



UvA-DARE (Digital Academic Repository)

COVID-19 Symposium: US Border Closure Breaches International Refugee Law

Castellanos-Jankiewicz, L.

Publication date

2020

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Castellanos-Jankiewicz, L. (Author). (2020). COVID-19 Symposium: US Border Closure Breaches International Refugee Law. Web publication or website, *Opinio Juris*.
<http://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

COVID-19 Symposium: US Border Closure Breaches International Refugee Law

opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/

April 3, 2020



[León Castellanos-Jankiewicz is Researcher in International Law at the Asser Institute for International and European Law in The Hague and Academic Coordinator of the Netherlands Network for Human Rights Research.]

As nearly half the world goes under lockdown to contain the spread of COVID-19, migrants have been especially helpless in the face of governmental measures restricting the movement of persons. Recent reports have documented the plight of seasonal workers stranded in [India](#), as well as the precariousness of migrant camps in [Greece](#), [Italy](#) and [Bangladesh](#). The border between Mexico and the United States constitutes another flashpoint where conditions are [rapidly deteriorating](#). On March 20th, the Mexican and American governments partially closed their land boundary, barring all non-essential travel until April 20th. The challenges of implementing these tightened controls to protect public health are staggering: documented crossings amount to over 990 million annually, making this the busiest international boundary worldwide.

However, the pandemic is also being invoked by the Trump administration to roll out [unprecedented measures](#) aimed at deporting migrants and asylum seekers. These new provisions place migrants at severe risk of kidnapping, torture, rape, and, ultimately, death.

Their adoption and ongoing implementation therefore bring the United States in breach of international refugee law, particularly as regards the obligation of non-refoulement. To be clear, the US government is duty-bound to avoid further contagion through immigration and other controls, but procedures must be applied in a proportionate and non-discriminatory manner. Absent any proof that migrants constitute an important source of contagion, these new restrictions can hardly pass muster as being proportionate, legitimate or necessary, given that they seem disconnected from immediate public health concerns. Instead, the new rules aggressively target migrants and their application represents a credible threat to the personal integrity of refugees and asylum seekers.

The Unprecedented Measures Breach Non-Refoulement Obligations

The far-reaching authorization issued by the US Department of Homeland Security requires officials to immediately remove undocumented migrants regardless of their provenance and, most problematically, to return all asylum seekers without distinction to their country of origin or point of entry without being processed. According to *The Washington Post*, the US government is now expelling all border-crossers to Mexico in 96 minutes on average. This contravenes the non-refoulement obligations contained in Article 33 of the Refugee Convention of 1951 that bind the United States through its accession to the 1967 Protocol and customary international law. Pursuant to the guarantee of non-refoulement, individuals cannot be returned to their country of nationality if they have a well-founded fear that their life, bodily integrity or fundamental rights would be threatened there.

The border's closure further breaches US obligations relating to the determination of refugee status in accordance with Article 9 of the Refugee Convention, which are outlined in a dedicated Handbook issued by the United Nations High Commissioner for Refugees. According to that document, authorities must have a clearly established procedure for examining and processing refugee applicants, who must be allowed to remain in the country while their refugee status is being determined. The right to remain must also be guaranteed when an appeal to said determination is pending. Moreover, refugees may not be penalized by unlawful arrival, as recognized in Article 31 of the Convention.

President Trump's new restrictions have also diverted the public's attention from other, more drastic, rules adopted by his administration against migrants and refugees beyond the border area. On the day of the partial closure, the US Centers for Disease Control and Prevention suspended the introduction of persons from designated countries, including Mexico, in the interest of public health for one year with the possibility of indefinite extension. This comes on the heels of the cancellation of all deportation hearings in US immigration courts from March 18th for health and safety reasons.

Taken together, these measures could effectively bring the entire US asylum system to a grinding halt, thus placing migrants and refugees at severe risk. Their lack of any sunset provisions also brings the US in breach of the aforementioned obligations contained in the

Refugee Convention. The immediate return policy is also disproportionate to the objective sought, considering that the US government has failed to demonstrate that migrants constitute a focal point of contagion as outlined below. Therefore, the obligation to avoid the credible threat to loss of life that expelled refugees and asylum seekers are subject to greatly outweighs the application of these new measures.

The Emergency Response Cloaks Discriminatory Action against Migrants

The stated aim of this unparalleled operation is to contain the coronavirus pandemic, but the methods used hardly withstand scrutiny when measured against the ostensible health risk posed by migrants. For one, the US government has not provided conclusive evidence that migrants have been significantly exposed to the virus. Indeed, on the day in which the closure came into effect, the World Health Organization (WHO) reported 164 confirmed cases of contagion in Mexico, whereas the US had 15,219 infected patients. Furthermore, Honduras, Guatemala and Belize, which are countries from where many migrants originate, had 36 cases in total. Although the lack of testing capabilities in Latin America might skew these statistics, travelers may not be turned away on this ground alone and their fundamental rights should be respected, according to the WHO's International Health Regulations. It would seem, then, that discriminatory action against migrants is being cloaked as a public health emergency response.

Quite tellingly, in his address of March 20th announcing the border's partial closure, President Trump cited the need to 'reduce the incentive for a mass global migration', and gestured in no ambiguous terms to the stringent immigration policies that have been a hallmark of his presidency. Surely, viral containment must be ensured across complex borders that are also economically vital. But this does not justify the systematic forced return of thousands of migrants and asylum seekers, especially when their exposure to the virus has not been conclusively established. Moreover, the procedures largely disregard the health and safety of migrant populations and, if anything, have worsened their conditions.

To justify the severity of these restrictions, Trump also invoked the National Emergency Proclamation that he issued on March 13th. However, such emergency declarations are subject to 'strict scrutiny' review by the US judiciary when they involve restrictions to fundamental rights. According to one expert, this review requires that the measures adopted be narrowly tailored to achieve the compelling interest sought. Crucially, the action taken should be the least restrictive means available to achieve the public health goal and must be evidence-based. In contrast, Trump's clampdown-like policies are disproportionate and fail to demonstrate compelling interest, notably because of the lack of conclusive proof that migrants represent such an imminent public health risk that would justify their automatic expulsion. It is therefore highly doubtful that the US administration's border restrictions meet the requirements of strict scrutiny review.

Further indication that the specific restrictions for migrants are unconnected to public health can be found in the so-called Migration Protection Protocols, also known as the 'Remain in Mexico' policy, which the recent measures further strengthen. Pursuant to this program, the US has already been outsourcing the custody of migrants to Mexico since January 2019. The practice is highly controversial, given the credible threat posed by drug cartels and other criminal organizations at the border. Even then, the 60,000 aliens currently subject to these proceedings have access to free counsel and are able to enter the US to attend their immigration court hearings. The new policies would render this system all but inoperative, thus depriving claimants from the opportunity to present their case before competent immigration judges. Needless to say, Mexico's aid or assistance to the US in executing these restrictive procedures could also give rise to its responsibility for breaches of international standards of refugee protection.

Concluding Remarks

The efforts to contain COVID-19 are placing a formidable strain on solidarity mechanisms established by international law, and risk placing vulnerable groups in evermore precarious situations. As borders continue to harden, governments should bear in mind that restrictions to freedom of movement and liberty will only be justified if they are proportionate, time-bound, strictly necessary and applied in a non-discriminatory manner. In particular, they should not unduly affect human rights or the right to seek asylum.