

Acquiescing in Refoulement

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The judgment of the US Supreme Court issued on Wednesday ([Attorney General v. East Bay Sanctuary Covenant](#)) purports to be simply procedural: it overturns a lower court injunction that prevented President Trump's unilateral "safe third country" rule from coming into force before its legality is tested on the merits.

But in truth, the Supreme Court knowingly acquiesced in the *refoulement* of refugees arriving at the US southern border. Especially since any reversal of the lower court's decision is supposed to be "extraordinary" relief – with the government bearing an "especially heavy" burden – the US Supreme Court cannot avoid its own complicity in this tragic result.

The rule that the US government announced it will "commence implementing... ASAP" is an exercise in wilful blindness. Any refugee claimant arriving at the land border will be ineligible to seek asylum in the US unless able to show that they sought and were denied refugee protection in a country through which they have passed. This means that Hondurans and Salvadorans must seek and be turned down for asylum in Guatemala or Mexico, and Guatemalans must have been rejected by Mexico.

It is an understatement to say that this is an odd rule. Why would an administration concerned to deter what it sees as non-genuine asylum claims agree to process *only* those whose claims have already been *turned down* by another country? Surely, if anything, such persons are less likely to have sound claims than those not already rejected.

More fundamentally, there is no substantive "protection elsewhere" framework here. The US law is not justified on the basis that the refugees' claim would be fairly processed elsewhere, nor that the rights owed to them under international law would be guaranteed in practice. To the contrary, Mexico's asylum system remains rudimentary and the Guatemalan system is barely functional. Neither country has been able to protect refugees' basic physical security, much less to ensure their ability to survive economically. Indeed, Guatemala and even Mexico continue to *produce* genuine refugees, as asylum decisions in the US and other jurisdictions attest.

This is, quite simply, the dumping of refugees into precarious situations. In that sense it is reminiscent of Australia's forcing away of refugees to Nauru and Papua New Guinea, or Europe's diversion of refugees to Turkey and Libya.

And critically, it is also illegal *refoulement* – a clear breach of Art. 33 of the Refugee Convention, binding on the United States. Refugee rights inhere until and unless an individual is fairly found not to qualify for protection, and legal or other rules that push refugees back to the risk of being persecuted – "in any manner whatsoever,"

directly or indirectly – are absolutely prohibited. In this sense, even the two dissenters (Justices Ginsburg and Sotomayor) got it wrong: what is at stake is not just “longstanding practices regarding refugees,” but the most fundamental principle of international refugee law itself.

This is not, of course, a final decision on the merits of the Trump plan – that will eventually come from the US Court of Appeals for the Ninth Circuit and almost inevitably from the US Supreme Court itself. But that process will take many months if not more, and in the interim genuine refugees will be pushed back into the arms of their persecutors. Ironically, it was the US representative to the committee that drafted the Refugee Convention who insisted that

[w]hether it was a question of closing the frontier to a refugee who asked for admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened. (UN Doc. E/AC.32/SR.20, at 11-12)

We can of course hope that some or all of the substantive arguments made against the plan – that it breaches the US asylum statute, that the plan was devised without respect for rulemaking procedures, and that the rule is arbitrary and capricious – will ultimately be affirmed. But at least in the Supreme Court, the odds are not good. Putting aside the present politicized nature of that body, the Court has a long history of failing to understand the duty of *non-refoulement* (for example, in relation to Haitians deterred at sea). It has also famously determined that “... those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible [only] for the discretionary relief of asylum” (*Cardoza Foseca v. INS*) – as fundamental an error of refugee law as can be imagined.

And in any event, and whatever the ultimate disposition, the immediate result of the US Supreme Court’s decision is clear. As Justice Sotomayor correctly observed, the victims will be “some of the most vulnerable people in the Western Hemisphere.” Illegal *refoulement* will occur, at least for now, and with the Supreme Court’s blessing.

