

BOFAXE

From Persecution to Poverty

Trump's Guatemala 'agreement' and the expansion of the 'safe third country' principle

— A 2019 ['safe third country' agreement](#) between Guatemala and the US allows the US to send asylum seekers who arrive at the US-Mexican border to Guatemala. Under the agreement Guatemala will process claims for asylum sent by the US and if successful offer protection. On the 6th of January 2020 [a U.S Department of Homeland Security spokesperson issued a statement](#) announcing that certain Mexicans seeking humanitarian protection in the US will now be included in the agreement. The inclusion of Mexican asylum seekers contradicts the assumption present in the 2019 reporting (see for example, [Foreign Affairs, BBC](#), and [The New Yorker](#)) that the US government would only 'deport asylum seekers to Guatemala if they passed through that country during their journey to the US-Mexican border.' Under the recent ['pivot'](#) from the original agreement the US is now able to fly a Mexican asylum seeker fleeing persecution on the other side of the Texas border some 2,500 kilometres away to Guatemala.

The [1951 UN Refugee Convention](#) and its [1967 Protocol relating to the Status of Refugees](#) (which will be referred to collectively as the Refugee Convention) require signatory states to provide protection to refugees who are 'fleeing a well-founded fear of persecution based on their race, religion, nationality, or membership of a political or social group' (Article 1). However, the exact nature of the protection is vague as the Refugee Convention ['neither expressly authorises nor prohibits'](#) the transfer of protection obligations between states.

The ['safe third country' principle](#) has conventionally been based on an interpretation of the Refugee Convention that requires a joint reading of Articles 31 and 33 (see [here](#) at 670). The existing debate in human rights law about the exact criteria for determining a 'safe' third country and the legality of specific asylum transfers can only be assessed on a case-by-case basis. Such an analysis is beyond the scope of this post. Instead the post focuses on the application of the general principle and its evolution. The principle has traditionally accepted that asylum seekers may be transferred between states, as long as the asylum seeker does not face persecution in that state (Article 33) and the asylum seeker is not coming directly from a territory where his/her life or freedom was threatened (Article 31).

The 'safe third country' principle first emerged in the Scandinavian states in the mid-1980s and was argued across Europe by the 1990s (see [here](#) for details, p. 664). It aimed to address the increasing concern that asylum seekers were not claiming asylum in their first European country of arrival but were moving across Europe to reach more ['sympathetic'](#) states or were applying in multiple states. The 'safe third country' principle was considered necessary to prevent asylum seeker 'orbit' and 'asylum shopping' (see [id.](#), 670). The principle was reflected in the [Dublin Convention](#), which allowed the transfer of asylum seekers between certain European states if the asylum seeker had transited through or had existing family connections in the receiving state. The principle was also present in a 2016 agreement between the European Union and Turkey. The agreement stipulated that any Syrian refugee who reached Greece from Turkey would be returned to Turkey. It reflects a common justification for the 'safe third country' principle: the agreement acts as a deterrent to prevent asylum seekers from risking their lives as they move between states. The EU-Turkey agreement was argued to deter asylum seekers from taking dangerous boat journeys between Turkey and Greece.

The UNHCR responded to the development of the 'safe third country' principle by recognising that international co-operation and burden sharing were a ['prerequisite for refugee protection.'](#) However, the practice of asylum transfer was, in the [opinion of the UNHCR](#), only legal if the receiving state complied with basic human rights instruments, provided 'access to status determination procedures' and satisfactory means of subsistence for the asylum seeker.

Guatemala's 'safe third country' agreement with the US was unveiled in July 2019 and it initially appeared to follow a similar pattern and logic to previous agreements. Under the agreement it was reported that El Salvadorian and Honduras asylum seekers who travelled through Guatemala to reach the US-Mexican border would be flown back to Guatemala. The Trump administration argued that this would deter asylum seekers from making the [dangerous journey](#) to the US through Central America.

Therefore the statement by the US Department of Homeland Security spokesperson that Mexicans could now be sent to Guatemala [contradicted the initial assumption](#) that the agreement only applied to asylum seekers who travelled through Guatemala. For a Mexican asylum seeker there is no 'dangerous journey' through other Central American states. They are 'coming directly from a territory where their life or freedom was threatened' (Article 31). The inclusion of Mexican asylum seekers in the US-Guatemala agreement supports a broader interpretation of the principle that allows for the transfer of refugees as long as the transfer does not breach the principle of non-refoulement (Article 33). However, this wider interpretation does not require the receiving state to have a geographical connection with the refugee's flight from persecution.

The US is not the first country to adopt an expansive interpretation of the 'safe third country' principle, (see [Bar-Tuvia's article on Australia and Israel](#)), and there is also support for the interpretation in academic scholarship (see [here](#)). The inclusion of Mexican asylum seekers in the agreement is nonetheless significant as it provides support from the world's largest power for the adoption of a wider interpretation of the principle. This support advances a precedent that could have a significant effect on states' handling of future flows of asylum seekers, with possible transfer agreements made with any 'safe' (in accordance with Article 33) state regardless of an asylum seekers geographical route of transit. This could hypothetically see Hungary transferring Syrian asylum seekers to Guatemala.

Previous 'safe third country' agreements have seen receiving states leveraging their consent to these agreements for financial benefits (see these pieces on the [EU-Turkey agreement](#) and the [Australia agreement](#)). The 'agreement' between the US and Guatemala is significant for creating a precedent that allows larger and richer states to coerce, rather than persuade, poorer states into signing safe third country agreements. When the initial secret negotiations were leaked the proposed US-Guatemala agreement faced opposition in Guatemala, with [one poll](#) reporting that only 18% of people supported it. President Trump responded to the opposition on [twitter](#), 'Guatemala... Now we are looking at the 'BAN, Tariffs, Remittance Fees, or all of the above.' Trump's threats could have had significant consequences for the Guatemalan economy. The US receives nearly 40% of Guatemala's exports. Remittances sent from the US make up nearly 12% of Guatemala's GDP. The US also provides 1 billion in foreign direct investment. Consequently, Guatemala, [57% of whose population is estimated to live in poverty](#), signed the agreement.

This reality contrasts with the [UNHCR's attempted characterisation](#) of 'safe third country' agreements as fostering regional co-operation and facilitating burden sharing. Instead the US appears to be using its economic power to form 'agreements' that create a precedent for burden shifting from wealthier to poorer states (see for example [the finalisation of a US agreement with Honduras](#)) notably without any [apparent financial compensation](#) for the receiving state. Receiving states would then have even less financial capacity to process asylum claims and provide protection. Therefore the expansion of the safe third country principle and an increasingly coercive approach to forming 'agreements' may have a detrimental effect on future asylum seekers. These changes make it increasingly likely that after fleeing persecution asylum seekers will then be transferred to poverty.