

ASYLUM IN MESOAMERICA

ACCESSIONING IN INTERNATIONAL PROTECTION
IN MEXICO AND GUATEMALA



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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.

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,

"...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 COVID-19 global pandemic has heightened the already high risks protection seekers face. The Inter-American Commission on Human Rights (“Commission” or “IACHR”)



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.



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.

³⁷

(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,

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 when the individual is found to be ineligible for refugee status based on the grounds of the individual's actions while in Mexico.⁷⁰

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

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.



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 investigated Sam, an African American who had been the best friend of the victim. His name had been changed to reflect his identity. Sam testified that he had been living in San Antonio, a fact that is impossible to verify in Mexico because he was in 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 lighting and no bedding. Sam and the other detainees could only see Mexican authorities if they did not speak Spanish, but he, who speaks Spanish, was not allowed to speak with them. A few days after his arrest, he was taken to a medical center. There, a nurse named Juanita was in the middle of the room. Detainees could not hear African detainees who were being discriminated against. Guards laughed at them for their race and ethnicity. They forced detainees to sing each in Spanish, and if detainees fell asleep, they were regarded as dead.

"None here knew what was happening," Sam said. "I am like the old days of segregation. The day he released me last year, I had given up because I had

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/>.

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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,

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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

171Id.

172Id. Art. 44.

173U.N. Special Rapporteur on Torture, Center of Hum. Rts. Fray Matías de Córdova, Migration A . 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>.

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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 rev(s.)]TJaev(s.)]TJad tha(or the rmsr r)(oof of the l alude applicdeclaa)5 (t)15 (

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).

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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

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

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 a number of shortcomings (including the release of protection-seekers to shelters without proper screening and the lack of adequate shelter conditions).²²⁴

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/>.

²³⁵Id.

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>.

²³⁷Id.

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/>.

²⁴⁰Id.

²⁴¹Id.

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

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.

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 ~~smitten 2012 uk2 TdTt-b30 (en unliv)~~ plagued riskswection Humaekers foutico, with Journaliph

The UN Committee on Migrant Workers expressed in 2017 its particular concern about violations of the rights of migrant activists.³⁰⁷

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.

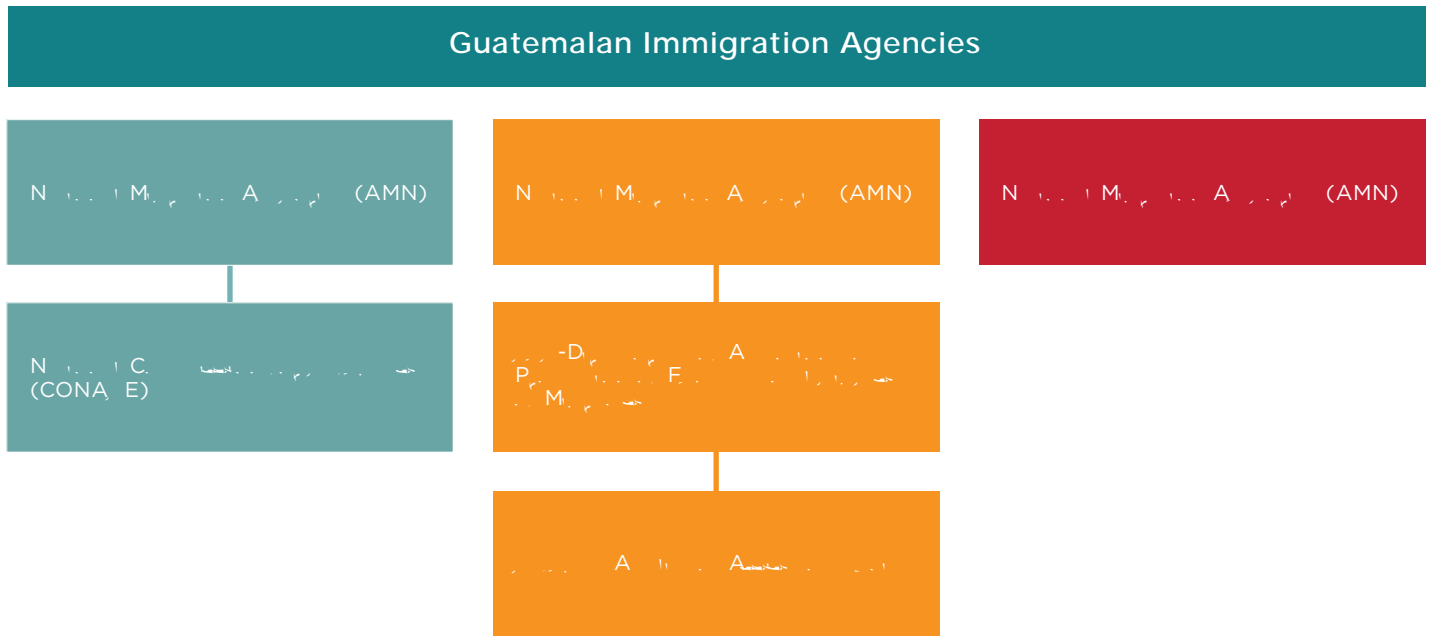
³¹⁶See infra Part III.A.3. The Guatemalan Immigration Code identifies asylum seekers as applicants for refugee status. For simplicity, we refer to those applying for refugee status as protection-seekers.

³¹⁷See infra Part III.B.5.

³¹⁸See infra Part III.B.



Fig. 2: Guatemala Immigration Agencies (see 2016 Migration Code amendments)



336 Regulation 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]” of

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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

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.).

³⁵⁹Id. 78 (d) .

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

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

³⁶²Id.

³⁶³Id.

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

³⁶⁵Id.

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 I had here, I remember a ... We contacted the ACNUR and El Refugiado de la Niñez and ... needed ...
Miguel, Salvadoran grand refugee ... 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

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 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

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

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, ma,

460The Georgetown Law Human Rights Institute, *Dead Ends: No Path to Protection for Asylum Seekers Under the Guatemala Asylum Cooperative*

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

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
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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-

⁴⁹⁸Je 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/>.
⁴⁹⁹Id.

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.

⁵²¹Id.

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.")

⁵²³Id.

⁵²⁴Id.

⁵²⁵Id.

⁵²⁶Id.

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.

