

2. MEXICAN LAW CONCERNING POLITICAL ASYLUM	8
Constitutional Principles and Norms	8
Secondary Legislation	9
General Law on Population	10
Regulations of the General Law on Population	10
Labor Laws	11
Regional Inter-American Conventions	12
The Havana Convention of 1928	12
The Montevideo Convention of 1933	13
The Caracas Convention on Diplomatic Asylum of 1954	13
The Caracas Convention on Territorial Asylum of 1954	14
The American Convention on Human Rights of 1969	14

CHAPTER 2

MEXICAN LAW CONCERNING POLITICAL ASYLUM

The system of asylum in Mexico is derived from a series of rules scattered through different legal codes of varied nature and standing, including regional instruments which Mexico has signed. Some of these provisions apply specifically to asylees. Other provisions apply generally to all foreigners and illustrate the degree to which people who flee to Mexico because of persecution are subject to the same requirements as foreigners living there for economic or other reasons. Finally, it is clear that much of Mexican law, especially the emphasis from the inter-American regional agreements on diplomatic asylum and political crimes, is inadequate to deal with the mass influxes of Central Americans to Mexico.

CONSTITUTIONAL PRINCIPLES AND NORMS

The Mexican Constitution of 1917 does not directly recognize the legal institution of asylum, nor does the concept of the political asylee appear in any of its provisions. However, Article 15 prohibits extradition treaties which would require Mexico to hand over to foreign countries persons accused of political crimes. It can be inferred that this provision establishes the right of asylum, albeit indirectly. This constitutional protection is further developed in Mexico's Law of International Extradition, which allows extradition only for common crimes [1] and prohibits extradition when the person could have been the object of political persecution or was a slave in the country where the crime was committed.[2] There are no reported cases in which a person granted asylum in Mexico has been extradited under the provisions of this law.[3]

The Constitution also recognizes a series of human rights enumerated in Articles 1 through 29, under the title of "individual guarantees." [4] These rights include freedom of expression and the right to due process. Article 1 provides that "[i]n the United Mexican States each individual will enjoy the guarantees that this Constitution grants [Articles 1-29], which cannot be restricted or suspended, except in those cases and with the conditions that it itself establishes." Article 33 expressly includes foreigners, and therefore political asylees as defined by Mexican legislation, within the protections granted by Article 1.

But the same Article 33 makes foreigners, including asylees, vulnerable to expulsion from the country. It states:

Foreigners are persons who do not possess the attributes determined in Article 30 [regarding citizenship and naturalization]. They have rights to the guarantees granted by chapter I, title 1, of the present Constitution; but the Executive of the Union will have the

exclusive ability to order expulsion from the national territory, immediately and without the need for previous legal process, by any foreigner whose residence is judged inadvisable. Foreigners can in no way interfere in the political affairs of the country.

Article 33 has serious ramifications for foreigners, including asylees, because there may be no legal recourse for a foreigner expelled under its provisions. Its effect is to legitimize any expulsion. The only limitation to the president's power under Article 33 may be Article 16, which requires a legal basis for actions against individuals. But foreigners under threat of expulsion have no right to appeal and therefore invoke the protection of Article 16. In fact, the authors of the Constitution as well as the Supreme Court have rejected the right of *amparo*, a protective order, to a foreigner about to be expelled because this could lead to an open conflict with the president and could impede the president's ability to carry out expulsions necessary for national interests and security.[5]

Article 30 determines that Mexicans by birth are those people born in Mexican territory, regardless of their parents' nationality; those born abroad whose parents, or at least one of them, are of Mexican nationality; and those born on board vessels or aircraft that fly the Mexican flag or are registered in Mexico.[6] The article states that Mexicans by naturalization are those foreigners who obtain the appropriate letter from the Foreign Ministry as well as those foreigners who marry Mexicans and establish their residence within national territory.[7] This definition of a Mexican citizen, either by birth or naturalization, is repeated in Mexico's Law on Nationality and Naturalization.[8]

Under these provisions, children born in Mexico, whether or not their parents are legally in the country, should be Mexican citizens. The failure to recognize these children as Mexican citizens violates the Constitution. However, as will be discussed in Part 2, the children of Central Americans in Mexico (whether legally or illegally) are not always recognized as citizens.

Finally, some individual guarantees under the Constitution are limited to citizens. For example, the right to petition in the political arena under Article 8 and freedom of association concerning political matters under Article 9 are extended only to citizens. In addition, Article 32 of the Constitution gives Mexicans preference over foreigners in employment and in the grant of governmental concessions.

SECONDARY LEGISLATION

Very few Mexican legal codes refer directly and specifically to political asylees and their legal situation. Among those that do are the General Law on Population and its regulations, the Regulatory Law of Constitutional Article 5 (concerning the exercise of professions in the Federal District), and the Law of International Extradition mentioned above. There are no available administrative or judicial decisions interpreting these provisions. There are no written criteria for the grant of asylum, which is discretionary under Mexican law, and no written procedures that asylees must follow with respect to any of these provisions. Finally, while political asylum status is the only immigration status

under Mexican law that may be granted specifically because of persecution, it is rarely granted.

General Law on Population

The purpose of the General Law on Population is to regulate matters which affect the Mexican population in terms of its size, structure, growth, and distribution in the national territory, with the aim of assuring equitable participation in the benefits of economic and social development.[9] (The General Law on Population is reproduced in Appendix C.) The law empowers the federal executive, through the *Secretaría de Gobernación* (Interior Ministry), to take necessary measures to resolve the country's demographic problems.[10] Among the Interior Ministry's duties is to control the immigration of foreigners.[11] To enter or leave the country, foreigners must satisfy the requirements of this law and its regulations, as well as the other laws that apply to foreigners.[12]

The General Law on Population specifically authorizes the Interior Ministry to grant political asylum to those who have temporarily entered Mexico to protect their lives or liberty from political persecution in their country of origin. The Interior Ministry decides, on an individual basis, the appropriate length of time for which to grant this status. An asylee who leaves Mexico without permission loses his right to asylee status. Additionally, an asylee who violates any of the national laws will lose his status as an asylee, but may be granted another immigration status that the Interior Ministry deems appropriate.[13] Foreigners who have suffered political persecution may be admitted provisionally while their cases are being decided.[14]

The immigration category of political asylum is only one possible temporary immigration status that may be granted to foreigners. Sometimes, those who meet the 1951 U.N. Convention definition of refugee or the Mexican legal definition of asylee are granted one of the other temporary immigration categories that do not involve flight from persecution. These immigration categories are described in Part 2.

Regulations of the General Law on Population

The regulations of the General Law on Population were issued on November 12, 1976, by the executive branch of government and approved by the *Cámara de Diputados* (Chamber of Deputies). (See Appendix D.) The regulations establish rules for the admission of both territorial and diplomatic asylees and set conditions for their residence in Mexico. The regulations reiterate that asylum is limited to those fleeing political persecution.[15] They further require that asylees come directly from the country where they have suffered political persecution, unless they simply passed through another country en route to Mexico.[16] Under the regulations, Mexican embassies, with subsequent ratification by the Interior Ministry, may grant diplomatic asylum to foreigners. The foreigners then will be transferred to Mexico.[17]

The regulations also set the conditions which govern an asylee's stay in Mexico. Both diplomatic and territorial asylees are subject to these conditions. The

regulations authorize the Interior Ministry to determine the place where the asylee may live; they also permit the asylee's spouse and children to be considered as political asylees. Asylees may leave Mexico only with the permission of the Interior Ministry and only for the time allotted, or risk losing their status as asylees. Asylee status lasts as long as the Interior Ministry deems advisable and the Ministry must approve any change in the asylee's activities. The asylee and his or her family must leave Mexico within 30 days after the cessation of the circumstances that caused the need for political asylum. Asylees must register themselves in a National Registry of Foreigners and report any change of address or civil status (marriage or divorce). They are further subject to all the obligations imposed by the General Law on Population and its regulations, unless they are expressly exempt or these obligations would be contrary to their condition as asylees.[18]

The regulations do not mention appeal from administrative decisions made under the regulations. As a practical matter, the only appeal is within the Interior Ministry, either to the Director of the *Dirección General de Servicios Migratorios*, the agency within the Ministry of the Interior that manages immigration matters, or to the Interior Minister himself.

Labor Laws

Certain legal provisions give asylees special permission to work. For example, the Regulatory Law of Constitutional Article 5 concerning the exercise of professions in the Federal District provides that foreign professionals who have suffered political persecution in their countries may be given temporary permission to exercise their professions in the Federal District.[19] Further, the children of political refugees may engage in professions upon graduation from institutions of higher education in Mexico.[20] These provisions are significant because they are an exception to a government attempt to ban the exercise of professions by foreign professionals in the Federal District.[21]

However, other secondary legislation, some of whose provisions refer to foreigners in general rather than to political asylees in particular, limit the ability of asylees to work in Mexico. For example, the Federal Labor Law establishes limitations on the work and union activities of foreigners. It requires that "[i]n each enterprise or establishment, the employer shall employ at least 90 percent Mexican workers. . . . Doctors in service of the enterprise must be Mexican. . . ."[22] In addition, it provides that "[t]he employers are obliged to give preference, in equal circumstances, to workers who are Mexican over those who are not." [23] It also provides that "[f]oreigners. . . may not form part of the leadership of unions." [24] These restrictions reflect the terms and the spirit of Article 32 of the Constitution, which gives preference to Mexicans in hiring.

Inspections to determine compliance with these statutory provisions are the province of *Secretaría de Trabajo y Previsión Social* (Ministry of Labor and Social Security). The government publishes no reports on enforcement of these provisions, but inspections are thought to occur infrequently, if at all. Nevertheless, the practical effect of these restrictions is to reduce the possibility of foreigners, including asylees, finding work in Mexico.

INTER-AMERICAN REGIONAL CONVENTIONS

To date, Mexico has subscribed to and ratified five inter-American instruments applicable to asylum. Four of these—the Havana Convention of 1928, the Montevideo Convention of 1933, the Caracas Convention on Diplomatic Asylum of 1954, and the Caracas Convention on Territorial Asylum of 1954—deal only with the problem of political asylum. The fifth—the American Convention on Human Rights or San Jose Pact of 1969—refers to human rights in general, with several references to asylum.

The Havana Convention of 1928, the Montevideo Convention of 1933, and the Caracas Convention on Diplomatic Asylum of 1954 deal primarily with diplomatic asylum. The Caracas Convention on Territorial Asylum of 1954 deals with territorial asylum. The American Convention on Human Rights—the San Jose Pact of 1969—refers specifically to territorial asylum.

All these conventions form part of domestic Mexican law, according to Constitutional Article 133, which provides:

This Constitution, the laws of the Congress of the Union which emanate from the Constitution and all those treaties in accordance with it, signed by the President of the Republic, with approval of the Senate, shall be the Supreme Law of all the Union. The judges of each State shall adjust themselves to the said Constitution, laws and treaties, despite provisions to the contrary which there may be in the Constitutions or laws of the States.

Under this provision, the hierarchy of authority in the Mexican legal system is the Constitution, followed by federal law and then by international treaties.

All of these instruments contain provisions intended to regulate the admission or granting of legal status to persons coming from another country where they have been objects of persecution. The persecution may have been because of their beliefs, opinions, or political affiliation, or for the commission of political crimes.

These regional conventions suffer from ambiguities, limitations, inconsistencies, and contradictions of a purely technical nature.[25] They also are almost completely devoid of provisions regulating the rights and duties of asylees within the receiving country. For example, only three provisions of the Caracas Convention on Territorial Asylum refer to the protection of the lives and safety of asylees or to their rights of freedom of expression and freedom of assembly and association.[26]

The Havana Convention of 1928

The Convention on Asylum of February 20, 1928, adopted by the Sixth International Conference of American States in Havana (the Havana Convention of 1928) uses, without distinguishing between them, the terms “asylee” and “refugee” in relation to diplomatic asylum.[27] Although the term “diplomatic asylum” is not used, in favor of “political asylum,” in fact Articles 1 and 2 undertake to regulate only diplomatic asylum.

This Convention prohibits the grant of diplomatic asylum to persons accused or convicted of committing common crimes. These people may be extradited, if the state where the crimes were committed requests extradition from the state that has jurisdiction over the criminal.[28] However, diplomatic asylum may be granted to political criminals. Asylum can be granted in urgent cases and for the period of time indispensable to guarantee the safety of the asylee. The Ministry of Foreign Relations or the appropriate administrative authority of the asylee's country will be informed immediately of the grant of asylum. The government of the country of origin may demand that the asylee leave the country as quickly as possible, while the diplomatic agent of the country that granted asylum can demand necessary guarantees for the safe departure of the asylee. During his stay in the country of asylum, the asylee cannot carry out acts contrary to the public peace.[29]

Finally, Article 3 of this Convention safeguards any other obligations previously contracted to by the parties to the convention.[30]

The Montevideo Convention of 1933

The Convention on Political Asylum of December 26, 1933, adopted by the Seventh International Conference of American States in Montevideo (the Montevideo Convention of 1933), uses the term "asylee" as a synonym for political asylee.[31] It does not use the term "diplomatic asylum." However, its application is limited to diplomatic asylum.

This convention, as a whole, repairs the omissions and lack of precision in the Havana Convention of 1928. A new Article 1 is substituted for Article 1 of the Havana Convention, with the aim of eliminating any confusion concerning the common criminals to whom asylum cannot be given. The new Article 1 prohibits the grant of asylum to those accused of common offenses who have been duly prosecuted (eliminating the less precise reference to those accused of common crimes) or who have been sentenced by courts previously established in accordance with law (rejecting convictions by special or *ad hoc* courts).

This Convention resolves a fundamental question of diplomatic asylum by providing that the judgment regarding political delinquency is made by the state that grants asylum.[32] It expressly recognizes that political asylum is a humanitarian institution that is not subject to reciprocity and may be sought by any person regardless of nationality.[33] Finally, it reiterates that its provisions do not affect obligations previously entered into by the contracting parties.[34]

The Caracas Convention on Diplomatic Asylum of 1954

The Convention on Diplomatic Asylum of March 28, 1954, adopted by the Tenth Inter-American Conference in Caracas (the Caracas Convention on Diplomatic Asylum) uses the term "diplomatic asylum;" the term "political asylum" is not used at all.[35]

This Convention contains significant advances and innovations concerning diplomatic asylum. It extends the physical premises where asylum can be provided, including places designated by chiefs of mission for asylees when their

number exceeds the normal capacity of the buildings where the diplomatic seat is located.[36] The grant of diplomatic asylum is a discretionary right of the grantor state. As a consequence, the state is not obliged either to grant asylum or deny it nor to explain the reasons for its decision.[37] The asylum state has discretion to determine the degree of urgency of each application.[38] The territorial state must grant safe conduct for the departure of the asylee, with guarantees for his or her security.[39]

The Convention underlines the relationship between asylum and extradition, in providing that the grant of asylum is not an impediment to a later request for the extradition of the asylee. The request nevertheless has to be made subject to applicable national and international provisions.[40] Finally, a break in diplomatic relations between the state of asylum and the territorial state does not extinguish the grant of asylum. Instead, a diplomatic representative of the asylum state will be obligated to leave with the asylee, or the asylee will be entrusted to the diplomatic mission of another state that is a party to the Convention.[41]

The Caracas Convention on Territorial Asylum of 1954

The Convention on Territorial Asylum of March 28, 1954, adopted by the Tenth Inter-American Conference in Caracas (the Caracas Convention on Territorial Asylum) uses the terms "political asylee" or "refugee" when referring to the concept of territorial asylum.[42]

This Convention establishes that territorial asylum is an exercise of sovereignty. Each government has a right to admit into its territory those persons it deems advisable and the exercise of this right does not constitute grounds for a complaint by any other state.[43] The Convention requires respect for a state's assumption of jurisdiction over those who have entered from a state where they were persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered political offenses.[44]

No country is obligated to expel to or deliver to another country foreigners who have been persecuted elsewhere for political reasons or offenses.[45] Similarly, a government need not extradite people whom the government determines are being sought for political motives, political crimes, or common offenses committed for political ends.[46]

Finally, this Convention prohibits complaints by outside states concerning asylees' or refugees' exercise of freedom of expression recognized by domestic law for all inhabitants of the asylee state, except where it becomes systematic propaganda through which they incite the use of force or violence against the government of the complaining state.[47] Nor can another state request that the right of assembly and association granted to all aliens within the territory be restricted, except when the purpose of the meetings is to encourage the use of force or violence against the government of the complaining state.[48]

The American Convention on Human Rights of 1969

The American Convention on Human Rights, also known as the San Jose Pact of 1969, establishes that every person has the right to seek and be granted

asylum in foreign territory, in accordance with the legislation of the asylee state and international conventions, when the person is being pursued for political offenses or related common crimes.[49] A person's right to seek and be granted territorial asylum is not an obligation on the part of the asylee state to grant it.

In addition, the San Jose Pact provides that a foreigner who finds himself legally in the territory of a state that is a party to the Convention can only be expelled from it pursuant to a decision adopted according to law.[50] In no case can a foreigner be expelled or returned to another country, whether his country of origin or not, where his right to life or personal liberty may be violated because of his race, nationality, religion, social condition, or political opinions.[51] This provision is the broadest *non-refoulement* provision to which Mexico is subject.

Complaints that a member state violated any of the Convention provisions may be brought to the Inter-American Court of Human Rights. Only member states or the Inter-American Commission on Human Rights, whose members are chosen by the member states of the Convention, may submit cases to the court.[52] The Commission itself may receive complaints from individuals or groups that a member state has violated the Convention and may subsequently present these matters to the Court.[53]

However, Mexico specifically has refused to recognize the jurisdiction of the Inter-American Court on the grounds that Mexican law provides the necessary resources to correct "whatever shortcoming exists in the preservation of individual and collective civil rights." Mexican commentators have concluded that the real reason for the reservation is that Mexico is not prepared to accept the jurisdiction of the Court on a matter "as delicate as human rights. . . ."[54]

Therefore, individuals who claim that Mexico violated their rights under the Convention, including the protection against expulsion and the right to *non-refoulement*, may not look to the Inter-American Court for redress. At the same time, Article 33 of the Mexican Constitution appears to annul, within the Mexican system, any challenges to expulsion from Mexico.

As a consequence, it is unclear how rights under these treaties can be enforced. At least one Mexican authority believes that the federal courts have jurisdiction to enforce these rights, as individual rights are enforced under Article 103 of the Constitution. Under this analysis, no revisions in Mexican legislation would be necessary to add the rights under the Convention to those already guaranteed by the Constitution. This optimistic view is rejected by other scholars, who believe these rights can only be enforced in "pluri-national" forums, which would include the Inter-American Court of Human Rights.[55]