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**RE: Request for Comments: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act (November 19, 2019) DHS Docket No. USCIS-2019-0021 and DOJ Docket No. EOIR-19-0021; A.G. Order No. 4581-2019.**

Dear Mr. Davidson and Ms. Alder:

The Migrant Rights and Justice (MRJ) Program of the Women’s Refugee Commission (WRC) writes in response to DHS Docket No. USCIS-2019-0021 and DOJ Docket No. EOIR-19-0021; A.G. Order No. 4581-2019, Request for Comments: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act (November 19, 2019) (hereinafter, the Rule).

WRC is a non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. WRC is a leading expert on the needs of refugee women and children, and the policies and programs that can protect and empower them. The MRJ program focuses on the right to seek asylum in the United States. It strives to ensure that refugees, including women and children, are provided with humane reception in transit and in the United States, given access to legal protection, and protected from exposure to gender discrimination or gender-based violence.

Since 1996, the MRJ team has made numerous visits to the southwest border region, including along Mexico’s northern border, as well as to immigration detention centers for adult women and families and to shelters housing unaccompanied children throughout the country. Based on the information that we collect on these visits and our legal and policy analysis of the issues, we advocate for improvements through various methods, including meetings with government officials and service providers, and by documenting our findings through fact sheets, reports, backgrounders, and other materials. We make recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency could improve its compliance with the relevant standards.<sup>1</sup>

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<sup>1</sup> WRC, LAWG, et. al., *Forced Return to Danger*, December 5, 2019; WRC, AILA, et. al, *Congress Should Conduct Significant Oversight of Remain in Mexico and Use of Tent Courts by DHS and DOJ*, letter to Congress, October 2, 2019; WRC, *Separation of families via the ‘Migrant Protection Protocols’*, Complaint to DHS, August 16, 2019; WRC, *How the Trump Administration Caused the Humanitarian Crisis at the Border and What Congress and the Administration Can Do to Fix It*, July 2019; WRC, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, June 2019; WRC, *Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso*, September 2019, WRC, *Comments to ICE in response to the Department of Homeland Security and the Department of Health and Human Services’ Proposed Regulations to the Flores Settlement Agreement*, November 2018; WRC, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement*, March 2019; WRC, *Five Ways Trump’s Enforcement Regime is Devastating Children and Families*, November 2018; WRC, *Backgrounder: Memorandum of Agreement Between DHS and HHS Emphasizes Immigration Enforcement Over Child Safety*, June 2018; WRC and KIND, *Family Separation at the Border*, November 2018; WRC, *Why Mexico Does Not Qualify as a Safe Third Country*,

WRC has extensively documented how endemic violence, including life-threatening sexual and gender based violence, extreme economic hardship, climate change, weak institutions, impunity and corruption in El Salvador, Honduras and Guatemala have lead their citizens to flee and seek international protection.<sup>2</sup> We regularly interview asylum-seekers, service providers, lawyers and government officials who shared stories that attest to the refugee nature of the displacement in Central and North America, as well as to the significant risks and protection gaps asylum-seekers face in El Salvador, Guatemala, Honduras and Mexico.

Our comments relate to the so-called Asylum Cooperative Agreements (ACA) the U.S. entered into with Honduras, El Salvador, and Honduras to reduce the number of asylum applicants allowed to present asylum claims in the United States. The government appears to be basing its authority to enter into the ACA on Section 208(a)(2)(A) of the Immigration and Nationality Act (INA), which governs safe third country agreements.<sup>3</sup> However, the government’s reliance is misplaced because Guatemala, El Salvador, and Honduras cannot fulfil the legal elements of a safe third country agreement.

As leading experts on legal and humanitarian protections to asylum seekers, WRC is concerned that this rule and the ACA it seeks to implement contravene both domestic and international law and will send asylum seekers to countries where they will not be able to receive meaningful protection and will face life-threatening dangers. Specifically, it is our expert opinion that the countries with which the U.S. has pursued ACA are unsafe and do not have asylum systems capable of providing the required “full and fair” procedure for determining asylum or equivalent protection. Further, it is our expert opinion that this rule and the ACA, if implemented, could lead to family separations and the *refoulement* of vulnerable asylum seekers, including women and children to countries where they are at risk of harm, torture, or death.

For the reasons detailed in the comments that follow, WRC urges DHS and DOJ (hereinafter the Departments) to immediately withdraw this Rule, suspend the implementation of the ACA with Guatemala, Honduras and El Salvador, suspend the negotiation of additional ACA or equivalent safe third country agreements.

**I. HONDURAS, EL SALVADOR, AND GUATEMALA CANNOT PROVIDE ASYLUM SEEKERS WITH “ACCESS TO A FULL AND FAIR PROCEDURE FOR DETERMINING A CLAIM TO ASYLUM OR EQUIVALENT TEMPORARY PROTECTION” AS REQUIRED BY U.S. AND INTERNATIONAL LAW**

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May 2018; WRC, et. al, *Joint Complaint to Department of Homeland Security’s Office of the Inspector General and Office of Civil Rights and Civil Liberties on Forcible Separation of Families in Customs and Border Protection Custody*, December 2017; WRC, et al, *Joint Complaint to Department of Homeland Security’s Office of the Inspector General and Office of Civil Rights and Civil Liberties on ICE Raids Targeting Sponsors of Unaccompanied Children*, December 2017; WRC, et. al., *Letter to Secretary Kelly Urging Him to Abandon Any Plans to Pursue This Costly Expansion*, May 3, 2017; WRC, *10 Things to Know about How Trump’s Executive Order will Harm Women & Children Seeking Protection*, January 2017.

<sup>2</sup> E.g.; Women’s Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America*, October 2012; Women’s Refugee Commission, *Migrant and Refugee Caravans: Failed Responses to Women and Children in Need of International Protection and Humanitarian Aid*, May 2019.

<sup>3</sup> See Rule at 63996: Section 208(a)(2)(A) bars an alien from applying for asylum in the United States when the following four requirements are satisfied: (i) The United States has entered into a requisite “bilateral or multilateral agreement”; (ii) at least one of the signatory countries to the agreement is a “third country” with respect to the alien; (iii) “the alien’s life or freedom would not be threatened” in that third country “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and (iv) that third country provides aliens removed there pursuant to the agreement “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”

At 63999 and 64000 the Rule specifies that: “the salient factor for the formulation and application of a section 208(a)(2)(A) agreement is whether the country sharing responsibility with the United States for refugee protection has laws and mechanisms in place that adhere to international treaty obligations to protect refugees.” On 64002, it goes on to specify that “prior to implementation of an ACA subject to this rule, the Departments will make a generalized determination as to whether the third country grants asylum seekers ‘access to a full and fair procedure’ within the meaning of INA 208(a)(2)(A). This finding is required by the text of section 208(a)(2)(A).”

Given that the United States has already signed ACA with Guatemala, Honduras and El Salvador, and has started to implement its agreement with Guatemala, WRC questions the diligence with which these assessments were carried out and will be carried out for future agreements. The Departments’ conclusion that Guatemala, Honduras and El Salvador can provide asylum-seekers with fair and full asylum proceedings is unequivocally wrong. This is plainly apparent given the weaknesses of the embryonic asylum systems in each of these countries:

- Guatemala decided less than 10% of the less than 500 asylum claims it received between January 2018 and August 1, 2019.<sup>4</sup> This figure reflects problems of understaffing and underqualified personnel. The Guatemalan asylum system has only three officers to interview applicants and twelve officers to adjudicate the cases.<sup>5</sup> In 2018, the United States State Department reported that “both migration and police authorities [in Guatemala] lacked adequate training concerning the rules for establishing refugee status.”<sup>6</sup> Despite this, and without any explanation, the Departments certified that Guatemala offers “fair and full asylum proceedings.”<sup>7</sup> There is no doubt that the facts contravene this “certification” and reveal that Guatemala’s asylum system is weak and dysfunctional.
- The United Nations High Commissioner for Refugees (UNHCR) has stated as recently as October 2019 that Honduras does not have a recent history of asylum processing.<sup>8</sup> In 2018, only 80 individuals sought asylum in Honduras<sup>9</sup> and the State Department human rights report on Honduras mentions significant delays in processing of asylum claims.<sup>10</sup>
- The President of El Salvador declared that El Salvador does not have the asylum capacities to receive people transferred by the ACAs.<sup>11</sup> The considerable information gaps regarding the Salvadoran asylum system are concerning. Local media reported that there is only one officer working directly on asylum claims.<sup>12</sup> The 2018 State Department human rights report, as of July 31, 2018, reflects that only four asylum requests had been submitted, with three resulting in denial and one still under consideration.<sup>13</sup>

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<sup>4</sup> “¿Tercer país seguro? Guatemala no está en capacidad de atender un aumento de solicitudes de asilo”, Univision, August 3, 2019. <https://www.univision.com/noticias/inmigracion/tercer-pais-seguro-el-sistema-de-asilo-rudimentario-de-guatemala-carece-de-capacidad-dicen-expertos>.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Department of State, *2018 Country Reports on Human Rights Practices: Guatemala*.

<sup>7</sup> [https://twitter.com/J\\_Gelatt/status/1192510394167808002](https://twitter.com/J_Gelatt/status/1192510394167808002).

<sup>8</sup> UNHCR, Posición del ACNUR frente a la implementación del ‘acuerdo de asilo’ bilateral entre Honduras y EUA., October 23, 2019. <https://www.acnur.org/noticias/press/2019/10/5db06d9a4/posicion-del-acnur-frente-a-la-implementacion-del-acuerdo-de-asilo-bilateral.html>

<sup>9</sup> UNHCR, Expanding Operations in Central America 2019, <http://reporting.unhcr.org/sites/default/files/UNHCR%20Expanding%20Operations%20in%20Central%20America%20-%20February%202019.pdf>

<sup>10</sup> U.S. Department of State, *2018 Country Reports on Human Rights Practices: Honduras*.

<sup>11</sup> Sharyn Alfonsi, *60 Minutes interview with Salvadorian President Nayib Bukele*, December 15, 2019, <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>.

<sup>12</sup> Nelson Rauda, “El Salvador Signs Agreement to Accept Asylum Seekers the US Won’t Protect”, *El Faro*, September 21, 2019, [https://elfaro.net/en/201909/el\\_salvador/23667/El-Salvador-Signs-Agreement-to-Accept-Asylum-Seekers-the-US-Won%E2%80%99t-Protect.htm](https://elfaro.net/en/201909/el_salvador/23667/El-Salvador-Signs-Agreement-to-Accept-Asylum-Seekers-the-US-Won%E2%80%99t-Protect.htm).

<sup>13</sup> U.S. Department of State, *2018 Country Reports on Human Rights Practices: El Salvador*.

It is worth noting, that when expressing its concerns about the Rule, UNHCR described the asylum systems of the three countries as “still very nascent.”<sup>14</sup> Furthermore, integration services in these countries are not comparable to those offered in the United States and they do not even comply with international refugee law standards. Governmental services and civil society efforts to welcome migrants are already beyond capacity with the significant numbers of repatriated migrants who face service and protection gaps.<sup>15</sup>

For the reasons stated above, the Rule should be rescinded. If the government was to propose new regulations for implementing ACA with any country, the Departments must provide answers to the following questions:

- How do the asylum systems of the country in questions – in this cases, El Salvador, Guatemala and Honduras work?
- How many asylum officers do they have and what is their training?
- Have the Salvadorian, Guatemalan and Honduras asylum systems overcome the shortcomings identified by the Department of State? If so, when and how?
- What methodology was followed to determine that a country has laws in place for asylum seekers to access a full and fair immigration procedure?
- What methodology was followed to determine that a country has mechanisms in place for asylum seekers to access a full and fair immigration procedure?
- For accountability and transparency, the assessments should be challengeable by Congress, Courts and the public in general. Where and when will the assessments be published?
- What procedures will be in place to comment on the Departments assessment of the asylum system of a country with which the government signs and ACA?

## II. GUATEMALA, EL SALVADOR, AND HONDURAS ARE NOT SAFE COUNTRIES

The countries with which the United States has entered into ACA – Guatemala, El Salvador, and Honduras – are extremely unsafe and lack conditions to guarantee minimum standards of well-being for people living in them. Displacement from the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras) has proven to be an enduring phenomenon due to widespread and unchecked criminal violence caused by gang- and drug-related activities, extreme economic hardship aggravated by climate change, corruption and crime, and life-threatening domestic violence.<sup>16</sup>

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<sup>14</sup> UNHCR, *Statement on new U.S. asylum policy*, November 19, 2019,

<https://www.unhcr.org/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html>.

<sup>15</sup> WRC, LAWG, et. al., *Forced return to danger: Civil Society Concerns with the Agreements Signed between the United States and Guatemala, Honduras, and El Salvador*, December 5, 2019, “Guatemala “tercer país seguro”, no tan seguro para migrantes,” Associated Press, July 13, 2019,

<https://www.apnews.com/78d8f540f6a74a5191bd78f032b86306>; El Salvador sin capacidad para recibir a solicitantes de asilo, dice experto,” El Salvador.com, November 20, 2019.

<https://www.elsalvador.com/noticias/nacional/el-salvador-sin-capacidad-para-recibir-a-solicitantes-de-asilo-dice-experto/642018/2019/>; La Pastoral de Movilidad Humana CEG, Facebook, November 15 2019.;

[https://m.facebook.com/story.php?story\\_fbid=2683767648332644&id=321801504529282](https://m.facebook.com/story.php?story_fbid=2683767648332644&id=321801504529282).

<sup>16</sup> Abdel Camargo, *Arrancados de Raíz: Causas que originan el desplazamiento transfronterizo de niños, niñas y adolescentes no acompañados y/o separados de Centroamérica y sus necesidades de protección internacional*, UNHCR, 2014. UNHCR, UNHCR), *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection*, 13 March 2014; *Women on the Run: First-hand accounts on Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 26 October 2015. UNICEF, *Desarraigados en Centroamérica y México: Los niños migrantes y refugiados se enfrentan a un círculo vicioso de adversidad y*

Honduras and El Salvador are among the five most violent countries in the world.<sup>17</sup> In 2018, the Northern Triangle registered 37.8 homicides for every 100,000 inhabitants,<sup>18</sup> compared with 5.4 in the United States.<sup>19</sup> In 2018, at least 190,000 individuals were internally displaced in Honduras<sup>20</sup> and 280,000 in El Salvador<sup>21</sup> due to violence from gangs and organized crime.<sup>22</sup> In Guatemala, the figure for 2017 was 242,200 people internally displaced.<sup>23</sup>

For historic and geographical reasons, the Northern Triangle of Central America is a hub of transnational criminal organizations, like gangs and drug dealers that coordinate with domestic organized-crime groups.<sup>24</sup> Gangs such as MS-13 and Barrio 18 exercise territorial control in all the region,<sup>25</sup> which implies that persecutors are not bound by borders and could easily locate and harm asylum seekers in any country in the region to which they are transferred. This risk is heightened by the fact that there is free movement across borders between El Salvador, Guatemala, Honduras, and Nicaragua due to the Central America – 4 Free Mobility Agreement (CA-4).

The Northern Triangle of Central America also registers one of the highest rates of gender-based violence in the world, including femicides. Gender and sexual violence are rooted in the patriarchal and *machista* culture. In gang-controlled areas, women and girls face sexual exploitation and are often coerced into becoming a male gang member's sexual partner.<sup>26</sup>

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*peligro; August 2018. Sandra Albicker, et al., La caravana de migrantes centroamericanos en Tijuana 2018: diagnóstico y propuestas de acción, El Colegio de la Frontera Norte, 2018, pp. 2-4.*

<sup>17</sup> Washington Office on Latin America (WOLA). "9 Questions (and Answers) About the Central American Migrant Caravan". October 22, 2018. <https://www.wola.org/analysis/9-questions-answers-central-american-migrant-caravan/>

<sup>18</sup> In 2018, El Salvador registered a 51 per 100,000 people homicide rate. Mexico registered a homicide rate of 25.8 per 100,000 people in 2018. Guatemala's rate was lower, at 22.4 per 100,000 people for the same year. Source: InSight Crime, "Balance de InSight Crime sobre los homicidios en 2018", January 22, 2019. <https://es.insightcrime.org/noticias/analisis/balance-de-insight-crime-sobre-los-homicidios-en-2018/>; KIND, *Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala*, 2017. [https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice\\_SGBV-Gang-Report-FINAL.pdf](https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf)

<sup>19</sup> Lois Beckett, "US violent crime and murder down after two years of increases, FBI data shows", *The Guardian*, September 24, 2018, <https://www.theguardian.com/us-news/2018/sep/24/fbi-data-violent-crime-murder-us>.

<sup>20</sup> Honduras, Internal Displacement Monitoring Centre, <http://www.internal-displacement.org/countries/honduras>

<sup>21</sup> Internal Displacement Monitoring Centre, *El Salvador*, <http://www.internal-displacement.org/countries/el-salvador>.

<sup>22</sup> Internal Displacement Monitoring Centre, *Honduras*, <http://www.internal-displacement.org/countries/honduras>.

<sup>23</sup> Internal Displacement Moderating Centre, *Guatemala*, <http://www.internal-displacement.org/countries/guatemala>.

<sup>24</sup> Rocio Cara Labrador y Danielle Renwick, "Central America's Violent Northern Triangle", Council on Foreign Relations, June 26, 2018, <https://www.cfr.org/background/central-americas-violent-northern-triangle>.

<sup>25</sup> Insight Crime, *Barrio 18*, February 10, 2017, <https://es.insightcrime.org/el-salvador-crimen-organizado/barrio-18-perfil/>, Insight Crime, *Mara Salvatrucha (MS13)*, January 11, 2013, <https://es.insightcrime.org/el-salvador-crimen-organizado/mara-salvatrucha-ms-13-perfil/>.

<sup>26</sup> KIND, *Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala*, 2017. [https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice\\_SGBV-Gang-Report-FINAL.pdf](https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf)

- In Honduras, a woman was killed every 18 hours in 2018.<sup>27</sup> That same year, a total of 25 LGBTQ individuals were murdered, adding to the 303 who have been murdered since 2009.<sup>28</sup>
- In Guatemala, more than 100 cases of violence against women and girls were reported daily in 2018.<sup>29</sup> This figure is the tip of the iceberg, as most cases go unreported.
- In El Salvador there were 356 femicides<sup>30</sup> and at least over one third of women experienced some form of sexual and gender-based violence in 2018.<sup>31</sup> Given rampant impunity less than 10% of cases end in a conviction.<sup>32</sup> That year, there were 19 transgendered individuals murdered and six transgender women have been murdered in 2019.<sup>33</sup> A clear indication of the level of impunity is that not one of the 600 cases of transgender women murdered between 1993 and January 2019 has been solved.<sup>34</sup>

Authorities in the region are also agents of persecution. In its human rights reports, the U.S. State Department has pointed out alleged cases of unlawful killings by security forces; forced disappearances by military personnel; and torture by security forces.<sup>35</sup> UN bodies have continuously underscored that Central Americans are fleeing systematic human rights violations.<sup>36</sup> All the risks outlined above are exacerbated by weak institutions and corruption that lead to generalized impunity. Asylum seekers transferred under the ACA will not only be in danger, but will have little or no access to protection, justice and reparations.

For the reasons stated above, the Rule should be rescinded. If the government was to propose new regulations for implementing ACA with any country, the Departments must provide answers to the following questions:

- How did the Department conclude that countries with staggering levels of insecurity and impunity could be considered as viable options to transfer asylum seekers?
- Which methodology are the Departments following to determine that in country conditions are acceptable to receive transferred asylum seekers?
- What is the threshold to consider a country is safe to transfer an asylum seeker?

<sup>27</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer agreements of asylum seekers*, <https://www.refworld.org/docid/51af82794.html>.

<sup>28</sup> Centro de Monitoreo de Medios, Cattrachas, Accessed November 20, 2019. <http://cattrachas.org/index.php/es/observatorio>

<sup>29</sup> Ivan Gordillo, "Más de 100 Denuncias por Violencia Contra la Mujer se Reciben en Promedio Cada Día," *Publinews*, July 24, 2017, <https://www.publinews.gt/gt/noticias/2018/07/24/denuncias-por-violencia-contra-la-mujer-en-aumento.html>; Palma, Claudia, Cada 46 Minutos se Comete una Violación, *Prensa Libre*, May 16, 2016, <http://www.prensalibre.com/guatemala/justicia/cada-46-minutos-se-comete-una-violacion>.

<sup>30</sup> "Una mujer ha sido asesinada por día en lo que va del año en El Salvador," *Moneda*, February 14, 2019. <https://www.elsalvador.com/noticias/nacional/una-mujer-ha-sido-asesinada-por-dia-en-lo-que-va-del-ano-en-el-salvador/568115/2019/>

<sup>31</sup> "Policía asegura que cifra de feminicidios en El Salvador ha bajado un 18 % en lo que va de 2018", *El Salvador.com*, December 10, 2018. <https://www.elsalvador.com/noticias/nacional/este-ano-han-ocurrido-81-feminicidios-menos-a-comparacion-del-ano-pasado/547726/2018/>.

<sup>32</sup> WRC, LAWG and KIND, *Sexual and Gender-based Violence and Migration Fact Sheet*, December 2018. <https://www.lawg.org/wp-content/uploads/SGBV-Fact-Sheet-December-2018.pdf>.

<sup>33</sup> Internal Displacement Monitoring Centre, *El Salvador*, <http://www.internal-displacement.org/countries/el-salvador>.

<sup>34</sup> "En El Salvador hay un genocidio de las personas LGBTI", *Agencia Presentes*, January 14, 2019. <http://agenciapresentes.org/2019/01/14/karla-avelar-en-el-salvador-hay-un-genocidio-de-las-personas-lgbti/>

<sup>35</sup> U.S. Department of State, *2018 Country Reports on Human Rights Practices: El Salvador*.

<sup>36</sup> OHCHR, *Committees of experts from the UN urge States to protect the human rights of Central American migrants*, October 26, 2018, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23867&LangID=S>.

- Will Guatemala, Honduras and/or El Salvador provide special protection for transferred asylum seekers given their high levels of vulnerability? What kind of protections?
- For accountability and transparency, the assessments of countries that are considered viable for ACAs should be challengeable by Congress, Courts and the public in general. Where and when will the assessments be published?

### III. THE ACA WITH HONDURAS, EL SALVADOR, AND GUATEMALA MAY VIOLATE CUSTOMARY INTERNATIONAL LAW BECAUSE THEY WERE OBTAINED THROUGH COERCION

The lack of transparency with which these agreements were negotiated raises additional red flags regarding the trustworthiness of the Central American countries alleged willingness, commitment, and capacity to protect returned people. On 64001-002, the IFR affirms that “these third countries of removal would have pre-committed, per binding agreements with the United States, to provide access to a ‘full and fair procedure’ for the alien to acquire ‘asylum or equivalent temporary protection.” In the case of the ACA the United States government secured with Guatemala, El Salvador and Honduras, there are reasons to believe these countries were coerced and rushed into commitments they cannot and will not honor:

- In October 2018, President Trump threatened the Northern Triangle of Central America with cutting aid and cooperation funds if they did not help the reduce the number of migrants that were arriving to the US southwest border.<sup>37</sup> This threat was carried out on June 2019.<sup>38</sup>
- On July 14, 2019, the Guatemalan Constitutional Court issued an injunction against the Guatemalan President signing a Safe Third Country Agreement with the United States. Guatemala’s highest court pointed out that the country’s asylum system has considerable limitations and could not process people as required by such an agreement. Moreover, it required that any such agreement be approved by Congress before implemented.<sup>39</sup> The Guatemalan congress has not yet approved the agreement, potentially rendering it unenforceable in that country.
- On July 23, 2019, President Trump threatened Guatemala with tariffs, remittances fees and banning Guatemalans from entering United States after Guatemalan President Jimmy Morales postponed a visit to Washington in which he would allegedly sign the ACA.<sup>40</sup>
- On December 15, 2019, almost three months after El Salvador and the US sign an ACA, the Salvadorian President described the ACAs as having a “lot of ifs because these countries need to be safer, a lot safer,” noting that El Salvador does not have asylum capacity to received people transferred under these agreements.<sup>41</sup>

Article 51 of the Vienna Convention on the Law of Treaties establishes that “the expression of State’s consent to be bound by a treaty which has been procured by the coercion of its representatives though acts or threats directed against him shall be without any legal effect.” Guatemala and Honduras are party to the Vienna Convention, while the United States and El Salvador are signatory, and, according to the Department of State, the United States considers many of its parts as to

<sup>37</sup> Makini Brice and Delphine Schrank, “Trump threatens to cut Central America aid over migrant caravan”, *Reuters*, October 22, 2018.

<sup>38</sup> Lesley Wroughton and Patricia Zengerle, “As promised, Trump slashes aid to Central America over migrants”, *Reuters*, June 17, 2019.

<sup>39</sup> Decision issued on July 14, 2019 by the Guatemalan Constitutional Court in the files 3829-2019, 3849-2019 and 3881-2019.

<sup>40</sup> John Wagner, et. al, “Trump threatens Guatemala after it backs away from ‘safe third country’ asylum deal”, *The Washington Post*, July 23, 2019.

<sup>41</sup> Sharyn Alfonsi, *60 Minutes interview with Salvadorian President Nayib Bukele*, December 15, 2019, <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>.

constitute customary international law on the law of treaties.<sup>42</sup> The United States is also bound by customary international law, which is an accepted part of federal law.<sup>43</sup> As the United States may have coerced Honduras, El Salvador, and Guatemala into the ACA, the agreements may be unlawful under international law, and they should be suspended and the implementing Rule should be rescinded. If the government was to propose new regulations for implementing ACAs with any country, it must ensure through the Rule that the negotiation process be transparent, accountable and free from coercion.

#### **IV. THE SCREENING PROCEDURES IN THE RULE ARE INSUFFICIENT TO PREVENT THE UNITED STATES FROM VIOLATING DOMESTIC AND INTERNATIONAL LEGAL OBLIGATIONS BY REMOVING ASYLUM SEEKERS TO A THIRD COUNTRY WHERE THEY MIGHT BE PERSECUTED OR TORTURED**

The right to seek asylum is established in international law under the 1948 Universal Declaration of Human Rights and the binding 1951 Convention on the Status of Refugees.<sup>44</sup> The Refugee Convention establishes who qualifies as a refugee, the rights of persons recognized as refugees or granted asylum, and the obligations of States toward these persons. The US is bound by the corresponding duty of *non-refoulement* under domestic and international law.

Specifically, INA 208(a)(2)(A) requires that an asylum seeker's "life or freedom would not be threatened" in a third country "on account of race, religion, nationality, membership in a particular social group, or political opinion." It is a violation INA 208(a)(2)(A) and of international law to remove an asylum seeker to a third country without an individualized determination that the third country is indeed safe for that asylum seeker, including safe from refoulement to that asylum seeker's home country, and that the asylum seeker will have access to a full and fair asylum procedure in that country.

Removing individuals from the U.S.-Mexico border, barring them from seeking protection in the United States, and forcibly sending them to seek asylum in any of these countries violates the principle of nonrefoulement or an individual's right to not be returned to a country where they have reason to fear persecution. The screening mechanism is described in the Rule as follows:

"If, on the other hand, the alien affirmatively states a fear of persecution or torture in, or removal to, the third country or countries, the asylum officer will then determine whether the alien can establish, by a preponderance of the evidence, that, if the alien were removed to the third country or countries, it is more likely than not that he or she would be persecuted on account of a protected ground or tortured." (Rule at 64002).

This mechanism places the burden on the applicant to both affirmatively express fear of harm in a third, unknown country and to meet their heightened burden of proof that they would suffer persecution in that country by a preponderance of the evidence. The rule itself signals that few asylum seekers will be able to meet this burden because the third country "did not prompt" the asylum claim. (Rule at 64004). Even those who succeed in meeting the burden for a specific country face being sent to another third country with which the United States has executed an asylum

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<sup>42</sup> US Department of State, Vienna Convention on the Law of Treaties, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm>.

<sup>43</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>44</sup> Convention and Protocol Relating to the Status of Refugees, United Nations General Assembly resolution 429(V) of 14 December 1950, available at <http://www.unhcr.org/refworld/docid/3b00f08a27.htm> (last accessed July 26, 2017).



agreement. Moreover, per the rule, throughout this entire process asylum seekers will not be allowed to access legal counsel before being transferred to a third country to claim asylum.

Because the screening mechanism created by the Rule is woefully inadequate to implement the obligation of *non-refoulement*, the Rule will undoubtedly lead to violations of domestic and international law because it will lead to the forcible return of vulnerable asylum seekers to countries in which their lives and freedom will undoubtedly be threatened. For the reasons stated above, the Rule should be rescinded. If the government was to propose new regulations for implementing ACA with any country, it should ensure it fully complies with United States *non-refoulement* obligations under domestic and international law.

## V. THE RULE IS BASED ON AN INACCURATE INTERPRETATION OF INTERNATIONAL PRACTICE WITH REGARD TO THE TREATMENT AND TRANSFER OF ASYLUM-SEEKERS

On 64000 the Departments justify the Rule under the assumption that according to UNHCR, “refugees do not have an unfettered right to choose their asylum country.” This argument reflects an incomplete understanding of UNHCR’s guidelines on bilateral and/or multilateral transfer arrangements of asylum seekers and omits that those same guidelines specify that “there is no obligation for asylum-seekers to seek asylum at the first effective opportunity” and that “the intentions of an asylum-seeker [...] ought to be taken into account to the extent possible.”<sup>45</sup>

Furthermore, UNHCR began the guidelines stating that their position is “that asylum seekers and refugees should ordinarily be processed in the territory of the State where they arrived. [...]and that] The primary responsibility to provide protection rests with the State where asylum is sought.” Then, UNHCR specifies that “the legality and appropriateness of bilateral or multilateral arrangements to transfer asylum seekers need to be assessed on a case-by-case basis”<sup>46</sup>

Accuracy in the evaluations of the security conditions and asylum systems of potential safe-third countries is key to the legality of transferring an asylum seeker to a third country, and ensuring that they are not being subject to *refoulement* by being returned to a country where their life and freedoms are at risk. In UNHCR’s *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, it is clearly stated that “while being party to international and regional refugee and human rights instruments is an important indicator as to whether the receiving State meets the criteria outlined in this Guidance Note, review of the actual practice of the State and its compliance with these instruments is an essential part of this assessment.”<sup>47</sup>

UNCHR’s Guidance Note also establishes that:

- “Arrangements should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not to be burden shifting.”<sup>48</sup> The facts reveal that the United States is following a burden shifting approach to evade its responsibility towards asylum seekers. Despite being the most developed country in the region, the United States has practically left no avenue for individuals to claim asylum in the country and has transferred this obligation to neighboring countries (as a result of the Agreement between the U.S. and

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<sup>45</sup> UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <https://www.refworld.org/docid/51af82794.html> [accessed 14 December 2019]

<sup>46</sup> UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <https://www.refworld.org/docid/51af82794.html> [accessed 14 December 2019]

<sup>47</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer agreements of asylum seekers*, <https://www.refworld.org/docid/51af82794.html>.

<sup>48</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer agreements of asylum seekers*, <https://www.refworld.org/docid/51af82794.html>.

Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry; the Migration Protection Protocols, also known as Remain in Mexico; the ACA with Guatemala, El Salvador and Honduras; and, most notably, the Interim Final Rule: Asylum Eligibility and Procedural Modification, also known as the Asylum Ban 2.0).

- The transfer arrangement needs to guarantee that each asylum-seeker will be protected against *refoulement*; have access to basic services and human rights commensurate under the 1951 Convention; receive fair and efficient processing for refugee determination and are able to enjoy asylum.<sup>49</sup>

UNHCR described the Rule as “an approach at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers.”<sup>50</sup> It is clear that the Rule violates international law by not protecting asylum seekers against *refoulement* or granting the procedural and integration rights established in the Refugee Convention.

Furthermore, comparing this Rule and its related ACA with the Common European Union Asylum System and its Dublin regulations is misleading. The European Union was founded under the guiding principle of free movement of people, services and goods. In order to fulfill this goal, they have developed institutions and harmonized certain rules and regulations. One of such institutions is the European Asylum Support Office (EASO) and the Dublin Regulation. In fact, the Dublin system is based on the assumption that EU States’ asylum law and practices share common standards, giving asylum seekers the opportunity to enjoy similar levels of protection in any EU member state.<sup>51</sup> There are no such institutions or common standards in North and Central America. Furthermore, beyond a lack of commitment towards free movement of people in the region, strong policies are enforced to limit and restrict it. These cooperation agreements are in fact another means to further strengthen immigration controls and restrict movement.

Even when the European Union has moved towards a regional agreement to process asylum claims, it has faced several challenges and criticism that have not been completely solved. Over a decade ago, in 2008, “the European Parliament noted that, in the absence of harmonization, ‘the Dublin system will continue to be unfair both to asylum seekers and to certain Member States’”.<sup>52</sup> In previous occasions, when a country’s policies have shifted from the European and international law, the UNHCR has urged countries “to suspend any Dublin transfer of asylum-seekers”.<sup>53</sup> On her part, the German Chancellor, Angela Merkel, has referred to the system as dysfunctional.<sup>54</sup> This reflects that even when having more favorable circumstances, the Dublin system is far from being a role model for other countries and regions.

However, the most important difference between the European Union and the Western Hemisphere is that no EU country is a refugee producer, unlike the Americas where several countries face daunting institutional challenges to effectively protect their own citizens and offer them safety and opportunities, causing them to flee. As discussed previously, evidence points to the fact that the countries with which the United States has secured ACA do not have the capacity to offer protection to asylum seekers as they cannot effectively offer it to their own citizens. Over the past few years, civil

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<sup>49</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer agreements of asylum seekers*, <https://www.refworld.org/docid/51af82794.html>.

<sup>50</sup> UNHCR, *Statement on new U.S. asylum policy*, November 19, 2019, <https://www.unhcr.org/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html>.

<sup>51</sup> <https://www.unhcr.org/4a9d13d59.pdf>

<sup>52</sup> <https://www.unhcr.org/4a9d13d59.pdf>

<sup>53</sup> <https://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>

<sup>54</sup> <https://www.irishtimes.com/news/world/europe/merkel-eyes-reform-of-dysfunctional-eu-migration-agreement-1.3593868>

society organizations have documented many of these challenges, urging the United States to consider them before agreeing to any cooperation in this matter,<sup>55</sup> as well as to implement an immigration and asylum policy that acknowledges the refugee nature of displacement in Central America and grant adequate protection to those in need.

For the reasons stated above, the Rule should be rescinded. If the government was to propose new regulations for implementing ACA with any country, it should ensure it fully complies with United States obligations under international law.

## **VI. EARLY REPORTING INDICATES THE ACA WILL LEAD TO FAMILY SEPARATIONS IN VIOLATION OF FEDERAL COURT ORDERS**

On December 10, 2019, media outlets reported that family units were being sent back under the ACA.<sup>56</sup> The inclusion of families or those arriving in families creates additional concerns regarding safety and legal compliances. Just as with detention decisions, and the Migration Protection Protocols (MPP), or Remain in Mexico, the determination of family units is further complicated when individuals from a group traveling together are not placed in the same program.

WRC has documented numerous cases of MPP in which adults are accused of not being legitimate parents are separated from their child, and then it is discovered that they were indeed the biological parents or legal guardian of the child in question.<sup>57</sup> The ACA offers no protections against family separation and indeed creates yet another dangerous mechanism through which families are likely to be separated. Furthermore, if family members cross separately for logistical or other reasons, the process enumerated may result in different outcomes with family members being sent to different countries at different times, making reunification difficult or impossible.

Family separation subjects migrants to physical danger, it has serious, harmful consequences on the ability of asylum-seeking families to meaningfully be able to seek protection in our country as well as on the physical and mental well-being of those separated from loved ones, and in certain cases, it could also run afoul of federal court orders under the *Ms. L. v. ICE* lawsuit.

As with MPP, family separation across borders, and family separation through the ACA are extremely traumatic and difficult to track. Because cross border tracking and communication are difficult or

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<sup>55</sup> See, e.g., Women's Refugee Commission, *Safe Third Countries for Asylum Seekers. Why Mexico does not Qualify as a Third Safe Country*. May 2018, <https://www.womensrefugeecommission.org/rights/resources/1638-safe-third-countries-for-asylum-seekers>. See also, Beltrán, Adriana, "Guatemala is not Third Safe Country. Why the Asylum Deal is a Mistake", *Foreign Affairs*, September 2019, <https://www.foreignaffairs.com/articles/guatemala/2019-09-25/guatemala-no-safe-third-country>; Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?*, June 2019, [https://www.humanrightsfirst.org/sites/default/files/GUATEMALA\\_SAFE\\_THIRD.pdf](https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf)

<sup>56</sup> Molly O'Toole, "In a first, U.S. starts pushing Central American families seeking asylum to Guatemala", *L.A. Times*, December 10, 2019, <https://www.latimes.com/politics/story/2019-12-10/u-s-starts-pushing-asylum-seeking-families-back-to-guatemala-for-first-time>

<sup>57</sup> Women's Refugee Commission, *WRC complaint submitted to DHS OIG, "Separation of families via the 'Migrant Protection Protocols'"*, August 16, 2019, <https://www.womensrefugeecommission.org/rights/resources/1824-separation-of-families-via-the-migrant-protection-protocols>.

impossible for this populations it places children in extreme danger in addition to resulting in additional trauma.

For the reasons stated above, the Rule should be rescinded. If the government was to propose new regulations for implementing ACAs with any country, the Departments must ensure family unity and child protection, and must provide answers to the following questions:

- Is there any possibility that the ACAs would separate individuals arriving in families or conduct assessments of family relationships?
- Is there any possibility that the ACAs would develop a pattern or practice of separating families?
- Will family ties be assessed?
  - How will family relationships be assessed?
  - What procedures will be used? How were these procedures developed?
  - What opportunity do individuals within families have to object or provide evidence?
  - Will child welfare professionals be involved in screening?
- In the cases of the separation:
  - What steps are the Departments taking to ensure accuracy of their determinations?
  - What reasons will justify separation?
  - Are reasons for separation justified under law – including family law, child welfare law, the Constitution, international human rights law, and Ms L?
  - Are reasons given for the separation?
  - Who will make the determination?
  - What steps will the Departments make to record and track these families and the reason(s) for their separation?
  - What information was or will be provided to families in this situation about their rights?
  - What steps will be taken to follow up on reunification if ties are later found to be well founded – or risk allegations are unfounded?
  - How can these families communicate? How are they informed of the process and their rights?
  - What steps will be taken to facilitate ORR communication with accompanying adults or parents?
  - How can these families reunify? How will they be informed about steps for reunification?
  - How can these families present their case prior to transferring them to a third? How were they inform about it?

## **VII. CONCLUSION**

As outlined above, it is WRC's expert opinion that this Rule and the ACA it seeks to implement with El Salvador, Honduras, and Guatemala contravene both domestic and international law and will send asylum seekers to countries where they will not be able to receive meaningful protection and will face life-threatening dangers. Specifically, it is our expert opinion that the countries with which the US has pursued ACA are unsafe and do not have asylum systems capable of providing the required "full and fair" procedure for determining asylum or equivalent protection. Further, it is our expert opinion that this rule and the ACA, if implemented, could lead to family separations and the *refoulement* of vulnerable asylum seekers, including women and children to countries where they are at risk of harm, torture, or death. WRC urges the government to immediately rescind this harmful rule and refrain from further implementing any of these ACA as well as to follow our obligations under domestic and international law, including those of INA 208(a)(2)(A).

Women's Refugee Commission appreciates the opportunity to submit comments on this regulation. Please do not hesitate to contact us with any questions or further information.

Sincerely,

Michelle Brané  
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