



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

Via electronic submission to eRulemaking Portal

RE: Amnesty International USA Comments on Interim Final Rule Regarding Asylum Eligibility (EOIR Docket ID No. 19-0504)

Amnesty International USA submits the following comments in response to the July 2019 interim final rule barring eligibility for asylum for virtually all asylum-seekers who have crossed through another country in transit to the United States. We are profoundly concerned about how this rule eviscerates the right to seek asylum in the United States and will result in countless wrongful returns of individuals to places where they fear grave harm.

Amnesty International is the world's largest grassroots human rights organization, comprising a global support base of over eight million individual members, supporters, and activists in more than 150 countries and territories. Amnesty International engages in activism, research, policy advocacy, litigation, and education to demand human rights for all people. A top priority for the U.S. section of Amnesty International for the past several years has been the protection of the right to seek asylum.

Our opposition to the third-country transit rule here is rooted in our expertise in the international human rights standards governing asylum law as well as our extensive research on access to asylum throughout the region – including our documentation of the inadequacies of Mexico's asylum system¹ and the grave dangers faced by asylum-seekers in their countries of origin and en route to the United States.²

- **Categorical bans on asylum eligibility such as the interim final rule violate U.S. legal obligations under domestic and international human rights law.**

As a starting matter, the interim final rule starkly violates the principle of non-*refoulement* – the requirement that states not return an individual to any place where they would face serious harm – because it categorically bans nearly all asylum-seekers from all countries who apply for protection at the U.S. southern land border and denies them access to an asylum procedure.

The text accompanying the rule explains that “with limited exceptions, an alien who enters or arrives in the United States across the southern land border is ineligible for the discretionary benefit of asylum

¹ “Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum,” Amnesty International, Jan. 2018, available at: <https://www.amnesty.org/en/documents/amr41/7602/2018/en/>.

² “No Safe Place: Salvadorans, Guatemalans, and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and Gender Identity,” Amnesty International, Nov. 2017, available at: <https://www.amnesty.org/en/documents/amr01/7258/2017/en/%20/>.

unless he or she applied for and received a final judgment denying protection in at least one third country through which he or she transited en route to the United States.” In practice, this means that any asylum-seeker who has transited through any other country on their way here – i.e., all asylum-seekers from countries other than Mexico – would be categorically barred from applying for asylum in the United States. The rule further clarifies that the bar is to be applied during the initial credible fear interview, meaning that the vast majority of asylum-seekers will be barred from asylum under this rule before a judge ever hears their claims.

The United States is obligated to comply with the principle of non-*refoulement*, which requires that asylum-seekers receive an individualized determination regarding their fear of return to any country to which the United States seeks to transfer them. Categorical bans such as this one run counter to this obligation because they cut off access to protection for broad swaths of asylum-seekers without providing for such an individualized determination. Indeed, the United Nations High Commissioner for Refugees (UNHCR), which is responsible for interpreting states’ obligations under the international refugee protection framework, sharply criticized the interim final rule for “excessively curtail[ing] the right to apply for asylum” and “jeopardizing the right to protection from refoulement.”³

Furthermore, if a state seeks to deny asylum on the basis that the asylum-seeker can avail themselves of protection elsewhere, the burden of proof must lie with the state to demonstrate the alternative is safe.⁴ For example, the “firm resettlement” bar under U.S. law, which renders applicants ineligible for asylum if they received an offer of permanent status or residence in a third country, requires the Department of Homeland Security to make a showing that the applicant received such an offer.⁵ Yet the interim final rule places the burden to establish the *lack* of availability of asylum protection in a third country with the asylum applicant, and curtails asylum for applicants unless they prove they applied for asylum and received a final, negative decision in their cases. Such a showing, in the words of UNHCR, “significantly raises the burden of proof on asylum seekers beyond the international legal standard.”⁶

Finally, withholding of removal and relief under the Convention against Torture, which the rule clarifies will still be available for those subject to this new asylum bar, are not adequate substitutes for asylum. For one, withholding of removal requires asylum-seekers to meet a more stringent standard of proof to establish their eligibility for this relief.⁷ Furthermore, unlike a grant of asylum, receiving withholding of removal protects from deportation but offers little else: no pathway to lawful permanent residence in the United States, significant barriers to education and work, and insurmountable barriers to family unity.⁸ In sum, it fails to provide the panoply of rights to which refugees are entitled under domestic and international law.

- **The so-called “safe asylum countries” identified in the interim final rule are anything but**

³ “UNHCR Deeply Concerned About New Asylum Restrictions,” UNHCR, July 15, 2019, <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.

⁴ “Amnesty International Public Statement: Halt the ‘Remain in Mexico’ Plan,” April 15, 2019, <https://www.amnesty.org/download/Documents/AMR5101722019ENGLISH.PDF>.

⁵ 8 CFR § 1208.15.

⁶ See *supra* note 3.

⁷ *INS v. Stevic*, 476 U.S. 407 (1984).

⁸ See INA 241(b)(3); 8 CFR. §§ 208.16-208.18.

safe.

The rule claims it seeks to prevent “forum-shopping” and root out “meritless claims” because asylum-seekers transit through “multiple countries in which they may seek protection” on their way to the United States. This assumption is belied by reality: common countries for asylum-seekers cannot and will not protect them.

For example, in Mexico, Amnesty International has long documented a pattern of serious and systemic human rights violations against refugees and migrants.⁹ Mexican authorities have ignored the claims of Central American nationals explicitly seeking asylum or expressing fear for their lives in their country of origin, sending them back to their country in violation of the obligation of non-refoulement. In addition, for years, Amnesty International has documented how migrants and asylum-seekers are frequently subject to violent crimes, including kidnappings, killings, extortions and other form of violence, on their journey through Mexico; in many instances, these crimes are not properly investigated by authorities.

Between May and September of 2017, Amnesty International surveyed migrants and asylum seekers in Mexico to understand whether Mexican officials were meeting their asylum obligations. Amnesty International found that the National Institute of Migration (“INM”), the body responsible for regulating migration and policing borders in Mexico, systemically ignored procedural safeguards under Mexican law to protect the legal rights of asylum seekers. Amnesty International analyzed 500 survey responses and found 120 instances where refoulement had likely occurred—approximately 24 percent of total responses. Many of those surveyed were deported to their country of origin despite explicitly expressing a fear of return to the INM. Amnesty International also gathered 297 responses of people who had passed through migration detention centers. Of those, 75 percent were never informed of their right to seek asylum in Mexico, and 69 percent stated that INM officers never asked their reasons for leaving their home country. Both practices directly contravene Mexico’s domestic and international legal obligations.

Recent evidence suggests that the protection environment for asylum-seekers in Mexico has only worsened. The government has ramped up detentions and engaged in expedited deportations, carried out without allowing migrants access to legal advice, and deployed thousands of national guard troops, tasked with immigration enforcement responsibilities, throughout the country.¹⁰ In July 2019, state police fatally shot a migrant in front of his eight-year-old daughter as they were leaving a shelter in Saltillo.¹¹

The justification for the rule notes that asylum applications have exponentially increased in Mexico in recent years and extrapolates from this fact that protection is available there. In reality, the Mexican asylum system is woefully underfunded and backlogged, meaning that asylum-seekers cannot access effective protection there. Although Mexico’s asylum agency has had to respond to a doubling of asylum

⁹ “Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum,” Amnesty International, Jan. 2018, available at: <https://www.amnesty.org/en/documents/amr41/7602/2018/en/>¹⁰ ; <https://www.amnestyusa.org/urgent-actions/urgent-action-national-guard-harasses-migrant-shelter-mexico-ua-93-19/>; <https://www.amnestyusa.org/urgent-actions/urgent-action-asylum-seekers-at-risk-of-mass-detentions-mexico-ua-84-19/>

¹¹ <https://www.amnesty.org/en/latest/news/2019/08/mexico-death-raises-serious-questions-about-worsening-treatment-migrants/>

claims annually since 2013, it is facing its lowest budget in seven years: a mere \$1.2 million and 48 staff members to assess the claims of 60,000 to 80,000 projected asylum applicants in 2019.¹² In the meantime, asylum-seekers in Mexico are left without protection and exposed to increasing threats of detention and deportation. The rule's suggestion that this environment offers adequate protections to asylum-seekers is utterly ignorant of reality.

As for Guatemala, El Salvador, and Honduras, ample reporting demonstrates that they are some of the least safe countries for their own nationals, let alone for the migrants and refugees who pass through them.

Amnesty has documented that the environment of generalized impunity and corruption in these three countries has engendered unchecked violence: El Salvador has one of the highest homicide rates in Latin America, and in Honduras, the murder rate is 800% higher than that of the United States. A recent report describes how these countries are home to “unprecedented levels of violence outside a war zone,” in which “citizens are murdered with impunity [and] kidnappings and extortions are daily occurrences.”¹³

Even the U.S. State Department's most recent human rights reports document just how unsafe these countries continue to be, especially for migrants. The Honduras report notes that “[o]rganized criminal elements . . . were significant perpetrators of violent crimes” throughout the country, and that migrants in transit are “vulnerable to abuse by criminal organizations.”¹⁴ The El Salvador report documents the practice of territorial control by gangs and the difficulty of assisting asylum-seekers and refugees in areas controlled by them, as well as the pitifully small number of asylum applications – three (all denials) – ever adjudicated by the national government.¹⁵ The Guatemala report describes the asylum procedure there as “inadequate” and notes the disappointing backslide towards corruption and impunity in the country.¹⁶

Given the acknowledgments in these reports, the notion animating this rule that these countries will now somehow be considered safe asylum countries is appalling, irresponsible, and entirely counterfactual, and reveals itself to be just another tactic to dissuade people from trying to seek safety in the United States.

- **The rule endangers particularly vulnerable groups of asylum-seekers.**

While the rule will undoubtedly harm all asylum-seekers who arrive here in search of safety, particularly vulnerable groups – including women, children, and LGBTI people – will be subject to particular harm.

¹² Delphine Schrank and Diego Ore, “U.S., Mexico set talks amid tension over asylum-seekers,” Reuters, July 16, 2019, <https://ca.reuters.com/article/topNews/idCAKCN1UB2BW-OCATP>; NPR story

¹³ <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>

¹⁴ <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/honduras/>

¹⁵ <https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf>

¹⁶ <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>

LGBTI Individuals: Amnesty International has documented how LGBTI people are particularly affected by the widespread climate of violence and insecurity in Guatemala, Honduras, and El Salvador.¹⁷ LGBTI people are frequently the target of different forms of violence due to their real or perceived sexual orientation and/ or gender identity – including intimidation, threats, physical aggression, sexual violence and even murder. According to a UNHCR study, 88% of LGBTI asylum seekers and refugees from these countries reported having suffered sexual and gender-based violence in their countries of origin.¹⁸

Violence towards LGBTI people is rooted in the environment of discrimination and stigma that is prevalent in society generally towards these people, who are perceived as diverging from the traditionally established patriarchal social norms and gender roles in society, including in areas subject to territorial control by gangs and non-state armed groups. LGBTI individuals are at particular risk of discrimination and stigma not just in their countries of origin, but often on their route to safety in countries of transit, meaning they often face the same abuses and violations of their rights that they are trying to escape from at home. Yet, if implemented, the rule would require LGBTI individuals to “avail themselves” of protection in countries where they are equally at risk and would cut off access to lifesaving asylum protections for them in the United States.

Women: Similarly, women who are fleeing particularized harm in their countries of origin are often at equally grave risk of harm in countries of transit. According to a study conducted by UNHCR, women report facing extreme levels of violence in Guatemala, El Salvador, and Honduras at the hands of transnational and local criminal armed groups.¹⁹ Many of these same threats exist in Mexico, where women reported being raped, assaulted, and threatened by members of transnational criminal gangs, as well as experiencing severe domestic violence.²⁰ Under the so-called “Migrant Protection Protocols” program, migrant women have reported experiencing sexual violence and kidnapping while waiting for their U.S. court hearings in Mexico.²¹ Requiring these women to seek protection in an environment rife with many of the same harms that impelled their flight is unacceptable.

Children: Children are likely to experience particularly grave harms that extend from their countries of origin to countries of transit. According to UNHCR, violence by organized armed criminal actors, many of which operate across boundaries, is a primary driver of child migration.²² In Mexico, UNHCR found that children are uniquely vulnerable to forced recruitment into and exploitation by the human smuggling industry.²³ A 2019 report assessing access to protections for migrant children in Mexico concluded that children are at serious risk of detention in overcrowded adult facilities, where they are not given any information about their right to access asylum; rapidly deported to their countries of origin, where they are sent back into harm’s way without ever receiving a proper assessment of their circumstances; or

¹⁷ “No Safe Place: Salvadorans, Guatemalans, and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and Gender Identity,” Amnesty International, Nov. 2017, available at: <https://www.amnesty.org/en/documents/amr01/7258/2017/en/%20/>.

¹⁸ *Id.* at [XX].

¹⁹ <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>

²⁰ *Id.* at [XX].

²¹ Parker Asmann, “Mexico Police Collude With Criminals to Kidnap, Extort Migrant,” Insight Crime, June 20, 2019, <https://www.insightcrime.org/news/brief/mexico-police-collude-criminals-kidnap-migrant/>.

²² <https://www.unhcr.org/en-us/children-on-the-run.html>

²³ *Id.* at [XX].

relegated to uncertainty and danger as they attempt to seek protection in a woefully understaffed and underfunded asylum system.²⁴

In sum, this interim final rule starkly violates our obligations towards asylum-seekers, rests on the fiction that adequate protections are available in common countries of transit and endangers particularly vulnerable groups of asylum-seekers. For all these reasons, Amnesty International urges the Department of Justice and Department of Homeland Security to rescind this ill-advised and patently illegal rule and instead focus their ample resources on upholding the United States' domestic and international legal obligations towards asylum-seekers.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charanya', with a long, wavy horizontal line extending to the right.

Charanya Krishnaswami
Americas Advocacy Director
Amnesty International USA

²⁴ Kids in Need of Defense, “The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children Along Mexico’s Southern Border,” July 26, 2019, <https://supportkind.org/resources/the-invisible-wall-obstacles-to-protection-for-unaccompanied-migrant-children-along-mexicos-southern-border/>.