AMNESTY INTERNATIONAL

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Via electronic submission to eRulemaking Portal

RE: Amnesty International USA Comment on "Implementing Bilateral and Multilateral Asylum Agreements Under the Immigration and Nationality Act" (EOIR and USCIS Docket No. 19-0021)

Amnesty International USA submits the following comment in response to the November 2019 interim final rule implementing a series of dangerous and ill-conceived asylum agreements with the countries of Guatemala, El Salvador, and Honduras. 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 are at risk of grave harm, in violation of domestic and international law.

Amnesty International is the world's largest grassroots human rights organization, comprising a global support base of millions of 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 Amnesty International for the past several years has been the protection of the right to seek asylum.

Our opposition to the rule at hand is rooted in our expertise in the international human rights standards governing asylum law as well as our research on access to asylum throughout the region – including documentation of the grave dangers faced by asylum-seekers in the three countries the United States now counterfactually deems "safe."[1]

- **The asylum agreements with El Salvador, Guatemala, and Honduras are illegal on their face.**

First, the three asylum agreements that spurred the drafting and publication of this rule are illegal on their face and represent a dramatic departure from U.S. obligations towards asylum-seekers.

Under U.S. law, a country can constitute a "safe third country" only if an asylum-seeker's "life or freedom" would not be threatened there *and* if the asylum-seeker can access a "full and fair"

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

asylum procedure in the third country.[2] Those conditions cannot be considered met in the cases of El Salvador, Guatemala, or Honduras – the three countries with which the United States has recently signed the asylum agreements this rule seeks to implement. Indeed, the U.N. High Commissioner for Refugees (UNHCR), which is responsible for determining states' obligations towards refugees and asylum-seekers under international treaties, has expressed its concern that the approach of the rule at hand "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."[3]

No access to full and fair asylum procedures

The asylum systems in Guatemala, El Salvador, and Honduras have been described by the UNHCR as "still very nascent."[4] The U.S. State Department's most recent human rights report describes the asylum procedure in Guatemala as "inadequate,"[5] and other reports note that there are fewer than four asylum officers in the country, which has adjudicated just 18 claims of 200 received.[6] In El Salvador, only 30 asylum applications were filed in 2018, of which 18 are still pending, and local newspapers report that the system has only one asylum officer.[7] Little information is publicly available about Honduras's asylum system, other than that, according to the U.S. State Department's most recent report, "there are significant delays" in processing asylum applications.[8]

The text accompanying the rule notes that the United States has made a "generalized determination as to whether the third country grants asylum seekers 'access to a full and fair procedure,'"[9] and that the "terms of some of the current [agreements] have been contingent on the signing countries exchanging diplomatic notes certifying that each country has put in place the legal framework necessary to effectuate and operationalize the agreement."[10]

In other words, the rule contemplates the transfer of asylum-seekers to unsafe third countries based on nothing more than empty diplomatic assurances by receiving countries that asylum-

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[2] 8 U.S.C. § 1158(a)(2).
[3] UNHCR, "Statement on New U.S. Asylum Policy," Nov. 19, 2019, https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html.
[4] UNHCR, "UNHCR Statement on New U.S. Asylum Policy," Nov. 19, 2019, https://www.unhcr.org/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html.
[5] U.S. Department of State, 2018 Country Report – Guatemala, https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.
[6] Hamed Aleaziz, "Trump Is Sending Asylum-Seekers to Guatemala. His Administration Admitted Privately It Had No Idea What Would Happen to Them Next," BUZZFEED NEWS, Nov. 18, 2019, https://www.buzzfeednews.com/article/hamedaleaziz/trump-asylum-guatemala-dhs-safe-third-plan.
[7] Zolan Kanno-Youngs & Elisabeth Malkin, "U.S. Agreement with El Salvador Seeks to Divert Asylum-Seekers," N.Y. TIMES, Sept. 20, 2019, https://www.nytimes.com/2019/09/20/us/politics/us-asylum-el-salvador.html; Nelson Rauda Zablah, "El Salvador Signs Agreement to Accept Asylum-Seekers the U.S. Won't Protect," EL FARO, Sept. 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.
[8] U.S. Department of State, 2018 Country Report – Honduras, https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf.
[9] "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act," 84 Fed. Reg. 63994 (Nov. 19, 2019), at 64002, available at https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf.
[10] *Id.* at 64005.

seekers will have access to an asylum procedure and be protected from serious harm. In related contexts, diplomatic assurances by receiving countries that they will not torture or mistreat individuals at risk of forcible transfer have been widely condemned as unreliable and inherently wrong.[11] As is the case in those contexts, here, mere say-so cannot make a fiction true.

Countries with conditions that are anything but safe

Furthermore, asylum-seekers' lives and freedoms will almost certainly be at risk in all three countries of possible transfer under this rule – which are also the most common countries of origin for people seeking asylum in the United States. In fiscal year 2019, 91% of families and 83% of unaccompanied children apprehended at the U.S. border were from Guatemala, Honduras, and El Salvador.[12] And with good reason: asylum-seekers from these countries are fleeing levels of targeted violence comparable to those found in war zones from which often corrupt and ineffectual state institutions are unable to protect them.[13]

For example, Guatemala's highest authorities have, in recent years, significantly undermined access to justice – threatening judges and prosecutors involved in high-profile prosecutions of illegal criminal networks, intimidating and expelling an anti-corruption body with a proven track record of success, and preserving a culture of impunity for crimes and corrupt behavior that has existed since the armed conflict.[14]

El Salvador, meanwhile, recently experienced the highest murder rate in the world and is still home to one of the highest homicide rates in Latin America, but only 5% of crimes prosecuted ever lead to a conviction. This is in part because of weak justice systems: in the words of one woman whose husband and two sons were killed by members of MS-13, "[t]alking to the police is a death sentence."[15]

In Honduras, the murder rate is 800% higher than that of the United States, and only 13% of homicides prosecuted led to convictions; furthermore, the Honduran government has shown little interest in renewing the mandate of an international anti-impunity mechanism, even though the mechanism had improved access to justice in the country.[16]

The weakness of state institutions in all three countries is a critical consideration because all three agreements are predicated on the notion that these institutions will protect asylum-seekers. In reality, they are unequipped to protect their own nationals, much less asylum-seekers, who are often more vulnerable to risks of violence, extortion, and harm.

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[11] Amnesty International, "Diplomatic Assurances Against Torture: Inherently Wrong, Inherently Unreliable," April 2017, https://www.amnesty.org/download/Documents/IOR4061452017ENGLISH.pdf.

[12] *See* U.S. Customs and Border Protection, "Southwest Border Apprehension Statistics FY19," https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019 (last accessed Dec. 19, 2019).

[13] Doctors Without Borders, "War Zones: Violence in Central America Is Similar to What MSF Sees in Global Conflict Areas," June 27, 2019, https://www.doctorswithoutborders.ca/war-zones-violence-central-america-similar-what-msf-sees-global-conflict-areas.

[14] Amnesty International, "Last Chance for Justice," April 2019, available at https://www.amnesty.org/download/Documents/AMR3406112019ENGLISH.pdf.

[15] Ali Watkins & Meredith Kohut, "MS-13, Trump and America's Stake in El Salvador's Gang War," N.Y. TIMES, Dec. 10, 2018, https://www.nytimes.com/2018/12/10/us/el-salvador-ms-13.html.

[16] Association for a More Just Society, "What is the Homicide Rate in Honduras?," Nov. 2018, https://www.ajs-us.org/content/homicides-honduras.

- **The procedures outlined in the interim final rule contemplate mass *refoulement* of asylum-seekers.**

Second, by providing for the forcible transfer of individuals to places where they face grave risk of harm without an individualized determination of potential harm, the procedures outlined in the interim final rule contemplate a system of mass *refoulement* in violation of domestic and international law.

The United States' obligation to avoid *refoulement*, or the forcible transfer or return of people to places where they would face persecution or torture, is a bedrock principle enshrined in treaties ratified by the United States as well as domestic law.[17] The principle of non-*refoulement* applies not just to returns to one's country of origin or last residence but to forcible transfer to any country or territory where one may face such grave harm.[18]

Far from ensuring compliance with this bedrock principle, the interim final rule actively enables *refoulement* by failing to require an individualized inquiry of feared harm in the third country before transferring asylum-seekers there and subjecting individuals who do affirmatively express a fear to an exceedingly high threshold screening which lacks basic procedural protections.

Failure to provide an individualized inquiry of potential harm

As a starting matter, as Amnesty International has noted elsewhere in the cases of the European Union's "Dublin Regulation" as well as the U.S.-Canada Safe Third Country Agreement, any categorical ban on asylum, including bans based on the existence of alleged "safe third countries," risks violating the principle of non-*refoulement*.[19] Such bans force asylum-seekers to overcome often unreasonable presumptions against the validity of their asylum claims and place them at grave risk of direct or indirect *refoulement* (when a country sends an asylum-seeker to a third country, which then sends the asylum-seeker to an unsafe country). Amnesty International thus opposes the categorical use of the "safe third country" concept and has documented its devastating human costs across the globe.[20]

Here, the process outlined in the new rule for determining whether an asylum-seeker will be subject to transfer to a third country does not even require an inquiry into whether the asylum-seeker fears harm in that country before forcibly sending them there. Instead, the burden is on

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[17] 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, available at: https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch_V_2p.pdf; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, available at: https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf; 8 U.S.C. § 1231(b).

[18] "Amnesty International Public Statement: Halt the 'Remain in Mexico' Plan," April 15, 2019, https://www.amnesty.org/download/Documents/AMR5101722019ENGLISH.PDF.

[19] Amnesty International, "EU: Historic opportunity to reform the infamous Dublin regulation," May 30, 2018, https://www.amnesty.eu/news/eu-historic-opportunity-to-reform-the-infamous-dublin-regulation-1120/.

[20] *See, e.g.*, Amnesty International, "Safe Third Country Agreement must be suspended, say Canadian Council for Refugees and Amnesty International in comprehensive brief to Canadian government," June 27, 2017, https://www.amnesty.ca/news/safe-third-country-agreement-must-be-suspended-say-canadian-council-refugees-and-amnesty; Amnesty International, "EU: Historic opportunity to reform the infamous Dublin regulation," May 30, 2018, https://www.amnesty.eu/news/eu-historic-opportunity-to-reform-the-infamous-dublin-regulation-1120/. The U.N. Special Rapporteur on Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment has criticized "safe third country" agreements as fundamentally illegal. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/37/50 (26 February 2018), available at https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf, at para. 46.

the asylum-seeker both to affirmatively express fear of harm *and* to prove that they will are more likely than not to be harmed in the third country.

According to the text accompanying the rule, an official (either an immigration officer or an immigration judge) "will determine whether an [asylum-seeker] is subject" to an asylum agreement, "and if so, in those instances in which the [asylum-seeker] *affirmatively states* a fear of removal to a country that is a signatory to the agreement, whether [they] can affirmatively establish it is more likely than not that [they] would be persecuted or tortured in that country."[21]

The text of the regulation states that the asylum-seeker at risk of transfer to a third country will be provided a "written notice that if he or she fears removal to the prospective receiving country because of the likelihood of persecution on account of a protected ground or torture in that country and wants the officer to determine whether it is more likely than not the alien would be persecuted on account of a protected ground or tortured in that country, the alien should affirmatively state to the officer such a fear of removal."[22] Only then will the officer assess the individual's fear of return.

According to UNHCR, for a state to comply with its obligations towards asylum seekers, any transfer arrangement must require the state to individually assess each asylum-seeker, including risk of *refoulement*.[23] Forcibly transferring an individual to a country without first affirmatively examining in each case whether they might be harmed there plainly violates *refoulement* – particularly in this context, when the United States is seeking to transfer individuals to countries asylum-seekers regularly flee.

Providing written notice of an individual's ability to express fear of return is wholly insufficient to discharge the duty to individually inquire about potential risk of *refoulement*. Asylum-seekers at the Mexico/U.S. border report that U.S. officials routinely fail to properly explain documents to them and force them to acknowledge and sign forms in languages they do not understand.[24] The regulation contains no requirements about whether the written notice must even be provided in a language the asylum-seeker understands.

Unreasonably high evidentiary burden with no procedural protections

Furthermore, the rule improperly shifts the onus to the asylum-seeker to demonstrate that the proposed third country is *unsafe*, when it is the state that should bear the burden of demonstrating that the third country is safe.[25] In addition to inappropriately shifting the burden, the rule also heightens the standard of proof, requiring the asylum-seeker to show by a preponderance of the evidence that they will be tortured or persecuted on account of a protected ground – an evidentiary showing higher than that required to win asylum on the merits.[26]

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[21] 84 Fed. Reg. at 63998 (emphasis added).
[22] *Id.* at 64009.
[23] UNHCR, "Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers," May 2013, available at https://www.refworld.org/pdfid/51af82794.pdf.
[24] Amnesty International, "You Don't Have Any Rights Here," Oct. 2018, https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF at 50.
[25] "Amnesty International Public Statement: Halt the 'Remain in Mexico' Plan," April 15, 2019, https://www.amnesty.org/download/Documents/AMR5101722019ENGLISH.PDF.
[26] The "more likely than not" standard, which the U.S. has interpreted as the requisite showing for the mandatory duty of non-*refoulement* to attach, is at odds with established international legal standards, which require only a lesser showing of "real risk." *See, e.g.*, Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle

According to leaked implementing guidance, the threshold and process for fear screenings contemplated under this rule are analogous to the "fear of return to Mexico" screenings conducted for asylum-seekers subject to the "Remain in Mexico" program (formally and misleadingly known as the "Migrant Protection Protocols").[27] Those screenings are widely understood to be a sham and a farce. Asylum-seekers who have faced kidnapping, sexual assault, and torture in Mexico have nevertheless been determined to have an insufficient fear of harm following these screenings.[28] Even in the rare instances when they have attorneys, asylum-seekers are regularly denied the right to consult with them.[29] The questions asylum-seekers are asked in these interviews are often purposely cursory.[30] Asylum officers responsible for conducting these examinations have gone on the record to report how the prohibitively high evidentiary threshold, combined with excruciating pressure to issue denials in nearly all cases, have made them complicit in certain *refoulement.*[31] A recent U.S. Senate study concluded that the high evidentiary threshold made it "virtually impossible" for an asylum-seeker to be screened out of the program, even when they were at grave risk of harm.[32]

The rule at hand here combines this prohibitively high evidentiary threshold with a near-total lack of procedural protections. Unlike in the U.S.-Canada Safe Third Country Agreement, the procedures here do not even provide for a minimal consultation period with an attorney.[33] The text accompanying the rule justifies this by arguing that the threshold screening provides "additional process" in the form of a fear screening, which the U.S.-Canada agreement does not provide, while simultaneously noting that the exceptions in the U.S.-Canada agreement are "more complex" than those found here. In other words, the government appears to be arguing that attorney consultation is unnecessary because the screening is both *less* complex and *more* involved. This defies logic.

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of non-refoulement: opinion," in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 125-126, 161-162. However, even accepting "more likely than not" as the ultimate legal standard required to demonstrate the U.S.'s obligation of non-*refoulement*, the proper evidentiary for a threshold determination would be a "reasonable possibility" of persecution, which the United States assesses in the context of reasonable fear interviews to determine applicants' eligibility to apply for withholding of removal and relief under the Convention Against Torture. *See* 8 C.F.R. § 1208.01 (describing reasonable fear proceedings).

[27] *See* Ted Hesson, Mica Rosenberg, and Kristina Cooke, "Trump administration prepares to send asylum seekers to Guatemala," REUTERS, Nov. 20, 2019, https://www.reuters.com/article/us-usa-immigration-guatemala-asylum/trump-administration-prepares-to-send-asylum-seekers-to-guatemala-idUSKBN1XU2SI (referencing leaked guidance).

[28] Human Rights First, "Orders from Above," Oct. 2019, available at https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

[29] ACLU, "Asylum Seekers Subject to Trump's Remain in Mexico Policy Must be Given Access to Counsel," Nov. 5, 2019, https://www.aclusandiego.org/aclu-asylum-seekers-subject-to-trumps-remain-in-mexico-policy-must-be-given-access-to-counsel/.

[30] Human Rights First, "Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue," Dec. 2019, available at https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf; Amnesty International interview with legal services provider in Harlingen, Texas (Sept. 19, 2019).

[31] Bobby Allyn, "Asylum Officers: Trump's 'Remain In Mexico' Policy Is Against 'Moral Fabric' Of U.S.," NPR NEWS, June 27, 2019, https://www.npr.org/2019/06/27/736461700/asylum-officers-trumps-remain-in-mexico-policy-is-against-moral-fabric-of-u-s.

[32] Office of Sen. Jeff Merkley, "Shattered Refuge," available at https://www.merkley.senate.gov/imo/media/doc/SHATTERED%20REFUGE%20-%20A%20US%20Senate%20Investigation%20into%20the%20Trump%20Administration%20Gutting%20of%20Asylum.pdf.

[33] 84 Fed. Reg. at 64003.

Finally, the regulations and implementing guidance expressly prohibit immigration judges from reviewing the immigration officer's determination that an asylum-seeker is properly subject to a safe third country agreement.[34] The justification for this, according to the text accompanying the rule, is that the review here would be "reasonably more minimalistic than requisite procedures for deciding asylum and withholding claims on the merits."[35] On the contrary, the review here would be exactly the review required of an immigration judge in a withholding of removal case, because that is the evidentiary standard the screening requires.

Given the complexity of proving possible persecution and nexus and the high stakes of these proceedings, the extreme evidentiary standard, prohibition on attorney consultation, and lack of immigration judge review are inexcusable and reveal the screening to be nothing more than a mass-*refoulement* machine. The flaws in the screening process are especially concerning given the consequences that flow from the screening: an asylum-seeker who cannot prove that they should not be forcibly transferred to a third country is foreclosed from seeking not just asylum, but *any* form of fear-based relief (including withholding of removal and relief under the Convention against Torture) in the United States.[36]

In sum, this interim final rule starkly violates U.S. obligations towards asylum-seekers, rests on the fiction that adequate protections are available in countries whose authorities are unable or unwilling protect their own nationals, and enables mass *refoulement* of vulnerable people in search of safety. 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 the asylum agreements underlying it.

Sincerely,

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[34] Memorandum from James R. McHenry III, Director, Exec. Office of Immigration Review, "Guidelines Regarding New Regulations Providing for the Implementation of Asylum Cooperative Agreements," Nov. 19, 2019, available at https://www.justice.gov/eoir/page/file/1218516/download.
[35] *Id.* at 64004.
[36] *See* interim final rule at 64000. The U.S.-Honduras asylum agreement specifically notes that if an asylum claim in Honduras is rejected, the asylum-seeker is still barred from seeking asylum in the United States. Thus, at least in the case of the Honduras agreement, the threshold screening determination that an asylum-seeker can properly be transferred will have the effect of permanently foreclosing an asylum application in the United States. *See* Molly O'Toole & Molly Hennessey-Fiske, "U.S. to Send Asylum-Seekers to Honduras, Bypassing American Asylum," L.A. TIMES, Dec. 16, 2019, https://www.latimes.com/world-nation/story/2019-12-16/us-poised-to-send-asylum-seekers-to-honduras.