



**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

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Regulations Docket Clerk
Office of Legal Policy
Dept. of Justice
905 Pennsylvania Avenue, NW
Washington, DC 20530

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Re: Docket No. USCIS-2019-0021 and EOIR Docket No. 19-0021, Comments in Response to the Interim Final Rule: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act

Dear Secretaries of the Departments of Justice and Homeland Security:

The Immigration and Nationality Law Committee¹ of the New York City Bar Association (City Bar) submits this comment in opposition to the above-referenced Interim Final Rule (IFR), Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act (INA). The IFR modifies existing regulations to provide for the implementation of Asylum Cooperative Agreements (ACAs) that the United States has recently entered into with El Salvador, Guatemala and Honduras (collectively “Northern Triangle Countries”) purportedly pursuant to INA 208(a)(2)(A).² Unlike the so-called “Migrant Protection

¹ The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The City Bar’s Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff members of legal services organizations providing immigration assistance, private immigration attorneys, staff members of local prosecutor’s offices, staff members of immigrant advocacy organizations, academics, and law students.

² INA § 208(a)(2)(A) states that one may not apply for asylum where “the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for

Protocols”³ through which the United States requires asylum seekers to wait in Mexico for an immigration court date in the United States, this IFR sends vulnerable asylum seekers to third countries to try to seek asylum under whatever system that country may have. As discussed below, Northern Triangle countries are neither “safe” as required by the INA, nor do they provide “access to a full and fair procedure for determining a claim to asylum.” Instead, the U.S. government is essentially sending asylum seekers directly back into countries where their lives may be threatened while denying them fair and full access to asylum protections mandated under international human rights law. Though the IFR has been adopted with the express purpose of increasing efficiency and decreasing backlogs, it hastily creates a framework for thwarting legitimate asylum claims while circumventing the Administrative Procedures Act (APA) mandated notice and comment period.

The City Bar strongly opposes the IFR and urges the Department of Homeland Security (DHS) and Department of Justice (DOJ) to withdraw the IFR because it violates the INA and its promulgation as an interim final rule violates the APA.

I. THE IFR PLACES ASYLUM SEEKERS IN SERIOUS DANGER IN NEWLY ESTABLISHED ACA COUNTRIES, WHERE THEY FACE SIGNIFICANT RISK OF PERSECUTION AND/OR TORTURE.

This IFR amends DHS and DOJ regulations implementing INA Section 208(a)(2)(A) to bar a noncitizen from even applying for asylum in the United States, without any evaluation of the merits of the underlying asylum claim, when the following requirements are met: 1) there is an ACA in place between the United States and a Northern Triangle country; 2) a signatory to the ACA is a third country with respect to the noncitizen who is subject to the ACA; 3) the noncitizen’s life or freedom would not be threatened in the third country on account of race, religion, nationality, membership in a particular social group, or political opinion; and 4) the safe third country provides noncitizens removed there pursuant to the ACA access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.⁴ Crucially, the IFR dramatically changes screening requirements, allowing an asylum officer to make a threshold determination as to whether an asylum seeker falls under the above criteria, a decision which the IFR states is not reviewable by any federal court. If an asylum seeker is denied the opportunity to apply for asylum in the United States under the IFR, the U.S. government will also not consider applications for withholding of removal and protection under the Convention against Torture, reasoning that the U.S. could simply remove the noncitizen to the third country under the agreement. This policy could have devastating consequences for the asylum seeker.

The IFR expressly violates international human rights principles of non-refoulement, by sending asylum seekers back into harm’s way. Though the IFR creates exceptions for those who can prove that their life or freedom would be threatened based on a protected characteristic, this

determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

³ Department of Homeland Security, *Migrant Protection Protocols*, Jan. 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>. (All links in this comment letter were last checked on December 19, 2019).

⁴ INA 208(a)(2)(A).

standard will be nearly impossible to meet regarding countries that the asylum seeker may never have set foot in.⁵ The burden of proof for this showing is high, and the regulation requires asylum seekers to offer proof of past or future persecution in a third country which is not the country from which they fled persecution. And, the asylum seeker must articulate this fear without any access to counsel. In sum, though the IFR presents a veil of compliance with obligations under the INA and international human rights norms, in execution it will be impossible for the U.S. Government to ensure that the asylum seekers it sends to Northern Triangle Countries will receive basic protections, much less access to a fair asylum process.

The horrific country conditions in each of the three Northern Triangle countries are well documented in numerous reports, including reports issued by the U.S. government's Department of State.⁶ All three nations rank in the top ten⁷ worldwide for homicide, and experience food insecurity and corruption, factors that have led thousands of their own citizens to seek asylum in the United States. Gang recruitment and law enforcement corruption leave youth especially vulnerable, while women and members of the LGBTQI community also face high rates of violence.

II. ASYLUM SEEKERS REMOVED TO NORTHERN TRIANGLE COUNTRIES PURSUANT TO ACAS WITH THE UNITED STATES CANNOT ACCESS FULL AND FAIR PROCEDURES FOR DETERMINING A CLAIM TO ASYLUM OR EQUIVALENT TEMPORARY PROTECTION.

Unlike Canada, which is the only previous nation with which the U.S. implemented a safe third country agreement, El Salvador, Honduras and Guatemala have compromised or non-functioning rule of law institutions with no indication they could provide full and fair procedures for determining asylum claims. The Northern Triangle countries lack even the most basic capabilities, resources, and infrastructure to afford these protections and carry out the terms of the ACAs. For example, Guatemala's national asylum office has four employees.⁸ Guatemala and has

⁵ The regulation adopts a withholding of removal standard, requiring the asylum seeker to show a 51% percent chance of harm in the designated safe third country to prevent their deportation there. In comparison, if that individual were to apply for asylum in the United States., they would only need to show a 10% probability of persecution in their home country. Further, these individuals will have to meet this standard without any access to counsel or access to country conditions about the third-country to which removal is sought. Since the third-country is not the original nation that the asylum seeker was fleeing from, it is highly unlikely they will be able to identify their fears and grounds of persecution in the third country.

⁶ See Northern Triangle Country Conditions: Ranking the Highest and Lowest Areas of Reported Homicides, Disappearances, and Extortion. U.S. Department of State, May 2019. <https://www.state.gov/wp-content/uploads/2019/06/Highest-and-Lowest-Municipalities.pdf>; Northern Triangle and Mexico Country Conditions, May 2019. <https://www.justice.gov/eoir/page/file/1180711/download>; CRS Report R43616, *El Salvador: Background and U.S. Relations*; CRS Report R42580, *Guatemala: Political and Socioeconomic Conditions and U.S. Relations*; CRS Report RL34027, *Honduras: Background and U.S. Relations*; CRS Report In Focus, *Central American Migration, Root Causes and U.S. Policy*, IF11151. <https://www.crs.org/>.

⁷ See Kids In Need of Defense, "Asylum Cooperative Agreements" Fact Sheet, Nov. 20, 2019, <https://supportkind.org/resources/asylum-cooperative-agreements-fact-sheet/>.

⁸ See, Paola Nagovitch, *Explainer: U.S. Immigration Deals with Northern Triangle Countries and Mexico*, Americas Society, Oct. 2019, <https://www.as-coa.org/articles/explainer-us-immigration-deals-northern-triangle-countries-and-mexico>

not resolved any asylum cases thus far in 2019.⁹ In the last week alone, the U.S. government has sent approximately 40 individuals, including families with children, to Guatemala under the IFR, numbers which are sure to rise exponentially given the U.S. government's stated desire to use the IFR to reduce its responsibilities to asylum seekers at the Southern border.¹⁰

Further, growing burdens imposed by this IFR will heighten crisis conditions and threats to safety and security arising from multiple root causes such as weakened state presence, conflict and pervasive violence.¹¹ These progressively deteriorating conditions make it increasingly impossible for the Northern Triangle countries to sustain and support very vulnerable populations of asylum seekers, and their children and families, who as a result of the IFR are barred from seeking asylum in the United States based on the false premise that they may seek asylum in a "safe" third country.¹²

III. THE IFR CIRCUMVENTS THE NOTICE AND COMMENT RULEMAKING PROCEDURES MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT (APA).

The Departments improperly rely on the "good cause" and "foreign affairs" exceptions under the APA, which apply when the normal rulemaking process of notice and public comment is impracticable, unnecessary, or contrary to the public interest. The Departments make a weak case that the normal procedures would have compromised ongoing negotiations with other nations for the purposes of entering into ACAs. The Departments' argument that a purported fear of migrants rushing to the United States – presumably in anticipation of the bilateral agreements going into effect - constitutes grounds to circumvent the APA is only further evidence of a hastily enacted final rule, one which provides no information on how the United States will ensure that ACA countries will establish full and fair procedures as mandated by the INA. Given that the rule precludes judicial review of determinations impacting the most basic ability for asylum seekers to even apply for protection in the United States, the notice and comment period would have been one of the only meaningful ways to insert accountability and have a robust discussion about how to ensure asylum seekers remain protected. Rather, the IFR stands as a glaring injustice to asylum seekers who will be barred from seeking asylum in the United States in violation of the INA and removed to countries that lack the governmental capabilities and infrastructure to adequately protect those who are subject to the ACAs.

⁹ David C. Adams, *Guatemala's "Embryonic" Asylum System Lacks Capacity To Serve As Safe U.S. Partner, Experts Say*, UNIVISION NEWS Aug. 2, 2019, <https://www.univision.com/univision-news/immigration/guatemalas-embryonic-asylum-system-lacks-capacity-to-serve-as-safe-u-s-partner-experts-say>.

¹⁰ See, Sonia Perez, *US Sends First Non-Guatemalan Migrant Families to Guatemala*, News 95.7, Dec. 2019, <https://www.news957.com/world/2019/12/12/us-sends-first-non-guatemalan-migrant-families-to-guatemala/>.

¹¹ CRS Report In Focus, *Central American Migration, Root Causes and U.S. Policy*, IF11151. www.crs.gov; Kids In Need of Defense, "Asylum Cooperative Agreements" Fact Sheet, Nov, 2019. <https://supportkind.org/resources/asylum-cooperative-agreements-fact-sheet/>.

¹² Kids In Need of Defense, "Asylum Cooperative Agreements" Fact Sheet, Nov, 2019. <https://supportkind.org/resources/asylum-cooperative-agreements-fact-sheet/>.

IV. CONCLUSION

In conclusion, the City Bar expresses its opposition to the IFR and urges the Departments of Homeland Security and Justice to withdraw it. In the alternative, if the agencies wish to pursue true Safe Third Country Agreements with countries other than Canada, they should comport with the rulemaking procedures of the APA and only do so after ensuring that the countries are truly safe.

Respectfully,

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