

## The Biden Administration’s Asylum Policy Adheres to International Law...Technically.

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On May 16, 2023, the Department of Homeland Security and the Department of Justice issued a rule on asylum titled “Circumvention of Lawful Pathways.”<sup>i</sup> The Rule replaced the Trump administration’s controversial “Title 42” rule, issued by the Centers for Disease Control.<sup>ii</sup> Circumvention of Lawful Pathways discontinues Title 42’s practice of simply turning away asylum seekers and replaces it with a rebuttable presumption that all non-Mexican migrants who cross border without some sort of immigration status are presumed ineligible for asylum unless they make an appointment to apply for asylum via the CBP One App, or they are covered by an exception.<sup>iii</sup> The presumption can be rebutted if one is able to show that they are facing an acute medical emergency, an imminent threat to one’s life or safety, or that they were a victim of a “severe” form of human trafficking.<sup>iv</sup> Those subject to the presumption may avoid expedited

removal only by showing that are eligible for relief under the Convention Against Torture or Withholding of Removal, and it heightens the standard required to demonstrate one may be eligible for relief under both.<sup>v</sup>

Immigrants' rights groups sued to enjoin the rule as soon as it took effect and were initially successful in the Northern District of California; the district court found that the rule was both procedurally and substantively invalid and vacated it.<sup>vi</sup> The Ninth Circuit Court of Appeals reinstated the rule pending a full hearing later this year.<sup>vii</sup> Though the status of the rule under U.S. law is unclear, its validity under international law is more easily ascertained. Circumvention of Lawful Pathways likely does not violate the letter of international law, because it does not apply to Withholding of Removal. However, it does continue a concerning trend among Western nations of attempting to avoid their obligations to refugees, a trend which raises concerns about the viability of the current international refugee infrastructure.

The rights of refugees under international law were established in the wake of World War II by the 1951 Convention Relating to the Status of Refugees.<sup>viii</sup> The convention established the international definition of a refugee. Under International Law a refugee is “ any person who... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, ... is unwilling to avail himself of the protection of that country; or ...is unable or, ..., is unwilling to return to it.”<sup>ix</sup> Initially, the convention was both geographically and temporally limited to cover primarily people who displaced by World War II, but those limitations were eliminated by the 1967 Protocol Relating to the Status of Refugees, which the United States was party to, despite not being party to the convention.<sup>x</sup> The most fundamental principle of both the convention and the protocol is the prohibition of expulsion or non-refoulement.

In this context, non-refoulement means that a state cannot return or expel a refugee “in any manner whatsoever” to “the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>xi</sup> Notably, this principle applies even when a refugee has arrived in a state without authorization, and a state is only relieved of their duty not to return a refugee if the refugee poses danger to the security of the country, if they are convicted of a particularly serious crime, or if they pose a danger to the security of a country.<sup>xii</sup>

As noted above, the Biden administration’s policy creates a presumption that all non-Mexican individuals arriving without authorization at the southern border are ineligible for asylum unless they are facing a medical emergency, are under imminent threat of harm, were subject to “severe” human trafficking, or are part of an exempted group (like unaccompanied minors).<sup>xiii</sup> During the rulemaking process, and after it was published, Circumvention of Lawful Pathways was said by too many to run the risk of violating the principle of non-refoulement. The United Nations High Commissioner on Refugees, for example, filed a comment during the rulemaking period arguing that the regulation, “would restrict the fundamental human right to seek asylum for people who passed through another country and arrived in the United States without authorization... would lead to cases of refoulement.”<sup>xiv</sup> Several human rights and refugee resettlement organizations made similar claims, as did the union that represents asylum officers, and failure to uphold the United States’ treaty obligations was included in several of the lawsuits filed to enjoin the rule.<sup>xv</sup> The United States itself acknowledged that the rule will result in the presumptive denial of otherwise valid asylum claims, but argues that those with valid claims will be protected by Withholding of Removal and the Convention Against Torture.<sup>xvi</sup>

Withholding of Removal allows a migrant who otherwise meets the definition of a refugee to avoid removal if she can show that it is more likely than not that she will be persecuted if she is returned to her home country.<sup>xvii</sup> The Convention Against Torture provides similar protection to those specifically at risk of torture. To qualify for relief from expedited removal and be able to have one's claim heard in Immigration Court, under Circumventions of Lawful Pathways, migrants must show that they have a "reasonable fear" or persecution, a higher standard than the "credible fear" standard for asylum, and one that is rarely met.<sup>xviii</sup> When applicants are able to get a hearing on a withholding of removal claim, they rarely win.<sup>xix</sup>

The question raised under the 1967 Protocol, then, is whether Withholding of Removal and the Convention Against Torture are enough to satisfy the United States Obligation to asylum seekers whose claims for asylum in the U.S. are presumptively denied because they entered the United States without authorization. The answer is technically yes. The United States has long held that their obligation to refugees is satisfied by withholding of removal, and though the standard for withholding of removal is higher, it does still forbid refoulment of those satisfying the definition of a refugee.<sup>xx</sup> The standard by which a state judges the likelihood of persecution based on the definition of a refugee is not addressed in either the Convention or the Protocol, and the process for determining whether a person meets the definition of a refugee is left to the signatories, so long as there is one.<sup>xxi</sup> Furthermore, it does not appear that there has ever been a challenge to a nation's policy under the 1951 Convention or the 1967 Protocol, although the 1951 Protocol does provide that disputes under can be referred to the International Court of Justice.<sup>xxii</sup> In International Law cases where the non-refoulment has been found to be violated based on laws derived from the convention, rather than the convention itself, it is more common that the ability to apply for any

legal status has either been completely rejected,<sup>xxiii</sup> or potential applicants were just immediately returned to the nation where they were at risk without any sort of process as all.<sup>xxiv</sup>

Whether the United States will actually avoid refolement under this policy is questionable. Those who fail to meet the heightened standard under expedited removal are deported to Mexico when possible, and Mexicans are excluded from presumption of ineligibility for asylum.<sup>xxv</sup> Though, Mexico is not a “safe third country” as defined by the 1951 Convention, and thus, the U.S. is not authorized to restrict asylum based on its availability in Mexico, it is not the place where asylum seekers under the definition of a refugee fear persecution, because Mexicans are excluded from Circumvention of Legal Pathways.<sup>xxvi</sup> Mexico is allowing those removed from the United States to apply for asylum there, though the Mexican asylum system is becoming increasingly backlogged and overburdened, partially as a result of U.S. policies.<sup>xxvii</sup>

Even if the policy evades technical violation of the 1967 Protocol, the Biden administration’s policy continues a concerning trend. This restrictive policy comes on the heels of Title 42, which simply denied many migrants the opportunity for asylum, and the United Kingdom’s Illegal Migration Bill, which prevents people who arrive in the United Kingdom from applying for asylum at all.<sup>xxviii</sup> Policies like these are contrary to the purpose of the 1951 Convention and the 1967 protocol, but the lack of enforcement capability of the United Nations, particularly against powerful nations like the United States and the United Kingdom, suggests that there is little likelihood these policies will end.

Unfortunately, these policies are not connected to a meaningful reduction in migrants need for protection, particularly in South and Central America.<sup>xxix</sup> Despite no change in the underlying need, the percentage of asylum seekers passing initial inspection dropped over 30% in the first month of Circumventions of Legal Pathways.<sup>xxx</sup> Less than 1 in 10 asylum seekers were able to

rebut the presumption of ineligibility.<sup>xxxix</sup> Even if the Circumvention of Lawful Pathways rule does not violate international law, that does not mean that the policy is acceptable. It simply means that the law has failed those it is meant to help.

## Endnote

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<sup>i</sup> See Circumvention of Lawful Pathways, 88 FR 31314-01 (May 16, 2023) (to be codified at 8 C.F.R pts. 208,1003,1208).

<sup>ii</sup> See DEPT. OF HOMELAND SEC., FACT SHEET: CIRCUMVENTION OF LEGAL PATHWAYS RULE (2023), <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule> [<https://perma.cc/V6WK-QS72>].

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

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

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

<sup>vi</sup> See *E. Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST, 2023 WL 4729278, 1,18-19 (N.D. Cal. July 25, 2023)

<sup>vii</sup> See Lucy Hodgman, *9th Circuit allows Biden Asylum Policy to Proceed For Now*, POLITICO (Aug. 3, 2023, 09:56 PM), <https://www.politico.com/news/2023/08/03/federal-court-biden-asylum-policy-00109797> [<https://perma.cc/7XDK-XKGF>].

<sup>viii</sup> See UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, CONVENTION AND PROTOCOL RELATED TO THE STATUS OF REFUGEES, 2 (2010).

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

<sup>x</sup> See *id.* at 46-47.

<sup>xi</sup> See *id.* at 30.

<sup>xii</sup> See *id.* at 29-30.

<sup>xiii</sup> See DEPT. OF HOMELAND SEC., FACT SHEET: CIRCUMVENTION OF LEGAL PATHWAYS RULE

<sup>xiv</sup> See UNHCR Urges United States Not to Implement Proposed Barrier to Asylum, (Mar. 27, 2023), <https://www.unhcr.org/us/news/unhcr-urges-united-states-not-implement-proposed-barrier-asylum> [<https://perma.cc/T3QC-A3W9>].

<sup>xv</sup> See *US: Biden 'Asylum Ban' Endangers Lives at the Border*, HUMAN RIGHTS WATCH, (May 11, 2023 7:55PM) <https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border> [<https://perma.cc/V2Y4-U7ST>]; See also Eric Katz *Federal Asylum Officers Blast New Biden Rule as Contrary to Legal, Moral Obligations*, GOVERNMENT EXECUTIVE, (Mar. 30, 2023), <https://www.govexec.com/workforce/2023/03/federal-asylum-officers-blast-new-biden-rule-contrary-legal-moral-obligations/384640/> [<https://perma.cc/63AH-VLG2>].

<sup>xvi</sup> See *E. Bay Sanctuary Covenant*, No. 18-CV-06810-JST, 2023 WL 4729278, at 13.

<sup>xvii</sup> See *The Difference Between Asylum and Withholding of Removal*, AMERICAN IMMIGRATION COUNCIL (Oct. 6, 2020) <https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal> [<https://perma.cc/B9YH-WKVB>].

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

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

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

<sup>xxi</sup> See generally, UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, (lacking specific guidance on how states are to determine whether a given individual meets the definition of a refugee).

<sup>xxii</sup> See *id.* at 33.

<sup>xxiii</sup> *Hirsi Jama v. Italy*, App. No. 27765/09 ¶9-14 (23 Feb. 2012) <https://hudoc.echr.coe.int/?i=001-109231>

<sup>xxiv</sup> See *M.A. v. Lithuania*, App. No. 59793/17 ¶9-21 (11 Mar. 2019) <https://hudoc.echr.coe.int/?i=001-188267>

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<sup>xxv</sup> See DEPT. OF HOMELAND SEC., FACT SHEET: CIRCUMVENTION OF LEGAL PATHWAYS RULE

<sup>xxvi</sup> See *Safe Third Countries for Asylum Seekers: Why Mexico Does Not Qualify as a Safe Third Country*, WOMEN'S REFUGEE COMMISSION, (May 21, 2018), <https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/SafeThirdCountries.pdf> [ <https://perma.cc/9ZT4-AQZY>].

<sup>xxvii</sup> See Avery Franklin, *Biden Border Policy Will Further Strain Mexico's Asylum System, Report Says*, RICE UNIV., (Mar. 20, 2023) <https://news.rice.edu/news/2023/biden-border-policy-will-further-strain-mexicos-asylum-system-report-says> [ <https://perma.cc/6MD4-XSBZ>].

<sup>xxviii</sup> See *what is the 'Illegal Migration' Bill*, REFUGEE COUNCIL, (2023), <https://www.refugeecouncil.org.uk/information/what-is-the-illegal-migration-bill/> [ <https://perma.cc/5VVB-Q53>].

<sup>xxix</sup> See Daniela Roy & Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, (July 13, 2023, 02:55PM) <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> [ <https://perma.cc/LW4E-JHBB>].

<sup>xxx</sup> Hamed Aleaziz, *U.S. is Rejecting Asylum Seekers at Much Higher Rates Under New Biden Policy*, L.A. TIMES, (Jun. 20, 2023), <https://www.latimes.com/politics/story/2023-06-20/biden-asylum-seekers-turned-down-rates> [ <https://perma.cc/6LWW-RVQW>].

<sup>xxxi</sup> *Id.*