December 19, 2019

Mr. Andrew Davidson  
Chief, Asylum Division, Refugee Asylum and International Operations  
U.S. Citizenship & Immigration Services  
Department of Homeland Security  
20 Massachusetts Ave., NW, Suite 1100  
Washington, DC  20529-2140

Ms. Lauren Alder Reid  
Assistant Director, Office of Policy  
Executive Office for Immigration Review  
Department of Justice  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA  22041

USCIS-2019-0021, EOIR Docket No. 19-0021

Dear Chief Davidson and Assistant Director Alder Reid:

On behalf of the American Bar Association (“ABA”), I submit the following comments in response to USCIS-2019-0021, EOIR Docket No. 19-0021, the Interim Final Rule and Request for Comment on Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019) (hereinafter, the “Interim Final Rule”).

The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. The ABA’s Commission on Immigration provides continuing education to the legal community, judges, and the public, and develops and assists in the operation of pro bono legal representation programs.

The ABA has long supported the establishment of laws, policies, and practices that ensure access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. Therefore, we have serious concerns about the Interim Final Rule, which threatens to prevent individuals fleeing violence and persecution in the Northern Triangle countries – Honduras, Guatemala, and El Salvador – from accessing any legal protection in the United States.

The Interim Final Rule purports to implement the purpose of section 208(a)(2) of the Immigration Nationality Act (“INA”), which provides that a person may be ineligible for asylum
if he or she transited through a country that has signed a “safe third country” agreement with the United States.\(^1\) However, as the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) (hereinafter “Departments”) acknowledge, a fundamental premise underlying section 208(a)(2) is that asylum seekers removed to safe third countries would have access to a “full and fair procedure” for determining a claim for asylum or equivalent protection.\(^2\) All available evidence indicates not only that the countries with which DHS has recently entered into “Asylum Cooperative Agreements” – Guatemala, Honduras, and El Salvador\(^3\) – are not safe, but that they also do not provide access to a full and fair procedure for determining protection claims.

According to DHS’ own figures, nearly three quarters of all migrants apprehended at the Southwest border through August of Fiscal Year 2019 were from one of these three countries.\(^4\) This, accompanied by an increase in the percentage of non-citizens in expedited removal proceedings raising claims of fear or torture,\(^5\) demonstrates that many of these individuals are fleeing persecution from which these Central American governments have been unable to protect them. Therefore, it is difficult to conclude that these same countries have the institutional capacity to protect nationals of other states who are likely to be even more vulnerable.

Honduras, Guatemala, and El Salvador are among the most violent countries in the world.\(^6\) Honduras suffers from widespread government corruption, acts of impunity, and threats and acts of violence committed by organized criminal elements against vulnerable groups.\(^7\) This year, the President of Honduras was named as an unindicted co-conspirator in a federal criminal trial in New York where his brother was found guilty of drug trafficking.\(^8\) Testimony in that trial demonstrated how drug traffickers funneled money to the president’s party in exchange for authorities looking the other way.\(^9\) Because of rampant criminal activity within the country, migrants transiting through Honduras are left vulnerable to abuse, and government authorities cannot assure freedom of movement.\(^10\)

---

\(^2\) 84 Fed. Reg. at 63994.
\(^4\) See DHS Face Sheet.
\(^5\) 84 Fed. Reg. at 63995.
\(^6\) For example, in 2018, El Salvador, Honduras, and Guatemala had homicide rates of 51/100,000 residents, 41/100,000 residents, and 22/100,000 residents, respectively. Congressional Research Service, In Focus IF10371, U.S. Strategy for Engagement in Central America: An Overview 2, available at https://fas.org/sgp/crs/row/IF10371.pdf (updated July 17, 2019).
\(^9\) Id.
Widespread corruption and impunity for violent crimes also exist in Guatemala, and the government signaled its disinterest in addressing these issues by announcing that it would not renew the mandate of the International Commission Against Impunity in Guatemala.¹¹ Violence against internally displaced persons also remains a concern, and femicide and other forms of violence against women continue to be significant problems in Guatemala.¹²

El Salvador also struggles with widespread government corruption, forced disappearances, impunity, and organized criminal elements.¹³ Criminal gang activity limits the ability of the government to guarantee freedom of movement within the country and cooperate with humanitarian organizations on providing protection to internally displaced persons, refugees, and asylum seekers.¹⁴ Violence against women also remains a serious problem.¹⁵

These are just a few examples of the many serious problems that exist in these countries. Given these facts, it is difficult to understand how DHS and DOJ have determined that entering into cooperative agreements to transfer asylum seekers to these three countries is consistent with the purpose of the INA. The Departments’ lack of attention to the “safe” component of the “safe third country” provision of the INA is evident in the removal of the word “safe” from the language of 8 C.F.R. §§ 208.4(a)(6), 1208.4(a)(6) and 1240.11(h)(4). However, eliminating the word from the language of the governing regulations does not change the government’s statutory obligation when it comes to bilateral agreements pursuant to section 208(a)(2).

The United Nations High Commissioner for Refugees (“UNHCR”) agrees, expressing “serious concerns” about the Interim Final Rule, saying that it is “at variance with international law” and “could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers.”¹⁶ These concerns include the lack of a full and fair procedure for determining a claim to protection. UNHCR describes the asylum systems in Central America as “still very nascent.”¹⁷ The little information that is available about the asylum systems in the Northern Triangle countries confirms this assessment.

According to the State Department, Guatemala established a system for providing protection for refugees in 2017, but UNHCR reported that identification and referral mechanisms were inadequate and authorities lacked adequate training regarding the rules for establishing refugee status.¹⁸ Honduras also has established a system to provide protection to refugees, but

---

¹² Id. at 12-13, 16.
¹⁴ Id. at 12-13.
¹⁵ Id. at 16.
¹⁷ Id.
¹⁸ Guatemala 2018 Human Rights Report at 12-13; see also Declaration of Lisa Frydman in Support of Plaintiffs’ Motion for a Temporary Restraining Order ¶ 14, ECF No. 3-6, East Bay Sanctuary Covenant v. Barr, 3:10-cv-4073 (N.D. Cal. July 17, 2019), available at https://www.aclu.org/legal-document/declaration-lisa-frydman (saying that implementing regulations for Guatemala’s new migration code went into effect in early 2019, and that the country had only 3 asylum officers for a population exceeding 17 million people, had decided a maximum of 30 applications, and decided no applications between March 2018 and May 2019).
there are sometimes significant delays in processing provisional permits for asylum applicants. And El Salvador’s president said, in a recent interview, that his country currently does not have asylum capacities to accept asylum seekers from the United States. The State Department reports that Salvadoran law provides for an established system for providing protection to refugees, but that only four petitions had been submitted as of July 31, 2019, with three resulting in denial and one still under consideration.

Before implementing an asylum cooperative agreement, the Attorney General and the Secretary of Homeland Security must make a “categorical determination” that the country to which asylum seekers would be transferred provides access to a full and fair procedure for determining a claim for asylum or equivalent protection. According to news reports, the U.S. government has begun to implement the agreement with Guatemala. However, the government has not made its categorical determination regarding Guatemala’s asylum procedure public. The information regarding Guatemala’s asylum system discussed above raises significant doubts about the bases for the determination by the Departments that Guatemala provides access to a full and fair procedure for determining a claim to asylum or equivalent protection. The ABA therefore urges the Departments to make this determination public so that interested parties can be informed as to how the Guatemalan system will protect those individuals who may be removed there pursuant to the Interim Final Rule.

Without the benefit of reviewing the Departments’ determination regarding Guatemala, it is impossible to conclude that the government has followed the UNHCR guidance that it cites to in the Interim Final Rule regarding transfer arrangements for asylum seekers. That guidance emphasizes that the fact that a receiving country is a party to international refugee and human rights instruments is not sufficient for purposes of entering into a safe third country agreement. Rather the transferring state must review the actual practice in the country and its compliance with international instruments. The transferring state must not only guarantee that each asylum seeker will be protected against refoulement, but also that she will “have access to fair and efficient procedures for the determination” of forms of protection, and “be treated in accordance with accepted international standards,” in terms of access to services, reception arrangements, and other needs.

---

22 84 Fed. Reg. at 63997.
25 Id.
26 Id. at 2; see also UNHCR, Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries 3-5 (Apr. 2018) (cited in 84 Fed. Reg. at 64000), https://www.refworld.org/pdfid/5acb33ad4.pdf (to determine whether standards of treatment are commensurate with international standards, transferring country must look to the state’s “domestic laws and the
The text of the agreement between the United States and Guatemala parrots the relevant phrases, but contains no information or details sufficient to demonstrate that Guatemala’s “actual practice” with respect to procedures for deciding forms of protection is sufficient.27 There is no indication in the Interim Final Rule or the text of the agreement with Guatemala that the United States has examined the “actual practice” in Guatemala, and that that practice demonstrates “consistent compliance” with international legal obligations. In fact, it is hard to believe how this could be so, given that the current Guatemalan asylum system is just two years old. Moreover, information from the U.S. Department of State suggests that the Northern Triangle countries lack the institutional capacity to provide asylum seekers removed to those countries with the type of support that meets international standards.28

For the foregoing reasons, the Interim Final Rule is inconsistent with the government’s statutory and international law obligations, and should be rescinded.

If the government does not rescind the Interim Final Rule, the ABA is concerned that DHS’ efforts to comply with its fundamental non-refoulement obligations in the current version do not adequately protect the legal rights of asylum seekers who fear that they will be subjected to persecution or torture in one or more third countries with which the United States has entered into a safe third-country agreement. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees. Article 33 of the 1951 Convention provides that “[n]o contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”29 The United States is also bound by Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which provides that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”30 Congress subsequently codified these obligations into law.31

---

27 See Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 84 Fed. Reg. at 64096-98 (stating that the United States and Guatemala “offer refugee protection systems that are consistent with their obligations under the 1951 Convention and/or the 1967 Protocols”, are committed to “access to a full and fair procedure”, and that the parties “may regularly exchange information regarding laws, regulations, and practices related to their respective systems to determine migration protection”).

28 See, e.g., Guatemala 2018 Human Rights Report at 13 (access to education for refugees is challenging due to onerous requirements for access to formal education).


31 I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) (noting that one of the primary purposes in enacting the Refugee Act of 1980 was to implement the principles agreed to in the 1967 Protocol, and that the withholding of removal statute, now codified at 8 U.S.C. § 1231(b)(3), mirrors Article 33); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, Div. G Title XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would
Despite documented levels of violence and impunity in the Northern Triangle countries, the Interim Final Rule does not require asylum officers to affirmatively ask individuals whether they fear persecution or torture if returned to any country with which the U.S. has entered into an asylum cooperative agreement. While new 8 C.F.R. § 208.30(e)(7) does reference a written notice that will be provided to each asylum seeker explaining that she can affirmatively state a fear of removal to a prospective receiving country, such a notice may not be sufficient to ensure that asylum seekers who have a genuine fear of persecution or torture in prospective receiving countries are not removed to those counties. For example, a written notice will not be helpful to individuals who are not literate in the native language, much less those who are not literate, and the Interim Final Rule does not address whether the notice will be translated into other common languages. It would instead be relatively simple for asylum officers, during the threshold screening interview, to affirmatively ask each individual if she fears persecution or torture in a prospective receiving country; Customs and Border Protection officers do this every day for individuals in expedited removal proceedings. Therefore, if the government does not rescind the Interim Final Rule, the ABA urges DHS to revise 8 C.F.R. § 208.30(e)(7) to provide that asylum officers must affirmatively ask individuals if they fear persecution or torture in any of the prospective receiving countries.

We also note that the Interim Final Rule does not explain the procedures immigration judges will follow for determining whether it is more likely than not that an asylum seeker would be persecuted on account of a protected ground or tortured in a third country. At what stage of the proceeding will this determination be made, and is the immigration judge required to ask the asylum seeker if she fears persecution or torture in the third country? If the government does not rescind the Interim Final Rule, the ABA encourages EOIR to revise 8 C.F.R. § 1240.11(h) to require immigration judges to ask asylum seekers if they fear persecution or torture in any third country to which they may be removed pursuant to section 208(a)(2), and ensure that asylum seekers are given notice and an opportunity to demonstrate their fear with documentary and testimonial evidence.

The ABA also is concerned about the burden of proof that an asylum seeker must satisfy in DHS threshold screening interviews to demonstrate that a section 208(a)(2) agreement may not be applied to her. An asylum seeker must demonstrate that she is more likely than not to be persecuted or tortured in each prospective receiving country, which is the same standard as she would be required to meet to be granted withholding of removal or relief under the CAT by an immigration judge. This standard is higher than that required to demonstrate eligibility for asylum, or the standard applied by asylum officers in credible and reasonable fear interviews where asylum seekers are screened to determine whether they will be able to present their asylum, withholding or CAT claims before an immigration judge. Asylum seekers should not

33 84 Fed. Reg. at 63999, 64003.
be held to this high standard in a threshold screening interview, especially as this interview is meant to ensure compliance with international law obligations.

The threshold screening process outlined in the Interim Final Rule also does not provide fundamental procedural protections, such as administrative review and access to counsel, that are available even in expedited removal proceedings. Individuals in expedited removal proceedings are provided with a form before the interview which explains the interview and the individual’s rights, are permitted to consult with an attorney and can be represented at the interview, and are entitled to immigration judge review of any negative determination.35

The lack of such protections in the Interim Final Rule is of great concern to the ABA. One of the determinations an asylum officer makes in the threshold screening interview is whether an individual is more likely than not to be persecuted or tortured in the country with which the U.S. has entered a safe third-country agreement. As discussed above, this assessment is analogous to deciding the merits of a non-citizen’s claim for withholding of removal or CAT relief. For these reasons, if the government does not rescind the Interim Final Rule, the ABA encourages DHS to revise the language of § 208.30(e)(7) to require advance written notice of the threshold screening interview, the opportunity to consult with counsel prior to the interview,36 the right to be represented during the threshold screening portion of the interview, and the opportunity for review by an immigration judge of an asylum officer’s determination that an individual is ineligible to apply for asylum in the United States.

The ABA repeatedly and consistently across administrations has emphasized that our government must address the immigration challenges facing the United States by means that are humane, fair, and effective, and that uphold the principles of due process. The Interim Final Rule fails to meet this objective. It instead creates a major barrier to access to the U.S. asylum system without ensuring that asylum seekers will have access to a full and fair procedure in another country for determining their claims for protection. For this reason, the ABA urges the Departments to rescind the Interim Final Rule.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at 202-662-1763 or kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez

---

35 8 C.F.R. § 208.30(d)(4), (g); see also 8 C.F.R. § 208.31(c), (g).
36 The final rule implementing the United States’ agreement with Canada allows for a consultation period prior to the threshold screening interview. 84 Fed. Reg. at 64003.