

FOREWORD

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This study of the situation of Central American refugees in Mexico is important to an assessment of the adequacy of United States policy regarding those refugees. There is a current debate in the U.S. over whether Central Americans should be denied asylum, or denied permission to remain in the United States even if eligible for asylum, because of having found safety in Mexico. This report seeks to address the pertinent circumstances of Central Americans in Mexico. It has general implications, furthermore, for U.S. policy toward all asylum seekers, both in the adjudication of individual cases and group safe haven determinations.

The scope of legal protection for refugees in any particular country is derived from an amalgam of domestic and international law, including the United Nations Convention and Protocol relating to the Status of Refugees. The classic definition of a refugee comes from the 1951 United Nations Convention. A "refugee" is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence...is unable or, owing to such fear, is unwilling to return to it. [1]

Although neither the Convention nor the Protocol require a state party to admit into its territory any individuals who are recognized as refugees, noted commentators have observed that under state practice, including practice as reflected in Article 33 of the Convention and Protocol, there has evolved a customary legal norm that prohibits the authorities of a country of asylum from returning persons to territories where they would face persecution. [2]

As this study details, Mexico, while not a party to the Convention and Protocol, is a party to five regional conventions which provide additional sources of refugee protection. The scope of that protection, however, is focused on those who are fleeing political persecution and on so-called "diplomatic" asylum, whereby asylum seekers can request refuge in the embassy of a country with provision for safe passage to the border. The limited character of formal refugee protection in Latin America, coupled with the large numbers of those displaced by civil war, has recently inspired discussions between the United Nations High Commissioner for Refugees, the organization responsible for supervising the application of the Convention and Protocol, and the Organization of American

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States. These UNHCR-OAS discussions were held with a view toward considering an expanded regional definition of refugee. An example of such an expanded definition is found in the refugee convention of the Organization of African Unity, which provides protection to those fleeing artificial disasters such as war.

The asylum procedures and practices in the United States must be seen against the circumscribed scope of international refugee protection. The United States enacted its first asylum statute in the Refugee Act of 1980. [3] The legislative history of that provision demonstrates little consideration by Congress other than the intent to make it possible for those who are present in the United States, irrespective of their immigration status, to apply for asylum if they meet the international refugee definition. The implementation of the statute was left to the Attorney General through the promulgation of administrative rules. Interim rules were issued shortly after the enactment of the Refugee Act and, with one minor exception, remain to be finalized. [4] Proposals are under consideration currently by the Attorney General respecting final asylum rules.

Shortly after the effective date of the Refugee Act, 125,000 Cubans, and a smaller number of Haitians, came by boat to southern Florida fleeing repression in their homelands. Almost all of the Cubans and Haitians who came in 1980 were given a special immigration status permitting them to remain indefinitely in the United States. The only exception to this grant of "Cuban Haitian Entrant" status [5] concerns about 3,000 Cubans who are currently incarcerated in jails around the country, including the Atlanta Penitentiary, because they either admitted criminal histories or mental problems upon arrival, or have had contact with the criminal justice system while in the United States. Most of the Cubans who came in 1980 have now received permanent residence status under a 1966 statute. [6]

As a result of the influxes, U.S. authorities embarked upon a series of deterrence measures designed to stem the flow of those coming and to avoid the arrival of others in the future. These measures included the detention of arriving undocumented aliens, the interdiction by Coast Guard cutters of Haitian boat people and their return to Haiti, and an increasingly restrictive approach by the authorities in asylum adjudication. [7]

Moreover, the siege mentality occasioned by the 1980 influx lingers on today in policy. Increasingly, the authorities seek to deny asylum to those in the United States who have transitted through other countries or spent some time in those countries on the theory that they may have achieved "safe haven" or "protection" elsewhere. Regulations considered by the Attorney General have included provisions for asylum denials on these grounds. The first cases that established the restrictive principles involved Afghan and Iranian refugees who were denied asylum as a matter of "discretion" on the grounds they had been "involved with smugglers" or had "intentionally circumvented" the U.S. overseas refugee admissions process. [8] These individuals were granted the right to *non-refoulement* through decisions that they not be returned to their home countries. Attempts were made, however, to return them to the countries through which they had transitted. This was done sometimes without checking in advance to see whether those countries would accept the individuals in question, thereby creating so-called "refugees in orbit." [9]

The orbiting process is bizarre. Individuals would frequently be placed on air carriers and headed to a third country where they had had some prior contact and where the authorities frequently declined to re-admit them and instead sent them back to the United States. The most notorious case involved two Iranian brothers in New York who were sent in 1982, not to Iran where the authorities conceded that they would face persecution, but to Spain where they had enplaned. The Spanish authorities in Madrid refused entry and sent them back to New York. The immigration authorities in New York, however, were firm and again sent them back to Madrid. The Spanish authorities were no less firm and returned them once more to New York. The two brothers were on their way a third time to Spain when a federal judge in New York signed a temporary restraining order halting the effort. [10]

Even if a departure cannot be effectuated to a third country, an individual denied asylum under these circumstances finds himself in a peculiar situation of "limbo." He or she must request permission to work and to travel abroad and return to the United States, and generally has no possibility of a durable immigration status or the ability to reunify with close family. Such a person is truly without a country.

The restrictive approach to asylum discussed above is a general problem. It takes the form of refusing to examine asylum requests at the border, particularly in Europe, and denying asylum on the ground that "protection" has been achieved elsewhere. [11] The potential impact on Central Americans who have passed through Mexico and subsequently apply for asylum in the United States could be devastating. Increasingly, authorities and advocates alike are examining whether refugees have achieved protection in other countries in assessing their requests for asylum in the United States.

This study addresses a number of significant questions. In what countries can an individual claim protection under the Convention and Protocol? Put another way, is the country in question a state party to those international instruments? Is it possible for the individuals to apply for admission under the U.S. overseas refugee admissions program? The only country designated for admissions purposes by the U.S. as of "special humanitarian concern" in the Latin American region is Cuba, and only those who fall in the first of six agency priorities (former political prisoners) can be recognized under the admissions program. [12] Refugees other than Cuban former political prisoners cannot be admitted under the U.S. overseas program. Salvadorans and Guatemalans, therefore, would seem not to be disabled by a claim that they had intentionally circumvented the U.S. refugee quota system, since that system is not available to them.

Other questions are also raised. Are the individuals in question merely transiting through the intermediary country, or have they established themselves in a way comparable to the nationals of that country? Is there a guarantee against deportation to the home country? These questions are involved not only in determining whether an individual has achieved protection in a country of first asylum, but also in determining whether a nationality group should be given a categorical grant of temporary safe haven or extended voluntary departure in the United States. [13]

This study seeks to provide a sensitive assessment of the relevant legal framework and procedure, as well as practice by authorities, respecting Central American refugees in Mexico. Without the benefit of such research, policy makers and adjudicators are left to speculate about whether “protection” has been achieved in some theoretical sense. Such a guess, given the restrictive tendencies of the time, frequently leads to inaccurate determinations. More informed decision-making is needed, and the questions answered and raised in this study make an important contribution to the dialogue.