

Compendium of International, Regional and National Legal Instruments on Forced Displacement

MAY 2017



... we can help host countries see refugees not just as a burden, but as a benefit. The international community could be doing much more, through development assistance and trade deals, to encourage businesses and states hosting refugees to see the upside of people's hands being occupied and not idle (the World Bank and the Scriptures agree on this). The refugees want to work. They were shopkeepers, teachers and musicians at home, and want to be these things again, or maybe become new things — if they can get education, training and access to the labor market.” **Bono, U2, The New York Times, The Opinion Pages, Notes from a mass exodus**

Compendium of International, Regional and National Legal Instruments on Forced Displacement

Dr. Mirjana Stankovic

Community of Practice on Legal Aspects of Forced Displacement

Global Forum on Law, Justice and Development

The World Bank Group

May 2017

ACKNOWLEDGMENTS

The completion of this Compendium could not have been possible without the participation and assistance of many people whose names may not all be enumerated. Their contributions are sincerely appreciated and gratefully acknowledged. However, on behalf of the Community of Practice on Legal Aspects of Forced Displacement, Global Forum on Law, Justice and Development, the World Bank, we would like to express our deep appreciation and indebtedness to the following contributors:

- **Dr. Viktoria Khaitina**, Global Forum on Law, Justice and Development, the World Bank Group;
- **Aladejola William Adigun**, Emory University School of Law;
- **Ahmad Shakeeb Safai**, Emory University School of Law;
- **Kari Marie Bloom**, Global Forum on Law, Justice and Development, the World Bank Group;
- **Sebastian Urthaler**, Global Forum on Law, Justice and Development, the World Bank Group;
- **Kavell Gianina Joseph**, Global Forum on Law, Justice and Development, the World Bank Group;
- **Ibrahim Fares**, Global Forum on Law, Justice and Development, the World Bank Group.

Special gratitude to Mr. Marco Nicoli Senior Project Manager, Global Forum on Law, Justice and Development, Senior Knowledge Management Officer, Legal Vice Presidency, the World Bank.

AUTHOR

- **Dr. Mirjana Stankovic**, Senior Legal Consultant, Global Forum on Law, Justice and Development, the World Bank Group.



Compendium of International, Regional and National Legal Instruments on Forced Displacement by Dr. Mirjana Stankovic is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-nc-sa/4.0/).

Foreword

The unprecedented migrant crisis and the complexity of modern demographic movements around the globe have questioned the classic notions of forced displacement law and initiated a debate on how to best regulate the vexing issues of irregular migration and mixed flows. These migratory flows encompass people with different objectives who move along each other using the same routes and means of transport. On one hand, often these migratory flows are initiated by serious threats to fundamental human rights, such as persecution, armed conflict, war. On the other hand, demographic growth, poverty, climate change are also contemporary drivers of forced displacement.

According to UNCHR every minute 24 people are displaced. One in every 113 people globally is now either an asylum-seeker, internally displaced or a refugee. In practice, due to the causes and the nature of the irregular migration and mixed flows, oftentimes it is extremely difficult to differentiate between refugees and so-called economic migrants.

The 1951 Convention relating to the status of refugees does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. As a result, disparities among different States have arisen, as governments craft asylum laws based on their public policy concerns, history and culture. Despite differences at the national and regional levels, the all-embracing goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

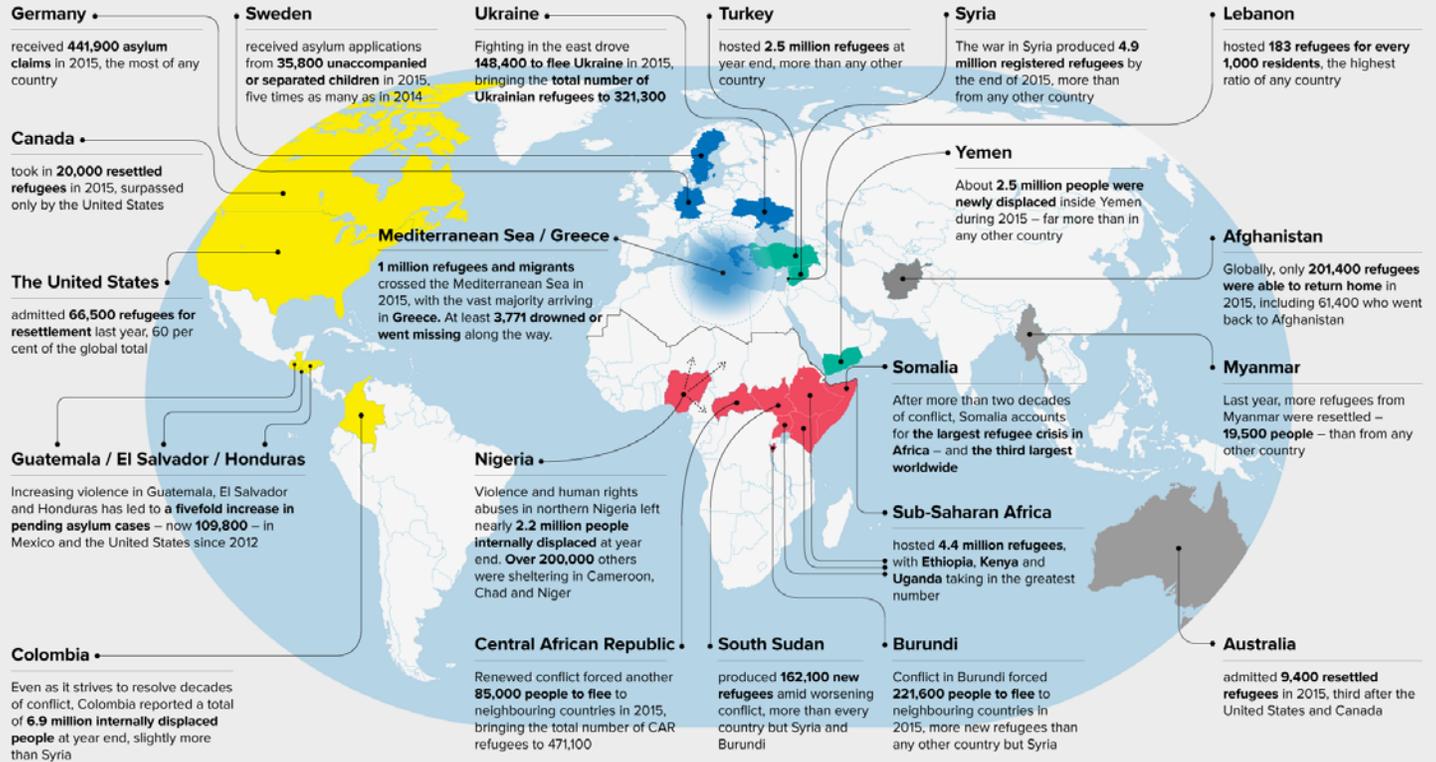
This Compendium aims to provide an accessible reference for research on international, regional and national law relating to forced displacement. It is organized to present information about a significant number of international, regional and national legal instruments that affect the forcibly displaced persons. These legal instruments are organized by topic (international, regional and national). The list of instruments is not exhaustive. Many of the entries for multilateral agreements contained in this Compendium include brief summaries of the nature and terms of the agreement and how it relates to forced displacement; as appropriate, the entry for the agreement includes short-hand references to specific provisions dealing with or relevant to the forcibly displaced persons. These entries are not extracts from the original texts, should not be cited as such, and are meant simply to facilitate further research.

We see this Compendium as a basis for further research into labor mobility, labor market integration and employment rights of the forcibly displaced.

2015: Forced Displacement Hits a Record High

Conflict and persecution caused global forced displacement to escalate sharply in 2015. Now at the highest level ever recorded, it represents immense human suffering around the world.

Source: UNHCR / 20 JUNE 2016



The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.



Table of Contents

I. International Legal Framework	11
Universal Declaration of Human Rights (art. 14)	11
Convention relating to the Status of Refugees, 1951	11
Who is a refugee?	11
Principle of non-discrimination.....	12
Principle of non-penalization.....	12
Non-refoulement	12
Basic minimum standards for the treatment of refugees	12
Freedom of movement	12
Right to Liberty and Security of the Person	13
Right to Family Life.....	13
Other Rights	13
To whom does not the Convention apply?.....	14
Exceptions: Exclusion and Cessation Clauses	14
Optional Protocol relating to the Status of Refugees 1967	15
Geneva Convention Relative to the Protection of Civilian Persons in Times of War	15
Agreement Relating to Refugee Seamen 1957	15
Guiding Principles on Internal Displacement	15
General Assembly Resolution on the Protection of and Assistance to Internally Displaced Persons	16
UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees	16
Convention on the rights of the child 1989	16
General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin	16
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	16
II. Regional Legal Framework	17
Common European Asylum System	17

EU Reception Conditions Directive	18
Qualification Directive	19
EU Asylum Procedures Directive.....	19
The Dublin Regulation.....	19
The Eurodac Regulation	20
European Convention on Human Rights (art. 2, 3 and 5)	20
European Agreement on the Abolition of Visas for Refugees (art. 1).....	20
Declaration on Territorial Asylum, 18th November 1977	21
European Convention on Nationality 1997 (art. 4).....	21
African [Banjul] Charter on Human and Peoples’ Rights (art. 12).....	21
OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa 1969 (art. 1 and 2)	21
Arab Charter on Human Rights 1994 (art. 20,21, 22 and 23).....	22
Cairo Declaration on Human Rights in Islam 1990 (art. 12).....	22
American Declaration on the Rights and Duties of Man (art. 27)	22
American Convention on Human Rights (art. 22)	23
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights	24
Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (art. 3)	24
Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (1989)	24
San José Declaration on Refugees and Displaced Persons, which focused on internal displacement (art. 1, 18 and 20)	25
Rio de Janeiro Declaration on the Institution of Refuge 2000.....	25
Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.....	25
Brazil Declaration and Plan of Action “Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity” 2014	26
III. National Legal Framework	27
USA.....	27
The Refugee Act of 1980.....	28

Claimants outside the country	28
Claimants inside the country	29
Bars to Applying for Asylum.....	31
Bars to Getting Asylum	31
Temporary Protected Status (TPS).....	32
The Central American Minors Refugee/Parol Program	32
Withholding of Removal	33
Protection under the Convention Against Torture (CAT)	34
Case Law.....	34
Afghanistan	37
Pakistan	37
Australia	37
Family violence and the definition of a refugee	38
The role of state responsibility	39
Family violence claims post-Khawar	40
Complexity of gender-related cases	41
Canada	42
Claiming Refugee Protection in Canada – Procedures	42
“Serious Criminality” Defined.	43
Cessation of Refugee Protection.....	43
Canada-United States Safe Third Country Agreement	43
Who is a Convention Refugee under the IRA?.....	44
Rights of refugees	45
Right to Work.....	45
Right to Healthcare	45
Right to Education	45
Access to Courts	46
Case Law.....	46
Germany	49
Main Legal Framework in Force.....	49
Asylum Procedure	51
Rights of Refugees and Beneficiaries of Subsidiary Protection	53

Case Law on Asylum.....	55
Greece	56
Asylum Procedure	59
Rights of Refugees and Beneficiaries of Subsidiary Protection	62
Case Law on Asylum.....	63
Jordan	64
Main Legal Framework in Force.....	64
Rights of a Refugee	65
Asylum Procedure	66
Lebanon	66
Main Legal Framework in Force.....	67
Rights of Refugees.....	67

I. International Legal Framework

Universal Declaration of Human Rights (art. 14)

Summary: The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations. It sets out, for the first time, **fundamental human rights to be universally protected**. The **Declaration applies unconditionally to all people without distinction of any kind**. Articles 3 through 11 address individual rights, such as the right to life and the prohibition of slavery. Articles 12 through 17 address the civil and political rights of individuals within society. Articles 18 through 21 are concerned with spiritual, public and political freedoms such as freedom of religion and freedom of association. Articles 22 through 27 set out social, economic and cultural rights.

Relevant articles: 14.

[Link to full text](#)

Convention relating to the Status of Refugees, 1951

Summary: This instrument is grounded in Article 14 of the Universal Declaration of human rights of 1948, which recognizes the **right of persons to seek asylum from persecution in other countries**. As a post- Second World War instrument, it was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention **universal coverage**. It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.

Who is a refugee?

The 1951 Convention has established the definition of a refugee. This definition emphasizes the protection of persons from political or other forms of persecution. A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Although the Convention definition remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the Convention. The Convention does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements.¹

Applying this definition, internally displaced persons (IDPs) – including individuals fleeing natural disasters and generalized violence, stateless individuals not outside their country of habitual residence or not facing persecution, and individuals who have crossed an international border fleeing generalized violence are not considered refugees under either the 1951 Convention or the 1967 Optional Protocol.

Countries in the Americas and Africa experiencing large-scale displacement as a result of armed conflicts found that the 1951 Convention definition did not go far enough in addressing the protection needs of their populations. Consequently, both Article 3 of the Cartagena Declaration and Article 1(2) of the 1969 OAU Convention extend refugee status to an individual who “owing to

¹ <http://www.ijrcenter.org/refugee-law/>

external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.² The African Union is unique in having a convention that specifically addresses the protection needs of IDPs: [African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa](#). Finally, the [United Nations High Commissioner for Refugees \(UNHCR\)](#) provides protection to IDPs and stateless individuals in addition to 1951 Convention refugees.

Principle of non-discrimination

The 1951 Convention provisions are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination.

Principle of non-penalization

Subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules. Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum.

Non-refoulement

No reservations or derogations may be made to it. Non-refoulement refers to the obligation of States not to refoule (or return) a refugee to “the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Non-refoulement is universally acknowledged as a human right. It is expressly stated in human rights treaties such as Article 3 of the Convention against Torture and Article 22(8) of the American Convention on Human Rights.

Both regional and domestic courts have interpreted the rights to life and freedom from torture to include a prohibition against refoulement.³ The principle of non-refoulement prohibits not only the removal of individuals but also the mass expulsion of refugees.⁴

There are two important restrictions to this principle. Persons who otherwise qualify as refugees may not claim protection under this principle where there are “reasonable grounds” for regarding the refugee as a danger to the national security of the host country or where the refugee, having been convicted of a particularly serious crime, constitutes a danger to the host community.⁵

Basic minimum standards for the treatment of refugees

It lays down the basic minimum standards without prejudice to States granting more favourable treatment. Such rights include access to the courts, to primary education, to work, and the provision for documentation, including a refugee travel document in passport form.

Freedom of movement

Article 26 of the 1951 Convention provides that States shall afford refugees the right to choose their place of residence within the territory and to move freely within the State. Article 28 obliges States Parties to issue refugees travel documents permitting them to travel outside the State “unless compelling reasons of national security or public order otherwise require.”

Freedom of movement is an important issue with regard to protracted refugee situations in countries with limited national resources and/or limited legal frameworks for protecting refugees who nonetheless host large refugee populations. In such countries, refugee warehousing – in which

² OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, art. 1(2); *accord* Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico & Panama, art. 3.

³ See *R (on the application of) ABC (a minor) (Afghanistan) v. Sec’y of State for the Home Dep’t* [2011] EWHC 2937 (Admin.) (U.K.); ECtHR, *Case of M.S.S. v. Belgium and Greece* [GC], no. 30696109, ECHR 2011, Judgment of 1 January 2011.

⁴ See, e.g., African [Banjul] Charter on Human and Peoples’ Rights, art. 12(5).

⁵ 1951 Convention, art. 33(2).

refugees are confined to refugee camps, thereby restricting their access to employment and education – is commonly practiced.⁶ Countries such as Kenya and Ethiopia specify in their national laws that the movement of refugees throughout the country may be restricted and that refugees may be limited to living in designated areas, namely refugee camps.⁷

At the regional level, the rights to seek asylum and to freedom of movement can be found within the text of the same article.⁸ Freedom of movement, however, is also a key right for refugees within their host country.⁹

Right to Liberty and Security of the Person

The right to liberty and security of the person is important in the context of how asylum seekers are treated within the intended country of refuge. The national laws of several countries provide for the detention of asylum seekers at one point or another during the adjudication of their claims.¹⁰

The detention of asylum seekers is a contentious issue because of the conditions found in the detention facilities of several countries.¹¹

Right to Family Life

The family is seen as the “natural and fundamental group unit of society and is entitled to protection by society and the State.”¹² In respect of this right, a number of countries provide for the granting of derivative status to dependent relatives. Thus, where an individual is granted asylum, his or her dependent relatives will also receive protection through him or her.¹³ These domestic laws do not preclude dependent relatives from making their own asylum claims¹⁴.

The definition of a dependent relative, however, varies by the cultural notions of family prevalent in the State Party. For instance, in the U.K., dependents are defined as the “spouse, civil partner, unmarried or same-sex partner, or minor child accompanying the applicant” while in Kenya, dependent relatives include the brother or sister of an applicant under the age of eighteen, “or any dependent grandparent, parent, grandchild or ward living in the same household as the refugee.”¹⁵

Other Rights

The Convention also protects other rights of refugees, such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in

⁶ U.S. Comm. for Refugees & Immigrants, *World Refugee Survey 2009* (2009)

⁷ National Refugee Proclamation, No. 409/2004, art. 21(1) (Eth.); The Refugees Act, No. 13, Legislative Supplement No. 7 (2009), Kenya Gazette Supplement No. 11 § 35.

⁸ See African [Banjul] Charter on Human and Peoples’ Rights, art. 12(1) and (3); American Convention on Human Rights, art. 22. The rights are closely related, since the inability to return to one’s country is the basis of an asylum claim while the ability to leave one’s country is a prerequisite for claiming refugee status under the 1951 Convention.

⁹ See, e.g., International Covenant on Civil and Political Rights, arts. 12.

¹⁰ 8 CFR § 235.3(c) (U.S.); U.K. Border Agency, *Screening*; The Refugees Act, No. 13, Legislative Supplement No. 7 (2009), Kenya Gazette Supplement No. 11 § 17.

¹¹ This has been particularly an issue in Greece, a country overwhelmed by the number of asylum-seekers it receives, many of whom use Greece as a port of entry as they try to access other European countries. In order to clarify which State has responsibility for a particular asylum applicant, the Council of Europe issued Council Regulation EC No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (commonly known as the Dublin Regulation). Under the Dublin Regulation, the State through which the third country national first entered Europe is generally considered the State responsible for adjudicating that national’s asylum claim. See Dublin Regulation, art. 10(1). As a result, many of these asylum seekers are returned to Greece to have their claims adjudicated. Human rights organizations including Amnesty International have reported on unsanitary and over-crowded conditions in Greek detention centers¹¹. Additionally, asylum-seekers have claimed that they did not have access to a UNHCR representative or information about how to apply for asylum while in detention. *Id.* The European Court of Human Rights (ECtHR) has held in a number of cases that the conditions in the Greek detention centers violate individuals’ rights to humane treatment and dignity under the European Convention on Human Rights¹¹.

¹² See, International Covenant on Civil and Political Rights, art. 23(1).

¹³ See 8 U.S.C. § 1158(b)(3)(A) (U.S.); Immigration Rules, 2012, S.I. 2012/11, art. 339, ¶ Q (U.K.); National Refugee Proclamation, No. 409/2004, art. 12 (Eth.); The Refugees Act, No. 13 (2006), Kenya Gazette Supplement No. 11 § 24. However, should that individual’s refugee status be terminated, the status of dependent relatives will also be terminated. National Refugee Proclamation, No. 409/2004, art. 12 (Eth.); The Refugees Act, No. 13 (2006), Kenya Gazette Supplement No. 11 § 24.

¹⁴ *Id.*

¹⁵ Immigration Rules, 2012, S.I. 2012/11, art. 349 (U.K.); The Refugees Act, No. 13 (2006), Kenya Gazette Supplement No. 11 § 2.

international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others, such as wage-earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals.¹⁶ Despite these rights being protected in the 1951 Convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges. Ethiopia, for example, made reservations to Articles 22 (public education) and Article 17, treating these articles as recommendations rather than obligations¹⁷. Although not a party to the 1951 Convention, Lebanon is host to a large population of refugees. Restrictive labor and property laws in Lebanon prevent refugees from practicing professions requiring syndicate membership, such as law, medicine, and engineering, and from registering property.¹⁸

To whom does not the Convention apply?

The Convention does not however apply to all persons who might otherwise satisfy the definition of a refugee in Article 1. In particular, the Convention does not apply to those for whom there are serious reasons for considering that they have committed war crimes or crimes against humanity, serious non-political crimes, or are guilty of acts contrary to the purposes and principles of the United Nations. The Convention also does not apply to those refugees who benefit from the protection or assistance of a United Nations agency other than UNHCR, such as refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Nor does the Convention apply to those refugees who have a status equivalent to nationals in their country of asylum¹⁹.

Exceptions: Exclusion and Cessation Clauses

Article 1(D) excludes individuals who, at the time of the 1951 Convention, were already receiving protection or assistance from another UN organ or agency. Article 1(D) largely applied to Koreans receiving aid from the United Nations Korean Reconstruction Agency (UNKRA) and Palestinians receiving aid from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and continues to apply to the latter.²⁰

Additionally, Article 1(F) excludes individuals with respect to whom there are serious reasons for considering that have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; have been guilty of acts contrary to the purposes and principles of the United Nations. Individuals who voluntarily avail themselves of the protection of their country of nationality or habitual residence or individuals who have received protection in a third country are also not considered refugees.²¹

[States Parties to the Convention and its 1967 Protocol Reservations and Declarations](#)
[Link to full text](#)

¹⁶ 1951 Convention, art. 16 (refugees are to be granted equal access to the courts), art. 17 (refugees are to be afforded the same access to wage-earning employment as foreign nationals), art. 13 (refugees are to be afforded the same rights to moveable and immoveable property as foreign nationals).

¹⁷ U.S. Comm. for Refugees & Immigrants, *World Refugee Survey 2009: Ethiopia* (2009).

¹⁸ Human Rights Watch, *World Report 2011: Lebanon* (2011).

¹⁹ <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

²⁰ UNHCR, *Handbook on Procedures for Determining Refugee Status under the 1951 Convention & the 1967 Protocol relating to the Status of Refugees*, para. 142. Although Palestinians living in areas where UNRWA operates are eligible for refugee status under the 1951 Convention. *Id.* para. 143.

²¹ See 1951 Convention relating to the Status of Refugees, art. 1(C).

Optional Protocol relating to the Status of Refugees 1967

Summary: States parties to the Protocol, which can be ratified or acceded to by a State without becoming a party to the Convention, agree to apply articles 2 to 34 of the Convention to refugees defined in article 1 thereof, as if the dateline were omitted (article I of the Protocol). Importantly, this Protocol **expands coverage to refugees** resulting from circumstances other than only those who have become refugees as a result of events occurring before the events of January 1951. Parties undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined. The term "refugee" now means any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted. The present Protocol shall be applied by the States Parties hereto **without any geographic limitation**, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

[Link to full text](#)

Geneva Convention Relative to the Protection of Civilian Persons in Times of War

Summary: This Convention was drafted in response to the atrocities committed in WWII, and this instrument contains a short part concerning the general **protection of populations against certain consequences of war** (Part II), leaving aside the problem of the limitation of the use of weapons. The great bulk of the Convention (Part III - Articles 27-141) puts forth the regulations governing **the status and treatment of protected persons**; these provisions distinguish between the situation of **foreigners** on the territory of one of the parties to the conflict and that of **civilians in occupied territory**. The Convention does not invalidate the provisions of the Hague Regulations of 1907 on the same subjects but is supplementary to them (see Article 154 of the Convention).

Nationals of a State that are not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

[Link to full text](#)

Agreement Relating to Refugee Seamen 1957

Summary: This treatment is intended to protect **refugee seamen**. The Convention applies to seamen **who fear persecution for reasons including nationality**. The Convention also calls for the **same treatment** of all seamen with regard to admissions and sympathetic consideration for those seamen who do not qualify as **staying lawfully under the convention**.

[Link to full text](#)

Guiding Principles on Internal Displacement

The [Guiding Principles](#) are based in part on the following instruments:

- [Universal Declaration of Human Rights](#)
- [International Covenant on Civil and Political Rights](#)
- [International Covenant on Economic, Social and Cultural Rights](#)
- [Convention on the Elimination of All Forms of Discrimination against Women](#)
- [International Convention on the Elimination of All Forms of Racial Discrimination](#)

- [Convention on the Rights of the Child](#)
- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)
- [Convention on the Prevention and Punishment of the Crime of Genocide](#)
- [ILO Convention \(No. 169\) concerning Indigenous and Tribal Peoples in Independent Countries](#)
- [Convention relating to the Status of Refugees](#) (applied by analogy)
- [Geneva Convention relative to the Protection of Civilian Persons in Time of War](#)
- [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#)
- [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#)
- [The Rome Statute of the International Criminal Court](#)
- [Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#)
- [Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committee in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of the Neighbouring States, between 1 January 1994 and 31 December 1994](#)

[Link to full text](#)

General Assembly Resolution on the Protection of and Assistance to Internally Displaced Persons

[Link to full text](#)

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees

[Link to full text](#)

Convention on the rights of the child 1989

[Link to full text](#)

General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin

[Link to full text](#)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

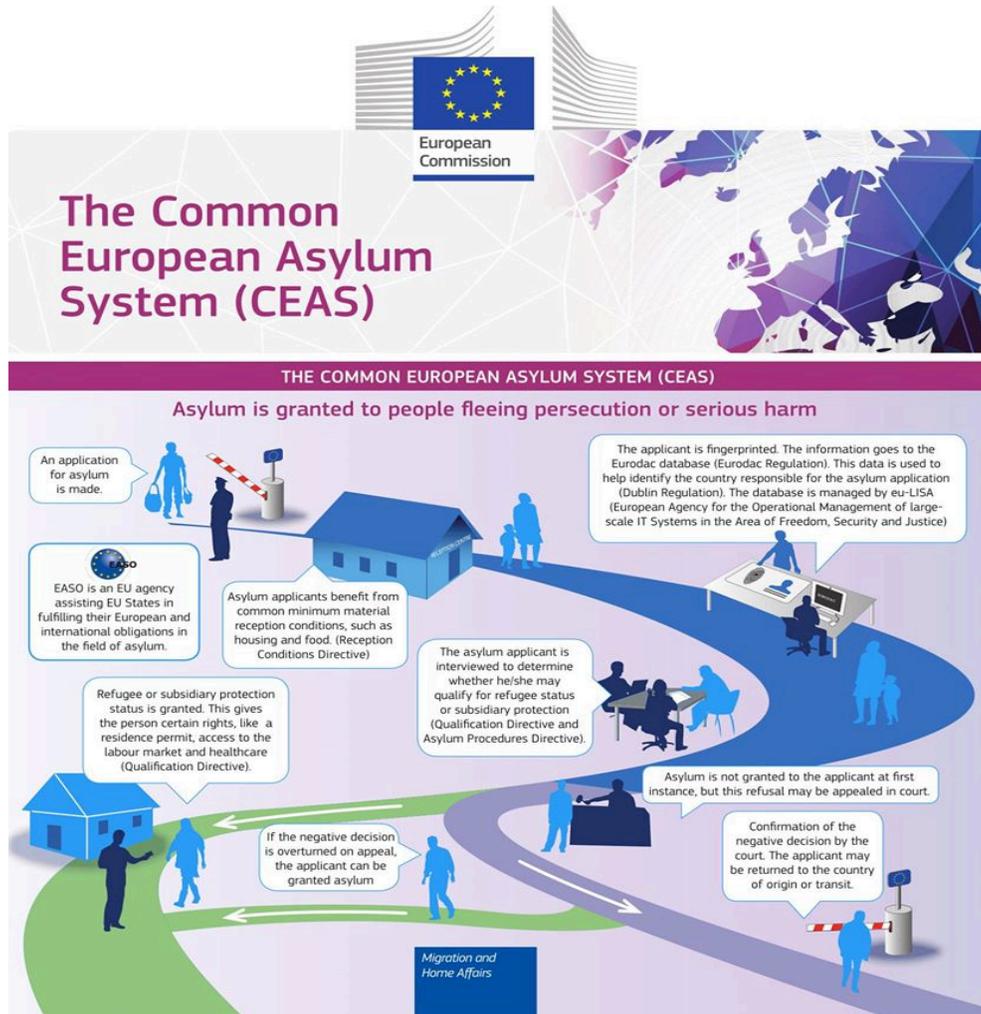
[Link to full text](#)

II. Regional Legal Framework

Common European Asylum System

Summary: The Goal of the Common European Asylum System (CEAS) was to harmonise Member States' legal frameworks on the basis of common minimum standards and establish a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, as well as strengthening practical cooperation between national asylum administrations and the external dimension of asylum. Asylum is a fundamental right and granting it is an international obligation, stemming from the 1951 Geneva Convention on the protection of refugees. Those who seek, or have been granted, protection do not have the right to choose in which Member State they want to settle. The CEAS provides common minimum standards for the treatment of all asylum seekers and applications. The CEAS consists of a legal framework covering all aspects of the asylum process and a support agency - the European Asylum Support Office (EASO).

However, in practice, the current system is still characterised by differing treatment of asylum seekers and varying recognition rates amongst EU Member States. This divergence is what encourages secondary movements and is partly due to the fact that **the current rules grant Member States a lot of discretion in how they apply the common EU rules.** The large-scale, uncontrolled arrival of migrants and asylum seekers since early 2015 has put a strain on many Member States' asylum systems and on the CEAS as a whole. The EU now needs to put in place the tools to better manage migration flows in the medium and long term. The overall objective is to move from a system which, by design or poor implementation, encourages uncontrolled or irregular migratory flows to one which provides orderly and safe pathways to the EU for third country nationals. New EU rules have now been agreed, setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply.



Source: <http://ec.europa.eu/malta/news/commission-presents-options-reforming-common-european-asylum-system-and-developing-safe-and-en>

EU Reception Conditions Directive

- Ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected;
- Ensures that detention is only applied as a measure of last resort;
- Sets better and more harmonised standards of reception conditions throughout the Union;
- Includes an exhaustive list of detention grounds that will help to avoid arbitrary detention practices and limits detention to as short a period of time as possible;
- Restricts the detention of vulnerable persons in particular minors;
- Includes important legal guarantees such as access to free legal assistance and information in writing when lodging an appeal against a detention order;
- Introduces specific reception conditions for detention facilities, such as access to fresh air and communication with lawyers, NGOs and family members.

The new Directive also clarifies the obligation to conduct an individual assessment in order to identify the special reception needs of vulnerable persons. It provides particular attention to unaccompanied minors and victims of torture and ensures that vulnerable asylum seekers can also

access psychological support. Finally, it includes rules on the qualifications of the representatives for unaccompanied minors. Access to employment for an asylum seeker must now be granted within a maximum period of 9 months.²²

Relevant Article: Asylum seekers waiting for a decision on their application must be provided with certain necessities that guarantee them a dignified standard of living.

[Link to full text](#)

Qualification Directive

This Directive clarifies the grounds for granting international protection and therefore will make asylum decisions more robust. It will also improve the access to rights and integration measures for beneficiaries of international protection. It clarifies the grounds for granting international protection and leads to more robust determinations, thus improving the efficiency of the asylum process and prevention of fraud, and ensures coherence with the European court's judgments.²³

Before a person can receive asylum, he/she must be recognised as a refugee or as a beneficiary of subsidiary protection.

EU Asylum Procedures Directive

It sets out rules on the whole process of claiming asylum, including on: how to apply, how the application will be examined, what help the asylum seeker will be given, how to appeal and whether the appeal will allow the person to stay on the territory, what can be done if the applicant absconds or how to deal with repeated applications. Asylum seekers with special needs will receive the necessary support to explain their claim and in particular there will be greater protection of unaccompanied minors and victims of torture.²⁴

Common safeguards must be ensured for people fleeing persecution and seeking international protection — asylum seekers must have access to fair and efficient asylum procedures.

The Dublin Regulation

It enhances the protection of asylum seekers during the process of establishing the state responsible for examining the application and clarifies the rules governing the relations between states; it creates a system to detect early problems in national asylum or reception systems and address their root causes before they develop into fully fledged crises; The core principle of the Dublin Regulation is that the responsibility for examining claim lies primarily with the Member State which played the greatest part in the applicant's entry or residence in the EU.

The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly or regularly.²⁵

Every single asylum application lodged within EU territory needs to be examined — each EU Member State must be able to determine if and when it is responsible for handling an asylum claim.

²² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 (recast) (applicable from 21 July 2015)

²³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), applicable from 21 December 2013.

²⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), applicable from 21 July 2015.

²⁵ Regulation (EU) No 604/2013 of the European Parliament (recast) (applicable from 1 January 2014).

The Eurodac Regulation

- Establishes an EU asylum fingerprint database. When someone applies for asylum, no matter where they are in the EU, their fingerprints are transmitted to the Eurodac central system;²⁶
- Makes it easier for EU Member States to determine responsibility for examining an asylum application by comparing fingerprint datasets;
- Sets out minimum standards and procedures for processing and assessing asylum applications, and for the treatment of both asylum seekers and those who are granted refugee status. However, many EU states have yet to properly implement these standards; What exists instead is a patchwork of 28 asylum systems producing uneven results. In the fall of 2015, the European Commission launched inquiries against many of its member states that failed to adhere to common rules for granting protection and providing decent conditions to asylum seekers, such as housing, food, and health care.

European Convention on Human Rights (art. 2, 3 and 5)

Summary: European Convention on Human Rights (ECHR), in full Convention for the Protection of Human Rights and Fundamental Freedoms, convention adopted by the Council of Europe in 1950 to guard fundamental freedoms and human rights in Europe. Together with its 11 additional protocols, the convention—which entered into force on September 3, 1953—represents the most advanced and successful international experiment in the field.

On November 4, 1950, the Council of Europe agreed to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the substantive provisions of which were based on a draft of what is now the International Covenant on Civil and Political Rights. Over the years, the enforcement mechanisms created by the convention have developed a considerable body of case law on questions regulated by the convention, which the state parties typically have honoured and respected. In some European states, the provisions of the convention are deemed to be part of domestic constitutional or statutory law. Where that is not the case, the state parties have taken other measures to make their domestic laws conform with their obligations under the convention.

A significant streamlining of the European human rights regime took place on November 1, 1998, when Protocol No. 11 to the convention entered into force. Pursuant to the protocol, two of the enforcement mechanisms created by the convention—the European Commission of Human Rights and the European Court of Human Rights—were merged into a reconstituted court, which is now empowered to hear individual (rather than only interstate) petitions or complaints without the prior approval of the local government. The decisions of the court are final and binding on the state parties to the convention.

Parties: All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity

Relevant Articles: 2, 3 and 5.

[Link to full text](#)

European Agreement on the Abolition of Visas for Refugees (art. 1)

Summary: The Agreement aims to facilitate travel for refugees residing in territory of Parties. To this end, it provides that refugees may enter without visas on the territory of all Parties for a

²⁶ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (applicable from 20 July 2015)

maximum of 3 months, but does not apply to persons in paid employment. It sets out also that the refugees shall be re-admitted at any time to the territory of the Party by whose authorities a travel document was issued, at the simple request of the other Party²⁷.

Relevant Articles: 1.

[Link to full text](#)

Declaration on Territorial Asylum, 18th November 1977

Summary: The Declaration underscore that the grant of the asylum is a peaceful and humanitarian act that is incidental to the state sovereignty and should therefore be respected by all other states. The Declaration was adopted in lieu of a Council of Europe instrument that would give legal recognition to the practice of granting asylum in Council of Europe Member States²⁸.

Relevant Articles: 2.

[Link to full text](#)

European Convention on Nationality 1997 (art. 4)

Summary: European Convention on Nationality was signed in Strasbourg on 6 November 1997. It is a comprehensive convention of the Council of Europe dealing with the law of nationality. The Convention is open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration and for accession by other non-member States. The Convention came into force on 1 March 2000 after ratification by 3 countries. As at 6 March 2014, the Convention has been signed by 29 countries, but has been ratified by only 20 of those countries.

Parties: Albania, Austria, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Moldova, Montenegro, Netherlands, Norway, Portugal, Romania, Slovakia, Sweden, Macedonia, Ukraine.

Relevant Articles: 4.

[Link to full text](#)

African [Banjul] Charter on Human and Peoples' Rights (art. 12)

Summary: The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.

The Charter was adopted by the Organisation for African Unity (OAU) Assembly on 28 June 1981, in Nairobi, Kenya. After ratifications by the absolute majority of member states of the OAU, the Charter came into force on 21 October 1986. By 1999, the African Charter had been ratified by all the member states of the OAU.

Relevant Articles: 12.

[Link to full text](#)

OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa 1969 (art. 1 and 2)

Summary: The 1969 Convention governing the Specific Aspects of Refugee Problems in Africa ('1969 Convention') is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the Organization of African Unity,

²⁷ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/031>

²⁸ The EU Charter of Fundamental Rights: A Commentary edited by Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward //Bloomsbury Publishing, Dec 1, 2014 - Law - 1865 pages

now African Union (AU). It entered into force on 20 June 1974 after ratification by one third of the Member States. It has since been signed or ratified by 50 of the 53 Member States of the AU. The 1969 Convention is a relatively short instrument, containing a preamble and 15 articles²⁹. When the Convention was adopted in Addis Ababa in September 1969, coming into force in June 1974, there was much acclamation about its timeliness and importance. The welcome for the Convention was supported by the international community, among them humanitarian actors, human rights activists, academics and the rest of civil society. What was expected to follow was its implementation and, where there was reluctance on the part of States Party, a nudging by the international community to do so. It is fair to observe, however, that while the latter has diligently done its part in pushing for full implementation, States Party have largely reneged on their commitment³⁰.

Relevant Articles: 1 and 2.

[Link to full text](#)

Arab Charter on Human Rights 1994 (art. 20,21, 22 and 23)

Summary: The Arab Charter on Human Rights was adopted by the League of Arab States in 1994. However, none of the member states had ratified the Charter. The Charter was later updated and led to the amended version by the Arab summit in Tunis in 2004. The 2004 version of the Charter came as part of an effort to modernise the League of Arab States. The Arab Charter on Human Rights entered into force on 16 March 2008, two months after ratification of the seventh member state of the Arab League³¹.

Although the Charter has been criticized by Arab civil society as falling short of international human rights standards in many key ways, it does establish an independent Arab Human Rights Committee charged with reviewing reports (submitted every three years) from ratifying states³². The treaty body established to supervise its implementation is the Arab Human Rights Committee.

Parties: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen

Relevant Articles: 20, 21, 22, and 23.

[Link to full text](#)

Cairo Declaration on Human Rights in Islam 1990 (art. 12)

Summary: The Organisation for Islamic Cooperation (OIC) officially adopted the Cairo Declaration on Human Rights in Islam in 1990. It was promoted as a “complement” to the UDHR, not a replacement, and efforts were made to have it adopted by the UN Human Rights Council³³.

Relevant Articles: 12.

[Link to full text](#)

American Declaration on the Rights and Duties of Man (art. 27)

Summary: The American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, was the world's first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights by less than a year.

The current interamerican system of human rights formally started with the adoption of the American Declaration of the Rights and Duties of Man at the Ninth International Conference of

²⁹ <http://www.refugeelaidinformation.org/african-union-refugee-definition#sthash.Fjvrneuv.dpuf>

³⁰ <http://www.fmreview.org/faith/okello.html#sthash.BZiFfxqs.dpuf>

³¹ <http://www.humanrights.ch/en/standards/other-regions-instruments/arab-charter-on-human-rights/>

³² <http://www.icnl.org/research/monitor/las.html>

³³ <https://thebentangle.wordpress.com/tag/cairo-declaration-on-human-rights-in-islam/>

American States, held in Bogotá in 1948, during which the Charter of the OAS (hereinafter “the Charter”) was adopted, promoting the "fundamental rights of the individual" as one of the principles on which the Organization is founded³⁴. The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS.

The American Declaration establishes that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality." Accordingly, the States of the Americas recognize that when the state legislates in this area, it does not create or grant rights, but rather recognizes rights that exist independent of the formation of the State. Both the Commission and the Court have established that despite having been adopted as a declaration and not as a treaty, today the American Declaration constitutes a source of international obligations for the Member States of the OAS

Parties: All members of the Organization of American States (OAS), including the United States, are legally bound to the declaration.³⁵

Relevant Articles: 27.

[Link to full text](#)

American Convention on Human Rights (art. 22)

Summary: The beginnings of the American Convention go back to the Inter-American Conference held in Mexico in 1945, which entrusted the Inter-American Juridical Committee with preparing a draft declaration. That idea was taken up anew at the Fifth Meeting of Ministers of Foreign Affairs that met in Santiago, Chile, in August 1959, in which it was decided to promote the drafting of a human rights convention. The original draft Convention was prepared by the Inter-American Council of Jurists, submitted to the Permanent Council of the OAS, and opened up for comments by the States and the Inter-American Commission. In 1967 the Commission submitted a new draft Convention. In order to analyze the various drafts, the OAS convened an Inter-American Specialized Conference on Human Rights, which met in San José, Costa Rica from November 7 to 22, 1969. The entry into force of the American Convention in 1978 enhanced the effectiveness of the Commission, established an Inter-American Court of Human Rights, and modified the legal nature of the instruments on which the institutional structure is based.

In its first part, the American Convention establishes States’ obligations and enunciates the human rights protected thereof. In its second part, the American Convention establishes the means of protection: the IACHR and the I/ACourTHR, which it declares to be organs competent "with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention."

Parties: As of May 16, 2016, the 24 member States of the OAS that have ratified the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela³⁶.

Relevant Articles: 22.

[Link to full text](#)

³⁴ <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm>

³⁵ <http://www.dignityinschools.org/content/american-declaration-rights-and-duties-man-article-12>

³⁶ http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

Summary: The Protocol was adopted in San Salvador, El Salvador, in 1988. So far 16 State Parties in the Convention have ratified the Protocol. This instrument protects a number of ESC rights but according to Article 19(6) PSS, only violations of the right to unionisation (Article 8(1)(a) PSS), and the right to education (Article 13 PSS) may give rise, through participation of the Inter-American Commission of Human Rights (the Commission or IACoMHR) and, when applicable, of the Inter-American Court of Human Rights (the Court or IACtHR), to application of the system of individual petitions governed by the Convention. In other words, the Protocol only gives jurisdiction *ratione materiae* to the Commission and the Court over two ESC rights.

[Link to full text](#)

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (art. 3)

Summary: The Cartagena Declaration on Refugees is a regional protection instrument, adopted in 1984 by a group of experts from several Latin-American countries, as the result of a colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama held in Cartagena de Indias, Colombia. The Cartagena Declaration reaffirms the centrality of the right to asylum and the principle of non-refoulement, the importance of searching actively for durable solutions, and the necessity of co-ordination and harmonization of universal and regional systems and national efforts.

Although included in a non-binding regional instrument, the Cartagena refugee definition has attained a particular standing in the region, not least through its incorporation into 14 national laws and State practice. The Cartagena Declaration, as a protection instrument, has at its foundation the commitment to grant the treatment provided by the 1951 Convention to individuals not covered by the classic refugee definition, but who are nevertheless in need of international protection.

The extended refugee definition of the Cartagena Declaration aims to provide protection from situational or group-based risks. The five “situational events” of the Cartagena refugee definition are characterized by the indiscriminate, unpredictable or collective nature of the risks they present to a person or group of persons, or even to the population at large.

The Cartagena refugee definition contains three criteria: i) the person needs to be outside his/her country; ii) the country in question is experiencing at least one of the situational events; and iii) the person’s life, security or freedom is threatened (at risk) as a result of one or more of the situational events³⁷.

Relevant Articles: 3.

[Link to full text](#)

Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (1989)

Summary: This document was prepared by the Group of Experts for the International Conference on Central American Refugees pursuant to specific objective: to assess the progress achieved in respect of the principles underlying the protection of and assistance to refugees and their voluntary repatriation with a view to encouraging their dissemination and application. The Group has sought to identify the basic set of principles and criteria by which States are guided in their treatment of refugees, among which solutions to the problems of refugees may also be found. The Group has also referred extensively to the sources of the various principles and criteria, indicating by means of

³⁷ <http://www.unhcr.org/53bd4d0c9.html>

footnotes the documents in which they are contained. In the context of an assessment, these notes are of particular importance, as the character of these principles and criteria of international law varies according to the source from which they derive³⁸.

[Link to full text](#)

San José Declaration on Refugees and Displaced Persons, which focused on internal displacement (art. 1, 18 and 20)

Summary: On the occasion of 10th anniversary of the Cartagena Declaration in 1994, the importance of this document was reiterated in the Colloquium in Commemoration on “The Tenth Anniversary of Cartagena Declaration on Refugees” that took place in San Jose, Costa Rica, in which Delegates of 20 American Countries participated. This Colloquium aimed to reevaluate the Cartagena Declaration and resulted in the elaboration of the San Jose Declaration on Refugees and Displaced Persons. The Colloquium proposed to evaluate the Cartagena Declaration and noted that its adoption has led to the development of refugee protection with the intention of durable solutions. The San Jose Declaration intensified the relations between Refugee Law and Human Rights. This Declaration acknowledged the convergences among International Refugee Law, International Human Rights and International Humanitarian Law when stating that violation of human rights is one of the cause of displacement and, therefore, the protection of such rights and the strengthening of democratic system are the best measures in the search for durable solutions as well as the prevention of the conflicts the exodus of refugees and the severe humanitarian crisis. This Declaration served to reanimate and strengthen the commitment of the countries in the American continent in the treatment in the search of solutions for the question of refugees and displaced people³⁹.

Relevant Articles: 1, 18 and 20.

[Link to full text](#)

Rio de Janeiro Declaration on the Institution of Refuge 2000

Summary: This Declaration includes the unrestricted respect, agreed by the countries, to the principle of non-devolution (non-refoulement), including non-rejection at borders and legalizing the illegal entry of foreigners in their country. The text also supports the continued incorporation, into national laws on refugees and IDPs, of the variables of gender, age and diversity.

[Link to full text](#)

Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America

Summary: New and growing challenges, governments, civil society representative and international organizations met in Mexico City in 2004 on the occasion of the 20th Anniversary of Cartagena Declaration. This meeting reaffirmed the principles already established and developed a new framework of commitments embodied in the Declaration and Plan of Action of Mexico (DPAM). One of the important points of DPAM was to incorporate the Colombian issue in the institutional and legal framework for refugees in the continent and to establish strategic pillars of concerted action among governments, civil society and local groups to implement better legal protection mechanisms and facilitate the process of local integration of refugees. These pillars were substantiated in three areas:

³⁸ <http://www.refworld.org/docid/4370ca8b4.html>

³⁹ Exploring the Boundaries of Refugee Law: Current Protection Challenges. Jean-Pierre Gauçi, Mariagiulia Giuffrè, Evangelia (Lilian) Tsourdi//Hotei Publishing, Apr 13, 2015 - Political Science - 356 pages-p.159

- Borders of solidarity, aimed at local development strategies of border regions and the articulation of local population and refugees;
- Cities of solidarity, aiming to improve the integration process of refugees in urban areas;
- Solidary resettlement, aiming to distribute the responsibilities of protection – the reception and acceptance of refugees - between countries. In this sense, the DPAM aims to stimulate the development of policies and integrate

In this sense, DPAM aims to stimulate the development of policies and integrated strategies at the regional and local levels, paying attention to the specificities of the dynamic of reception and influx of refugees in the region. In addition, DCAM looks to a horizon in which Latin American governments could assume a larger share of responsibility in relation to international humanitarian protection, not only among countries in the region that host a large population of refugees and asylum seekers, but also with other regions of the world where the issue persists. Declaration and Plan of Action of Mexico were recognized as important agreements to expand the space of hospitality towards refugees and to make viable new alternatives and solutions⁴⁰.

Brazil Declaration and Plan of Action “Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity” 2014

Summary: In December 2014, at a ministerial meeting in Brasilia, the UN refugee agency and representatives of 28 countries and three territories in Latin America and the Caribbean adopted a road map to address new displacement trends and end statelessness by 2024.

This important development came on the 30th anniversary of the Cartagena Declaration on Refugees, a landmark regional refugee instrument that broadened the refugee definition for Latin America and proposed new cooperative approaches to the humanitarian needs of refugees and the internally displaced. The meeting in Brazil came at the end of a year-long commemorative process known as Cartagena +30, which included consultations in Argentina, Ecuador, Nicaragua and the Cayman Islands with governments, international and regional organizations, ombudsman offices and civil society. Participants adopted by acclamation the Brazil Declaration and Plan of Action, agreeing to work together to uphold the highest international and regional protection standards, implement innovative solutions for refugees and other displaced people and end the plight of stateless persons throughout the region within a decade.

The Brazil Declaration builds upon previous regional frameworks, including the 1994 San José Declaration on Refugees and Displaced Persons, which focused on internal displacement, and the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America. It devises a new regional framework for the coming years, acknowledging the new realities forcing people in Latin America and the Caribbean to flee their homes and seek protection. The wording of the declaration and the plan of action reflect the commitment of governments to address the needs of the most vulnerable. The plan of action includes 11 strategic programmes, to be implemented by willing governments by 2024⁴¹.

[Link to full text](#)

⁴⁰ <http://reliefweb.int/sites/reliefweb.int/files/resources/630648841.pdf>

⁴¹ <http://www.unhcr.org/pages/54d0d66d6.html>

III. National Legal Framework

USA

Summary: The United States Immigration and Nationality Act (INA) appears to clearly distinguish between the terms “refugee” and “asylum.” In Section 208 of the INA, the Act states that an alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, is eligible to apply for asylum status.⁴²

The provisions in the Section 207 of the INA contain caps on the number of people that may be admitted into the United States in refugee status. This section of the Act contemplates that the term “refugee” should necessarily be used for those seeking protection from outside the United States – in other words, those not within the borders of the United States⁴³. On the other hand, the term “asylum” is to be used for the class people seeking protection while physically within the confines of the United States – regardless of how such person managed to come within its borders. Pursuant to Section 207 of the INA, if the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished given the aforementioned numerical restrictions, the President may fix a number of refugees to be admitted to the United States in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States⁴⁴. Additionally, the Act vests in the Attorney General the power to admit any refugee who is not “firmly resettled in any foreign country” and is determined to be of “special humanitarian concern” to the United States, pursuant to certain numerical limitations and conditions.⁴⁵

“Appropriate consultation” must be undergone by the President before exercising his powers to admit refugees into the country due to an unforeseen humanitarian crisis. This consultation must, per the INA, involve discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States, and to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns. During the course of this consultation, the following information must be provided:

- A description of the nature of the refugee situation;
- A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came;
- A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement;
- An analysis of the anticipated social, economic, and demographic impact of their admission to the United States;
- A description of the extent to which other countries will admit and assist in the resettlement of such refugees;
- An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States;

⁴² See INA, § 208.

⁴³ See INA, § 207.

⁴⁴ *Id* at Subsection (b)

⁴⁵ *Id* at Subsection (c)(1)

- Such additional information as may be appropriate or requested by such members.⁴⁶

The Refugee Act of 1980 ⁴⁷

Title II of the Refugee Act defines a “refugee” as a person who is outside their country of nationality or, in the case of a person having no nationality (that is a stateless person), is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The Act also extends the definition of “refugee” to such a person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. To be fully covered under the term “refugee”, this class of persons must be beneficiaries of the President’s exercise of emergency powers as prescribed in Section 207 (e) of the INA after appropriate consultation. The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Procedures for Claiming Refugee Status in the United States

Claimants outside the country

Refugee status applicants that are outside the United States must be eligible for resettlement in the United States. Refugees may be eligible for a United States Citizenship and Immigration Services (USCIS) interview for resettlement in the United States if they meet one of the following conditions: (1) the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or a non-governmental organization refers them to the United States for resettlement; (2) they are members of specified groups with special characteristics in certain countries determined by the United States, or; (3) they have an anchor relative in the United States who is a refugee or asylee.^{48,49}

The United States divides refugee applicants into three (3) different priority processing categories, determined by the Department of State. These categories are based, in order of priority, on individual selection (P1), group selection (P2), and family reunification (P3.):

- Under the first priority category, individuals from any country that has been officially recognized by the UNHCR or the U.S. Government as refugees and for whom resettlement is seen to be the best option are eligible for USCIS resettlement interviews. A person covered under this category could, for example, be a person who spoke out against government practices, or a woman who was raped and is now ostracized by her community.⁵⁰
- Under the second priority category are those who have been identified by the Department of State, in conjunction with other national and international groups, as being in need of resettlement. Often these are people of a specific ethnic, religious or national identity which has been persecuted or oppressed. Such processing is done in-country in the Former Soviet Union, Cuba, and Vietnam. Out of country processing is done for ethnic minorities and others from Burma in camps in Thailand, Burundians in Tanzania, and Bhutanese in Nepal.⁵¹

⁴⁶ *Id* at Subsection (e)

⁴⁷ Refugee Act of 1980 available in PDF format – obtained from the Government Publishing Office, <https://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>, accessed June 30, 2016.

^{48, 9, 10} “Anchor relatives” are those who are spouses, unmarried children under the age of 21, or parents of individuals already admitted to the U.S. as refugees or asylees. See Hebrew Immigrant Aid Society, <http://www.hias.org/us-refugee-priorities>.

⁴⁹ See USCIS Questions & Answers: Refugees, <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/questions-answers-refugees>.

- Under the third priority category are refugees who are spouses (including same-sex spouses), unmarried children under the age of 21, or parents of individuals already admitted to the U.S. as refugees or asylees. As such, this category is for those that intend to immigrate to the United States by virtue of a qualified relative who had valid asylum or refugee status in United States. P3 Immigrants come from certain countries designated by the Department of State. In order to bring a relative to the U.S. with P3 designation, an applicant must file an Affidavit of Relationship (AOR) with a local agency. An Affidavit of Relationship confirms the relationship between a refugee or asylee living in the U.S (an anchor relative) and their relatives who are overseas seeking refugee status. Other relatives may qualify for resettlement in the United States if they meet the U.S. refugee criteria with their own separate and independent claims. The U.S. Department of State has designated the following countries for P3 Status: Afghanistan, Burma, Burundi, Colombia, Congo (Brazzaville), Cuba, Democratic People’s Republic of Korea (DPRK), Democratic Republic of Congo (DRC/Kinshasa), Eritrea, Ethiopia, Haiti, Iran, Iraq, Rwanda, Somalia, Sudan, and Uzbekistan.

Generally, refugees must be outside their homelands to be eligible for the U.S. refugee program; however, the US Refugee Admissions Program (USRAP) processes refugees in their home countries.⁵² Even if an applicant is determined by USCIS to be a refugee, refugees must be admissible to the United States. An applicant can be found “inadmissible” to the United States for a variety of reasons, including criminal, health, or security-related grounds.

If refugee-seekers choose to go through the UNHCR, a vital part of being recognized as a refugee is Refugee Status Determination (RSD.) This is the administrative process by which governments or the UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law. State parties to the Refugee Convention have the primary responsibility for determining the status of asylum-seekers, but UNHCR may do so where states are unable or unwilling to do so. In recent years, due to changes in volumes and patterns of forced displacement, the UNHCR has been required to conduct RSDs in more countries than before and for a greater number of people.⁵³

The U.S. Department of State Resettlement Service Centers (RSCs) in various countries carry out most of the casework preparation for refugee eligibility interviews. The RSCs pre-screen applicants, help prepare the applications for the USCIS, initiate background security checks, and arrange medical examinations for those refugees approved by USCIS.

Following USCIS approval (after the resettlement interview), the applicant’s case is sent to a processing entity (an NGO like the Hebrew Immigrant Aid Society, for example) – this entity also asks for the names and addresses of any relatives in the United States, for details on the person's work history and job skills, and for any special educational or medical needs of the refugee and accompanying family members, in order to determine the best resettlement arrangements for the refugee.

The International Organization for Migration generally arranges transportation to the United States on a loan basis. Refugees are expected to repay the cost of their transportation once they are established in the United States. Individual refugees or their relatives may pay for transportation costs in advance.

Claimants inside the country

Claimants that are already within the United States are subject to the same legal standards as those that are seeking protection from outside the country – that is, they have to prove that they have suffered persecution or fear that they will suffer persecution due to their race, religion,

⁵² Visit <http://www.state.gov/j/prm/releases/factsheets/2016/254652.htm> to see an example of the U.S. Department of State implementing the USRAP in Iraq. The factsheet gives more detail as to how the Refugee Admissions Program works in Iraq.

⁵³ See UNHCR on Refugee Status Determination, <http://www.unhcr.org/en-us/refugee-status-determination.html>

nationality, membership in a particular social group, or political opinion. The only difference between applicants inside and those outside the country is the name ascribed and the processing procedures to which they are subjected. For those inside the country, the general process by which they gain protection from persecution is “asylum.” There are two different asylum processes in the United States – the affirmative asylum process and the defensive asylum process.

The basic difference between the affirmative and defensive asylum processes is that the defensive asylum seeker is pleading asylum after being dragged into removal proceedings before an Immigration Judge. In a majority of the cases, the defensive asylum seeker has attempted, by land, to cross the border into the United States, has been apprehended by Customs and Border Patrol (CBP) officers, and detained (for a while) in an immigration detention facility.

Upon detention, the detainee immediately scheduled and processed for deportation, unless the detainee advises the immigration officer that he or she intends to apply for asylum in the United States. If such an advisement is made, the immigration officer will refer the detainee to undergo a credible fear interview process with an asylum officer who works for Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS.) The detainee should be given at least 48 hours to prepare for this interview, unless that right is waived, and the detainee is also entitled to legal representation at this interview.⁵⁴

During the credible fear interview, the asylum officer will ask specific questions relating to the several categories under which a claimant may claim asylum. The officer will then decide whether the applicant has demonstrated a credible fear of persecution. The standard used is whether the detainee has demonstrated a “significant possibility” of being able to prove to an Immigration Judge that the detainee would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her home country.⁵⁵ If the officer answers “no” to this question, then the claimant can request a judicial review (by an Immigration Judge) of the adverse decision. If the officer answers “yes” to this question, then the claimant’s case will be referred to an Immigration Judge for adjudication on the claim of asylum.

Once the case has been referred to an Immigration Judge, the claimant will be issued a Form I-862 Notice to Appear – the form will contain the date, time, and location at which the claimant is to appear at an immigration court to defend his deportation case by pleading asylum. A formal request of asylum must be made by completing a Form I-589 Application for Asylum and for Withholding of Removal within one year of arriving in the United States.⁵⁶

The process is slightly different for an affirmative asylum seeker. The affirmative seeker has not been apprehended by the CBP officer but is present in the United States without legal status, or in very few cases, with legal status. A person may apply for asylum status regardless of their current immigration status and regardless of how they arrived in the United States and. However, the affirmative asylum seeker must also make a formal request of asylum by filing a Form I-589 Application for Asylum and for Withholding of Removal with the USCIS within one year of arriving in the United States, unless the applicant can show (a) changed circumstances that materially affect their eligibility for asylum or extraordinary circumstances relating to the delay in filing; and (b) they filed their asylum application within a reasonable amount of time given those circumstances.

⁵⁴ USCIS Credible Fear Frequently Asked Questions, <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40176>

⁵⁵ See INA Section 235(b)(1)(B)(v), defining a credible fear of persecution as a “significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208 [of the INA].”

⁵⁶ In order to prevail on a challenge to the one-year bar on the filing of an asylum application, the applicant must prove (1) the existence of changed circumstances which materially affect the applicant’s eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing; and (3) that the application was filed within a “reasonable period of time” after the changed or extraordinary circumstance. See Immigration Equality, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/5-immigration-basics-the-one-year-filing-deadline>.

Upon receiving an application for asylum, the USCIS will forward the case file to its Asylum Division which will assess the case on its merits, schedule and conduct an asylum interview with an Asylum Officer. The applicant in this category is also allowed to have legal representation as the interview with the Asylum Officer. The Asylum Officer then decides whether the claimant has met the legal standard based on the evidence and testimony. The asylum officer will determine whether the applicant is eligible to apply for asylum, whether the claimant meets the definition of a Convention Refugee as spelled out in INA Section 101(a)(42)(A), and whether the claimant is barred from being granted asylum pursuant to INA Section 208(b)(2). If the case is not approved and the claimant does not have independent legal immigration status, the USCIS will issue a Form I-862, Notice to Appear, and forward the case to an Immigration Judge at the Executive Office for Immigration Review (EOIR). The Immigration Judge conducts a de novo hearing and adjudicates the case on its merits.⁵⁷

*Bars to Applying for Asylum*⁵⁸

A person may be found ineligible to apply for asylum if:

- They wait more than one year after their last entry into the United States to initiate their asylum application, and they fall within no exception;
- They had a previous asylum application denied by an Immigration Judge or the Board of Immigration Appeals; or
- They can be removed to a safe third country under a two-party or multi-party agreement between the United States and other countries.

*Bars to Getting Asylum*⁵⁹

A person may be barred from receiving asylum status if they:

- Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion
- Were convicted of a “particularly serious crime” such that you are a danger to the United States
- Committed a “serious nonpolitical crime” outside the United States
- Pose a danger to the security of the United States
- Have been firmly resettled in another country before arriving in the United States.

Additionally, an applicant will also be barred from receiving asylum status if they are found inadmissible by reason of:

- Having engaged in terrorist activity or provided material support to further terrorist activity;
- Being engaged in or are likely to engage after entry in any terrorist activity;
- Having incited terrorist activity;
- Bring a representative of a foreign terrorist organization;
- Being a member of a terrorist organization;
- Having persuaded others to support terrorist activity or a terrorist organization;
- Having received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization; and
- Being the spouse or child of an individual who is inadmissible for any of the above within the last 5 years.

The same bars that apply to *getting* asylum status in the United States will also apply to those seeking refugee status. However, the bars to *applying* for asylum in the United States may not necessarily apply to those seeking refugee status.

⁵⁷ USCIS, Obtaining Asylum in the United States, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>

^{58, 18} USCIS, Asylum Bars, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars>

Temporary Protected Status (TPS)

TPS is a form of humanitarian relief created by Congress in 1990 with the aim of granting temporary protection to people unable to return to their home countries due to violent conflicts or natural and environmental disasters. As the name implies, TPS is not a grant of permanent legal status in the country – in other words, TPS will never lead to a green card or a grant of U.S. citizenship. The benefits TPS holders will enjoy is limited to a protection against deportation and the ability to work in the United States. The Department of Homeland Security is responsible for designating a particular country based on conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is incapacitated to handle the return of its nationals. Such conditions include ongoing armed conflict (such as civil war), an environmental disaster (an earthquake or hurricane, for example), an epidemic, or such other extraordinary and temporary conditions as the Secretary of Homeland Security may see fit.⁶⁰ Once the condition for which TPS was designated no longer exists to prevent nationals from returning, the Secretary may terminate TPS status for a country, which will subject nationals of that country to removal from the United States.⁶¹ As of today, the countries designated by Secretary are El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, South Sudan, Syria, and Yemen.⁶²

An applicant for TPS must (1) be a national of a country designated for TPS, or in the case of a stateless person, must have last habitually resided in the designated country; (2) file for TPS during open initial registration period or be eligible for late registration; (3) must have continuing physical presence (CPP) in the United States since the effective date of the most recent designation date of their country; and (4) must have been continuously residing in the United States since the specified date for their country. TPS registrants must annually renew their Employment Authorization Document.

The Central American Minors Refugee/Parol Program

In response to a dramatic surge in arrivals at the U.S.-Mexico border of minor children from Central America (El Salvador, Honduras, and Guatemala), the Obama administration established the Central American Minors (CAM) Refugee/Parol Program, with the aim of providing a safe alternative to the highly risky trips (often through illegal smuggling routes) taken by these children to get to the border of the United States. The program allows children to be reunited with their parents who are lawfully living in the United States.⁶³ The sharp increase in gang activity, the prevalence of organized crime groups as well as the rising rates of homicide, drug trafficking, human trafficking, gender-based violence is making life increasingly unbearable for some inhabitants of cities in the Central America's Northern Triangle (El Salvador, Guatemala, and Honduras.)

The dangers people are fleeing are real and personal to them and their communities. The amount of people that have fled this region is evident in the amount of asylum petitions filed not only in the United States but also in countries around the region. While the United States continues to be a primary destination, the countries neighboring the Northern Triangle, including Mexico, Costa Rica, Belize, and Nicaragua, have seen requests for asylum from citizens of these countries increase by almost 1,200 percent since 2008. Between 2008 and August 2015, Costa Rica alone saw a sixteen-fold increase in asylum requests from the Northern Triangle countries. Request for

⁶⁰ See Department of Justice, Executive Office for Immigration Review, Temporary Protected Status. https://www.justice.gov/eoir/temporary-protected-status#tps_countries for all countries that have ever been designated for TPS and their termination dates, as applicable. This list was last updated July 8, 2016.

⁶¹ Migration Policy Institute – TPS in the United States: A Grant of Humanitarian Relief that Is Less Than Permanent. <http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>

⁶² See USCIS, Temporary Protected Status Eligibility Requirements. <https://www.uscis.gov/humanitarian/temporary-protected-status#What%20is%20TPS?>

^{63, 25, 26} USCIS, In-Country Refugee/parole Processing for Minors in Honduras, El Salvador, and Guatemala (Central American Minors – CAM.) <https://www.uscis.gov/CAM>

asylum in Mexico, primarily from Northern Triangle countries, have more than doubled since 2013.⁶⁴

Under the CAM program, a qualifying U.S. resident parent who is 18 years of age or older must be lawfully present in the country – the parent meets this status if they are lawful permanent residents (LPRs), TPS registrants, deferred action recipients, or withholding of removal beneficiaries. The qualifying child must be: (1) the child (genetic, legally adopted in any jurisdiction, or stepchild) of the qualifying parent; (2) unmarried; (3) under the age of 21; (3) a national of El Salvador, Honduras, or Guatemala; and (4) residing in the country of nationality.

Applying for the CAM Program

The application process involves the qualifying parent residing in the United States (in one of the immigration categories listed above at the time of applying for this program, as well as at the time of admission or parole of the beneficiary of this program) filing the Form DS-7699 Affidavit of Relationship (AOR) for Minors Who Are Nationals of El Salvador, Guatemala, and Honduras. The qualifying parent must retrieve this form and fill it out at a refugee resettlement agency in the United States as the form can only be accessed and completed with the assistance of a designated resettlement agency.

A DNA test to prove the claimed relationship will be conducted for those applicants that claim a biological or genetic relationship. For those applicants that claim relationship by legal adoption, adoption decrees from whatever jurisdiction the adoption took place must be provided to prove the legal relationship between the qualifying parent and the qualifying child. For those applicant claiming relationship by virtue of being a step-parent, the documentation process to prove this relationship is two-fold. First, there must be documentation proving a current marriage to the genetic or adoptive parent of the qualifying child. Second, there must be documentation showing a relationship between the qualifying child and the spouse of the qualifying parent.⁶⁵

The CAM program is expanded to include a parent of a qualifying child who is not the qualifying parent. A parent of the qualifying child may be included in the application if (1) the parent is part of the same household unit as the qualifying child, (2) the parent is legally married to the qualifying parent at the time of the filing of the application, and (3) continues to be legally married to the qualifying parent at the time of admission into the United States. Both the qualifying child and the parent must independently satisfy requirements to be determined as refugees.⁶⁶

Withholding of Removal

This is another form of relief to people who are physically present in the United States and fear persecution in returning to their homeland or countries of origin. This provision under U.S. law is drawn from the *non-refoulement* provision found in the Refugee Convention. This provision prohibits the government from removing a person a country where their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. The procedure for filing for Withholding is the same as the procedure for filing for asylum – the applicant completes the Form I-589 Application for Asylum and for Withholding of Removal.

Differences between Withholding of Removal and Asylum

- Asylum may be granted by either an immigration judge or an asylum officer. Withholding, on the other hand, may only be granted by an immigration judge.⁶⁷

⁶⁴ Washington Office on Latin America, Five facts About Migration from Central America's Northern Triangle. http://www.wola.org/commentary/five_facts_about_migration_from_central_america_s_northern_triangle

⁶⁷ Immigration Equality, Immigration Basics; Withholding of Removal, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/6-immigration-basics-withholding-of-removal/#return-note-2054-1>
²⁹ United States Department of Justice, Executive Office for Immigration Review, Factsheet on Asylum, Withholding of Removal, and the Convention Against Torture, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>

- Withholding of Removal requires that an applicant demonstrate by a preponderance of the evidence (that is more likely than not) that he or she will face persecution on account of a protected ground (under asylum and refugee law) if returned back to the country or origin.
- A successful asylum applicant is permitted to (1) remain in the United States; (2) have their family member included in the application remain in the United States; (3) petition to bring their eligible family members to the United States, and (4) after some time, apply for lawful permanent residence and citizenship.⁶⁸ Withholding of Removal, however, (1) does not provide relief for eligible family members in the United States; (2) does not provide the ability to petition to bring family members into the United States; and (3) will never make the applicant eligible for permanent residence or citizenship. Successful Withholding applicants will, however, be eligible for work permits.
- The immigration judge has no discretion to deny a withholding of removal application as long as the applicant objectively meets the burden of proof.
- The government still retains the legal right to deport a person in withholding of removal status to a country other than the one from which he or she fears persecution.
- The sixth difference is that the one-year deadline to apply for asylum in the United States does not apply to an application under withholding of removal. Aside from the one-year bar and the firm resettlement bar, other bars that prevent a grant of asylum will also prevent a grant of withholding.⁶⁹

Protection under the Convention Against Torture (CAT)

Relief under CAT is also a non-discretionary, mandatory form of relief that is awarded to an applicant if he or she meets all of the required elements. To qualify for CAT, an applicant must show that by a preponderance of the evidence (that it is more likely than not) that he or she will be tortured if removed to a country in which they fear torture. Under the CAT, “torture” is defined as any intentional unlawful infliction of severe – physical or mental – suffering or pain, with consent or acquiescence of a public official or another person acting in an official capacity, for purposes such as punishment, obtaining a confession, intimidation, or discrimination.

The main difference between relief under the CAT and relief under Asylum and Withholding of Removal is that none of the bars to asylum or withholding would prevent an applicant from applying for or being granted relief under the CAT. Additionally, the torture an applicant would face in their country of origin does not need to be on account of race, religion, nationality, political opinion, or membership in a particular social group.

Case Law

Membership in a Particular Social Group

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) concerns the case of a native of El Salvador, who along with several other taxi drivers in 1978, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. The applicant rose to become the General Manager of this cooperative and continued drive taxis even on weekends. In 1979, the cooperative started receiving messages from anti-government guerilla groups to cease operations, with the guerrilla groups targeting, in part, the transportation industry in order to slow down El Salvador’s economy. When COTAXI refused to accede to the guerilla’s requests, the taxis were seized and burned, and some of the COTAXI drivers were assaulted and killed. The applicant, in 1981, also

³⁰ Immigration Equality, Withholding of Removal and CAT. See <http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/>

⁶⁹ Immigration Equality, Immigration Basics; Withholding of Removal, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/6-immigration-basics-withholding-of-removal/#return-note-2054-1>

received three personal threats to his life – one of the threats specifically reference “Taxi No. 95”, which was the taxi that belonged to the applicant.

In defining what would constitute a persecution on account of membership in a particular social group, the *Acosta* court intimated the following:

“The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.”

The court in *Acosta* went further to indicate that refugee status for those who belong to a social group is restricted to individuals who possess a characteristic so fundamental to their identities or conscience that they are either unable to change by their own actions or that they should not be required to change in order to avoid persecution.⁷⁰

Political Opinion, “On Account of”, AND More on Membership In a Social Group

With regard to political opinion, the law covers a person who is persecuted based on their actual political opinion and imputed political opinion. *In re C-A*, 23 I&N Dec. 951 (BIA 2006) deals with a respondent who is a native of Colombia and was threatened with harm on account of membership in a group composed of noncriminal informants working against the Colombian Cali drug cartel. In his asylum case, the Immigration Judge reasoned that the assault and threats against the respondent were based on retaliation or retribution because of his voluntary decision to provide information to the Colombian Government concerning the operations of the Cali cartel. Finding a lack of the required nexus, the Immigration Judge denied the respondent’s application for asylum and withholding of removal.

On appeal, the BIA rejected the respondent’s argument claiming persecution based on imputed political opinion, saying that that there was insufficient motivation behind the actions of the cartel members against the respondent, other than revenge for the aid he provided to the government.

The BIA went further to explain that the persecution respondent suffered in Colombia was not as a result of his voluntary decision to serve as a government informant. The court indicated that the respondent’s case lacked social visibility – that is the very nature of respondent’s conduct was such that it is generally out of public view. Because informants usually remain unknown and undiscovered, discovery or social visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members. In this case, the court chose to believe that the cartel members did not specifically target the respondent because they knew he was an informant. Rather, he only happened to be a victim of the cartel’s attack on the general public and on anyone perceived to interfere with their activities.

As such, the court found that the respondent had not demonstrated that noncriminal drug informants working against the Cali drug cartel constitute a “particular social group” as that term is used in the definition of a “refugee” in section 101(a)(42)(A) of the INA.⁷¹

⁷⁰ See also *Matter of Mogharrabi*, Int. Dec. No. 3028 (BIA 1987), where the BIA made the determination that asylum may be claimed based on a well-founded fear of future persecution. The BIA made it clear that an applicant need not have suffered past persecution to have a well-founded fear of future persecution.

⁷¹ It is important to note that even though the respondent never testified in court against members of the cartel, there was, in my opinion, sufficient evidence to conclude that the cartel figured him out to be an informant. In the facts of the case, the cartel members said, “We will get

Persecution

The BIA, in *In re T-Z*, 24 I&N Dec. 163 (BIA 2007), was faced with the question of whether a couple forced into aborting two pregnancies while living in China had a well-founded fear of persecution. The applicants claimed they were forced into aborting two pregnancies in order to comply with the Chinese government's one child policy. According to their petition and testimony, the authorities would have dismissed the wife from her job, the children would not have been able to be registered, and they could possibly have been forced to undergo sterilization had they refused to undergo the abortions. The issue was whether the applicants were entitled to asylum or withholding of removal based on the wife's submission to abortions based on economic threats, including the loss of her job.

The court recounted, in part, the provisions of Section 101(a)(42) of the INA saying that:

"For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion."

The court went on to add that nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution. The term "persecution" is not limited to physical harm or threats of physical harm and may include threats of economic harm, so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution. The court, however, put a caveat on the interpretation of economic harm as it relates to "forced" abortion. The court noted that "not all threats of fines, wage reduction, or loss of employment, will suffice to indicate that submission to an abortion was "forced" within the meaning of the Act". An abortion is "forced" by threats of harm (whether in form of physical harm, economic sanctions, or otherwise) when a reasonable person would objectively view the threats as genuine, and the threatened harm, if carried out, would meet or exceed the threshold level of harm for past persecution.⁷²

Material Support

In the *Matter of M-H-Z*, the issue presented before the Board of Immigration Appeals (BIA) was whether the "material support bar" in section 212(a)(3)(B)(iv)(VI) of the INA includes an implied exception for an alien who has provided material support to a terrorist organization under duress. The applicant in this case was a native of Colombia who, due to threats by the Revolutionary Armed Forces of Colombia (FARC), assisted the organization. The applicant was a successful business woman who owned a hotel and a store in El Bordo, Colombia. After the applicant began receiving demands from FARC for goods and money, the applicant acceded to the demands and began to provide merchandise from her store. Every 3 months from 1997 to early 1999, she supplied food and other products that the FARC requested. She also housed government officials at her hotel, which she believes resulted in more serious threats being made in 1999. On March 7, 2000, the FARC attacked El Bordo, and her store and hotel were destroyed.

Section 212(a)(3)(B)(iv)(VI) of the INA defines the term "engage in terrorist activity" to include a person who commits an act that the actor knows, or reasonably should know, affords

V-M-M, too" on the day the respondent was beaten in the street. V-M-M, according to the facts, is the person to whom the respondent was giving details about the cartel's criminal activity.

⁷² See also *Mikhael v. INS*, 115 F.3d 299 (1997), where the U.S. Court of Appeals for the 5th Circuit stated that "the harm or suffering need not be physical, and may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."

material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training [to a terrorist organization or for a terrorist activity.” Relying on precedent decisions from federal courts, the BIA concluded in this case that the “material support bar” applies even to those that have provided support under duress.

Afghanistan

Summary: Afghanistan is a party to the Geneva Convention of 1951 and its 1967 Protocol.⁷³

However, there seems to be no local legislative governing provisions that apply to Afghanistan or any case law that governs refugee rules within the country.

- a. [National Policy on Internally Displaced Persons, Ministry of Refugees and Repatriation, the Government of the Islamic Republic of Afghanistan, 25th November 2013](#)
- b. [Decree of the President of the Afghan Interim Administration Ref No.\(297\) On Dignified Return of Refugees](#)

Pakistan

Summary: Pakistan is not a party to the 1951 Convention relating to the Status of Refugees/1967 Protocol and has also not enacted any national legislation for the protection of refugees nor established procedures to determine the refugee status of persons who are seeking international protection within its territory. Such persons are therefore treated in accordance with the provisions of the Foreigners Act, 1946.

In the absence of a national refugee legal framework, UNHCR conducts refugee status determination under its mandate (Statute of the Office of the United Nations High Commissioner for Refugees adopted by the General Assembly Resolution 428 (V) of 14 December 1950) and on behalf of the Government of Pakistan in accordance with the 1993 Cooperation Agreement between the Government of Pakistan and UNHCR. Pakistan generally accepts UNHCR decisions to grant refugee status and allows asylum-seekers (who are still undergoing the procedure) as well as recognized refugees to remain in Pakistan pending identification of a durable solution.

Afghan refugees: In February 2007, the Government of Pakistan concluded a registration exercise of Afghan refugees living in Pakistan and issued Proof of Registration (PoR) cards to them, which provide temporary legal stay in Pakistan, freedom of movement and exemption from the application of the Foreigners Act, 1946. Approximately 1.5 million Afghans are currently holding PoR cards. Only new born children to Afghan PoR cardholders can still be registered by the Government of Pakistan while newly arriving Afghans with international protection needs will need to go through the refugee status determination procedure conducted by UNHCR⁷⁴.

Australia

Summary: Australia is a signatory to the 1951 Convention, the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution.⁷⁵ Article 1A(2) defines a refugee as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his

⁷³ United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>

⁷⁴ <http://unhcrpk.org/about/asylum-system-in-pakistan/>

⁷⁵ *Convention Relating to the Status of Refugees*, 189 UNTS 151 (entered into force on 22 April 1954).

former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The *Migration Act* incorporates art 1A(2) into Australian domestic law, and gives effect to Australia's obligation of *non-refoulement*—not to return a person in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.^[3] Section 36(2) provides for the grant of a protection visa to a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.

The term 'persecuted' in art 1A(2) is qualified by s 91R(1) of the *Migration Act*, which provides that art 1A(2) does not apply, unless persecution for one or more of the Convention reasons is:

- the 'essential and significant reason(s), for the persecution'; and
- the persecution involves 'serious harm' to the person; and
- the persecution involves 'systematic and discriminatory conduct'.

A non-exhaustive list of instances of 'serious harm' is provided in s 91R(2) of the *Migration Act*, including:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

The onshore component of Australia's Refugee and Humanitarian Program allows asylum seekers to apply for a protection visa⁷⁶. Primary refugee status assessments are made by a DIAC officer, as delegate of the Minister for Immigration and Citizenship. Unsuccessful applicants can seek merits review by the Refugee Review Tribunal (RRT) and, thereafter, judicial review by the courts. Under s 417 of the *Migration Act*, the Minister may personally consider and grant a visa on humanitarian grounds, if he or she considers it to be in the public interest.⁷⁷ This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.⁷⁸

Family violence and the definition of a refugee

Applicants who make asylum claims based on family violence have faced difficulties meeting the definition of 'refugee' in art 1A(2) of the Refugees Convention—both internationally and in Australia. While it is generally accepted that instances of family violence can constitute 'serious harm', two compounding and interlinking factors have historically excluded victims of family violence from protection under the Refugees Convention. These are family violence claims in the context of gender-related persecution and the public/private dichotomy.

First, family violence claims have tended to exist within the wider context of gender-specific harm, including: sexual violence; forced marriage; female genital mutilation; and honour killings.⁷⁹ These types of harms—generally experienced by women—are not afforded protection, because neither gender nor sex is an enumerated Convention ground. Therefore, courts have

⁷⁶ The requirements for a Protection Visa (Class XA) (Subclass 866) are found in the *Migration Regulations 1994* (Cth) sch 2.

⁷⁷ *Migration Act 1958* (Cth) s 417(1) provides that 'the Minister may substitute for a decision of the Tribunal under s 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision'.

⁷⁸ *Ibid* s 417(3).

⁷⁹ See A Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 160, 164 where she draws a distinction between 'gender-specific harm' and 'gender-related claims'. Roberts also notes that, while men can also be victims of family violence, the majority of asylum claims on the basis of being victims of family violence are made by women.

traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.⁸⁰

A more problematic distinction relates to the public/private dichotomy. As Anthea Roberts explained, the Refugees Convention is primarily aimed at protecting individuals from state or public forms of persecution, rather than intruding into the private realm of family life and personal activities.⁸¹

This is most evident in the interpretation of the term ‘persecution’. The Refugees Convention contains no definition of ‘persecution’.⁸² However, the term is widely recognised as involving a certain relation between the individual and the state, whereby persecution occurs in the public sphere and the perpetrators are the state or its agents.⁸³

In *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court explained that: Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.⁸⁴ As family violence tends to be perpetrated by non-state actors within private relationships, such claims have historically been construed as falling outside the bounds of the Refugees Convention, because the state cannot be implicated in the infliction of that harm.⁸⁵

The role of state responsibility

The issue of state responsibility—in cases where the harm is inflicted by non-state actors for a non-Convention reason—was clarified by the landmark decision of the High Court in *Khawar*.⁸⁶

In *Khawar*, the applicant, Ms Khawar, fled Pakistan to Australia with her three daughters, after years of escalating abuse from her husband and his family. She claimed asylum on the basis that the Pakistani authorities (the police) had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state. Thus, it was argued her well-founded fear of persecution was based on the lack of state protection for reasons of her membership of a particular social group—‘women in Pakistan’.

The case was eventually appealed to the High Court, where Gleeson CJ defined the issues in dispute in the following terms: The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention. The second issue is whether women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention.⁸⁷ In separate judgments, the majority answered both questions in the affirmative. Gleeson CJ held that persecution may result where the criminal conduct of private individuals is tolerated or condoned by the state in circumstances where the state has the duty to provide protection against harm.⁸⁸

⁸⁰ H Crawley, *Refugees and Gender: Law and Process* (2001), 21–26, 79–90.

⁸¹ A Roberts, ‘Gender and Refugee Law’ (2002) 22 *Australian Yearbook of International Law* 160, 161.

⁸² Though as noted above, the term ‘persecution’ is qualified by s 91R of the *Migration Act 1958* (Cth) for the purposes of Australian law.

⁸³ See, eg, C Yeo, ‘Agents of the State: When is an Official of the State an Agent of the State?’ (2003) 14 *International Journal of Refugee Law* 510, 510. The Convention grounds reflected the concerns of the drafters of the Convention to protect those fleeing state based persecution in the aftermath of World War II.

⁸⁴ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

⁸⁵ Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 243.

⁸⁶ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

⁸⁷ *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].

⁸⁸ *Ibid.*, [30].

Kirby J adopted the formula, 'Persecution = Serious Harm + The Failure of State Protection',⁸⁹ to find that it was: 'sufficient that there is both a risk of serious harm to the applicant from human sources, and a failure on the part of the state to afford protection that is adequate to protect the human rights and dignity of the person concerned'.⁹⁰ He considered that 'persecution' is a construct of these two separate but essential elements. McHugh and Gummow JJ found that 'the persecution in question lies in the discriminatory inactivity of the State authorities in not responding to the violence of non-state actors'.⁹¹

Although the judgments took different approaches, the cumulative effect was that, where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Refugees Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for a Convention ground.

On the issue of particular social group, McHugh and Gummow JJ held that the evidence supported a social group, that was, 'at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household'.⁹² Gleeson CJ considered that it was open on the evidence to conclude that 'women in Pakistan' comprise a 'particular social group'.⁹³

Family violence claims post-Khawar

Legislative amendments

Section 91R(1) of the *Migration Act* requires the applicant to show that the Convention reason is 'the essential and significant reason' for the persecution.⁹⁴

Commentators have argued that s 91R has made it more difficult to sustain claims for protection on family violence grounds. Catherine Hunter argues that, in the context of gender-related claims, the 'essential and significant' requirement will mean that decision makers are likely to focus on aspects other than gender—such as political opinion or religion—until gender-related decisions are no longer controversial.⁹⁵ This concern is echoed by Leanne McKay, who states that applicants have 'difficulty articulating their claims in asylum terms that are assessable by decision makers due to shame or fear'⁹⁶ and, therefore, due to the restrictive terminology of s 91R ... there is now a risk that certain Refugees Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.⁹⁷

Others have criticised the definition of persecution under s 91R(2) of the *Migration Act* for its failure explicitly to recognise psychological harm as serious harm, and the impact that this may have for victims of sexual violence and abuse.⁹⁸ In particular, such victims can experience serious psychological trauma even where there are minimal physical injuries.⁹⁹ Another concern is that s 91R(2) makes no reference to the failure of state protection as being an element of persecution and

⁸⁹ Ibid, [118] referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515–516.

⁹⁰ Ibid, [115].

⁹¹ Ibid, [87].

⁹² *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [85].

⁹³ Ibid, [32].

⁹⁴ *Migration Act 1958* (Cth) s 91R(1)(a). See also Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [19]. Section 91R was inserted due to government concerns that decisions such as *Khawar* had widened the application of the Refugees Convention 'beyond the bounds intended'.

⁹⁵ C Hunter, 'Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims' (2002) 8(1) *Australian Journal of Human Rights* 107.

⁹⁶ L McKay, 'Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)' (2003) 4 *Melbourne Journal of International Law* 439, 459 referring to Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines On Gender Issues For Decision Makers* (1996).

⁹⁷ L McKay, 'Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)' (2003) 4 *Melbourne Journal of International Law* 439, 459.

⁹⁸ Ibid, 454.

⁹⁹ H Crawley, *Refugees and Gender: Law and Process* (2001), 43; *UNHCR Guidelines on International Protection: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2002), UN Doc HCR/GIP/02/01.

thus appears to direct decision makers towards cases where persecution emanates from the state.¹⁰⁰

Throughout the Inquiry, stakeholders expressed concern that the definition of ‘serious harm’ under s 91R of the *Migration Act* did not specifically address the experiences of victims of family violence,¹⁰¹ and called for amendments to s 91R specifically to recognise gender-based claims,¹⁰² including that ‘serious harm’ may include family violence coupled with the lack of state protection.¹⁰³

However, the ALRC considers that substantive amendments to the *Migration Act*, and s 91R are not necessary, since that section does not provide an exhaustive list of types of harm that may constitute ‘serious harm’. While s 91R does not expressly acknowledge psychological harm or the failure of state protection, the ALRC considers that this is a sufficiently well established in Australian law in light of the decision in *Khawar*.¹⁰⁴ The ALRC has concluded that problems arise not because of a lack of understanding that family violence claims may fall under the Convention, but in the application of the principles in *Khawar* as it relates to s 91R.

Complexity of gender-related cases

In addition to the barriers imposed by s 91R in relation to ‘serious harm’, subsequent cases post-*Khawar* suggests that the area remains complex and challenging for decision makers and applicants alike. In particular, findings of fact as to what comprises a ‘particular social group’ and whether the state has withdrawn protection for a Convention reason, require an in-depth understanding of the applicants’ claims and how it relates to country information.¹⁰⁵ Complex family violence claims are often intertwined with other Convention grounds, such as political opinion and religion, making it difficult to identify the nexus between the Convention reason and the harm feared.¹⁰⁶

Applicants face particular challenges in making claims with respect to a particular social group. For example, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be difficult for those who face language barriers, lack legal representation, or lack access to current country information.¹⁰⁷ Claims that define the particular social group too broadly risk a finding that the harm feared is not motivated by their membership of that particular social group. On the other hand, claims that define the particular social group too narrowly risk a finding that the group is impermissibly defined by the harm feared.¹⁰⁸

Decision makers also face challenges in making consistent decisions. The consideration of whether the applicant is a member of a particular social group is dependent on the cultural, legal, social and religious factors that must be properly understood. Decisions about whether a victim of family violence can access ‘effective state protection’ therefore depends on access to current and up-to-date country information. As Gleeson CJ emphasised in *Khawar*:

¹⁰⁰ L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

¹⁰¹ ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Law Institute of Victoria, *Submission CFV 74*; Good Shepherd Australia New Zealand, *Submission CFV 41*; RAILS, *Submission CFV 34*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

¹⁰² Law Institute of Victoria, *Submission CFV 74*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

¹⁰³ ANU Migration Law Program, *Submission CFV 79*; Good Shepherd Australia New Zealand, *Submission CFV 41*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

¹⁰⁴ See also, Migration and Refugee Review Tribunals, *Submission CFV 31*; RILC, *Submission CFV*.

¹⁰⁵ See, eg, *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390; *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 255; *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 117 FCR 412.

¹⁰⁶ C Hunter, ‘Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

¹⁰⁷ R Bacon and K Booth, ‘Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*’ (2002) 24 *Sydney Law Review* 584, 600.

¹⁰⁸ Case law has established that the common characteristic of a ‘particular social group’ cannot be the harm feared. See eg, *Ibid*, 600, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitudes of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.¹⁰⁹

Canada

Claiming Refugee Protection in Canada – Procedures

From Outside Canada –

The application must be made by requesting a visa as a Convention refugee or a person similarly-situated. Applications under this procedure are governed by the section of the statute that govern regular immigration to Canada.

From Inside Canada (not at a port of entry) –

Claims under this section must be made to an officer by a person not subject to an order of removal/deportation. Upon receipt of an asylum application under this section, the officer must determine whether the claim is eligible to be referred to the Refugee Protection Division (RPD) – this determination must be made within three (3) working days of receiving the application. The applicant bears the burden of proof to show that that his or her claim is eligible to be referred to the RPD. The RPD may not consider a claim for refugee status unless it is referred by an officer – if the claim is not referred within the aforementioned deadline of three (3) working days given to the officer to make the determination of eligibility, the claim is deemed to be referred, unless the officer suspends this consideration or determines it to be ineligible.

The officer will suspend the consideration of eligibility of a claim for asylum if –

1. There has been a referral to determine whether the person is inadmissible on grounds of security, violation of human rights, involvement in organized crime or serious crimes;
or
2. There is a pending court ruling with respect to a person charged with a crime or offense punishable by a maximum term of imprisonment of 10 years or more. Under this second provision, the officer has discretion as to whether to wait for the court ruling before referring the claim for asylum or refugee status to the RPD.

From Inside Canada (at a port of entry) –

Claims made at a port of entry are subject to the same qualification guidelines as discussed in the preceding section. The IRA, however, has a provision that places a duty on the officer to fix a hearing date on which the asylum claimant to present themselves and plead their case to the Refugee Protection Division.

What makes a claimant ineligible for referral to RPD?

Pursuant to the IRA, there are six (6) grounds on which a person might be deemed ineligible to be referred to the RPD.

1. Refugee protection has already been conferred on the claimant;
2. A claim for protection has already been rejected by the Immigration and Refugee Board (IRB);
3. A prior claim for protection was found ineligible to be referred to the RPD, or the claim was abandoned or withdrawn;
4. The claimant was already determined to be a Convention refugee by another country other than Canada and the claimant can be sent to that country;

¹⁰⁹ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [26].

5. Claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of nationality or habitual residence. The following are countries that have been designated by the Ministry of Citizenship and Immigration: Andorra, Australia, Austria, Belgium, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel (excludes Gaza and the West Bank), Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, United Kingdom, and United States of America;
6. Claimant has been determined to be inadmissible on grounds on security, violation of human rights, and perpetrating organized criminal activity or serious criminality.

“Serious Criminality” Defined.

If the alleged offense occurred in Canada, there must be a conviction; and that conviction must be for an offense that is punishable by a maximum term of imprisonment of (10) years or more. If the alleged offense occurred outside of Canada, the conviction must be for an offense that, had it been committed in Canada, would constitute an offense that is punishable by a maximum term of imprisonment of (10) years or more.

Cessation of Refugee Protection.

Under Section 108(1) of the IRA, a person will cease to be a refugee or a person in need of protection upon an occurrence of either of the following:

1. The person re-avails themselves of protection of the country from which they initially claimed protection – re-availing must be voluntary;
2. The person voluntarily reacquires their nationality;
3. The person acquires a new nationality and begins to enjoy the protections of that new country;
4. The person becomes re-established in the country from which they left;
5. Reasons for which they sought refuge status no longer exists.

Canada-United States Safe Third Country Agreement

Under the Canada-U.S. Safe Third Country Agreement (STCA), a person seeking refugee protection must make a claim in the first country they arrive in (United States or Canada), unless they fall within a narrow list of exceptions. Therefore, a potential refugee arriving from the United States into Canada may be allowed to pursue his or her claim only if they fall into a list of exceptions to the STCA. There are four categories of exceptions:

1. **Family member exception:** Claimants under this category qualify for the exception if they have a *family member* in Canada who:
 - is a citizen of Canada;
 - is a permanent resident of Canada;
 - is a protected person under the IRPA;
 - has made a claim for refugee status in Canada, and that application has been accepted by the Immigration and Refugee Board (IRB);
 - has a stay of removal from Canada on humanitarian and compassionate grounds;
 - has a valid Canadian employment authorization document;
 - holds a valid Canadian study permit;
 - is over the age of 18 and has a claim for refugee protection that has been referred to the IRB for determination.
2. **Unaccompanied minor exception:** Claimants under this category qualify for the exception if they are unaccompanied minors (under the age of 18) who:
 - are not accompanied by their mother, father, or legal guardian;

- do not have a spouse or a common law partner;
 - do not have a mother, father, or legal guardian in Canada or in the United States.
3. **Document holder exception:** Claimants under this category qualify for the exception if they:
- hold a valid Canadian visa other than a tourist visa;
 - hold a valid work permit;
 - hold a valid study permit;
 - hold a valid travel document or other valid admission document issued by the government of Canada;
 - do not need a temporary resident visa to enter into Canada but need a visa to enter into the United States.
4. **Public interest exception:** Claimants under this category qualify for the exception if they have been charged with or convicted of an offense that *could* subject them to the death penalty in the United States or any other country.

Designated foreign national 31.1. For the purposes of Article 28 of the Refugee Convention, a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under section 24

Conferral of refugee protection under the Canada Immigration & refugee Act.

A person is designated as a refugee when, (a) after an application for refugee status, they have been deemed a Convention refugee or a similarly-situated person, and then they are awarded permanent residence or temporary residence.

Protected Person

A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

Who is a Convention Refugee under the IRA?

A person who:

- By reason of a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group or political opinion;
- Leaves their country of nationality or is unable or unwilling to return; **or**
- Is a stateless person (not having a country of nationality) and is unwilling or unable to return to their habitual country of residence.

Who is a person in need of protection under the IRA?

A person in need of protection is someone who is physically in Canada, **and**

1. Whose removal to their country of nationality (or country of habitual residence if they are a stateless person) would personally subject them to:
 - a. Danger of torture, according to the meaning of Article 1 of the Convention Against Torture (CAT.)
 - i. "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only

from, inherent in or incidental to lawful sanctions (UNHCR website – CAT - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>)

or;

- b. Risk to their life or cruel treatment, if
 - i. The person is unable or unwilling or unwilling, due to said risk, to avail themselves of the protections of that country;
 - ii. The risk would be faced by the person in every part of that country, and other individuals do not generally face that type of risk;
 - iii. Said risk is not incidental to lawful sanctions; and
 - iv. The risk is not because the country is not able to provide adequate healthcare.
2. A person who has been designation by regulation as being in the class of persons in need of protection.

Rights of refugees

Right to Work

Once a claimant has had his or claim referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board, most refugee claimants can apply for a work permit through the Immigration, Refugees and Citizenship Canada (IRCC) (formerly Citizenship and Immigration Canada or CIC). In order for a claimant to qualify for a work permit, they must show that they cannot support themselves without work. Usually, only people who cannot live without public assistance are usually eligible for employment authorization. A claimant who has applied for public assistance or is on public assistance must include proof of such along with their work permit application.

Claimants must also include proof that they have completed their medical examinations. The forms and instructions for getting a medical examination are given to claimants when they are found eligible for a refugee protection hearing. IRCC will not issue the work permit until they have the results of the medical examination.

Refugee claimant that are from Designated Countries of Origin (DCOs) have different rules that apply to them. Different rules apply to refugee claimants who are from a designated country of origin. These claimants cannot apply for work permits until either their refugee claim is accepted or 180 days have passed since their claim was referred to the Immigration and Refugee Board.

Right to Healthcare

There is an Interim Federal Health Program (IFHP), which provides limited, temporary coverage of health-care benefits to people who are not eligible for provincial or territorial health insurance. Refugee claimants belong in this class of people.

Right to Education

Claimants can also apply for study permits to attend school while they are waiting for a decision on a claim for refugee status. Minor children of claimants will automatically be eligible to attend school once claimants arrive in Canada and submit their applications for refugee status. Even though education is not a fundamental right available to refugee claimants, provinces like Ontario, for example, have the *Education Act*, which says that children *must* attend school. The only way that a child can be excused from attending school is for one of the reasons set out in the Act. (For example, children may be excused if they are sick.) It is against the law for a school to refuse to admit a child who is under 18 only because the child, or the child's parent or guardian, is in Canada without immigration status.

Access to Courts

Government legislation, policies, and regulations relating to the rights of refugee claimants to access the justice system are scarce. However, refugees have access to the Canadian juridical system through the expansion of third party standing. Third party standing allows other groups and organizations that represent the interests of refugees to sue in court on behalf of refugees. One of such third party standing cases came down in September 2012; the case of *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 effectively rewrote the third element of the third party standing test – a sticking point that has historically hindered access to justice for many vulnerable populations including refugees. The test's previous requirement that “no other reasonable and effective manner in which the issue may be brought to court” has now been replaced with a more contextual approach allowing courts to consider if it is realistic and efficient for an individual to challenge the constitutionality of the legislation on their own. This decision opens important avenues for justice: disenfranchised groups who lack access to courts – including refugees – now have potential voices who can speak on their behalf against institutionalized injustices.

Case Law

Reasonable Fear

In the case of *Eze v. Canada*, Neutral citation: 2016 FC 601; File numbers: IMM-4590-15, a Canadian federal court denied asylum status to the applicants agreeing with the Refugee Protection Board that the applicant does not qualify as a “Convention refugee” or a “person in need of protection” pursuant to Sections 96 and 97 of the Immigration and Refugee Protection Act. The applicant, a citizen of Nigeria, alleged that her husband's family members threatened to subject her children to female genital mutilation (FGM), that her husband's mother 70-year old mother would regularly travel 500 kilometers to make these threats in person. At certain times, the 70-year old mother would travel along with other family members, who would also make these threats.

The RPD, however, found that there was a lack of subjective fear on the part of the applicant as the applicant and her husband traveled to Europe without their children following an alleged attempted abduction in 2009. Additionally, the evidence in this case suggested that the family members of the husband would visit the home where the female children lived even during these travels to Europe. Furthermore, there is no evidence to suggest that the applicants applied for asylum in any of the European countries they had visited prior to coming to Canada. As such the federal court agreed with the RPD that there was a lack of subjective fear to warrant a finding that the applicant was a Convention refugee or a person in need of protection.

Convention Refugee

In the case of *Wangden v. Canada*, Neutral citation: 2008 FC 1230; File numbers: IMM-1570-08, a Canadian federal court was confronted with the issue of whether a grant of “withholding of removal” status under the immigration laws of the United States counts as recognition as a Convention refugee for the purposes of the Canadian *Immigration and Refugee Protection Act* of 2001.

The applicant in this case is a Tibetan who considered himself a stateless person. He also had a half-brother in Canada, which would usually mean he qualified as an exception to the Safe Third Country Agreement (STCA) Canada has with the United States. However, since he was already granted withholding of removal in the United States, the Court had to determine whether that grant of status in the United States meant that he has already been recognized as a Convention refugee, and, therefore, eligible for return to the United States. Applicant first applied for asylum in the U.S., but later withdrew this application – the Immigration Judge in the United States on the same day granted him withholding of removal status.

The Canadian federal court declined applicant's petition for refugee status in Canada on grounds that he had already been granted withholding of removal status in the United States – in the Court's

opinion, a withholding of removal status meant that the United States already considered him a Convention refugee. Even though a person granted withholding status enjoys less rights and privileges than a person granted asylum or refugee status, such a person still enjoys the full range of rights guaranteed by the Convention to a refugee in comparable circumstances. As such, the Canadian federal court came to a conclusion that the granting of withholding status necessarily meant that the United States recognized the applicant as a Convention refugee.

Membership in a Particular Social Group

In the case of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, a particular social group within the meaning of section 96 of the Act is either: (i) a group defined by an innate and unchangeable characteristic; (ii) a group whose members voluntarily associate for reasons fundamental to their human dignity; or (iii) a group defined by a former voluntary association that is now unalterable due to its historical permanence. The Canadian Supreme Court in that an important consideration for determining whether a person is a member of a particular social group is whether the cases raises “underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative.” Therefore, choosing to set sail for Canada on a smuggling ship is merely a choice of method of transportation rather than what someone is.

In the case of *The Minister of Citizenship and Immigration v. B399*, Neutral citation: 2013FC260; File numbers: IMM-3266-12, a Minister of Citizenship objected to the IRB’s decision to confer refugee status on a young, Tamil male from Sri Lanka perceived to have ties to the Tamil Tigers (LTTE). The IRB found that this young Sri Lankan male, who the Court chose to identify as “B399”, was a member of a particular social group. The applicant was a Tamil male from Sri Lanka who was forced to leave Sri Lanka after repeated efforts by the Tamil Tigers to recruit him; he left Sri Lanka in 2008 for Thailand, and he registered with the UNHCR in Thailand. Even though the conflict in Sri Lanka ended in 2009, he traveled to Canada on the MV Sun Sea and arrived in Canada in August of 2010. The Sri Lankan Secretary of Defense believed the MV Sun Sea voyage was used to raise money for the Tamil Tigers and that the passengers were associated with the LTTE. There was strong evidence showing that returnees from the MV Sun Sea were arrested and physically mistreated, even though a few were only questioned and released. There was no evidence, however, showing the applicant was, in fact, associated the LTTE. The Court in opined that while some passengers on the MV Sun Sea may be regarded as being associated with the LTTE, there was no reason to believe this was true of B399.

Perceived Political Opinion

In the same case, the Court went on to agree with the IRB that B399 had a well-founded fear of persecution on account of his ethnicity and perceived political opinion. The panel found that authorities in Sri Lanka will suspect the claimant has links to the LTTE; the country documents established that Tamils suspected of having links to the LTTE continued to face torture and abuse when they returned. The Court agreed that B399 had a well-founded fear of persecution as a young Tamil male (ethnicity) perceived to have ties to the LTTE (perceived political opinion.)

Persecution

A Canadian federal court in the case of *Junusmin v. Canada*, 2009 FC 673, agreed with the notion that there is no universally accepted definition of the term “persecution”, but it may be inferred that a threat to life, or freedom on account of race, religion, nationality, political opinion or membership in a particular social group. This case involved an Indonesian citizen of Chinese origin who is a practicing Christian. The applicant suffered several assaults, insults, and robberies at the hands of several mob groups by virtue of his Chinese ethnicity and Christian faith. The Court agreed with the Article 33 of the 1951 Convention interpretation guidelines contained in the UN Handbook saying that other serious violations of human rights – for the same reasons- would also constitute persecution.

In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context (*Junusmin v. Canada*, at para. 51).

The case of *Smirnova v. Canada*, 2013 FC 347 presented a similar question of what “persecution” means. That case involved a citizen of Russia who was of Jewish ethnicity. The applicant endured incidents of physical assault due to her Jewish ethnicity, one in 1998 resulting in her pinkie finger being broken, and one in October 2008 when she was beaten by nationalists following an argument with a female co-worker. In 2005, she started to notice that her personal belongings were being damaged or vandalized with swastikas and other anti-Semitic signs at work. One day during her break at work, the Principal Applicant’s supervisor placed scissors on her back and threatened to kill her if she did not resign from her job. The issue surrounding this case was whether these ordeals suffered by the applicant amounted to mere discrimination, rather than persecution. The RPD was of the opinion that the events amounted to nothing more than mere discrimination and did not rise to fit within the meaning of persecution as promulgated by the 1951 Convention. Additionally, an issue arose as to whether the applicant had a duty to flee or relocate to an internal flight alternative (IFA) such as St. Petersburg and whether the applicant, indeed, had an IFA.

The *Smirnova* Court referred to the meaning of “persecution” as noted in the case of *Canada (Attorney General) v Ward*, [1993] SCJ 74 at para 63, saying that “persecution”, though undefined in the Convention, has been ascribed the meaning of “sustained or systemic violation of basic human rights demonstrative of a failure of state protection.” The Court also referred to the *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398 at para 3, 1993, in which the court there noted the difficulty to establish the dividing line between persecution and discrimination and that, however, discrimination may very well amount to persecution given the cumulative effects of several incidents of discrimination and harassment. The identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. *Id.* As such, the Court determined that the RPD was reasonable in denying the application of for refugee status as the cumulative effect of the discriminatory and harassing incidents faced by the applicant did not amount to persecution. Answering the question of whether there was an internal flight alternative (IFA) available, the *Smirnova* court said, first, that there should be no serious possibility of the claimant being persecuted in the part of the country where an IFA is proposed. Second, it must be reasonable for the claimant to seek refuge there, given his or her personal circumstances. *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), 140 NR 138, 31 ACWS (3d) 139 (FCA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), 22 Imm LR (2d) 241, 109 DLR (4th) 682 (FCA)).

State Protection

Smirnova also stood for the proposition that there is a presumption that a state is capable of protecting its own citizens; this presumption is, however, rebuttable. The applicant bears the burden of proof to rebut this presumption. *Id.* at para 39. The more the claimant must have done to exhaust all courses of action open to him or her (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 57, 282 DLR (4th) 413). Additionally, local failures to provide adequate policing do not amount to a lack of state protection (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 32, 69 Imm LR (3d) 309).

Germany

Summary: Germany is a party to the Geneva Convention of 1951 and its 1967 Protocol,¹¹⁰ and also a member of the European Union. The right to asylum is also a constitutional right in Germany and is granted to everyone who flees political persecution under article 16 of the Basic Law for the Federal Republic of Germany.¹¹¹ Political persecution within the statute is defined as persecution that causes specific violations of individual rights and, due to its intensity, excludes the individual from the “general peace framework of the state unit.”¹¹² Germany has implemented the Geneva Convention of 1951 and its 1967 Protocol into German law.¹¹³ Article 1(A) (2) of the Geneva Convention of 1951 which defines refugee is incorporated into section 3 of the German Asylum Act.¹¹⁴ The Asylum Act and the Residence Act are the two most important immigration laws in Germany that provide rules for the admission of refugees and the handling of refugee claims.¹¹⁵ The Asylum Act codifies the process and consequences of granting and denying asylum, whereas the Residence Act provides rules concerning the entry, stay, exit, and employment of foreigners in general.¹¹⁶

Germany is a member of the European Union and its asylum system is therefore in accordance with the Common European Union Asylum System. Germany must comply with the directives and regulations that form the Common European Asylum System (CEAS), the Schengen Borders Code, and the Charter of Fundamental rights of the European Union, which guarantees the right to asylum.¹¹⁷

The right to be able to apply for refugee status in Germany and the systems codified by legislation has allowed the country to receive 425,035 asylum applications between January and November 2015, with 57,816 in November alone.¹¹⁸

Main Legal Framework in Force

[Basic Law for the Federal Republic of Germany \(German Constitution\)](#)¹¹⁹

[The Asylum Procedure Act](#)¹²⁰

[Residence Act](#)¹²¹

¹¹⁰ United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

¹¹¹ Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBl.] [Federal Law Gazette] I at 1, art. 16a, unofficial English translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf>

¹¹² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 80 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Decisions of the Federal Constitutional Court] 315, 334; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹¹³ Gesetz betreffend das Abkommen vom 28. Juli 1951 über die Rechtstellung der Flüchtlinge [Act on the Convention of July 28, 1951 Relating to the Status of Refugees], Sept. 1, 1953, BGBl. II at 559, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl253s0559.pdf, archived at <http://perma.cc/JZJ8-CVXX>; Jenny Gesley,

Refugee Law and Policy: Germany, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹¹⁴ Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBl. I at 1798, § 3, http://www.gesetze-im-internet.de/bundesrecht/asylvfg_1992/gesamt.pdf, archived at <http://perma.cc/5UGT-VNNE>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf, archived at <http://perma.cc/E2YA-U7LK>. Please note that the English version is only current up to December 2014 and does not reflect the name change of the act to Asylum Act; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹¹⁵ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹¹⁶ *Ibid.*

¹¹⁷ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

¹¹⁸ Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees], Aktuelle Zahlen zu Asyl [Current Asylum Numbers], Nov. 2015, at 4, http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/statistik-anlage-teil-4-aktuelle-zahlen-zu-asyl.pdf?__blob=publicationFile, archived at <http://perma.cc/9MUN-2ZL8>; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹¹⁹ Article 16a (1) of the Basic Law for the Federal Republic of Germany states “persons persecuted on political grounds shall have the right of asylum.”

¹²⁰ Section 3 of the Asylum Procedure Act defines the individuals who are given the recognition of refugee status.

¹²¹ Article 60 (5) of the Residence, Economic Activity and Integration of Foreigners in the Federal Territory Residence Act states “a foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 1952 II, p. 685).”; Article 60 (7) of the Residence, Economic Activity and Integration of

[The Asylum Act](#)

[The Asylum Seekers Benefits Act](#)

[Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction](#)

[Regulation on Residence](#)

[EU-Council Directive 2013/32/EU, OJ 2013 L180/60 of 29 June 2013](#)

Abstract: Develops the standards for procedures to grant and withdraw international protection to establish a common asylum procedure in the Union.

[Act on the Acceleration of Asylum Procedures](#)

[Housing, Care and Treatment of Foreign Minors and Adolescents Act](#)

[Act to Redefine the Rights to Stay and the Termination of Residence](#)

[Asylum Package II \(government agreed on stricter rules on asylum measures on February 3rd 2016\)](#)

Key Terms

- **“A refugee”** is a person who has well-founded fear of persecution in his country of origin on account of his race, religion, nationality, political opinion or membership of a particular social group and resides outside the country (country of origin) whose nationality he possesses and the protection of which he cannot, or, owing to such fear does not want to avail himself of, or where he used to have his habitual residence as a stateless person and where he cannot, or, owing to said fear, does not want to return.¹²²
- **“Beneficiary of international protection”** indicates that the person concerned has been granted international protection.¹²³
- **“Person eligible for subsidiary protection”** is a person who has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his country of origin.¹²⁴
- **“Safe third country”** is where a foreigner enters the federal territory from a third country that is a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured.¹²⁵ The states outside the European Communities shall require the consent of the Bundesrat.¹²⁶
- **“Serious harm”** consist of: a) death penalty or execution, b) torture or inhuman or degrading treatment or punishment, or c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹²⁷

Criteria for Refugee and Subsidiary Protection Status

The protection against political persecution is codified in article 16a of the Basic Law, as discussed above.¹²⁸ If the applicant was the victim of political persecution, he or she may be

Foreigners in the Federal Territory Residence Act states “prohibition of deportation is to be granted if the foreigner faces a substantial concrete danger or an extreme general danger on return to the destination state.”

¹²² Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBl. I at 1798, § 3, http://www.gesetze-im-internet.de/bundesrecht/asylvfg_1992/gesamt.pdf, archived at <http://perma.cc/5UGT-VNNE>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf, archived at <http://perma.cc/E2YA-U7LK>. Please note that the English version is only current up to December 2014 and does not reflect the name change of the act to Asylum Act; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹²³ Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBl. I at 162, as amended, § 45a, http://www.gesetze-im-internet.de/bundesrecht/aufenthg_2004/gesamt.pdf, archived at <http://perma.cc/2PK7-NQL8>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_aufenthg/residence_act.pdf, archived at <http://perma.cc/P5Y3-V27S>.

¹²⁴ Asylum Procedure Act, section 4, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf

¹²⁵ Asylum Procedure Act, section 26a, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf; Basic Law Act, section 16(a)(2), <https://www.btg-bestellservice.de/pdf/80201000.pdf>

¹²⁶ Basic Law Act, section 16(a)(2), <https://www.btg-bestellservice.de/pdf/80201000.pdf>

¹²⁷ Asylum Procedure Act, section 4, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf

¹²⁸ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

granted political asylum under article 16a of the Basic Law.¹²⁹ Refugee status under the Geneva Convention, codified in section 3, paragraph 1 of the Asylum Act, may be granted for humanitarian reasons.¹³⁰ Those reasons include the criteria for political asylum and a broad range of other humanitarian reasons.¹³¹

Asylum Procedure

A refugee can either register as an asylum-seeker at the border or inside the country. The authorities then direct him or her to the closest reception facility.¹³² Staff at this reception facility issues a certificate of registration as an asylum seeker, which includes personal details and a photo.¹³³ The next step is for the authorities determine which German state is responsible for processing the asylum application.¹³⁴ The distribution among the German states takes place according to the EASY system.¹³⁵ The allocation to a reception facility depends on the capacity available, the home country of the asylum seeker, and a quota system.¹³⁶ Not all branch offices handle all countries.¹³⁷ In addition, each German state only needs to accept a certain number of applicants based on a quota system called *Königsteiner Schlüssel*.¹³⁸ The quota is calculated each year according to the tax receipts and population numbers of the German states.¹³⁹ If the reception center in which the asylum seeker registered is not the one that is responsible for handling his or her case, he or she has to travel to the responsible center.¹⁴⁰ The branch offices of the Federal Office for Migration and Refugees in which the asylum seeker must submit his or her application are usually close to the reception centers.¹⁴¹

At some German airports, there is capacity to deal with asylum seekers who enter by air. They are subject to the “airport procedure.”¹⁴² If the asylum seeker entered without or with false or expired papers or via a safe country of origin, the asylum procedure is carried out directly in the airport transit area.¹⁴³ The Federal Office for Migration and Refugees must decide within two days whether the asylum application is justified.¹⁴⁴ If the application is denied, the applicant will be denied entry into Germany and threatened with deportation if he enters Germany illegally.¹⁴⁵ The applicant has the right to an attorney and can appeal the decision within three days.¹⁴⁶ A judge will

¹²⁹ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³⁰ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³¹ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³² Federal Office for Migration and Refugees, Germany’s Asylum Procedure – in Detail: Responsibilities, Procedures, Statistics, Legal Consequences 28 *et seq.* (Nov. 2014), <http://perma.cc/27SD-YPHZ>; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³³ Federal Office for Migration and Refugees, Germany’s Asylum Procedure – in Detail: Responsibilities, Procedures, Statistics, Legal Consequences 28 *et seq.* (Nov. 2014), <http://perma.cc/27SD-YPHZ>; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³⁴ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁴⁴ Asylum Act § 18(a), para. 6, no. 2. http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf

¹⁴⁵ Asylum Act § 18(a), para. 2,3, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf

¹⁴⁶ *Id.* §§ 18a, para. 1, sentence 5, 18a, para. 4.

issue a ruling in an emergency proceeding within fourteen days.¹⁴⁷ While the application is pending, the asylum seeker must stay in the airport transit area and cannot enter Germany.¹⁴⁸

After an application has been submitted, the person seeking asylum is invited to an in-person interview.¹⁴⁹ No in-person interview is necessary if the applicant is younger than six years of age.¹⁵⁰ The applicant is informed about his or her rights in a language he or she understands.¹⁵¹ It is the duty of the applicant to provide information and proof of persecution or serious harm.¹⁵² That includes information on former residences, travel routes, time spent in other countries, and whether a refugee or asylum application has already been initiated or completed in another country or in a different location in Germany.¹⁵³

The case worker makes a decision on the basis of an overall assessment of all relevant findings, with an emphasis on the personal interview.¹⁵⁴ In making the decision, the case worker may also consult the Federal Office's Asylum and Migration Information Centre and its Migration Info Logistics (MILo) database;¹⁵⁵ send individual queries to the German Foreign Office; and obtain language and text analyses, physical-technical document examinations, and medical or other expert advice.¹⁵⁶ The decision on the asylum application is given to the applicant in writing and details the reasoning and the legal options for appeal.¹⁵⁷

Most Recent Amendments:

- Act on the Acceleration of Asylum Procedures

Web Link:

http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbl115s1722.pdf

The Act amended several laws in order to accelerate the asylum process; substitute in-kind benefits for cash benefits; reduce the financial burden on the German states and municipalities; reform integration policies for refugees; and designate Albania, Kosovo, and Montenegro as safe countries of origin.¹⁵⁸

- Act to Improve the Housing, Care, and Treatment of Foreign Minors and Adolescents

Web Link:

http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbl115s1802.pdf

It entered into force November 1st 2015 with its goal being to improve the situation of young unaccompanied refugees and provide them with appropriate care.¹⁵⁹

- Act to Redefine the Right to Stay and the Termination of Residence entered into force.

¹⁴⁷ *Id.* § 18a, paras. 4, 6, no. 3.

¹⁴⁸ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁴⁹ Asylum Act §§ 24, 25 http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf.

¹⁵⁰ *Id.* § 24, para. 1, sentence 6, http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf.

¹⁵¹ *Id.* http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf.

¹⁵² *Id.* § 25, para. 1, sentence 1.

¹⁵³ *Id.* § 25, para. 1, sentence 2.

¹⁵⁴ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁵⁵ The MILo database contains information on countries of origin, asylum and refugee protection, assisted returns, and immigration/migration. See *Easy Access to Important Documents*, Federal Office for Migration and Refugees, <http://www.bamf.de/EN/DasBAMF/IZAsylMigration/MILo/milo-node.html>, archived at <http://perma.cc/37NR-8TFW>.

¹⁵⁶ Federal Office for Migration and Refugees, Germany's Asylum Procedure – in Detail: Responsibilities, Procedures, Statistics, Legal Consequences 28 *et seq.* (Nov. 2014), http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Broschueren/das-deutsche-asylverfahren.pdf?__blob=publicationFile, archived at <http://perma.cc/27SD-YPHZ>.

¹⁵⁷ Asylum Act § 31, para. 1. http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf

¹⁵⁸ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁵⁹ *Ibid.*

Web Link:

http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl115s1386.pdf

It amended the Residence Act by ordering a ban on entry and residence for applicants from safe countries of residence and in case of repeat follow-up applications.¹⁶⁰ The Act grants a residence permit to persons who can prove that they are well-integrated after a period of eight years and to well-integrated minors after four years.¹⁶¹

- Asylum Package II

Web Link: <https://www.bundesregierung.de/Content/DE/Artikel/2016/02/2016-02-03-asylpaket2.html?nn=694676#Start>

The German government agreed on a set of stricter asylum measures (Asylum Package II), which will now be debated by the German Bundestag.¹⁶² The Asylum Package II would accelerate the asylum application process; suspend family reunification for refugees with subsidiary protection status for a period of two years; decrease asylees' monthly cash benefits; facilitate deportation; establish a new Federal Police unit to help procure replacement documents; improve the safety of refugee minors; and designate Algeria, Morocco, and Tunisia as safe countries of origin¹⁶³

- Agreement with Turkey

Web Link:

On November 2015, the European Union and Turkey agreed on an Action Plan to increase cooperation and coordinate of their actions on the refugee crisis, and to reduce the huge flow of immigrants who enter the EU through Turkey.¹⁶⁴ The Action Plan contains short- and long-term measures to tackle the refugee crisis.¹⁶⁵ Its twin objectives are to support the refugees and their host communities in Turkey and to boost cooperation to reduce migratory flows from Turkey.¹⁶⁶

Rights of Refugees and Beneficiaries of Subsidiary Protection

Before the recent changes, asylum seekers in a reception facility received essential benefits in kind and an additional cash allowance (pocket money) for personal use.¹⁶⁷ The pocket money totalled €140 per month for a single adult (about US\$154) or €126 per month for each of two adult recipients living in a common household.¹⁶⁸ According to the amendment, refugees and asylum seekers in reception facilities now only receive essential items like food, housing, heat, clothing, health care, and household items in kind or in the form of vouchers.¹⁶⁹ Items for personal use are also provided in kind, but states retain discretion to provide refugees and asylum seekers with cash if necessary.¹⁷⁰ Cash allowances cannot be disbursed more than one month in advance.¹⁷¹

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Jenny Gesley, *Germany: Proposed Tightening of Asylum Rules*, Global Legal Monitor (Feb. 8, 2016), <http://www.loc.gov/law/foreign-news/article/germany-proposed-tightening-of-asylum-rules/?locl= eaglm>, archived at <http://perma.cc/T5WM-7F5B>.

¹⁶⁴ *Communication on the State of Play*, COM (2016) 85 final, *supra* note 119, Annex 1, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_01_en.pdf, archived at <https://perma.cc/ZXJ3-W6LG>.

¹⁶⁵ *Communication on the State of Play*, COM (2016) 85 final, *supra* note 119, Annex 1, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_01_en.pdf, archived at <https://perma.cc/ZXJ3-W6LG>.

¹⁶⁶ *Communication on the State of Play*, COM (2016) 85 final, *supra* note 119, Annex 1, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_01_en.pdf, archived at <https://perma.cc/ZXJ3-W6LG>.

¹⁶⁷ *Finanzausgleichsgesetz [FAG] [Financial Compensation Act]*, Dec. 20, 2001, BGBl. I at 3955, 3956, as amended, § 1, sentence 5, http://www.gesetze-im-internet.de/bundesrecht/finausglg_2005/gesamt.pdf, archived at <http://perma.cc/2DBB-QGC7>.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Id. § 3, para. 6.

Asylum seekers who are housed outside of reception facilities primarily receive cash allowances to purchase essential items.¹⁷² A single adult recipient receives €216 per month; two adult recipients with a common household each receive €194 per month; other adult beneficiaries without a household, €174 per month; adolescents between fifteen and eighteen years old, €198 per month; children between seven and fourteen years old, €157 per month; and children up to six years old, €133 per month.¹⁷³

Currently, the municipalities that receive refugees and asylum seekers pay for their essential needs and are reimbursed by the German states.¹⁷⁴ Starting in 2016, the federal government will pay the German states €670 per asylum seeker per month, until the asylum procedure has been concluded, in order to reduce the financial burden on the German states.¹⁷⁵ The federal government will therefore allocate a provisional sum of approximately €2.8 billion (about US\$3.1 billion) to the states.¹⁷⁶ The sum is only an estimate and will be adjusted as needed at the end of 2016.¹⁷⁷ The allocation is based on the assumption that there will be around 800,000 applicants for asylum, with an average processing time of five months, and around 400,000 denied applications, for which the states will receive another month's worth of compensation.¹⁷⁸ The allocation also includes money to cover expenses for unaccompanied refugee minors.¹⁷⁹

The Federal Employment Agency assumes the costs for integration and language classes for asylum seekers whose applications are likely to be approved, in order to improve their chances in the job market and accelerate their integration into Germany.¹⁸⁰ The Act on the Acceleration of Asylum Procedures also dispensed with some building code and renewable energy law requirements, in order to facilitate and accelerate the building of new accommodations and the repurposing of existing facilities to provide housing for refugees.¹⁸¹ Under current rules, the youth office in the district in which an unaccompanied minor arrives is obligated to take him or her into its care.¹⁸² Some local communities in central arrival locations are therefore disproportionately affected. In order to distribute the burden evenly, the Act to Improve the Housing, Care, and Treatment of Foreign Minors and Adolescents created an obligation for all German states to receive unaccompanied refugee minors. Refugee minors will be distributed throughout Germany by the local youth office according to the quota system, *Königsteiner Schlüssel*.¹⁸³

¹⁷² Id. § 3, para. 2.

¹⁷³ Id. § 3, para. 2.

¹⁷⁴ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Finanzausgleichsgesetz [FAG] [Financial Compensation Act]*, Dec. 20, 2001, BGBl. I at 3955, 3956, as amended, § 1, sentence 5, http://www.gesetze-im-internet.de/bundesrecht/finausglg_2005/gesamt.pdf, archived at <http://perma.cc/2DDB-QGC7>

¹⁷⁷ Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁷⁸ *Ibid.*

¹⁷⁹ Deutscher Bundestag: Drucksachen und Protokolle [BT-Drs.] 18/6185, p. 57; Jenny Gesley, *Refugee Law and Policy: Germany*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/germany.php#_ftnref2.

¹⁸⁰ Residence Act § 45a; Sozialgesetzbuch Drittes Buch [SGB III] [Social Security Code Third Book], Mar. 24, 1997, BGBl. I at 594, 595, as amended, §§ 131, 421, http://www.gesetze-im-internet.de/bundesrecht/sgb_3/gesamt.pdf, archived at <http://perma.cc/UQ9T-MRDP>.

¹⁸¹ Baugesetzbuch [BauGB] [Building Code], Sept. 23, 2004, BGBl. I at 2414, as amended, § 246, <http://www.gesetze-im-internet.de/bundesrecht/bbaug/gesamt.pdf>, archived at <http://perma.cc/3984-ND8Z>; Act on the Acceleration of Asylum Procedures art. 6; Erneuerbare-Energien-Wärmegesetz [EEWärmeG] [Renewable Energy Heat Act], Aug. 7, 2008, BGBl. I at 1658, as amended, § 9a, http://www.gesetze-im-internet.de/bundesrecht/eew_rmeg/gesamt.pdf, archived at <http://perma.cc/NU7N-ZAXW>.

¹⁸² Sozialgesetzbuch Aches Buch [SGB VIII] [Social Security Code Eighth Book], Sept. 11, 2012, BGBl. I at 2022, as amended, § 42, para. 1, sentence 1, no. 3, § 87, http://www.gesetze-im-internet.de/bundesrecht/sgb_8/gesamt.pdf, archived at <http://perma.cc/8WA2-WUHP>

¹⁸³ Id. §§ 42b, 42c

In addition, the age of legal capacity to act in an asylum procedure was raised from sixteen to eighteen years. That means that every asylum seeker under the age of eighteen is provided with a legal guardian to act on his or her behalf and to handle the complex asylum procedure.¹⁸⁴

Case Law on Asylum

Germany – Administrative Court Lüneburg, 24. May 2016, 5 A 194/ 4

- i. Web Link: <http://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-administrative-court-l%C3%BCneburg-24-may-2016-5-194-4#content>

The applicant (born 2009) is a Somali national and entered Germany –together with his grandparents – in August 2013. The mother of the applicant subsequently entered Germany as well and claimed asylum on 20 February 2014. She had previously been granted refugee status in Italy on 29 June 2011. The applicant claims that he flew directly from Ethiopia to Germany. He believes that the Dublin III Regulation is not applicable in either his or his mothers’ case. The court held that the Member State responsible, in accordance with the criteria set out in Art 7 (2) of the Dublin III Regulation, shall be determined on the basis of the situation at the time when the applicant first lodged his or her application for international protection with a Member State. Contrary to the opinion of the defendant, Italy’s responsibility does not ensue from Art 20 (3) of the Dublin III Regulation. Thereafter, “for the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be in-dissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor’s best interests.” There’s no danger of separating the applicant from his mother – with due regard to Art 6 of the German Basic Law and Art 8 of the ECHR- because the mother is also entitled to a residence permit under Sections 27, 36 of the Residence Act.

Furthermore, the present case is also a special case, because the mother cannot be send back to Italy at the moment - with due regard to Art 6 of the German Basic Law and Art 8 of the ECHR – since the Italian authorities are unable to assure that the applicant’s mother (and her 7 months old daughter as well as the applicant) will be accommodated in such a way that family unity is ensured. (See Administrative Court Lüneburg, decision from 16 May 2016 – 4 A 267/14).

Germany - Federal Constitutional Court, 2 May 2016, 2 BvR 273/16

- i. Web Link: <http://www.asylumlawdatabase.eu/en/case-law/germany-federal-constitutional-court-2-may-2016-2-bvr-27316#content>

The complainant is a Syrian national. By his own account, he travelled on 26 August 2014 to the Federal Republic of Germany and requested asylum on 27 October 2014. The Federal Office for Migration and Refugees (BAMF) noted that he had already sought asylum in Bulgaria. Bulgaria rejected the take back request on the grounds that the complainant had received subsidiary protection in Germany. The BAMF issued a decision on 21 November 2014 that the applicant was not entitled to asylum in Germany as he had already received subsidiary protection in Bulgaria and ordered his deportation to Bulgaria. On November 30, 2015, the appellant requested the decision of 21 November 2014 be quashed. He alleged that the decision had become unlawful as current evidence suggested that the return of a person entitled to protection to Bulgaria was not possible. There was a risk that these persons would face inhuman and degrading treatment in Bulgaria including having to live on the street, having no access to medical insurance or employment and discrimination by the population. The court noted that the general principle of equality pursuant to Article 3 Para 1 Basic Law demands that what is substantially equal be treated equally and what is

¹⁸⁴ Residence Act § 80; Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, Reichs-gesetzblatt [RGBl.] [Reich Law Gazette] I at 583, as amended, § 37, para. 1, <http://www.gesetze-im-internet.de/bundesrecht/rustag/gesamt.pdf>, archived at <http://perma.cc/4S9F-5T8E>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_rustag/nationality_act.pdf, archived at <http://perma.cc/9B2Z-N5PS>. Please note that the English version is only current up to November 2014.

substantially unequal be treated unequally. The decision of the Administrative Court does not hold up to the scrutiny of this standard. The question whether a person with international protection status in another member state will face a risk of inhuman or degrading treatment triggering a transfer ban, requires, like a finding of systemic flaws in the asylum procedure, an overall evaluation of the available reports and statements on the current situation. In this regard periodic and consistent reports of international non-governmental organizations are of particular importance.

BVerwG, 17 September 2015, BVerwG 1 C 26.14

i. Web Link:

<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/BVerwG%20%2C%2017%20September%202015%2C%20BVerwG%201%20C%2026.14.pdf>

Greece

Summary: Greece is a party to the Geneva Convention of 1951 (Refugee Convention) and its 1967 Protocol,¹⁸⁵ and also a member of the European Union. Its asylum system should therefore be in accordance with the Refugee Convention and its 1967 Protocol, as well as Common European Union Asylum System. Greece must comply with the directives and regulations that form the Common European Asylum System (CEAS), the Schengen Borders Code, and the Charter of Fundamental rights of the European Union, which guarantees the right to asylum.¹⁸⁶

Greece's geographic location, its membership in the European Union, and its status as a first country of entry under the Regulation (EU) No. 604/2013 (the Dublin Regulation)¹⁸⁷ have resulted in an influx of refugees in its territory, mainly from Syria, Iraq and Afghanistan.

Only after Greek asylum law was criticized in 2011 for suffering from "systematic deficiencies,"¹⁸⁸ did Greece take measures to reform its asylum system. Law 3907/2011 brought remarkable reforms to the asylum system in Greece, such as creation of a civil Asylum Service, a First Reception Service, and an Appeals Authority.¹⁸⁹ The new Asylum Service has been active since June 2013 under a completely "new procedure," regulated by Presidential Decree 113/2013, unlike the "old procedure" which was regulated by Presidential Decree 114/2010. Yet, asylum applications lodged prior to June 7, 2013 are to be regulated under the "old procedure". Thus, Greece has a two-fold asylum procedure.

The most recent laws, L 4375/2016 and L 4399/2016 brought new changes in the Greek asylum system in order to comply with the recent developments with regard to the management of refugee crisis in Europe, including the recent EU-Turkey deal (March 2016) and closure of Balkan route.

Main Legal Framework in force:

¹⁸⁵ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, <https://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf>, archived at <https://perma.cc/A6MN-JB7K>; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, archived at <https://perma.cc/594H-T6U6>; <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last visited July 8, 2016)

¹⁸⁶ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

¹⁸⁷ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, *as amended*, 2013 O.J. (L 180) 31, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604>

¹⁸⁸ M.S.S. v. Belgium and Greece, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011), <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>; Joined Cases C-411/10 & C-493/10 (Ct. J. EU – Grand Chamber, Dec. 21, 2011), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d543fe293820c7418e9d1c98ec1611a8d0.e34KaxiLc3eQc40LaxqMbN4OchaKe0?text=&docid=117187&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=342818>

¹⁸⁹ Law No. 3907/2011 on Establishing an Asylum Service, First Line Reception Office, and Harmonization with Directive 2008/115/EC on Common Standards and Procedures for the Return of Illegally Staying Third-Country Nationals and Other Provisions arts. 1, 6, 7, E.K.E.D., Jan. 26, 2011, A:7, <http://www.et.gr/index.php/2013-01-28-14-06-23/search-laws> (in Greek), archived at <https://perma.cc/QTL6-YLQR>

1. The Constitution of Greece (as revised by parliamentary resolution of April 6, 2001).¹⁹⁰
 - i. Web Link: <http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr220en.pdf>
2. Law 4251/2014 “Immigration and Social Integration Code and other Provisions.”
 - i. Web Link: http://www.enterprisegreece.gov.gr/files/Pdf/2015/residence_permits_july_2015/N4251-2014_EN.pdf
 - ii. Abstract: Includes provisions for the entry of foreigners into Greece, their residence, various purposes for residence.
 - iii. Amended by: Law 4332/2015
3. Law 4332/2015 “Amendment of Provisions of the Greek Code of Citizenship- Amendment of L. 4521/2014 [...]”
 - i. Web Link: <http://www.yypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metan-n4332-2015.pdf> (unofficial)
 - ii. Abstracts: Includes provisions for amending Law 3284/2004 rules concerning conditions and procedure of acquiring Greek nationality. It also amends certain provisions L 4521/2014 (Immigration Code). One of the positives changes that this law brought is decriminalization of the act of transporting newly-arrived refugees.
4. Law 3386/2005 “Entry, Residence and Social Integration of Third Country Nationals on the Greek Territory” (L 3386/2005)
 - i. Web Link <http://www.refworld.org/docid/4c5270962.html>
 - ii. Amended by: Law 4332/2015 “Amendment of Provisions of the Greek code of Citizenship- Amendment of L. 4521/2014 [...]”
 - iii. Abolished by: Law 4251/2014, except for a few provisions.
5. Law 4018/2011 on the Establishment of “one-stop shop” Services.
6. Law 3907/2011 “On the Establishment of an Asylum Service and a First Reception Service”
 - i. Web link: <http://www.refworld.org/docid/4da6ee7e2.html>
7. Presidential Decrees: These Decrees transpose EU Directives.
 - i. PD 207/2007 on the transposition into the Greek legislation of Council Directive 2003/9/EC from 2013.
 - ii. PD 220/2007
 - iii. PD 96/2008 transposing Council Directive 2004/83/EC from April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
 - iv. PD 90/2008 transposing Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.
 - v. PD 114/2010: It defines minimum standards on procedure for granting and withdrawing refugee status.
 - vi. PD 104/2012 on the organization and operation of the Asylum Service within the Ministry of Public Order and Citizen Protection (G. 172/A/05-09/2012)
 - vii. PD 113/2013 on the establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to

¹⁹⁰ Article 5(2) of the Constitution of the Hellenic Republic states that “the extradition of aliens prosecuted for their action as freedom-fighters shall be prohibited.”

stateless individuals in conformity with Council Directive 2005/85/EC 'on minimum standards on procedures in Member States for granting and withdrawing refugee status and other provisions.

1. Web link: <http://www.refworld.org/docid/525e84ae4.html>
8. Joint Ministerial Decision 7001/2/1454-h/2012 "on the rules of operation of the Regional First Reception Services" (G 64/B/26-01-2012)
 - i. Web link: <http://www.refworld.org/docid/4f33bace2.html>
9. Ministerial Decision 6416/2014 "on the Rules of Procedure of the Asylum Service"
 - i. Web link: <http://www.synigoros.gr/resources/docs/kanonismos-yphresias-asyloy.pdf> (Greek)
10. EU- Council Directive 2009/52/EC, OJ 2009 L168/24 of 18 June 2009
 - i. Abstract: Provides for minimum standards on sanctions and measures against employers that illegally employ third-country nationals.
11. Schengen and Dublin III Regulations.

Key Terms:

12. "Applicant for Asylum" or "applicant for international protection" is a person, who declares that he/she requests asylum or subsidiary protection in Greece or who in any other way asks not to be deported to a country on the grounds of fear of persecution for reasons of race, religion, nationality, political opinions or membership of a particular social group, or because he/she risks suffering serious harm in respect of which request a final decision has not yet been taken.¹⁹¹
13. "Beneficiary of international protection" is a person who has been granted refugee status or subsidiary protection status.¹⁹²
14. "Refugee" "is an alien or a stateless person, who fulfils the requirements of Article 1A of the Geneva Conventions."¹⁹³
15. "Person eligible for subsidiary protection" is a person "who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin or in case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm...and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."¹⁹⁴
16. Safe third country: is a country where (a) there is no threat to life or freedom based on religion, race, ethnicity, participation in a particular social group, or political opinions; (b) the applicant is not in risk of suffering serious harm; (c) the non-refoulement principle of the Geneva Convention is upheld; (d) the applicant is not returned to a country where he/she will be subject to torture, cruel, inhuman or degrading treatment or punishment as defined in international law; (e) the possibility to apply for refugee status exists., and (f) the applicant has a connection with that country. ¹⁹⁵
17. "Serious harm" is (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment; or (c) serious and individual threat to a civilians' life by indiscriminate violence.¹⁹⁶

Criteria for Refugee and Subsidiary Protection Status:

An applicant must meet the following criteria in order to be recognized as a refugee:

¹⁹¹ PD 141/2013, Art. 2(c).

¹⁹² Id., at 2(d)

¹⁹³ Id., at art. 2(e)

¹⁹⁴ PD 113/2013, Art. 2(f)

¹⁹⁵ Law 4375/2016, Article 56; PD 113/2013, art. 20.

¹⁹⁶ PD 141/2013, Article 15.

- Must face a well-founded fear of persecution within the meaning of Article 1A of the Geneva Convention.
- The persecution must be based on applicant's race, religion, nationality, political opinion, or membership in a particular social group.
- A causal link must exist between the well-founded fear or persecution and the acts of persecution.
- The acts of persecution may take different forms, such as physical or mental violence.¹⁹⁷

An applicant who does not meet the mentioned criteria, but there are substantial grounds to believe that he or she would face a real risk of suffering serious harm if returned to his/her country of origin, may be granted subsidiary protection status.¹⁹⁸

Asylum Procedure

Asylum applications can be submitted to relevant authorities either at entry or inland, in written or oral form.¹⁹⁹ If an application is submitted to an entity which by law is not responsible for examining asylum application, that entity should refer the application to relevant asylum authorities. An asylum application may include a request not to be deported to a country where the applicant may face persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion,²⁰⁰ or where the applicant faces the risk of suffering serious harm.²⁰¹ Applications of the following applicants have priority: (a) vulnerable persons, (b) persons in detention or in transit, (c) persons whose applications are prima facie substantiated, (d) persons whose applications are manifestly unfounded, and (e) persons whom police deem to be a danger to national security or public order.²⁰²

Two-fold Asylum Registration System:

In the past, the authority to deal with asylum applications and refugee status determination in Greece rested with the Police. Asylum examination procedure was regulated by Presidential Decree 114/2010. However, in 2011 Law No. 3907/2011 reformed the asylum system of Greece by creating a civil Asylum Service, a First Reception Service, and an Appeals Authority and giving them the authority to deal with asylum applications and refugee status determination.²⁰³ The Asylum Service is constituted of the Central Asylum Service, which monitors the overall process of registration and application, and Regional Asylum Offices, which are responsible for registering and fingerprinting applicants.²⁰⁴

However, because of delays in creation of the new Asylum Service, the asylum applications were still temporarily examined according to the old procedure in light of Presidential Decree 114/2010. Soon after the first Regional Asylum Office was created in June 2013, Presidential Decree 113/2013 was adopted to regulate asylum applications as authorized by Law 3907/2011.²⁰⁵ Therefore, Greece has a twofold asylum registration system now, according to which:

- Applications lodged before June 7 2013 will be registered and examined according to the old procedure in light of PD 114/2010.
- Applications lodged after June 7 2013 will be examined according to the new procedure under the scope of PD 113/2013.

¹⁹⁷ PD No. 141/2013, arts. 9 & 10.

¹⁹⁸ Id., art. 15.

¹⁹⁹ PD 113/2013, art. 4.

²⁰⁰ Article 1A(2) of Refugee Convention

²⁰¹ Article 15 PD 141/2013.

²⁰² Law 3907/2011, arts. 1-3.

²⁰³ Law 3907/2011, arts 1-3.

²⁰⁴ Id.

²⁰⁵ Presidential Decree No. 113/2013 on the Establishment of a Common Procedure for Identifying the Refugee Status of Foreigners and Stateless Persons or Subsidiary Protection in Compliance with Directive 2005/85/EC and Other Provisions, E.K.E.D., June 13, 2013, A:146, <http://www.et.gr/index.php/2013-01-28-14-06-23/search-laws> (in Greek).

Under both the Old Procedure and the New Procedure, Appeals can be first made before Appeals Committees and then before the Administrative Court of Appeal.²⁰⁶ There is no time limit for lodging an application,²⁰⁷ but a first instance decision should be made within 6 months following the date of application.²⁰⁸ Yet, this does not constitute an obligation on the authorities to decide in a certain time limit.²⁰⁹ Under the New Procedure, Regional Asylum Offices (RAOs) and Asylum Units (AUs) receive asylum application.²¹⁰ Applications should be submitted in person,²¹¹ except for force majeure conditions.²¹²

If an unaccompanied minor files the application, the relevant authorities must appoint a guardian.²¹³ Applicants are given a card valid for four months, except for applicants from a limited number of countries, whose card will be valid for three months.²¹⁴

Although not sanctioned by law, a fast-track processing is being implemented by the Asylum Service since September 2014 for applications lodged by Syrians.²¹⁵ Under this procedure, claims should be registered and decisions should be issued on the same day.

An application is considered inadmissible for a number of a number reasons, including the existence of a “first country of asylum’ or a “safe third country”.

Dublin Procedure

Dublin III Regulation²¹⁶ establishes criteria and mechanism for determining Member State responsible for examining an asylum application lodged in one of the Member State by nationals of third country or stateless persons. According to Article 21 of the Dublin III Regulations (January 2014),²¹⁷ where authorities of a Member State consider that another Member State is responsible for examining an asylum application, they must issue a request calling for that Member State to take charge of the applicant. After the ruling of the ECtHR in *MSS v Belgium and Greece*²¹⁸ prohibiting the return by other EU Member States of asylum seekers to Greece on grounds that they would face degrading treatment in Greece, Dublin transfers to Greece have been halted.

The Most Recent Amendments:

Law No. 4375/2016 on the transposition of the recast Asylum Procedures Directive of the EU

Web link: http://www.asylumineurope.org/sites/default/files/resources/nomos_4375-2016.pdf [Greek]

Web link: <http://www.refworld.org/docid/573ad4cb4.html> [English, unofficial translation]

Law 4357/2016²¹⁹ was adopted in order to implement the EU-Turkey Deal, amending the organization asylum institutions and asylum procedure. According to this law, applicants, who have had asylum application pending for over five years and possess a valid asylum seeker permit, are automatically entitled to a renewable 2-year residence permit on humanitarian grounds. [Article 22]. Applicants with pending appeals under the old procedure (applications lodged before June 7, 2013) who have not appeared before the authorities until 31 August 2015 are considered to have withdrawn their applications. [Art. 23]. This provision eliminates the old procedure, unless an applicant appeals the decision to grant him/her residence permit on humanitarian grounds, in which case the old procedure will apply.

²⁰⁶ Article 25(1) PD 114/2010, Article 25(1) PD 113/2013.

²⁰⁷ Article 6 PD 114/2010, Article 6 PD 113/2013.

²⁰⁸ Article 6(2) PD 113/2013.

²⁰⁹ Id.

²¹⁰ Article 2(n) PD 113/2013.

²¹¹ Article 4(1) PD 113/2013.

²¹² Article 9(1) (a) PD 113/2013.

²¹³ Presidential Decree No. 220/2007, art. 19, para. 1, E.K.E.D., Nov. 13, 2007, A:251, <http://www.et.gr/index.php/2013-01-28-14-06-23/search-laws> (in Greek).

²¹⁴ Decision 8248/2014 of the Director of the Asylum Services.

²¹⁵ http://www.asylumineurope.org/reports/country/greece/asylum-procedure/procedures/regular-procedure#footnoteref8_rqmpkc9

²¹⁶ EU Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013

²¹⁷

²¹⁸ ECtHR, *MSS v Belgium & Greece*, Application No. 30696/09, Judgment of 21 January 2011.

²¹⁹ Law 4375/2016, Official Gazette 51/A/3-4-2016, available at: <http://goo.gl/xkdhWo>

It states that the Appeals Committees should comprise of two judges from administrative courts and one person designated by UNHCR, instead of the former three members selected by a Selection Committee.²²⁰

One important change that this law brought is granting more discretion to the government in cases of large numbers of asylum application. According to Article 60(4) of L 4375/2016, the Ministries of Interior and Defense may activate exceptional measure in case of large arrivals of asylum seekers at the border, which include:

- The ability of police and unarmed soldiers to register asylum application;
- The possibility of European Asylum Support Office (EASO) officials assisting Greek authorities in registering asylum applications and conducting interviews;
- An expedient version of border registration of application which will last no longer than 14 days.²²¹

Free legal assistance will be granted for appeals before Appeals Authority. [Art. 44(3)] The continuance of detention for already detained asylum seekers will be allowed under exceptional circumstance for the following grounds: (a) establishing their identity or origin; (b) examining main elements of their claim where there is a risk of absconding; (c) when they had the opportunity to seek protection but applied solely to avoid deportation; (d) when they pose a threat to national security or public order; and € to conduct a Dublin transfer where there is a significant risk of absconding. [Art. 46]. It also brings the minimum duration of detention for each of the mentioned grounds in line with EU recast Reception Conditions Directive.

Article 55 drops the requirement that Asylum Service consider safety criteria in determining a “safe third country.”

Law 4399/2016 (amending Law 4375/2016)²²²

Web link: http://www.asylumineurope.org/sites/default/files/resources/n_4399.2016.pdf {Greek}

This law brought some reforms in the composition of Appeals Committees and the right of asylum seekers to appeal negative decisions.

The EU-Turkey Deal²²³

Web link: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

In March 2016, Macedonia, and other Balkan countries completely closed the Balkan trail, shutting off the route out of Greece.²²⁴ Soon after that, the European Council stated that: “irregular flows of migrants along the Western Balkans routs have now come to an end.”²²⁵ After the closure of the Balkan route, the EU started negotiations with Turkey which resulted to EU-Turkey statement of March 18, 2016 (EU-Turkey deal).²²⁶ It contains several commitments from both EU and Turkey. It basically ensures the return of all persons irregularly entering the Greek islands after March 20, 2016. The legality EU-Turkey deal has been challenged before the General Court of the European Union.²²⁷ It remains to be seen how the Court will interpret the concepts of “safe third country” or “first country of asylum” with regard to Turkey.

²²⁰ Article 5(2) L 4375/2016.

²²¹ Article 60(4)

²²² Official Gazette 117/A/22-6-2016.

²²³ European Council, EU-Turkey statement, 18 March 2016, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

²²⁴ Balkan Countries Completely Seal Off Migrant Trail as Part of EU Plan, The Wall Street Journal, March 9, 2016, at <http://www.wsj.com/articles/macedonia-completely-closes-border-with-greece-to-migrants-1457521754>

²²⁵ European Council, Meeting of the EU Heads of State or Government (Brussels, 7 March 2016) Statement, available at: <http://bit.ly/1RxLZ46>, para 2.

²²⁶ European Council, EU-Turkey statement, 18 March 2016, available at: <http://goo.gl/reBVOt>

²²⁷ General Court of the European Union, Cases T-192/16, T-193/16 and T-257/16 NF v European Council, notified on 31 May 2016 and 2 June 2016.

Rights of Refugees and Beneficiaries of Subsidiary Protection

Important social rights of asylum-seekers and international protection beneficiaries are supported in PD 220/2007, PD 96/2008, but they are generally scattered across different laws (PD 266/1999, Law 3454/2006, Law 3631/2008, Law 3838/2010, PD 141/2013). Applicants of the refugee and subsidiary protection status have the right to stay in Greece during the application process,²²⁸ to have a lawyer at their own expense.²²⁹ They have the right not to be detained solely because they applied for international protection or entered Greece illegally.²³⁰ An applicant who files his/her application while in detention may remain in detention for determination of his/her identity or in case he/she is deemed to be a danger to the public or national security.²³¹ Access to legal aid is guaranteed to those in need.²³² Applicants have the right to appeal.²³³

Refugees and Beneficiaries of Subsidiary Protection have the following rights:

Family Reunification

The Common European Asylum System includes specific provisions on family unity for the beneficiaries of international protection.²³⁴ In addition, the right to family life is protected by the Charter of Fundamental Rights of the European Union (Articles 7, 9 and 33), European Convention on Human Rights (Article 8), Universal Declaration of Human Rights (Articles 12 and 16), International Covenant on Civil and Political rights (Articles 17, 23 and 24), and the Convention on the Rights of the Child (Articles 10, 16 and 22).

The Presidential Decree 141/2013 provides for maintenance of family unity for beneficiaries of international protection, and issuance of residence permits for members of their family (Articles 20, 23, 24). Article 23 of PD 141/2013, as modified by Article 21 of Law 4375/2016, states that: "The competent authorities shall ensure that all necessary measures allowing for maintaining family unity are taken." Article 28 of PD 114/2010 too guarantees the unity of beneficiaries of subsidiary protection with their families. Family of a beneficiary of international protection means: (a) his/her spouse or unmarried partner in a stable relationship according to Greek law; (b) his/her minor, unmarried and dependent children; (c) his/her adult descendants, who suffer from a mental or physical disability which renders them unable to submit an application separately; and (d) the father, mother or another adult responsible for a minor and unmarried beneficiary of international protection.²³⁵

Residence Permit

Once an asylum applicant has been recognized as a refugee or beneficiary of subsidiary protection, they will be granted a residence permit valid for three years, which may be renewed.²³⁶ Residence permits may not be issued for reasons of national security or public order. Applicants with pending applications lodged over five years may be granted a 2-year long residence permit on humanitarian grounds.²³⁷

- Travel Documents: beneficiaries of refugee and subsidiary protection statuses should be given travel documents in order to be able to travel abroad.²³⁸
- Access to education under the same terms and conditions as nationals.²³⁹
- Access to social welfare under the same conditions as nationals.²⁴⁰

²²⁸ PD 113/2013, Art. 5(1).

²²⁹ Id., at art. 10(1).

²³⁰ PD 113/2013, art. 12, para 1.

²³¹ Id., para 2.

²³² Law No. 3226/2004, E.K.E.D., Feb. 4, 2004, A:24, <http://www.et.gr/index.php/2013-01-28-14-06-23/search-laws> (in Greek).

²³³ PD 141/2013, art. 25.

²³⁴ See, e.g., Directives 2004/83/EC, 2011/95/EU, and Directive 2003/86/EC (Family Reunification Directive).

²³⁵ PD 141/2013, Article 2(i).

²³⁶ Id., at art. 24.

²³⁷ Law 4375/2016, Article 22.

²³⁸ Id., at art. 25.

²³⁹ Id., at art. 28.

²⁴⁰ Id., at art. 29.

- Access to employment: Refugees have the right to receive a work permit under the conditions of Article 1 Paragraph 1 of Presidential Decree 189/1998.²⁴¹ Beneficiaries of subsidiary protection status also have the right to get a work permit after meeting the conditions of Article 4 paragraph 1 of Presidential Decree 189/1998.
- Access to health care on the same terms and conditions as nationals.²⁴²
- Freedom of movement: “freedom of movement of beneficiaries of international protection shall be allowed under the same conditions and restrictions as those provided for other third-country national legally resident in the country...”²⁴³

Case Law on Asylum

M.S.S. v. Belgium and Greece²⁴⁴

i. Web Link:

http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE_0.pdf

In this case, an Afghan national arrived, through Greece, into Belgium, where he lodged an application for international protection. He was returned back to Greece as the first country of his entry into the EU according to the Dublin Regulations. He was detained in Greece in a small room with twenty other detainees. The Grand Chamber of the European Court of Human Rights ruled that both Belgium and Greece had acted in violation of the European Convention on Human Rights. It held that Belgium violated the Convention by subjecting the applicant to the risks arising from the deficiencies of Greek asylum system and to detention and living conditions that amounted to degrading treatment.²⁴⁵ It also held that Greece failed to provide effective remedy as enshrined in Article 13 of the Convention because of the harsh living conditions and inadequate asylum procedure in the country.²⁴⁶

N. S. v. Secretary of State for the Home Department²⁴⁷

ii. Web Link: <http://www.refworld.org/docid/4ef1ed702.html>

In this Case, an Afghan national was detained in Greece for illegal entry before he was expelled to Turkey. He arrived into the United Kingdom, where he applied for asylum. He challenged a decision of the United Kingdom to return him to Greece as his first country of entry in accordance with Regulation No. 343/2003. The Court of Justice of the European Union held that Member States of the EU are prohibited from making a “conclusive presumption” that the Member State responsible for reviewing an asylum application, according to Dublin rules, observes the fundamental rights of the EU.²⁴⁸ The Court held that Member States may not transfer an asylum seeker to the Member State responsible within the meaning of the Dublin Regulation where they are aware of systemic deficiencies in the asylum procedure and the reception conditions such that an asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.²⁴⁹

²⁴¹ PD 189/1998, A: 180.

²⁴² PD 141/2013, art. 31.

²⁴³ *Id.*, at art. 33.

²⁴⁴ European Court of Human Rights, Application No 30696/09, Judgment of 21 January 2011.

²⁴⁵ M.S.S. v. Belgium and Greece, App. No. 30696/09 (Eur. Ct. H.R., Jan. 21, 2011), paras. 358, 360, 367,

http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE_0.pdf

²⁴⁶ *Id.*

²⁴⁷ Joined Cases C-411/10 and C-493/10, Judgment of 21 December 2011.

²⁴⁸ Joined Cases C-411/10 and C-493/10 (Eur. Ct. Justice (Grand Chamber), Dec. 21, 2011), paras 103-104,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d543fe293820c7418e9d1c98ec1611a8d0.e34KaxiLc3eQc40LaxqMbn4OchaKe0?text=&docid=117187&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=342818>

²⁴⁹ *Id.*, para 106.

Therefore, EU Member States suspended transfer of asylum applicants to the Greece under the Dublin Regulation.²⁵⁰

Bundesrepublik Deutschland v. Kavh Puid

Mr. Puid arrived in Greece in 2007 and then travelled to Germany where he filed an application for asylum.²⁵¹ He was detained in Germany until he was transferred to Greece on January 23, 2008.²⁵² In 2013, The Grand Chamber of the European Court of Justice held that EU Member States should not return asylum seekers to Greece because systematic deficiencies in the asylum procedure and conditions provides substantial grounds that they would be exposed to degrading treatment.²⁵³

Sakir v. Greece:²⁵⁴

Mr. Sakir, an Afghan national who stayed in Athens illegally, was attacked by a group of masked people during the summer of 2009 in Athens. They beat him with wooden and iron bars and stabbed him repeatedly in the sternum. Three days later, when he left the hospital, Police detained him for illegal residence and subjected to criminal investigation for illegal entry into the Greek territory. In March 2016, the European Court of Human Rights held that Greece had violated Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the European Convention on Human Rights with regard to Mr. Sakir's detention conditions in a Police station in Athens in 2009.

Jordan

Summary: Jordan is neither a signatory to the Geneva Convention of 1951 nor to the 1967 Protocol²⁵⁵ Under article 21(1) of the Jordanian Constitution it is noted that political refugees shall not be extradited on account of their political beliefs or for their defense of liberty.²⁵⁶ However, Jordan has not enacted any legislation that regulates the status of refugees, including those who seek asylum for political reasons.²⁵⁷ Therefore, refugees and asylum seekers are subject to Law No. 24 of 1973 concerning Residency and Foreigners Affairs.²⁵⁸ This law applies to all foreigners without distinction between refugees and non-refugees.²⁵⁹ The legislation also does not define refugees. This is confirmed by the International Labour Organization (ILO) 2015 Report.²⁶⁰

Main Legal Framework in Force

1. Constitution of the Hashemite Kingdom of Jordan
 - i. Web Link: <http://www.parliament.jo/node/137>

²⁵⁰ Commission Recommendation of 2/10/2016 Addressed to the Hellenic Republic on the Urgent Measures to Be Taken by Greece in View of the Resumption of Transfers Under Regulation 604/2013, C(2016) 871 final (Feb. 10, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/commission_recommendation_addressed_to_the_hellenic_republic_2016_0210_en.pdf

²⁵¹ Judgment in Case C-4/11 Bundesrepublik Deutschland v Kaveh Puid, Para 13, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0004>

²⁵² Id., at 14, 15.

²⁵³ Id., at 36.

²⁵⁴ European Court of Human Rights, Sakir v. Greece, 48475/09 (March 24, 2016), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-161541"\]}](http://hudoc.echr.coe.int/eng#{) French

²⁵⁵ United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>

²⁵⁶ Constitution of the Hashemite Kingdom of Jordan, *as amended*, <http://www.parliament.jo/node/137> (in Arabic), archived at <https://perma.cc/4D2K-CYDL>

²⁵⁷ Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3

²⁵⁸ Law No. 24 of 1973 concerning Residency and Foreigners' Affairs, available at <http://www.e-lawyerassistance.com/LegislationsPDF/jordan/residencyLawAr.pdf> (in Arabic; last visited Jan. 6, 2016), archived at <https://perma.cc/RGH6-KPBH>.

²⁵⁹ Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3

²⁶⁰ International Labour Organization, Access to Work for Syrian Refugees in Jordan: A Discussion Paper on Labour and Refugee Laws and Policies 11–12 (2015), 11–12 <https://data.unhcr.org/syrianrefugees/download.php?id=8919>, archived at <https://perma.cc/QKT3-GCU2>.

2. Law No. 24 of 1973 Residency and Foreigners' Affairs
 - i. Web Link: <http://www.e-lawyerassistance.com/LegislationsPDF/jordan/residencyLawAr.pdf>
3. Memorandum of Understanding Between the Government of Jordan and UNHCR
 - i. Web Link: <http://mawgeng.a.m.f.unblog.fr/files/2009/02/moujordan.doc>
 - ii. Amended by: Memorandum of Understanding March 31, 2014
 - iii. Web Link: <http://www.jordantimes.com/news/local/gov%E2%80%99t-unhcr-sign-amendments-cooperation-memo>

Rights of a Refugee

Under article 4 of Law No. 24 of 1973 concerning Residency and Foreigners Affairs it is noted that a travel permit issued to a refugee by the country of his residence is a valid documentation allowing him to enter Jordan.²⁶¹ Additionally, under article 10 of the said Law it is noted that the Minister of Interior based on the recommendation of the general security director can issue regulations concerning the travel documentation that Jordan may grant to refugees within its borders, despite there not being any regulations addressing the conditions under which those refugees can be admitted into the country.²⁶²

Protection and Rights of Refugees

In 1998, Jordan and the UNHCR signed a memorandum of understanding (MOU) to allow the UNHCR to act within its mandate to provide international protection to persons falling within its mandate.²⁶³ This MOU has been amended in 2014, however its contents are not accessible online even in Arabic. This MOU has become the legal framework under which refugees are treated and processed in Jordan.²⁶⁴ Unlike Law No. 24 of 1973 legislation above, the MOU provides that Jordan accepts the definition of “refugee” contained in the Geneva Convention of 1951 Convention.²⁶⁵ Under article 2 of the MOU, it is noted that Jordan also agrees to respect the principle of non-refoulement, meaning that no person seeking asylum in Jordan will be returned to a county where his or her life or freedom could be threatened because of his or her race, religion, nationality, membership of a particular social group, or political opinion.²⁶⁶ Additionally, under article 5 of the MOU Jordan agrees that asylum seekers and refugees should receive treatment according to internationally accepted standards.²⁶⁷ Under the MOU, a refugee is granted legal status and the UNHCR will endeavour to find the refugee a durable solution, be it voluntary repatriation to the country of origin or resettlement in a third country.²⁶⁸ The stay of the refugee in Jordan should not exceed six months.²⁶⁹

Under article 6, 7 and 10 of the MOU the following rights and privileges are to be respected by Jordan to refugees and asylum seekers, these include:

²⁶¹ Law No. 24 of 1973 concerning Residency and Foreigners' Affairs, available at <http://www.e-lawyerassistance.com/LegislationsPDF/jordan/residencyLawAr.pdf> (in Arabic; last visited Jan. 6, 2016), archived at <https://perma.cc/RGH6-KPBH>; Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3.

²⁶² Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3.

²⁶³ Memorandum of Understanding Between the Government of Jordan and UNHCR (Apr. 5, 1998), available at <http://mawgeng.a.m.f.unblog.fr/files/2009/02/moujordan.doc>.

²⁶⁴ Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3.

²⁶⁵ Memorandum of Understanding Between the Government of Jordan and UNHCR (Apr. 5, 1998), art. 1 available at <http://mawgeng.a.m.f.unblog.fr/files/2009/02/moujordan.doc>.

²⁶⁶ *Ibid.*, art. 2.

²⁶⁷ *Ibid.*, art. 5.

²⁶⁸ *Id.*; Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3.

²⁶⁹ *Id.*

- Principles of freedom to practice their religion and provide religious education to their children,
- Freedom from discrimination based on race, religion, or nationality, provided that religious rights are not contrary to laws, regulations, and public decency,
- Free access to courts of law with the same right of litigation and legal assistance as is accorded Jordanian nationals, wherever possible, and
- Exemption from overstay fines and departure fees.

Asylum Procedure

The UNHCR is allowed to interview asylum seekers who enter Jordan illegally, to make its determination as to their status within seven days and only in exceptional cases where another procedure is required that the determination period can exceed up to one month.²⁷⁰ The MOU amendment which is not publicly available notes that, the UNHCR time to process the refugee application extended from between twenty one days and thirty days to 90 days, and the validity of the refugee card was extended to one year instead of six months.²⁷¹

Lebanon

Summary: While the Lebanese government has created a Central Committee for Refugee Affairs in 1950 to administer the Palestinian refugee presence in Lebanon, the country is neither a signatory to the Geneva Convention of 1951 nor to the 1967 Protocol.²⁷² However, it is noted under Section B of the Lebanese Constitution that as a founding member of the United Nations Organization it abides by its covenants and by the Universal Declaration of Human Rights.²⁷³ The Government shall embody these principles in all fields and areas without exception.²⁷⁴ It could be argued that this provision requires, among other things, that the government enact comprehensive legislation related to refugees.²⁷⁵ However, no such legislation exists.

In relation to domestic legislation, the law that governs refugees in the country is the Law Relating the Entry and Stay of Foreigners in Lebanon.²⁷⁶ This law was enacted in 1962.²⁷⁷ Under article 26 of the said statute, it is noted that any foreigner who is subject or has been convicted for a political crime by a non-Lebanese authority or whose life or freedom is threatened because of political considerations may ask for political asylum.²⁷⁸ Additionally, under article 31 of the said statute, it is noted that if a decision is made to expel a political refugee it is not permissible to deport such refugee to the territory of a state where his life or freedom are not secured.²⁷⁹

²⁷⁰ Memorandum of Understanding Between the Government of Jordan and UNHCR (Apr. 5, 1998), art. 3 available at <http://mawgeng.a.m.f.unblog.fr/files/2009/02/moujordan.doc>.

²⁷¹ Khetam Malkawi, *Gov't, UNHCR Sign Amendments to Cooperation Memo*, Jordan Times (Mar. 31, 2014), <http://www.jordantimes.com/news/local/gov%E2%80%99t-unhcr-sign-amendments-cooperation-memo>, archived at <https://perma.cc/3VRX-NFGH>; Issam Saliba, *Refugee Law and Policy: Jordan*, Library of Congress (Mar. 2016), https://www.loc.gov/law/help/refugee-law/jordan.php#_ftnref3.

²⁷² Library of Congress, *Legal Status of Refugees Egypt, Jordan, Lebanon, and Iraq* (Dec. 2013), <https://www.loc.gov/law/help/refugees/2014-010156%20RPT.pdf>; United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; Library of Congress, *Refugee Law and Policy: Lebanon*, <https://www.loc.gov/law/help/refugee-law/lebanon.php>.

²⁷³ Lebanese Constitution (1926), as amended to 1995,

<http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf>, archived at <http://perma.cc/Z7H7-JC2R>.

²⁷⁴ Lebanese Constitution (1926), as amended to 1995,

<http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf>, archived at <http://perma.cc/Z7H7-JC2R>.

²⁷⁵ Library of Congress, *Refugee Law and Policy: Lebanon* https://www.loc.gov/law/help/refugee-law/lebanon.php#_ftn4.

²⁷⁶ Law of 1962 Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country, Bulletin de Législation Libanaise (Journal Officiel), No. 28-1962, available on the website of the Lebanese Ministry of Justice, at <http://ahdath.justice.gov.lb/law-nearby-Foreigners.htm> (in Arabic), archived at <http://perma.cc/N6PB-7E8K>; a partial English translation of the Law is available on the UNODC website, at https://www.unodc.org/res/cld/document/lbn/1962/order_no_319_regulating_the_status_of_foreign_nationals_in_lebanon_en_html/Order_no_319_EN_excerpts.pdf, archived at <https://perma.cc/7VZX-V33W>.

²⁷⁷ Id.

²⁷⁸ Id., art. 26.

²⁷⁹ Id., art 31.

However, the domestic law clearly makes it clear that entering into Lebanon illegally can be subject to imprisonment for one month to three years and/or a fine.²⁸⁰

In November 2000, the Lebanese government passed Decree No. 4082 to change the name of the Department of Palestinian Refugee Affairs to the Department of Political and Refugee Affairs.²⁸¹ This allowed the department to be able to regulate other refugees with the Palestinian refugees.²⁸² Palestinian refugees from Syria are not viewed the same as Syrian refugees from Syria as, the former cannot benefit from the humanitarian exceptions clause.²⁸³

Main Legal Framework in Force

1. The Lebanese Constitution
 - i. Web Link:
<http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf>

2. Law Regulating the Entry of Foreigners in Lebanon
 - i. Web Link:
https://www.unodc.org/res/cld/document/lbn/1962/order_no__319_regulating_the_status_of_foreign_nationals_in_lebanon_en_html/Order_no_319_EN_excerpts.pdf

3. Presidential Decree 42-1959
 - i. Web Link:
<http://www.forcedmigration.org/research-resources/expert-guides/palestinian-refugees-in-lebanon/fmo018.pdf>
 - ii. Amended by: Presidential Decree No. 4082

<https://www.loc.gov/law/help/refugees/2014-010156%20RPT.pdf>

4. Memorandum of Understanding between Lebanon and UNHCR
 - i. Web Link:
<http://www.unhcr.org/3fd9c6a14.pdf>

Rights of Refugees

Lebanon has taken some measures to deal with the absence of national refugee law. The Department of Palestinian Refugee Affairs was created by the Presidential Decree No. 42 of 1959. This allows for Palestinian refugees to receive relief, shelter, education, health and social services.²⁸⁴ A Memorandum of Understanding (MOU) was signed between the United Nations High Commissioner for Refugees (UNHCR) and the Government of Lebanon in September 2003.²⁸⁵

This MOU provides that the UNHCR can adjudicate claims for asylum with the Lebanese General Security Office.²⁸⁶ This will allow for the government to legalize the status of asylum seekers in Lebanon, and the government will issue temporary residence permit for a period of three

²⁸⁰ Id., art. 32

²⁸¹ Jaber Suleiman, *Marginalized Community: The Case of Palestinian Refugees in Lebanon* (Dev. Res. Ctr. on Migration, Univ. of Sussex, Apr. 2006), 13, <http://r4d.dfid.gov.uk/pdf/outputs/migrationlobpov/jaberedited.pdf>.

²⁸² Id.

²⁸³ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 15, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf; Amnesty International, *Denied Refugees: Palestinians From Syria Seeking Safety in Lebanon* (Feb. 2014), 7-14 <https://www.amnesty.ch/de/laender/naher-osten-nordafrika/libanon/dok/2014/libanon-palaestinensischen-fluechtlingen-aus-syrien-einreise-verweigert/bericht-denied-refuge-palestinians-from-syria-seeking-safety-in-lebanon--18-seiten.-juli-2014>

²⁸⁴ Sherifa Shadie, *Palestinian Refugees in Lebanon*, Forced Migration Online (July 2007), 11, <http://www.forcedmigration.org/research-resources/expert-guides/palestinian-refugees-in-lebanon/fmo018.pdf>.

²⁸⁵ UNHCR Regional Office in Lebanon, *Country Operations Plan I (2004)*, <http://www.unhcr.org/3fd9c6a14.pdf>, archived at <http://perma.cc/H975-EC7S>.

²⁸⁶ Id.

months normally, but which can be extended to six to nine months.²⁸⁷ However, the fee to renew the residency is \$200 USD, which is at the discretion of the General Security.²⁸⁸ Additionally, refugees not registered with the UNHCR, have an additional requirement which includes a “pledge of responsibility”.²⁸⁹ This pledge can either be a sponsorship for an individual work permit by a Lebanese individual, or a group pledge of responsibility provided by a registered entity that hires a number of Syrian nationals.²⁹⁰ A Lebanese national may also pledge to host and be fully responsible for one Syrian family.²⁹¹ The sponsorship system, previously only applied to third-country migrants and domestic workers, entails that employers take full responsibility for the concerned individual.²⁹² The sponsor is as such not only responsible for the Syrian national’s living costs and liable for his/her misdemeanours, but is also required to be present at the General Security Office for any renewals of the Syrian national’s residency permit.²⁹³ As such, the duty of sponsors to cooperate with General Security means that the sponsorship system assists Lebanese security forces in their ability to monitor Syrian refugees.²⁹⁴

In relation to benefits for refugees, the Lebanese government allows refugees to enroll in Lebanese universities, and to have access to primary health care after registering with the UNHCR.²⁹⁵ However, it should be noted that the UNHCR is not permitted to freely register Syrian refugees without interference from the Lebanese government. In April 2015, the Ministry of Social Affairs requested that UNHCR de-register over 1,400 Syrian refugees who had arrived in Lebanon after 5 January 2015.²⁹⁶ Additionally, in May 2015, Lebanese authorities even instructed UNHCR to temporarily suspend registration of Syrian refugees, including individuals already in the country and new arrivals. The reason given for this new ban was that a new mechanism for registration of refugees was to be established.²⁹⁷

On February 2013, Resolution No. 1/19 opened some professions, such as those involving construction, electricity, and sales, to refugees; those professions were previously restricted to Lebanese citizens.²⁹⁸ However, on 31st December 2014, 13th January, and on 3rd & 23rd February 2015, the General Security Office issued new regulations that manage the flow of Syrian refugees entering into Lebanon.²⁹⁹ These regulations provide that Syrians will only be admitted where they fall within specific categories such as tourism, business visit, property owner or tenant.³⁰⁰ The new regulations also specify what documents are required for each category.³⁰¹ This severely limits the

²⁸⁷ Id., 2

²⁸⁸ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 14, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf.

²⁸⁹ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 14, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf.

²⁹⁰ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 14, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Library of Congress, *Legal Status of Refugees Egypt, Jordan, Lebanon, and Iraq* (Dec. 2013), <https://www.loc.gov/law/help/refugees/2014-010156%20RPT.pdf>; United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; Library of Congress, *Refugee Law and Policy: Lebanon*, <https://www.loc.gov/law/help/refugee-law/lebanon.php>.

²⁹⁶ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 10, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf

²⁹⁷ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon*, AUB Policy Institute (Mar. 2016), 10, https://www.aub.edu.lb/ifi/publications/Documents/working_papers/20160331_Maja_Janmyr.pdf.

²⁹⁸ George Sadek, *Legal Status of Refugees Egypt, Jordan, Lebanon, and Iraq*, Library of Congress (Dec. 2013), <https://www.loc.gov/law/help/refugees/2014-010156%20RPT.pdf>; United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; Library of Congress, *Refugee Law and Policy: Lebanon*, <https://www.loc.gov/law/help/refugee-law/lebanon.php>.

²⁹⁹ UNHCR, *Refugee Response in Lebanon Briefing Documents* (March 2015), 10, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/95_finalbriefingkit_/95_finalbriefingkit_en.pdf.

³⁰⁰ Id.

³⁰¹ Id.

amount of refugees who may apply for visa/residency. These regulations came into effect on January 5, 2015 according to the instructions that consist of an explanatory note which was published by the Lebanese embassy in Berlin, Germany.³⁰² However, it should be noted that Law No. 296 of 2001 banned foreign nationals of recognized UN states from owning any real estate unless they obtain official permission.³⁰³

Additionally, no information exist as to whether the instructions of 2014 and 2015 were formally adopted and issued by a Council of Ministers decree as required under article 5 of the 1962 law on Regulating the Entry and Stay of Foreigners in Lebanon.³⁰⁴

³⁰² Embassy of Lebanon, Berlin, *Entry Visas for Lebanon* <http://www.libanesische-botschaft.info/index.php/en/consular-services/visa>, archived at <https://perma.cc/K6MD-U69K>.

³⁰³ Library of Congress, *Legal Status of Refugees Egypt, Jordan, Lebanon, and Iraq* (Dec. 2013), <https://www.loc.gov/law/help/refugees/2014-010156%20RPT.pdf>.

³⁰⁴ Law of 1962 Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country, *Bulletin de Législation Libanaise (Journal Officiel)*, No. 28-1962, available on the website of the Lebanese Ministry of Justice, at <http://ahdath.justice.gov.lb/law-nearby-Foreigners.htm> (in Arabic), archived at <http://perma.cc/N6PB-7E8K>; a partial English translation of the Law is available on the UNODC website, at https://www.unodc.org/res/cld/document/lbn/1962/order_no_319_regulating_the_status_of_foreign_nationals_in_lebanon_en_html/Order_no_319_EN_excerpts.pdf, archived at <https://perma.cc/7VZX-V33W>; Library of Congress, *Refugee Law and Policy: Lebanon*, <https://www.loc.gov/law/help/refugee-law/lebanon.php>.

GLOBAL FORUM on LAW, JUSTICE and DEVELOPMENT

c/o The World Bank

1818 H Street, NW

Washington, DC 20433

Mail stop MC6-607

Email: globalforumljd@worldbank.org

Web: www.globalforumljd.org

