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# Comparative perspectives on airport asylum procedures before and during the COVID-19 pandemic

Regina Jefferies, December 2021



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## **Executive summary**

The COVID-19 pandemic has prompted unprecedented border restrictions and closures around the world, slowing international air travel to a fraction of its pre-pandemic levels. Yet, persecution, conflict, disasters and violence – at times exacerbated by COVID-19 – continue to displace millions of people, forcing many to seek safety in other countries. Problematically, many States' pandemic-related border restrictions have failed to provide exceptions for refugees and people seeking asylum.<sup>1</sup> This has not only left people at risk of serious harm but has potentially resulted in numerous instances of *refoulement*.

Even prior to the pandemic, overlapping international legal regimes governing air travel, passenger processing and international protection created particular difficulties for refugees and people seeking asylum, who were often unable to satisfy visa or other documentary requirements.<sup>2</sup> Arguably, these have become even more entrenched during the pandemic, especially as some States have used COVID-19 as a cover for justifying blanket restrictions. Furthermore, in practical terms, limits on 'non-essential' travel have drastically reduced the number of flights available and severely curtailed access to air travel.

This Policy Brief examines how different countries have dealt with international protection needs during the pandemic and provides guidance moving forward. It does so by examining the pre-pandemic use of airport asylum procedures in seven different countries (Australia, Canada, Costa Rica, Germany, Uganda and the United States), as well as those countries' subsequent use of border restrictions and/or closures in response to COVID-19. By reviewing a range of different approaches, it highlights persistent issues of transparency, procedural fairness and accountability that pre-date – but have been exacerbated by – the pandemic. With respect to measures suspending or limiting air travel, it identifies a number of recommended practices to ensure that States continue to meet their international protection obligations towards refugees and asylum seekers, while also responding to public health concerns. Although human rights law permits States to impose exceptional measures in a public health emergency (which must be necessary, proportionate and reasonable, as well as non-discriminatory), international law still requires that people seeking protection are given an effective opportunity to do so. As such, no risk to public health can justify a State denying asylum seekers and refugees access to their territory without appropriate safeguards to prevent *refoulement* and safeguard minimum rights.

## **Recommendations**

### **No blanket health-related dismissals or rejections of asylum claims**

- States should implement specific exemptions to border closures for people fleeing a real risk of persecution or other serious harm. In no circumstances should States remove people to any country where they face a real risk of such ill-treatment.
- To the extent that States adopt full or partial border closures, those measures should be exceptional and regularly reviewed to consider whether a change in circumstances renders such measures unnecessary, disproportionate, or unreasonable.
- States should implement medical screening and testing for air travellers in a non-discriminatory manner, which may include questionnaires, presentation of proof of vaccination or health certificates, and laboratory tests with high-reliability and supported by medical advice.
- Where States implement quarantine or isolation requirements upon arrival, those requirements should also conform to proportionality and reasonableness

requirements, and account for circumstances in which people may have particular needs that require alternative accommodation.

- The requirement and forms of medical screening, testing and restriction should account for the circumstances of particularly vulnerable people, or people in locations where access to such enhanced health measures is not readily available, and provide an alternative for people in those situations.

### **Decouple ‘entry’ fictions from access to asylum**

- States should eliminate the ability of border enforcement agencies to remove a person who has raised an asylum claim until that person has had access to a fair and efficient RSD procedure. Delaying such decisions on entry until after the applicant has had their claim examined by the appropriate RSD authority removes time pressure, and other operational incentives, on border enforcement officials at the airport to quickly remove asylum seekers.
- States should embed experienced RSD officers at airport immigration inspection sites, with the power to identify, screen and refer asylum claims to the appropriate agency for a full and fair determination. Embedded RSD officials could not only more efficiently and accurately identify, screen, and refer asylum claims to the appropriate RSD procedure, but their presence would remove the pressure on border enforcement officials to refuse to process asylum claims in order to save time.
- States should require an appropriate RSD official, rather than border enforcement officials, to make determinations as to the initial eligibility of an asylum claim. Such decisions should also be eligible for appeal or reconsideration.

### **A fair and robust decision-making process**

- In addition to embedding RSD officials at airports, States that resort to simplified or accelerated screening procedures should adopt clear-cut eligibility criteria which clearly separate substantive RSD criteria from the initial screening process. Such criteria should clearly curtail, and provide penalties for, border enforcement officials who improperly reject asylum claims.
- To the extent that information provided to applicants about the airport asylum procedure does not actually inform them of the procedural and requirements of the process, such information should be supplemented by access to appropriate legal advice.
- States should provide access to interpreters and translation as a matter of course, where either the applicant makes the request, or the need for an interpreter becomes apparent to the official interacting with the applicant.
- States should provide access to independent review of fast-track decisions made as part of airport asylum procedures, in addition to providing access to review and appeals procedures made following a full decision on the asylum claim.
- States should adopt enhanced hygiene and testing measures throughout the airport asylum process, including supporting applicants in submitting applications by phone, online, or through legal representatives or non-governmental organisations, where appropriate.
- States should fully automate the process of providing proof of application to asylum seekers, where possible. Proof of application and accompanying identity and other documents should be provided as a matter of course and without requiring additional applications.

## **End mandatory and arbitrary detention**

- States should institute reception areas at airports that allow for physical distancing and the separation of people confirmed or suspected of having COVID-19 to prevent transmission.
- States should conduct health screenings of asylum seekers arriving by air to determine whether they require immediate referral to medical accommodation, or whether they may be referred to alternative accommodation (not detention).
- Refugees and asylum seekers should only be detained as a last resort. States should use alternatives to detention wherever possible, including supervised release or remote monitoring. Any decision to detain must be based on an individualised assessment and implemented according to procedures prescribed by law. Detention should be for the shortest possible time, proportionate and subject to regular independent review.
- In order to reduce the risk of transmission of COVID-19 in detention facilities, States should ensure that physical distancing measures are put in place, that there is regular cleaning and disinfection, and that there are enhanced water, sanitation and hygiene measures. Detainees should also be provided with access to COVID-19 vaccines.

## **Access to lawyers and application forms**

- States should ensure access to legal assistance and advice at all stages of an airport asylum process. The need for legal advice and assistance is particularly acute at the initial stage when the individual may be held by border enforcement officials and have a limited ability to communicate with others.
- States should consider maintaining an 'on-call' legal assistance program located at airports where lawyers can provide individualised and urgent advice to asylum seekers, including assistance with completing forms and in attending interviews.
- States should consider adopting in-person initial eligibility interviews with trained RSD officials, subject to appropriate public health safeguards, for individuals who raise asylum claims at airports.
- States should readily provide access to necessary asylum application forms and information, including access to online versions of the form where applications must be lodged online, or providing applicants with the ability to physically lodge a written form at the airport.

# 1 Introduction

For people seeking international protection, air travel is often cited as a safe alternative to dangerous journeys by land and sea.<sup>3</sup> However, through a combination of measures that prioritise border control over protection, States have made it increasingly difficult for asylum seekers to fly. For instance, airlines are fined if they transport people who do not have the correct documentation (eg visas),<sup>4</sup> with the result that many asylum seekers are denied boarding<sup>5</sup> – and thus access to a refugee status determination (RSD) process.

When the World Health Organization (WHO) announced the designation of COVID-19 as a pandemic on 11 March 2020,<sup>6</sup> States were presented with an opportunity to interpret and structure public health responses in a manner that both protected public health and remained consistent with their obligations under international refugee and human rights law. Since that time, the United Nations High Commissioner for Refugees (UNHCR) has consistently maintained that the protection of public health and ensuring access to asylum are fully compatible.<sup>7</sup> However, many States have relied on public health emergency measures to justify restrictions on, or complete denial of, the right to seek asylum.

This section provides an overview of COVID-19-related border controls impacting the arrival of asylum seekers by air, and highlights Australia's response as an extreme example of border control that all but eliminated access to asylum – even nearly two years after COVID-19 was declared a global pandemic.

## 1.1 Overview of pandemic border controls impacting air arrivals

According to UNHCR and the International Organization for Migration (IOM), COVID-19-related border restrictions have impacted 'heavily on asylum-seekers and refugees, preventing many across the world from seeking asylum and safety, in violation of the international legal principle of non-refoulement.'<sup>8</sup> By 21 April 2020, UNHCR estimated that 167 countries had fully or partially closed their borders to contain the spread of COVID-19, with 57 of them making no exception for people seeking asylum.<sup>9</sup> By 7 November 2021, UNHCR reported that of the 118 countries whose borders were still fully or partially closed, only 43 provided no exception for people seeking international protection.<sup>10</sup>

Aside from concerns of *refoulement*, UNHCR and IOM noted that border closures could lead to individuals being stranded at airports, denied entry or forcibly removed. Such actions could not only place people at further risk of danger (eg at heightened risk of trafficking, exploitation, or abuse), but (ironically) could also 'be detrimental to public health, as irregular movements and entry will increase the number of people who are not detected or known to authorities, further complicating efforts to curb and respond to the pandemic.'<sup>11</sup>

The lack of commitment on the part of many States to ensure access to protection during the pandemic underscores pre-existing trends of restriction. COVID-19 has been used 'as a pretext and as cover' to block access and 'to allow ill-treatment and abuse to continue at their borders and on the high seas'.<sup>12</sup> Yet, the pandemic has also highlighted a number of good practices aimed at protecting the rights of refugees and asylum seekers on the move, while balancing public health concerns, in an acknowledgment that managing risk is also part of responsibility-sharing.



## 1.2 Australia's pandemic response

Even before the WHO declared COVID-19 a global pandemic, Australia imposed stringent border restrictions which prevented foreign nationals (excluding permanent residents) from certain countries hard-hit by COVID-19 from travelling to Australia.<sup>13</sup> On 19 March 2020, those country-specific restrictions were extended to all non-citizens, with exemptions for permanent residents and certain other categories, such as immediate family of Australian citizens.<sup>14</sup> There was no exemption for people seeking asylum. Despite the availability of vaccines in Australia from January 2021 (and the vaccination rollout beginning on 22 February 2021),<sup>15</sup> this remained the default policy setting until 1 November 2021, when fully vaccinated immediate family members of Australian citizens and permanent residents were permitted to enter.<sup>16</sup> In late November, it was announced that the border would re-open for fully vaccinated people on skilled visas, student visas, refugee visas, humanitarian visas and working holiday visas,<sup>17</sup> as well as fully vaccinated tourists from Japan and South Korea,<sup>18</sup> from 1 December 2021. However, this was postponed to 15 December after the emergence of the Omicron variant of COVID-19.<sup>19</sup> For the same reason, on 27 November 2021, Australia temporarily closed its border to people travelling from nine African countries.<sup>20</sup> While there was an exemption for Australian citizens, permanent residents and their immediate family, there was no exemption for asylum seekers or refugees.<sup>21</sup> This means that for almost two years, asylum seekers and refugees – including those already accepted for resettlement<sup>22</sup> – have been unable to access protection in Australia.<sup>23</sup>

Due to Australia's island geography, asylum seekers can only access the country by air or by sea. Decades-long policies aimed at deterring asylum seekers from arriving by sea (including through interdiction, excision of territory, detention and offshore processing) mean that flying in has become the only viable route for seeking asylum.<sup>24</sup> However, Australia's blanket pandemic-related border closures have removed even this as a possibility.

## 2 International protection obligations at airports and in transit areas

Under international law, every person 'has the right to seek and to enjoy in other countries asylum from persecution'.<sup>25</sup> Various regional instruments affirm this fundamental right, including the *African Charter on Human and Peoples' Rights*, the *American Convention on Human Rights*, and the *Charter of Fundamental Rights of the European Union*.<sup>26</sup> Under international refugee and human rights law, States have an obligation not to remove people who face a well-founded fear of being persecuted (for one of five grounds), or who otherwise face serious harm.<sup>27</sup>

Although States have at times sought to claim that individuals intercepted at airports and in transit areas fall outside their jurisdiction and responsibility, such claims have no basis in international law.<sup>28</sup> International law recognises the competence and responsibility of States over their entire territory<sup>29</sup> and requires States to protect individuals from *refoulement* who are within their 'territory and subject to [their] jurisdiction.'<sup>30</sup> As UNHCR has made clear, the responsibility to protect individuals from *refoulement* attaches 'regardless of whether the person has entered the country in a legal sense and has passed immigration control, was authorized to enter, or is located in the transit areas or "international" zone of an airport.'<sup>31</sup> Thus, States must provide persons seeking international protection in such areas with

access to full and fair procedures for adjudicating their claims, in line with relevant international and regional protection obligations and customary international law.

While States have some choice about the processes they use, ‘minimum substantive and procedural requirements should be guided by obligations derived from international treaties, international refugee law, customary international law, UNHCR guidance, and Conclusions adopted by UNHCR’s Executive Committee’.<sup>32</sup> Those obligations include the principle of *non-refoulement*, which prohibits States from returning people to places where they face a real risk of persecution or other serious harm;<sup>33</sup> non-penalisation, which prohibits States from penalising refugees who arrive without documents (and meet certain conditions) on account of their ‘illegal entry or presence’;<sup>34</sup> and the prohibition of arbitrary detention.<sup>35</sup>

Adherence to these principles requires *fair* and *effective* procedures for identifying and screening people with potential protection claims, and for assessing those claims.<sup>36</sup> Fair and effective procedures include, at a minimum, the right to information about the right to seek asylum and the relevant asylum procedure, access to a lawyer and interpreter, the reasonable and objective evaluation of the claim by a qualified official, and the availability of independent review.<sup>37</sup> Finally, although States have a responsibility to protect public health and may adopt measures aimed at minimising the spread of COVID-19, those measures must still comply with other international legal obligations, including those in international refugee and human rights law. Any such measures must be ‘non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health.’<sup>38</sup> While it may be lawful to place restrictions on the entry of non-nationals, they must not prevent people from being able to seek asylum.<sup>39</sup> As such, the imposition of blanket prohibitions on the admission of asylum seekers or refugees, or of people of a particular nationality, ‘without evidence of a health risk *and* without measures to protect against refoulement, would be discriminatory and would not meet international standards.’<sup>40</sup> Furthermore, public health concerns ‘do not justify the systematic use of immigration detention against individuals or groups of asylum seekers or refugees.’<sup>41</sup> Where States do impose restrictions on movement to manage a public health risk, such restrictions must also be ‘in accordance with the law, necessary for the legitimate purpose of managing the identified health risk, proportionate, and subject to regular review.’<sup>42</sup>

### **3 Airport asylum procedures across jurisdictions**

This section surveys airport asylum procedures across seven countries to provide an overview of practices in geographically diverse jurisdictions (Australia, Canada, Costa Rica, Germany, Mexico, Uganda and the US; see table below). It also details COVID-19-related measures that impacted, or had the potential to impact, travellers seeking international protection at airports. All States analysed are parties to the *1951 Convention* and/or *1967 Protocol*, have a refugee status determination procedure in place, and have publicly available information about their airport procedures.

#### **3.1 Australia**

Every non-citizen seeking to enter Australia must hold a valid visa before being allowed to board a flight.<sup>43</sup> Because Australia does not offer a visa for the purpose of seeking asylum, potential asylum seekers must obtain a different visa, such as a tourist visa, work visa, or

student visa. However, doing so may paradoxically place them in breach of Australia's immigration laws, including the requirement (for those visas) that they intend to stay only temporarily.<sup>44</sup> As analysed in detail in a previous Policy Brief,<sup>45</sup> Australia uses an accelerated and summary procedure called 'entry screening' to identify and screen protection claims articulated by travellers at Australian airports. This means that upon arrival, travellers must provide evidence of identity and a valid visa. To be 'immigration cleared', they must leave the airport with the permission of a 'clearance authority' and not subject to immigration detention.<sup>46</sup>

Travellers who raise a protection claim at the airport are referred for entry screening by an Australian Border Force (ABF) official. Once referred, an ABF Visa Determination Officer (VDO) conducts two interviews. The first interview is solely to determine whether the person should be immigration cleared, or whether their visa should be cancelled. If the traveller has their visa cancelled, they are subject to mandatory detention before the second 'pre-screening' interview can be conducted. The second interview requires the VDO to follow an interview template to explore any protection claims that the traveller has raised. During this interview, the official must allow the person access to a consular or UNHCR official, if requested. Once the VDO completes the pre-screening interview, they email the traveller's information and a copy of the interview to a Duty Delegate of the Humanitarian Program Operations Branch of the Department of Home Affairs.<sup>47</sup> The Duty Delegate then considers the traveller's claims and decides, based on the emailed information from the pre-screening interview, whether the traveller has made 'a prima facie protection claim that is not considered "far-fetched and fanciful"'.<sup>48</sup> If the claim meets this threshold, the person will be 'screened in' and allowed to lodge a temporary protection application. If the claim does not meet the threshold, the person will be 'screened out' and removed from the country.<sup>49</sup>

As noted above, during the first two years of the pandemic, Australia closed its international borders to all travellers except Australian citizens and permanent residents, with limited exceptions for other classes of visa holders. Those exemptions did not include asylum seekers. All those allowed to enter the country were also subject to a strict, 14-day period of hotel quarantine.<sup>50</sup> As noted above, on 27 November 2021 Australia moved to prohibit the entry of people from nine countries in Africa; those measures also do not exempt asylum seekers from the ban.

### **3.2 Canada**

Travellers seeking to enter Canada by air must apply for a visa before being allowed to board a flight.<sup>51</sup> Like Australia, Canada does not offer a visa for people seeking to apply for asylum. Unlike Australia, while obtaining a different visa, such as a tourist visa, work visa, or student visa, and requesting asylum on arrival does not place the person at a legal disadvantage in terms of access to permanent protection, it does place people on a pathway to removal if their claim is found to be ineligible, or is ultimately denied.<sup>52</sup> It should also be noted that Canada's *Safe Third Country Agreement* with the US does not apply to air travellers seeking asylum who have either directly or indirectly travelled to Canada from the US.<sup>53</sup>

Upon arrival, the traveller may make a claim for asylum to a Canada Border Services Agency (CBSA) official at the airport. That official must 'determine whether the claim is eligible to be

referred to the Refugee Protection Division' (RPD) of the Immigration and Refugee Board (IRB) and, if eligible, 'shall refer the claim'.<sup>54</sup> A claim made by an air arrival may not be eligible for referral if the traveller:

- has already been granted refugee protection in Canada;
- has had their claim for refugee protection rejected by the IRB;
- made a prior claim for refugee protection that was determined to be ineligible for referral to the Refugee Protection Division, or to have been withdrawn or abandoned;
- has made a claim for refugee protection in a country with whom Canada has entered into an information-sharing arrangement for the purpose of assisting in the administration and enforcement of their immigration and citizenship laws;
- has been recognised as a Convention refugee by another country and can return to that country;
- is subject to the limited exception for claims made by persons transiting through Canada by air pursuant to the execution of a removal order by the US; or
- is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, with limited exception.<sup>55</sup>

The CBSA official must first determine whether the traveller can understand and communicate fully in either French or English,<sup>56</sup> and if not, then an interpreter will be provided. Travellers may also have a representative present at the eligibility interview. The traveller bears the burden of proving that the claim is eligible to be referred to the RPD, although CBSA officials may choose not to assess the credibility or merits of the protection claim.<sup>57</sup> The CBSA official must review eligibility and assist the traveller to complete the application forms. Absent any evidence that the traveller is ineligible to be referred to the RPD, the official must 'resolve eligibility in favour of the claimant'.<sup>58</sup> If the traveller is eligible for referral, they will be given a Basis of Claim (BOC) form that must be submitted to the RPD 15 calendar days after the initial claim.<sup>59</sup> If the traveller is found ineligible, they may usually apply for a Pre-Removal Risk Assessment to determine whether they are at risk of *refoulement*, or may ask the Federal Court to review the finding of ineligibility.<sup>60</sup>

From 21 February 2020, Canada has required travellers entering the country to undertake quarantine and isolation measures, although there are now exceptions for fully vaccinated travellers and, subject to conditions, for protected persons.<sup>61</sup> Beginning on 18 March 2020, Canada placed significant restrictions on air travel due to the COVID-19 pandemic. For much of the pandemic, only Canadian citizens or permanent residents and US citizens or residents (subject to conditions) could enter Canada by air, with limited exceptions – including for asylum seekers arriving by air.<sup>62</sup> As of 9 August 2021, those restrictions were lifted for fully vaccinated US citizens and lawful permanent residents of the US.<sup>63</sup> On 7 September 2021, the restrictions were lifted for fully vaccinated travellers for all other countries.<sup>64</sup> However, as of 26 November 2021, Canada had reimposed a ban on travellers from South Africa, Eswatini, Lesotho, Botswana, Zimbabwe, Mozambique and Namibia; it was unclear whether the measure included an exemption for asylum seekers.<sup>65</sup>

### **3.3 Costa Rica**

In Costa Rica, the right to seek and enjoy asylum is enshrined in the constitution.<sup>66</sup> Applicants who arrive by air may lodge a protection application with immigration officials from the Dirección General de Migración y Extranjería (DGME) at the airport,<sup>67</sup> and may be

issued immediately with an identification document.<sup>68</sup> Within the DGME, the Comisión de Visas Restringidas y Refugio is responsible for adjudicating applications for asylum (la condición de persona refugiada).<sup>69</sup> However, prior to an adjudication by the Comisión, the central refugee authority of DGME (La Unidad de Refugio, Visas Restringidas y Consulares) manages the independent 'subprocess' and conducts the pre-decisional work on asylum applications, including processing the application and evidence, conducting the interview, and considering whether an application is manifestly unfounded or clearly abusive.<sup>70</sup> The latter is not determinative of the outcome, but is communicated by official letter to the interested parties and resolved through a special procedure of the Comisión.<sup>71</sup>

Travellers applying for asylum have the right to due process, the right to information, the right to legal representation, the right to request administrative remedies, and they must not be removed from Costa Rica before having had the opportunity to exhaust all legal remedies.<sup>72</sup> Applicants may appeal decisions to the Tribunal Administrativo Migratorio (TAM).<sup>73</sup> Costa Rican law also requires minimum procedural protections in the event that a traveller is detained, including complete and timely reasons for detention, information regarding the right to legal representation, the ability to have a court or administrative tribunal review the detention decision, information regarding the right to contact UNHCR and the right to translation, among others.<sup>74</sup>

On 18 March 2020, Costa Rica closed its international borders to all travellers except Costa Rican citizens and residents after having declared a state of emergency in response to the COVID-19 pandemic.<sup>75</sup> The border closures did not exempt asylum seekers. The blanket closure of international borders on public health grounds continued until 1 August 2020, when Costa Rica began allowing citizens and residents of Canada, the European Union and the United Kingdom to enter the country by air.<sup>76</sup> By 15 October 2020, Costa Rica began to allow air arrivals from all other Central American countries.<sup>77</sup> From 1 November 2020, all travellers from any country have been allowed to travel to Costa Rica by air, subject to certain restrictions.<sup>78</sup>

### **3.4 Germany**

The right to political asylum is enshrined in article 16a of the German constitution (Grundgesetz).<sup>79</sup> However, legislation has placed significant limitations on travellers' ability to seek and enjoy asylum, particularly with the introduction in 1993 of a 'fast-track' procedure (Schnellverfahren) for individuals arriving by plane without valid documents, or from a 'safe' country of origin.<sup>80</sup> German domestic law considers these travellers as not having yet 'entered' the country and instead as being present in a 'transit area' (Transitbereich), despite being in German territory.<sup>81</sup> Air travellers first encounter an official with the German border agency, the Federal Police (Bundespolizei), who interviews the traveller to confirm whether they are requesting asylum.<sup>82</sup> If confirmed, the Federal Police forwards the interview transcript and documents to the Bundesamt für Migration und Flüchtlinge (BAMF), which is the authority responsible for processing claims for international protection raised by air travellers.<sup>83</sup> If the Federal Police concludes that no request for asylum has been made, nothing is forwarded to the BAMF and the Federal Police determines whether or not to remove the person from Germany.<sup>84</sup> Importantly, if there are indications that the Dublin III Regulation<sup>85</sup> applies to an asylum claim, the Federal Police will still conduct an interview, but will forward the information to a department of the BAMF responsible for Dublin-referrals

to decide (on the basis of the Federal Police interview) whether another EU Member State is responsible for the processing the asylum claim.<sup>86</sup>

The BAMF must meet several other conditions to resort to the fast-track procedure, including that the airport has appropriate accommodation for the asylum seeker, that the person is able to lodge an asylum application with the BAMF without delay, and that the BAMF may immediately and personally conduct a hearing with the asylum seeker.<sup>87</sup> If these further conditions are met, the fast-track procedure may be applied and the applicant will only be given the opportunity to contact a lawyer after the BAMF hearing occurs, unless the traveller has already arranged legal assistance.<sup>88</sup> The BAMF must then decide within two days of the hearing whether the asylum application may be rejected as ‘manifestly unfounded’ (offensichtlich unbegründet).<sup>89</sup> If it is not rejected, then the fast-track procedure ends and the traveller continues with the regular asylum process for those allowed to enter Germany.<sup>90</sup>

If the application is considered to be ‘manifestly unfounded’ within the two-day time limit, then the traveller will not be allowed to enter Germany.<sup>91</sup> The decision may be appealed to the Administrative Court in an urgent application for relief, which stays the execution of the refusal of entry until a decision is reached.<sup>92</sup> If a decision is not reached within 14 days, the person will be granted the right to enter by operation of law.<sup>93</sup> The Administrative Court may only allow the appeal if ‘serious doubts’ exist about the BAMF’s rejection of the application as manifestly unfounded.<sup>94</sup> Although the decision of the Administrative Court is final, an asylum seeker may attempt an urgent complaint to the Federal Constitutional Court (Bundesverfassungsgericht) or the European Court of Human Rights.<sup>95</sup>

On 16 March 2020, Germany and other EU Member States agreed to an immediate ban on non-essential travel across the EU’s external borders by non-EU citizens, with limited exceptions.<sup>96</sup> One of the exceptions included travellers with essential functions or needs, including ‘[p]ersons in need of international protection or for other humanitarian reasons.’<sup>97</sup> Germany began to lift non-essential travel restrictions on European countries and the UK from 15 June 2020.<sup>98</sup> On 13 October 2020, EU Member States adopted a Council Recommendation for a coordinated approach to travel restrictions in response to the pandemic.<sup>99</sup> Germany lifted many travel restrictions on 1 July 2021,<sup>100</sup> although has reimposed travel restrictions on countries affected by COVID-19 variants at different points in time.<sup>101</sup> Throughout the pandemic, Germany has provided travel exemptions for asylum seekers arriving by air. On 28 November 2021, Germany imposed a ban on travellers from Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa and Zimbabwe.<sup>102</sup> Asylum seekers appear to be exempt from the ban, however, since they presumably fall within the exception for people travelling for ‘urgent humanitarian reasons’ (Beförderungen aus dringenden humanitären Gründen).<sup>103</sup>

### **3.5 Mexico**

In Mexico, the right to seek and enjoy asylum is enshrined in the constitution.<sup>104</sup> Travellers arriving by air may raise an asylum claim with any Mexican official, including an official of the Instituto Nacional de Migración (INM).<sup>105</sup> INM is the border agency responsible for reviewing the immigration status of travellers located at airports who are seeking to enter Mexico.<sup>106</sup> A traveller may either raise a protection claim in the initial immigration status review (filtro de revisión migratoria), or in a secondary review if their status could not be

resolved.<sup>107</sup> If a traveller raises an asylum claim at either of those points, INM must receive the application and immediately inform the Comisión Mexicana de Ayuda a Refugiados (COMAR) of the request in writing.<sup>108</sup> COMAR is the entity responsible for adjudicating asylum applications.<sup>109</sup> In principle, asylum seekers may seek judicial review in the event that INM unlawfully fails to refer the asylum claim to COMAR, but various jurisdictional and practical bars exist that call into question the effectiveness of the judicial remedy.<sup>110</sup>

Once COMAR has received the asylum request, the agency issues a Certificate (constancia) showing the person's status as an asylum seeker.<sup>111</sup> The applicant has a right to an attorney and interpreter throughout this process (including at the airport).<sup>112</sup> COMAR then conducts an eligibility interview to explore the asylum claim in detail and must issue a reasoned, written decision within 45 business days of the date of application.<sup>113</sup> COMAR's analysis begins with an examination of whether the applicant meets the *1951 Convention* refugee definition; if not, the agency examines whether the applicant meets the broader *Cartagena Declaration* criteria.<sup>114</sup> COMAR may grant the applicant asylum under either the *1951 Convention* or *Cartagena Declaration*, complementary protection, or deny international protection.<sup>115</sup> If the application is denied, the applicant may appeal the decision within 15 days and COMAR will review the case a second time.<sup>116</sup> If the application is again denied, the applicant may seek legal advice for a judicial appeal.<sup>117</sup>

Asylum seekers who arrive in Mexico by air have access to the full protection framework, where a grant of refugee status may lead to permanent residency and access to a variety of rights and protections.<sup>118</sup> Furthermore, due to a significant increase in the number of asylum applications,<sup>119</sup> COMAR adopted two new processes of asylum adjudication: (1) merged procedures and application of the broader refugee definition (since March 2020); and (2) simplified procedures (since July 2019).<sup>120</sup> The merged procedure is an accelerated asylum procedure for people 'with a high probability of being granted refugee status' and only applies to applicants with specific profiles from Venezuela, Honduras and El Salvador.<sup>121</sup> The merged procedure collapses the initial registration interview and the asylum eligibility interview for people 'with a high probability of being granted refugee status.'<sup>122</sup> COMAR reviews the person's case and conducts the eligibility interview in one day, then issues a decision within 20 days.<sup>123</sup> The simplified procedure inverts the examination of eligibility under the broader *Cartagena Declaration* criteria and the *1951 Convention* and is used in cases with a high degree of similarity.<sup>124</sup> For instance, following an in-depth analysis of conditions in several countries, COMAR concluded that some conditions were sufficient to 'consider that there is a presumption of inclusion' and recognise asylum seekers as refugees under the *Cartagena Declaration*.<sup>125</sup> In addition to the grounds specified in the *1951 Convention*, the *Cartagena Declaration* provides protection to people fleeing their home country on account of 'generalized violence, foreign aggression, internal conflicts, massive human rights violations, and other circumstances that have seriously disturbed public order'.<sup>126</sup> In determining whether an applicant can access the simplified procedure, COMAR uses a 'country-of-origin information document that contains deep and specialized research', 'an interviewing guideline that allows COMAR to easily identify legal and factual elements to assess the asylum claim', and a resolution template that 'contains common elements which can be easily applied to many cases and shortens the time of decision-making.'<sup>127</sup>

On 30 March 2020, Mexico declared a state of emergency due to the COVID-19 pandemic<sup>128</sup> but never closed its international borders to air travellers. Mexico deemed the registration of

asylum claims an essential activity and COMAR continued to register new asylum claims.<sup>129</sup> UNHCR worked with COMAR to undertake remote interviews, 'leaving face-to-face interviews in COMAR offices for the most vulnerable and urgent cases.'<sup>130</sup>

### **3.6 Uganda**

A traveller who enters Uganda by air and seeks asylum at the airport must be received by the refugee reception officer and registered as soon as practicable as a person seeking refugee status.<sup>131</sup> Where the person cannot be registered 'as soon as practicable', the refugee reception officer 'shall register the person within thirty days after the reception of the person.'<sup>132</sup> The refugee reception officer must also give the traveller the contact information for the nearest UNHCR office<sup>133</sup> and provide an interpreter if the person does not speak English.<sup>134</sup> However, if a traveller is determined to come from an area of a country that is 'affected by a highly infectious pandemic disease,' they will be detained in a 'special holding centre' while their asylum application is processed.<sup>135</sup> The traveller must then apply 'to the Eligibility Committee for the grant of refugee status within thirty days after the date of entry in Uganda.'<sup>136</sup> Once an application has been submitted, the Eligibility Committee may undertake an accelerated procedure to hear and decide on an application that 'in the opinion of the Committee is clearly abusive or manifestly unfounded.'<sup>137</sup> The Committee must notify the asylum seeker of its decision within seven days of the hearing and also advise them of their right to appeal.<sup>138</sup> An asylum seeker who is rejected under this provision may be deported.<sup>139</sup>

On 18 March 2020, Uganda imposed a ban on foreign nationals travelling from high-risk countries for an initial period of 32 days.<sup>140</sup> Uganda suspended all incoming commercial passenger flights effective 22 March 2020 for a period of at least 30 days.<sup>141</sup> The ban on travel remained in effect until Entebbe International Airport reopened to commercial flights on 1 October 2020.<sup>142</sup>

### **3.7 United States**

Travellers who arrive in the US by air and seek asylum at the airport are generally subject to an accelerated and summary procedure called 'expedited removal'.<sup>143</sup> US Customs and Border Protection (CBP) is the agency responsible for reviewing a traveller's immigration status and admissibility at primary inspection points in the airport.<sup>144</sup> Travellers may request asylum at any point, although US law considers an asylum seeker at this stage to be an 'applicant for admission' who has not legally entered the country.<sup>145</sup> If a CBP official determines that the traveller may not be admitted because they do not have a valid visa or travel document, or because they have committed certain types of fraud or misrepresentation, the person may be removed from the US without a further hearing, unless they express an intention to seek asylum.<sup>146</sup>

CBP officials cannot remove travellers who raise an asylum claim. Instead, they must refer them to an asylum officer from the US Citizenship and Immigration Services (USCIS) Refugee, Asylum, and International Operations (RAIO) branch for a 'credible fear' screening.<sup>147</sup> The asylum officer must conduct a non-adversarial interview with the traveller to determine whether they have a 'credible fear of persecution', which means establishing that the person has a 'significant possibility' of establishing eligibility for asylum.<sup>148</sup> If a



'credible fear' is identified, the traveller must be referred for further consideration of their asylum claim, which currently takes place before an immigration judge with the Executive Office of Immigration Review (EOIR).<sup>149</sup> Asylum seekers are detained while their asylum application is pending before the immigration court.<sup>150</sup> If the asylum officer does not find a 'credible fear' or persecution, the traveller may seek expedited review of the negative decision before an EOIR immigration judge, but cannot seek further appellate review.<sup>151</sup> If the negative credible fear determination is affirmed, or the traveller does not seek review, they are removed from the US.

If the traveller has been previously removed from the US and raises a claim for international protection, they may only seek 'withholding of removal' and must be referred to an asylum officer for a 'reasonable fear' screening.<sup>152</sup> This requires the traveller to establish that there is a 'reasonable possibility' they would be persecuted for a Convention reason, or that they would be tortured.<sup>153</sup> If the asylum officer finds a reasonable fear exists, then they must refer the case to an immigration judge for a full consideration of the request for withholding of removal.<sup>154</sup> If the asylum officer does not find a reasonable fear, applicants can request that an immigration judge review a negative 'reasonable fear' finding.<sup>155</sup> If the immigration judge agrees with the asylum officer's finding, the person is removed from the US.<sup>156</sup> Travellers subject to expedited or reinstatement of removal are detained until they are either granted relief or removed from the US. There is no right to appeal a CBP official's decision to place them in expedited or reinstatement of removal proceedings.<sup>157</sup> However, in some cases, travellers found to have a credible or reasonable fear may be paroled (released from detention) and permitted to remain in the US while their asylum or withholding of removal case is pending.<sup>158</sup>

On 11 March 2020, the US barred the entry, including by air, of all non-citizens and non-permanent residents who were physically present within the Schengen Area during the 14-day period preceding their attempted entry into the US.<sup>159</sup> The restrictions were subsequently extended to the UK and Ireland,<sup>160</sup> as well as all new lawful permanent residents (who had not previously been admitted as lawful permanent residents) into the US.<sup>161</sup> On 24 May 2020, the US suspended travel from Brazil.<sup>162</sup> On 25 January 2021, the US temporarily suspended the entry of non-citizens who were physically present within the Schengen Area, the UK, Ireland, Brazil and South Africa during the 14-day period preceding their entry (or attempted entry) into the US.<sup>163</sup> All of the travel restrictions specifically exempted asylum seekers. Finally, on 25 October 2021, the US moved away from country-specific travel restrictions and suspended the entry of non-vaccinated non-US citizens and non-permanent residents from travel into the US,<sup>164</sup> while lifting restrictions for vaccinated travellers from previously barred States (effective 8 November 2021).<sup>165</sup> However, on 26 November 2021, the US reimposed a ban on travellers from Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa and Zimbabwe, but with an exemption for asylum seekers.<sup>166</sup>

Case Studies						
State	1951 Convention/ 1967 Protocol	Regional Instrument(s)	Accelerated/ Summary Procedure	COVID-19 Air Border Closure Start Date	Asylum Seeker Exemption	COVID-19 Border Closure End Date <sup>167</sup>
Australia	Yes/Yes	None	Entry Screening	19 March 2020	No	19 April 2021/ 15 December 2021 <sup>168</sup>
Canada	Yes/Yes	<ul style="list-style-type: none"> <li>• <i>American Declaration on the Rights and Duties of Man</i><sup>169</sup></li> <li>• <i>Charter of the Organization of American States</i><sup>170</sup></li> </ul>	Eligibility Assessment	18 March 2020	Yes	9 August 2021/ 7 September 2021 <sup>171</sup>
Costa Rica	Yes/Yes	<ul style="list-style-type: none"> <li>• <i>American Declaration on the Rights and Duties of Man</i><sup>172</sup></li> <li>• <i>Charter of the Organization of American States</i><sup>173</sup></li> <li>• <i>American Convention on Human Rights</i><sup>174</sup></li> <li>• <i>Cartagena Declaration on Refugees</i><sup>175</sup></li> <li>• <i>Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women</i><sup>176</sup></li> </ul>	Subprocess	18 March 2020	No	15 October 2020/ 1 November 2020 <sup>177</sup>
Germany	Yes/Yes	<ul style="list-style-type: none"> <li>• <i>European Social Charter (Revised)</i><sup>178</sup></li> <li>• <i>Convention on Preventing and Combating Violence against Women and Domestic Violence</i><sup>179</sup></li> <li>• <i>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</i><sup>180</sup></li> <li>• <i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i><sup>181</sup></li> </ul>	Schnellverfahren	16 March 2020	Yes	15 June 2020/ 1 July 2021 <sup>182</sup>

Mexico	Yes/Yes	<ul style="list-style-type: none"> <li>• <i>American Declaration on the Rights and Duties of Man</i><sup>183</sup></li> <li>• <i>Charter of the Organization of American States</i><sup>184</sup></li> <li>• <i>American Convention on Human Rights</i><sup>185</sup></li> <li>• <i>Cartagena Declaration on Refugees</i><sup>186</sup></li> <li>• <i>Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women</i><sup>187</sup></li> </ul>	None	No closure	N/A	N/A
Uganda	Yes/Yes	<ul style="list-style-type: none"> <li>• <i>OAU Convention Governing the Specific aspects of Refugee Problems in Africa</i><sup>188</sup></li> <li>• <i>African Charter on Human and Peoples' Rights</i><sup>189</sup></li> <li>• <i>African Charter on the Rights and Welfare of the Child</i><sup>190</sup></li> </ul>	Expeditious Handling of Abusive or Unfounded Applications	22 March 2020	No	1 October 2020
United States	No <sup>191</sup> /Yes	<ul style="list-style-type: none"> <li>• <i>American Declaration on the Rights and Duties of Man</i><sup>192</sup></li> <li>• <i>Charter of the Organization of American States</i><sup>193</sup></li> </ul>	Expedited Removal	25 January 2021/ 25 October 2021 <sup>194</sup>	Yes	8 November 2021 <sup>195</sup>

## **4 Best practices to ensure that States meet their international obligations**

Although many States took necessary, proportionate, and reasonable public health measures in response to the COVID-19 pandemic, measures such as complete border closures clearly contravene the right to seek asylum in international law and principles of international solidarity upon which the international protection system is based. Such measures may also violate the principle of *non-refoulement*.<sup>196</sup> In some cases, States that imposed strict measures at the beginning of the pandemic have not re-adjusted them in light of changed circumstances, such as the widespread availability of vaccines and improved contact-tracing, which may indicate a lack of proportionality. In terms of airport asylum procedures more generally, screening and referral mechanisms for international protection claims should not take the form of de facto status determination or admissibility procedures.<sup>197</sup> However, the use of simplified or accelerated procedures, triggered by border enforcement officials and linked to a legal fiction of ‘admission’ or ‘entry’, places a disproportionate amount of discretion and power in the hands of border agents whom the law often only envisions as having a ‘claim referral’ role.

### **4.1 Airport Asylum Procedures**

Each State surveyed in this Policy Brief, with the exception of Mexico, has some form of accelerated or simplified asylum procedure used at airports to explicitly disqualify ‘manifestly unfounded’ claims. Of the six States that have these procedures, only one – Australia – uses the accelerated or simplified procedure to provide asylum seekers with a lesser form of international protection (temporary protection). All the States surveyed tie the airport asylum procedure to the question whether a traveller should be allowed to ‘enter’ the country in a legal (rather than physical) sense. The following recommendations highlight means of implementation that reflect a good faith understanding of relevant international legal obligations, and draw upon UNHCR recommendations and State practice. This section highlights best practices – and pitfalls – taken from the case studies.

#### **4.1.1 No blanket health-related dismissals or rejections of asylum claims**

States must not resort to blanket public health measures as a pretext for justifying border restrictions or closures that prevent asylum seekers from accessing territory. International law recognises that States must not dismiss or reject asylum seekers without an examination of their claims, ‘since protection begins with the ability of the refugee to secure admission to territory.’<sup>198</sup> The prohibition of *refoulement* includes rejection at the border or non-admission to the territory in a physical sense. Although the COVID-19 pandemic has presented an exceptional situation, allowing States to take proportionate and reasonable measures aimed at protecting public health, under no circumstances may they engage in conduct leading to ‘return in any manner whatsoever’ of a person to a place where they risk persecution or other serious harm.

Of the countries surveyed, Mexico was the only State that did not implement border restrictions or closures for travellers arriving in the country by air. Airports remained open to asylum seekers throughout the pandemic, although various levels of medical screenings and testing were also implemented. Canada, Germany and the US variously instituted

partial border closures that specifically exempted asylum seekers and others in need of humanitarian protection. Those measures were also accompanied by various levels of medical screenings, testing, isolation or quarantine requirements (albeit now with exemptions for fully vaccinated travellers and, subject to conditions, for protected persons).<sup>199</sup> For example, Canada previously required all travellers, subject to exemptions, to undertake testing and submit a quarantine plan detailing where they would remain for the 14 days following their entry into Canada. If a person did not have a suitable place to quarantine, they could access a federal quarantine facility as a last resort.<sup>200</sup>

Where States implement full border closures or restrictions that do not contain exceptions for people seeking international protection (as in Australia, Costa Rica and Uganda), people in vulnerable circumstances may resort to irregular movement to circumvent the controls. Not only may this mean that States violate their *non-refoulement* obligations, but complete border closures externalise the impacts of the spread of COVID-19 to departure and bordering States hosting people on the move. As UNHCR has noted, blanket rejections may send asylum seekers into “orbit” in search of a State willing to receive them’, potentially contributing to the further spread of COVID-19. While Uganda fully re-opened air travel on 1 October 2020 and Costa Rica on 1 November 2020, Australia will have left its strict border closure in place until at least 15 December 2021 – almost two years into the pandemic. This closure, which has prevented anyone except Australian citizens or permanent residents (with limited exceptions) from entering the country, raises serious questions about the proportionality and reasonableness of the response.<sup>201</sup>

## Recommendations

- States should implement specific exemptions to border closures for people fleeing a real risk of persecution or other serious harm. In no circumstances should States remove people to any country where they face a real risk of such ill-treatment.
- To the extent that States adopt full or partial border closures, those measures should be exceptional and regularly reviewed to consider whether a change in circumstances renders such measures unnecessary, disproportionate, or unreasonable.
- States should implement medical screening and testing for air travellers in a non-discriminatory manner, which may include questionnaires, presentation of proof of vaccination or health certificates, and laboratory tests with high-reliability and supported by medical advice.
- Where States implement quarantine or isolation requirements upon arrival, those requirements should also conform to proportionality and reasonableness requirements, and account for circumstances in which people may have particular needs that require alternative accommodation.
- The requirement and forms of medical screening, testing and restriction should account for the circumstances of particularly vulnerable people, or people in locations where access to such enhanced health measures is not readily available, and provide an alternative for people in those situations.

### 4.1.2 Decouple ‘entry’ fictions from access to asylum

Protecting asylum seekers in airport asylum procedures from the risk of *refoulement* requires a re-examination of the role of border enforcement agencies in a fundamentally humanitarian procedure. Tying applications for international protection to domestic legal ‘entry’ fictions in airport transit zones links time-sensitive decisions about whether to remove

an asylum seeker with time-intensive decisions about whether the asylum seeker is, in fact, a refugee. There is an inherent tension between these two tasks, raising questions about whether people's protection needs (and States' *non-refoulement* obligations) are sufficiently prioritised. The risk of rejection or removal at the airport may also disincentivise asylum seekers from approaching 'the authorities of the State of refuge without delay',<sup>202</sup> with the perverse consequence that they may be assumed to be less credible.

For example, Canada's simplified Eligibility Assessment tightly restricts the grounds on which CSBA officials may refuse to refer an asylum seeker to the IRB. However, in addition to these tightly restricted eligibility criteria, CSBA's role in the referral process still requires that they determine whether a traveller has raised an asylum claim in the first place. Thus, whether an asylum seeker is referred to the appropriate RSD mechanism for adjudication of that claim does not depend solely on the explicit referral criteria. In most States surveyed, a persistent and serious complaint about the airport asylum process related to the conduct and interpretations of border enforcement agencies within the entry and referral processes. Even where States explicitly prescribe legal criteria for non-referral to an RSD procedure, border officials sometimes fail to properly refer claims.

The case of Mexico is also instructive. Although Mexico's legal protection framework is very progressive on paper, serious and persistent issues exist with respect to the role of INM in screening and the referral of asylum seekers to COMAR for the determination of the asylum claim. Advocates have reported extended airport detention where applicants are held *incommunicado*, as well as numerous instances of *refoulement* and pushbacks.<sup>203</sup> Furthermore, where initial eligibility determinations are made by an RSD official on the basis of written information provided by border enforcement officials, as is the case of Germany, the opportunity to request an appeal or reconsideration of negative eligibility findings is critical.

## Recommendations

- States should eliminate the ability of border enforcement agencies to remove a person who has raised an asylum claim until that person has had access to a fair and efficient RSD procedure. Delaying such decisions on entry until after the applicant has had their claim examined by the appropriate RSD authority removes time pressure, and other operational incentives, on border enforcement officials at the airport to quickly remove asylum seekers.
- States should embed experienced RSD officers at airport immigration inspection sites, with the power to identify, screen and refer asylum claims to the appropriate agency for a full and fair determination. Embedded RSD officials could not only more efficiently and accurately identify, screen, and refer asylum claims to the appropriate RSD procedure, but their presence would remove the pressure on border enforcement officials to refuse to process asylum claims in order to save time.
- States should require an appropriate RSD official, rather than border enforcement officials, to make determinations as to the initial eligibility of an asylum claim. Such decisions should also be eligible for appeal or reconsideration.

### 4.1.3 A fair and robust decision-making process

States cannot adequately identify people in need of international protection without a fair and robust decision-making process for protection claims. For an airport asylum process to

meet this requirement, it must include procedural safeguards to ensure that refugees have the opportunity to present their claims, be heard, and seek review of negative decisions before an independent decisionmaker. These types of procedural safeguards would minimise the risk of a person in need of protection being returned to a place where they face a real risk of persecution or other serious harm.

In all of the States surveyed, the first-contact official at the airport was a border enforcement agent. Although the Canadian eligibility screening system provides the most clear-cut curtailment of the discretion of border officials to improperly reject asylum claims, allowing such enforcement officials to decide whether to refer an applicant for further processing of an asylum claim at all presents an inherent risk of improper rejection. As discussed in Section 4.1.2, such decisions should be made by RSD officials, or by border officials with oversight by embedded RSD officials.

Furthermore, interviews conducted within the context of airport asylum procedures, whether by the first-contact agency or the appropriate RSD agency, should be done in person, with appropriate public health safeguards. For example, Germany has instituted a COVID-19 testing strategy for applicants attending in-person appointments with the BAMF, which informs applicants about free public testing, to which they have the same access as German citizens. The BAMF also provides free self-tests to applicants who arrive at appointments without having been able to test ahead of time.<sup>204</sup> These types of tailored measures not only conform to medical advice, but also ensure that asylum seekers receive proper consideration of their claims without the disadvantages of interviews mediated by imperfect technology.

Most States surveyed had procedures in place to provide appropriate information about the asylum process to those making claims at airports. For example, Uganda specifically requires refugee reception officials to 'give applications and guidelines for refugee status to every person who wishes to apply for refugee status at the point of entry'.<sup>205</sup> Although applicants in Germany receive information on the airport procedure, it has been reported that asylum seekers may generally have significant difficulty in understanding the process.<sup>206</sup> By contrast, Australia does not explicitly require border enforcement officials to provide asylum seekers with information about the entry screening procedure.

All States surveyed require that border enforcement and RSD officials provide applicants with access to interpreters, should one be required. However, at least in the Canadian context, the decision whether an interpreter will be provided is made by the border enforcement official and is not provided solely at the request of the applicant. Many States, such as Australia and Mexico, explicitly provide the asylum applicant with the opportunity to contact a representative of UNHCR.

Finally, most States allow negative fast-track determination decisions to be appealed or reviewed. Canada, Costa Rica, Germany, Uganda and the US provide some sort of review mechanism, whether by an administrative or judicial body. In the US, people who receive a negative 'credible fear' or 'reasonable fear' determination may request that an immigration judge within EOIR review it, although no further judicial review is generally available. In Germany, an applicant may appeal a 'manifestly unfounded' finding to the Administrative Court on urgent appeal. While the applicant may also attempt an urgent complaint to the

Federal Constitutional Court (Bundesverfassungsgericht) or the European Court of Human Rights, such further judicial review is both difficult to pursue and has a low likelihood of success.

## **Recommendations**

- In addition to embedding RSD officials at airports, States that resort to simplified or accelerated screening procedures should adopt clear-cut eligibility criteria which clearly separate substantive RSD criteria from the initial screening process. Such criteria should clearly curtail, and provide penalties for, border enforcement officials who improperly reject asylum claims.
- To the extent that information provided to applicants about the airport asylum procedure does not actually inform them of the procedural and requirements of the process, such information should be supplemented by access to appropriate legal advice.
- States should provide access to interpreters and translation as a matter of course, where either the applicant makes the request, or the need for an interpreter becomes apparent to the official interacting with the applicant.
- States should provide access to independent review of fast-track decisions made as part of airport asylum procedures, in addition to providing access to review and appeals procedures made following a full decision on the asylum claim.
- States should adopt enhanced hygiene and testing measures throughout the airport asylum process, including supporting applicants in submitting applications by phone, online, or through legal representatives or non-governmental organisations, where appropriate.
- States should fully automate the process of providing proof of application to asylum seekers, where possible. Proof of application and accompanying identity and other documents should be provided as a matter of course and without requiring additional applications.

### **4.1.4 End mandatory and arbitrary detention**

Most of the States surveyed either prescribe mandatory detention for travellers raising international protection claims at the airport, or indirectly require such detention by combining questions regarding the person's eligibility for 'entry' into the country with their protection claim. For example, Australia and the US explicitly require mandatory detention as part of their Entry Screening and Expedited Removal (or Reinstatement of Removal) processes, respectively. In both cases, the individual circumstances of the asylum seeker are not considered as part of the decision to detain. In Uganda, while there is no general legal requirement for the mandatory detention of asylum seekers, if an asylum seeker comes from an area 'affected by a highly infectious pandemic disease'<sup>207</sup> then they must be 'interned in a special holding centre' while their asylum application is processed. There does not appear to be any individualised review of such decisions.

In addition to explicit mandatory detention measures, many States surveyed engage in the de facto detention of asylum seekers in airport transit spaces. For example, although German law does not consider airport facilities or transit areas as locations of detention,<sup>208</sup> holding asylum seekers in freedom-restricted areas clearly constitutes a form of detention where the person is unable to leave without abandoning their asylum claim.



During the pandemic, detention measures have come into sharp focus as areas of confinement, and detention centres pose specific challenges in terms of physical distancing requirements and other health measures required to stop the spread of COVID-19.<sup>209</sup>

## **Recommendations**

- States should institute reception areas at airports that allow for physical distancing and the separation of people confirmed or suspected of having COVID-19 to prevent transmission.
- States should conduct health screenings of asylum seekers arriving by air to determine whether they require immediate referral to medical accommodation, or whether they may be referred to alternative accommodation (not detention).
- Refugees and asylum seekers should only be detained as a last resort. States should use alternatives to detention wherever possible, including supervised release or remote monitoring. Any decision to detain must be based on an individualised assessment and implemented according to procedures prescribed by law. Detention should be for the shortest possible time, proportionate and subject to regular independent review.
- In order to reduce the risk of transmission of COVID-19 in detention facilities, States should ensure that physical distancing measures are put in place, that there is regular cleaning and disinfection, and that there are enhanced water, sanitation and hygiene measures. Detainees should also be provided with access to COVID-19 vaccines.

### **4.1.5 Access to lawyers and application forms**

Access to good legal advice and representation is a critical component of a fair asylum procedure.<sup>210</sup> Several States surveyed explicitly provide access to legal representation and legal advice as a part of the airport asylum process, including in fast-track procedures. For example, Mexico guarantees access to counsel and legal advice within the context of airport asylum procedures, including by allowing legal representatives to be present with the asylum seeker at the airport while the procedure is conducted. Canada similarly allows access to legal representatives at airports. German practice appears to exclude legal assistance in the airport procedure prior to the BAMF interview (Belehrung), with varying practice in terms of the ability of legal aid providers to accompany the applicant at that initial stage.<sup>211</sup> Germany and Mexico also provide legal advice and assistance following a negative decision on the asylum claim and, in the case of Germany, a negative decision during the fast-track airport procedure. However, border enforcement officials in Australia, Germany, Mexico and the US frequently confiscate the phones of asylum seekers, which may prevent travellers from communicating to arrange their own legal assistance.

## **Recommendations**

- States should ensure access to legal assistance and advice at all stages of an airport asylum process. The need for legal advice and assistance is particularly acute at the initial stage when the individual may be held by border enforcement officials and have a limited ability to communicate with others.
- States should consider maintaining an 'on-call' legal assistance program located at airports where lawyers can provide individualised and urgent advice to asylum seekers, including assistance with completing forms and in attending interviews.

- States should consider adopting in-person initial eligibility interviews with trained RSD officials, subject to appropriate public health safeguards, for individuals who raise asylum claims at airports.
- States should readily provide access to necessary asylum application forms and information, including access to online versions of the form where applications must be lodged online, or providing applicants with the ability to physically lodge a written form at the airport.

#### **4.1.6 Provide access to permanent protection**

Of the States surveyed, only Australia penalises asylum seekers arriving by air by denying them access to the country's full RSD process (which is the only way of obtaining permanent protection). Every other State that uses a fast-track procedure, including Canada, Costa Rica, Germany, Uganda and the US, provides access to the full RSD system once the initial eligibility of the claim has been determined. In providing access only to temporary protection to air arrivals who raise claims at Australian airports, Australia not only provides a disincentive for travellers to raise their claim at the earliest possible opportunity, but also places people at a significant disadvantage in the process of seeking and enjoying protection from persecution and other serious harm.

#### **Recommendations**

- States should not adopt differentiated asylum procedures that offer a lesser form of protection to individuals who raise protection claims at international airports. Such policies are counterproductive, disincentivise people from quickly raising claims, and place people at risk of *refoulement*.

#### **4.1.7 Adopt simplified procedures for applicants from certain countries**

The simplified and accelerated procedures adopted by States surveyed above are generally intended to winnow out applications that are likely to be considered 'manifestly unfounded' or 'fraudulent'. The primary aim of these processes is typically to reduce pressure on RSD systems and dispense with asylum claims unlikely to succeed if submitted to a full, formal review. Yet, few States have considered simplified and accelerated procedures for asylum claims that are likely to succeed. Of the States surveyed, only Mexico has such a procedure in place: it enables refugee status to be granted quickly to applicants from certain countries (where the country conditions will likely give rise to a protection need). Such procedures have been used for applicants from Venezuela or Honduras, where many individuals have similar protection claims stemming from objectively verifiable conditions in their country of origin or habitual residence. This has, in turn, increased the efficiency of COMAR.<sup>212</sup>

#### **Recommendations**

- States should consider adopting differentiated procedures that presume eligibility for protection in circumstances where conditions in certain countries demonstrate a compelling need for protection. Adopting such a presumption may assist States in reducing asylum backlogs.

## 5 Conclusions

This Policy Brief has examined airport asylum procedures in a variety of jurisdictions in order to understand how different approaches may best advance the protection needs of those arriving by plane and uphold States' international legal obligations. It highlighted several ways in which the complex legal and administrative task of receiving asylum seekers at airports and processing their claims may be simplified and improved to ensure that no one faces the risk of *refoulement*. The Policy Brief also examined how this task has been complicated by the COVID-19 pandemic, and provided practical recommendations for States about how to protect refugees and asylum seekers while still safeguarding public health.

## Endnotes

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<sup>1</sup> For the purposes of this Policy Brief, references to ‘asylum’ also encompass complementary protection claims.

<sup>2</sup> See Regina Jefferies, Daniel Ghezelbash and Asher Hirsch, ‘Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations’ (Policy Brief, Kaldor Centre for International Refugee Law, 2020) [https://kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy\\_Brief\\_9\\_Airports.pdf](https://kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_9_Airports.pdf).

<sup>3</sup> See, eg, UNHCR, ‘UNHCR Observations on the New Plan for Immigration Policy Statement of the Government of the United Kingdom’ (May 2021); UNHCR, *Mid-Year Trends Report 2020* (2020) 7.

<sup>4</sup> See, eg, International Civil Aviation Organization, *Manual on the Regulation of International Air Transport* (Doc No 9626, 2nd ed, 2004) 4.9-6–4.9-7; Theodore Baird, ‘Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries’ (2017) 19(3) *European Journal of Migration and Law* 307.

<sup>5</sup> Erika Feller, ‘Carrier Sanctions and International Law’ (1989) 1(1) *International Journal of Refugee Law* 48; Tilman Rodenhäuser, ‘Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control’ (2014) 26(2) *International Journal of Refugee Law* 223; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press, 2011); Bill Frelick, Ian M Kysel and Jennifer Podkul, ‘The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4(4) *Journal of Migration and Human Security* 190; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Regina Jefferies, ‘Bringing Externalization Home: the International Civil Aviation Organization and “entry screening” in Australia’ (2021) *Globalizations* DOI: 10.1080/14747731.2021.1989152.

<sup>6</sup> The WHO first declared ‘novel coronavirus’ a public health emergency of international concern on 30 January 2020. Tedros Adhanom Ghebreyesus, ‘WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)’ (Speech, World Health Organization, 30 January 2020) [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov)).

<sup>7</sup> UNHCR, ‘Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the context of the COVID-19 Response’ (16 March 2020); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4<sup>th</sup> ed, 2021) 246.

<sup>8</sup> UNHCR and IOM, ‘COVID-19: Access Challenges and the Implications of Border Restrictions’ (27 April 2020).

<sup>9</sup> *Ibid.*

<sup>10</sup> UNHCR, ‘Temporary Measures and Impact on Protection’, *COVID-19 Platform* (Website, 7 November 2021) [https://im.unhcr.org/covid19\\_platform/](https://im.unhcr.org/covid19_platform/).

<sup>11</sup> UNHCR and IOM, above n 8, 1.

<sup>12</sup> Guy S Goodwin-Gill, ‘Concluding Comments: Revisiting the Principles of Protection for Migrants, Refugees and Other Displaced Persons, One Year On’ (2021) 54 *Cornell International Law Journal Online* 21.

<sup>13</sup> Regina Jefferies, Jane McAdam and Sangeetha Pillai, ‘Can We Still Call Australia Home?: The Right to Return and the Legality of Australia’s COVID-19 Travel Restrictions’ (2021) 27(2) *Australian Journal of Human Rights* (in press).

<sup>14</sup> Scott Morrison, Marise Payne and Peter Dutton, ‘Border Restrictions’ (Joint Media Release, 19 March 2020); Australian Border Force (Cth), ‘Inwards Travel Restrictions Operation Directive’ (version 5) <https://www.homeaffairs.gov.au/covid-19/Documents/inward-travel-restrictions-operation-directive.pdf>.

<sup>15</sup> Jefferies, McAdam and Pillai, above n 13; Department of Health (Cth), ‘TGA provisionally approves Pfizer/BioNTech COVID-19 vaccine for use in Australia’ (Press Release, 25 January 2021) <https://www.health.gov.au/news/tga-provisionally-approves-pfizerbiontech-covid-19-vaccine-for-use-in-australia>.

<sup>16</sup> Paul Karp and Amy Remeikis, ‘Australia set to restart international travel in November, Scott Morrison says’, *The Guardian* (online), 1 October 2021 <https://www.theguardian.com/australia-news/2021/oct/01/australia-set-to-restart-international-travel-in-november-scott-morrison-says>.

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<sup>17</sup> The Hon Alex Hawke MP, 'Visa changes to support the reopening of Australia and our economic recovery' (online) 25 November 2021 <https://minister.homeaffairs.gov.au/AlexHawke/Pages/visa-changes-to-support-the-reopening-of-australia.aspx>. At the time of writing, it is unclear whether this will continue given the discovery of the Omicron strain of the virus: Rachel Clun and Nick Bonyhady, 'Urgent meetings of national cabinet, national security committee over Omicron strain, but reopening plan remains', *Sydney Morning Herald* (online) 29 November 2021 <https://www.smh.com.au/politics/federal/urgent-national-cabinet-meeting-over-omicron-strain-but-reopening-plan-remains-20211129-p59cz4.html>.

<sup>18</sup> Claudia Long and Georgia Hitch, 'Border rules relaxed for Japan and South Korea tourists, international students and visa holders currently overseas', *ABC News* (online) 22 November 2021 <https://www.abc.net.au/news/2021-11-22/migration-boost-visa-international-student-places/100638704>.

<sup>19</sup> Media Statement: Prime Minister, Deputy Prime Minister, Minister for Infrastructure, Minister for Infrastructure, Transport and Regional Development, Minister for Foreign Affairs, Minister for Women, Minister for Health and Aged Care, Minister for Home Affairs (29 November 2021) <https://www.pm.gov.au/media/pause-further-easing-border-restrictions>.

<sup>20</sup> Greg Hunt, 'Additional border security measures to protect Australians from the new "Omicron" COVID-19 variant', Department of Health (Press Release, 27 November 2021) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/additional-border-security-measures-to-protect-australians-from-the-new-omicron-covid-19-variant>.

<sup>21</sup> *Ibid.*

<sup>22</sup> Australia did resettle a small number of refugees in 2020 (1,082) and 2021 (187) on an emergency basis: UNHCR, 'Resettlement Data Finder' (online) (queried 26 November 2021) <https://rsq.unhcr.org/en/#3q1M>.

<sup>23</sup> Caitlin Cassidy, 'Australia international border restrictions: what's changed for travel and who can arrive quarantine-free', *The Guardian* (online) 22 November 2021 <https://www.theguardian.com/travel/2021/nov/22/australia-international-border-restrictions-whats-changed-for-travel-and-who-can-arrive-quarantine-free>; Department of Home Affairs (Cth), 'Discussion Paper: Australia's Humanitarian Program 2021–22' (2021) 3; Australian Mission to the United Nations, 'UNHCR High Commissioner's Dialogue on Protection Challenges 2020, National Statement' (2020) 3; see also Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection', *Robert Schuman Centre for Advanced Studies (RSCAS) 2020/55*, (2020) 5.

<sup>24</sup> Regina Jefferies, Daniel Ghezelbash and Asher Hirsch, 'Assessing Refugee Protection Claims at Australian Airports: The gap between law, policy, and practice' (2020) 44(1) *Melbourne University Law Review* 162.

<sup>25</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 14 (*UDHR*).

<sup>26</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights (Banjul Charter)*, OAU Doc CAB/LEG/67/3 rev. 5, 27 June 1981, art 12(3) (*Banjul Charter*); Organization of American States, *American Convention on Human Rights, 'Pact of San Jose', Costa Rica*, 22 November 1969, art 22(7) (*ACHR*); European Union, *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, 26 October 2012, art 18 (*ECHR*). See also Organization of American States, *American Declaration on the Rights and Duties of Man*, 2 May 1948, art XXVII (*American Declaration*).

<sup>27</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (*1951 Convention*); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (*1967 Protocol*); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 (*ICCPR*); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (entered into force 26 June 1987) (*CAT*) art 3; *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) (*CRC*) arts 6, 37; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) (*CRPD*) art 15; *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, 999 UNTS 414 (entered into force 11 July 1991) (*Second Optional Protocol*); *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981) (*CEDAW*); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) (*CERD*); *International Convention for the Protection of All Persons from Enforced Disappearance*, 2716 UNTS 3 (entered into force 23 December 2010) (*ICPPED*); Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees: HCR/MMSP/2001/09 (16 Jan. 2002) para. 4, contained in UNHCR, *An Agenda for Protection* (3rd ed, 2003); *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10

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September 1969, 1001 UNTS 45 (entered into force 20 January 1974) art II (*OAU Convention*); *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Conclusion III(4), (*Cartagena Declaration*); *ECHR*, above n 26, arts 2, 3; 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) [2011] OJ L337/9, arts 2, 15; Final Text of the Asian–African Legal Consultative Organization’s 1966 Bangkok Principles on Status and Treatment of Refugees, 40th Session, New Delhi (adopted 24 Jun. 2001). For an extended discussion, see Goodwin-Gill and McAdam, above n 7, 240–44.

<sup>28</sup> UNHCR, ‘Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports’ (17 January 2019); Goodwin-Gill and McAdam, above n 7, 244–45, 316–19; Jefferies, Ghezelbash and Hirsch, above n 2, 35.

<sup>29</sup> Goodwin-Gill and McAdam, above n 7, 244–45, 316–19; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2021) 183–85; *ICCPR*, above n 27, art 2; *ECHR*, above n 26, art 1; *ACHR*, above n 26, art 1. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 9, 20, 24, 26, 32–43 [www.unhcr.org/refworld/docid/45f17a1a4.html](http://www.unhcr.org/refworld/docid/45f17a1a4.html); UNHCR, ‘UNHCR’s oral intervention at the European Court of Human Rights: Hearing of the case *Hirsi and Others v Italy*’, 22 June 2011, Application No. 27765/09 [www.refworld.org/docid/4e0356d42.html](http://www.refworld.org/docid/4e0356d42.html); UNHCR, ‘Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Hirsi and Others v Italy*’, March 2010, paras. 4.1.1–4.2.3, [www.unhcr.org/refworld/docid/4b97778d2.html](http://www.unhcr.org/refworld/docid/4b97778d2.html); UNHCR, ‘UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR’, 17 February 2012, para 2(4) [www.refworld.org/docid/4f4c959f2.html](http://www.refworld.org/docid/4f4c959f2.html); UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligations imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 10 [www.refworld.org/docid/478b26ae2.html](http://www.refworld.org/docid/478b26ae2.html). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, paras 109–13, considering that States are bound to fulfil their international human rights obligations wherever they exercise jurisdiction.

<sup>30</sup> *ICCPR*, above n 27, art 2; Goodwin-Gill and McAdam, above n 7, 314.

<sup>31</sup> UNHCR, above n 28, para 6.

<sup>32</sup> *Ibid.*

<sup>33</sup> *1951 Convention*, above n 27; *1967 Protocol*, above n 27; *ICCPR*, above n 27, art 7; *CAT*, above n 27, art 3; *CRC*, above n 27, arts 6, 37; *CRPD*, above n 27, art 15; *Second Optional Protocol*, above n 27; *CEDAW*, above n 27; *CERD*, above n 27; *ICPPED*, above n 27. For an extended discussion of additional relevant instruments and materials, see Goodwin-Gill and McAdam, above n 7, 244–245, 316–19.

<sup>34</sup> The prohibition on penalisation applies to both refugees and asylum seekers because ‘a State cannot identify whether an asylum seeker is a refugee until a full and fair refugee status determination procedure has been conducted’: Jefferies, Ghezelbash and Hirsch, above n 2, 12; Goodwin-Gill and McAdam, above n 7, 273. See also Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) para 27. A ‘person is a refugee ... as soon as [they] fulfil[] the criteria contained in the definition’: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4 (1979, reissued 2019) 17 para 28.

<sup>35</sup> *ICCPR*, above n 27, art 9(1). Detention is arbitrary where it is ‘inappropriate, unjust or unpredictable’ or where it is ‘not necessary in all the circumstances of the case and proportionate to the ends sought’: see Goodwin-Gill and McAdam, above n 7, 276; Jefferies, Ghezelbash and Hirsch, above n 2, 12. Detention must therefore only be imposed pursuant to an individualised determination of the need for such a measure, including whether it is proportionate and for a legitimate purpose. See Human Rights Committee, *Views: Communication No 1324/2004*, 89th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) [7.2] (*Shafiq v Australia*); see also Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2] (*A v Australia*).

<sup>36</sup> Goodwin-Gill and McAdam, above n 7, 254, 316; see also Jefferies, Ghezelbash and Hirsch, above n 2, 10.

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- <sup>37</sup> Goodwin-Gill and McAdam, above n 7, 316; see also UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures): Global Consultations on International Protection*, EC/GC/01/12 (31 May 2001) paras 2, 43.
- <sup>38</sup> UNHCR, above n 7, para 5.
- <sup>39</sup> *UDHR*, above n 25, art 14; Goodwin-Gill and McAdam, above n 7, 400–09.
- <sup>40</sup> UNHCR, above n 7, para 6.
- <sup>41</sup> *Ibid* at para 7.
- <sup>42</sup> *Ibid*.
- <sup>43</sup> *Migration Act 1958* (Cth) s 4(2).
- <sup>44</sup> See, eg, *Migration Regulation 1994* (Cth) sch 2 cl 600.211.
- <sup>45</sup> Jefferies, Ghezelbash and Hirsch, above n 2.
- <sup>46</sup> *Migration Act 1958* (Cth) ss 166, 172; *Migration Act 1958* (Cth) s 172(1); *Cujba v Minister for Immigration & Multicultural Affairs* [2001] FCA 146.
- <sup>47</sup> Department of Home Affairs, 'Protection claims at the border' (Procedural Instruction, 21 November 2018) 14 (Procedural Instruction).
- <sup>48</sup> Department of Home Affairs, 'The Protection Visa Processing Guidelines' (Procedural Instruction, 12 August 2018) Annexure 2: Unauthorised arrival entry screening guidelines, s 4.119.1.
- <sup>49</sup> Department of Home Affairs, 'The Protection Visa Processing Guidelines', above n 48; Department of Home Affairs, 'Procedural Instruction', above n 47, 16.
- <sup>50</sup> See Jane Halton, *National Review of Hotel Quarantine*, Parliament of Australia (Final Report, 23 October 2020) 6. Although there were exemptions for certain classes of people, those groups did not include asylum seekers. See Department of Health (Cth), 'Exemptions to the 14 day mandatory quarantine period for international travellers' (April 2020) <https://www.health.gov.au/sites/default/files/documents/2020/04/coronavirus-covid-19-exemptions-to-the-14-day-mandatory-quarantine-period.pdf>.
- <sup>51</sup> *Immigration and Refugee Protection Act*, SC 2001, s 11(1) (*IRPA*).
- <sup>52</sup> Immigration, Refugees and Citizenship Canada, 'In-Canada refugee claims: admissibility' (Program Delivery Instructions, Refugee Protection, 25 February 2013): 'Most refugee claimants are inadmissible by virtue of the fact that they want to remain in Canada permanently, but do not have a permanent resident visa'. CSBA officials may also issue a conditional departure order for refugee claimants who have been 'determined to be eligible to be referred to the Refugee Protection Division (RPD) or no eligibility determination has been made'. Immigration, Refugees and Citizenship Canada, 'Review of reports under subsection A44(1)' (Operational Manual, Enforcement (ENF) 6, 12 February 2020) p 27, s 10.4; see also *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 228(3) (*IRPR*).
- <sup>53</sup> *IRPR*, s 159.4(1)(c). However, the Safe Third Country provision does apply to a person being removed from the US who seeks asylum at a Canadian airport while they are transiting through Canada from the US in the course of that removal: *IRPR*, s 159.4(2).
- <sup>54</sup> *IRPA*, s 100(1).
- <sup>55</sup> *Ibid* at s 101(1).
- <sup>56</sup> Immigration, Refugees and Citizenship Canada, 'Intake of Claims for Refugee Protection at Ports of Entry' (Program Delivery Instructions, Refugee Protection, 21 June 2019).
- <sup>57</sup> Immigration, Refugees and Citizenship Canada, 'In-Canada claims for refugee protection: Interviews' (Program Delivery Instructions, Refugee Protection, 25 February 2013).
- <sup>58</sup> Immigration, Refugees and Citizenship Canada, 'Eligibility for referral of in-Canada claims to the IRB' (Program Delivery Instructions, Refugee Protection, 25 February 2013).
- <sup>59</sup> UNHCR, 'What happens after I apply?' (Website, 2021) <https://help.unhcr.org/canada/applying-for-asylum/what-happens-after-i-apply/>.

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<sup>60</sup> Immigration, Refugees and Citizenship Canada, 'Claiming asylum in Canada – what happens?' (Website, 6 October 2021) [https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming\\_asylum\\_incanadawhathappens.html](https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html); *IRPA*, s 112(1).

<sup>61</sup> Order in Council, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* (No 2021-0904, 15 September 2021) sch 2, table 1, item 9. Under *IRPA*, the term 'protected person' includes a person who has been granted asylum or who has been allowed to apply for protection: *IRPA*, s 95(1).

<sup>62</sup> UNHCR, 'Seeking asylum in Canada during the COVID-19 Pandemic', *UNHCR Canada* (Website, 18 August 2021) <https://www.unhcr.ca/in-canada/making-refugee-claim/>.

<sup>63</sup> Order in Council, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from Any Country Other than the United States)* (No 2021-0823, 6 August 2021).

<sup>64</sup> *Ibid.*

<sup>65</sup> Public Health Agency of Canada, 'Government of Canada introduces new measures to address COVID-19 Omicron variant of concern' (News Release, 26 November 2021) <https://www.canada.ca/en/public-health/news/2021/11/government-of-canada-introduces-new-measures-to-address-covid-19-omicron-variant-of-concern.html>.

<sup>66</sup> Constitución Política (1949), art 31: 'El territorio de Costa Rica será asilo para todo perseguido por razones políticas. Si por imperativo legal se decretare su expulsión, nunca podrá enviársele al país donde fuere perseguido.'

<sup>67</sup> La Ley General de Migración N°8764, arts 13 [26], 31[9], 34, 41.

<sup>68</sup> ACNUR, 'Fortaleciendo sistemas de asilo', Marco Integral Regional para la Protección y Soluciones para América Central y México (MIRPS) (mid-2018); Reglamento de Personas Refugiadas No 36831-G, art 54.

<sup>69</sup> Reglamento de Personas Refugiadas No 36831-G, art 3; see also La Ley General de Migración N°8764, art 49.

<sup>70</sup> Reglamento de Personas Refugiadas No 36831-G, art 121.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at art 7.

<sup>73</sup> La Ley General de Migración N°8764, art 29.

<sup>74</sup> Reglamento de Personas Refugiadas No 36831-G, art 44.

<sup>75</sup> UNHCR, 'Costa Rica', UNHCR COVID-19 Flash Update (7 March 2020–3 April 2020); see also Executive Decree, Ministerio de Salud y Dirección General de Migración y Extranjería, Protocolo de Atención de la Emergencia Nacional por COVID-19, en Puestos Fronterizos Migratorios Aéreos, Marítimos y Terrestres (No 42238-MGP-S, 17 March 2020); Raquel Vargas Jaubert, 'Directriz de ingreso de personas extranjera por la emergencia de COVID-19' (Circular No DG-0005-03-2020-AJ, 17 March 2020).

<sup>76</sup> Alejandro Zúñiga, 'Costa Rica reopening for tourists from EU, UK and Canada', *The Tico Times* (online) 23 July 2020 <https://ticotimes.net/2020/07/23/costa-rica-reopening-for-tourists-from-eu-uk-and-canada>.

<sup>77</sup> 'Costa Rica authorizes flights from all Central American countries', *The Tico Times* (online) 9 October 2020 <https://ticotimes.net/2020/10/09/costa-rica-authorizes-flights-from-all-central-american-countries>.

<sup>78</sup> Gov.UK, 'Foreign Travel Advice: Costa Rica' (Website, 2021) <https://www.gov.uk/foreign-travel-advice/costa-rica/entry-requirements>.

<sup>79</sup> Grundgesetz für die Bundesrepublik Deutschland, art 16a.

<sup>80</sup> Asylgesetz, s 18a; see also ProAsyl, *Abgelehnt im Niemandes-Land: Vom Flughafenverfahren zum "New Pact on Migration and Asylum" – Warum Asylgrenzverfahren unfair und mangelhaft sind* (ProAsyl, June 2021) 7. The recast Asylum Procedures Directive limits the use of the fast-track border procedure to cases covered by the inadmissibility and accelerated procedure grounds: Asylum Procedures Directive (recast), art 43(1)(b), citing art 31(8).

<sup>81</sup> Aufenthaltsgesetz, § 13 Abs 2, S 2.

<sup>82</sup> ProAsyl, above n 80, 8.



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<sup>83</sup> Ibid at 7–8.

<sup>84</sup> Ibid at 8; Aufenthaltsgesetz § 15.

<sup>85</sup> The 'Dublin system' seeks to 'identify a single responsible State and to require it to determine the asylum claim, thereby reducing the likelihood of multiple, successive applications by asylum seekers, and eliminating asylum seekers "in orbit". It is based on the "legal fiction" that all EU Member States provide uniform protection and are thus "safe" countries': Goodwin-Gill and McAdam, above n 7, 453 (citations omitted). See Dublin III Regulation, previously, 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 [2003] OJ L50/1.

<sup>86</sup> ProAsyl, above n 80, 8; See also Regulation (EU) No 604/2013 of the European Parliament and of the Council, OJ L 180 (29 June 2013).

<sup>87</sup> ProAsyl, above n 80, 8–9.

<sup>88</sup> Ibid at 9.

<sup>89</sup> Asylgesetz § 18a Abs. 6 Nr. 2; ProAsyl, above n 80, 9.

<sup>90</sup> ProAsyl, above n 80, at 9.

<sup>91</sup> Ibid. The traveller will receive a decision from the BAMF and a refusal of entry decision from the Federal Police. Ibid.

<sup>92</sup> Ibid at 10; Asylgesetz § 18 a Abs. 4 S 1.

<sup>93</sup> ProAsyl, above n 80, 10; Asylgesetz § 18a Abs. 6 Nr. 3.

<sup>94</sup> ProAsyl, above n 80, 10.

<sup>95</sup> Ibid at 11.

<sup>96</sup> Communication from the Commission to the European Parliament, the European Council and the Council, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU' (COM(2020)115, 16 March 2020).

<sup>97</sup> Ibid at 2.

<sup>98</sup> Deutsche Welle, 'Coronavirus: Germany to lift travel ban for 29 European countries on June 15' (online) 3 June 2020 <https://www.dw.com/en/coronavirus-germany-to-lift-travel-ban-for-29-european-countries-on-june-15/a-53667506>.

<sup>99</sup> Council Recommendation (EU) No 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ 337/3.

<sup>100</sup> *Deutsche Welle*, 'Germany takes US, Canada off travel risk list, most others from July' (online) 11 June 2021 <https://p.dw.com/p/3ujn3>.

<sup>101</sup> Daniel Boffey, 'EU tells six countries to lift Covid border restrictions' *The Guardian* (online) 24 February 2021 <https://www.theguardian.com/world/2021/feb/23/eu-tells-six-countries-to-lift-covid-border-restrictions>; Federal Ministry of Health, 'Current information for travelers: Ordinance on Coronavirus Entry Regulations (Coronavirus-Einreiseverordnung – CoronaEinreiseV)' (Website, 22 October 2021) <https://www.bundesgesundheitsministerium.de/en/service/gesetze-und-verordnungen/guv-19-lp/coronavirus-einreiseverordnung.html>; Ralf Bosen and Jens Thurau, 'COVID: Germany battles the pandemic – a chronology', *Deutsche Welle* (online) 19 November 2021 <https://www.dw.com/en/covid-germany-battles-the-pandemic-a-chronology/a-58026877>.

<sup>102</sup> Robert Koch Institute, 'Information on the designation of international risk areas' (online) 26 November 2021 [https://www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/Transport/Archiv\\_Risikogebiete/Risikogebiete\\_2021-11-26\\_en.pdf?\\_\\_blob=publicationFile](https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Transport/Archiv_Risikogebiete/Risikogebiete_2021-11-26_en.pdf?__blob=publicationFile).

<sup>103</sup> Bundesministerium für Gesundheit, *Verordnung zum Schutz vor einreisebedingten Infektionsgefahren in Bezug auf das Coronavirus SARS-CoV-2 (Coronavirus-Einreiseverordnung – CoronaEinreiseV)* (28 September 2021) s 10.

<sup>104</sup> *Constitución Política de los Estados Unidos Mexicanos (1917 y sus reformas)*, art 11: '... Toda persona tiene derecho a buscar y recibir asilo. El reconocimiento de la condición de refugiado y el otorgamiento de asilo político, se realizarán de conformidad con los tratados internacionales....'

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<sup>105</sup> *Ley Sobre Refugiados Vigente en México*, art 21.

<sup>106</sup> *Ley de Migración*, art 3, fracc XII.

<sup>107</sup> Testimony of Adriana Cano Cuevas, 'México: Protección de los derechos humanos de las personas en situación de movilidad humana', 180<sup>th</sup> Period of Sessions, Inter-American Commission on Human Rights (YouTube, 1 July 2021) [https://www.youtube.com/watch?v=1JO6\\_yBIMAM](https://www.youtube.com/watch?v=1JO6_yBIMAM).

<sup>108</sup> *Ley Sobre Refugiados, Protección Complementaria y Asilo Político*, art 21: 'Cualquier autoridad que tenga conocimiento de la pretensión de un extranjero de solicitar el reconocimiento de la condición de refugiado, deberá dar aviso por escrito y de manera inmediata a la Secretaría.'

<sup>109</sup> UNHCR, 'Mexico: Simplified procedures' (Online, 2021) (Mexico: Simplified procedures) <https://acsg-portal.org/tools/55487/>.

<sup>110</sup> Testimony of Ana Lilia Amezcua Ferrer, 'México: Protección de los derechos humanos de las personas en situación de movilidad humana', 180<sup>th</sup> Period of Sessions, Inter-American Commission on Human Rights (YouTube, 1 July 2021) [https://www.youtube.com/watch?v=1JO6\\_yBIMAM](https://www.youtube.com/watch?v=1JO6_yBIMAM).

<sup>111</sup> *Ley Sobre Refugiados, Protección Complementaria y Asilo Político*, art 22.

<sup>112</sup> *Ibid* at art 21; UNHCR, 'How to Apply for Refugee Status in Mexico' (Online) <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/>.

<sup>113</sup> *Ley Sobre Refugiados, Protección Complementaria y Asilo Político*, art 24.

<sup>114</sup> Rachel Schmidtke and Daniel Gutiérrez Escobedo, 'Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing', *Refugees International* (July 2021) 5.

<sup>115</sup> *Ibid*.

<sup>116</sup> *Ley Sobre Refugiados, Protección Complementaria y Asilo Político*, art 25.

<sup>117</sup> UNHCR, 'How to Apply for Refugee Status in Mexico' (online) <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/>.

<sup>118</sup> *Ley Sobre Refugiados, Protección Complementaria y Asilo Político*, art 44.

<sup>119</sup> The increase included high numbers of applicants from Venezuela, Honduras and El Salvador, among which certain categories of applicants had a high probability of being granted refugee status. See Schmidtke and Gutiérrez Escobedo, above n 114, 2–3; UNHCR, 'Mexico: Merged procedures and application of the broader refugee definition' (Online, 2021) (Mexico: Merged procedures) <https://acsg-portal.org/tools/mexico-merged-procedures-and-application-of-the-broader-refugee-definition/>.

<sup>120</sup> *Ibid*.

<sup>121</sup> Schmidtke and Gutiérrez Escobedo, above n 114, 7.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*; 'Mexico: Merged procedures', above n 119.

<sup>124</sup> Schmidtke and Gutiérrez Escobedo, above n 114, 7.

<sup>125</sup> 'Mexico: Simplified procedures', above n 109.

<sup>126</sup> *Cartagena Declaration*, above n 27, conclusion 3.

<sup>127</sup> Schmidtke and Gutiérrez Escobedo, above n 114, 7, citing Buenas prácticas Asilo Américas, 'México: Procedimientos Simplificados' <https://www.asiloamericas.org/2021/06/28/mex-procedimientos-simplificados/>.

<sup>128</sup> General Health Council, 'ACUERDO por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19)' (30 March 2020) [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590745&fecha=30/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020). See also Pedro A Villareal, 'Mexico: Legal Response to COVID-19', in Jeff King and Octávio LM Ferraz, et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (Oxford University Press, 2021).

<sup>129</sup> UNHCR, '2020 UNHCR Highlights Mexico' (2021).

<sup>130</sup> *Ibid* at 25.

<sup>131</sup> *Refugees Regulations 2010*, s 12; see also *Refugees Act 2006*, Act No 21.

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<sup>132</sup> *Refugees Regulations 2010*, s 12(2). Despite the broadly generous nature of Uganda's refugee and asylum framework, serious problems persist in the country for many asylum seekers and refugees, including LGBTQIA+ individuals and other disfavoured groups. See Khangelani Moyo, Kalyango Ronald Sebba and Franzisca Zanker, 'Who is Watching? Refugee Protection During a Pandemic – Responses from Uganda and South Africa' (2021) 9 *Comparative Migration Studies* 37: 1–19, 7 (citations omitted): 'The situation highlights one persistent role for the Ugandan government – their (warranted) image as a refugee-friendly country of "open doors" while distracting "international attention from political oppression and persecution of minorities, such as from the LGBTQ+-community and perhaps more recently journalists and opposition leaders.'

<sup>133</sup> *Refugees Regulations 2010*, s 12(3).

<sup>134</sup> *Ibid* at s 11.

<sup>135</sup> *Ibid* at s 12(4).

<sup>136</sup> *Ibid* at s 3.

<sup>137</sup> *Ibid* at s 15.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid*.

<sup>140</sup> Moyo et al, above n 132, 1.

<sup>141</sup> Javira Ssebami, 'Breaking! Uganda shuts down Entebbe International Airport, all borders', *PML Daily* (21 March 2020) <https://www.pmeldaily.com/features/tours-travel/2020/03/breaking-uganda-shuts-down-airport.html>.

<sup>142</sup> Elias Biryabarema, 'Uganda says to re-open airport and resume international flights on Oct. 1', *Reuters* (online) 10 September 2020 <https://www.reuters.com/article/health-coronavirus-uganda/uganda-says-to-re-open-airport-and-resume-international-flights-on-oct-1-idUSL8N2G73O8>. It should be noted that while Uganda's international borders were closed to asylum seekers from March 2020 to 1 October 2020, the Ugandan government implemented exemptions from land border closures for thousands of asylum seekers fleeing violence in the Democratic Republic of the Congo (DRC) on at least one occasion: UNHCR, 'Uganda provides a safe haven to DRC refugees amid COVID-19 lockdown' (online) 1 July 2020 <https://www.unhcr.org/en-au/news/press/2020/7/5efca8d64/uganda-provides-safe-haven-drc-refugees-amid-covid-19-lockdown.html>.

<sup>143</sup> 8 USC § 1225(b)(1)(A)(i). Air arrivals are generally placed in expedited removal proceedings, although US Customs and Border Protection (CBP) officials have discretion to parole asylum seekers into the US, or even issue a 'Notice to Appear' for a removal hearing under INA §240 in which the person may also apply for asylum. See 8 USC § 1225(b)(1), (2); 8 USC §1182(d)(5); Ben Harrington, 'The Law of Asylum Procedure at the Border: Statutes and Agency Implementation', *Congressional Research Service* (Report No R46755, 9 April 2021) summary.

<sup>144</sup> See Lisa Seghetti, 'Border Security: Immigration Inspections at Ports of Entry', *Congressional Research Service* (Report No R43356, 26 January 2015).

<sup>145</sup> 8 USC § 1225(a)(1).

<sup>146</sup> 8 USC § 1225(b)(1)(A)(i); 69 Fed. Reg. 48878 (August 11, 2004).

<sup>147</sup> 8 USC § 1225(b)(1)(B)(i).

<sup>148</sup> 8 CFR § 208.30(e)(2) (2018).

<sup>149</sup> INA 235(b)(1)(B)(ii); 8 USC § 1229a.

<sup>150</sup> 8 USC § 1225(b)(2)(A).

<sup>151</sup> 8 USC § 1225(b)(1)(B)(iii); 8 USC §§ 1252(a)(2)(A)(iii), (e)(2).

<sup>152</sup> 8 CFR § 1241.8(e). Persons in this category will be placed in 'reinstatement of removal' proceedings, rather than 'expedited removal' proceedings. 8 USC § 1231(a)(5) (2012); 8 CFR § 1241.8(a) (2018).

<sup>153</sup> 8 CFR § 1208.31(c).

<sup>154</sup> 8 CFR § 1208.31(e).

<sup>155</sup> 8 CFR § 1208.31(g).

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<sup>156</sup> 8 CFR § 1208.31(g)(1).

<sup>157</sup> 8 USC §§ 1225(b)(1)(A)(i), (b)(2)(A).

<sup>158</sup> 69 Fed. Reg. 48877-48881 (August 11, 2004).

<sup>159</sup> Presidential Proclamation, *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, 11 March 2020 <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

<sup>160</sup> Presidential Proclamation, *Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus*, 14 March 2020 <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/>.

<sup>161</sup> Presidential Proclamation, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, 22 April 2020 <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/>.

<sup>162</sup> Presidential Proclamation, *Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Novel Coronavirus*, 24 May 2020 <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-novel-coronavirus/>.

<sup>163</sup> Presidential Proclamation, *A Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease*, 25 January 2021 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/>.

<sup>164</sup> Presidential Proclamation, *A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, 25 October 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/>.

<sup>165</sup> Célia Belin, 'Travel is resuming, but not for everyone', *Brookings* (Online) 8 November 2021 <https://www.brookings.edu/blog/order-from-chaos/2021/11/08/travel-is-resuming-but-not-for-everyone/>.

<sup>166</sup> Presidential Proclamation, *A Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019*, 26 November 2021 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/26/a-proclamation-on-suspension-of-entry-as-immigrants-and-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease-2019/>.

<sup>167</sup> It is difficult to place definitive end dates on border restrictions, in part because many countries have imposed, lifted, then re-imposed restrictions at various times. This chart lists the date when travel restrictions imposed at the beginning of the pandemic (March 2020) were initially lifted (noting that Australia's original announcement of 1 December 2021 was changed to 15 December 2021: see text to nn 17–19).

<sup>168</sup> Australia opened quarantine-free travel with New Zealand from 19 April 2021, although travel was subsequently suspended on 23 July 2021, then later re-started. StatsNZ, 'Trans-Tasman bubble lifts travel' (online, 13 June 2021 <https://www.stats.govt.nz/news/trans-tasman-bubble-lifts-travel>). Australia also opened quarantine-free travel with Singapore from 21 November 2021: Department of Home Affairs (Cth), 'COVID-19 and the border: Singapore' (online 27 November 2021 <https://covid19.homeaffairs.gov.au/singapore>). The 'end date' does not constitute a complete re-opening of the border (see text to nn 17–19).

<sup>169</sup> *American Declaration*, above n 26.

<sup>170</sup> *Charter of the Organization of American States* (1948) (adopted at the Ninth International Conference of American States, Bogotá, Colombia, 30 April 1948) (*OAS Charter*)

<sup>171</sup> The restrictions were lifted for fully vaccinated US citizens and lawful permanent residents on 9 August 2021.

<sup>172</sup> *American Declaration*, above n 26.

<sup>173</sup> *OAS Charter*, above n 170.

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<sup>174</sup> ACHR, above n 26.

<sup>175</sup> *Cartagena Declaration*, above n 27.

<sup>176</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994 (*Eradication of Violence against Women*).

<sup>177</sup> On 15 October 2020, Costa Rica began to allow air arrivals from other Central American countries, with the general travel restriction lifted for all other countries on 1 November 2020.

<sup>178</sup> *European Social Charter (Revised)*, 3 May 1996, ETS 163.

<sup>179</sup> *Convention on Preventing and Combating Violence against Women and Domestic Violence*, 12 April 2011, ETS 210.

<sup>180</sup> *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987, ETS 126.

<sup>181</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 005.

<sup>182</sup> Germany began to lift non-essential travel restrictions on European countries and the UK from 15 June 2020, then on most other countries in July 2021.

<sup>183</sup> *American Declaration*, above n 26.

<sup>184</sup> *OAS Charter*, above n 170.

<sup>185</sup> ACHR, above n 26.

<sup>186</sup> *Cartagena Declaration*, above n 27.

<sup>187</sup> *Eradication of Violence against Women*, above n 176.

<sup>188</sup> *OAU Convention*, above n 27.

<sup>189</sup> *Banjul Charter*, above n 26.

<sup>190</sup> *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>191</sup> Although the US has not ratified the *1951 Convention*, it has ratified the *1967 Protocol* which incorporates all of the substantive provisions of the *1951 Convention*.

<sup>192</sup> *American Declaration*, above n 26.

<sup>193</sup> *OAS Charter*, above n 170.

<sup>194</sup> Prior to this date, the US imposed country-specific restrictions on travel.

<sup>195</sup> On this date, travel reopened for fully vaccinated travellers.

<sup>196</sup> UNHCR, 'Note on International Protection', UN Doc A/AC.96/1145 (2 Jul. 2015) para. 39; UNHCR, 'Note on International Protection', UN doc. A/AC.96/1098 (28 Jun. 2011) para. 30; see also Goodwin-Gill and McAdam, above n 7, 244–45; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17(3) *International Journal of Refugee Law* 542, 548.

<sup>197</sup> See further Jefferies, Ghezelbash and Hirsch, above n 2.

<sup>198</sup> Goodwin-Gill and McAdam, above n 7, 179; UNHCR, 'Note on International Protection', UN doc. A/AC.96/1145 (2 July 2015) para. 39; UNHCR, 'Note on International Protection', UN doc. A/AC.96/1098 (28 June 2011) para. 30; see also *UDHR*, above n 25, art 14.

<sup>199</sup> Order in Council, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* (No 2021-0904, 15 September 2021) sch 2, table 1, item 9.

<sup>200</sup> Government of Canada, 'Quarantine or isolation' (Website, 16 November 2021) [https://travel.gc.ca/travel-covid/travel-restrictions/isolation?\\_ga=2.92315028.82120391.1615919319-1323203841.1614619964](https://travel.gc.ca/travel-covid/travel-restrictions/isolation?_ga=2.92315028.82120391.1615919319-1323203841.1614619964).

<sup>201</sup> See further Jefferies, McAdam and Pillai, above n 13.

<sup>202</sup> Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *Article 31 of the 1951 Convention relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01 (July 2017) 10.

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<sup>203</sup> Testimony of Adriana Cano Cuevas, above n 107; Testimony of Ana Lilia Amezcua Ferrer, above n 110; Daniela Gutierrez Escobedo, 'No Rights: Mexican Airports as Unprotected Spaces for Asylum Seekers', Refugees International (Blog Post, 11 December 2020); Sin Fronteras IAP, 'Solicitantes de asilo en aeropuertos' *YouTube* (2 July 2021) <https://www.youtube.com/watch?v=yYXlupof3Y8>; Comisión Nacional de los Derechos Humanos, 'Acredita CNDH Violaciones a Derechos Humanos a 21 Personas en el Aeropuerto Capitalino y Emite Recomendación al Instituto Nacional de Migración' (Press Release No CGCP/369/15, 7 December 2015);

<sup>204</sup> 'Contribution by Germany to the questionnaire on the impact of COVID-19 on the human rights of migrants', Special Rapporteur on the Human Rights of Migrants: Call for Inputs, Office of the High Commissioner for Human Rights (2021) <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/COVID.aspx>.

<sup>205</sup> *Refugees Regulations 2010*, s 52.

<sup>206</sup> European Council on Refugees and Exiles, *Airport Procedures in Germany: Gaps in quality and compliance with guarantees* (Report, 2020) 13.

<sup>207</sup> *Refugees Regulations 2010*, s 12(4).

<sup>208</sup> BVerfG, Decision 2 BvR 1516/93, 14 May 1996; BGH, Decision V ZB 170/16, 16 March 2017.

<sup>209</sup> Australian Human Rights Commission, *Management of COVID-19 Risks in Immigration Detention* (Report, 2021); US Government Accountability Office, 'Immigration Detention: ICE Efforts to Address COVID-19 in Detention Facilities' (GAO-21-414, June 2021). Even alternative forms of detention, such as holding travellers in hotels, do not generally meet health requirements for slowing or stopping COVID-19 transmission: Halton, above n 50.

<sup>210</sup> ProAsyl, above n 80, 6: 'Gute Rechtsberatung und –vertretung sind ein entscheidender und unerlässlicher Baustein für faire Asylverfahren, werden aber in der Diskussion über die Machbarkeit faire Asylverfahren für tausende Asylsuchende an den Außengrenzen oft vernachlässigt.'

<sup>211</sup> European Council on Refugees and Exiles, *Airport Procedures in Germany: Gaps in quality and compliance with guarantees* (Report, 2020) 13.

<sup>212</sup> 'Mexico: Simplified procedures', above n 109.

