COVID-19 and the Protection of Refugees and Asylum-Seekers

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The warnings were dire: COVID-19 would ravage refugee camps. Residents of these congregate settings, it was said, were particularly vulnerable because of dense and multi-generational living conditions, poor sanitation and hygiene, a lack of adequate medical facilities and staff, difficulties in educating refugee populations about the disease and its spread, and the likelihood that host states would put refugees low on the list for treatment and vaccinations. Yet the predicted "perfect storm" has not come to pass. While refugee camps exhibit elevated risk factors, they also benefit from programs and medical interventions sponsored by international and other non-governmental organizations. And, in general, infection and mortality rates have been lower in the Global South than the Global North—for reasons that are not entirely clear.

The most serious impacts of the pandemic have been non-health related: loss of jobs during lockdowns, a decline in remittances, an increase in gender-based violence, xenophobia directed generally at "foreigners," and the loss of education opportunities due to school closures. COVID-19 may cause more deaths indirectly than directly in the Global South due to a reduction in prevention measures and access to medical treatment for other diseases such as malaria.

The pandemic has also had a significant impact on the international protection regime by restricting the travel of refugees and asylum-seekers.[1] The United States provides a deeply troubling example.

Prior to the pandemic, the Trump administration had announced dramatic cuts in the U.S. overseas refugee program and a plethora of policies to prevent asylum-seekers from getting to the United States (most notably, the "remain in Mexico" program). COVID-19 provided a basis for extending and further tightening these restrictions.

As explained by the State Department in an October 2020 report to Congress:

"Refugee resettlement in the United States decreased significantly in FY 2020 due to the COVID-19 pandemic. Due to travel restrictions in and out of refugee processing sites worldwide, USRAP suspended refugee arrivals from March 19 to July 29, 2020 except for emergency cases. USRAP resumed general refugee arrivals July 30, 2020 with additional health measures specified by the Centers for Disease Control and Prevention (CDC). However, reduced flight availability due to the general decrease in demand for international travel meant a slow pace of refugee resettlement in the United States through the rest of FY 2020. Almost 7,000 of the 18,000 refugee numbers available under the FY 2020 Presidential Determination went unused. (Pp. 4-5.)"

One should be highly skeptical of the claim that U.S. refugee processing was suspended and then re-started at a slower pace due to "travel restrictions" and "reduced flight availability." The United States, working with the UN Refugee Agency, could have found ways to admit refugees if it had sought to do so, with, for example, the assistance of U.S. military flights.

COVID-19 also provided the silver bullet for Trump administration efforts to close the U.S. southwest border to asylum-seekers. The Trump White House pressured the Centers for Disease Control and Prevention (CDC) to invoke a little-known provision of the Public Health Service Act to bar the admission of all persons seeking entry to the United States anywhere other than designated ports of entry. Through a new process now labeled "Title 42 expulsions"—not provided for in U.S. immigration statutes—the government has turned back more than 600,000 migrants at the southwest border as of May 2021. Although the CDC and Department of Homeland Security regulations provide the possibility of a "humanitarian" exception to expulsion, reportedly very few persons subject to the CDC rules have been permitted to remain in the United States to pursue asylum claims.

Again, a great deal of skepticism should be applied to Trump administration justifications for the expulsion policy. It based the complete denial of due process at the border on purported concerns about the spread of COVID-19 to Border Patrol agents who come in contact with asylum-seekers. But the policy was announced at a time when U.S. cases far outnumbered Mexican cases; and, in any event, providing U.S. officials with personal protective equipment, as well as testing and quarantining asylum-seekers are obvious alternatives to expulsion.

The Biden administration has reversed the Trump policies on admission of refugees, raising the cap for fiscal year 2021 to 62,500. But is has kept in place the Title 42 expulsion process.

This is not to say that travel restrictions cannot be legitimate and proportionate responses to COVID-19. But travel restrictions, and other state policies that burden migrants, must be evaluated against core human rights principles that protect people on the move. An expert group has compiled these principles in a document that has been signed by more than 1000 academics worldwide: Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons. As to refugees and asylum-seekers, the Principles affirm that states must, inter alia, ensure access to health services and treatments to persons irrespective of immigration status and respect the norm of non-refoulement in crafting pandemic-related regulations.

How would the Principles apply to current (and future) U.S. policies?

First, COVID-19 policies cannot be used as a pretext for adopting non-health related control measures. The existence of reasonable alternatives would be important in demonstrating pretextual justifications.

Second, non-citizens must have access to health facilities, treatment, and vaccination programs.[2] Persons admitted through the U.S. overseas refugee program are eligible for health benefits for a period of time and can enroll in Affordable Care Act insurance plans and Medicaid (under rules set by states). Asylum-seekers who have no other lawful status, however, are excluded from most federal and state health programs (although they are eligible for COVID-19 testing and emergency treatment at hospitals, and some states have extended Medicaid to cover them).

Third, programs adopted to respond to the

financial impacts of the pandemic—e.g., enhanced unemployment payments and eviction moratoria[3] —should be made available to asylum-seekers.

Fourth, the U.S. expulsion policy violates fundamental human rights norms that protect against arbitrary state conduct. For persons with a well-founded fear of return to their home state, the lack of due process is particularly egregious. The United States must amend the CDC order to establish a procedure for the screening of asylum applicants, perhaps through use of "credible fear" determinations. With testing and other precautions, this can be accomplished in a manner that protects government officials. Regrettably, the Biden administration has retained the Trump COVID-related expulsion policies, announcing an exception only for unaccompanied minor children.

Fifth, given the risk of the spread of COVID-19 in congregate settings, asylum-seekers at the border and inside the United States should not be detained except to the extent necessary to preserve their health and the health of others (i.e., for testing and treatment).

References

1. Although, according to UNHCR, 81 countries that have adopted travel restrictions have some kind of exception for asylum-seekers.

2. Globally, refugees are included in about 57% of the more than 90 vaccination plans being developed by states: https://www.unhcr.org/en-us/news/latest/2021/1/5fff1afe4/qa-including-refugees-vaccine-rollout-key-ending-pandemic.html.

3. The current CDC eviction moratorium appears to apply to all tenants, irrespective of immigration status: https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-01292021.pdf.