cases of false imprisonment of migrant rights defenders, such as Irineo Mujica, who was arrested and falsely accused of human trafficking in Pueblo Sin Fronteras, Mexico.³¹⁰ After his release due to lack of evidence, his case was appealed, and the INM and National Guard attempted to detain him in order to prevent him from appearing for his appeal hearing.³¹¹ In August 2019, two armed men threatened him at his home.³¹² Mujica was also the victim of attempted arson of his home and vehicle in Tijuana.³¹³ Moreover, the report describes dozens more attacks and threats against migrant defenders and the shelters protecting them, showing how prevalent an issue migrant defender safety is in Mexico.³¹⁴

C. Conclusion

Though robust on its face, Mexico’s legal framework fails to achieve its goals to protect protection-seekers and other vulnerable migrants in every way. Although the laws are on the books, they are consistently ignored by Mexican officials, whether purposefully or ignorantly. Systemic barriers further bar access to the legal protections that are supposedly guaranteed. The reality facing protection-seekers includes the risk of enforced disappearances, intimidation, militarized borders, inhumane and prolonged detention, and deportation back to countries where their lives are at risk. Mexico continuously fails to mitigate these dangers and abuses.

The challenge Mexico faces is giving meaningful effect to asylum and refugee laws. Changing migration and the global COVID-19 pandemic, in addition to humanitarian crises in the Americas and across the world, mean that asylum and international protection are more critical than ever. Mexico potentially can provide this protection, but so far has chronically underperformed to protect protection-seekers and other vulnerable migrants within its borders.

³⁰⁷U.N. CMW, *supra* note 133, at para. 43.

³⁰⁸*Id.*

³⁰⁹Frontline Defenders, Red TDT & PRAMI, *Defenders Beyond Borders: Migrant Rights Defenders Under Attack in Central America, Mexico & the United States* 25 (Sept. 2019), https://www.frontlinedefenders.org/sites/default/files/frontline_defenders_mexico_english_v2.pdf.

³¹⁰*Id.*

³¹¹*Id.*

³¹²*Id.*

³¹³*Id.*, at 26.

³¹⁴*Id.*, at 19-33.

III. Availability of International Protection in Guatemala

Guatemala is bound by both its domestic legislation and international agreements with respect to migrant protection-seekers. In 2016, the Congress of the Republic of Guatemala restructured Guatemala's asylum legal framework through Decreto No. 44-2016 – Código de Migración. In 2019, the National Migration Authority issued implementing regulations.³¹⁵ The new law and regulations streamlined the process for applying for refugee status and other forms of international protection, and explicitly outlined the rights and protections afforded to protection-seekers.³¹⁶ Protection-seekers, however, still face a number of barriers to obtaining refugee status. The new laws, while an improvement, still contain a number of gaps, including insufficient due process protections.³¹⁷ Additionally, protection-seekers face lengthy bureaucratic delays, lack of access to government documentation, harassment by police officers, uninformed and underqualified immigration officials, and risk of detention.³¹⁸

³¹⁵Decreto No. 44-2016 – Código de Migración [Immigration Code], Diario de Centro America [DCA] 18-10-2016 (Guat.), formato PDF, <https://igm.gob.gt/wp-content/uploads/2017/09/CODIGO-MIGRACION-DTO-44-2016.pdf>; Acuerdo de Autoridad Migratoria Nacional No. 2-2019 - Reglamento de Procedimiento para la protección, determinación y reconocimiento del estatuto del refugiado en el Estado de Guatemala [Regulation No. 2-2019], 2019 (Guat.), <https://igm.gob.gt/wp-content/uploads/2017/09/ACUERDO-2-2019-Reglamento-Refugiado-1.pdf>; Acuerdo de Autoridad Migratoria Nacional No. 7-2019 – Reglamento General del Código de Migración [Regulation No. 7-2019], 2019 (Guat.), https://igm.gob.gt/wp-content/uploads/2017/09/ACUERDO-AMN-7-2019_Plantilla.pdf.

³¹⁶See *infra* Part III.A.3. The Guatemalan Immigration Code identifies asylum seekers as applicants for refugee status. For simplicity, we refer to those applying for refugee status as protection-seekers.

³¹⁷See *infra* Part III.B.5.

³¹⁸See *infra* Part III.B.

*They are not protected at all. The institutions that need to address the issues and pass rules or regulations related to asylum are not doing that. Asylum seekers are pretty unprotected.*³¹⁹

*Mr. Carlos Eduardo Woltke Martínez,
Ombudsman for Migrants within the Human Rights Ombudsman*

A. Overview of the Guatemalan System for International Protection

1. Applicable Legal Framework

The Guatemalan Constitution recognizes an individual's right to seek asylum in Guatemala and guarantees non-refoulement from persecution.³²⁰ The Guatemalan Constitution also establishes the preeminence of international human rights treaties over domestic law.³²¹ Guatemala acceded to the 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees in September 1983.³²² Guatemala initially made reservations to the 1951 Convention and its Protocol,³²³ but in 2007, Guatemala withdrew its reservations.³²⁴

Guatemala is also a party to the Cartagena Declaration on Refugees of 1984, which it ratified on September 14, 2001.³²⁵ Through legislation, Guatemala adopted the definition of refugee stated in the Cartagena Declaration, a broader definition than the 1951 Convention and its Protocol.³²⁶ In 2016, the Guatemalan Congress passed into law the current Migration Code, Decree Number 44-2016, but the implementing regulations were not adopted until 2019.³²⁷ The series of regulations, or *acuerdos*, interpret and provide guidance on the functions of the various administrative bodies and procedures to implement and ensure the rights established in the Migration Code.³²⁸

³¹⁹Interview with Carlos Eduardo Woltke Martínez, the Guatemalan Ombudsman for Migrants within the Human Rights Ombudsman ("Procurado de los Derechos Humanos"), Nov. 16, 2020, source on file with the authors.

³²⁰Constitución Política de la República de Guatemala [Guatemalan Constitution], 1985, reformada por Acuerdo legislativo No. 18-93 del 17-11-1993, art. 27 https://www.oas.org/dil/esp/Constitucion_Guatemala.pdf.

³²¹Guatemalan Constitution, art. 46, (Guat.).

³²²UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 3 (2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; see also UNHCR, UNHCR Submission on Guatemala: UPR 28th Session, March 2017 [hereinafter UNHCR Submission on Guatemala] <https://www.refworld.org/docid/5a12ae190.html>.

³²³Id.

³²⁴In a communication received on April 26, 2007, the Government of the Republic of Guatemala notified the Secretary-General that it has decided to withdraw the reservation and declaration made upon accession to the Convention. Id.

³²⁵Ministerio de Relaciones Exteriores, Acuerdo Gubernativo No. 383-2001 - Reglamento para la Protección y Determinación del Estatuto de Refugiado en el Territorio del Estado de Guatemala, Sept. 14, 2001 (Guat.), <https://www.acnur.org/fileadmin/Documentos/BDL/2002/1410.pdf>; Inter-American Comm'n H.R., Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, IACHR Doc. 46/15, 51 (2015) [hereinafter IACHR 2015 Report].

³²⁶UNHCR Submission on Guatemala, supra note 333, at 1; see also IACHR 2015 Report, supra note 336, at 49.

³²⁷Immigration Code (Guat.); Regulation No. 2-2019 (Guat.); Regulation No. 7-2019 (Guat.).

³²⁸See generally id.

National Migration Authority Agreement No. 2-2019 (Regulation No. 2-2019) set forth the rules and procedures for refugee recognition in Guatemala.³²⁹

The 2016 Migration Code restructured the immigration system by creating three bodies: the National Migration Authority (AMN), the Guatemalan Institute of Migration (IGM), and the National Council of Attention to the Migrant of Guatemala.³³⁰ The AMN has the authority to enact immigration policy, while the IGM is responsible for implementing the policies and regulations promulgated by the AMN.³³¹ Importantly, the AMN has the sole authority to decide applications for refugee status.³³² The 2016 Migration Code authorized the AMN to create the National Commission for Refugees (la Comisión Nacional para Refugiados, or CONARE), which is an advisory body to the AMN and completes initial investigations of applications for refugee status, extensions of refugee status, and refugee status terminations.³³³ The CONARE then issues opinions and recommendations to the AMN regarding the ultimate decision on refugee status, extension, or cessation.³³⁴ Importantly, in early 2021, Guatemala with the support of the UNHCR, created a new office within the IGM called the Refugee Status Recognition Department (DRER by its Spanish acronym) with the aim of increasing Guatemala's capacity to process refugee applications and support refugees while their applications are pending.³³⁵

³²⁹See Regulation No. 2-2019, art. 1 (Guat.).

³³⁰Immigration Code, art. 113 (Guat.).

³³¹Id. at art. 114.

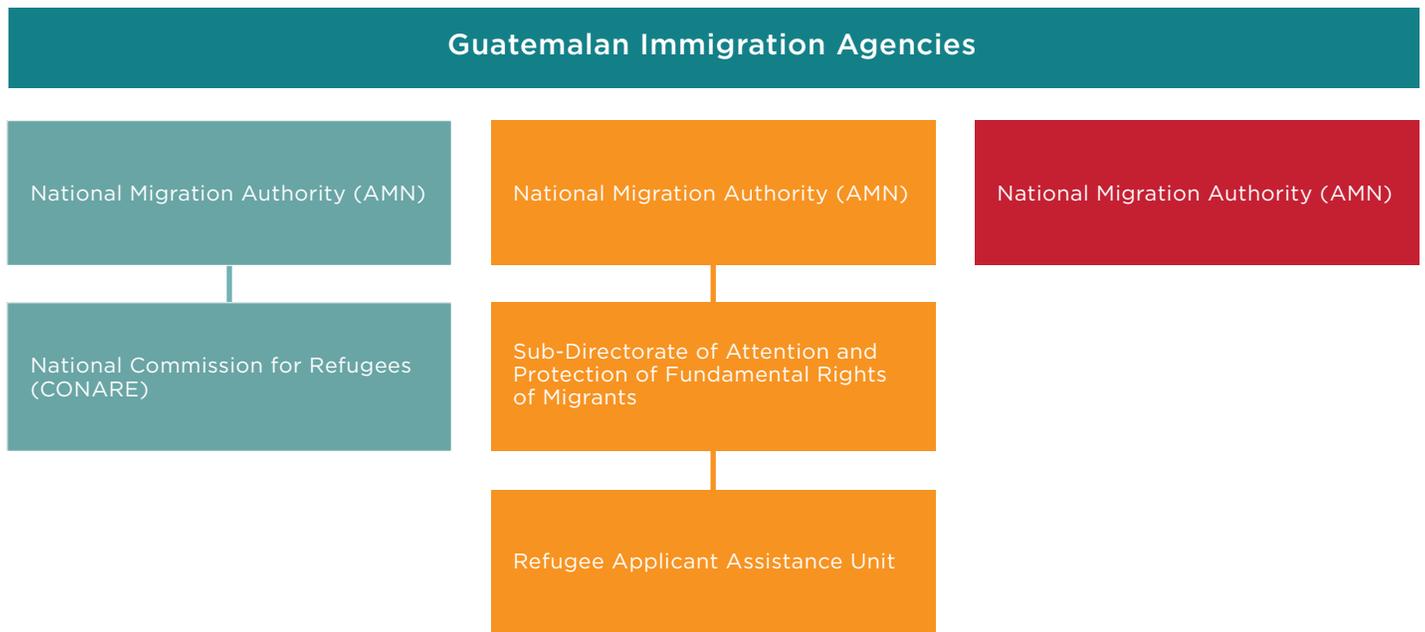
³³²Id at art. 117, 177. (the AMN is comprised of Guatemala's: Vice President; Ministers of Foreign Affairs, Social Development, Labor and Social Welfare, and the Interior; the Director of the Guatemalan Institute of Migration; and the Executive Secretary of the Migrant Assistance Council of Guatemala); Refugees Int'l & Human Rights Watch, *Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement (May 2020)*, <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5ec3f0b370656c62ed7daa24/1589899466780/Guatemala+ACA+Report+-+May+2020+-+FINAL.pdf>.

³³³Immigration Code, art. 177 (Guat.); Regulation No. 2-2019, art. 14 (Guat.).

³³⁴Id.

³³⁵UNHCR. UNHCR Welcomes Expansion of Guatemala's Asylum Capacity (Feb. 10, 2021), <https://www.unhcr.org/en-us/news/press/2021/2/6023f7d918/unhcr-welcomes-expansion-guatemalas-asylum-capacity.html>.

Figure 2: Guatemalan Immigration Agencies (per the 2016 Migration Code & accompanying acuerdos)



Article 4 of Regulation No. 2-2019 defines three categories of persons who may request refugee status:

- a. Any person who, due to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a certain social group or political opinions, is in the country and cannot, or because of said fears, does not want to avail themselves of the protection of the country of their nationality;
- b. Whoever fled his [or her] country because his [or her] life, security or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order;
- c. Whoever suffers from persecution through sexual violence or other forms of gender or sexual orientation persecution that results from human rights violations contained in international agreements to which the State of Guatemala is a party.³³⁶

³³⁶Regulation No. 2-2019, art. 4 (Guat.).

The 2019 regulation defines “refugee status” as the “[e]xtraordinary migratory status” of a foreign person who, in accordance with the 2016 Migration Code, is recognized as a refugee by the AMN.³³⁷ Further, refugee status and refugee applicant status are “extendable” to the spouse and relatives of the applicant or refugee.³³⁸ “Well-founded fear” is defined as the events amounting to persecution that, because of their nature or frequency, would or could put the life, safety, or freedom of the person at risk.³³⁹

Those who have committed war crimes or crimes against humanity cannot be granted refugee status.³⁴⁰ Neither can those who have committed “particularly serious crime[s]” outside of Guatemala, those who seek refugee status to evade prosecution in another country, or those who are “guilty of acts contrary to the purposes and principles of the United Nations” be granted refugee status.³⁴¹

Refugee status is not permanent in Guatemala, and the 2016 Migration Code details the circumstances in which a refugee can have their status revoked. Immigration authorities can seek the termination of refugee status when a refugee does one of the following: Voluntarily renounces one’s refugee status; voluntarily accepts the protection of one’s country of origin; voluntarily recovers one’s lost nationality; voluntarily acquires a new refugee status or nationality and claims the protection of the country of that new refugee status or nationality; voluntarily establishes oneself in the country of persecution or feared persecution; or is unable to continue claiming the protection of Guatemala because of changed circumstances in the country of origin.³⁴² In all circumstances, the CONARE will investigate the reasons for possible cessation of refugee status.³⁴³ However, a refugee is only entitled to a hearing for the potential loss of status under changed circumstances in the country of origin.³⁴⁴ Even then, a refugee is not entitled to be present for a ruling by the CONARE.³⁴⁵ Should the AMN (or the CONARE in situations of cessation due to changed circumstances) declare the termination of one’s refugee status, the person has 30 days to regularize their immigration status or leave the country.³⁴⁶

³³⁷Id. art. 2(j).

³³⁸Id. A refugee or applicant for refugee status must formally apply for the extension of status to his or her spouse or relatives. Regulation No. 2-2019, art. 26 (Guat.).

³³⁹Id. art. 2(i).

³⁴⁰Immigration Code, art. 47(a) (Guat.).

³⁴¹Id. art. 47(b)-(c); Regulation No. 2-2019 (Guat.) has clarified that the exclusion of a foreigner for refugee status due to the above prohibitions does not extend to the foreigner’s family members. Regulation No. 2-2019, art. 5 (Guat.).

³⁴²Id. art. 184.

³⁴³Id., arts. 22-23.

³⁴⁴Immigration Code, art. 184(f) (Guat.); Regulation No. 2-2019, art. 23 (Guat.).

³⁴⁵Regulation No. 2-2019, art. 23(b) (Guat.).

³⁴⁶Id., art. 24 .

Separate from an application for refugee status, migrants may enter Guatemala for humanitarian reasons and apply for “extraordinary immigration status of permanence for humanitarian reasons.”³⁴⁷ The duration of such status depends on the circumstances for seeking humanitarian protection and will last until the humanitarian need ends.³⁴⁸

As a result of seeking refugee or humanitarian status, migrants can be granted one of three “permanence statuses:” Provisional permanence status; special care permanence status; or humanitarian stay status.³⁴⁹ These three “permanence statuses” provide legal status for protection-seekers, but they are limited in their duration. A fourth status, temporary residence status, is only available to unaccompanied children and those granted refugee status, and is valid for up to five years, providing more stability.³⁵⁰

Provisional Permanence Status	Special Care Permanence Status	Humanitarian Stay Status	Temporary Residence Status
<ul style="list-style-type: none"> • Available to asylum seekers with pending refugee status applications. • Valid for 30 days, renewable. 	<ul style="list-style-type: none"> • Available to vulnerable migrants (e.g., victims of torture, trafficking, sexual violence). • Duration of status determined on a case-by-case basis. 	<ul style="list-style-type: none"> • Available to migrants seeking safety in Guatemala for humanitarian reasons (e.g., fleeing natural disaster or armed conflict). • Valid for duration of humanitarian crisis. 	<ul style="list-style-type: none"> • Available to unaccompanied children upon submitting an application for refugee status and to adults granted refugee status. • Valid for up to five years.

Applicants for refugee status are provided provisional permanence either upon formal request from a Guatemalan government authority or upon proof of one’s formal request for refugee status.³⁵¹ Provisional permanence is valid for 30 days and is renewable.³⁵² Migrants eligible for special care permanence status are: Victims of torture, human trafficking, or sexual violence; unaccompanied children; and the elderly or those living with mental illness.³⁵³ The duration of the status is dependent on the specific circumstances of the migrant and the decision of a judge or the adjudicating authority.³⁵⁴ Migrants who meet one of the categories of humanitarian reasons will be granted humanitarian stay status, which is only valid for as long as the humanitarian reason is a present concern.³⁵⁵

³⁴⁷Regulation No. 7-2019 (Guat.); Immigration Code, art. 85 (Guat.).
³⁴⁸Id. arts. 22, 55 (Guat.); the Immigration Code lists circumstances that are considered humanitarian reasons. Immigration Code, art. 68 (Guat.).
³⁴⁹Immigration Code, art. 81 (Guat.).
³⁵⁰Immigration Code, art. 48 (Guat.); Regulation No. 7-2019, arts. 50, 83 (Guat.); see Regulation No. 2-2019, art. 17(1)(d) (Guat.).
³⁵¹Regulation No. 7-2019, art. 53 (Guat.); Immigration Code, art. 82 (Guat.).
³⁵²Immigration Code, art. 82 (Guat.).
³⁵³Id. art. 83.
³⁵⁴Regulation No. 7-2019, art. 54 (Guat.).
³⁵⁵Immigration Code, art. 85 (Guat.); Regulation No. 7-2019, art. 55 (Guat.).

Once granted refugee status, adult refugees are provided temporary residence status, which is valid for up to five years.³⁵⁶ Unaccompanied children who request refugee status are automatically granted temporary residence status upon submitting a formal application.³⁵⁷ The regulations have no clarity about what happens after the initial time granted expires. However, the 2016 Law states that a person can apply for permanent residence status when “they have been temporary residents for a period equal to or greater than five years.”³⁵⁸ Applicants for refugee status are provided provisional permanence either upon formal request from a Guatemalan government authority or upon proof of one’s formal request for refugee status.³⁵⁹

2. Procedures for Accessing Refugee Status

To access international protection in Guatemala, an applicant must request refugee status verbally or in writing at any Immigration Control post,³⁶⁰ or once in the country at the Sub-Directorate of Attention and Protection of Fundamental Rights of Migrants within the IGM.³⁶¹ The requests received by these authorities must be immediately transferred in writing to the CONARE.³⁶² Once it receives a request, the CONARE must inform the applicant how to submit a formal application for refugee status, and the CONARE must make the application form available to the applicant.³⁶³ Practice reveals that while the regulations provide the CONARE with the authority to investigate applications for refugee status, the Office of International Migratory Relations (ORMI), a specialized unit within the IGM, is actually the authority that processes applications and conducts initial interviews.³⁶⁴ After completing an initial investigation, ORMI forwards the case to the CONARE for further consideration.³⁶⁵ According to a recent annual report published through the Comprehensive Regional Protection and Solutions Framework (MIRPS by its Spanish acronym), the newly-created Refugee Status Recognition Department absorbs the functions of ORMI and aims to improve processing and resolution of refugee applications.³⁶⁶

³⁵⁶Immigration Code, art. 48 (Guat.); Regulation No. 7-2019, art. 50 (Guat.).

³⁵⁷Immigration Code, art. 83 (Guat.); Regulation No. 2-2019, art. 17(1)(d) (Guat.).

³⁵⁸Immigration Code, art. 78 (a) (Guat.).

³⁵⁹*Id.* 78 (d) .

³⁶⁰Immigration Control posts are stations located primarily along Guatemala’s border to process migrants.

³⁶¹Regulation No. 2-2019, art. 17(1) (Guat.).

³⁶²*Id.*

³⁶³*Id.*

³⁶⁴Georgetown Law Human Rights Institute. *Supra* note 256.

³⁶⁵*Id.*

³⁶⁶MIRPS, III Annual Report of the Comprehensive Regional Protection and Solutions Framework: Implementing the Global Compact on Refugees in Central America and Mexico 32, (2020), <https://www.refworld.org.es/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5fcf9e8d4>. [hereinafter MIRPS Annual Report].



When submitting the application form, protection-seekers must state the reasons for seeking refugee status and leaving their home country, and applicants may include identity documents and any evidence relevant to their claim.³⁶⁷ Once the application has been formalized, the CONARE must immediately begin investigating and notify the Sub-Directorate of Attention and Protection of Fundamental Rights of Migrants, which, through its Refugee Applicant Assistance Unit, will issue the provisional residence permit indicating 30-day provisional permanence status.³⁶⁸ Upon receipt of the formal application, the CONARE must schedule the applicant's eligibility interview within fifteen days of receipt of the application.³⁶⁹ Should the applicant not appear for his or her interview, the application will officially be considered abandoned once six months have passed and the applicant has not contacted CONARE.³⁷⁰

We knew it because a relative told us we had the requirements to apply for asylum . . . We contacted the ACNUR and El Refugio de la Ninez to find out what we needed to do.³⁷¹

Miguel, Salvadoran granted refugee status in Guatemala

The eligibility interview must be conducted individually, recorded with audio and video equipment, and in the presence of a psychologist who will submit a psychological evaluation following the interview.³⁷² The interviews are conducted in Spanish, and an interpreter will be provided if needed.³⁷³

³⁶⁷Regulations 2-2019, art. 17(1)(b) (Guat.).

³⁶⁸Id., arts. 17(1), 17(3); Acuerdo de Autoridad Migratoria Nacional No. 8-2019 [Regulation No. 8-2019], art. 271. See generally UNHCR, Help Guatemala: Apply for Refugee Status, <https://help.unhcr.org/guatemala/solicitando-la-condicion-de-refugiado/solicitar-la-condicion-de-refugiado/> (outlining the steps to apply for refugee status). Unaccompanied children will be granted temporary residence rather than the provisional residence permit. Regulation No. 2-2019, art. 17(1)(d). (Guat.).

³⁶⁹Regulation No. 2-2019, art. 17(1)(e) (Guat.).

³⁷⁰Id., art. 20.

³⁷¹Interview with a protection-seeker in Guatemala who had successfully received refugee status,(Feb. 8, 2021).

³⁷²Regulation No. 2-2019, art. 17(2) (Guat.). According to an interview with Carlos Eduardo Woltke Martínez, the Guatemalan Ombudsman for Migrants, psychologists are not currently permitted in the individual interviews because of concern for maintaining the confidentiality of the applicant and their refugee status application. Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

³⁷³Regulation No. 2-2019, art. 17(2) (Guat.).

Throughout the interview process, the CONARE support staff must provide specialized care,³⁷⁴ particularly to unaccompanied children.³⁷⁵

After the interview has been completed and the investigation finalized, the CONARE has 30 days to issue a recommendation to the AMN.³⁷⁶ UThe AMN will then issue a final decision either recognizing or denying refugee status.³⁷⁷

If the application is denied, the applicant has a right to appeal within ten days after receiving the ANM's decision.³⁷⁸ The appeal is processed directly by the AMN, which must render a decision on the appeal within five days.³⁷⁹ Should the AMN ultimately refuse the request for refugee status, the UN High Commissioner for Refugees (UNHCR) may request that the applicant be granted a reasonable period of stay in Guatemala while the applicant seeks admission to another country.³⁸⁰ The AMN must ultimately agree to this.³⁸¹ Absent a UNHCR request for a reasonable period of stay, the applicant must regularize their immigration status.³⁸²

B. Refugee and Protection-Seeker Rights: Assessing Barriers to International Protection

The 2016 Migration Code enumerates the rights guaranteed to all foreigners, as well as rights afforded specifically to international protection seekers, refugees, unaccompanied children, and other special populations, including pregnant women and the elderly. The 2016 Migration Code recognizes the right of applicants for refugee status to equality before the law and guarantees that they will “enjoy all the rights and obligations set forth in Guatemalan legislation . . . as well as those recognized and guaranteed in international treaties and conventions ratified by the State of Guatemala.”³⁸³ The identity documents provided to applicants for refugee status should enable them to access necessary government services, including education and health services.³⁸⁴

³⁷⁴While specialized care is not specifically defined in the regulations, with regard to unaccompanied children, they should be cared for by immigration personnel who have specific training in the rights and treatment of children. Regulation No. 7-2019, arts. 97(b), 101 (Guat.).

³⁷⁵Regulation No. 2-2019, art. 17(2) (Guat.).

³⁷⁶Id. at art. 17(3).

³⁷⁷Id. at art. 17(4) .

³⁷⁸Id. at art. 18; Immigration Code, art. 182 .

³⁷⁹Regulation No. 2-2019, art. 18.

³⁸⁰Immigration Code, art. 183 .

³⁸¹Id.

³⁸²Regulation No. 2-2019, art. 18.

³⁸³Immigration Code, art. 51.

³⁸⁴Id. at arts. 53, 100.

Furthermore, those granted temporary resident status, including unaccompanied children and those granted refugee status, are guaranteed access to the rights that accompany their status, including the freedom of movement, access to health care, access to education, access to justice and legal counsel, and other fundamental rights found in both national legislation and international law.³⁸⁵

These and other rights discussed below are formally conferred to protection-seekers in Guatemala, but the reality is that migrants face systematic human rights violations and barriers when attempting to access their rights.

The Guatemalan government is not adequately implementing the present legal protection framework for migrants, leaving asylum seekers vulnerable to human rights abuses and without adequate protection. Furthermore, Guatemala lacks the infrastructure and sociopolitical power to protect its own citizens, let alone protection-seekers from other countries. Guatemala has been labeled “among the most dangerous countries in the world” and struggles with high levels of impunity and corruption.³⁸⁶ As a result of these barriers and the socio-economic conditions of Guatemala, few protection-seekers attempt to seek protection in Guatemala. Of those refugee status applications that are submitted, only a limited number are resolved. This section describes the rights that should be afforded to protection-seekers and the limitations and repercussions created by systemic barriers and legal gaps.

1. Access to Refugee Application Process

Interviews with protection-seekers, service providers, and experts in migration in Guatemala reveal that the processes established by the 2019 regulations meant to make refugee status more accessible largely are not being implemented or followed. While protection-seekers technically can apply for refugee status at any designated port of entry, Guatemalan border agents and migration officers are not equipped with the knowledge, resources, funding, and infrastructure to support those seeking refugee status.³⁸⁷ Mr. Carlos Eduardo Woltke Martínez, the Guatemalan Ombudsman for Migrants, stated that immigration officers are “the main obstacle” for protection-seekers.³⁸⁸ He explained that “people seeking refugee status encounter officials who instead of processing their claims erect barriers to their seeking protection.

³⁸⁵Immigration Code, art. 48 (Guat.).

³⁸⁶Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* 2 (2019), https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

³⁸⁷Procurador de los Derechos Humanos de Guatemala, *Informe Anual Circunstanciado de Actividades y de la Situación de los Derechos Humanos y Resumen Ejecutivo* 332-333 (2019), <https://www.pdh.org.gt/documentos/informes/informes-anuales/3859-informe-anual-circunstanciado-pdh-2019/file.html>.

³⁸⁸Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

Because border agents are unfamiliar with the IGM or the proper procedures to assist protection-seekers,³⁸⁹ those seeking refugee status distrust immigration authorities at the border.³⁹⁰ Mr. Woltke Martínez explained that officials “will intentionally hide [or] not provide information,” and immigration officials prevent migrants attempting to enter Guatemala from even submitting an application for protection.”³⁹¹ As a result, many protection-seekers prefer to make a request for international protection in Guatemala City rather than at the border.³⁹² The UNHCR has found that Guatemala’s mechanisms for identifying and referring protection-seekers for refugee assessments are inadequate and leave them at risk of deportation back to their countries of persecution.³⁹³

Once a protection-seeker submits an application for refugee status, flaws in Guatemala’s refugee application process continue to reveal themselves. While the regulations provide that a refugee applicant is to have one interview scheduled within 15 days of receipt of the application, refugee applicants interviewed for this Report described being subjected to three to five interviews over several months; some were conducted via phone, most were conducted in person in the capital in Guatemala City.³⁹⁴ Requiring multiple interviews creates substantial barriers for refugee applicants, particularly those who live far from the capital. Refugee applicants reported having to ride a bus for at least fourteen hours one-way to reach the capital for their interviews.³⁹⁵ Such travel may be cost prohibitive for some protection-seekers, and the hours spent traveling may conflict with refugee applicants’ ability to maintain employment.

In addition to the refugee application process being difficult to access, the adjudication process is flawed. Guatemala lacks qualified adjudicators working in the CONARE to determine claims and make recommendations to the AMN.³⁹⁶ The CONARE’s members are appointed, and there is no requirement that they have practice or otherwise have knowledge of asylum and refugee law.³⁹⁷ The CONARE also includes the General Director of Migration and a representative from the UNHRC, but they only maintain advisory roles without the authority to make a decision on refugee status, despite their expertise.³⁹⁸

³⁸⁹Comisión Pastoral de Movilidad Humana de la Conferencia Episcopal de Guatemala et al, Informe País de Sociedad Civil y Academia en Guatemala sobre Avances y Desafíos en la Protección Internacional,10 (May 2014), https://movilidadhumana.com/informe-sobre-avances-y-desafios-en-la-proteccion-internacional/#_ftn7.

³⁹⁰*Id.* at 11. See also, Refugees Int’l & Human Rights Watch, *supra* note 343, at 40.

³⁹¹Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

³⁹²*Id.*

³⁹³Refugees Int’l & Human Rights First, *supra* note 343, at 41-42.

³⁹⁴Telephone Interview with Anonymous Salvadoran man seeking asylum in Guatemala, International Human Rights Law Clinic (Jan. 27, 2021).

³⁹⁵*Id.*

³⁹⁶Refugees Int’l & Human Rights Watch, *supra* note 343, at 42.

³⁹⁷*Id.*

³⁹⁸*Id.*

Mr. Woltke Martínez further explained that those appointed to the CONARE are appointed for the wrong reasons and that they subsequently do not have the sufficient knowledge or expertise to adequately serve in their positions.³⁹⁹

The CONARE is required to meet at least once a month to facilitate the adjudication of refugee status applications, yet this is not the present practice.⁴⁰⁰ The CONARE has waited, at times, nine months to meet and resolve any refugee status applications.⁴⁰¹ In the past two years, “minimal to no asylum claims” have been resolved.⁴⁰² From January 2018 to November 2018, 262 refugee status applications were filed in Guatemala and only twenty were resolved.⁴⁰³ As of October 2019, 374 applications for refugee status in total were received: 26 were granted, 20 were denied, and 328 are still pending.⁴⁰⁴ At the end of March 2020, the backlog of pending cases had grown to 713 cases.⁴⁰⁵

The office that initially processes refugee applications (ORMI, now the Departamento de Reconocimiento del Estatus de Refugiado [DRER]), also lacks sufficient staff for the number of applications it receives. As of 2019, the unit had only 3 caseworkers, 3 investigators, and 1 supervisor who have to process 100 to 150 claims per year, despite an over 700-case backlog.⁴⁰⁶ Due to the limited number of officials processing applications, applicants may wait several years.⁴⁰⁷

Mr. Woltke Martínez explained that the institutions Guatemala has developed to protect applicants for refugee status are neither addressing their issues, nor are they attempting to pass rules or regulations to improve the situation.⁴⁰⁸ Protection-seekers become frustrated with the process and may decide to return to their country of origin.⁴⁰⁹ While there is hope that the newly formed DRER will increase Guatemala’s capacity to process refugee status applications with the support of qualified staff familiar with the refugee application procedures, there is still a lack of expertise within the decision-making bodies, the CONARE and the AMN.

As described above, after an asylum application has been received by the DRER, the CONARE evaluates the application and makes a recommendation to the AMN, which ultimately issues the eligibility decision. Within this process, the decision maker has no interaction with the protection-seeker.⁴¹⁰

³⁹⁹Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

⁴⁰⁰Comisión Pastoral de Movilidad Humana de la Conferencia Episcopal de Guatemala, *supra* note 401, at 5.

⁴⁰¹*Id.*

⁴⁰²Georgetown Law Human Rights Institute, *supra* note 375, at 74.

⁴⁰³Human Rights First, *supra* note 397.

⁴⁰⁴Procurador de los Derechos Humanos de Guatemala, *supra* note 398, at 333.

⁴⁰⁵Refugees Int’l & Human Rights Watch, *supra* note 343 at, 41.

⁴⁰⁶*Id.*

⁴⁰⁷Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

⁴⁰⁸*Id.*

⁴⁰⁹*Id.*

⁴¹⁰See Georgetown Law Human Rights Institute, *supra* note 256, at 60-62.

This significantly undermines protection-seekers' due process right to be heard.⁴¹¹ Moreover, the same agency that makes the eligibility decisions, the AMN, is responsible for reviewing appeals from adverse determinations.⁴¹² The regulations do not provide judicial review of denials of refugee status.⁴¹³

2. Right to Identity Documents and Right to Travel

Persons who have formalized an application for refugee status have a right to an identity document in order to access social services.⁴¹⁴ Applicants are specifically entitled to a certificate issued by the IGM, which confirms that the application for refugee status is pending.⁴¹⁵ This certificate can be used as an official identification document in Guatemala, and it must be renewed every 30 days in person at the capital.⁴¹⁶ However, since the COVID-19 pandemic, the Guatemalan Government has created an online system through which a person can renew the certificate as an identity document.⁴¹⁷ A person with provisional residence status, i.e. those with formalized applications for refugee status, may also use their passports as their official identity document.⁴¹⁸

Despite the implementation of an online system, refugee applicants describe barriers to receiving their refugee applicant identity documents. In order to apply for a permanent residence status, those applying for temporary residence, including those granted refugee status, are required to pay expensive fees, making it cost-prohibitive for marginalized asylum-seekers.⁴¹⁹ Further, there have been reports that National Registry of Persons (RENAP) does not consistently issue the new identification cards to protection-seekers or refugees as required.⁴²⁰ Due to delays in processing identity document renewals, protection-seekers report receiving their renewed documents with only 15 days of validity left before they have to renew them again.⁴²¹ Without this documentation, refugees and asylum-seekers are prevented from accessing job opportunities, free public education, health care, bank services, legal processes, and more.⁴²²

⁴¹¹Id.

⁴¹²Immigration Code, art. 177, 182-83 (Guat.).

⁴¹³An asylum seeker could try to appeal the decision of the AMN to the Guatemalan Constitutional Court to seek an injunction, but this remedy is not typically applied to immigration decisions. See Georgetown Law Human Rights Institute, *supra* note 375, at 60.

⁴¹⁴Immigration Code, art. 53 (Guat.).

⁴¹⁵Id. at art.101(b).

⁴¹⁶Id. at arts. 82, 101; Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

⁴¹⁷Id.

⁴¹⁸Immigration Code, art. 101 (Guat.).

⁴¹⁹Application fees for permanent residence status can range between \$200-300 U.S. dollars. See Georgetown Law Human Rights Institute, *supra* note 375, at 73.

⁴²⁰Refugees Int'l & Human Rights Watch, *supra* note 343, at 42; UNHCR, Sistema Nacional de Protección de Refugiados en Guatemala, Segunda Edición9 (2018), https://www.acnur.org/op/op_fs/5b3e64214/informe-del-sistema-de-proteccion-en-guatemala-segunda-edicion.html.

⁴²¹Interview with protection-seeker granted refugee status in Guatemala (Feb. 8, 2021).

⁴²²Comisión Pastoral de Movilidad Humana de la Conferencia Episcopal de Guatemala, *supra* note 401, at 5.

Mr. Woltke Martínez explained that the biggest problem with the documentation provided to refugee status applicants is that police do not accept the form as an ID document when they stop protection-seekers, and police officers may then require the payment of a “bribe.”⁴²³ If a bribe is not provided, the protection-seeker is taken to the police station and immigration officials are called. Once immigration officials confirm that the protection-seeker’s application is pending, the protection-seeker is allowed to leave, but he or she is left with more stress and a risk of economic uncertainty.⁴²⁴

I entered the country legally in my vehicle and was fleeing the violence in my country. When we entered the country, we had issues with the police. They were saying that I was smuggling people with me An example is one of my sisters, who didn’t have my last name, so we had problems with her. . . .

The threats from the police were that they said they were going to destroy the vehicle, move us to different (separate) cities, and were also going to call a judge. All to pressure us to give them money. That’s why I paid them 2,000 pesos so they allow us to go into the country.⁴²⁵

Guillermo, Salvadoran granted refugee status in Guatemala

In general, the 2016 Migration Code recognizes one’s rights to emigrate or immigrate, and those entering, leaving, or transiting through the country must do so in compliance with national legislation.⁴²⁶ Those who have pending refugee status or other international protections applications cannot leave the country without first providing adequate justification to the IGM.⁴²⁷ Should the applicant leave the national territory without appropriate authorization, the application will be considered abandoned.⁴²⁸ Those recognized as refugees have the right to travel outside of Guatemalan territory, but only after requesting a special travel document from the IGM that is valid for a period of two years for one exit and one re-entry.⁴²⁹

⁴²³Interview with Carlos Eduardo Woltke Martínez, supra note 330.

⁴²⁴Id.

⁴²⁵Interview with protection-seeker granted refugee status in Guatemala (Jan. 27, 2021).

⁴²⁶Immigration Code, art. 1 (Guat.).

⁴²⁷Immigration Code, art. 89 (Guat.).

⁴²⁸Regulation No. 7-2019, art. 28 (Guat.).

⁴²⁹Immigration Code, arts. 93 (Guat.), 104; Regulation No. 7-2019, art. 84 (Guat.).

Additionally, refugees may not travel back to the country of alleged persecution.⁴³⁰ Leaving the national territory of Guatemala without the special travel document will result in refugees losing their refugee status.⁴³¹

3. Right to Work and to Non-Discrimination

Like the barriers faced to obtaining refugee identity documents, work permits are equally difficult to obtain. Once Regulation No. 2-2019 entered into force, the government created a new work permit for refugee applicants. The work permit is valid for six months and “is renewable upon completion of the minimum requirements.”⁴³² The work permit is obtained from the Ministry of Labor and Social Security (MINTRAB) without any cost.⁴³³ The process, however, is arguably unnecessarily complicated. Protection-seekers must express their interest in a work permit to the IGM at the time of the interview, and the applicant must then fill out a form the IGM provides.⁴³⁴ The IGM will then issue documentation confirming the status of the refugee status application.⁴³⁵ The applicant must subsequently submit this information to the MINTRAB, which in turn decides whether to issue the authorization.⁴³⁶

Despite having the right to work, a lack of identification documents prevents many protection-seekers from securing employment.⁴³⁷ According to the law, the CONARE should issue documentation that would allow protection-seekers to obtain the work permit, but that is not current practice.⁴³⁸ The Ombudsman’s office shares “it’s kind of a vicious circle because refugee applicants do not have identification, they are not able to apply for the work permit, they cannot access criminal background check, and other things you need ID to start the process or apply for other benefits.”⁴³⁹ When interviewed, an Salvadoran woman with a pending application for refugee status talked about the impossible situation the limited validity of her temporary ID and work permit puts her and her family in.⁴⁴⁰ She shared that the process provides a very limited window, at times only eight days, in which a refugee applicant can secure the proper documentation and transportation to Guatemala City to apply for a work permit.⁴⁴¹

⁴³⁰Regulation No. 2-2019, art. 7 (Guat.).

⁴³¹Id.

⁴³²UNHCR, Guatemala: An overview of how the Global Compact on Refugees is being turned into action in Guatemala, Global Compact on Refugees (Feb. 11, 2021), <https://globalcompactrefugees.org/article/guatemala>. The regulations do not specify how the work permits must be renewed or what are considered the “minimum requirements.” The Ministry of Labor and Social Security (MINTRAB) only has specific guidelines for those already granted refugee status; refugees must simply submit a written request from the ministry and provide a copy of their refugee identity card. See Requirements to Apply for a Work Permit for Foreigners, Part. C, https://www.mintrabajo.gob.gt/images/Servicios/DGE/Permisos_de_Trabajo_para_Extranjeros/Requisitossolicitudespermisos.pdf.

⁴³³UNHCR, supra note 379.

⁴³⁴Id.

⁴³⁵Id.

⁴³⁶Id.

⁴³⁷Georgetown Law Human Rights Institute, supra note 375, at 72.

⁴³⁸UNHCR, supra note 433.

⁴³⁹Interview with Carlos Eduardo Woltke Martínez, supra note 330.

⁴⁴⁰Telephone Interview with Anonymous Salvadoran woman seeking asylum in Guatemala, International Human Rights Law Clinic (Feb. 1, 2021).

⁴⁴¹Id.

If a migrant is successful in submitting a work permit, there is then a very long delay in its processing.⁴⁴² As a result, it is difficult for protection-seekers to obtain a work permit.

Migrants who are unable to obtain a work permit resort to working in less-favorable jobs with employers who are willing to pay them under the table. When interviewed, a Salvadoran man with a pending refugee status application reported that he was trapped working in a position that took him deep into the Guatemalan rainforest, where he works for weeks without phone or internet access.⁴⁴³ The isolated nature of his job makes it hard to pursue an application for a work permit, keeping him trapped in his current job.

Migrants are at particular risk for abusive working conditions and forced labor due to the difficulty in accessing the legal labor market. Even if they do obtain a permit, employers do not recognize its validity,⁴⁴⁴ and protection-seekers are discriminated against within the labor force for their foreign status.⁴⁴⁵ Guatemala's Labor Code caps a business's foreign workforce at ten percent.⁴⁴⁶ Working conditions are generally precarious in the country, and labor rights are inadequately enforced.⁴⁴⁷ Moreover, protection-seekers are often unaware of their employment rights, which has resulted in abuses by employers, including employers failing to comply with benefits such as access to social security.⁴⁴⁸ Under the 2016 Migration Code, all migrants have the right to be free from discrimination based on race, color, nationality, sex, sexual orientation, language, religion or belief, political or other opinion, marital status, birth, or any other personal characteristic.⁴⁴⁹ The Government of Guatemala also has an affirmative obligation to protect, without discrimination, the life, liberty, and personal integrity of foreigners and migrants within Guatemalan territory.⁴⁵⁰

⁴⁴²It is worth noting that in light of the COVID-19 pandemic, in August 2020 the Ministry of Labour and Social Welfare suspended the expiration date of work permits for foreigners in the country. MIRPS Annual Report, *supra* note 377, at 31.

⁴⁴³Telephone Interview with Anonymous Salvadoran man seeking asylum in Guatemala, International Human Rights Law Clinic (Jan. 22, 2021).

⁴⁴⁴Refugees Int'l & Human Rights Watch, *supra* note 343, at 42.

⁴⁴⁵Asylum Access, *El Derecho al Trabajo de las Personas Solicitantes de Asilo Refugiadas en América Latina y el Caribe* 37-38 (June 2018), <https://asylumaccess.org/wp-content/uploads/2019/07/Derechos-Laborales-Refugiadas-en-America-Latina-y-el-Caribe-final-ESP.pdf>,

⁴⁴⁶*Id.*; Refugees Int'l & Human Rights Watch, *supra* note 457.

⁴⁴⁷*Id.* See U.S. Department of State, *Guatemala Human Rights Report 24* (2019), <https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁴⁸*Id.*

⁴⁴⁹Immigration Code, art. 9 (Guat.).

⁴⁵⁰*Id.* at art. 10.

However, Guatemalan law does not have specific provisions for protecting people from violence based on gender identity or sexual orientation or from discrimination in employment, housing, or access to public and private services.⁴⁵¹ LGBTQI+ protection-seekers therefore experience violence, discrimination, and harassment from both Guatemalan nationals and the police.⁴⁵² Transgender protection-seekers are particularly subject to discrimination, especially within the legal framework, as transgender people cannot change their gender markers on legal documents, and transgender crime victims report that they are misgendered and unrecognized by police.⁴⁵³ Additionally, in the midst of the COVID-19 pandemic, migrants in Guatemala faced increased stigma, particularly those returned from the United States, because return to Guatemala was seen to be connected with transmission of COVID-19.⁴⁵⁴

A thing that happens when you're living in another country and they realize you're from another country is that they look at you differently and treat you differently. But the thing is I came here to have another life, not because we're here to do something bad we're just here to have a better life. Regular people, not government officials, that you meet treat you differently.⁴⁵⁵

Guillermo, Salvadoran granted refugee status in Guatemala

4. Confidentiality, Access to Counsel, and Interpretation

The 2016 Migration Code and accompanying regulation enshrines the right of confidentiality for refugee status applicants and those granted refugee status.⁴⁵⁶ The State guarantees that applications, when they are being processed, are kept confidential to protect applicants' life and freedom.⁴⁵⁷ The law requires particular care to keep confidential the information of vulnerable migrants, such as unaccompanied children.⁴⁵⁸ Applicants for refugee status are also guaranteed the right to legal assistance and interpretation throughout the entire application process, including during the individual interview.⁴⁵⁹

⁴⁵¹Refugees Int'l & Human Rights Watch, *supra* note 343, at 32-33.

⁴⁵²*Id.*

⁴⁵³Human Rights Watch, "Every Day I Live in Fear": Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States, 52-55 (Oct. 2020), https://www.hrw.org/sites/default/files/media_2020/10/centralamerica_lgbt1020_web.pdf.

⁴⁵⁴UN Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights: Situation of Human Rights in Guatemala, Doc. UN A/HRC/46/74, para. 22 (2021).

⁴⁵⁵Interview with protection-seeker granted refugee status in Guatemala, *supra* note 438.

⁴⁵⁶Immigration Code, art. 52; Regulation No. 2-2019, art. 3.

⁴⁵⁷Immigration Code, art. 181.

⁴⁵⁸*Id.* at art. 170(8).

⁴⁵⁹*Id.* at art. 180; Regulation No 2-2019, art. 17(2).

While protection-seekers have a right to counsel, in practice they do not have meaningful access to legal assistance.⁴⁶⁰ This limits their ability to fully understand the asylum process and steps needed to support their case.⁴⁶¹ The Guatemalan government has identified counsel as unnecessary in the application process.⁴⁶² Further, while Guatemalan law provides a right to legal assistance and language interpretation throughout the refugee status application process,⁴⁶³ these rights are not afforded in practice.⁴⁶⁴ The General Directorate of Migration asserts that legal counsel may be present during interviews and throughout the refugee application process, but lawyers from the Pastoral de Movilidad Humana report that they have not been allowed to appear on behalf of their clients until their appeal.⁴⁶⁵

If an appeal is denied, the adjudicating agency provides a form decision letter with no additional rational or judicial reasoning.⁴⁶⁶ Protection-seekers face the majority of the process, including interviews, alone.⁴⁶⁷ Overall, there is a lack of legal safeguards for refugees and protection-seekers. Failure to provide, implement, or enforce legal safeguards plays a major role in deterring and preventing protection-seekers from filing an application with the proper authorities.⁴⁶⁸ If refugees and protection-seekers cannot access counsel or obtain information in their native language, it may be impossible for them to follow the proper procedures to be released from detention, renew their refugee identity document or work permit, or complete the process to apply for asylum.

*We did not have a lawyer help us submit the application for asylum. A lawyer from El Refugio de la Niñez did help explain what we needed to do. In that organization there are lawyers, psychologists, and social workers. But our family did not work with the psychologists or the social workers. . . . We did not have a lawyer with us when we travelled to the capital for our interview but we did have one present at the interview closer to where we are living now.*⁴⁶⁹

Maria, Salvadoran Protection-Seeker in Guatemala

⁴⁶⁰The Georgetown Law Human Rights Institute, *Dead Ends: No Path to Protection for Asylum Seekers Under the Guatemala Asylum Cooperative Agreement*, 65-66 (June 2020), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2020/06/Dead-Ends-Report_web.pdf.

⁴⁶¹*Id.*

⁴⁶²*Id.*

⁴⁶³Immigration Code, art. 180; Regulation No 2-2019, art. 17(2).

⁴⁶⁴Georgetown Law Human Rights Institute, *supra* note 375, at 66.

⁴⁶⁵*Id.*

⁴⁶⁶*Id.*

⁴⁶⁷*Id.*

⁴⁶⁸See generally Refugees Int'l & Human Rights Watch, *supra* note 343.

⁴⁶⁹Telephone Interview with Anonymous Salvadoran woman seeking asylum in Guatemala, International Human Rights Law Clinic (Feb. 1, 2021).

5. Temporary Care and Shelter, Detention, and Non-Refoulement

Protection-seekers have a right to temporary shelter and care.⁴⁷⁰ The Sub-directorate of Attention and Protection of Fundamental Rights of Migrants, within the IGM, is responsible for the operation and monitoring of migrant care centers.⁴⁷¹ Shelter and Temporary Migrant Care Centers (CACTMI by their Spanish acronym) must be available for those seeking international protection, although the shelter may only be available for a 48-hour period.⁴⁷²

Despite having a right to temporary care and shelter, refugees and protection-seekers who enter or stay in Guatemala without authorization may be subject to a fine, deportation, or expulsion.⁴⁷³ Such measures are authorized by the 2016 Migration Code and regulations,⁴⁷⁴ illustrating a discrepancy within the Code. International agreements to which Guatemala is a party require protection-seekers arriving without authorization to be provided shelter and to not be penalized for entering unauthorized.⁴⁷⁵

In practice, protection-seekers are only given housing through NGOs.. The consortium of organizations that can provide housing can only assist 500 people a year compared to the 1800 estimated cases that require humanitarian assistance.⁴⁷⁶ In reality, however, those who arrive at the airport without authorization are told to board a return flight, and if they refuse, they are detained.⁴⁷⁷ Refugees and asylum-seekers who do receive housing are placed in accommodation centers (centros de albergue), which include old hotels and naval bases.⁴⁷⁸

The Migration Code is silent on migration detention, creating a legal framework that allows asylum-seekers to be detained indefinitely until their cases are decided, and it does not have any procedures in place for reviewing detention measures.⁴⁷⁹ Therefore, even if the refugee or protection-seeker is not a danger to the community, there is no review process to release the migrant once they are detained.

⁴⁷⁰Immigration Code, art. 71.

⁴⁷¹Regulation No. 7-2019, art. 91.

⁴⁷²Id. at art. 94.

⁴⁷³Global Detention Project, Guatemala Issues Related to Immigration Detention, Submission to the UN Committee against Torture 72 Session (Nov.- Dec. 2021), submitted June 2021, <https://www.globaldetentionproject.org/wp-content/uploads/2021/06/GDP-Submission-to-the-UN-Committee-against-Torture-Guatemala.pdf>.

⁴⁷⁴Immigration Code, art. 50; Regulation No. 7-2019, art. 14 (“Foreigners who fail to comply with the entry requirements to the national territory will be rejected.”).

⁴⁷⁵Id. at art. 71; Refugee Convention, *supra* note 2, art. 31.

⁴⁷⁶Georgetown Law Human Rights Institute, *supra* note 375, at 70.

⁴⁷⁷Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

⁴⁷⁸Global Detention Project, Immigration Detention in Guatemala 4,9 (Feb. 2016), https://www.globaldetentionproject.org/wp-content/uploads/2016/06/guatemala_immigration_detention_profile.pdf. According to statistics from 2015, the most common nationalities of refugees and asylum-seekers detained were El Salvador, Honduras, and Nicaragua.

⁴⁷⁹See Immigration Code, art. 186 (providing that the National Civil Police is the authority that detains people and that people cannot be detained at immigration posts.)

While the Criminal Procedure Code outlines the process by which a person can be placed in preventive detention, including a review of the person’s risk of flight or danger to the community,⁴⁸⁰ preventive detention is used excessively in Guatemala, and detainees are often held longer than the statutorily mandated maximum.⁴⁸¹ Additionally, protection-seekers who are detained pending the resolution of their application for refugee status may not be subject to the protections of the Criminal Procedure Code because those who violate the Migration Code are not subject to criminalization.⁴⁸²

Mr. Woltke Martínez, the Guatemalan Ombudsman for Migrants within the Human Rights Ombudsman, reports that police officers do not recognize refugee applicant documents as proper identity documents, and they have been known to physically discard the refugee applicant documents and detain protection-seekers temporarily to verify their status by calling immigration officials.⁴⁸³ Mr. Woltke Martínez noted that “they are not detained for a long time or permanently,” and that despite police harassing protection-seekers and potentially destroying their documents, their applications for refugee status are not impacted.⁴⁸⁴ Mr. Woltke Martínez explains:

Where we saw some longer detention is at the border when they are detained [under] administrative detention. [i.e. detention only for the purpose of an administrative proceeding]. While they are detained, they seek to apply for refugee status [or] protection status. In that situation, until they ask for a judicial decision, they have to wait in detention, and it takes a long time. Mostly people being detained at the border are coming in from the international airport.⁴⁸⁵

Current data regarding the present situation of detained migrants is not publicly available. The most recent statistics from 2015 report that there were 563 immigration detainees.⁴⁸⁶ Reports of overcrowding are common in Guatemala’s detention facilities that leads to unsanitary and dangerous conditions for detainees.⁴⁸⁷

⁴⁸⁰See Decree No. 10-2019 - Amendments to Decree No. 51-92 of the Congress of the Republic, Code of Criminal Procedure arts. 259-68.

⁴⁸¹UN Committee Against Torture, Concluding observations on the seventh periodic report of Guatemala, Doc. UN CAT/C/GTM/CO/7 (2018) para. 18.

⁴⁸²Immigration Code, art. 64.

⁴⁸³Interview with Carlos Eduardo Woltke Martínez, *supra* note 330.

⁴⁸⁴*Id.*

⁴⁸⁵*Id.*

⁴⁸⁶Global Detention Project, Guatemala Immigration Detention Data Profile, Global Immigration Detention , (2020), <https://www.globaldetentionproject.org/wp-content/uploads/2020/11/Guatemala-Detention-Data-Profile-2020.pdf>.

⁴⁸⁷UN Committee Against Torture, Concluding observations on the seventh periodic report of Guatemala, Doc. UN CAT/C/GTM/CO/7, para. 24 (2018).

Article 46 of the 2016 Migration Code enshrines the right to non-refoulement. A refugee applicant therefore cannot be returned to the country of origin when there is a “well-founded reason” that a person’s life, physical safety, and freedom would be seriously endangered should the person be returned.⁴⁸⁸ Guatemala is bound to a similar standard under the 1951 Convention on the Status of Refugees to not return refugees to any country where their life or liberty would be threatened because of their “race, religion, nationality, membership of a particular social group or political opinion.”⁴⁸⁹ Additionally, before a person who has had their application for refugee status denied is returned, Guatemala must guarantee that the Office of the United Nations High Commissioner for Refugees (UNHCR) is aware of that person’s situation.⁴⁹⁰

The legal protections against non-refoulement, however, are not adequately enforced. The U.S. embassy in Guatemala reported in 2019 that Guatemala “does not provide sufficient safeguards against refoulement.”⁴⁹¹ Between November 21, 2019, and March 16, 2020, while the Asylum Cooperative Agreement (ACA) between the United States and Guatemala was in effect, 939 protection-seekers from El Salvador and Honduras were deported from the United States to Guatemala to seek protection there.⁴⁹² Those transferred pursuant to the ACA reported having only 72 hours to decide whether to remain in Guatemala or leave the country.⁴⁹³ Of the 939 transferred protection-seekers, only 20 pursued an application for refugee status in Guatemala because their fear of persecution and lack of economic opportunities in Guatemala.⁴⁹⁴

In early 2021, Central American migrants primarily from Honduras began their journey to the United States to seek safety and escape life-threatening poverty. Instead of being permitted to continue to Mexico into the United States, the migrants were met with violence and force at the hands of Guatemalan police and security forces.⁴⁹⁵ The immigration chief was reported as saying “we invite you to return to your country of origin, you will not pass.”⁴⁹⁶ In a matter of days, 2,300 migrants had been returned to Honduras.⁴⁹⁷ This mass deportation deprived migrants of their right to individualized review and likely led to violations of the prohibition on non-refoulement. Migrants who may have wanted to seek asylum in Guatemala rather than be returned to Honduras did not have that chance.

⁴⁸⁸Immigration Code, art. 46.

⁴⁸⁹Refugee Convention, *supra* note 2, art. 34.

⁴⁹⁰Immigration Code, art. 46.

⁴⁹¹The U.S. Sent Central American Asylum Seekers to Guatemala to Seek Refuge. None Were Granted Asylum, Report Says, *The Washington Post* (Jan. 16, 2021), https://www.washingtonpost.com/world/the_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html.

⁴⁹²UN Human Rights Council, *supra* note 467, para. 44.

⁴⁹³Refugees Int’l & Human Rights Watch, *supra* note 343, at 25.

⁴⁹⁴UN Human Rights Council, *supra* note 505.

⁴⁹⁵BBC News, Migrant Caravan: Guatemala Blocks Thousands Bound for US, (Jan. 18, 2021), <https://www.bbc.com/news/world-latin-america-55699540>.

⁴⁹⁶Global Detention Project, Guatemala: Overview, (Jan. 18, 2021), <https://www.globaldetentionproject.org/countries/americas/guatemala>.

⁴⁹⁷Large Migrant Caravan Dissolves in Guatemala, *AP News* (Jan. 19, 2021), <https://apnews.com/article/joe-biden-honduras-gangs-coronavirus-pandemic-immigration-c381b8ac9f22291188a403b7bbeb1d51>.

Guatemala’s increasingly hardline approach against migrants and protection-seekers is a result of pressure from the U.S. government to reduce the influx of migrants presenting at the U.S. southern border.⁴⁹⁸ Ahead of the first “caravan” of migrants in 2021, Guatemala declared a state of emergency to deploy thousands of soldiers to the borders of Honduras and El Salvador. This state of emergency was reportedly the first used to curb migrants and protection-seekers from accessing the country.⁴⁹⁹

6. Right to Education and Family Reunification

Any foreign person, including applicants for refugee status and refugees, have the right to education “within the national educational system and the higher education system.”⁵⁰⁰ According to the UNHCR, not having the necessary educational certificates or identity documents should not be a barrier to accessing education.⁵⁰¹ However, the regulations require that refugee status applicants submit their special identity document provided by the IGM in order to access educational institutions.⁵⁰² If an applicant for refugee status is in a shelter or temporary care facility, the facility must ensure that the applicant has access to specialized care and education.⁵⁰³

The Constitution of Guatemala guarantees that the State will protect the family’s social, economic, and legal rights.⁵⁰⁴ The 2016 Migration Code broadly recognizes the right of foreigners to settle in Guatemala to form or reunify their families.⁵⁰⁵ Furthermore, migrants specifically have the right to stay with their families at all times and should only be separated under extremely exceptional circumstances for administrative reasons.⁵⁰⁶ Should families arrive in the national territory without proper authorization, the government must follow the principle of family reunification and the Deputy Director of Attention and Protection of Fundamental Rights of Migrants must provide appropriate care and follow-up.⁵⁰⁷ When migrants are held in temporary care shelters, they may request the assistance of the IGM to contact family abroad.⁵⁰⁸ Family reunification is defined in the regulation as the principle that ensures that unaccompanied children or children separated from their families be reunited with their parents, guardian, or “whoever exercises custody.”⁵⁰⁹

⁴⁹⁸Jeff Abbott, Guatemala Takes a Hard Line Against Migrants–With US Support, *The Nation*(Feb. 16, 2021), <https://www.thenation.com/article/world/migrants-immigration-guatemala-mexico/>.

⁴⁹⁹*Id.*

⁵⁰⁰Immigration Code, art. 7 (Guat.).

⁵⁰¹UNHCR *supra* note 379.

⁵⁰²Regulation No. 2-219, art. 9 (Guat.).

⁵⁰³Regulation No 7-2019, art. 101 (Guat.).

⁵⁰⁴Constitution of Guatemala, art. 47 (1985, rev. 1993) (Guat.).

⁵⁰⁵Immigration Code, art. 4 (Guat.).

⁵⁰⁶*Id.* at art. 15 (Guat.); see also UNHCR, *supra* note 379 (explaining that applicants for refugee status have a right to be reunified with their spouses, common law partners, and family members “within the degrees of the law”).

⁵⁰⁷Immigration Code, art. 71(d) (Guat.).

⁵⁰⁸*Id.* at art. 19.

⁵⁰⁹Regulation No. 2-2019, art. 2(g) (Guat.).

When working with unaccompanied children, authorities must use all available means to ensure they are reunited with their parents or guardians, whether that occurs in Guatemala or in the child's country of origin, unless it is in the best interest of the child to maintain separation.⁵¹⁰

7. Deterioration of the Rule of Law

Guatemalan officials are rarely held accountable for abuses of power or for failing to fulfill their obligations. Between 2012 and 2017, 247 sanctions against corrupt officials were filed by the Public Prosecutor's Unit Against Corruption.⁵¹¹ Widespread corruption has been enabled by weak government institutions and constant threats to judicial independence.⁵¹²

The International Commission against Impunity (CICIG, by its Spanish acronym) in Guatemala documented this corruption and attendant impunity. The CICIG was a joint initiative of the United Nations and the Guatemalan government established in 2006.⁵¹³ Together with Guatemalan prosecutors, the CICIG initiated investigations leading to the indictment of over 660 individuals and 400 convictions, uncovering 70 secret criminal structures linked to politicians, business leaders, and members of the military.⁵¹⁴ Additionally, the CICIG documented the presence of illicit networks in the Guatemalan congress and took steps to overcome executive impunity.⁵¹⁵ This included steps to investigate Guatemalan President Jimmy Morales on charges of illicit campaign financing prior to the CICIG being shut down on September 3, 2019, following the unilateral decision of Guatemalan government.⁵¹⁶

Additionally, on September 4, 2019, the government declared a state of siege for twenty-two municipalities, thereby suspending constitutional guarantees and empowering Guatemala's military forces to carry out civil police functions.⁵¹⁷ A similar state of siege was declared by Guatemala's current president in May of 2020, affecting three municipalities.⁵¹⁸

⁵¹⁰Immigration Code, art. 170(3) (Guat.).

⁵¹¹World Politics Review, In Guatemala, Corruption is at the Heart of An Escalating Political Crisis, (July 23, 2020), <https://www.worldpoliticsreview.com/trend-lines/28937/in-guatemala-corruption-is-at-the-heart-of-an-escalating-political-crisis>; IACHR, Situation of Human Rights in Guatemala, OEA/Ser.L/V/II., Doc. 208/17 (Dec. 31, 2017), <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

⁵¹²IACHR, Situation of Human Rights in Guatemala, OEA/Ser.L/V/II., Doc. 208/17 (Dec. 31, 2017), <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

⁵¹³IACHR, *supra* note 524.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*, para. 56-58.

⁵¹⁶See Face of Guatemala's anti-corruption fight faces threats, AP News (Nov. 25, 2019), <https://apnews.com/article/business-arrests-jimmy-morales-guatemala-guatemala-city-763a102ceac5081a1fd6a868cad6b503>.

⁵¹⁷See Guatemala Declares State of Emergency After Soldier Ambush, AP News (Sept. 7, 2019), <https://apnews.com/article/8d7ec8f5af2c497ca9432f4f99a466ff>.

⁵¹⁸Network in Solidarity with the People of Guatemala (NISGUA), NISGUA denounces the State of Siege in three municipalities in Sololá (June 29, 2020), <https://nisgua.org/denounces-state-of-siege-solola/>

The lack of a functioning civilian police force, and one that is actively hostile toward applicants for refugee status, leaves protection-seekers with nowhere to turn when they experience violence.⁵¹⁹

Guatemala also does not have clear separation of powers. Judicial independence has been threatened by unfounded criminal investigations launched against at least twenty-two high profile judges, while justices of the Guatemalan Constitutional Court who ruled against former President Morales' administration have been publicly condemned and subjected to criminal proceedings as a form of harassment.⁵²⁰ Five judges of the Constitutional Court and four judges of the high-risk tribunals, dedicated to hearing cases of extreme sensitivity, have been granted precautionary measures by the Inter-American Commission on Human Rights as a result of these investigations.⁵²¹ This context makes it extremely difficult for prosecutorial abuses to be held in check or for judicial decisions to be independently reviewed. A weakened rule of law has consequences for protection-seekers, both within the refugee application process and as people living under the "protection" of the Guatemalan legal framework.⁵²²

Moreover, refugees and protection-seekers in Guatemala are particularly vulnerable to violence. This is heavily connected to lack of economic support.⁵²³ The Guatemalan government does not provide protection-seekers with help obtaining food, shelter, or employment.⁵²⁴ Further, although applying for asylum is free, refugees must pay for permanent residency.⁵²⁵ Protection-seekers who lack social networks are even more vulnerable to these conditions. This coupled with widespread xenophobia against refugees and migrants has left these populations extremely vulnerable.⁵²⁶

⁵¹⁹See supra text accompanying notes 467-68, 490-91.

⁵²⁰International Legal Assistance Consortium, *A Window of Opportunity: Support to the Rule of Law in Guatemala*, 27-29 (2020), https://ilacnet.org/wp-content/uploads/2020/03/ILAC-Guatemala-report-2020_web.pdf.

⁵²¹*Id.*

⁵²²Georgetown Law Human Rights Institute, supra note 375, at 70. ("Additionally, Guatemala struggles with malnutrition and inequality. One child out of two is malnourished. The Guatemalan Ministry of Public Health and Social Assistance communicated that they did not have the capacity to help all the people seeking the services they provide, such as medicine, mental health services, and primary care.")

⁵²³*Id.*

⁵²⁴*Id.*

⁵²⁵*Id.*

⁵²⁶*Id.*

Guatemala is one of the most dangerous countries in the world.⁵²⁷ High rates of violence occur due in large part to the presence of narco trafficking and gang organizations.⁵²⁸ This is particularly true in border towns and urban neighborhoods.⁵²⁹ Police and the judicial system are unable to control gang violence.⁵³⁰ Transnational criminal organizations (gangs or “maras”) and narco trafficking organizations specifically commit acts of gender-based violence to demonstrate control or power over their territories.⁵³¹ Combined with high levels of corruption and structural impunity, it is practically impossible for ordinary Guatemalans to avoid the effects of these conditions, let alone vulnerable protection-seekers.⁵³²

C. Conclusion

Guatemalan law and the international agreements to which Guatemala is a party outline specific and necessary protections for applicants for refugee status. While the 2016 Migration Code and accompanying regulations helped enshrine important rights for protection-seekers, there are still existing gaps in the current legal framework, and government officials are not complying with or effectively implementing the new laws and regulations.

Protection-seekers are often not given a meaningful opportunity to complete the process for obtaining refugee status, and are often not afforded the fundamental legal safeguards of legal assistance and language access throughout the application process. Protection-seekers face risk of detention, harassment from police, barriers to accessing social services and employment, and violence from gangs and other criminal organizations. The burden of ensuring protection-seekers have access to rights and services often rests on nonprofits rather than the government. The Guatemalan government must do more to ensure the rights afforded to refugee status applicants on paper are actually provided in practice.

⁵²⁷Overseas Security Advisory Council (OSAC), Guatemala 2020 Crime & Safety Report, (Mar. 31, 2020), <https://www.osac.gov/Country/Guatemala/Content/Detail/Report/d8c492ad-b604-457b-bd8f-18550eec1ff2#:~:text=Guatemala's%20homicide%20rate%20peaked%20at,3%2C578%20homicides%20reported%20for%202019.>

⁵²⁸*Id.*

⁵²⁹*Id.*

⁵³⁰Georgetown Law Human Rights Institute, *supra* note 256, at 73-74: “There is further a severe lack of access to justice; for example, impunity numbers are as high as 98% for sexual violence. Broadly, it is understood that if you report a police officer or a drug dealer they will target you or your family. And even when victims dare to report crimes, they are faced with a highly corrupt judicial system. In Guatemala, nobody has access to justice unless they have money to pay the lawyers or if they have an organization helping them.”

⁵³¹World Politics Review, *supra* note 524; IAHCR, *supra* note 524.

⁵³²*Id.*

IV. Overall Conclusions

The information contained in this Report demonstrates significant limitations on access to international protection in Mexico and Guatemala and signals the extreme vulnerability in which protection-seekers and refugees find themselves in both countries.

Although Mexico's international protection laws may appear robust on paper, the reality of their implementation reveals that many individuals in need of protection are not able to obtain protection. The systematic detention of asylum-seekers, the lack of awareness on the part of government officials, the insufficient mechanisms for the identification of persons with protection needs, and the overwhelming backlog facing the under-resourced COMAR render Mexico's asylum system unfair and inefficient. At the same time, the practice of expulsions and coerced returns combined with the exposure of asylum-seekers to violence and abuse, including at the hands of state agents, prevents Mexico from offering effective protection to these persons.

Similarly, Guatemala's underdeveloped asylum system is characterized by a grossly insufficient ability to process protection-seekers, a lack of technical expertise, and a variety of due process violations. Taken together with the risk of deportation as a result of irregular entry and the widespread insecurity that protection-seekers face in Guatemala, it is clear that protection-seekers cannot access effective protection in Guatemala. As a result of the deficient asylum system in Guatemala and the multiple challenges to protection-seekers' security and safety in the country, Guatemala's ability to offer effective international protection is severely undermined.

Because the United States placed the pressure on Guatemala and Mexico to reduce migration flows across its border, the Biden Administration can play an active role in encouraging the Guatemalan and Mexican governments to respect the rights of migrants and protection-seekers. The following can help strengthen the asylum system in Mexico and Guatemala:

- Encourage the Mexican and Guatemala government to pass a reform to abolish mandatory detention and create alternatives to incarceration. The detention must be subject to periodic review and appropriate judicial oversight. Also, establish that all other options to detention must consider the best interest of children and family situation of migrants and protection seekers.
- Provide training to immigration authorities about the rights of migrants and protection-seekers. Authorities must cease to use detention as a way to discourage protection-seeker from applying for asylum and prevent committing acts contrary to the principle of non-refoulement.

- Provide information to all protection-seekers on their right to seek asylum and the asylum procedure to guarantee adequate access to the asylum process and remove barriers to submitting applications, as the short time that protection-seekers have to present their application. In addition, provide financial and technical support to COMAR and CONARE to expand its presence along with the country and to improve its capacity to adequately interview protection-seekers.
- Guarantee access to identity documents to protection-seekers to allow them to access to employment and labor rights. Also, create and enable access to programs providing housing and food assistance to protection-seekers.
- Strengthen the access to justice mechanism for migrants and protection-seekers victims of human rights violations.

AMERICAN  UNIVERSITY
WASHINGTON
COLLEGE OF LAW

30 años
defendemos derechos para construir realidades
CEJIL