

Constructing Deterrence in the Age of Trump: Restricting Asylum, Separating Families, and Criminalizing Migration

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Lost amid the tumult surrounding the Trump administration's family separation policy, which took more than 2,600 children from their parents at the US-Mexico border, was a radical change in the grounds for granting asylum. The new policy, announced by Attorney General Jeff Sessions on June 11, 2018, disallows domestic abuse, gang violence, and drug-traffic-related violence as grounds for claiming asylum in the United States. Mr. Sessions claimed that US asylum law does not offer protection against these types of "private criminal activity" and other kinds of "misfortune." Only being a victim of "public" violence, that is, violence perpetrated by a home-country government, might qualify one for asylum.

This sweeping reinterpretation of US asylum law disproportionately affects nationals of the Northern Triangle countries—Guatemala, Honduras, and El Salvador—since they are the vast majority of asylum-seeking migrants who have been arriving at the US-Mexico border in the current decade, and because virtually all Northern Triangle migrants are fleeing some type of "private" violence.

Despite the Trump administration's frequent characterization of them as largely economic refugees, lawyers working with Northern Triangle migrants report that 85–90 percent are seeking asylum based on grounds now excluded by Mr. Sessions's ruling.¹ Women who are victims of domestic abuse and female teenagers threatened with sexual assault are particularly impacted. Anecdotal evidence suggests that, up to now, at least 35 percent of those who sought asylum in the United States because of domestic violence were granted protection.

In yet another step toward gutting the US asylum system, the Trump administration has announced its intention to stop processing asylum claims in ports of entry along the border, instead requiring asylum seekers to apply for protection from their home countries. This would significantly increase their exposure to the conditions from which they are fleeing. The administration has also made it considerably more difficult to get a credible-fear-of-persecution interview—the first step in the granting of asylum. Homeland Security agents at the border have been told that, given Attorney General Sessions's ruling restricting the grounds for asylum claims, Northern Triangle migrants do not have a realistic chance of passing such an interview and advancing to a hearing before an immigration judge.

On top of all these measures, the Trump administration has been drastically shrinking the whole asylum program. The annual ceiling for refugees who can be resettled in the United States has gone from 85,000 in fiscal year (FY) 2016 to 45,000 in FY 2018. Another 40 percent reduction, to 25,000, has been proposed for FY 2019. This cap would be the lowest since the current program was established by the Refugee Act of 1980, greatly increasing worldwide competition for protection in the United States.

Deterring Central American Transit Migration through Mexico

In 2017 Trump administration officials began advocating the deliberate separation of migrating families to discourage further migration from Central America. A formal family separation policy was announced on May 11, 2018. Mr. Trump

rescinded the policy by executive order on June 20, 2018, in response to an intense public outcry and a federal court order. The administration's replacement policy was to keep migrant families together but to incarcerate as many as of them as possible. This policy was blocked by a pair of federal court orders, including a ruling that denied the administration's request to modify the 1997 Flores settlement, which prohibits detaining children for more than 20 days. On July 10, administration officials suspended family incarceration, citing these court rulings. Henceforth families with children "apprehended"² at the border will be given a court date and released with GPS ankle monitoring devices, thus returning to the "catch and release" practice condemned by candidate Trump in 2016.

However, by early October the administration was planning to revive the family separation policy by placing the onus on migrant parents. Under a new "binary choice" policy, parents will be forced to choose between staying in detention together with their children for months or years as their case proceeds in immigration court, vs. releasing their children to a government shelter while the parents remain jailed. In sharp contrast to Obama administration policy, the Trump administration has been detaining virtually all asylum-seekers who present themselves at the border. Previously, nine out of ten asylum-seekers were released to sponsors on "humanitarian parole" pending their hearing in immigration court. Now, nine out of ten are detained, indefinitely, in federal lock-ups. By October 1 the detainees included about 13,000 children — a fivefold increase from 2017.

More than 765,000 cases are currently backlogged in the US immigration court system, of which nearly half are pending asylum cases. Given Mr. Trump's adamant opposition to hiring more immigration judges to speed up the process (he opposes giving more migrants due process), it may take many months or even years for these families' situations to be resolved. The administration has ordered construction of tent cities on military bases to house up to 20,000 of them.

Making it much harder to access the US asylum system is part of the Trump administration's larger project to reduce migration flows by constructing "deterrence" in various forms. In numerous media interviews, Trump administration officials have explicitly cited discouragement of would-be unauthorized migrants and asylum seekers as the rationale for a wide range of policies, from Mr. Trump's border wall to separating migrant parents from their children, restricting the grounds for asylum claims, stepped-up workplace raids, and a "zero tolerance" policy, under which 100 percent of unauthorized migrants apprehended at the US-Mexico border are prosecuted through the federal criminal court system rather giving them the option of "voluntary departure" as in the past. Moreover, huge cuts in the US asylum program are an integral part of the project pushed by Stephen Miller, Mr. Trump's senior policy adviser, to reduce the overall level of legal immigration by at least one-half.

Beginning in FY 2011, heavier flows of Northern Triangle transit migrants through Mexico have been driven largely by an increase in numbers of child migrants, either unaccompanied or traveling with family members, and women. As part of its response to a 2014 surge in such migrants from the Northern Triangle, the Obama administration launched the Central American Minors (CAM) Program, which allowed about 13,000 minors fleeing home-country violence to settle in the United States, even if they had been denied asylum. The program was terminated by the Trump administration in August 2017.

A new surge in Northern Triangle migration to the US-Mexico border began in the spring of 2018. As in 2014, the flow was dominated by families and unaccompanied children. This time, the Trump administration's simultaneous implementation of the "zero tolerance" policy and a ramped-up family separation policy created a genuine humanitarian crisis.³ Administration officials demonized asylum-seeking parents as suspected human traffickers, to justify putting their children into federal custody.

The zero-tolerance policy was suspended "temporarily" in June 2018, because the federal government lacked the bed space to incarcerate the thousands of migrants being referred for

criminal prosecution each week while keeping families together, as belatedly ordered by President Trump. However, the new restrictions on asylum claims remain in place, essentially closing off the main avenue for Northern Triangle migrants seeking legal entry into the United States.

The Failure of Deterrence

By October 1, 2018, there was little evidence that the Trump administration's new policies were having the intended deterrent effect, and arrests of migrant family units surged to a record level in August-September. Border apprehensions actually increased during the May-June period when both zero-tolerance and family separation policies were in effect.⁴ Nor was there evidence that would-be asylum seekers already at the border were turning around and going home after being blocked by US authorities from making asylum claims at legal ports of entry. This is hardly surprising: Most Northern Triangle migrants seeking asylum are fleeing life-or-death situations, and returnees would be targeted immediately by the violent gangs that control their home communities.

Thousands of other "turn-backs" have piled up in migrant shelters operated by NGOs and in makeshift camps in Mexican border cities, many in the shadow of bridges linking Mexico to the United States, waiting for US authorities to grant them a "credible fear" interview. Under guidance issued in June 2018 by the Department of Homeland Security in June 2018, officials at the border are discouraged from conducting credible-fear interviews, because passing them means that the interviewee has a significant possibility of winning asylum. Under Attorney General Sessions's new reinterpretation of asylum law, Northern Triangle migrants no longer have that chance.

Being bottled up on the Mexican side of the border exposes them to crime and exploitation by police. For example, Tijuana, which has the largest population of turned-back asylum seekers, has the fifth-highest homicide rate among all world cities with over 300,000 inhabitants.⁵ There are media reports that drug-cartel-connected kidnapping rings are systematically stalking migrants who have been turned away at the US border. Nevertheless,

focus groups and media interviews with Northern Triangle migrants have revealed a consistent pattern: The perceived risks of going to the United States are less than the dangers of staying home, and the risks of returning home from the US border (death, rape) outweigh the prospect of long-term detention.

The influx of transit migrants into Mexico, most headed for the United States, now exceeds the flow of undocumented Mexican nationals seeking entry into the United States. By the most authoritative estimate, 392,000 Northern Triangle migrants transited through Mexico in 2014.⁶ Estimates by the Pew Research Center show that inflows of Northern Triangle migrants into the United States nearly doubled between 2011 and 2014, while inflows of Mexicans declined. Similarly, US Border Patrol statistics show a nearly 300 percent increase in apprehensions of third-country nationals at the US-Mexico border, from 54,098 in FY 2012 to 148,995 in FY 2017.

The Trump administration characterizes these transit migrants as disguised economic refugees, but analytically it is impossible to disentangle the economic hardships they have endured from the personal safety concerns they faced. Field interviews conducted in fall 2017 with transit migrants from Northern Triangle countries suggest that most are motivated by a combination of gang-related violence and lack of economic opportunities in their home countries. Some migrants fleeing gang violence have been personally threatened; others have relatives who have been harmed, and others, like small business owners, have been targets of extortion by gangs.⁷

Transit migrants' passage through Mexico to the US border is by no means risk-free. Scholars, the United Nations High Commissioner for Refugees, Mexico's National Human Rights Commission, and numerous nongovernmental organizations have extensively documented a pattern of human rights violations associated with transit migration through Mexico. Transit migrants are routinely robbed, assaulted, and kidnapped by criminal gangs, frequently operating in collusion with local police and officials. Those kidnapped are often beaten, tortured, starved, and deprived of their possessions.

A network of migrant protection organizations documented 5,298 criminal acts against transit migrants in 2016,⁸ but such crimes are severely under-reported. Still, the risk/benefit ratio favors attempting to reach the United States and, in many cases, be reunited with US-based relatives.

Mexico's Newly Important Asylum and Deportation Policies

As Northern Triangle migrants seeking asylum in the United States become bottled up within Mexico, due to new US restrictions on asylum claims, Mexico's own asylum and deportation policies assume greater importance. Mexico began deporting significant numbers of transit migrants in 1989, as the Carlos Salinas administration laid the groundwork for NAFTA. The policy continued under President Ernesto Zedillo (1994–2000), which began with an acute financial crisis. The Mexican government cooperated with the United States on migration control in exchange for much-needed financial aid. Under President Enrique Peña Nieto's Southern Border Program, enacted in 2014 in response to US pressure, deportations from Mexico have doubled. Altogether, from 1989 through 2016, Mexico deported more than 3 million people.⁹

The vast majority of Mexico's deportees are nationals of Northern Triangle countries. In all but one year (2013), Guatemalans have been a plurality, followed by Hondurans and Salvadorans. Nominally, the Mexican government seeks to apprehend and deport anyone in Mexico lacking legal status, but in practice its enforcement efforts have targeted Central American migrants. For domestic consumption, the Mexican government has justified its crackdown on transit migration by linking it with crime, portraying transit migrants as a threat to public safety, without evidence.

By 2015 Mexico was deporting more Central American migrants than the United States. Some transit migrants reaching the US-Mexico border in June–July 2018 had been apprehended by Mexican authorities while crossing Mexico's southern border; they were deported to Guatemala and had to start the US-bound trip again. Some transit migrants already in Mexico have taken up short-term residence in Tijuana and other border cities, seeing

a sojourn there as an opportunity to earn money and wait for conditions to improve in the United States. But some are using their stay in Mexico to apply for asylum in that country rather than in the United States.

In early 2018 the Trump administration pressed the Mexican government to sign a bilateral "safe third country" agreement, under which US officials could turn away most asylum-seeking transit migrants at the border and compel them to petition for protection in Mexico instead. The negotiations went nowhere, but the Trump administration has essentially enacted this policy unilaterally by disallowing so many asylum claims.

Mexico's asylum program, while improved in recent years, remains severely understaffed and underfunded. COMAR, the agency responsible for refugees, received just 5.3 percent of total federal government funding for migration-related activities in 2016, in a period of exponential growth in the flow of transit migrants. In 2007 COMAR received an average of one asylum petition per day; by 2016 it was receiving nearly 24 applications per day.¹⁰ In 2017, 14,596 migrants applied for asylum in Mexico—an elevenfold increase from 2013. In 2018 the number of applicants could reach 25,000.

Migrants who apply for asylum in Mexico have a much greater chance of success than in the United States. In 2017, 64 percent of completed cases resulted in protection, up from 46 percent in 2015. Petitioners may have to wait up to a year to have their cases resolved, but in the United States the average asylum claim takes nearly three years to adjudicate, and six-year waits are not uncommon. In 2017, The US approved only 19.9 percent of asylum applications submitted by Northern Triangle nationals. Moreover, Mexican authorities have been more humane to asylum applicants, releasing them from detention while their cases are processed, in contrast to the United States, where the Trump administration has been incarcerating growing numbers of asylum seekers in federal lockups.

Some asylum seekers turned away by US border officials are hiring Mexican coyotes to help them enter the United States clandestinely. But other

migrants who face life-threatening conditions in their home countries may conclude that they have no better option than staying put in Mexico—for as long as possible. Seeking asylum there seems likely to become more attractive, given the Trump administration’s sharp restriction of the grounds for asylum claims and the huge backlog in the US immigration court system. Moreover, there is room for growth because many transit migrants still don’t know they can ask for refuge in Mexico.

The Missing Policy Option

Strikingly absent from the ongoing debate over Central American transit migration is any serious discussion of a policy of creating alternatives to emigration through well-targeted development and rule-of-law assistance to the source countries. Indeed, the Trump administration has been disinvesting in this approach to migration control, and the US Congress has gone along. In FY 2018, the federal government allocated \$84.7 million less to Northern Triangle countries than in FY 2017, with major conditions on human rights and governance that must be met by recipient countries. For FY 2019, requested funding is \$100 million below the FY 2018 level.

Unless and until push factors in the Northern Triangle—especially threats to personal and family security—are addressed more robustly, future “migration crises” will be inevitable, along with ineffective and often inhumane US deterrence measures to deal with them.

Notes

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- ¹ Philip Schrag, “What Happens When Asylum Seekers Are Given a Chance to Make Their Case in the U.S.,” *All Things Considered*, National Public Radio, July 3, 2018.
- ² Most migrants currently seeking asylum in the United States turn themselves in to border authorities, waiting for days to be inspected in legal ports of entry.
- ³ The practice of separating migrant parents from their children at the US-Mexico border began quietly, as a pilot program, in the summer of 2017. It was launched as official policy, and greatly expanded, in May 2018.

- ⁴ An analysis of Border Patrol apprehensions data found that the Obama administration’s expanded use of family detention in July 2014, in response to the Central American “migration crisis” of that year, had no statistically significant effect on apprehensions of families at the U.S.-Mexico border. Tom K. Wong, “Do Family Separation and Detention Deter Immigration?” Center for American Progress, July 24, 2018, <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>.
- ⁵ Josiah Heyman and Jeremy Slack, “Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death,” Center for Migration Studies, June 2018, <http://cmsny.org/publications/heyman-slack-asylum-poe/>.
- ⁶ E. Rodríguez Chávez, “Central American Migrants in Irregular Transit through Mexico: New Figures and Trends,” Central America-North America Migration Dialogue, Policy Brief 14, March 2017, <http://www.canamid.org/en/publication?id=PB014>.
- ⁷ Zaira Razú Aznar, “Transcripción de entrevistas para el proyecto de migración centroamericana en tránsito,” Center for U.S.-Mexican Studies, UCSD, La Jolla, CA, October 2017.
- ⁸ Red de Documentación de las Organizaciones Defensoras de Migrantes, *Migrantes en México: Recorriendo un camino de violencia* (México, DF, 2016), p. 95.
- ⁹ David FitzGerald and A. Palomo-Contreras, “México entre el Sur y el Norte,” paper presented at the conference, “Los migrantes y las ciudades: Fronteras en mutación,” El Colegio de la Frontera Norte, Tijuana, BC, June 13-17, 2016.
- ¹⁰ Rodríguez Chávez, “Central American Migrants in Irregular Transit.” //