

THE ASYLUM CRISIS: WHAT CAN WE DO?

An NPG Forum Paper
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On May 13th 1939 a boat carrying 937 Jewish refugees fleeing Nazi persecution sailed from Hamburg, Germany to Havana, Cuba. Most of the passengers had applied for U.S. visas, and planned to stay on Cuba until they could enter the United States legally. By that time, it was clear that the Nazis were gearing up their efforts to place Jews in concentration camps. World War II and the formal implementation of The Final Solution were a few months away.

The S.S. St. Louis arrived in Havana on May 27th. The 28 people on board with valid visas were allowed to disembark. The Cuban government refused to admit the roughly 900 others. Some of them cabled President Franklin D. Roosevelt asking for admission as refugees, but he never responded. A State Department telegram warned that the asylum seekers must **“... await their turns on the waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”**¹

The ship continued north to Canada, but it was rejected there, also. **“No country could open its doors wide enough to take in the hundreds of thousands of Jewish people who want to leave Europe: the line must be drawn somewhere,”** Frederick Blair, Canada’s director of immigration, said at the time.

Out of options, the ship returned to Europe. Nearly half of those traveling on the ship perished in the Holocaust.

The League of Nations made no provision for the humane treatment of people facing persecution – or worse – in their homeland. Its successor, the United Nations, filled the void. The 1951 UN Convention on Refugees defined a refugee as a person outside of his or her home country who cannot return home because of a **“...well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”**²

A subsequent convention prohibited nations from **“...returning, extraditing, or refouling any person to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”**³ The UN’s Convention Against Torture (CAT) also specifies that this danger must be assessed not just for the initial receiving state, but also for states to which the person may be subsequently expelled, returned or extradited.

Had these provisions been in place, passengers on the St. Louis would have been admitted as asylees in Cuba or the U.S. They were clearly fleeing persecution on account of their religion. They would not have been shipped back to Europe from the Western Hemisphere. One of many such incidents, thousands of lives would have been saved.

NEVER AGAIN

There are a lot of things the Trump administration can do to resolve the current border crisis, but getting rid of the asylum process is not one of them. We signed the UN refugee convention. Its standards have been added to U.S. immigration law, which the President cannot change.

Genocide is never to be condoned under international law.

(As brought out below, the interpretation of UN standards by U.S. district courts has been problematic, at best, and is responsible for much of the disfunction in the current asylum system.)

The question we try to answer here, when thousands of Central American migrants are clamoring to enter the U.S. each month, is whether they meet the UN definition of “refugee.”

The answer, as we see it, is a resounding *no*.

The vast majority are fleeing domestic violence and abject poverty. These conditions, while unfortunate, hardly constitute persecution for reasons of “...race, religion, nationality, and membership of a particular social group or political opinion,” enshrined in both the UN Convention and U.S. immigration law. Yet - until recently - illegal aliens claiming a “well-founded fear” of persecution on these grounds *were* allowed to enter the country.

Furthermore, the Supreme Court defined “well-founded fear” to include cases where there is as little as a 10% chance of persecution.⁴

The low bar gave asylees virtually unfettered access to the U.S. during the Obama years. Open borders is not what the asylum law is all about. Yet open borders is what we had until recently.

NOVEMBER 2018: TRUMP TRIES TO ENFORCE THE ASYLUM LAW

U.S. immigration law gives the President broad authority to restrict the entry of illegal aliens into the United States if he determines it to be in the national interest to do so. On November 8th, 2018 the acting Attorney General (AG) Matthew Whitaker declared that migrants crossing the southern border between official ports of entry would be ineligible for asylum. Two sections of the Immigration and Nationality Act (INA) were cited as justification:

Section 212(f), which states that “[w]henver the President finds that the entry of *any aliens or of any class of aliens* into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, *suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens *any restrictions he may deem to be appropriate.*”⁵

and

Section 215(a) which states that it is “unlawful... for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.”

Taken together, these sections effectively criminalize the actions of asylees who attempt to enter after November 8th, 2018. Had the rule been allowed to stand, illegal border crossers would have been subject to deportation.

Unfortunately, “**That rule was blocked by the courts.**”⁶ When we non-lawyers read this statement, we think of checks and balances – the judiciary preventing overreach by the executive branch. Our friends at the Immigration Reform Law Institute (IRLI) set us straight:

“...the district court really did not have any valid criticism of the Attorney General’s application of U.S. law. Instead, over and over again, the district court overruled the Attorney General because his conclusions differed from a United Nations handbook on refugee policy that the district court claimed should be used as an authoritative guide to U.S. law. This handbook, however, is not part of U.S. law, but is merely a document produced by an international agency, and the Supreme Court has repeatedly held that it is not binding either on U.S. courts or on the Attorney General.”⁷

Implication: Our national sovereignty is threatened at the border and in the court system.

The courts *did* allow the Department of Homeland Security (DHS) to enforce a **Remain in Mexico** policy, requiring asylum seekers to wait in Mexico until their court hearing date. More than 12,000 migrants looking for asylum protection are now waiting across the border in Mexico.⁸ In prior years they would have been waived in to the U.S., told to apply for asylum within one year, and released. Most never bothered to apply, while less than half of those that did actually showed up for their court dates.

The Bad News: Many are languishing in unsafe cities in northern Mexico. Most want to go home, but cannot afford the one-way bus fare (3,000 pesos, or about \$155) for a private one-way bus ticket back to Central America.⁹ Their money has already gone to the smugglers who guided them to the United States.

The Good News: These horrible conditions already appear to have deterred asylum seekers from

undertaking the perilous journey to the U.S. (See below.)

Better Remedy #1:

WEAPONIZE U.S.-MEXICO TRADE POLICY

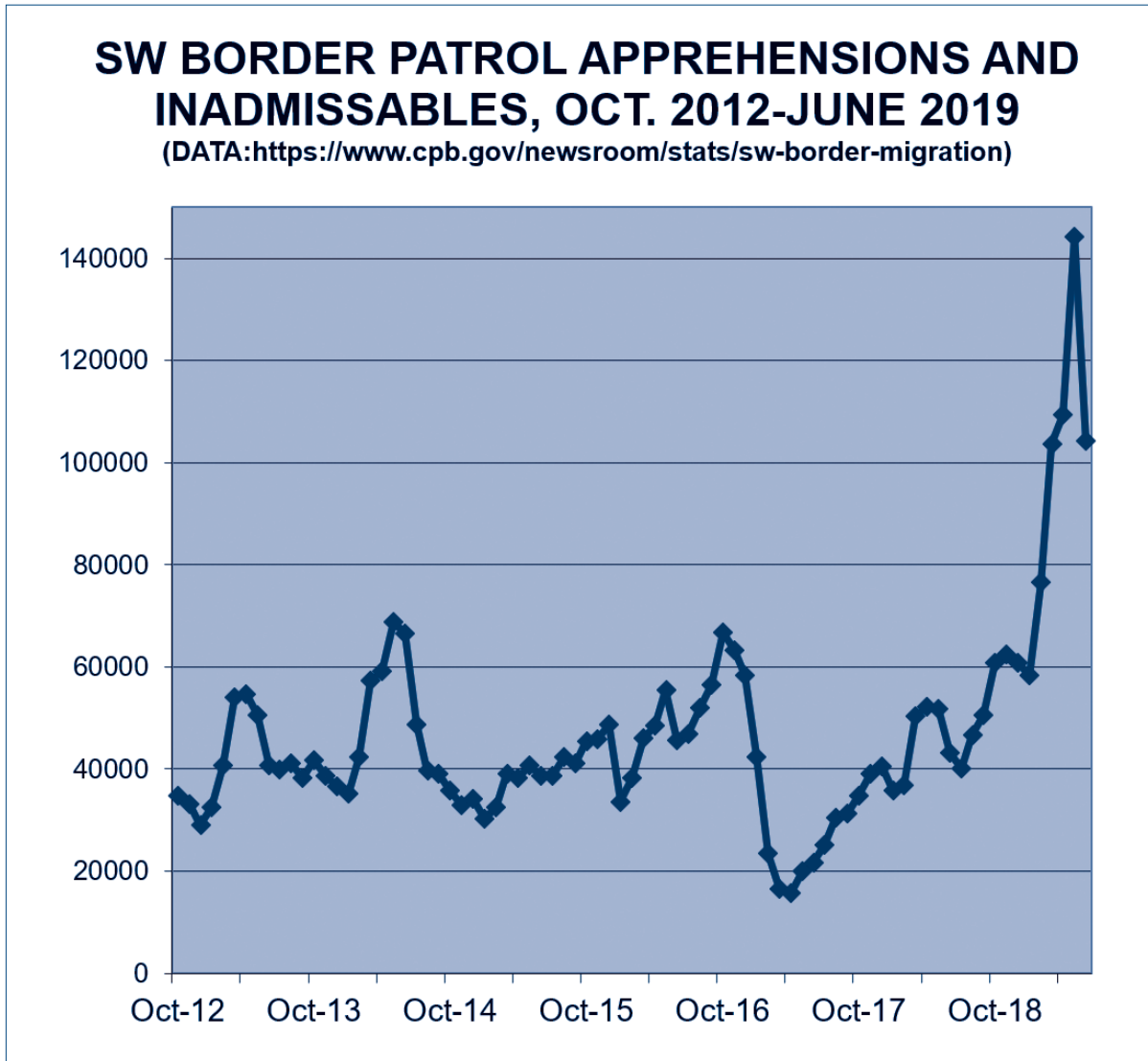
Since taking office President Trump has made border security a hallmark of his immigration policy. These efforts include a more robust border wall, slowing the processing of asylees at legal ports of entry, and holding ever larger numbers of illegal entrants in detention facilities.

In the beginning these initiatives were undertaken unilaterally by the U.S. In June 2019 the Administration persuaded Mexico to lend a hand.

OK, “persuaded” may not be the right word. To make good on a trade deal Mexico signed with the U.S. – and avert U.S. tariffs that would have destroyed much of Mexico’s economy - the Trump Administration essentially forced that country to deploy more than 20,000 security forces throughout the country’s southern and northern border states.

The deployment made an immediate impact. U.S. DHS says there was a “substantial increase” in interdictions along Mexico’s southern border with Guatemala in June. Mexican authorities concur, reporting that migrant apprehensions rose from 23,419 in May to 29,153 in June.¹⁰

Its impact was also felt more than one thousand miles north, along the U.S.-Mexican border. U.S. Border Patrol apprehended 29% fewer illegal entrants in June than in May.



June apprehension declines are not at all unusual. Nearly every summer since 2000 has seen similar declines. The one exception was the short-lived “Trump Effect” in 2017, when illegal border crossers moved up their crossing dates to before his inauguration, and others stayed away until they realized that little had changed.

A seasonal pattern is at work, as higher temperatures make the crossing more dangerous. But June 2019’s decline was particularly sharp. The average decline from May to June in 2000 to 2019 was 20%; the decline in June 2019 was 29%. The militarization of Mexico’s southern border in 2019 is one reason. Harsh conditions and family separation policies reported in U.S. detention facilities undoubtedly contributed.

Appearances are deceiving: the decline in illegal crossings is a win-win for both Mexico and the U.S. Mexican authorities had been trying to plug well-known, albeit illegal, crossing points along their southern border with Guatemala for some time. According to the Pew Research Center, Mexico deported 64,000 migrants from Honduras, Guatemala and El Salvador in the first seven months of FY 2019.¹¹

On our side of the border, overcrowding at detention facilities has abated.

The immigration courts may finally have time to hear cases of individuals already here, and deport those found ineligible for asylum.

Better Remedy #2:

SAFE THIRD NATION LAW

For decades the United States has treated Mexico’s border controls as an extension of its own. In 1904, the U.S. government established the first patrols of the Mexican border to block Chinese nationals smuggled across, seeking to avoid U.S. “Chinese exclusion” laws applied at ports of entry.¹² In the 1980s the U.S. pressured Mexico to hold Salvadorans and Guatemalans fleeing U.S.-supported military regimes. As the perceived threat of Muslim terrorism rose after 9/11, the U.S. pushed Mexico to divert migrants who entered from the Middle East and Africa bound for the United States.

The latest incarnation of this policy emerged in July 2019, when Trump administration officials said they would deny asylum to Central American migrants who failed to apply for asylum in the first safe country they passed through on their way north.



Translation: Apply in Mexico or Guatemala first. The map shows why.

Honduras and El Salvador are both south of Guatemala. Under the new rule, northbound Honduran and Salvadorian migrants would have to apply for – and be denied - asylum in Guatemala or Mexico before being eligible to apply in the U.S. Guatemalans would have to apply, and be rejected, for asylum in Mexico before applying here.

The rule would effectively limit asylum to Mexicans and those who cross the southwestern border by sea. Migrants from Honduras, El Salvador, and Guatemala would be stopped. They collectively comprise the lion’s share of Border Patrol apprehensions along the SW border.

The same dynamic applies to the drug smuggling. Even liberals acknowledge that the large rise in Central American families seeking asylum reflects, in part, the relative lack of scrutiny for family units at the border. “Parents” are often drug cartel operatives using children as cover.

Pro-migrant activists also ignore recent history. A small, but rapidly increasing number of migrants from Honduras, El Salvador, Guatemala, and other countries, have sought asylum in Mexico. In 2016 nearly 8,800 people applied for asylum in Mexico, almost seven-times as many as in 2013.¹³ And the trend is accelerating: The U.S. State Department, in its 2017 Human Rights Report for Mexico, notes: “The government and press reports noted a marked increase in refugee and asylum applications during the previous year. UNHCR projected the [Mexican] National Refugee Commission (COMAR) would receive 20,000 asylum claims by the end of the year, compared with 8,788 in 2016.”¹⁴

Asylum laws in both Mexico and the U.S. are broadly based on the United Nations Refugee Convention of 1951. In 2011 Mexico expanded its list of individuals eligible for asylum to include people fleeing “...**generalized violence, foreign aggression, internal conflict or major human rights violations.**”¹⁵ In other words, the same kind of domestic violence that AG

Jeff Sessions and his successor, Acting AG Matthew Whitaker, says is *not* a valid pretext for asylum in the U.S., *is* acceptable under Mexican law.

In addition, “In 2016 Mexico added protections in its Constitution saying that anyone entering the country has the right to request asylum.”¹⁶

Bottom line: the legal grounds for asylum in Mexico are more generous than those in the U.S.

If Mexico is so receptive to asylum seekers, why didn’t the Hondurans, Salvadorians, and Guatemalans seek asylum there instead of crossing into the U.S.? “**Simply put,**” says former immigration judge Andrew Arthur, “**there is no requirement for them to do so under U.S. law.**”¹⁷

SW BORDER PATROL APPREHENSIONS BY COUNTRY OF ORIGIN, 2018-2019 (Unaccompanied children and individuals traveling in family units)			
Country	FY2018	FY2019 (a)	% change
El Salvador	18,618	54,008	190.1%
Guatemala	72,728	194,272	167.1%
Honduras	50,352	168,911	235.5%
Mexico	12,397	11,052	-10.8%
Other	3,153	25,689	714.7%
Total	157,248	453,932	188.7%

a. October 2018 through June 2019 (1st 9 months of FY2019).
Data source: Border Patrol.

The predictable result: Pro-migrant activists now say that neither Mexico nor Guatemala are “safe countries” for Central Americans to seek asylum, and therefore safe third-party agreements with those nations cannot possibly meet our commitments under the UN refugee convention and U.S. immigration law.

This argument is based on the violence that takes place in Mexico’s northern border cities and most of Guatemala.

This argument overlooks the fact that much of the violence stems from infighting among human smugglers competing for customers in those places. By clamping down on asylum Trump is cutting profit margins, and absent profits, there will be little incentive for gangs to fight for market share.

That requirement is now in place, thanks to the safe third nation agreements the U.S. signed with Mexico and Guatemala in July 2019.

Canada also has liberal asylum laws, but Canada is subject to a different set of asylum regulations than Mexico. Under the Canada-U.S. Safe Third Country Agreement, **“refugee claimants are required to request refugee protection in the first safe country they arrive in, unless they qualify for an exception to the Agreement.”**¹⁸ The agreement stipulates that if an illegal alien enters the U.S. and attempts to enter Canada without applying for asylum here, Canada can send the alien back to the U.S. And vice-versa: the U.S. can halt illegals entering from Canada who have not applied for asylum there.

The Canada-U.S. agreement has been in effect since December 29, 2004.¹⁹ As with agreements just signed with Mexico and Guatemala, it was designed to ensure that grants of asylum go to individuals fleeing persecution, not to those seeking better jobs or living standards.

Had a similar agreement been in effect with Mexico, American officials would have likely stopped the Central American invasion long before it reached crisis stage.

Better Remedy #3

A HUMANITARIAN PROGRAM BASED IN MEXICO

“First, with the stroke of his pen, the President could replace the current asylum-focused chaos with a special humanitarian refugee program based in Mexico.”²⁰ So begins IRLI’s response to the request for public comments by DOJ and DHS earlier this year. At issue was the rule denying asylum to aliens entering illegally.

IRLI’s plan would open refugee application offices at U.S. consulates in Mexico and Central America. (The legal definition of refugee and asylee are identical; refugees are outside the country, asylees are in it.) Applicants for refugee status receive more comprehensive vetting—which helps exclude criminals, terrorists, and other undesirables—than do asylum claimants. And illegal entrants who refuse to apply as special humanitarian refugees can be denied both entry and asylum under our laws.

In the meantime, IRLI would streamline processing of Central American migrants at legal ports of entry. The administration adopted a system, negotiated with Mexican authorities in December, requiring asylum applicants to wait in Mexico for their screening interviews. IRLI would modify this practice by scheduling appointments for illegal entrants after those of aliens who initially appear at ports of entry. Illegal entrants can also be required to complete their application forms before even receiving an interview date.

IRLI also recommends that the Administration impose **“...asylum application fees on illegal entrants, to help recover the massive expenditures on enforcement resources needed to process illegal entrants seeking asylum.”**²¹

Finally, IRLI notes that the common definition of what constitutes being “in the U.S.” differs from the strictly legal one:

“...Only aliens ‘present in the United States’ have a statutory right to apply for asylum. The legal definition of ‘United States’ excludes our territorial waters, including rivers, lakes, and wetlands on the border—features that dominate border topography between El Paso and the Gulf of Mexico.”²²

The obvious implication is that aliens apprehended on this part of the border are technically ineligible for asylum, and subject to deportation.

“Lamentably, convincing Congress to fund effective border barriers appears to be a long twilight struggle,” writes Dale L. Wilcox, executive director and general counsel of IRLI. **“In the meantime, it is essential that the President scrutinize our existing laws to find faster methods of shutting down the surge of illegal entry from Mexico...”**²³

MEANWHILE, BACK AT THE UN...

“Migrating is not a choice”, according to Henrietta Fore, executive director of the United Nation Children’s Fund (UNICEF). Speaking to

the press at the Paris G-7 conference in July, Fore insisted that the northern and southern borders of Mexico are overwhelmed with migrants because the two principal causes driving people out of their country are not dealt with: **“one concerns violence of criminals and gangs and the other the need to find a source of income.”**

Whether in Syria, Libya, Central America, or elsewhere, the condition of young migrants is globally **“catastrophic”**, Fore said, concluding that: **“...those of us who live in more developed countries must do whatever we can to allow them to get here and integrate.”**²⁴

Due to relentless lobbying on Capitol Hill by UNICEF’s American supporters, the United States provides more unrestricted funding to UNICEF than any other government. The U.S. remains UNICEF’s top funder, with \$132.5 million in 2019.

Fore, a former American diplomat, became UNICEF’s seventh executive director in January 2018. She is a Trump appointee!

Memo to Donald Trump: Use your influence to have Mrs. Fore removed from her UN position. Let her successor know that our financial support comes with conditions: No more checks until UNICEF’s public take on migration is aligned with our own.

SUMMARY

Our border is out of control, and asylum abuse is the reason. Due to a huge number of bogus asylum claims, a process designed to provide refuge to the oppressed has become an enabler for out-of-control illegal immigration. As with all illegal immigration, criminals are getting through with the rest.

The Trump Administration has enlisted international trade policy in its efforts to control asylum, with some success. But economic conditions change. Asylum was designed to protect individuals fleeing persecution, not those fleeing poverty. Until this distinction is firmly entrenched in legal practice, our national sovereignty will be at risk.

WORKS CITED

1. <https://www.history.com/this-day-in-history/ss-st-louis-jewish-refugees-turned-away-holocaust>
2. https://en.wikipedia.org/wiki/Convention_Relating_to_the_Status_of_Refugees
3. https://en.wikipedia.org/wiki/United_Nations_Convention_against_Torture
4. Human Rights First, *Withholding of Removal and U.N. Convention Against Torture – No Substitute for Asylum, Putting Refugees at Risk*, November 9, 2018.
5. <https://www.justice.gov/opa/pr/doj-and-dhs-issue-new-asylum-rule>
6. Michael Shear and Zolan Kanno-Youngs, *Trump Moves to Block Another Road to Asylum*, New York Times, July 16, 2019.
7. Immigration Reform Law Institute, UN Asylum Policies Are not U.S. Law, June 11, 2019.
8. Shear and Kanno-Youngs, op. cit.
9. Miriam Jordon and Kirk Semple, *Once Overcrowded Shelter Sees A Stark New Figure: No Arrivals*, New York Times, July 11, 2019.
10. David Bier, *Decline in June Border Patrol Apprehensions Tracks Prior Years' Patterns*, Cato.org. July 9, 2019.
11. Susan Gzesh, *Safe Third Party Agreements With Mexico and Guatemala Would Be Unlawful*, July 16, 2019, Just Security.org.
12. *ibid.*
13. *ibid.*
14. *Country Reports on Human Rights Practices for 2017*, <https://www.state.gov/documents/organization/277589.pdf>
15. Kate Morrissey, *Should asylum seekers heading to the U.S. stay in Mexico?*, San Diego Union Tribune, May 21, 2018. <http://www.sandiegouniontribune.com/news/immigration/sd-me-safe-country-20180518-story.html>
16. *ibid.*
17. Andrew R. Arthur, *Caravan Points Out Weakness in U.S. Border Policy*, Center for Immigration Studies, April 3, 2018. https://cis.org/Arthur/Caravan-Points-Out-Weakness-US-Border-Policy?utm_source=twitter&utm_medium=social-media&utm_campaign=addtoany
18. *ibid.*
19. *ibid.*
20. IRLI, *Illegal Entries by Asylum Seekers Can be Stopped – Quickly*, January 10, 2019. <https://www.irli.org/single-post/2019/01/09/Illegal-Entries-by-Asylum-Seekers-Can-be-Stopped%E2%80%94Quickly>
21. *ibid.*
22. *ibid.*
23. *ibid.*
24. Nayla Rush, *UNICEF Chief: Developed World “Must” Welcome All Migrants*, CIS, July 10, 2019.



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