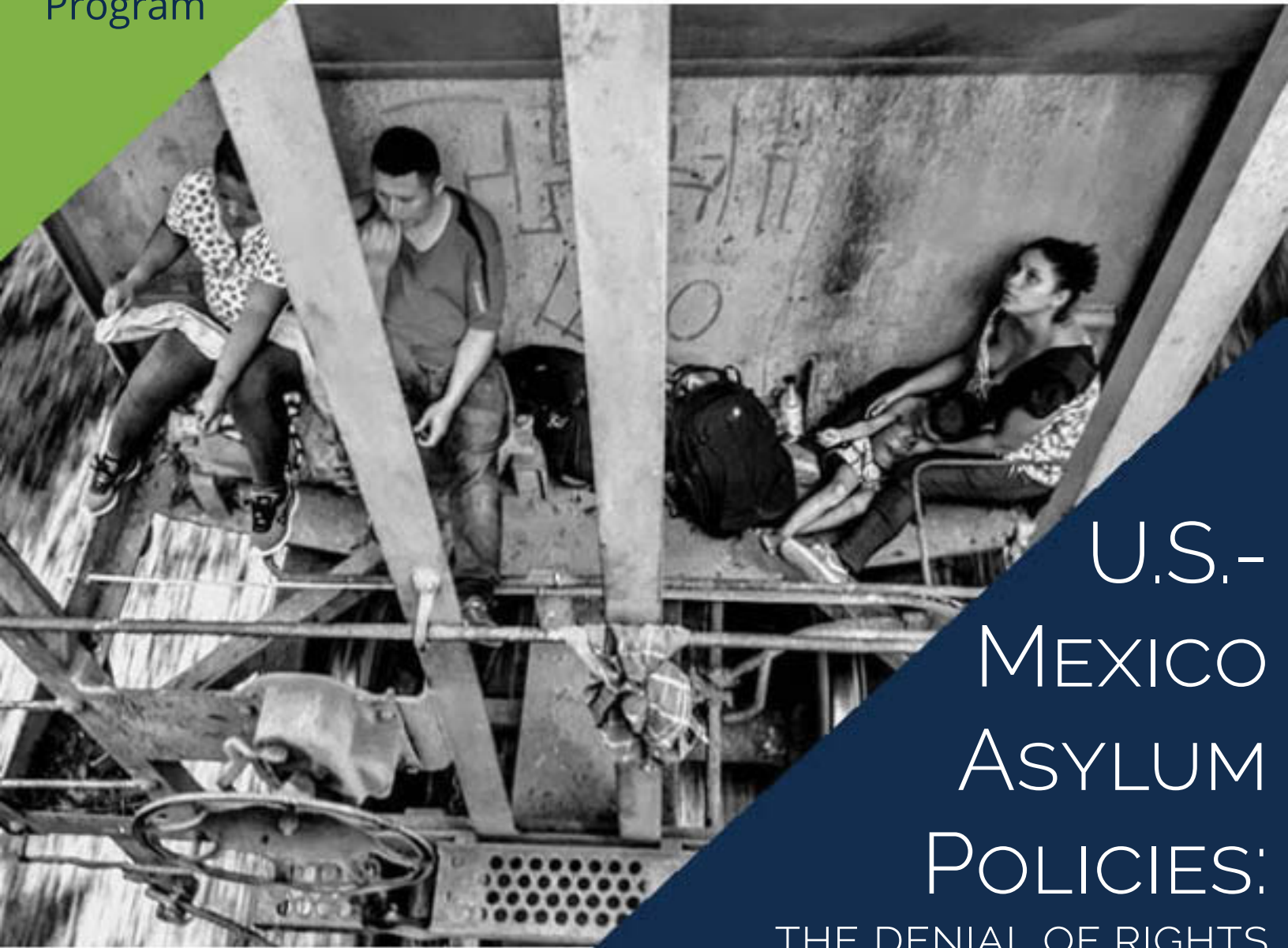


LAURA CARLSEN

Americas
Program



U.S.- MEXICO ASYLUM POLICIES: THE DENIAL OF RIGHTS AND THE EXTERNALIZATION OF BORDERS



CENTER FOR
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AUTHORS

Laura Carlsen, Executive Director, Americas Program of the Center for International Policy with Aude Blenet, Program Coordinator, Americas Program of the Center for International Policy

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Americas Program



“From the beginning, the monarch butterflies and the swallows and the flamingos fly, fleeing the cold, year after year, and the whales swim in search of other seas and the salmon and the trout in search of their rivers. They travel thousands of leagues on the free paths of air and water.

But the paths of human exodus are not free. In immense caravans march the fugitives of impossible lives. They travel from south to north, from sunset to sunrise. Their place in the world has been stolen. They have been dispossessed of their work and their lands. Many flee wars, but many more flee salaries of extermination and scorched lands.

Those shipwrecked by globalization take pilgrimages, invent paths, searching for home, knocking on doors: the doors open, magically, to money, or close in their faces. Some of them are able to get through. Others are cadavers that the sea delivers to proscribed beaches, or nameless bodies that lie under the ground in the other world they hoped to reach.”

Eduardo Galeano, “Emigrants, Now”



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EXECUTIVE SUMMARY

For months in 2018, the Trump administration stated publically that it was seeking an agreement with Mexico to recognize its southern neighbor as a “Safe Third Country”. This arrangement, according to Homeland Security, would allow the United States to reduce the number of refugees and asylum seekers in its territory by forcing them to seek refuge in Mexico as the first safe country they entered when fleeing by land from Central America.

There are precedents for this type of agreement in other countries. The Americas Program analyzed the most pertinent of these in this report to determine what such an agreement would mean for Mexico, for the United States and for the migrants from Central America who pass through Mexico to seek refuge in the United States. The results demonstrate the legal, social and human rights contradictions inherent in the concept and practice of “Safe Third Country”. In our analysis of existing experiences in the European Union and between the United States and Canada, and the conditions for such an agreement between Mexico and the United States, we found that:

1. The mechanism of safe third country has resulted in a host of legal challenges and difficulties in application, requiring constant modifications and proving infeasible in practice.
2. Some jurisdictions have ruled that States designated as safe third countries do not guarantee the safety of refugees and asylum seekers, putting the obligation of protection in question.
3. The Safe Third Country Agreements (STCA) have resulted in attempts to circumvent the system by some States.
4. The STCA have a chilling effect on requests for legal asylum.
5. The system places an undue burden on States with the least capacity to receive large numbers of immigrants.
6. The Safe Third Country Agreements (STCA) only takes into account the perspective of the states, and not the perspective of the asylum seekers and refugees themselves, nor the personal reasons why they might choose to request asylum in one country and how it could help with their assimilation (presence of friends, acquaintances, knowledge of the language, etc.), nor the widely varying conditions of reception in different countries, which affect the exercise of basic rights for refugees.
7. A STCA has the effect of pushing refugees into alternative, more dangerous routes.
8. A safe third country arrangement cannot be applied automatically without violating the 1951 Geneva Convention that requires that each individual case be analyzed on its merits with attention to its individual characteristics.

The Mexican government under Enrique Peña Nieto and, after Dec. 1, 2018, under President Andrés Manuel López Obrador has consistently stated it will not accept a safe third country agreement with the United States. In this context, we began to analyze another agreement that was being considered: the “Remain in Mexico” plan. This alternative plan would allow migrants to file for asylum in the United States, but return them to Mexico to await decisions in their cases.

As the reports had predicted, Donald Trump announced in January 2019 a plan to return asylum seekers to Mexico. Although the plan was not called “Remain in Mexico” and was presented as a unilateral decision of the US government, the Mexican government announced it would indeed receive the US asylum seekers “on human rights grounds”, while indicating that a negotiation had

taken place. There is very little official information regarding the apparent agreement that was struck.

Through an analysis of existing Safe Third Country Agreements and their contexts and the announced Remain in Mexico program, this report concludes:

The Safe Third Country practices in the European Union have been legally challenged, practically infeasible and violate refugee rights

In the European Union, the Dublin system and subsequent directives established a system to distribute asylum seekers between the States of the Union, with the possibility of also considering non-EU States as safe third countries. Our analysis of the Dublin system reveals a lack of solidarity among EU states, as shown by the concentration of asylum seekers and refugees in certain States, as well as a tendency to circumvent the system. Indeed, one of the results of the system was that the majority of asylum requests fell on a small number of Member States, namely Greece, Italy and Spain, which strained those countries' capacities to face migration flows.

In the years following adoption of the mechanism, courts as the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU), have handed down judgments that concluded that it violates the Geneva Convention of July 28, 1951 and its 1967 Protocol, in that a referral cannot be applied automatically and, on the contrary, must involve an examination of how legislation on asylum is applied and whether the applicant receives individualized attention adapted to their needs. A number of court decisions in the European Union have found that all EU States cannot be considered as safe countries, a priori. For example, the European Court of Human Rights (ECHR) in a judgment of January 21, 2011 ruled that Greece could not be considered as a safe country for refugees due to systemic flaws in the treatment of asylum seekers.

The Safe Third Country Agreement between the US and Canada has decreased guarantees of refugee rights

The United States and Canada signed a safe third country agreement on December 2, 2002. Based on this agreement, Canada and the United States are both considered safe countries for asylum seekers. The country responsible for examining an asylum application is automatically the first country that the applicant arrives at, with a few exceptions such as family reunification, unaccompanied minors, visa holders, public interest exception.

An analysis of the agreement's implementation shows that it had two main effects: a decline in the granting of refugee status in Canada, and the exclusion of certain groups from the benefits of international protection because of the different rates of acceptance in the United States and Canada. The agreement also caused illegal flows to increase and drove migrants to seek alternative, more dangerous routes into Canada. Finally, like the ECHR, the Inter-American Commission on Human Rights stressed that respect for the rights of refugees and asylum seekers must include prior individualized risk assessment of the case of each applicant and determined that failing to carry out a such assessment before directing asylum seekers back to the United States had the

effect of violating their right to seek asylum, as protected by Article XXVII of the American Declaration. The Commission added that the direct back policy had the effect of expelling the John Does without providing basic due process to challenge their expulsion, as required by article XVIII of the American Declaration.

The UNHCR Position

The UN Refugee Agency (UNHCR) also emphasizes the importance of individualized assessment of the safe third country asylum seeker and the guarantees that should accompany such use as the safe third country concept mechanism. The person must, for example, be able to appeal the inadmissibility decision before a court or tribunal. The UNHCR emphasized that “asylum should not be denied only because it could be sought in another State”.¹

In practice, the use of the safe third country concept ends up violating the rights of refugees and asylum seekers. Since the Geneva Convention of 1951 and the 1967 Protocol do not define or make exceptions for the concept of a safe third country, it is arguably illegal to reject an application based on this concept. The conventionality of the application of an agreement is also debatable because it directly contradicts the principle of non-refoulement, or not returning refugees to the danger they have fled, considered of central importance by the Courts and the UNHCR when guaranteeing the rights and obligations of protection.

The Illegality of a Potential US-Mexico Safe Third Country Agreement

In view of the experiences analyzed and the requirements established to consider a country as a safe third country, we find that the United States cannot adopt such an agreement to evade its responsibilities for protection, family reunification and refugee policies. We also find that Mexico cannot be considered as a safe third country today since refugees and asylum seekers face massive violations of their rights in transit through Mexico, its asylum system exhibits chronic systemic failures, and Mexico frequently violates the principle of non-refoulement by returning Central American migrants to home countries without adequate individualized assessment.

The sheer burden to Mexico of receiving U.S. asylum seekers is also a concern. In 2018, Mexico received 17,116 applications for refugee status² while the United States received 95,195 requests for affirmative asylum and 87,215 credible fear cases³. The number of pending affirmative asylum cases at DHS at the end of FY 2018 is about 320,000 (approximately 492,000 individuals)--this in addition to the asylum backlog in the immigration court system, which stands at about 348,000 individuals, representing nearly one million persons awaiting asylum rulings.

This number has been on a growth trend, meaning that if we extrapolate along current trends, Mexico could be in a position to receive some 100,000 refugees a year from the United States and be forced to hold them for years as they await decisions in their cases. There is also reason to believe that as part of dissuasion tactics to reduce the number of migrants, asylum seekers and refugees to the country, the Trump administration is purposely “metering” the entry of migrants to request asylum, processing cases slowly with a deficit of officers, and narrowing criteria to reject a larger and larger proportion of the applicants.

Finally, the alternative “Remain in Mexico” plan would make Mexico complicit in the anti-immigrant strategy of the United States by creating difficult conditions for asylum-seekers who may feel obliged by circumstances to return to dangerous situations in their home countries. Mexico would also become a partner in reducing the physical and administrative burden in the United States instead of obliging the U.S. government to fulfill its legal obligations to refugees.

Both the current “Remain in Mexico” plan and a potential Safe Third Country Agreement reduce access to asylum and refugee status and reflect the global trend of developed countries to externalize their borders and circumvent respect for the rights of refugees and asylum seekers guaranteed by the Geneva Convention.

By seeking to outsource legal and moral obligations to migrants, wealthy nations also seek to avoid questioning their own foreign policies, including the global economic development model that generates the inequality at the root of these population movements, and policies that cause and perpetuate war and conflict for the benefit of the few and the tremendous suffering of the many. The United States historically and currently has played a direct role in creating these conditions that cause forced migration in Central American nations.

INTRODUCTION

In the last several years, the governments of developed countries have adopted policies to exclude immigrants, asylum-seekers and refugees, using a combination of repressive practices, restrictive legislation and international agreements that establish new systems to keep certain foreign populations out. That trend has grown despite the fact that a broad range of national and international laws define and protect the rights of migrants and refugees.

People who request asylum have the right to specific kinds of protection. After the Second World War, a legal framework was developed to protect people fleeing their countries and prevent a situation in which they would be unable to find a place to live safely and exercise their rights. Through the application of the Geneva Convention of 1951, and the Protocol of 1967, Mexico and the United States, along with the vast majority of world governments—143 of the 197 nations recognized by the United Nations—agreed to accept refugees and apply norms to protect them.⁴

However, many states have since sought ways to block migration flows to avoid having to fulfill their obligations to accept men, women and children who seek protection. These include strategies to prevent asylum-seekers from arriving at their borders and denying due process when they do. One of the tools used by destination countries is the designation of another country as a “safe third country.” The European Union (EU) has applied this practice since 1990 between its member nations, and since 2013 with nations outside the EU. Canada and the United States also have a “safe third country” agreement, since 2004.

In the spring of 2018, the government of Donald Trump began to place considerable pressure on the outgoing government of Mexico’s then-president Enrique Peña Nieto to sign a “safe third country” agreement. What are the implications of this type of agreement for the United States, for Mexico, and especially, for migrants?

This report argues that the safe third country agreement (STCA) proposed by the U.S. government to the Mexican government would constitute a violation of the rights of migrants and refugees. Although no specific text of an agreement to create such an arrangement between the two countries exists, our conclusion is based on an analysis of the existing agreements and contexts, particularly: 1) the experience of the European Union, and the safe third country agreement between Canada and the United States, 2) immigration policy and practice in the United States and Mexico, and 3) the current situation relating to migration flows from the countries of the Northern Triangle (Guatemala, El Salvador and Honduras), which are the countries of origin for the majority of migrants who travel from Central America through Mexico to the United States.

WHAT IS A SAFE THIRD COUNTRY AGREEMENT?

A country designating another as a “safe third country” refers to an arrangement that allows the first country to send asylum seekers to the designated third country, with the premise that the third country is safe for asylum seekers and refugees. This type of arrangement includes financial compensation for the country that agrees to accept the asylum-seekers and refugees.⁵

Designating a safe third country permits a nation to reduce the number of refugees and asylum-seekers in its own territory by diverting them to another nation considered as safe. Such an arrangement can take the form of a formal agreement, a mechanism or even a set of agreed-upon practices.

A common justification for the practice is that if people are fleeing, they have no reason to go further than the first safe country they cross in their path. However, this kind of mechanism is used in various first-world countries as a tool to externalize their borders, because recognizing another country as a safe third country prevents people fleeing from persecution from reaching the territory of the first-world country.

WHY DID THE US GOVERNMENT PROPOSE A STCA WITH MEXICO?

According to media reports, as early as March 2018 the United States Department of Homeland Security proposed that the Mexican government sign a similar agreement to the one between the United States and Canada.⁶

The administration of Donald Trump came to power in the United States on an openly anti-immigrant platform. Since taking office, Trump's government has adopted an aggressive policy of detention and deportation of migrants in the country and sought to reduce the number of migrants who arrive at the border and request asylum. This is the motivation behind proposing a safe third country arrangement with Mexico. As one US official said, “We believe the flows would drop dramatically and fairly immediately,” with the implementation of a STCA.⁷ In July, U.S. Homeland Security Secretary Kirstjen Nielsen insisted, without legal arguments, that people who request asylum must request it in Mexico, and not in the United States.⁸

Designating Mexico as a safe third country would have the effect of allowing U.S. border agents to reject the majority of asylum-seekers who arrive on the U.S. southern border, because a large percentage of people who request asylum come from Central America and travel overland through Mexico.⁹ The majority of asylum-seekers who receive asylum in the United States come from the Northern Triangle (Guatemala, Honduras, El Salvador).

Figure 6.

**Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality:
Fiscal Year 2016**

(Ranked by country of nationality)

People's Republic of China

4,484 | 21.9%

El Salvador

2,157 | 10.5%

Guatemala

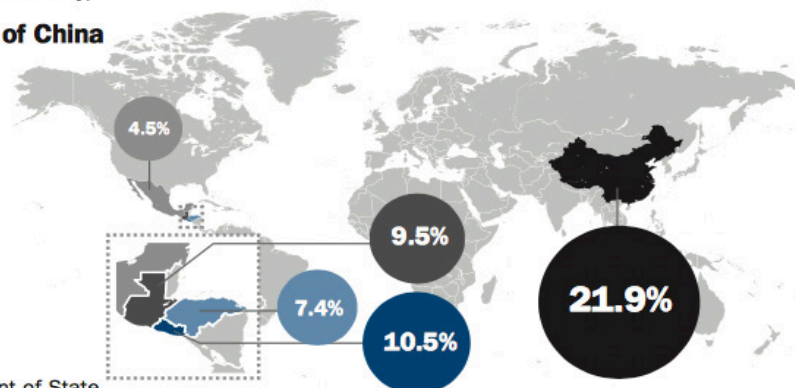
1,949 | 9.5%

Honduras

1,505 | 7.4%

Mexico

919 | 4.5%



Source: U.S. Department of State.

When the proposal was made public in March 2018, Mexican Foreign Relations Secretary Luis Videgaray declared that Mexico would not sign such an agreement.¹⁰ However, rumors persisted that some kind of negotiation could be going on, and that in the context of the renegotiation of the North American Free Trade Agreement (NAFTA), the Mexican government could announce a change of position before the new Mexico government took office on December 1, 2018.¹¹ Many Mexicans feared that conceding to such an agreement was being used as a bargaining chip by the Mexican side to achieve better terms in negotiations on tariffs under NAFTA. Although it wasn't mentioned when the new free trade agreement between Mexico and the United States was finally announced on Sept. 30, 2018, there was still talk that a safe third country agreement or some similar arrangement was on the table in the NAFTA renegotiations.

After Andrés Manuel López Obrador won the July 1 presidential elections, Roberto Velasco, spokesperson for future Foreign Relations Secretary Marcelo Ebrard, told the Washington Post that the new government had no position on a safe third country agreement with the United States because it did not have the details of the agreement or the status the negotiations between the two countries.¹² Unofficially, the administration was said to oppose such an agreement. Almost every organization that works with migrants in Mexico rejected the proposal.¹³ In a declaration on May 22, a coalition of Mexican organizations categorically rejected the possibility of a STCA between Mexico and the United States, stating, "An agreement of this sort would violate the United States' international protection obligations to people who request protection." Amnesty International affirmed, "An agreement of this sort would violate international law and would result in millions of people suffering."¹⁴

The following report was published and released in Spanish on November 2nd. On November 20, President Trump announced his decision to return Central American asylum-seekers to Mexico to await their decisions on asylum requests in the United States. Although announced as a unilateral

decision based on an obscure article of U.S. law, the decision had been previously negotiated with the López Obrador administration in terms that are still unknown to the public.¹⁵

This report by the Americas Program analyzes the safe third country concept and experiences, the global and regional context of immigration restriction and the announcement that Mexico will accept U.S. asylum-seekers awaiting hearings. The report details the factors that should be taken into account to create national and binational policies that privilege human rights and comply with national laws and international human rights norms and standards.

WHAT CAN WE LEARN FROM PRECEDENTS? SAFE THIRD COUNTRY PRACTICES IN OTHER PARTS OF THE WORLD

The safe third country arrangement has a history in other parts of the world that offer lessons for the functioning and impact of such an agreement. The following section analyzes the experience of the European Union and the United States and Canada.

THE EUROPEAN UNION

The Member States of the European Union have attempted to create a common policy on asylum and refuge for years. The first step resulted in the Dublin Convention, essentially a system for distributing asylum-seekers between the participating states. That was followed by Directive 2013/32/EU, "on common procedures for granting and withdrawing international protection," which made it possible for EU Member States to designate states outside of the EU as safe third countries. This second agreement was what allowed Greece to define Turkey as a safe country and return asylum-seekers there.

The Dublin System: distributing asylum seekers among European Union Member States

FACTS

One of the first objectives of the European Union Member States was to determine a single nation responsible for reviewing asylum requests made in European territory by citizens of non-EU Member States. That policy's stated goal was to prevent the phenomenon known as "asylum shopping" —supposedly when an asylum-seeker seeks out the best option among the benefits that different countries offer to refugees, sometimes even soliciting asylum requests in several different countries simultaneously.¹⁶ This was to prevent a situation in which the countries that offer the best services to asylum-seekers end up with the largest burden in terms of spending and responsibility for the flows of refugees, which were increasing. Since 1990, the European Union adopted conventions to define a single state as responsible for examining asylum claims under the Schengen Agreement and the Dublin Convention.

The Dublin Convention, signed on June 15, 1990, establishes the criteria and mechanisms to determine which Member State will be responsible for reviewing asylum claims presented in

any of the participating states. Originally just an agreement between countries, the Dublin Convention was formally integrated into European Union law through European Council Regulation N° 343/2003 of February 18, 2003,¹⁷ later replaced by the "Dublin III" system in 2013.¹⁸ Under the Dublin Convention, if an asylum seeker has previously crossed the border of a Member State from a country not in the European Union, that Member State will be responsible for reviewing the asylum seeker's claim up to 12 months after the date of their entry into the first state.¹⁹

For example, under this system, a Libyan who travels through Italy before arriving in France and requests asylum on the French border will be returned to Italy so that Italy can examine the Libyan's claim (in slang, one says that the Libyan is "Dublined"). Italy would be the only state responsible for examining the Libyan's claim for the year after his arrival in Italy. If the Libyan, after being returned to Italy, then goes to another EU country, such as Germany, and requests asylum again, Germany could return him to Italy if a year has not passed since he first entered Italian territory and made his initial request.

For this system to work, the EU has created a database of people who have entered into different countries called Eurodac. Every Member State has the obligation to register the fingerprints of all asylum seekers who cross their borders.²⁰

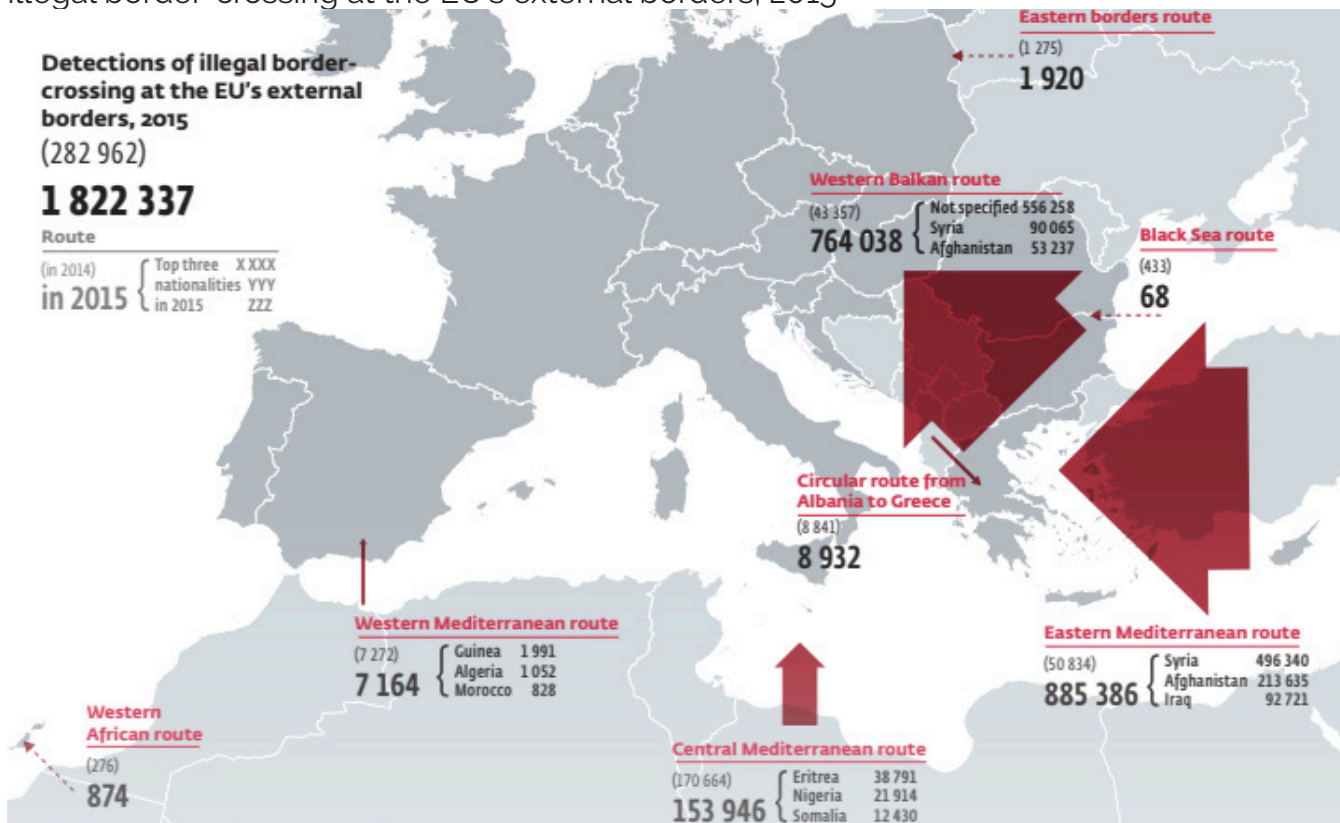
DEBATE

This first system has flaws that the so-called "migrant crisis" brought to light. Below we list the major criticisms that arose:

It is an unfair system that concentrates asylum-seekers in certain countries.

First, a result of this system was that the majority of asylum requests fell on a small number of Member States, namely Greece, Italy and Spain, which strained those countries' capacities to face migration flows.²¹ In the past few years, most migration flows to the EU pass through these countries, therefore leaving them with the responsibility to examine asylum claims as the country of entrance to the EU for migrants.

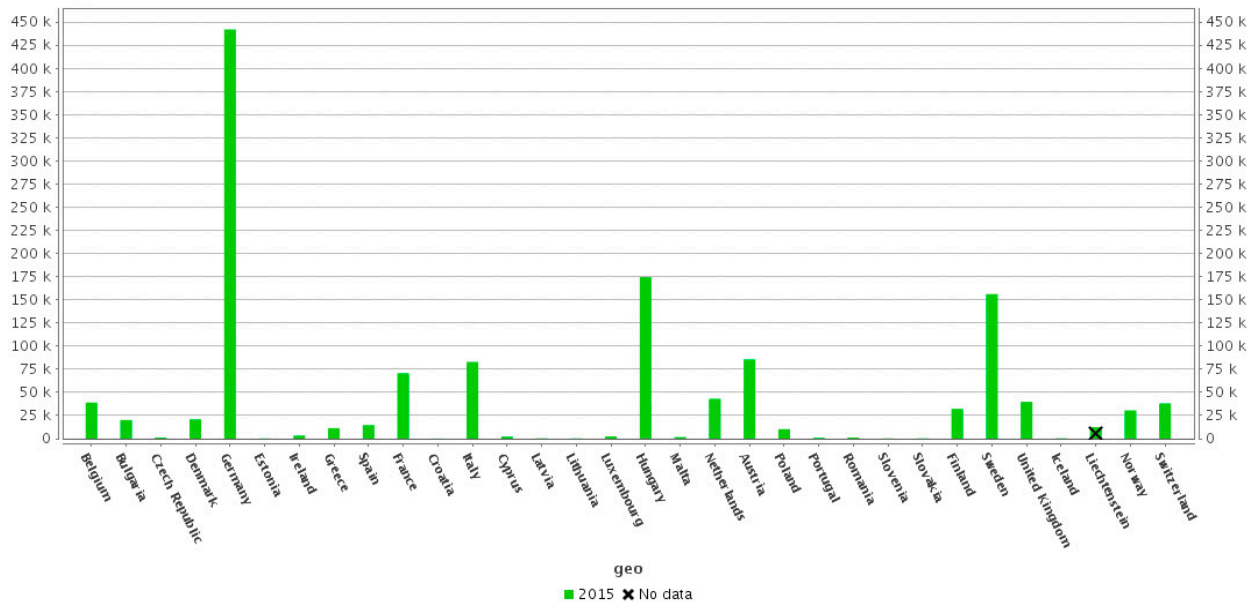
Illegal border-crossing at the EU's external borders, 2015



The European Commission found that more than 70% of asylum requests made in 2014 were made in only five European Union Member States.²² However, it's important to note that official statistics about asylum requests do not take into account undocumented migrants who do not make asylum requests in the countries they enter.

Asylum and first time asylum applicants - annual aggregated data (rounded) persons

First time applicant



Source of Data Eurostat
 Date of extraction: 30 Aug 2018 17:58:58 CEST
 Hiverlink to the craxh: <https://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&coluin=1&language=en&ocode=tos00191>

The European commission affirmed that:

*"The current Dublin system was not designed to ensure a sustainable sharing of responsibility for applicants across the Union. This has led to situations where a limited number of individual Member States had to deal with the vast majority of asylum-seekers arriving in the Union, putting the capacities of their asylum systems under strain and leading to some disregard of EU rules."*²³

That situation led to an emergency measure to support Greece and Italy during the autumn of 2015 that consisted of a provisional "relocation" system of certain quotas of asylum-seekers to other European Union countries.²⁴ The Member States agreed to house at first 160,000 asylum-seekers who were based in Greek and Italian territory. That figure was later reduced to a goal of 98,255 after 2016. However, the program did not succeed in its stated goals: by mid-2017, only 24,676 of the 98,255 asylum-seekers had been relocated.²⁵

Some European Union states (Hungary, Poland, the Czech Republic and Austria) refused to apply the program, as it was non-binding.²⁶

The EU tried to resolve the lack of solidarity between its Member States by sending resources to the "critical points," identified as Greece and Italy. The following graphic shows the financial aid sent to those two countries to help them receive refugees.

Program	Greece	Italy	
Asylum, Migration, and Integration Fund (AMIF)	National Programmes 2014-2020 (Long-Term Funding)	561 millions (m) allocated	653.72m allocated
	AMIF Emergency assistance	139.1m allocated	89.7m allocated
	Total AMIF	700,1m	743,42m
Internal security Fund (ISF)	ISF	393m allocated	189m allocated
	ISF Emergency assistance	55.8m allocated	99.4m allocated
	Total ISF	448,8m	288,4m
TOTAL	1 148,9m	1 031,82m	

Source: European Commission²⁷

AMIF – the fund promotes the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.

ISF- The Fund promotes the implementation of the Internal Security Strategy, law enforcement and the management of the Union's external borders. The ISF is composed of two instruments, ISF Borders and Visa and ISF Police.

Some EU states adopted strategies to prevent asylum-seekers from being returned to them

Since the Dublin system is based on registering fingerprints in the Eurodac system, it has been proven in investigations that some countries did not register the fingerprints of the migrants who were crossing their border in order to avoid their responsibility. By not registering migrants' fingerprints, a country can avoid being considered a first country of entry, and forgo responsibility for processing asylum claims. The European Commission stated that at the end of 2015, only 23% of people who crossed borders to enter an EU country were registered.²⁸

Jurisdictions have judged that not all EU Member States can be considered safe, and the Dublin system should not be applied automatically

In addition, the Dublin system implies that the EU Member States mutually consider each other "safe," to return asylum seekers to. However, it has been judged that certain EU states do not have the sufficient guarantees for asylum seekers to be returned to them.

The European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU), in several rulings, have concluded that the application of the Dublin system rules should be suspended in cases such as in 2011, when it was determined that Greece--a state designated as responsible for asylum requests--did not fulfill the requirements of being a "safe" country for refugees.²⁹ That decision had the effect of clogging the system, because other countries stopped returning asylum-seekers to Greece.³⁰

According to the European Human Rights Court, systematic problems in the treatment of asylum-seekers in Greece did not allow that asylum-seekers be sent there. In a ruling on January 21, 2011, the Court said,

- the systematic detention of asylum-seekers with no information about why they are being detained is a generalized practice by Greek authorities (point 226);
- numerous obstacles prevent or make more difficult in practice the asylum process for recently arrived asylum-seekers, for people returned under the Dublin system, and for people who travel through the Athens International Airport (point 173 and following);
- there were problems with the process of examining asylum claims. The Court highlighted a lack of preparation, qualification and competence of the Greek police responsible for asylum requests, and the fact that asylum claims were examined over very long periods of time (point 183 and following);
- there was a high risk that asylum-seekers would be returned. The court noted that "Greek authorities deport, sometimes collectively, both asylum-seekers who have not yet applied for asylum and those whose applications have been registered" (point 192).

The Court decided, therefore, that in this case "it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum-seekers in Greece find themselves in the same situation

as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable" (point 359).

In this case, the plaintiff was from Afghanistan, a country rife with violence and generalized insecurity. The plaintiff has worked as an interpreter, a category of the population that was, according to the court, "particularly exposed to reprisals at the hands of the anti-government forces" (point 296), a factor the Belgian authorities should have taken into account.

The ECHR recently confirmed its position with a ruling on March 15, 2018, in which it ruled that Greece denied a Sudanese man the right to request asylum because of problems in the system.³¹

"103. It is also clear from the M.S.S. judgment that the presumption that a State participating in the 'Dublin' system will respect the fundamental rights laid down by the Convention is not irrebuttable. For its part, the Court of Justice of the European Union has ruled that the presumption that a Dublin State complies with its obligations under Article 4 of the Charter of Fundamental Rights of the European Union is rebutted in the event of 'systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State.'

104. In the case of 'Dublin' returns, the presumption that a Contracting State which is also the 'receiving' country will comply with Article 3 of the Convention can therefore validly be rebutted where 'substantial grounds have been shown for believing' that the person whose return is being ordered faces a 'real risk' of being subjected to treatment contrary to that provision in the receiving country."³²

These decisions established that the mechanism of a safe third country cannot and should not be applied automatically. Although the Member States of the European Union decided to distribute refugees and asylum seekers and guarantee them the same level of protection, that proposal never went into effect, nor was it ever approved by the jurisdictions.

The pending reform of the failed EU system

A 2016 proposal by the European Commission seeks to reform this system with the goal of guaranteeing a more efficient system to distribute asylum-seekers among EU Member States, speeding up the asylum procedure and creating a correction mechanism that would be applied after a certain number of asylum requests. Such a mechanism would allow a state to receive no more than a certain number of asylum requests, based on the country's population and GDP.³³

Also, the proposal includes the option for a state to not participate in relocating asylum-seekers for a year in exchange for a "solidarity contribution," which the Commission proposed to set at 250,000 euros per asylum request denied.

The Commission's proposal explicitly states that:

"the right to apply for international protection does not encompass any choice of the applicant

regarding which Member State shall be responsible for examining the application for international protection."³⁴

The proposal also anticipates that once a state has been determined to be responsible for examining an asylum claim, it will remain responsible indefinitely. Therefore, an asylum-seeker would be assigned to a certain state, no matter how much time passes.

The proposal was criticized for not suggesting a change to the basic principle of the Dublin system, which establishes that the state responsible for examining an asylum request be the first state the asylum-seeker enters, and the burden that system places on states like Greece, Italy and Spain. In 2017, the European Parliament released a report that was very critical of the European Commission's proposal, and proposed instead a more equal and "supportive" distribution of asylum-seekers.³⁵

The internal European mechanism to determine which state is responsible for an asylum request therefore tends to be weak because of the lack of guarantees for asylum-seekers who have been returned to the first country of entry. German Chancellor Angela Merkel characterized the Dublin system as "obsolete" in an October 2015 speech to the European Parliament, emphasizing the fact that it left the responsibility for asylum-seekers in the hands of a small number of EU states, and that it was not compatible with European solidarity.

The problems with the European asylum system arise in spite of the fact that all of the European Union Member States share an explicit commitment to protecting human rights, including the rights of migrants and refugees.³⁶

In summary, under the EU system, transferring asylum-seekers among the Member States has been problematic in practice because:

1. The states that are the first point of entry are the least capable of receiving and processing refugees,
2. The system has resulted in serious and systematic human rights violations of asylum seekers,
3. The courts have recognized serious problems with the system's functioning and the safe third country practices,
4. The logic of transferring asylum claims only takes into account the perspective of the states, and not the perspective of the asylum seekers and refugees themselves, nor the personal reasons why they might choose to request asylum in one country and how it could help with their assimilation (presence of friends, acquaintances, knowledge of the language, etc.), nor the important differences that exist between the conditions of reception in different countries, which correspond to basic rights for refugees. As refugees are going to a new country to rebuild their lives, and usually starting from nothing, these issues are important to help an asylum seeker make their decision.

5. The states that receive the largest proportion of returned migrants do not always fulfill the criteria of “safe countries.”

2. The possibility of recognizing a state outside of the European Union as a safe third country

FACTS

The concept of a safe country was applied to a country outside of the European Union for the first time in a directive on December 1, 2005, in reference to the harmonization of asylum policies of EU Member States. The concept was developed in the directive “Proceedings” No. 2013/32/CE on June 26, 2013, which defines common procedures for the granting or removal of international protection to migrants.³⁷

The concept of a “*safe country*” has two distinct applications in European Union law through this directive:

- it can be used to qualify a country that supposedly does not produce refugees (country of origin) and apply a faster procedure to examine asylum claims of people from that country;
- it can be used to qualify a country that can provide effective protection to refugees so that refugees can be returned to that country.

In the latter case the concept of a safe third country in effect allows a Member State of the European Union to consider an asylum request inadmissible if the asylum seeker is from a non-EU Member State that is considered safe. It is not obligatory; EU countries are not required to incorporate the directive in their national legislation. Article 33 of the 2013/32/CE directive states:

“2. Member States may consider an application for international protection as inadmissible only if: (...)

c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38.”

So far, 19 EU Member States have taken advantage of that possibility. France, however, recently decided not to incorporate the directive into national legislation after a parliamentary debate and following large public demonstrations that protested that the project denied the right to asylum.³⁸ The European Commission, for its part, is encouraging countries to adopt the safe third country concept and has proposed a new regulation that would replace Directive 2013/32 and become an obligatory mechanism. This proposal, which is still being debated, requires that every European Union Member State adopt the third safe country mechanism and that safe third countries be designated at the level of the Union.³⁹ In an important international precedent, the French Council of State, the country’s supreme administrative court, when consulted about the adoption of this new regulation, ruled that applying the safe third country mechanism to return asylum seekers

would violate the constitutional guarantee of the right to asylum.⁴⁰

In the current framework, for a state to be considered a safe country, it must make the following guarantees to asylum seekers under Article 38 of Directive 2013/32:

- the absence of risk to the asylum seeker's life or liberty for any motive stated in the 1951 Geneva Convention, and the absence of real risk that allows the asylum seeker to request subsidiary protection;
- respect for the non-refoulement principle and prohibition of any deportation or extradition that would expose the asylum seeker to torture or inhumane or degrading treatment;
- that the asylum seekers be able to request asylum in that state and enjoy protection according to the 1951 Geneva Convention.

Furthermore, when a state receives an asylum request and considers transferring the asylum-seeker to a safe third country, the state should carry out an individual examination to determine if the third country is safe for the asylum-seeker.

Article 38 specifies that:

"2. The application of the safe third country concept shall be subject to rules laid down in national law, including: (...)

*(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a)."*⁴¹

DEBATE

From these requirements, we can deduce that any "safe country" must guarantee that within its territory there is no violence for reasons of race or sex, nor religious or political persecution, and that women, homosexuals, and LGBT people and other discriminated groups are protected.

According to researchers Julian Fernandez and Chloé Viel, there are very few countries in the world that fulfill these conditions and could therefore automatically be considered safe.⁴² In this context, guaranteeing the rights of asylum seekers according to the Geneva Convention using the safe third country mechanism appears almost impossible, because:

- 1. The mechanism of safe third countries has generated a series of problems, and has required constant modifications which has made the practice inviable** for European Union countries to use.

2. Some legal jurisdictions have proved that states designated as safe third countries do not guarantee the safety of the refugees and asylum seekers.

In one case, the European Human Rights Court convicted Hungary for designating Serbia as a safe third country and returning an asylum seeker from Bangladesh to Serbia. According to the Court's decision, that country cannot be considered a safe country and Hungary violated article 3 of the European Convention on Human Rights, putting the plaintiff at risk of inhumane or degrading treatment.⁴³ The Court also emphasized in the decision that Serbia was then able to return the plaintiff to Greece.

WHAT ABOUT TURKEY?

It must be clarified here that, contrary to common belief, the European Union has not explicitly recognized Turkey as a safe third country. In April of 2016, Greece designated Turkey as a third safe country in its own national legislation, following the EU's "Joint action plan with Turkey" and the joint statement.

On March 18, 2016, the states of the European Union and Turkey agreed to adopt a mechanism to regulate migration flows through another joint statement:

"In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU."⁴⁴

According to the declaration, all migrants who irregularly cross into Greece from Turkey after March 20, 2016 will be "transferred" to Turkey.⁴⁵

The declaration also contained compensation for Turkey:

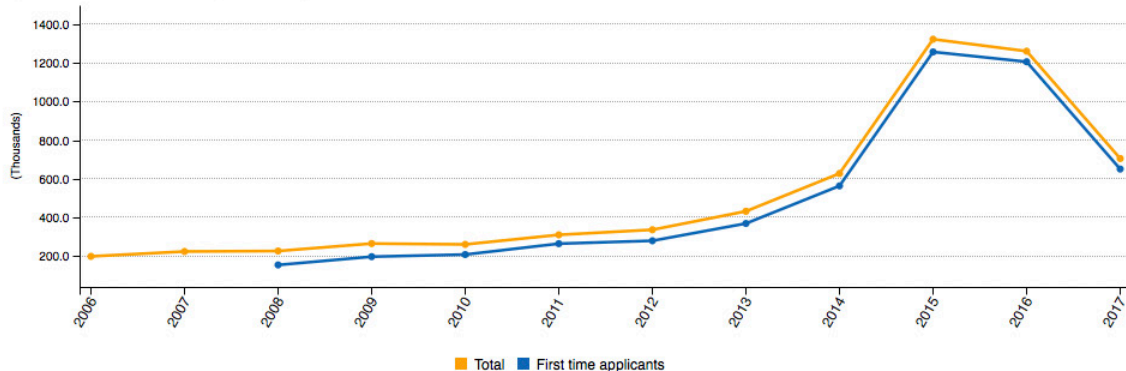
- financial aid consisting of 6 billion Euros (the Joint Action Plan of November 29, 2015 already included 3 billion Euros, and the joint declaration added another 3 billion);
- to accelerate Turkey's entrance into the European Union;
- to facilitate the process for Turks to receive EU visas.⁴⁶

The way this decision was reached made it very difficult to oppose. The Court of Justice of the European Union ruled that the joint declaration could not be considered an act of the European Union, and that therefore, the Court was not competent to judge its legality.⁴⁷

After that first joint declaration, on April 3, 2016, Greece introduced legislation to create the concept of a safe third country, and designated Turkey as a safe third country. This law was the basis for returning asylum-seekers who arrived in Greece to Turkey. In 2017, Greece's Council of State, the country's highest judicial body, rejected appeals from two Syrians against the decision to declare their asylum claims inadmissible for considering Turkey a safe third country,⁴⁸ even though there was evidence that Turkey has shown little respect for the non-refoulement principle⁴⁹ and only ratified the 1951 Geneva Convention with the condition of "geographical limitations" to its application.⁵⁰

This system led to a significant drop in the number of asylum seekers in the European Union.⁵¹

Asylum applications (non-EU) in the EU-28 Member States, 2006–2017



Total: 2006 and 2007: EU-27 and extra-EU-27.
First-time applicants: 2006 and 2007: not available.

eurostat

The Greek legislation has been criticized, because of:

- Questions regarding the political situation in Turkey, and the fact that this system gave power, legitimacy and resources to the controversial Turkish President Recep Tayyip Erdogan;
- The poor treatment of people who were returned to Turkey, which was denounced by non-governmental organizations like Amnesty International, Human Rights Watch, the International Federation for Human Rights and EuroMed Rights;⁵²
- People who arrive in Turkey face human rights violations, the risk of being returned or expelled without due process, bad conditions in refugee camps, long wait times for examining their claims, etc);⁵³
- It pushes migrants to alternative, more dangerous routes;⁵⁴
- The decision by Turkey to eventually close its border with Syria⁵⁵ and build a wall covering more than 750 km along its border with Syria, and the actions of Turkish border guards, who have shot at Syrians entering Turkey, seriously call into question Turkey's qualifications to receive refugees.⁵⁶

In its 2017 report, after a year of the application of the joint declaration, Doctors Without Borders affirms:

“What EU officials fail to mention is the devastating human consequences of this strategy on the lives and health of the thousands of refugees, asylum seekers and migrants trapped on the Greek islands and in the Balkans, particularly in Greece and Serbia, where they are living in limbo. What they fail to acknowledge is that, whether fully implemented or not, the EU-Turkey deal follows the logic of treating people as if they were commodities, with disastrous consequences for the people affected. And what is clear is that, despite evidence of the deadly consequences of their containment policy, European leaders have decided to put the survival of the EU-Turkey deal ahead of asylum seekers' safety and protection. (...)

Through the EU-Turkey deal, European Member States have denied people the protection they

need, resulting in people having to take greater risks and in the deterioration of their health. The deal simply cannot be seen as a model for further 'externalisation agreements' with other countries. The deal has been not a success story, but a horror story, with terrible consequences for people's lives and health."

THE SAFE THIRD COUNTRY AGREEMENT BETWEEN THE UNITED STATES AND CANADA

FACTS:

The United States and Canada share the longest border in the world and maintain a tight political and commercial relationship, with major flows of capital, goods, services and people.⁵⁷ Over 400,000 Canadian and US citizens cross the border between Canada and the United States every day, while 75% of Canadians live fewer than 160 km from the border. Three quarters of Canada's exports go to the United States and the two countries trade more than \$700 million in goods and services every year as part of the North American Free Trade Agreement, now US-Mexico-Canada Agreement.⁵⁸

After the attacks of September 11, 2001, however, the United States wrongly accused Canada of having allowed terrorists to enter, and declared a Level 1 Alert on the border that drastically reduced normal traffic flows and led to significant economic losses. The Canadian government's priority, therefore, was to reassure the US government about the two countries' shared border and its level of safety.⁵⁹ In this context, on December 12, 2001, the United States and Canada signed a "Smart Border Declaration," announcing a plan to make the border safer through implementing a 30-point plan.⁶⁰ The fifth point of this plan announced the negotiation of "a safe third country agreement to improve the handling of asylum claims."

In the context of securing the border, Canada and the United States took elements from the Dublin system, using the same justification of preventing "asylum shopping,"⁶¹ to negotiate and sign a safe third country agreement on December 2, 2002, which took effect on December 29, 2004.⁶²

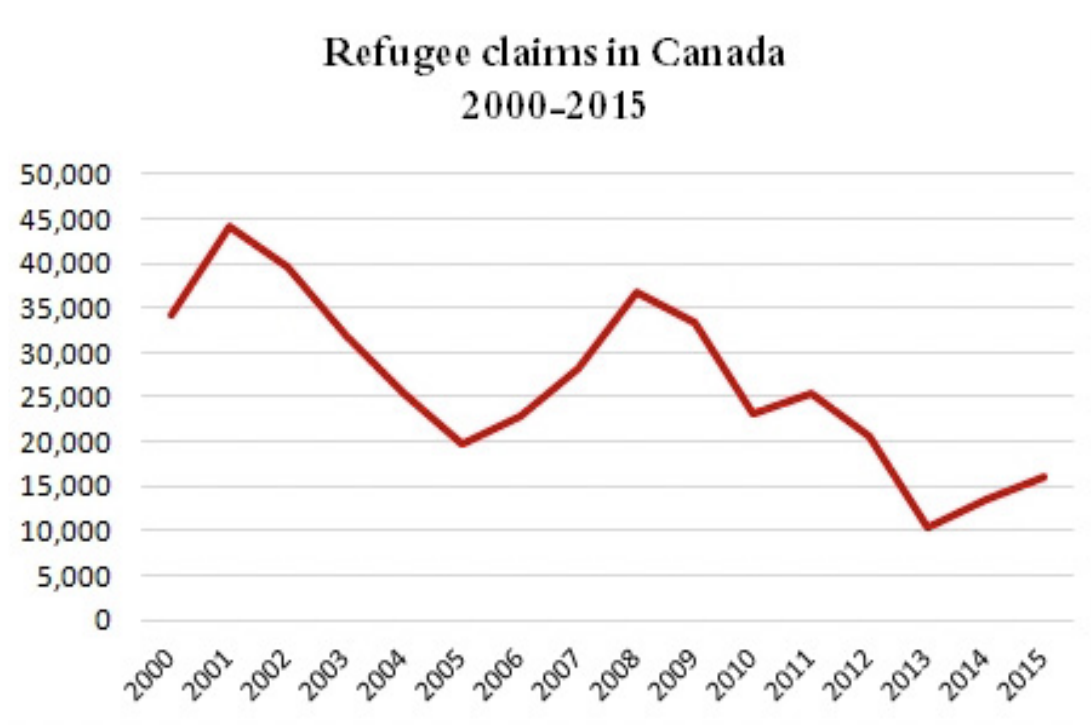
Based on that agreement, Canada and the United States consider each other safe countries for refugees, affirming that they respect the international principles of protection of refugees (the 1951 Geneva Convention and the 1984 Convention Against Torture). They established that except for certain exceptions (such as family reunification, unaccompanied minors, visa holders, public interest exception), the country responsible for examining an asylum claim will be the first of the two countries to which asylum-seekers arrives.⁶³ This agreement is only applied to people who request asylum at the land border between the United States and Canada, and not people who arrive by plane or boat, or who are already in Canada.

DEBATE:

The agreement is hotly debated in Canada. Many experts and human rights defenders argue that,

according to international conventions, asylum seekers have the right to request protection wherever they decide best suits them to establish their lives. They also argue that the United States cannot automatically be considered a safe country for all asylum-seekers.

Through the application of this agreement, many asylum seekers who arrive in Canada are transferred to the United States, which has led to a drastic drop in asylum claims in Canada.⁶⁴ Various reports on the effects of the agreement highlight that the most important effect is dissuasion. In the first year of the agreement, from 2004 to 2005, there was a decline of almost 6,000 claims to Canada compared to the year before. The data from the following years confirms that tendency.⁶⁵



The Canadian Council for Refugees emphasized in its report at the end of 2005 that:

The most important impact of the Safe Third Country Agreement has been the dramatic drop in the number of refugee claims made in Canada, particularly at the land border, where numbers have halved since 2004. This decline comes after several years of decreases in numbers of refugee claimants. The 2005 figure for refugee claims is lower than Canada has seen since the 1980s."⁶⁶

Another effect of the agreement is the exclusion of certain groups from the benefits of international protection. In an indicative study, Professor Delphine Nakache shows that the agreement had a negative effect on Colombian asylum seekers who were the largest group of asylum seekers on the Canadian border before the agreement went into effect. Nakache notes that the agreement has significantly reduced the chances of acceptance and the right to not be returned, pointing to the fact that the rate of acceptance for asylum claims from Colombians is 81% in Canada and 45% in the United States.⁶⁷ The Canadian Council for Refugees also mentions the reduction in requests, noting that the number of asylum claims from Colombians in Canada dropped by two-thirds between 2004 and 2005.⁶⁸

Claims by Colombians							
	2004	% by point in 2004	% by point Jan.- Nov. 2005	2005 projected year end	2005 projected as % of 2004	numbers 'missing' in 2005	
Border	3,521	97%	781	79%	852	24%	2,669
Airport	23	1%	41	4%	45	194%	-22
Inland	91	3%	163	17%	178	195%	-87
Totals	3,635		985		1,075	30%	2,560

Another effect, which is difficult to quantify and similar to the European situation, is the increases in illegal flows and the opening of other paths.⁶⁹

In an interview with the Americas Program, Francisco Rico, director of the FCJ Refugee Center in Toronto, Canada, affirms that *"we should clarify that in this type of agreement, there is no benefit for immigrants."*

He explains that the agreement *"(...) limits immigration, demanding certain conditions or requirements of immigrants to arrive at the border and request asylum. Now, one of the conditions for people to request asylum is to have a close family member, a mother, father, uncle, sibling, who is a resident or has permission to temporarily stay in the country. If the people do not fulfill this condition, they need to enter through informal points of entry, where there are no customs and they need to turn themselves into the authorities so that they will be brought to the Migration authorities."*

The critical position of the Inter-American Human Rights Commission:

Just as the European Court of Human Rights spoke out against the European system, the Inter-American Human Rights Commission criticized the system in the case of a group of asylum-seekers who were returned to the United States by Canada. In the case, a group of Haitians who arrived with the intention of requesting asylum in Canada were returned without individual hearings to the United States, from where they were deported immediately. Although the case does not directly relate to the safe third country agreement, the Commission points to various relevant issues. The Commission affirms about the right to request asylum that:

"(...) every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country's refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. To ensure that a refugee claimant's right to seek asylum under Article XXVII is preserved, before removing a refugee claimant to a third country, the Member State must conduct an individualized assessment of a refugee claimant's case, taking into account all the known facts of the claim in light of the third country's refugee laws. If there is any doubt as to the refugee claimant's ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country."

(...) As in the Haitian Interdiction Case, the State's application of its direct back policy had the effect of denying the John Does their fundamental right to seek asylum in a foreign territory. The John Does each sought asylum protection from the State of Canada. Instead of immediately processing the John Does' claims, the State applied its direct back policy, which provided no assurances that the John Does could present their claims for asylum, whether in Canada or in the United States. (...)

96. Likewise, in accordance with the policy applied, Canada did not seek assurances or conduct a basic evaluation of whether the John Does could apply for asylum in the United States once directed back. In these three cases, the direct back policy posed a real risk of denying the three John Does the opportunity to seek asylum in a foreign territory and placed them at possible risk of harm. In the case of John Doe 3, the State was later able to confirm that he had returned to Canada, after having been deported back to Albania, and had subsequently been granted asylum. These facts demonstrate the deleterious impact the direct back policy had on John Doe 3's rights under Article XXVII and the real threat he faced in the interim period in Albania."⁷⁰

The Commission also considers that failing to carry out an individualized risk assessment of each John Doe before returning them to the United States, where they faced the risk of falling into a chain of return (refoulement) to their countries of origin, constitutes a violation of article XXVII.⁷¹

The Commission concluded that the policy of direct return made it impossible for the plaintiffs to appeal the decisions about their returns, and therefore violated their right to due process.⁷²

The United States — a safe country?

Another criticism of the United States-Canada agreement is that many organizations and observers question whether the United States can be considered a safe country for refugees. The Canadian Refugee Council, Amnesty International and the Canadian Council of Churches joined a suit by a Colombian asylum-seeker in 2005, affirming that the United States could not be considered a safe third country.⁷³ The plaintiff initially won a favorable ruling, but the Federal Court of Appeals then reversed the decision on June 27, 2008,⁷⁴ and the Supreme Court declined to review the case.⁷⁵ In July 2017, the Canadian Refugee Council, Amnesty International and the Canadian Council of Churches again joined to support a suit by a person who was contesting the agreement in federal court. In that context, the NGOs recently submitted a document that provides ample evidence to prove that the United States cannot be considered a safe country, citing factors like a restricted interpretation of the category of refugee, a deficient asylum system, and risks of return or detention of refugees and asylum seekers.⁷⁶



4. THE POSITION OF THE UNHCR

The UN High Commissioner for Refugees (UNHCR), the guardian of the 1951 Geneva Convention, has criticized the use of the safe third country concept many times.

In a Global Consultation published on May 31, 2001, the UNHCR affirmed, *“As for the general question of ‘safety’, this cannot be answered solely on the basis of formal criteria.... The third State needs actually to implement appropriate asylum procedures and systems fairly.”*⁷⁷

In the same document, the UNHCR emphasized that *“another important element to consider when crafting this type of agreement is the question of the criteria applicable for determining the State responsible for examining each case to ensure that the operation of any transfer mechanism is timely and equitable, in line with a burden-sharing rationale.”* The simple fact of having traveled through a state is not sufficient, for example.

The UNHCR concludes that if a state designates another as a safe third country, it should *“provide for an individualized assessment that the third country is “safe” in the case of each asylum-seeker thus ensuring respect for international protection principles and in particular that of non-refoulement.”*⁷⁸

In an April 2018 note, the UNHCR explains the conditions that should be respected for the use of the safe third country concept:

“Prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third state will:

- *(re)admit the person,*
- *grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs,*
- *permit the person to remain while a determination is made, and*
- *accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including – but not limited to – protection from refoulement.*
- *Where she or he is determined to be a refugee, s/he should be recognized as such and be granted lawful stay” (point 4).*⁷⁹

“According to relevant conclusions of UNHCR’s Executive Committee, regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, s/he may if it appears fair and reasonable be called upon first to request asylum from that state. Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law. The person may well be returned to a country through which s/he may have passed en route, 12 or the person may be transferred to a country to which s/he has never been but that has agreed, by way of a formal arrangement, to be responsible.¹³ In follow up to relevant conclusions of UNHCR’s Executive Committee, UNHCR though has consistently been advocating for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another state” (point 6).

"As a precondition to return or transfer of an asylum-seeker or refugee to another country, it is crucial to establish that s/he has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards (...)" (point 7).

"Whether standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards are available cannot be answered without looking at the state's international legal obligations, its domestic laws and the actual practice of implementation" (point 10).

The UNHCR also insists on guarantees whenever this type of mechanism is used:

"When a state is considering applying the 'first country of asylum' or 'safe third country' concept, the individual asylum-seeker must have an opportunity within the procedure to be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment, in a previous State based on his or her circumstances. The APD provides that in such a procedure, a transferring state may decline to undertake a substantive assessment of the asylum claim, and declare the application inadmissible. The individual must however be able to appeal the inadmissibility decision before a court or tribunal and a right to remain pending the outcome of an appeal. Suspensive effect is automatic in case of an appeal against a decision based on the safe third country concept under Article 38, while the applicant may request a court to order suspensive effect in an appeal based on 'first country of asylum' under Article 35."⁸⁰

5. LEGAL CONTROVERSIES SURROUNDING THE SAFE THIRD COUNTRY CONCEPT

The very concept of the safe third country is questionable. In the context of the debate in 2018 about the new French migration law, the French National Consultative Commission on Human Rights published a report affirming that the principle was not only unconstitutional, but also that it contradicts the 1951 Geneva Convention.⁸¹ The report asked the French government to abandon the concept and pressured the European Union to stop using it. The legal arguments used were:

THIS CONCEPT ADDS A CRITERIA TO OBTAIN THE STATUS OF REFUGEE THAT IS NOT IN THE GENEVA CONVENTION.

The 1951 Geneva Convention and the 1967 Protocol state that a refugee is a person who fulfills four conditions:

1. has legitimate fears of persecution;
2. has determined motives of persecution (race, religion, nationality, membership in a specific social group, political opinions);
3. is outside of their country of nationality or residence;
4. does not have the protection of that country.⁸²

The Geneva Convention does not make reference to or define the concept of a safe third country, which makes it problematic to reject an asylum claim because of the fact that the asylum seeker crossed through or was in another so-called safe third country.⁸³

The UNHCR clearly affirmed, in that sense, that “Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State,”⁸⁴ although more recently, reconciling its position with that of the states, it recognized the possibility of agreements between countries, but with precautions.⁸⁵ In effect, the UNHCR stated:

“(...) it is reasonable, in order to distribute the burden, to create agreements that allow the readmission of refugees in another country where they will have the responsibility to determine their status, on the condition that such an agreement gives the refugees some kind of protection and the certainty that their problems will be solved.”

17. Without underestimating the difficulty of coming to an agreement about problems like those we mention above, (length of stay, criteria to determine the level of safety, etc.) the response should be reasonable, not a unilateral action, but an agreement that officially establishes mechanisms to determine the responsibility of the States involved, mechanisms such as the notion of a ‘safe country,’ while simultaneously creating clear and harmonized criteria to determine if a country can be considered safe. These mechanisms can only fulfill their purpose, in principle and in practice, if they comply with certain conditions, and in particular, if there is an agreement between the directly interested parties on a) the norms about who will apply the mechanisms, and with respect to which countries; b) the operative standards (how and when the mechanism should be applied); c) the operational modalities (treatment of asylum seekers, provisions for return and readmission, possible solutions); and d) monitoring of the functioning of the mechanism.”

In April 2018, the UNHCR published a document titled “*Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries.*”⁸⁶ This document details the conditions when a person can be returned or sent to a safe third country, but the UNHCR reaffirms that “asylum should not be refused solely on the ground that it could be sought from another state.”

THIS CONCEPT IS PROBLEMATIC REGARDING RESPECT FOR THE NON-REFOULEMENT PRINCIPLE

The use of the safe third country concept is also problematic regarding respect for the non-refoulement principle.

As the Inter-American Court recently noted in its advisory opinion of May 30, 2018, “*seeking and receiving asylum, and a state’s obligation not to return a person to a territory where they would risk persecution is a fundamental component of international law.*”⁸⁷ This principle, the Court continues, “*is the capstone of international protection for refugees asylum seekers.*”

First stated in Article 33.1 of the Geneva Convention, the non-refoulement principle is also a fundamental guarantee of various different non-deferrable human rights, because it allows the preservation of life, liberty or integrity of the protected person. The Inter-American Court considers

that the prohibition of torture or other cruel, inhumane or degrading punishments or treatments, laid out in Article 5 of the American Convention, extends to an obligation for a state not to deport, expel, extradite or otherwise remove a person subject to their jurisdiction to another state, or to a third state, when a credible presumption exists that the person would be in danger of facing torture or cruel, inhuman or degrading treatment. The United Nations Human Rights Committee has interpreted Article 7 of the International Covenant on Civil and Political Rights in the same way.⁸⁸

In addition, the non-refoulement principle does not only apply only in the territory of a state itself, but also at the border and international transit areas, and on the seas, to guarantee access to territorial asylum.

The Inter-American Court affirms, then, that “(...) *refoulement as an autonomous and all-encompassing concept, can include several different state behaviors that imply putting a person in the hands of a state where their life, security or liberty are in risk of violation by persecution or the threat of persecution, generalized violence or massive human rights violations, among other things, or put at risk of being subject to torture or cruel, inhumane or degrading treatment, or to a third state from where they could be sent to another state where they could face those risks (indirect refoulement).*”⁸⁹

The UNHCR, in its Note on International Protection on September 16, 2001, notes that the non-refoulement principle is applied independently of official recognition of refugees:

*“16. The obligation of States not to expel, return or refoule refugees to territories where their life or freedom would be threatened is a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established nonrefoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx.”*⁹⁰

Considering what the non-refoulement principle represents, it stands clearly in contradiction with the application of the safe third country principle.

As noted by the French National Consultative Commission on Human Rights, the concept also contradicts the goals and spirit of the 1951 Geneva Convention, in effect breaking with the logic of protection for people based on fear of individual persecution in favor of the abstract security of a state.

In summary, the legality of the safe third country concept is not only debatable, but also, its application is legally difficult. The examples of the European Union and the United States and Canada illustrate those difficulties.

As the international law researcher Maria Teresa Gil Bazo writes, through these experiences we can see an increase in mechanisms such as safe third country in bilateral readmission agreements, which may be formal, informal, regular or ad hoc, and in the absence of formal guarantees that the asylum seekers be treated according to international standards. *“As States move to act outside their borders, judicial scrutiny of their actions becomes more difficult, a picture that challenges not only the proper functioning of the asylum system, but also the very nature of liberal-democratic States based on the rule of law.”*⁹¹

6. MEXICO: A SAFE COUNTRY?

According to the requirements established in law and in the jurisprudence of other countries, there are many indications that Mexico cannot be considered a safe third country:

- In Mexico, refugees and asylum-seekers face massive violations of their rights;
- Mexico does not have an efficient asylum system that allows it to address the current number of asylum seekers, and far less the increased numbers that would result from this type of agreement with the United States (because of the asylum seekers who the United States would automatically return to Mexico),
- Mexico frequently violates the non-refoulement principle itself.

National and international civil society organizations have warned current and future authorities of their opposition to a safe third country agreement.⁹² In a declaration on May 22, 2018, Mexican organizations “categorically” condemned the possibility that Mexico and the United States sign such an agreement:

“An agreement of this type would violate the United States’ international protection commitments to people seeking protection. As recently as February 2018, the Mexican National Human Rights Commission (CNDH) issued an urgent call to the Mexican government out of concern that the Mexican Commission of Assistance to Refugees (COMAR) was collapsing and urging the government to affirm its commitment to refugee protection. Mexico is not safe for many migrants, and its asylum system lacks capacity to process more than a tiny fraction of cases of individuals seeking, and in need of, international protection.”

They demanded that the governments of Mexico and the United States abandon the negotiations and *“instead uphold their responsibility under international and national law.”*

In a second letter sent on July 12, 2018 to the Mexican president-elect and his future Foreign Relations Secretary Marcelo Ebrard, non-governmental organizations noted:

*“(...) the role of ‘safe third country’ not only goes against the position that you have taken during your electoral campaign, but would also be an irresponsible step, since the country does not have the conditions to guarantee access to fundamental rights like education, health and dignified and fair work for people who wait here for their process to be resolved.”*⁹³

Based on a review of many human rights reports, dozens of interviews with migrants and field

experience, the Americas Program concludes that Mexico cannot be considered a safe third country for people looking for refuge. As we wrote in January of 2018:

"Upon arriving in Mexico, migrants are victims of extortion, robbery, rape, disappearance, murder, general violence and sexual violence, kidnapping and human trafficking, at the hands of organized crime, but also by corrupt authorities who commit crimes with impunity. They travel along a circuit of human rights violations."⁹⁴

Marta Sánchez Soler, Director of the Mesoamerican Migrant Movement notes the rapid deterioration of conditions for migrants traveling through Mexico over the past years:

"The current situation bears no resemblance to that of Mexico in the 1980s. We are no longer a country of refuge, and there is little recognition that a large number of Central Americans deserve to be classified as refugees in Mexico; COMAR's statistics reflect an agency that has neither the staff, the resources, nor the will to fulfill its mission.

(...) In this context, migrants in transit through Mexico and refugee applicants face a bleak outlook, one that the countries involved have barely lifted a finger to address."⁹⁵

A. MASSIVE VIOLATIONS OF THE HUMAN RIGHTS OF REFUGEES AND ASYLUM SEEKERS IN TRANSIT THROUGH MEXICO

A WORRYING AND DENOUNCED SITUATION

Every report about the situation of migrants and refugees in Mexican territory concurs that they face a horrifying situation.⁹⁶ In its 2017 report, Doctors Without Borders states that:

"Through violence-assessment surveys and medical and psychosocial consultations, MSF teams have witnessed and documented a pattern of violent displacement, persecution, sexual violence, and forced repatriation akin to the conditions found in the deadliest armed conflicts in the world today."⁹⁷

Women suffer specific forms of violence, including rape. A 29-year-old woman, whose five children had stayed behind in Honduras with their grandmother, explained to us in an interview at the Hermanos en el Camino shelter in Ixtepec, Oaxaca:

"The trip was a horror for me. I was alone. I wanted to be trusting, and at one point I got into a taxi. When I was inside, he told me that he didn't want money, he wanted me to pay with sex. I refused. 'You have something to give me, but you won't give me a chance,' he said. I pleaded with him, 'Let me go, please,' but he didn't want to. I finally got out. I ran, I ran, I ran, and thanks to God I was able to escape, to hide. God has helped me a lot. I was very afraid.

Later, in La Ventosa, my money was stolen. Eventually, I was able to find a young man in Chahuities who accompanied me and helped me get to this place. He helped me with money. He got his papers worked out and he left, and I stayed here, alone."¹⁴⁵

In its 2018 report, the Network of Migrant Defense Organizations (REDODEM) reported that a total of 3,177 migrants who stayed at its shelters in 2017 reported experiencing or witnessing rape.

"In 2017, the main crimes of which migrants were victims were theft (76.06%), assault (5.14%), extortion (4.04%), kidnapping (3.82%) and abuse of authority (2.90%). Migrants who reported having witnessed crime reported principle crimes being theft, followed by assault, abuse of authority, kidnapping and homicide."⁹⁸

According to the REDODEM, the Mexican government is responsible for the terrible situation that migrants experience in Mexico:

"In terms of crimes against migrants and human rights violations in Mexico, it is clear that there is no real effort being made by Mexican authorities to design and implement a migration policy that will help resolve the grave situation of migrants who are fleeing their home countries, or to protect the life and integrity of migrants in transit through Mexico."⁹⁹

Amnesty International also emphasized in a 2017 investigation *"the role that the Mexican government plays in replicating these human rights violations against thousands of asylum-seekers who are fleeing extreme violence from Central America's Northern Triangle, (...) who in many cases are eligible to receive refugee status either in Mexico or the United States,"¹⁰⁰* emphasizing that *"(...) the Mexican government plays an important role in illegally detaining, deporting and returning thousands of people to situations of danger, at times relying on U.S. funding to do so."*

Among migrants, the situation of unaccompanied children that led to the *"crisis"* and resulted in an increase of repressive measures on the southern border by the United States and Mexican governments is still not being addressed in compliance with international agreements, and many children are still being detained. UNICEF has denounced the detention, return and deportation of children who should be recognized as refugees and be given international protection.¹⁰¹ Next-Gen also notes that even though there is a legislative framework that prohibits the detention of migrant children and adolescents, the Mexican government detained more than 18,000 minors in 2017.¹⁰² They state that:

"Identifying children and adolescents in the context of migration is a significant gap in Mexico, in both policy and practice. Protocols require that the Procurator Offices for the Protection of Children and Adolescents be notified of children in detention, and there are guidelines for the restitution of their rights. However, these are very rarely applied in practice, with the vast majority of children and adolescents remaining in detention before being returned to their countries of origin, without an adequate evaluation of their particular case or possible protection needs."

As the observers point out, there is a large gap between reality and the law:

"Nevertheless, despite the relatively adequate legal framework and the goodwill expressed in regional and international forums, the reality at the field level is extremely worrying: seeking asylum, getting refugee status, or even securing other forms of international protection, such as complementary measures in Mexico and the United States, remains almost impossible for people fleeing violence in the NTCA."¹⁰³

According to French-Mexican sociologist Argán Aragón, various factors contribute to the massive violation of human rights of migrants and insecurity in Mexican territory, including control by cartels, corruption of institutions and pressure from the United States to crackdown within Mexico's migration policy.¹⁰⁴

The United States has subcontracted the dirty work of stopping migration flows to Mexico for several years, through the Merida Initiative (IM-2008), and the Southern Border Plan (2014), financed in part by the Merida Initiative. Mexico carries out this containment work through policies of repression and militarization that pushes migrants to choose more and more dangerous paths.

The Americas Program has been tracking and researching the impacts of these programs since their inception and found a clear pattern of abuses, aggravated violence, disappearances and human rights violations.

"In Mexico, there are only partial figures for the number of deaths and disappearances among the almost 400,000 migrants that travel through the country every year. The policy of supporting the United States by militarizing borders started in 2014 with the Southern Border Plan, which, according to the 2016 report by the 72 Shelter, 'had a specific goal, to block and slow down, at any cost, the people who travel through Mexico irregularly on their way to the United States. Closing the border legitimized persecution, detention and deportation.' Since then, the Mexican government has increased its operations, military checkpoints, harassment and abuse against migrants."

In late July 2017, in only six days, the Hermanos en el Camino Shelter in Ixtepec, Oaxaca, was able to document the following abuses among people who were there at the time: assault, extortion, persecution, rape, beatings, kidnapping, bribery and sexual abuse. The crackdown at the Mexico-Guatemala border, and across all of Mexico, as a containment zone for the United States, makes migrants easy prey for the authorities and organized crime, with almost complete impunity. And even still, they keep leaving, not because they don't know the risks, but because the situations in their home countries is even more desperate. 'It's never been as hard as it is now. We're taking this route because there's no other option,' a young Honduran said, shrugging his shoulders."¹⁰⁵

The policy of repression of migrants and militarization of borders adopted in Mexico has direct consequences for migrants and asylum seekers throughout the region. A *"real success for Washington,"* as Argán Aragón writes, *"(...) the horror spawned by the 21st century border crosses to the Mexican side."*¹⁰⁶

When the Southern Border Plan was instituted in 2014, Carlsen we noted "the efforts to slow down migration from Central America to the United States and seal the southern border have led to a humanitarian crisis, turning migrants into targets for both organized crime and corrupt officials in Mexican territory. Stopping migration to the United States through criminalization, violence and terror has led to thousands of deaths in the country."¹⁰⁷

MIGRANTS AT THE MERCY OF ORGANIZED CRIME

The U.S.-backed fight against drug cartels, launched in 2006, is also an important factor in the violations of the rights of migrants. With the fragmentation of the large cartels and the launching of a

war for territory, the cartels diversified their sources of income, adding extortion, kidnapping, human trafficking and organ trafficking to their portfolios. Migration is a huge opportunity for extortion because the migrant population is persecuted and not protected by the Mexican government. In areas where migration routes pass through, organized crime has developed a business of robbing and extorting migrants. Migrants who flee Central America often find serious threats during their travels through Mexico, where violence by criminal groups and the corruption of state institutions results in migrants being kidnapped, extorted and trafficked by organized crime groups.¹⁰⁸

In a 2017 report, the Mexican National Human Rights Commission cited testimony that detailed the risks that migrants face from different organized crime groups, such local and international gangs like the Mara Salvatrucha. Such groups “often take them prisoner, extort them, force them to pay large ransoms, sometimes torture them, force them to work, including as hitmen,”¹⁰⁹ according to a person who works with migrants on the Northern Border.

The CNDH also mentions that:

“(...) recruiting of migrants by organized crime and gangs is becoming more and more frequent according to interviews with shelter and migrant house personnel. After being recruited, migrants are used to bring drugs to the United States, to keep watch, to recruit other migrants, to steal and to kidnap.”¹¹⁰

These cases of daily violence are framed by the discovery of massacres and hidden graves, and the invisible crime of the disappearance of thousands of migrants and Mexican citizens in the context of the war on drugs.¹¹¹

B. A DEFICIENT ASYLUM SYSTEM

In addition to massive human rights violations, asylum-seekers in Mexico face a gravely deficient asylum system. Under Mexican law, the process of recognition of the condition of refugee should take between 45 and 90 days from when it has been requested.¹¹² However, according to data from the Mexican Commission for Aid to Refugees (COMAR), only 30% of people who requested the condition of refugee in 2017 had finished the process that same year.¹¹³ More than half of the requests were still pending at the end of the year.

According to reports by national and international organizations, and testimonies collected by the Americas Program, there are several main reasons why many people abandon the process of obtaining recognition of refugee status:

- the fact that an application is considered abandoned when a migrant moves from one Mexican state to another without previous permission from the COMAR (according to article 24 of the Regulation of the Law on Refugees and Subsidiary Protection),
- refugees' limited resources do not allow them to wait for long periods of time. Asylum-seekers do not receive temporary work permits in Mexico and with limited resources and no source of income, few can sustain themselves during the time it takes to process the request,
- persecution and insecurity (which is discussed further below).

A 24-year-old Salvadoran migrant who we met at the Hermanos en el Camino shelter in Ixtepec in July 2017 described the threats he had faced in his home country and in transit through Mexico. As a young man in El Salvador, gangs had tried to recruit him, like they do to many others. Refusing to join these groups had exposed him to death threats. The imminent danger forced him to leave, fleeing for his life. He affirmed that he could not even stay in Mexico because the gangs kept following him and threatening him here. He stated that he felt had no choice but to continue north, that he could only be safe in the United States.

In its evaluation of the 2014-2017 Brazil Plan of Action, the Regional Articulation Group notes that in the Mexican asylum system:

- *“investigations of resolutions are insufficient and incongruous, or even recycled from former cases with little relation to the original case,”*
- *“for people in migration detention, access to the procedure is very limited: migration agents do not give information, delay or even ignore petitions to initiate an asylum request, as happens in Mexico with the almost 400,000 people who are detained every year. The degrading conditions of the detention push people to abandon their claims, allowing them to be expelled back to their home countries,”*
- *“lack of due process in detention and expulsion procedures,”*
- *“public defenders and human rights offices do not have sufficient human and financial resources.”¹¹⁴*

In a report from March 2016, Human Rights Watch lists various obstacles to access to asylum and other forms of protection for migrant children in Mexico:

- inadequate evaluation of children's protection needs;
- failure to fulfill the obligation to inform children about their rights;
- responses that dissuade children from requesting international protection;
- the use of detention to dissuade children from making asylum claims;
- the need to recognize that children can have more than one motive to leave their countries of origin;
- a lack of adequate support and assistance for children to prepare and present their asylum claims;
- the small number of asylum requests by children seen by the COMAR;
- the limited use of humanitarian visas.¹¹⁵

According to the Human Rights Institute at Georgetown University:

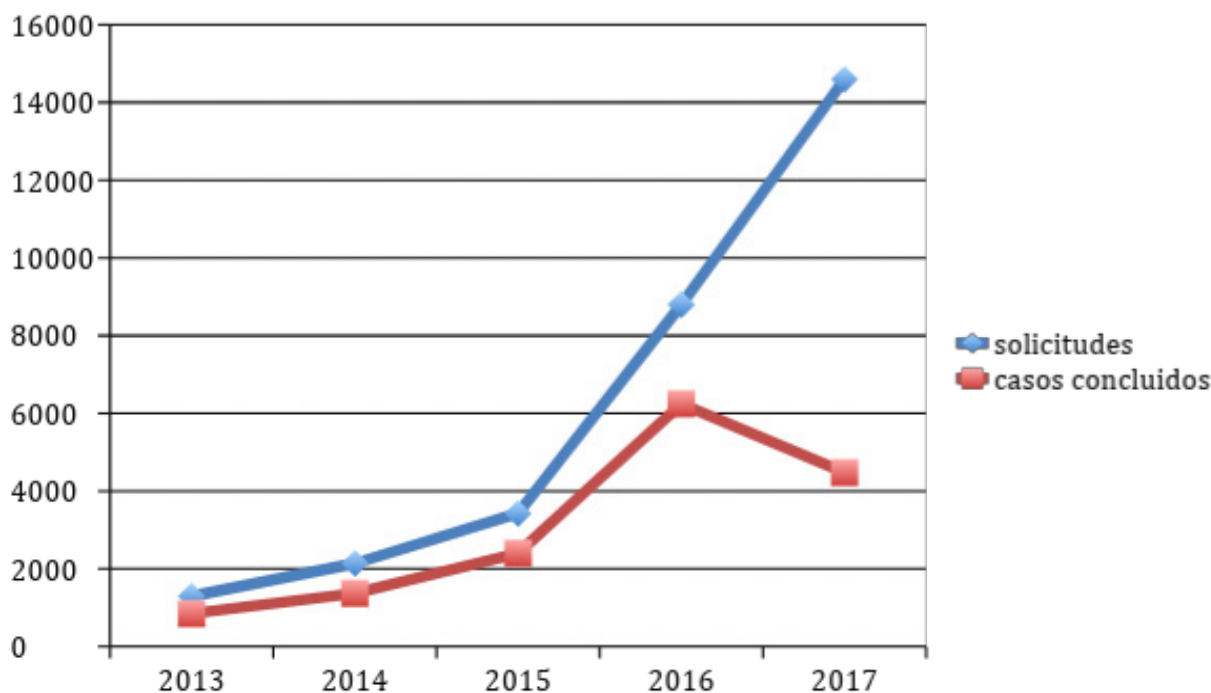
“The factors causing child migration out of Central America's Northern Triangle countries are complex. Yet there is broad consensus that increased levels of gang violence, gender-based violence, and deepening poverty cause many children to flee. Two studies released by the United Nations High Commissioner for Refugees (UNHCR) in 2014 found that approximately half of the children fleeing Northern Triangle countries showed signs of a need for international protection. However, despite these humanitarian concerns, the number of applications for asylum and other forms of international protection in Mexico has remained relatively low, even as Mexican immigration

officials have massively increased the apprehension and deportation of children."¹¹⁶

The Georgetown report concludes:

*"Mexico is also failing to meet its duty to screen migrant children for international protection needs and to meaningfully inform them of their right to seek asylum. As a result, nongovernmental organizations (NGOs) and UNHCR are left to attempt to fill the void of providing children with this information. This situation leads to many children learning about their right to seek asylum from other migrants, or being deported without ever learning about these rights. Additionally, Mexican immigration officials fail to screen children for international protection needs. As the Mexican government deports children to their home countries without performing these duties, they are at risk of violating the international human rights obligation of nonrefoulement."*¹¹⁷

The Mexican asylum system is unable or unwilling to confront the present challenges. According to data from the COMAR, while the number of asylum requests rose, the number of finished cases went down.¹¹⁸



The COMAR's delay is very worrying according to the following data:

COMAR Data 2013-2017	Pending cases (asylum seekers - abandoned and finished cases)	Cumulated pending cases since 2013
2013	846	846
2014	1370	2216
2015	2400	4616
2016	6261	10877
2017	12196	23073

The September 19 earthquake laid bare the problems with the COMAR: on October 30, 2017, an agreement was published that indefinitely suspended the terms and procedures of recognition of refugee status. Affirming that the COMAR “did not have the operative capacity to guarantee the development of the procedures,” the deadlines for examining asylum claims were not respected.¹¹⁹ Faced with this situation, on February 25, 2018, the National Human Rights Commission made an urgent call to the government, emphasizing that:

“With 14,596 asylum claims opened during 2017, and 7,719 that have not been resolved, the COMAR faces a backlog of close to 60% of procedures that have been started at a national level, when the Law on Refugees, Subsidiary Protection and Political Asylum indicates that claims should be resolved within a maximum term of 45 days. This situation is worrying because 2,400 abandoned and terminated procedures have been reported, presumably as a response to long wait times and the little information given to asylum seekers, which amounts to a de facto denial of international protection.”¹²⁰

The virtual suspension of the legal review of asylum cases following the earthquake left asylum-seekers in complete uncertainty with respect to how long COMAR would take to process their requests. Later, an Administrative Judge of the Ninth District of the Federal District declared the agreement unconstitutional on March 13, 2018.¹²¹

Alessio Mirra of the Casa de Migrante in the city of Saltillo, said that if Mexico is recognized as a safe third country and receives requests for asylum from U.S. asylum-seekers, an already deficient asylum system would become dysfunctional.¹²² The numbers speak for themselves:¹²³

- Annual asylum applications have tripled in the last 3 years,
- There has been a 1,750 percent increase in the asylum backlog over the last 5 years.
- The affirmative asylum backlog at U.S. Citizenship and Immigration Services has grown to 313,214 cases, as of January 28th 2018.
- Another 290,000 asylum cases are pending in immigration courts as of February 9 2018.
- The backlog of cases in immigrations courts is approximately 675,000 caes.
- In the United States in 2017, Immigrations and Customs Enforcement made approximately 140,000 arrests in Enforcement and Removal Operations (ERO),

The U.S. Citizenship and Immigration Services (USCIS), confirmed *“the agency currently faces a crisis-level backlog of 311,000 pending asylum cases as of Jan. 21, 2018, making the asylum system increasingly vulnerable to fraud and abuse”*.¹²⁴

C. MEXICO VIOLATES THE NON-REFOULEMENT PRINCIPLE

In practice, Mexico does not respect the principle of non-refoulement since it is routinely returning people to dangerous situations. This, in itself, disqualifies the country from being considered safe for refugees and asylum-seekers. Many organizations have already documented this fact, including Amnesty International, writing:

“Numerous asylum seekers in Mexico told Amnesty International that they had been returned on a number of occasions to their countries yet INM agents never informed them of their right to

seek asylum. (...) On repeated occasions, people fleeing violence in the Northern Triangle told Amnesty International that when they expressed fear of returning to their country, INM agents ignored their comments or at times made derogatory or mocking remarks about them."¹²⁵

7. THE "REMAIN IN MEXICO" AGREEMENT TO RECEIVE U.S. ASYLUM-SEEKERS

On December 20, President Donald Trump announced that the U.S. would be sending Central American asylum-seekers back to Mexico to await the results of their asylum processes. Trump cited a relatively obscure law INA § 235(b)(2)(C), which states:

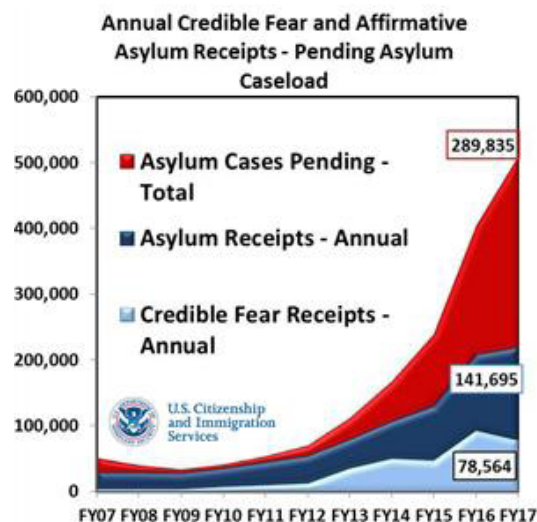
"Treatment of aliens arriving from contiguous territory. In the case of an alien described in subparagraph (A) [a person not clearly ineligible to enter the United States] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240 [removal proceedings]."

Secretary of Homeland Security Kirstjen Nielsen's announcement made full use of the demonizing portrayals of migrants and refugees that characterize the Trump administration, while at the same time trying to circle back to pay lip service to legal obligations to receive refugees:

"Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.' In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution."¹²⁶

The racist premises of the plan, officially and cynically called the "Migrant Protection Protocols", are abhorrent: asylum-seekers are impostors who fake persecution, conniving pretenders who "skip court dates" and dangerous tricksters who "disappear into" our communities where they commit violent crimes. The objective of shunting them off to Mexico had been percolating within the Trump administration for months. When this idea was floated in early 2018, the Peña Nieto government rejected it immediately.

For members of the migrant and migrant rights community in Mexico, the apparent deal cut by the Lopez Obrador government has been a huge disappointment. Mexican Foreign Relations Minister Marcelo Ebrard accepted the decision by Trump, calling it "is an internal matter", despite the fact that the measure implies dumping approximately 75,000 non-Mexican asylum-seekers a



year on the Mexican side of the border.¹²⁷ Under-Secretary Human Rights, Martha Delgado, stated that the Mexican government's decision was an "immediate response" to a unilateral decision, a disingenuous statement considering that rumors about the negotiations had been circulating for weeks and that Mexico has no obligation to accept unilateral decisions from the United States that involve its own border policies. Delgado noted, "We've decided to receive them for humanitarian reasons, especially women and children..." She did not explain how continuing with the normal procedure of maintaining asylum-seekers in the United States to attend to their cases would constitute a violation of human rights or humanitarian values.¹²⁸ While the U.S. government may use its own national law to justify expelling asylum-seekers to Mexico while they await resolutions, Mexico can also use its laws to refuse to accept them and insist that the United States live up to its international responsibilities.

Ebrard made a point of insisting that Mexico had not, and would not, accept a Safe Third Country agreement with the United States. The following are the differences and similarities between a Safe Third Country agreement and the so-called "Remain in Mexico" agreement that the Mexican government apparently has accepted:

1. As discussed above, the safe third country agreement effectively eliminates the possibility of Central Americans to request asylum in the United States by obliging them to request asylum in Mexico as the first "safe" country of entry. Under the "Remain in Mexico" arrangement, migrants can request asylum in the United States and would be returned to Mexico to await a decision.

The procedure is that asylum-seekers coming through Mexico enter the United States and make their case for "credible fear", that is, that they are persecuted in their home country.¹²⁹ Typically, the majority of these cases are recognized and passed on to an asylum hearing. The asylum-seeker is then returned to the Mexican border to await a decision, which takes years. The individual seeks asylum and carries out the legal process in the United States, not in Mexico.

2. The "Remain in Mexico" plan is not a binding treaty or formal agreement. Since it was announced as a unilateral decision of the US government, the Mexican government is going along with it while washing its hands of the responsibility for imposing it.
3. Both agreements are essentially designed to make refugees disappear into the cracks of the global system of institutionalized inequality. The injustices of the safe third country mechanism have been detailed above. The "Remain in Mexico" program requires asylum-seekers in the United States to live indefinitely in what is likely to be a dangerous and precarious environment for them on the Mexican border. Migrants are easy prey for drug cartels and despite promises of employment and basic necessities from the Mexican government, presumably with financial aid from the US, it is unlikely that they will immediately find jobs, schools, healthcare, housing and adequate food and safety. The program divides families as they are stuck in limbo, most unable to join family members in the United States, but unable to return to their home countries without losing their asylum cases.

4. Both have an inordinately heavy impact on women and children. Currently, there is a strong trend of more family units and women and children migrating north through Mexico, a trend that is expected to continue

The Mexican government has not publicly locked itself into receiving US asylum-seekers. However, the operative word is “publicly”—it is not clear what commitments were made during the negotiations that presumably took place between US Secretary of State Mike Pompeo and Foreign Minister Marcelo Ebrard in late November.¹³⁰ By all indications, the Mexican government had negotiated its acceptance of Trump’s plan, which will probably be declared illegal in U.S. courts, prior to the Dec. 20 announcement. On Dec. 18, International Migrants Day, the Mexican government announced an ambitious “Comprehensive Development Plan” for Central America, entailing investment from the U.S. and Mexico for more than \$30 billion dollars in the region.¹³¹ Migrant rights groups worry that the pledge of U.S. investment for the Northern Triangle and for projects in southern Mexico defined as priority by the new government involved a trade-off for accepting the asylum-seekers. Although the governments have not revealed details of the plan, much of the money would come from resources already in the pipeline, expected private investment and loans.

The “Remain in Mexico” plan has not been implemented as of this writing. U.S. border communities report that asylum-seekers, mostly women and men, are being dropped off in the streets of their communities as the men are held in detention centers. There is considerable doubt regarding the legality and the feasibility of the plan. It has been universally condemned by immigration rights groups in the United States, which have vowed to challenge it in court.¹³²

Organizations in Mexico, including the Americas Program, held a press conference just weeks before it was announced, urging the government “to reject any agreement with the United States that limits or denies in practice the rights of migrants, asylum seekers or refugees.¹³³ In particular, we demand that our government resist pressures from the Department of Homeland Security (DHS) to accept a ‘Safe Third Country’ agreement, ‘Remain in Mexico’ or any other plan that seeks to incorporate Mexico into the failed immigration system of the United States.” The letter was delivered to the Under-Secretary on Migration in the Ministry of the Interior. Following the decision to receive the U.S. asylum-seekers, the organizations have condemned the decision and requested detailed information on what and how it will be implemented.

8. SAFE THIRD COUNTRY AND “REMAIN IN MEXICO” IN THE CONTEXT OF THE GENERALIZED TREND TO AVOID RESPONSIBILITY

The concept of a safe third country is like playing hot potato with refugees. If current trends are not reversed, we are seeing the construction of a global system in which families that face life-and-death situations will not be able to find refuge in any country. Furthermore, this is happening in a context where the causes of violence are not being analyzed with the sufficient rigor to be able to design effective solutions that would allow people to remain in their places of origin. It has been amply demonstrated that Central American migration is overwhelmingly forced migration. As Melissa Fleming of the UNHCR said, “the simple truth is that few people would ever risk their

lives on a journey so dangerous if they could find safety and sustenance where they are."¹³⁴

The claim that wealthy nations must reject migration flows because they are unable to receive more migrants is increasingly accepted without question, despite the fact that especially in the case of Mexico and the United States these flows constitute a tiny fraction of the population. States, with the Trump administration in the vanguard, are looking for ways to close their borders to individuals fleeing desperate situations who simply need a safe place to live and raise their families.

The myths that are constructed to justify the anti-immigrant policies that many governments seek to pursue do not hold up under rational examination. Treating refugees and asylum seekers as a problem, and investing millions of pesos or dollars to stop them from coming in, raises questions not only of what kind of policy to adopt but of what kind of society we are. It has also been shown that restrictionist policies are irrational and inefficient, even in pursuit of their own biased objectives goals.

MYTHS AND FACTS ABOUT POPULATIONS SEEKING PROTECTION

1. Myth: Refugee flows are a problem for society.

Fact: Migrants support national economies, and every major study shows a net positive effect of the migrant population on the economy. Migrants and refugees are human beings with needs and rights.

There are many studies that show that migrant and refugee population, far from hurting the economy, create wealth. In a study about the economic effect of flows of asylum seekers in 15 countries in Western Europe between 1985 and 2015, researchers at the National Center for Scientific Research of France found that these flows had a positive macroeconomic effect:

"[Migration flows] significantly increase per capita GDP, reduce unemployment, and improve the balance of public finances; the additional public expenditures, which is usually referred to as the "refugee burden," is more than outweighed by the increase in tax revenues."¹³⁵

Data from the World Bank about remittances sent by migrants, in general, shows that migrants and refugees, with and without papers, are able to create wealth and send it to their families, which has a positive impact on their home countries.¹³⁶ Data from numerous studies in the United States demonstrates a net contribution of millions of dollars thanks to migrants.¹³⁷

2. Myth: We are facing a "crisis" of migrants at the border.

Fact: Mexico receives a manageable number of refugees and would have the capacity to receive many more if its asylum system were given more resources.

Migration flows through North America are not the human "surge" that Donald Trump repeatedly claims. In fact, they are at historically moderate levels and are entirely manageable to the benefit of the migrant families and the receiving communities with proper resources and policies.

In 2017, the world's population was 7.6 billion people. That year, the total number of refugees was 19.9 million people, and the number of asylum-seekers was 3 million, spread out across the world,¹³⁸ which adds to a total of 23 million refugees and asylum-seekers.¹³⁹ Of that population, there were 9,017 refugees and 10,368 asylum-seekers in Mexico, adding up to 19,385 people out of a total national population of 129,163,280.¹⁴⁰ In the United States, there are 287,129 refugees and 642,721 asylum-seekers in the country, adding up to 929,850 people out of a total population of 325,719,180.

In 2017, refugees and asylum seekers, together, represented .015% of the population of Mexico and 0.29% of the population of the United States.

It's also important to remember that in the past, Mexico has received a much higher number of refugees. In 1990, there were 356,400 refugees in Mexico.¹⁴¹ Likewise, in the United States in 1990, there were 464,887 refugees.¹⁴² At that time, the population of both countries was smaller.

By comparison, in the entire European Union (28 countries):

- in 2016 there were 1,887,348 refugees and 1,206,120 asylum seekers in the European Union, adding up to 3,093,468 people for a total population of 511,218,960, or 0.6% of the population.
- 649,855 asylum-seekers requests were made in 2017, a decline of 46% compared with 2016, with 1,206,120 requests made.
- there was a significant decline in the number of recognitions of refugee status in 2017 in several countries, at the same time that there was a global increase in the number of refugees and asylum seekers. The number of refugees accepted in the United States was lower than ever in 2017.¹⁴³

3. Myth: Mexico is incapable of absorbing refugees and on that basis must reject asylum-seekers from the United-States

Fact: The Mexican asylum system is currently facing a demand beyond its capacity. However, the fundamental issue is not capacity since capacity can be increased if there is the political will and commitment to respond to the demand. The fundamental issue is that Mexico should not receive migrants who have chosen to seek asylum in the United States and would be forced to seek asylum in Mexico. Doing so amounts to abetting the racist and exclusionary policies of the Trump administration, which violate the rights of migrants and refugees, and is based on a white supremacist politics. Accepting that role is an insult to Mexicans and a violation of the basic rights of Central Americans.

4. Myth: Mexicans are opposed to the safe third country agreement with the United States because they don't want to receive Central American refugees

Fact: Although some parts of Mexican society were hostile towards Central American migrants during the October exodus, there was a tremendous outpouring of solidarity. Mexican rights organizations have stated clearly that they are opposed to agreements like the safe third country agreement and the current agreement to receive U.S. asylum-seekers because refugees have the international right to request asylum where they choose. Each country that receives refugees must evaluate each one's situation and needs according to the merits of her or his case, and according to the law and international agreements.

The implementation of safe third country agreements and arrangements such as the Remain in Mexico agreement to effectively deport, albeit temporarily, U.S. asylum-seekers to Mexico (see Section X) has the effect of fomenting fear. It also has the effect of naturalizing anti-immigrant policies and the models of economic development and war policies that provoke displacement and forced migration. Opposition to these arrangements stems from their racist premises and violations of human rights, not from a rejection of the migrants themselves.

CONCLUSION

There is a worrying absence of reflection about the consequences of safe third country mechanisms, the Remain in Mexico agreement and policies to deport, detain and dissuade asylum-seekers. Where are refugees going to go? What happens to them when they are forced to return to their home countries? Who is responsible?

The law mandates that asylum cases be considered on a case-by-case basis. The protection system developed after the Second World War was focused on personal situations from which people were fleeing for specific reasons. A country can be safe for some and not for others, because of their different characteristics. Just because a country is not considered safe for all does not mean that it cannot or does not have the obligation to receive refugees, and countries that are considered generally safe may not be safe for certain individuals. All countries that signed the Geneva Convention agreed to protect refugees.

Today, many states are denying the right of people to live in safety in the places they choose, with the argument that if they are fleeing, they should be worried solely about survival, not about their futures and even this is a pretext for not receiving them. The increasingly selective and restrictive policies that these states are adopting violate the principles of refugee law and human rights.

The use of the safe third country concept and the Remain in Mexico program reflects the unwillingness of wealthy countries, particularly the United States, to take responsibility for their actions relating to these populations and their reasons to flee. They expose the fact that the Trump administration, and a growing number of governments in other parts of the world, are effectively deciding to end protection for refugees and asylum seekers. These measures violate laws that protect refugees. However, the current crisis is not just a crisis of failure to follow the law, but also a moral and social crisis.

Rather than a refugee crisis, the world is witnessing a refugee protection crisis.

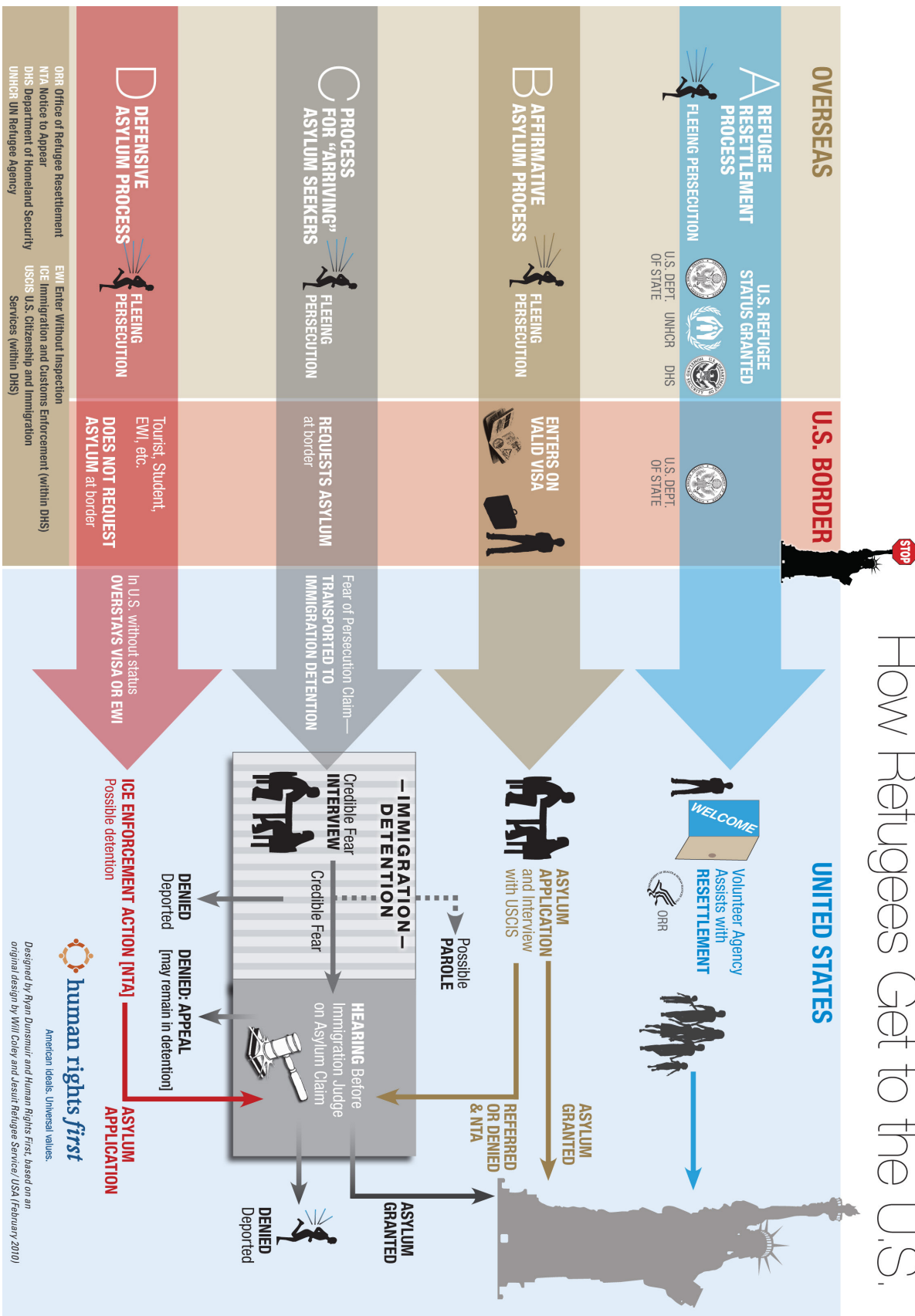
In attempting to keep refugees outside of their territory, states defend their policies of borders and walls through hate and fear. There's only one way to overcome the barriers of racism that U.S. elites are consciously building: talking to each other:

"We must put a human face on the phenomenon of migration and on migrants themselves. The media presents them as criminals or as individuals who go to the United States merely to take advantage of that country's wealth and standard of living, without taking into account that people are fleeing, or the fact that the United States has helped create the conditions that are forcing them to leave. If we don't tell those stories and listen to them, racism is going to keep winning. The moment when people actually meet each other face to face is the moment when the walls fall down, the moment when the myths built by the media, and the hatred built by politicians, starts to vanish.

Because, from person to person, from heart to heart, one can recognize the nobility of the migrant, and also the capacity for generosity of people in destination communities. "¹⁴⁴

APPENDICES

How Refugees Get to the U.S.





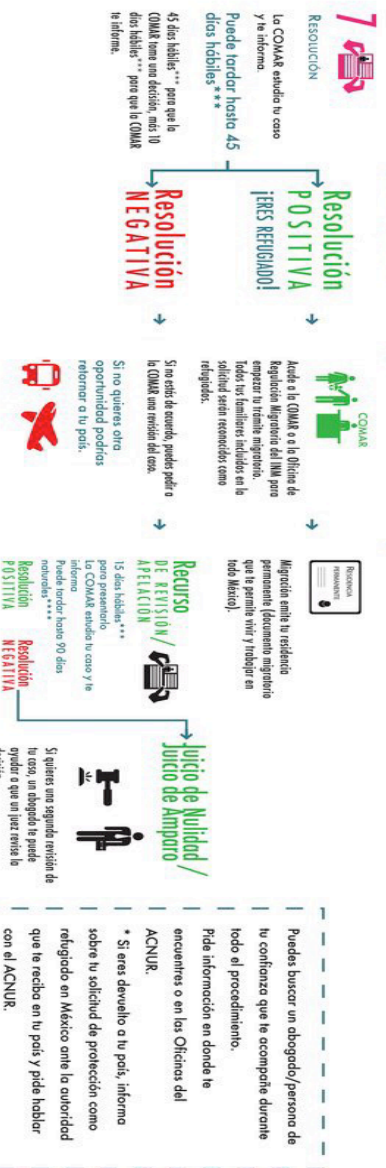
MIEDO PELIGRO

Si tienes MIEDO PELIGRO de regresar a tu país porque tu vida corre solicita la protección como REFUGIADO EN MÉXICO



Pasos para solicitar la condición de refugiado en México

- 1** **MIEDO PELIGRO**
Si tienes MIEDO DE REGRESAR A TU PAÍS, NO ESTÁS SOLO/A. Solicita protección como refugiado en México.
Si tu familia te acompaña, no olvides incluirlos en tu solicitud. Si se encuentran en el país de origen debes indicarlo.
Recuerda que migración **NO** te defenderá cuando te entregues a las Oficinas de Asignación Migratoria para presentar tu solicitud. A partir de este momento tienes el derecho a no ser devuelto o tu país.*
- 2** **SOLICITUD**
Ayuda a la oficina de la COMAR o te encuentras en su oficina, Agrupación Migratoria del INM en la Ciudad de México, o a sus Oficinas de Asignación Migratoria del INM en el resto del país para presentar tu solicitud.
- 3** **CONSTANCIA**
La COMAR te da un documento que prueba que te encuentras en el procedimiento.
Tu procedimiento inicia a partir de esta fecha.
No olvides que debes permanecer en la entidad federativa donde solicitaste la condición de refugiado. Si deseas trasladarte a una entidad federativa distinta debes solicitar autorización a la COMAR.
- 4** **VISANTE POR PASAJES HUMANITARIAS****
Con tu constancia solicita al INM tu título de visitante por razones humanitarias (te permite viajar durante el trámite).
Visante por Pasajes Humanitarios**
- 5** **FORMULARIO**
Llena un cuestionario explicando por qué estás de tu país.
La COMAR no va a compartir con nadie lo que tú le digas.
Formulario
- 6** **ENTREVISTA**
La COMAR te entrevista en persona para tener a tu vida corre peligro en tu país.
Si vienes junto a tu pareja, la entrevista puede ser realizada de manera individual.
Entrevista



- GRMS** Todo el procedimiento es gratis.
- Si tienes pruebas puedes mostrarlas a la COMAR.
- La COMAR no va a compartir con nadie lo que tú le digas (CONFIDENCIAL).
- Tienes derecho a tener representación legal durante todo el procedimiento.
- Mientras se resuelve tu solicitud, tienes derecho a salud pública gratuita durante 90 días con el Seguro Popular.
- Recuerda informar a la COMAR dónde se encuentran tus familiares.
- Puedes contactar a la Agencia de la ONU para los Refugiados (ACNUR).
- La CNDH te acompaña y protege tus derechos humanos.

- Solicita la condición de refugiado si tienes temor o miedo de regresar a tu país, pide comunicarte con la COMAR.
- COMISIÓN MEXICANA DE AYUDA A REFUGIADOS**
- Ciudad de México**
Dinamara No. 84, piso 4, Cal. Juárez
01 (55) 5109 8800 ext. 30150, 30162 y 30133
- Tampacón, Chiapas**
8a Avenida Sur y 4ta Panatina, No. 39 Cal Centro
01 (962) 642 3318 y 642 3319
01 (55) 5109 8800 ext. 30195
- Acrueros, Veracruz**
Carretera Costero del Gallo No. 180, Km. 221
01 (924) 247 2191
01 (55) 5109 8800 ext. 30163
- Ciudad de México**
Dinamara No. 84, piso 4, Cal. Juárez
01 (55) 5109 8800 ext. 30150, 30162 y 30133
- Ciudad de México**
Carreteras Severino 193, piso 14, oficina 1402, Cal. Gonda
01 (55) 5083 1710
- Tampacón, Chiapas**
21 Oriente No. 22, entre 9a. y 11a. M. Norte, Cal. Lomas del Socorro
01 (962) 642 5198 y 642 3199
- Acrueros, Veracruz**
Teléfono CAJUNO EN MÉXICO
01 800 226 87 69 (01 800 ACNURMEX)
- Tampacón, Tlaxcala**
Calle 22 No. 404 esquina con Calle 25, Centro Tlaxiangué
01 (934) 342 1687 y 342 1644
- Puedes buscar un abogado/persona de tu confianza que te acompañe durante todo el procedimiento.
Pide información en donde te encuentres o en las Oficinas del ACNUR.
* Si eres devuelto a tu país, informa sobre tu solicitud de protección como refugiado en México ante la autoridad que te reciba en tu país y pide hablar con el ACNUR.
** Condición de estancia de visitante por razones humanitarias: como condición de reconocimiento de la condición de refugiado, artículo 52, V, c) de la Ley de Migración.
*** Días hábiles: de lunes a viernes, no cuentan sábados, domingos y días festivos.
**** Días naturales: de lunes a domingo, si cuentan fines de semana y días festivos.
INM: Instituto Nacional de Migración (es del gobierno de México).

Endnotes

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And later, the Court mentioned regarding Greece:

“the Court found that the reception conditions of asylum seekers, including the shortcomings in the asylum procedure, amounted to a violation of Article 3, read alone or in conjunction with Article 13 of the Convention (see *M.S.S. v. Belgium and Greece*, cited above, §§ 62 to 86, 231, 299 to 302 and 321).”

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“71. It follows from all of the foregoing considerations that, independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure.

72. For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that ‘the EU and [the Republic of] Turkey agreed on ... additional action points’, the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.” <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188483&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=612658>

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