MPP as a Microcosm: What’s Wrong with Asylum at the Border and How to Fix It

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From January 3 to January 6, 2022, RI Deputy Director for the Americas and Europe, Yael Schacher, traveled to El Paso and observed immigration court proceedings for asylum seekers placed in the re-started Remain in Mexico program. Refugees International is pleased to share Dr. Schacher’s personal account and reflection on what she observed and its implications for broader asylum policy.

Introduction

A little less than three years ago, I watched the first immigration court proceedings for asylum seekers placed in the “Remain in Mexico” program, formally known as Migration Protection Protocols (MPP), and was disturbed by “egregious due process and protection concerns.” In early January 2022, I watched the first immigration court proceedings under a new iteration of MPP. I came away with an impression of wasted efforts that subject asylum seekers to insecurity and hinder their ability to get the counsel they need. The MPP proceedings involve a tiny percentage of asylum seekers, but those subject to the program face some of the same challenges as do both asylum seekers who are expelled to other countries and those who are admitted to pursue their claims in immigration court. The new MPP is indicative of a compromised approach to asylum at the border and fundamental problems with asylum adjudication in the United States.

Over the past year, the Biden administration has reversed some of the Trump administration’s harshest interior enforcement policies. But at the border, it has relied upon Trump-era anti-asylum policies, entrenching the border as a place where the United States will continue to upend norms of refugee protection and where the right to seek asylum does not apply. Unmoored from asylum law, policy at the border leaves those seeking refuge hoping for exemptions that give them access to U.S. territory (though qualifications are vague and largely unrelated to the refugee definition) and relying on speculative assurances of support in countries to which they are sent by the United States (though there is no agreement that these countries are safe). The result is the erosion of protection at a time when the need for it—and the reasons for forced displacement—are both growing.

Legal Background and Context

Sorting at the Border

It is important to put the new MPP program in context. In December 2021, when the program began, Customs and Border Protection (CBP) encountered about 180,000 people (though almost 45,000 were repeat crossers). Of those, about 80,000 people were expelled without access to asylum, pursuant to Title 42—a misused public health statute. The rest were processed under immigration law in different ways—about 12,000 unaccompanied children were sent to the Office of Refugee Resettlement
(ORR), about 65,000 were given notices to appear in immigration court (about half of whom were sent to detention and half of whom were paroled), almost 20,000 were put in alternative to detention programs, about 6,000 were placed in expedited removal, and 267 single adults were enrolled in MPP. Enrollments in the new MPP started in El Paso and expanded to San Diego and Brownsville in January, such that there are now a few hundred more people enrolled, with plans to soon enroll 30 to 40 people per day in Brownsville and to start enrolling people in MPP in Laredo.

None of the people placed in MPP in December were Honduran or Guatemalan, the largest nationality groups put in MPP during the Trump administration. Almost all Honduran and Guatemalan single adults and more than half of families were expelled under Title 42 either to Mexico or to their home countries in December. Haitians, though newly eligible for MPP in the Biden administration’s version, were not enrolled in it. In December, the Biden administration used the Title 42 authority to dramatically increase expulsion flights to Haiti, sending thousands of adults and families with children to what has fairly been described as a “humanitarian nightmare” without testing them for COVID-19. As of now, the administration has limited ability to expel Venezuelans, Cubans, and Nicaraguans, and it was almost entirely single men from these countries that began being placed in MPP in December.

**Title 42**

With Title 42, the Biden administration is sidestepping its legal responsibility to screen asylum seekers. The administration defended Title 42 in federal court in mid-January by claiming CBP officials are providing an opportunity for possible relief to those who express a fear of torture if expelled. But this is not done in accordance with procedures under the immigration law, which the administration believes COVID-19 allows it to ignore. On the ground at the border, only a handful of people have passed the government’s discretionarily accorded torture screenings. The administration also claimed in court that it provides humanitarian exceptions to Title 42 for those it deems “vulnerable,” but this in no way ensures compliance with the Refugee Convention’s prohibition on non-refoulement or the right to withholding of removal to persecution under U.S. law. The administration is treating a mandatory obligation to ensure people are not sent to harm as if it were discretionary.

Refugees International is aware that Biden administration officials have sought to institute a process—which was piloted in the spring and summer of 2021— whereby NGOs electronically pre-register vulnerable asylum seekers in Mexico who are then exempted from Title 42 and allowed to enter through ports of entry. These ports have remained closed to people seeking protection (though open to everyone else). But this is asylum registration and processing the government itself should conduct when asylum seekers approach ports of entry or ask border patrol agents for protection after crossing the border. An asylum system grounded in current U.S. law cannot cut off
access to territory to those seeking protection or limit the ability to apply for asylum at
the border to select people deemed vulnerable and who have managed to contact an
NGO. It is also noteworthy that the NGO personnel who administered the pilot
experienced the same dangers and security threats as asylum seekers expelled under
Title 42.

Since the pilot ended, CBP grants some exemptions to people with immediate medical
needs and extraordinary vulnerabilities but the number of exemptions granted varies by
port of entry—so that more are granted in El Paso and South Texas than in Arizona and
San Diego—and many are denied without explanation.

MPP

Based on my observations in El Paso, the Biden administration’s implementation of the
court-ordered MPP program also seems untethered from the spirit and the letter of
international refugee law and U.S. asylum law. MPP is eroding norms of protection
rather than strengthening and expanding them.

The Trump administration initiated the MPP program in 2019, invoking an obscure
“contiguous territory” provision of the U.S. immigration law in a new way to claim the
authority to send asylum seekers to wait in Mexico until their hearings in U.S.
immigration court. Of the hundreds of thousands who came to the border in 2019 and
the first half of 2020, about 70,000 people were placed in MPP by Customs and Border
Protection (CBP). The Biden administration stopped enrolling people in the program,
issued a memo terminating it, and, in the spring and early summer of 2021, admitted
nearly 13,000 people who had been subject to the program to pursue their cases from
within the United States. When the states of Texas and Missouri sued the Biden
administration over the change in policy, a federal court ruled that the Biden
administration’s termination memo was insufficient and that, under the court’s
interpretation of the immigration law, the Biden administration had only two choices: it
was bound to either return asylum seekers to Mexico or to detain them during the
course of their proceedings. The court ruled that asylum seekers who the administration
did not detain would have to be sent to wait in Mexico.

The Biden administration responded by issuing a new termination memo, planning for
the reimplementation of MPP, and appealing the court ruling. While the new termination
memo thoroughly presents all the problems with MPP (particularly that asylum seekers
faced danger and hardship in Mexico and lacked access to counsel), the Biden
administration’s negotiations with Mexico over MPP’s reimplementation led to expansion
(rather than narrowing) of the nationalities eligible for return under MPP.

In its appeal to the Supreme Court, the Biden administration argues that it is not
compelled to use MPP and that making people wait in Mexico is a discretionary
authority under the contiguous territory provision. Regrettably, the Biden administration did not adopt the ruling of the Ninth Circuit that MPP violates the prohibition on non-refoulement—by sending asylum seekers to danger in Mexico—and that sending asylum seekers to wait in Mexico is not authorized by the immigration statute.

This is certainly not the first time a presidential administration has articulated an intention to end an abusive return policy while being unwilling to abandon a dubious claim that it is legally entitled to act abusively. Quite obviously, such a position risks undermining protection over time. And it is regrettable that the administration does not appreciate—or seem sufficiently concerned—about the implications of its position in court.

Indeed, the administration’s brief says nothing about the right to seek asylum on U.S. soil and argues only that the lower court’s ruling interferes with its ability to manage migration using various discretionary tools authorized by the statute, including contiguous return, detention, and parole. Further, the administration’s brief to the Supreme Court barely acknowledges—at only one point, and in a list of problems with the lower court ruling—that MPP “exposes migrants to unacceptable risks.” This was a key point made in the termination memo: even if some improvements were made to MPP that “better protected individuals from being returned to persecution or torture, it would not protect people from generalized violence or other extreme hardships” that have been experienced by many returnees.

**Predictably Kafkaesque MPP Proceedings**

That the second termination memo predicted the problems I witnessed in court made the proceedings seem all the more disheartening—and surreal. The reimplementation of MPP not only betrays the procedural failures and waste of resources of the first time around but is also being administered by those who admit its flaws while supporting its lawfulness. Essentially, the Biden administration’s position is that “we know this is going to go badly and would rather not do it, but we are not doing anything legally wrong.” This matters little to the small number of asylum seekers placed in a program with a Kafkaesque quality. Many of the asylum seekers I saw seemed bewildered and without any sense of how to deal with the socio-bureaucratic absurdity.

In early December 2021, CBP began enrolling asylum seekers in MPP under new guidance issued by the Biden administration. The guidance specifies that, unlike under the first MPP program, CBP officers must ask each person about their fear of return to Mexico and accord them a chance to confer with counsel for a hearing with an asylum officer about their fear. Those who prove to the asylum officer that they have “a reasonable possibility of persecution” on account of race, religion, nationality, membership in a particular social group, or political opinion or a reasonable possibility of torture in Mexico will be exempted from the MPP program. The guidance also says
that DHS, on a case by case, discretionary basis, would exempt from MPP those eligible to be enrolled but who have medical or mental health “issues,” “particular vulnerabilities given their advanced age,” or are at increased risk of harm in Mexico due their sexual orientation or gender identity. The guidance also states that those enrolled in the program will be assured shelter in Mexico and transport from there to ports of entry to report for court hearings.

Between January 3-6, when I was in El Paso immigration court, approximately 140 adult men enrolled in the revived MPP in the El Paso sector were supposed to attend their initial hearings. The court dockets showed that only eight of them had attorneys. Because of COVID-19 protocols limiting the number of people who could be in a courtroom at any one time, I was only able to watch five hearings involving 19 asylum seekers over the four days. I also observed several “know your rights” (KYR) presentations conducted at the court by a local immigrant legal services organization for a total of about 35 asylum seekers. I saw three asylum seekers at the KYR who had medical infirmities or were LGBTQ+—and so seemingly should have been exempted from the program by CBP but were not.

The questions these asylum seekers raised when in court underscore fundamental problems not only with the workings of this version of MPP but, more deeply, with a morally compromised U.S. approach to protection at the border. They reveal how far U.S. policy at the border has strayed from the heart of what asylum is supposed to be: case by case adjudication of asylum seekers’ fear of persecution in their home countries and eligibility for protection in the United States so long as an asylum seeker is not firmly settled (with all the security, opportunity, and legal recognition that entails) in another country.

That the United States cannot send deportation flights to a particular country should not determine whether nationals of that country have a chance to seek asylum. But, in fact, the people in the MPP program are only from countries to which the United States cannot effectively send deportation flights. Further, only certain people of those nationalities are placed in MPP; it is up to the discretion of CBP to choose which of the many Cuban, Venezuelan, and Nicaraguan asylum seekers who are not deemed vulnerable are placed in the program to wait in Mexico and which are permitted to pursue their asylum cases from within the United States. This choice has nothing to do with an assessment of the reasons they fled their home countries and fear returning there. “Why was I returned to Mexico but my friends were not? Why me? So many got in,” a Nicaraguan said during a KYR. A Venezuelan asylum seeker told a judge that he was placed in MPP while his sibling was not.

To make MPP technically lawful, the administration is expending resources that do not get to the merits of asylum claims and leave asylum seekers confused and at a disadvantage in presenting their claims. This was apparent in several ways in the court in El Paso.
Asylum seekers in MPP who come into the United States for court hearings are heavily guarded—in the courtroom and when they receive the know your rights (KYR) presentations conducted by a local legal service provider. Despite spending a week or two in CBP custody, three or four weeks waiting for their hearings in shelters in Mexico and getting shuttled from and back to the port by the International Organization for Migration (IOM), most asylum seekers had little understanding of the significance of what one asylum seeker called the “mountain of papers” they had been given about MPP. During hearings before one immigration judge several asylum seekers said they did not know if a notice to appear in court was among their papers; several also said they were not sure if they received the list of low or no-cost legal service providers they should have been provided. One man who had the list said he called one of the numbers on it, but nobody answered. In fact, I was informed that most of the legal service providers on the list are not taking MPP cases because of the challenges the policy poses to adequate representation. The judge read a detailed explanation of the program to the asylum seekers during a group advisal. But the explanation did not address how waiting in Mexico would impact the ability of asylum seekers to inform the court of a change of address, to consult counsel, to collect and translate evidence to support asylum applications, or even to appear in court for their hearings.

The most obvious effort to make MPP lawful—the new way of handling interviews about fear of return to Mexico, or non-refoulement interviews (NRIs)—seemed to me the most flawed and misguided. There are two fundamental problems with the NRIs. First, they are not conducted in a way that effectively assesses fear of persecution. But more significantly, since returning people to Mexico is dangerous and unsafe, the process is conceptually flawed.

Several asylum seekers conveyed that they did not get a clear explanation from CBP regarding the purpose of these non-refoulement interviews (NRIs). Two Nicaraguans who had been in CBP custody from December 4 through December 12 said that they were told to sign a form to return to Mexico and were not given any information about access to a lawyer or what the fear interview was about. It is also very hard for these NRIs to truly be fair since they are conducted from within CBP detention, with a lawyer—at best—available over the phone. It is not easy for lawyers to return phone calls in order to reach those held in detention and who seek help for an NRI interview.

In early December, pro-bono attorneys were asked by the Biden administration to help people placed in MPP prepare for their NRI interviews; 70 percent of them described abuse ranging from extortion to kidnapping either at the hands of Mexican officials or in circumstances where Mexican officials were unable or unwilling to provide protection. According to DHS statistics, 91 percent of people enrolled in MPP in December 2021 claimed fear of return to Mexico, yet only 12 percent passed their NRIs. This rate is lower than the passage rate for NRIs during the Trump administration’s MPP program, when passing the interviews also required meeting a higher standard of proof. One
asylum seeker told an immigration judge that he was afraid to return to Mexico but also that he already had been given an interview about this fear and was still in MPP. NRIs that go nowhere waste the time of asylum officers and confuse asylum seekers who should not be required to prove persecution in Mexico—a country they transit quickly given the danger and lack of protection they face there—when they have come to the United States because they fear persecution in their home country. The United States does not have a safe third country agreement with Mexico, and it is unfair to ask asylum seekers to individually prove the reality that the country is unsafe.

In MPP, immigration judges do not assess claims of fear of return to Mexico, instead referring those who express this fear to DHS for NRIs. Moreover, in some cases, judicial deference extends to assessments of the merits of asylum claims. On January 3, an immigration judge told me that those who did not appear (thus missing their scheduled hearing) would be granted a continuance: “They are from Cuba, Venezuela and Nicaragua, with genuine asylum claims we have to hear.” But at a hearing on January 4, when an ICE attorney asked for the deportation of a Venezuelan who did not appear, the same judge granted it. “It’s a different day,” she said. Neither the judge nor the Immigration and Custom Enforcement (ICE) attorney had any idea what had happened to the Venezuelan; the record consisted only of his refusal to sign both the certificate of service of his notice to appear and the form attesting to having received an explanation of the NRI process. Through January, ICE continued to request—and judges continued to grant—removals of asylum seeker who did not appear for their hearings in El Paso immigration court. About 25 percent of asylum seekers were so removed.

Watching the proceedings in immigration court—which involved almost exclusively unrepresented asylum seekers—I was also reminded of the often incomprehensible legal constructs that burden all asylum seekers in the U.S. system (who have a right to counsel but at their own expense). For example, seeking asylum after entering without inspection is permissible under U.S. law—as it must be. So it is not surprising that several unrepresented Nicaraguans responded to the allegation that they “unlawfully” entered the United States by insisting that they turned themselves in to U.S. officials right away, and that they entered without documents only because they were forced to flee their home countries. In any event, as a practical matter, they couldn’t have entered any other way since ports of entry are currently closed to asylum seekers.

To make matters even more confusing, ICE attorneys in court served each person in MPP with an additional document stating they are to be considered “arriving aliens”—a term typically reserved for people who enter at ports—because they came through the port for their court hearing. This has important implications, as “arriving aliens” are ineligible for voluntary departure or for bond from an immigration judge, though Cubans alone may benefit from the designation because they can later adjust to permanent status. “Arriving aliens” can request to withdraw their application for admission, a grant of which would not result in a 10-year bar on admission. But this
complicated “arriving alien” construct and its implications are certainly not at all clear to asylum seekers without counsel.

Five of the men I saw in court on January 3 and 4 were scheduled for their second hearings before the same judge on February 1 and 2. One man’s name was not on the docket for February 1, so he may have passed his NRI interview and been removed from the program. Another caught the chicken pox in a shelter in Mexico and so could not attend court on February 2; he was rescheduled for a hearing in a few weeks, though it was unclear how he would receive notice about this. Another man did not appear for his hearing in court on February 2, so the judge ordered him removed in absentia. Later in the day, however, the court learned that he was at the port of entry and on his way to court because his notice had stated the wrong time to appear. Two Nicaraguan men who appeared without attorneys on February 1 submitted their asylum applications and also stated that they feared return to Mexico. One of them would, as a result, be given his third NRI interview since being placed in the program on December 3. During a hearing that took eleven minutes for the other man, the judge looked over his submitted asylum application and said that it did not explain his fear of return to Nicaragua. In response, he gave the judge a declaration and pictures and other documents he had with him but had not realized were important to provide with his application. The judge, who is used to hearing mostly pro se cases, did not urge that he find an attorney, which would greatly improve his ability to make his case. She just explained the standard of proof required in the NRI and asylum proceedings. The hearing on the merits of his application was, inauspiciously, scheduled for April 1, 2022.

**A New Approach to MPP, and to Asylum**

The lower court’s mandate that MPP be implemented in good faith still leaves the Biden administration with significant leeway as to its administration. It should lower the standard the proof required for the NRI interviews, given its recognition in the termination memo of the violence experienced by migrants in Mexico. ICE should not request the removal of any asylum seekers in absentia if it lacks knowledge of the asylum seekers’ safety and interest in pursuing asylum. The administration should also ensure that all asylum seekers enrolled in MPP have meaningful access to counsel and help translating documents and collecting evidence.

In its appeal of MPP, the Biden administration should adopt the Ninth Circuit’s interpretation of the immigration statute and change its position on the legality of returning asylum seekers to Mexico to await proceedings under the contiguous territory provision. The administration should avoid the temptation of arguing for a bad interpretation of a provision giving them undue authority by claiming they would never use the authority in that way.

If the Supreme Court does affirm the legality of returning asylum seekers under the contiguous territory provision, Congress should amend the immigration statute to eliminate the provision or explicitly preclude its application to asylum seekers.
The Biden administration must cancel informal agreements and end negotiations with third countries that have not been proven safe to accept removals of asylum seekers from the U.S. border. Removing asylum seekers this way may lead to refoulement or chain refoulement and also shirks the United States’s responsibility to do its fair share to protect asylum seekers. Whether an asylum seeker is ineligible for asylum in the United States—because of firm resettlement in a third country or otherwise—should not be prejudged, but instead determined through adjudication on U.S. territory. Anything else, as the termination memo states, would be “inconsistent with this Administration’s values, which include ensuring the rights of migrants to seek lawful protection from removal in a safe environment.” And further that, “as a global leader in offering protection and resettlement to refugees, the United States also has a moral obligation to fairly consider” the claims of asylum seekers at the border. To lessen irregular migration, the administration should increase resettlement opportunities and other legal migration pathways for Venezuelans, Nicaraguans, Cubans, and Haitians who are in third countries in the Americas.

Besides ending MPP, the Biden administration should stop using Title 42 and open and increase capacity of ports of entry to process asylum seekers. As public health officials have argued, there are mediation measures that can be taken, including those that many other countries have put into place for asylum seekers and that the United States currently uses for other travel. Once CBP processes asylum seekers safely, they should be sent to non-profit shelters for help arranging travel to communities where they can pursue their asylum cases with the support of case managers and counsel. The administration should request, and Congress should appropriate, funding for increased staff at ports of entry, for the non-profit shelters near the border, and for legal counsel and community-support programs for asylum seekers. Without legal counsel, asylum seekers cannot effectively present their cases for asylum.

The administration must affirm the legality of seeking asylum at the border, even after entering without inspection, because this is not widely accepted by CBP officers. The renewed implementation of MPP is revealing problems with the conduct of vulnerability assessments by CBP and of fear screenings by asylum officers while in CBP custody. In implementation of its new “procedures for credible fear screening” regulation, the administration should ensure that these screenings do not take place in CBP custody.

The renewed implementation of MPP has also highlighted fundamental problems with the immigration courts, and particularly their relationship to DHS. Congress should consider the establishment of an immigration court independent of the Department of Justice or the executive branch.