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USA/MEXICO: HALT THE “REMAIN IN MEXICO” PLAN

THE “REMAIN IN MEXICO” PLAN VIOLATES NATIONAL AND INTERNATIONAL LAW

On 20 December 2018 the US government announced new “Migrant Protection Protocols”, whereby individuals trying to enter the United States via land from Mexico to seek asylum may be returned to Mexico for the duration of their asylum proceedings if they arrive to the USA irregularly or present themselves at official ports of entry without “proper documentation”.¹

Under the new plan, better known as “Remain in Mexico”, certain categories of asylum-seekers arriving from Mexico would submit their asylum claim in the US, receive a notice to appear for their court hearing and then be forced back to wait in Mexico until their hearing date.² Once their claim is adjudicated, those granted asylum would be allowed to stay in the USA; the others would be deported from the USA back to their home countries. The Secretary of Homeland Security, Kirstjen M. Nielsen, summarized the new plan as “catch and return”.³

Implementation of the “Remain in Mexico” plan started at the San Ysidro Port of Entry (California) at the end of January 2019 and has been rolled out to include other ports of entry as well as entry between ports of entry along the border since. On 8 April 2019 a US federal court issued a preliminary injunction barring the further implementation of the plan.

Amnesty International believes that the plan falls short of US obligations under international and national law. The organization is therefore calling on the US authorities to halt its implementation immediately.

CENTRAL AMERICANS WHO HAVE REACHED THE USA HAVE A RIGHT TO SEEK ASYLUM

The US government hailed the “Remain in Mexico” plan as “historic action to confront the illegal immigration crisis facing the United States”, based on the claim that the majority of individuals seeking asylum in the USA do not need protection but lodge “false asylum claims” and use the asylum system to enter US territory and then “disappear”.⁴

In reality the people affected by the “Remain in Mexico” plan are exercising their human right to seek asylum. By trying to prevent, hinder and punish them for doing so, the USA is violating national and international law.

The “Remain in Mexico” plan disproportionately affects Guatemalan, Salvadoran and Honduran asylum-seekers. Many of them flee situations of violence and would be at risk if forced back to their countries.⁵ The US government has released no data showing a pattern or high incidence of fraudulent claims, including when requested by Congress to defend unfounded assertions that asylum claims are often “fraudulent” with data such as convictions for perjury. Rather, the US Department of Homeland Security has sought to conflate unsuccessful requests for asylum with fraudulent claims, even though all asylum-seekers have the right to request protection, irrespective of whether they are ultimately granted asylum.

More generally, the USA is not facing any “illegal immigration crisis”. Despite its rhetoric, the country is still experiencing levels of immigration that do not come close to the historic highs of years past.

THE “REMAIN IN MEXICO” PLAN VIOLATES THE INTERNATIONAL LAW OBLIGATION OF *NON-REFOULEMENT*

The “Remain in Mexico” plan applies to asylum-seekers who have either entered US territory or have fallen under US jurisdiction (including those apprehended by US officials along the border). The US government is under the international obligation not to subject them to *refoulement*.

Non-refoulement is an international legal principle that prohibits sending individuals to another country or jurisdiction where they would face a real risk of persecution or other serious human rights violations or abuses. This prohibition applies to transfers both to the country of origin and to third countries. It applies not only once the individual is on US territory, but from the moment the individual is under US jurisdiction, i.e., when they are under the effective control of US authorities.

It follows from the principle of *non-refoulement*, coupled with the right to an effective remedy, that non-nationals have a specific right to procedural safeguards before they can be sent to another country or jurisdiction. These procedural safeguards include: the opportunity to challenge the transfer on the grounds that it would put them at risk of serious human rights violations; that no transfer would occur until this challenge is decided, etc. These requirements are applicable not only to expulsion, but to all procedures and practices aimed at the obligatory departure of a non-national, including cases in which a person is handed over to officials of another country.

Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Amnesty International opposes “safe third country” agreements whereby transfers are automatic, or the individual circumstances of the asylum-seekers are otherwise not fully taken into account.

Asylum-seekers have the right to appeal a decision to transfer them to a “safe third country”, with suspensive effect. The burden of proof regarding the safety of the third country for the individual lies entirely with the country of asylum. Other elements must be considered, including access to a fair and satisfactory asylum determination procedure and to effective and durable protection in the third country; and risks of onwards *refoulement* from the third country.

In its guidance accompanying the “Remain in Mexico” plan, the US government has instructed its officials to act consistently with the obligation of *non-refoulement* and has sought the Mexican government’s assurances that Mexican officials will do the same.⁶ At the same time, the government has established a special procedure to determine whether asylum-seekers subjected to the “Remain in Mexico” plan would be at risk of serious human rights violations in Mexico, which falls short of the procedural safeguards provided by the Immigration and Nationality Act and other US legislation; most notably, asylum-seekers subjected to the “Remain in Mexico” plan do not have access to legal counsel and cannot appeal.⁷ Officers of the US Citizenship and Immigration Services making the determination are specifically instructed to take Mexico’s diplomatic assurances into account.⁸

Furthermore, in practice, it appears that the US government is failing to apply this screening procedure to individuals before sending them back to Mexico, and in some cases is disregarding their expressions of fear of return to Mexico.

Amnesty International remains concerned that asylum-seekers at the border are being sent back to Mexico if they want to pursue their claim, without a full assessment of the risks of serious human rights violations there, as the “Remain in Mexico” plan presumes that Mexico is a “safe” country for the purposes of transferring non-Mexican asylum-seekers.

The USA is already bound by a “safe country agreement” of doubtful legality with Canada. Under the agreement, asylum-seekers in the US and Canada must make their claim in the first country of arrival. In practice, this means that people in the USA who present themselves at the Canadian border are generally not permitted to seek asylum in Canada. In 2017 the UN Committee on the Elimination of Racial Discrimination (CERD) recommended that Canada “[r]escind or at least suspend the Safe Third Country Agreement with the United States of America to ensure that all individuals who attempt to enter the State party through a land border are provided with equal access to asylum proceedings”.⁹

The “Remain in Mexico” plan is not supposed to apply to unaccompanied children or individuals with “known physical/mental health issues”.¹⁰ It has already affected, however, other categories of asylum-seekers at increased risk of human rights violations, including children travelling with parents or guardians as well as members of the LGBTI community.¹¹

Amnesty International is concerned that the US government is using the “Remain in Mexico” plan to send individuals back to Mexico without assessing the individual circumstances of all the women, children and men affected.

THE LEGALITY OF THE “REMAIN IN MEXICO” PLAN IS DUBIOUS UNDER NATIONAL LAW

The legality of the “Remain in Mexico” plan is dubious under national law as well. The plan appears to rely on Section 235(b)(2)(C) of the US Immigration and Nationality Act, which allows for certain foreign nationals who have arrived from a contiguous country, such as Mexico, to be returned there pending immigration court hearings. However, the arbitrary application of Section 235(b)(2)(C) to only some people seems intended to circumvent the right of individuals at the US border to ask for asylum, as guaranteed under the US Immigration and Nationality Act.

TREATMENT OF ASYLUM-SEEKERS RETURNED FROM THE USA TO MEXICO

In response to the “Remain in Mexico” plan, the Mexican government declared that the asylum-seekers transferred from the USA would receive temporary humanitarian visas, be allowed to apply for work permits, and be treated without discrimination while they await the determination of their asylum claim.¹² However, several crucial points remain unclear regarding the treatment of asylum-seekers in Mexico.

A temporary humanitarian visa granting the asylum-seekers returned from the USA regular migration status could in principle protect them from the risk of detention and deportation as irregular migrants. However, the practical details about the procedure to obtain these visas, their duration, conditions, etc., remain unclear. In addition, there are serious doubts about the Mexican government’s administrative capacity to continue providing these visas.

Crucially, Amnesty International’s research has shown that the Mexican government routinely violates the principle of *non-refoulement* and other rights of migrants and refugees on its territory.

During the past few years, Amnesty International has documented a pattern of serious human rights violations against refugees and migrants in Mexico. Mexican authorities have ignored the claims of Central American nationals explicitly seeking asylum or expressing fear for their lives in their country of origin, sending them back to their country in violation of the obligation of *non-refoulement*.¹³ In addition, for years, Amnesty International has documented how migrants and asylum-seekers are frequently subject to violent crimes, including kidnappings, killings, extortions and other form of violence, on their journey through Mexico; in many instances, these crimes are not properly investigated by authorities. Arbitrary detention is also common.¹⁴

It is unclear which screening procedures the Mexican government will put in place, if any, to identify individuals with special protection and assistance needs, such as children, survivors of trafficking, survivors of torture or trauma, members of the LGBTI community, the elderly, individuals with serious illnesses, pregnant women, among others.

It is equally unclear how the USA and Mexico government intend to ensure that asylum-seekers can fully enjoy their human rights during the months and possibly years they will have to wait in Mexico for their asylum claim to be adjudicated.

¹ US Department of Homeland Security, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration”, 20 December 2018, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>; “Migrant Protection Protocols”, 24 January 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; US Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, PM-602-0169, 28 January 2019, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>.

² The “Remain in Mexico” plan does not affect Mexican asylum-seekers.

³ US Department of Homeland Security, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration”, cit.

⁴ Ibid.

⁵ UNHCR, *La huida de la violencia es uno de los motivos principales de la llegada de centroamericanos a México*, press release, 5 February 2019, <https://www.acnur.org/noticias/press/2019/2/5c5a19724/detecta-acnur-huida-de-violencia-un-motivo-principal-de-llegada-de-centroamericanos.html>.

⁶ US Department of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols*, 25 January 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; letter from Chargé d’Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores, dated 20 December 2018.

⁷ US Department of Homeland Security, US Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C)*, cit.

⁸ Ibid.

⁹ CERD, Concluding Observations: Canada, UN Doc. CERD/C/CAN/CO/21-23, 13 September 2017, Para34(d), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f21-23&Lang=en.

¹⁰ US Customs and Border Protection, *Guiding Principles for Migrant Protection Protocols*, 28 January 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

¹¹ Human Rights First, *A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico*, March 2019, https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf; CNN, *DHS plans to expand ‘Remain in Mexico’ policy in the near future*, 1 March 2019, <https://edition.cnn.com/2019/03/01/politics/remain-in-mexico-update/index.html>.

¹² Secretaría de Relaciones Exteriores, *Posicionamiento de México ante la decisión del Gobierno de EUA de implementar la sección 235(b)(2)(c) de su Ley de Inmigración y Nacionalidad*, 20 December 2018, <https://www.gob.mx/sre/prensa/posicionamiento-de-mexico-ante-la-decision-delgobierno-de-eua-de-implementar-la-seccion-235-b-2-c-de-su-ley-de-inmigracion-y-nacionalidad>.

¹³ Amnesty International, *Overlooked, under-protected: Mexico’s deadly refoulement of Central Americans seeking asylum*, January 2018, Index: AMR 41/7602/2018, <https://www.amnesty.org/en/documents/amr41/7602/2018/en/>.

¹⁴ Amnesty International, *Facing Walls: USA and Mexico’s Violations of the Rights of Asylum Seekers*, 15 June 2017, Index: AMR 01/6426/2017, <https://www.amnesty.org/en/documents/amr01/6426/2017/en/>.