

**ANNEX 3:**  
**Key Documents related to the U.S.-Guatemala Asylum Cooperative Agreement**  
**Document 1: Attorney General's Determination**



**Office of the Attorney General**  
**Washington, D. C. 20530**

November 7, 2019

MEMORANDUM FROM THE ATTORNEY GENERAL

SUBJECT: Whether Guatemala's Refugee Protection Laws and Procedures Satisfy the "Access to a Full and Fair Procedure" Requirements of Section 208(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A)

After careful consideration, I find that Guatemala's refugee protection laws and procedures satisfy the requirements of section 208(a)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158(a)(2)(A). I make this decision based upon the Guatemalan Migration Code, its implementing regulations, and information provided by the Departments of State and Homeland Security following consultations between the United States and Guatemala.

Pursuant to a bilateral or multilateral agreement, section 208(a)(2)(A) of the INA authorizes the removal of an alien to a country that will provide the alien with "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" rather than allowing the alien to pursue such a claim in the United States. As the Department of Homeland Security has recognized, the perfect harmonization of a foreign country's asylum laws and procedures with the laws and procedures of the United States "is not a prerequisite to entering into responsibility-sharing arrangements."<sup>1</sup> Guatemala has satisfied the INA section 208(a)(2)(A) "access to a full and fair procedure" requirement because it has in place a sufficient protection system with accompanying procedures and laws. An applicant for protection in Guatemala has a meaningful opportunity to make a protection claim, receive a hearing and adjudication regarding that claim, and safely remain in Guatemala until his or her protection claim is resolved.

The phrase "access to a full and fair procedure" presumes that the third country has in place a process that comports with basic notions of procedural fairness. The Guatemalan system meets these basic requirements. For example, Guatemalan legal provisions and representations made by Guatemalan officials in exchanges with the U.S. State Department and the Department of Homeland Security indicate that Guatemala has a competent immigration authority with clear procedures for addressing initial asylum applications, including referral of claims to an adjudicative body. At the initial stages of the proceedings, the applicant receives oral guidance on how to present a claim along with information on rights, protections, and privileges. Asylum

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<sup>1</sup> Notice of Proposed Rulemaking, *Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry*, 69 Fed. Reg. 10,620, 10,620 (Mar. 8, 2004) (Department of Homeland Security).


Subject: Whether Guatemala’s Refugee Protection Laws and Procedures Satisfy the “Access to a Full and Fair Procedure” Requirements of Section 208(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A)

and refugee-status grantees in Guatemala receive notice of the decisions granting them relief along with the ability to acquire identification facilitating access to health services, education, and employment. Guatemala also provides notice of the denial of protection applications and gives applicants the right to appeal an adverse decision within ten days of receiving the notification of denial. Applicants may remain in Guatemala during any appellate process.<sup>2</sup>

Guatemala has also adopted laws barring *refoulement* of refugees that are consistent with the *non-refoulement* obligations described in Article 33 of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. Article 46 of Guatemala’s Migration Code generally establishes the substance of Guatemala’s *non-refoulement* duties and commitments, and those commitments appear to meet or exceed the standards of Article 33 of the 1951 Refugee Convention and the 1967 Protocol. For example, Guatemalan law requires that, should asylum or refugee status be denied, an applicant will not be returned to “his or her country when there is a credible reason to fear serious danger to his or her life, physical integrity, and freedom.”<sup>3</sup> Guatemalan Migration Code Article 12 also guarantees that all migrants are not to be subject to “any form of violence,” including torture or cruel or degrading treatment.

Therefore, I find that the Guatemalan refugee protection system satisfies the “access to a full and fair procedure” requirement of INA section 208(a)(2)(A).

11/7/19  
Date

  
William P. Barr  
Attorney General

<sup>2</sup> See Regulations on the Procedure for the Protection, Determination, and Recognition of Refugee Status in the State of Guatemala, Order No. 2-2019, art. 17 (2019); see also Migration Code, Congressional Decree, No. 44-2016, arts. 43, 48, 84, & 177-87 (2016) (Guat.).

<sup>3</sup> Migration Code at art. 46.



## Document 2: DHS' Determination

Secretary

U.S. Department of Homeland Security  
Washington, DC 20528



# Homeland Security

### MEMORANDUM FROM THE SECRETARY

**SUBJECT:** Whether Guatemala's Refugee Protection Laws and Procedures Satisfy the "Access to a Full and Fair Procedure" Requirements of Section 208(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A).

After careful consideration, I find that Guatemala's refugee protection laws and procedures satisfy the requirements of Immigration and Nationality Act ("INA" or "the Act"), Section 208(a)(2)(A). This decision was made after a careful review of the available information found in the Guatemalan Migration Code, their implementing regulations, an active dialogue between our two States, information provided by the Department of State, information provided by the United Nations High Commissioner for Refugees (UNHCR), and information from other sources.

As the Department of Homeland Security has long recognized, the perfect harmonization of a foreign country's asylum laws and procedures to the laws and procedures in the United States "is not a prerequisite to entering into responsibility-sharing arrangements."<sup>1</sup>

Guatemala has satisfied the INA Section 208(a)(2)(A) requirement because it has in place a sufficient protection system with accompanying procedures and laws. Applicants for protection in Guatemala have a meaningful opportunity to make a protection claim, receive a hearing and adjudication regarding that claim, and safely remain in Guatemala until their protection claim is resolved.

Additionally, the phrase "full and fair procedure" presumes that the third country have in place a process that comports with basic notions of procedural fairness. The Guatemalan system meets these basic requirements. In Guatemala, an interpreter is available for the applicant during the interview, oral guidance is given to the applicant at the initial stages of the proceedings on how to present a claim along with information on rights, protections, and privileges, and an appeal process is provided. The applicant may also remain in Guatemala during the appeals process. Guatemalan law has adopted and maintains laws against *refoulement* of refugees that are in accord with its *non-refoulement* obligations described in Article 33 of the 1951 Convention Relating to the Status of Refugees 1951 and the 1967 Protocol Relating to the Status of Refugees, at a minimum.

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<sup>1</sup> 69 Fed. Reg. 10,620-01, 10,620 (Mar. 8, 2004).


**Subject:** Whether Guatemala’s Refugee Protection Laws and Procedures Satisfy the “Access to a Full and Fair Procedure” Requirements of Section 208(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A).

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Additionally, non-binding UNHCR guidance provides another official’s view in the context of safe third country considerations. The UNHCR Handbook is not definitive, but it indicates that a variety of procedures may be appropriate.<sup>2</sup>

I need not conclude that all of these UNHCR Handbook guidelines must be met for a country to provide “full and fair” procedures. Notwithstanding this, the Guatemalan system appears to satisfy each of them based on the available information. For example, it appears Guatemala has a competent immigration authority that has clear instruction for addressing initial asylum applicants, including referral to an adjudicative body. As for Guatemala’s compliance with its *non-refoulement* obligations, Article 46 of the Migration Code generally establishes what those *non-refoulement* duties and obligations are, and they appear to meet or exceed the standards of Article 33 of the 1951 Refugee Convention and the 1967 Protocol. For example, Guatemalan law requires that, should asylum or refugee status be denied, an applicant will not be return to “his or her country when there is a credible reason to fear serious dangers to his or her life, physical integrity, and freedom.”<sup>3</sup> Guatemalan Migration Code Article 12 also guarantees all migrants are not to be subject to “any form of violence,” including torture, cruel, or degrading treatment. Guatemalan law further provides that asylum applicants will receive guidance during their application process, and it has a robust protection system in place under its laws, including the availability of psychologist during the refugee interview.<sup>4</sup> It also appears that a refugee applicant and refugee status grantee in Guatemala are informed of this decision and issued certifying documentation. Guatemala provides applicants the right to appeal an adverse decision on protection applications, which they must do within 10 days of notification of the decision. Applicants are also allowed to stay in Guatemalan during the pendency an appeal.

Therefore, and based on the information provided, I find that the Guatemalan refugee protection system satisfies the “access to a full and fair procedure” requirements of INA § 208(a)(2)(A).

  
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Kevin K. McAleenan  
Acting Secretary of Homeland Security

OCT 16 2019  
\_\_\_\_\_  
Date

<sup>2</sup> See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”) ¶ 189 (Jan. 1992 ed.). Notably, the UNHCR Handbook’s most recent reissuance was in February 2019. However, the substance between the 2019 version of the UNHCR Handbook and the 1992 UNHCR Handbook remains unchanged.

<sup>3</sup> Migration Code, Congressional Decree, No. 44–2016, art. 46 (2016) (Guat.).

<sup>4</sup> See Regulations on the Procedure for the Protection, Determination, and Recognition of Refugee States in the State of Guatemala. Order No. 2-2019. at art. 17 (2019): *see also* Migration Code art. 180.

# Document 3: Diplomatic cable: U.S. Embassy Guatemala Assessment of the Guatemalan Asylum System

UNCLASSIFIED

SBU



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**MRN:** [19 GUATEMALA 536](#)  
**Date/DTG:** Jun 12, 2019 / 121741Z JUN 19  
**From:** AMEMBASSY GUATEMALA  
**Action:** WASHDC, SECSTATE *ROUTINE*  
**E.O.:** 13526  
**TAGS:** PREL, PREF, PHUM, SMIG, KCOM, GT  
**Captions:** SENSITIVE  
**Reference:** [19 STATE 61360](#)  
**Subject:** Assessment of the Guatemalan Asylum System

1. (U) Post provides the following responses to the request in Ref A for information on the Guatemalan Asylum System. The Director for the Guatemalan Institute for Migration, the United Nations High Commissioner for Refugees (UNHCR) Regional Representative and local UNHCR Protection Officer provided information for the responses.

## **(SBU) Eligibility to Apply for Asylum in Guatemala:**

- Where can asylum seekers apply for relief in Guatemala?

Asylum seekers can apply at the Guatemalan Institute for Migration (IGM) office in Guatemala City, and at any land, sea, or air port of entry.

- Is there a deadline or fee to apply?

No, there is no deadline or fee. Though it is not codified, IGM told Post that the National Police (PNC) are trained to bring anyone that wants to claim asylum to the IGM offices.

- Are asylum seekers protected from return while their application is pending?

Yes, while asylum seekers wait for adjudication, they receive temporary permanent residency (Article 17 subparagraph (c) of the Rules of Procedure for Refugee Status).

## **(SBU) Access to Information and Assistance:**

- What kind of information does the Guatemalan government provide to asylum seekers regarding the process to apply for asylum or equivalent protection?

IGM said applicants receive information about legal status and how and when to appear for an interview at IGM. “After the border agent or IGM official accepts a verbal or oral request for asylum, they immediately transmit it in writing to CONARE’s IGM support staff. After IGM support staff receive the written request, they provide guidance to the asylum applicant on the application procedures. CONARE’s IGM support staff give the applicant the application form and schedules an appointment for a personal interview regarding their claim,” (Migration Authority Agreement, Title II, Chapter II, Article 17).

According to IGM, at ports of entry, the border agent provides basic information regarding the asylum process to the asylum seeker. Post cannot confirm the consistency or quality of the information officials provide. If the applicant applies at IGM in Guatemala City, case officers who focus specifically on asylum cases handle the case.

- Are asylum seekers permitted access to an interpreter (if necessary), other explanatory assistance, and/or counsel during the application process?

Yes, but IGM said it currently has only English-language interpretation services available. Most applicants are from Spanish-speaking countries. However, IGM also receives a number of applications from the Middle East. It would like to expand its interpretation services to include Arabic.

- What kind of accommodations are provided to unaccompanied children or persons with disabilities?

The Secretariat for Social Welfare provides shelter for unaccompanied children, while IGM works with the Solicitor General’s Office to make a determination on the children’s asylum applications, usually denying asylum and returning children to their home countries. There are no special protections for persons with disability under the law. IGM told Post it prioritizes cases for the elderly and others with special considerations.

- Do asylum seekers in Guatemala have access to social services or the right to work while they wait for asylum claims to be adjudicated?

Asylum seekers are granted work permits according to Article 8 of the Rules of Procedure for Refugee Status, and Articles 6, 48, 53, 84 and 101 of the Migration Code. Asylum seekers receive a provisional permit that gives them access to health services and primary and secondary education. However, employment in the formal sector in Guatemala can be hard to find, as is the case for the general Guatemalan population. Claimants receive medical insurance through their employer, and without insurance, medical attention is limited to emergencies only.

According to UNHCR, despite legal entitlement, documentation issued to refugees lacks recognition by many public and private institutions, including banks. The new Migration Authority Agreement, which comes into effect in August, recognizes the role of the Guatemalan National Registry of Persons (RENAP) in issuing documents to asylum seekers. Having identification documents issued by RENAP should improve their recognition.

#### **(SBU) Refugee Status Determination Procedures:**

- Who bears the burden of proof? What is the relevant evidentiary standard?



The Rules of Procedure for Refugee Status do not specifically address who bears responsibility for burden of proof. CONARE consists of working-level technical representatives from the Ministries of Government, Labor and Social Development, Foreign Affairs, and a representative of the IGM director. CONARE's primary function is to make a technical recommendation to the National Migration Authority (AMN) to approve or deny a case, based on its assessment of whether the case meets burden of proof.

The representatives in CONARE remain on the payrolls of their respective ministries. According to UNHCR, CONARE has a principal participant and stand-in from each institution. Currently none of these people is dedicated to the council full-time and asylum is only one of their many portfolios.

CONARE has met three to four times to draft recommendations on asylum cases since March 2019, when the Rules of Procedure for Refugee Status came into effect. It has made about 30 determinations: 20 recommending asylum and five to ten recommending refusal. UNHCR told Post historically Guatemala approves 90-95% of asylum claims. Although council members have UNHCR training on legitimacy guidelines, UNHCR said the council probably made determinations on the first 30 cases based on "gut decision" and would need more training in evidentiary standards. CONARE has invited UNHCR to attend meetings this month to observe its process.

Before CONARE makes recommendations, investigators on IGM's payroll and seconded to CONARE collect information to verify the veracity of the claim. Investigators will ask the applicant to obtain proof of citizenship from his or her respective consulate in Guatemala if the claimant has no valid ID. Investigators will then verify the residence of the claimant with country officials and the level of threat in that area. Investigators run an INTERPOL background check on the claimant and seek to obtain police records from the country of origin, if available. The investigators provide information to CONARE to help corroborate or disprove the applicant's claim as well as highlight cases of blatant criminality or terrorism. CONARE can ask investigators to gather more information before making a recommendation for approval or denial of the case.

- Are there any limitations on the types of evidence that the asylum seeker can introduce?

No.

- Does Guatemalan law incorporate the definition of "refugee" from Article 1 of the Refugee Convention?

The Migration Authority Agreement, Title I, Article 4 lays out three different profiles for who may request asylum in Guatemala. The first definition mirrors the convention definition of an asylee.

- Does the Government of Guatemala exclude asylum seekers from protection on any basis other than those provided for in Articles 1 and 33(2) of the Refugee Convention?

No.

- Does Guatemalan law protect individuals from return to torture? If so, does Guatemalan law incorporate the standard from Article 3 of the Convention Against Torture?

The Migration Code does not clearly state a prohibition against returning individuals who may face torture. However, IGM said Guatemala considers the Convention Against Torture and all other conventions in its asylum processing. UNHCR confirmed that Guatemala follows all conventions in practice. According to IGM, Guatemalan law cannot run against these conventions without full declaration of intent to abandon the convention and subsequent congressional approval.

- Who is responsible for making the final determination about asylum?

The National Migration Authority (AMN) makes the final decision on asylum cases and ultimately grants asylum. CONARE, as a technical body, assesses the evidence and makes a recommendation to AMN, as the political body, to approve or deny an asylum claim. AMN is composed of seven governmental institutions: four ministries, the Guatemalan Institute for Migration (IGM), the Council for Guatemalan Migrants, and the Office of the Vice-President as the head. Like CONARE, AMN has a principal participant and stand-in from each institution, none of whom is full-time dedicated to asylum determinations.

AMN has not met since the March 2019 Rules of Procedure for Refugee Status came into effect, and therefore has not reviewed CONARE's recommendations on 30 asylum cases. Until AMN reviews CONARE's recommendations and makes a decision to approve or deny these cases, they remain pending. It is unclear whether CONARE will present a single recommendation for each case or each board member will submit individual recommendations to his or her agency counterpart on the AMN. UNHCR is encouraging the Guatemalan government to streamline this process as much as possible.

#### **(SBU) Appeal Rights:**

- If a claim is denied, is the applicant informed of the grounds of the decision in writing?

Yes, CONARE is responsible for notifying the applicant of the final decision to approve or deny a claim after AMN makes its final determination. There is no requirement in the law that CONARE provide a justification for a denial.

- Is there a mechanism to appeal asylum determinations?

Yes. Asylum seekers have ten days to appeal the denial to the AMN, through a legal action called *recurso de reposicion*. The AMN must uphold, overturn, or modify the decision within five days. Although the Migration Code does not clearly set out the option, asylum seekers could also file a petition for *amparo*, a legal remedy that challenges the constitutionality of the denial and acts as a stay.

#### **(SBU) Nature of Protection Granted:**

- What rights or benefits are provided to foreign nationals who are granted asylum or equivalent protection under Guatemalan law?

Asylees have the right to a national identification card in order to access education, health services, and work permits. They receive a separate legal status as an asylee, after which they can apply for permanent residency under certain circumstances.



**(SBU) Capacity of the National Migration Authority (AMN) and the National Refugee Commission (CONARE):**

- How many asylum claims does the Government of Guatemala adjudicate per year?

IGM handles approximately 100-150 asylum cases per year that proceed past the initial interview. IGM currently has over 400 pending asylum cases. IGM and CONARE were unable to work on cases for over a year while the Rules of Procedure for Refugee Status were being drafted. As of March 2019, there was a backlog of 210 cases. Though CONARE has been able to make about 30 recommendations since March, the AMN has not reached a decision on these cases. IGM and CONARE have created a plan to work through the backlog by the end of the calendar year. CONARE will meet biweekly instead of monthly over the next few months to make recommendations on the backlogged cases. Historically, Guatemala has had capacity to process about 100-150 cases per year.

- With increased assistance, how many asylum claims could Guatemala reasonably be expected to adjudicate per year?

The Office of International Migration Relations (ORMI), a specialized unit within the IGM, handles asylum claims. ORMI has three caseworkers, three investigators seconded to CONARE, and one supervisor to complete asylum casework. IGM said ORMI staffing was sufficient to complete the current average of 100-150 cases yearly, after completing the 210 cases in backlog. IGM said it could complete investigations within 30 days and send cases to CONARE within 3-4 months without a backlog.

Under the new Migration Authority Agreement, the entire National Migration Authority (AMN), including IGM, is moving out of the Ministry of Government in August to become a “decentralized entity.” UNHCR explained that ORMI would disappear, and responsibility for asylum processing would fall under a new Sub-Department for International Migration Relations. According to IGM and UNHCR, the new budget is still in negotiation, but IGM believes funding and resources would increase for asylum processing under this new entity. IGM continues to ask for technical assistance to hire psychologists and interpreters and update databases.

- Do asylum decision-makers receive training, including about non-refoulement obligations, and are there safeguards against corruption?

According to UNHCR, no cases of refoulement have been reported in Guatemala. According to IGM, all border officers receive training on initial processing of asylum claims including non-refoulement obligations. IGM told Post that border officers must submit all claims to IGM, but also said border officers were trained to decide if the claimant’s initial reason for asylum was valid to begin a case. IGM was unable to clarify the level of oversight over the officer’s initial decision at ports of entry.

**(SBU) UNHCR:**

- Why has UNHCR assessed that Guatemala’s Migration Code does not provide sufficient safeguards against refoulement?

UNCHR said that, while on the whole, the Migration Code is a positive step, some provisions may not be fully compatible with the principles of non-refoulement and nonpenalization for irregular entry. Specifically, Article 46 leaves some ambiguity with respect to UNHCR's role in preventing refoulement. Article 50 states that asylum seekers will not face criminal charges due to irregular entry, however they will have to pay administrative fines and may also be deported from Guatemala.

- Does the Government of Guatemala have a Memorandum of Understanding with UNHCR that outlines the government's cooperation with UNHCR on issues including technical assistance on and monitoring of refugee protection, access to refugees and asylum seekers in detention, and provision of basic services and assistance to refugees and asylum seekers? If so, please share a copy.

Currently UNHCR operates in Guatemala under the general UNDP framework and does not have a headquarters agreement with the Government of Guatemala. In December 2015, UNHCR and the Ministry of Foreign Affairs signed a MoU that includes various commitments to strengthen the asylum system in Guatemala. However, it expired in December 2017. UNHCR has proposed an extension of that MoU or a formal engagement with the Government, which has not materialized thus far. Following a meeting between the UNHCR Regional Representative and the Vice President last month, UNCHR has formally offered to sign a MoU with the AMN to strengthen their asylum capacity, to which it has not yet received a reply.

#### **(SBU) Other Factors for Consideration**

- Ratification of Safe Third Country Agreement in Guatemala

Post reached out to a former Solicitor General and a former Foreign Minister to determine if the Guatemalan congress would need to ratify a Safe Third Country Agreement. Both stated that they believe congressional ratification is necessary since the Guatemalan state would assume responsibility for individuals requesting asylum as well as the fact that it would be assuming a series of responsibilities to their countries of origin. In addition, article 171 of the Guatemalan constitution requires congressional ratification of international agreements that "affect the existing laws where this Constitution may require the same majority of votes"; that create a financial obligation for the state that is either equal to one percent of the budget or an indeterminate amount; or that result in the state submitting itself to international jurisdiction or an international judicial decision.

- Crime Statistics and Security

Guatemala's homicide rate in 2018 was about 22 per 100,000 inhabitants. In 2018, the police reported approximately 3,881 homicides, 4,246 aggravated assaults, and over 2,500 missing persons. Despite the slight downward trend, Guatemala remains among the most dangerous countries in the world, according to several security providers. Endemic poverty, an abundance of weapons, a legacy of societal violence, and the presence of organized criminal gangs Barrio 18 (18th Street) and Mara Salvatrucha (MS13) all contribute to the violent crime. Guatemala's high murder rate appears driven by narco-trafficking activity, gang-related violence, a heavily armed population, and police/judicial system unable to hold many criminals accountable.

Extortion is extremely common and affects all sectors of society with public bus and taxi drivers being the easiest and most common victims. However, small businesses, the U.S. private sector,

as well as local national employees of the U.S. Embassy were all frequent targets in 2018. The gangs also target schoolchildren, street vendors, and private citizens. Although in recent years the number of reported extortions increased, most incidents are still unreported. Gang members usually punish non-compliant victims with violent assault or murder, and their family members are also victimized as punishment.

According to official government crime statistics, sexual assault numbers slightly decreased from 551 in 2017 to 527 in 2018. The Embassy believes, however, that the actual numbers of sexual assaults are far greater; cultural stigmas and sporadic police presence in rural areas cause significant underreporting. (Guatemala 2019 Crime and Safety Report. OSAC. <https://www.osac.gov/Content/Report/5f31517e-62bb-4f2c-8956-15f4aeaab930>)

**Signature:**

Arreaga

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