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### **Biden’s Proposed Transit Ban Conflicts with International Law**

With the nearly 2.4 million migrant encounters at the U.S.-Mexico border,<sup>1</sup> it’s no wonder that the Biden administration is looking for some way of curtailing the wave of migrants and asylum encounters. However, the new approach by the Biden administration is not “new” in any sense and is actually an adaptation of a Trump administration policy.<sup>2</sup>

Biden’s proposed “transit ban” would create a “rebuttable presumption of asylum ineligibility” for migrants arriving at the U.S.-Mexico border who have not sought “protection in a country through which they traveled” on their journey, “unless they meet exceptions that will be specified.”<sup>3</sup> In other words, asylum seekers that present themselves at a port of entry – such as the southern border – without a previously scheduled appointment will be presumed ineligible for entry if they didn’t apply and were denied asylum in a country they passed through on the way to the U.S.<sup>4</sup>

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<sup>1</sup> Ariel G. Ruiz Soto, *Record-Breaking Migrant Encounters at the U.S.-Mexico Border Overlook the Bigger Story*, MIGRATION POL’Y INST. (Oct. 2022),

<https://www.migrationpolicy.org/news/2022-record-migrant-encounters-us-mexico-border>.

<sup>2</sup> Karen Musalo, *Biden’s Embrace of Trump’s Transit Ban Violates US Legal and Moral Refugee Obligations*, JUST SECURITY (Feb. 8, 2023),

<https://www.justsecurity.org/84977/bidens-embrace-of-trumps-transit-ban-violates-us-legal-and-moral-refugee-obligations/>.

<sup>3</sup> Ruiz Soto, *supra* note 1.

<sup>4</sup> *Biden’s Asylum Ban Would Return U.S. to Trump-Style Policy*, HUM. RTS FIRST (Feb. 21, 2023),

<https://humanrightsfirst.org/library/bidens-asylum-ban-would-return-u-s-to-trump-style-policy/> (hereinafter Human Rights First).

The move by the Biden administration runs counter to Biden’s campaign promises of not “deny[ing] asylum to people fleeing persecution and violence” and that he would end restrictions on asylum for individuals who transit through countries to reach safety.<sup>5</sup>

The problem with this idea, as was the problem with the very similar Trump policy, is that it conflicts with the U.S.’s responsibilities to asylum seekers, mainly under Article 31 of the Refugee Convention. Article 31 of the Refugee Convention states that, “[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>6</sup>In 1968, the U.S. agreed to the Refugee Protocol, which incorporated the 1951 Refugee Convention,<sup>7</sup> and in 1980, the U.S. aligned its federal immigration statute with the provisions of the Refugee Convention and the Refugee Protocol by passing the Refugee Act.<sup>8</sup>

While the U.S. refugee statute does permit the denial of asylum to those who pass through a “safe third country” en route to the U.S. and do not apply for protection there, the law has two requirements: (1) the country of transit must not be one where the asylum seeker’s life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion; and (2) the asylum seeker must have access to a “full and fair” procedure for determining claims to protection.<sup>9</sup> The U.S. even needs a formal agreement with the country where the migrant could have claimed asylum.<sup>10</sup> These requirements

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<sup>5</sup> *Id.*

<sup>6</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 31.

<sup>7</sup> Musalo, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

are not met in the countries, mainly in Central America, that most asylum seekers travel through on their way to the U.S.<sup>11</sup>

The Biden Administration will try to distinguish their policy from that of the Trump administration, which was repeatedly struck down as illegal,<sup>12</sup> by saying their policy only imposes a rebuttable presumption instead of an outright ban.<sup>13</sup> Regardless, if the presumption of ineligibility is actually applied during credible fear screening interviews at the southern border, as part of the expedited removal process, it will be next to impossible for the asylum seekers to rebut the presumption.<sup>14</sup> After all, the majority of asylum seekers coming to the southern border do not have an attorney and do not have sufficient knowledge of human rights conditions and asylum procedures in each of the countries they transited in order to successfully make the case that they qualify for an exception.<sup>15</sup> In effect, this policy imposes – in violation of Article 31 of the Refugee Convention – a penalty of an almost insurmountable hurdle for many migrants.

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<sup>11</sup> *Id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *Id.*