



# THE RIGHT TO ASYLUM UNDER INTERNATIONAL LAW

## ASYLUM LAW AND PROCEDURAL REQUIREMENTS

BY CHEPTUM TOROITICH, KIMBERLEY MUREITHI AND  
MARIA ANGELA MAINA

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## Part II: Asylum Law and Procedural Requirements

Cheptum Toroitich<sup>1</sup>, Kimberly Mureithi<sup>2</sup> and Maria Angela Maina<sup>3</sup>



Image source: [The Guardian](#)<sup>4</sup>

## Introduction

*“To be called a “refugee” is the opposite of an insult; it is a badge of strength, courage, and victory.”*

<sup>1</sup> LLB (Strathmore University). Cheptum Toroitich is a Researcher at The Thinking Watermill Society.

<sup>2</sup> LLB (Strathmore University). Kimberly Mureithi is a Researcher at The Thinking Watermill Society.

<sup>3</sup> LLB (Strathmore University). Maria Angela Maina is the Chief Research Coordinator-Africa at The Thinking Watermill Society.

<sup>4</sup> Hoping To Survive, by Razieh Gholami, from Afghanistan, painted in 2019.

This powerful quote rings true, not only does it evoke thought, but it also stretches out its hand and grabs the depth of one's heart.

A lack of understanding of asylum seekers and refugees leads to an ill-starred society and legal system. Whereas, asylum seekers have a legitimate and well-founded international right to seek asylum, various policies, guidelines, and measures in place make this an often cumbersome process. To understand the hardship, joys and losses that asylum seekers face, one must get acquainted with the right to asylum as enshrined in international law and the technical process one must go through to achieve refugee status.

## **Who Is an Asylum Seeker?**

The word “*asylum*” is the Latin counterpart of the Greek word "*asylon*," which means freedom from seizure.

Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Before the establishment of nation-states and the national laws that recognize the right to asylum, the idea was found in the religious laws, traditions, and practices of many societies, making it a “remarkably constant feature of human history.”<sup>6</sup>

Individuals who seek refugee status or any other form of protection are called “asylum seekers.” When asylum seekers are granted refugee status, they are then referred to as refugees.

An internationally accepted definition of an “asylum seeker” may be found in various United Nations High Commissioner for Refugees (UNHCR) documents.

According to the UNHCR:

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<sup>5</sup> Global Giving Team, 'A Quote To Share Every Waking Hour Of World Refugee Day' (June 2020) <<https://www.globalgiving.org/learn/listicle/12-shareable-world-refugee-day-quotes/>> accessed 8 June 2020.

<sup>6</sup> UNHCR, The State of the World's Refugees 2006: Human Displacement in The New Millennium 31.

*“asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined.”<sup>7</sup>*

Thus, a refugee is initially an asylum seeker, as he/she originally applies for asylum in the host country. An asylum seeker is not explicitly a refugee at the beginning but becomes one if he/she falls under the scope of the definition outlined in the 1951 Refugee Convention.

In the European Union (EU), an asylum seeker is a third-country national or stateless person who has made an application for protection under the 1951 Refugee Convention and Protocol in respect of which a final decision has not yet been taken.<sup>8</sup>

Recognizing the tumultuous circumstances that force millions of people to leave their home countries, various conventions, protocols and treaties have been ratified by states to grant special protected status to asylum seekers and refugees.

These instruments recognize the plight of asylum seekers, and due to the circumstances that push one to seek asylum, it would be unjust for them to suffer in inappropriate conditions as they are in detention or await processing by the host state.

Notably, the right of asylum stems from the recognition that the essential rights of human beings are not derived from the fact that he/she is a national of a certain state. Rather, it is founded on the attributes of human personality.<sup>9</sup>

Humans are dynamic in nature, and by virtue of this, it is close to impossible to formulate laws that will encompass every single aspect of human nature. This is why laws are enacted at different points in time to appreciate the dynamic nature of those it governs. One illustration worth

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<sup>7</sup> UNHCR, 2009 Global Trends, 23.

<sup>8</sup> Article 2(b) of Council Directive 2005/85/EC (Asylum Procedures Directive).

<sup>9</sup> American Declaration on the Rights and Duties of Man. 1948, Preamble.

examining is the evolution of the right of asylum. The aforementioned instruments have been enacted and further analysed in the following section.

## Origin of the Right of Asylum

*Why does this right deserve to be protected? Where did it originate from?*

To answer these questions, there is a need to understand the history of the turmoil asylum seekers faced before this right was duly protected by international law.

*“Refugees are not terrorists. They are often the first victims of terrorism.”*

*-[António Manuel de Oliveira Guterres](#)<sup>10</sup>*

History has often shown the negative perception surrounding asylum seekers and refugees by both politicians and citizens of host states. Some nations today have responded by building walls around their borders and passing regulations with strict guidelines lengthening the asylum process. The citizens view refugees as a threat to national security and a burden on the finances of the state without considering the difficult circumstances asylum seekers have faced.<sup>11</sup> Many never think of the journey refugees go through to seek a better life. This is portrayed by the media and various testimonials by refugees themselves.

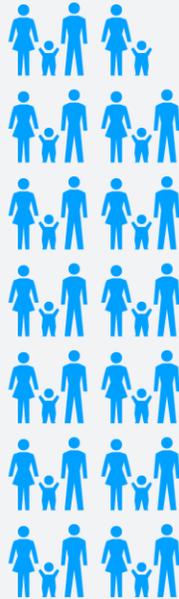
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<sup>10</sup> Global Giving Team, 'A Quote To Share Every Waking Hour Of World Refugee Day' (June 2020) <<https://www.globalgiving.org/learn/listicle/12-shareable-world-refugee-day-quotes/>> accessed 8 June 2020.

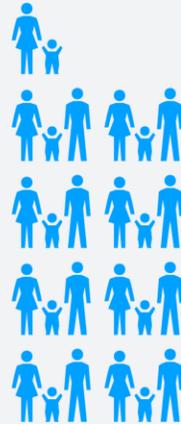
<sup>11</sup> Irina Mosel and Christopher Smart with Marta Foresti, Gemma Hennessy and Amy Leach, 'Public narratives and attitudes towards refugees and other migrants' (odi.org November 2019) <<https://www.odi.org/sites/odi.org.uk/files/resource-documents/12970.pdf>> accessed 10 June 2020.

## 70.8 million forcibly displaced worldwide

Internally displaced  
**41.3 million**



Refugees  
**25.9 million**



Asylum seekers  
**3.5 million**



Source: UNHCR | June 2019

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Image source: [DW](#)<sup>12</sup>

Here is what [Little Hamze](#)<sup>13</sup>, a young asylum-seeking boy, had to say:

*“We are here because we want a better life. In my country, ISIS was killing us. They killed many of our friends...When we came from Iraq, we walked very far. We came by bus, taxi, then a boat, then a train. We slept anywhere on the way. Now we have been here waiting for 3 months, waiting for the border to open so we can have a better life. Every night I pray that tomorrow we can go but nothing happens. I will keep praying every night.”*

<sup>12</sup> Deutsche Welle, ‘Refugee numbers worldwide hit record high: UN’ <<https://www.dw.com/en/refugee-numbers-worldwide-hit-record-high-un/a-49258216>> accessed on 11 June 2020.

<sup>13</sup> Youtube, ‘Refugee Life: Through a Child’s Eyes’ (July 2016) <<https://www.youtube.com/watch?v=tkkVnQEB1mE>> accessed 10 June 2020.

Little Hamze’s story is one that many asylum seekers relate to in every way. However, every refugee has a different story; each as terrifying as the next, illustrating the rigorous journeys they go through. This is why the law was developed: to provide humanity with protection from itself.

The table below illustrates the current international instruments that protect the right to seek and enjoy asylum:

<b>International instruments relating to the right of asylum</b>		
<b>Name of legislation</b>	<b>Article</b>	<b>Objective</b>
<b>Universal Declaration of Human Rights (UDHR) (1948).</b>	14	It provides the legal right to seek and enjoy asylum in other countries, which may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. <sup>14</sup>

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<sup>14</sup> Universal Declaration of Human Rights (UDHR) 1948, s14 (1 and 2).

<p><b>Convention Relating to the Status of Refugees (1951).</b></p>	<p>–</p>	<p>Aims to facilitate international cooperation when dealing with refugees.<sup>15</sup></p> <p>It elaborates on the requirements needed to be granted asylum and details the rights that stem from being a refugee.</p>
<p><b>Protocol Relating to the Status of Refugees (1967).</b></p>	<p>–</p>	<p>This protocol arose to capture novel refugee matters, which were not covered under the 1951 Convention.<sup>16</sup></p>

To reinforce these international efforts, there have been regional enactments that further declare the right of asylum, such as:<sup>17</sup>

<p align="center"><b>Regional Enactments Providing the Right to Seek and Enjoy Asylum In Certain Countries</b></p>	
<p><b>Name of legislation</b></p>	<p><b>Article</b></p>
<p>American Declaration on the Rights and Duties of Man.</p>	<p>27</p>

<sup>15</sup> Convention Relating to the Status of Refugees 1951.

<sup>16</sup> Protocol Relating to the Status of Refugees 1967.

<sup>17</sup> International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/>> accessed 8 June 2020.

American Convention on Human Rights (Pact of San José, Costa Rica).	22
The Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama (Cartagena Declaration).	–
African Charter on Human and Peoples’ Rights (Banjul Charter).	12
OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa.	–
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.	-
Arab Charter on Human Rights (1994) and Arab Charter on Human Rights (2004).	28
Cairo Declaration on Human Rights in Islam.	12
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).	–

Once in a new country, these individuals apply for asylum, hence the term ‘‘asylum seeker.’’ After a successful application, they are granted the legal status of ‘‘refugee.’’

## Requirements to obtain the Refugee Status

Under the 1951 Convention, individuals may obtain the refugee status if they meet the following criteria, as analysed here below.

### a) A well-founded fear.<sup>18</sup>

There are various interpretations of this criterion, especially because of its subjective nature. However, various legal opinions rightly hold that a well-founded fear refers to a future threat of persecution, especially by individuals who have faced persecution in the past.<sup>19</sup>

Additionally, in the *Matter of Mogharrabi*,<sup>20</sup> the Board of Immigration Appeals indicated that asylum seekers need to show that there is a reasonable possibility that they will suffer persecution if they return to their country of origin.

This begs the question of what constitutes persecution. Neither the 1951 Convention nor the 1967 Protocol expressly defines it. It appears that the definition is derived from the Council of the EU, which considers persecution to be acts of physical or mental violence, including:<sup>21</sup>

- acts of sexual violence;
- legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- prosecution or punishment, which is disproportionate or discriminatory;

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<sup>18</sup> UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf> > accessed 16 May 2020.

<sup>19</sup> International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/> > accessed 10 June 2020.

<sup>20</sup> *The Matter of Mogharrabi*, 1987 < <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3028.pdf> > accessed on 10 June 2020.

<sup>21</sup> International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/> > accessed 10 June 2020.

- denial of judicial redress resulting in disproportionate or discriminatory punishment;
- prosecution or punishment for refusal to perform military service in the conflict, where performing military service would include crimes or acts falling under the exclusion clauses set out in Article 12 (2);
- acts of a gender-specific or child-specific nature.

Consequently, in the demonstration of persecutory acts, there is the need to establish any such acts. The common notion is that these acts need to be perpetrated by a state agent, but this is not the case. 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 (the “Qualification Directive”)<sup>22</sup> states so by including non-state actors as falling under the qualification, where the state is unwilling or unable to protect the individual.<sup>23</sup>

Thereafter, there needs to be a nexus between the act of persecution and one of these grounds as elaborated in the next point.

**b) Persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion.**

In order for an asylum seeker to rely on any of these grounds, he/she needs to possess any one (or more) of these factors.

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<sup>22</sup> European Union, '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' (EUR-Lex 2011) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>> accessed 31 January 2021

<sup>23</sup> International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) <<https://ijrcenter.org/refugee-law/>> accessed 10 June 2020.

Today, with half of 19.6 million of the refugee population being women,<sup>24</sup> host states need to be mindful of the unique challenges that women particularly face within their countries of nationality.

There appears to be more awareness of this matter in the Qualification Directive that states:<sup>25</sup>

*“It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in, for example, genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.”*

The reason why relying on one or more of these grounds is important, is because these qualities are immutable. Therefore, even though these grounds may appear rigid *prima facie*, they are flexible in practical application.

For instance, the Council of the EU states that even women and homosexuals fall under the category of “a particular social group”. In each of these groups, there are individuals with similar characteristics that are so fundamental to their being and cannot be expected to change.<sup>26</sup> As a result, this distinct identity causes them to be perceived in a different light, making them vulnerable to persecution on this ground.

**c) The person 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.**

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<sup>24</sup> UN General Assembly, 2016, 'In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, Report of the Secretary General.

<sup>25</sup> Council Directive (EC) 2011/95/EU 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 (2011).

<sup>26</sup> International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/> > accessed 10 June 2020.

Based on the above two requirements, an asylum seeker would need to tie the various points raised to his/her country of nationality. That is to say, as a result of these grounds, the state has shown the inability or unwillingness to help them, causing them to have a well-founded fear of future persecution if they stay.

## **The Procedure of Asylum Application**

The 1951 Convention and the 1967 Protocol are the main international instruments governing the right to asylum. However, there are national procedures and guidelines that set forth the procedural requirements for an asylum application. Nonetheless, it appears that some asylum applications are done through UNHCR offices,<sup>27</sup> which conducts registration of persons as an essential tool for protection, for the management of operations, and the achievement of durable solutions. UNHCR's core methodology for refugee registration applies to asylum-seekers, refugees and other persons of concern to the Office and is used in situations such as:

- a) emergencies and mass movements;
- b) urban areas, where refugee status determination (RSD) may be the norm;
- c) camps for new populations and stable camp situations; and
- d) when implementing durable solutions, including voluntary repatriation, local integration and resettlement.<sup>28</sup>

The process of asylum application with the UNHCR is elaborated in the steps below.

### **1. Reception of asylum seekers in the UNHCR office.**

- Supervision and oversight in the reception.
- Reception procedures to assess the type of assistance the person is seeking and referral to the appropriate UNHCR procedures.
- Identification of any asylum seekers who may have special needs.

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<sup>27</sup> UNHCR, 'Procedural Standards for Refugee Status Determination under the UNHCR's mandate' (UNHCR) <<https://www.unhcr.org/4317223c9.pdf>> accessed 10 June 2020.

<sup>28</sup> UNHCR, 'Handbook For Registration' (UNHCR) <<https://www.unhcr.org/en-ie/3f8e96a04.pdf>> accessed 3 February 2021.

- Counselling on the UNHCR procedures.
- Maintenance of confidentiality.

## **2. Registration of Applicants.**

- Filling of a registration information sheet by the principal applicant and every accompanying family member or dependent, including children.

## **3. Registration Interview.**

- It takes place as soon as possible after asylum seekers approach the UNHCR office.
- Interviews should be conducted in a non-intimidating, non-threatening, and impartial manner.
- For children, interviews are conducted in a friendly manner with the age of the child in mind.
- A photograph of the individual is taken along with copies of supporting documents.
- Assignment of a registration number to identify the asylum seeker throughout the process.

## **4. UNHCR Asylum Seeker Certificate is issued.**

- Attests to the individual's status as "asylum seeker."
- Valid for not more than 1 year.

## **5. Interview.**

- Presentation of claims to a qualified eligibility officer.
- Questioning and presentation of evidence.

## **6. Notification of RSD decision.**

- Notice is given in writing.
- A positive decision grants the applicants refugee status and informs them of the implications of such recognition.
- Where there is a negative decision, one may appeal the decision.

## **Conclusion**

Refugees are from all walks of life and finding asylum in a host state gives them hope for a better future. Through this analysis of asylum law, it is evident that there is another side of the coin. That is, not every asylum seeker's application is accepted, thus, leaving them vulnerable.

This is not to say that they are forced back into dangerous environments, but according to practice, these individuals may apply for more limited forms of protection. In this respect, individuals may seek protection under the 1987 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. This could apply in instances where the individual's fundamental rights might be threatened upon return to their country of origin – for example, because they are at risk of being subjected to torture even if they do not qualify as refugees.

Unfortunately, this is just the tip of the iceberg. Today, refugees face great obstacles that make it difficult for them to search for asylum. Do you want to know what these stumbling blocks are? The next article will expound more on the challenges that refugees face.

For more information, kindly visit [our official website](#) and [YouTube page](#).



Image source: [The Guardian](#)<sup>29</sup>

*‘The painting is about unity. People from different countries, different religions, and different tribes need to accept each other. We need to put our hands together to build a better world, one that does not see colour or differences, only what unites us. We should see others as we see ourselves in the mirror, as human beings. Humanity should take precedence over everything.’*

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<sup>29</sup> Mirror of humanity, by Joseph Kangi, South Sudan, 2019.