



INDIRECT REFOULEMENT: WHY THE US CANNOT CREATE A SAFE THIRD COUNTRY AGREEMENT WITH MEXICO

Posted on August 6, 2018 by Sophia Genovese

The Trump Administration is seeking to create and implement [a safe third country agreement with Mexico](#). Under this agreement, asylum seekers arriving at the US border who have travelled through Mexico would be denied the ability to file their asylum claims in the US. Such an agreement would trample on the rights of asylum-seekers, violating both international and US asylum law. In particular, the US would be violating the international [principle of non-refoulement](#), which provides that no State “shall expel or return (“refoulé”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened,” where Mexico has a proven track record of being [anything but safe for asylum seekers](#). The US has also codified Article 33(1) of the Refugee Convention into [Section 208\(a\)\(2\)\(A\)](#) of the Immigration and Nationality Act (INA) which provides that it will not return an asylum seeker to his or her country of origin, but may, at the determination of the Attorney General, remove the asylum seeker to a “safe third country... where he would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.” Although Mexican officials have not yet indicated whether they would sign a safe third country agreement with the US, asylum advocates should proactively seek to prevent such a devastating policy with a country that lacks adequate asylum protections.

As reported by [Human Rights First](#) and [Amnesty International](#), 75 percent of asylum seekers apprehended and detained by the National Institute of Migration (INM), the Mexican immigration enforcement agency, were not informed of their right to seek asylum. Even if asylum seekers are able to make their claims, [only 30% of the asylum proceedings are ever concluded](#), and even

fewer are granted, leaving many *bona fide* asylum seekers stranded without a resolution. The treatment of unaccompanied minors' asylum claims in Mexico are even more dismal. Of the 35,000 minors apprehended by the INM in the first half of 2016, only [138 were able to apply for asylum](#), of which only 77 were granted protection. Beyond the failing asylum system in Mexico, asylum seekers are also in extreme danger of [kidnapping, murder, rape, trafficking, and other crimes](#) by INM officers and civilians.

A safe third country agreement with Mexico would violate the United States' international obligations under the 1967 Optional Protocol to the Refugee Convention, to which we are a signatory, which adopts by incorporation the obligations outlined in the 1951 Refugee Convention, to which the US is not a signatory. Take the example of an asylum-seeker, Mrs. H, who is fleeing politically-motivated violence in Honduras. Her husband, Mr. H, was a vocal political activist who opposed the National Party and members of the Honduran government. Mr. H began to receive death threats due to his political beliefs and reported such threats to the authorities. The authorities, however, did nothing to protect Mr. H and his family. Not long thereafter, Mr. and Mrs. H are attacked as they leave their home. Mrs. H is severely wounded, but her husband, Mr. H, dies. As Mrs. H recovers in the hospital, she begins to receive death threats on account of her husband's political beliefs. Fearing for her life, she flees Honduras, travels through Guatemala and Mexico, and presents herself at the US border claiming asylum. Given her extraordinary claims, Ms. H would most likely be granted asylum in the United States. However, under a safe third country agreement, if she travelled through Mexico to get to the US, the US would return Mrs. H to Mexico without first adjudicating her asylum claim. If Mexico in turn denies the asylum application (or worse, denies the asylum seeker access to its asylum procedures) where the US may have granted the application, and if the asylum seeker is thereafter refouled, the US is thus violating its international obligations and potentially under INA § 208(a)(2)(A) for indirectly refouling that individual.

The US currently has a [safe third country agreement with Canada](#) that has been similarly criticized, both at the initial signing and now with renewed fervor on account of Sessions' evisceration of the US asylum system. The first challenge to the agreement was in 2007 in [Canadian Council for Refugees, et al. v. Her Majesty the Queen](#), FC 1262 (Can. Ont.). The Court began by recalling that the US and Canada are both parties to the 1967 Optional Protocol to the UN Refugee

Convention and thus both possessed the same international obligations with respect to the treatment of asylum seekers, including the principle of non-refoulement. The Court found, however, that the US was “not compliant with international conventions,” especially with respect to its one-year asylum filing deadline (which Canada does not have), and thus concluded that the US was not a safe third country for asylum seekers. Accordingly, the Court reasoned that by returning asylum seekers to the US without first adjudicating their asylum claims, which results in their subsequently denied asylum application in the US and refoulement to their country of origin, Canada was also in violation of its international obligations and under the Canada Charter of Rights and Freedoms. In other words, Canada was indirectly responsible for impermissible refoulement. Unfortunately, the decision was ultimately [overturned by the Federal Court of Appeal](#), thus preserving the safe third country agreement.

There was another challenge to the US-Canada safe third country agreement at the Inter-American Commission on Human Rights (IACHR) in [John Doe et al. v. Canada](#), Case 12.586, Inter-Am. Comm'n H.R., Report No. 24/11, OEA/Ser.L/V/II.141, doc. 29 (2011). The IACHR similarly found that Canada was in violation of its international obligations of non-refoulement by failing to adjudicate asylum claims of individuals who had travelled through the US. Lacking enforcement authority, the IACHR merely offered recommendations to Canada so that they remain compliant with their international obligations. Legal challenges to the agreement in Canada laid dormant until July 2017 when [Amnesty International and the Canadian Council for Refugees](#) again initiated litigation against the agreement, where they outlined the numerous ways the US asylum system failed to meet international standards, and identified how US asylum policy has continued to deteriorate under the Trump regime. This suit remains pending. If the US were to adopt a safe third country agreement with Mexico, the Canadian Council for Refugees would certainly want to amend their pleadings and raise the issue of an asylum seeker potentially being subject to two safe third country agreements, implicating Canada in chain refoulement.

As we have blogged about extensively, [the US asylum system, especially under the Trump Administration, is certainly not the best asylum model](#) out there. This article does not suggest that the US asylum framework is the be-all end-all, nor do we suggest that Mexico is a bad country. Nevertheless, a safe third country agreement with Mexico would cause the United States to be in further violation of our international, and arguably domestic, obligations of non-

refoulement. Violence in Mexico has reached [record levels](#) and the US State Department has issued [multiple travel advisories to various Mexican states](#). Further, as discussed above, Mexico is extremely dangerous for vulnerable populations such as asylum-seekers and migrants, [especially women](#). Access to asylum procedures is astonishingly low in Mexico, and even if an individual is lucky enough to file their claim, it is still more likely than not that their claim will be denied.

It is unclear if the incoming Mexican president, Andres Manuel Lopez Obrador, will be more open to the agreement than the departing president, Enrique Peña Nieto. Under the backdrop of the NAFTA renegotiations, the US may seek to leverage their continued participation in NAFTA in return for a safe third country agreement with Mexico. Nevertheless, advocates should continue to speak out against this devastating policy ahead of any official negotiations. If the US and Mexico end up creating a safe third country agreement, advocates should vigorously contest the legality of this agreement in Court, as such an agreement will undoubtedly result in the impermissible return of *bona fide* asylum seekers to their country of origin.