



# CRUELTY, COERCION, AND LEGAL CONTORTIONS:

The Trump Administration's Unsafe  
Asylum Cooperative Agreements with  
Guatemala, Honduras, and El Salvador

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# Cruelty, Coercion, and Legal Contortions: The Trump Administration’s Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador

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- I -  
**Introduction**

Since his first days in office in 2017, President Donald Trump has aggressively exploited the U.S. immigration system to reduce the number of foreigners allowed entry into the United States, and especially to repel refugees, asylum seekers, and other vulnerable migrants in need of protection.<sup>1</sup> From separating migrant children from their parents at the border to decimating the U.S. Refugee Admissions Program to terminating Temporary Protected Status (TPS) for nearly 400,000 individuals at risk of deportation, the president has blocked people fleeing persecution, torture, and other vital threats from protection in the United States and systematically dismantled the institutions that made America a humanitarian leader.<sup>2</sup> The Trump administration implemented these policies despite record levels of forced displacement globally, with 26 million refugees and 4.2 million asylum seekers having fled persecution and conflict at the end of 2019.<sup>3</sup> While these policies have faced legal challenges in U.S. courts, their implementation has trampled on the United States' history as a haven from persecution, betrayed American values, and undermined U.S. global leadership. Our retreat—and the mockery this administration has made of a global protection regime—has made it easier for other countries to shirk their international obligations. The result is a severe weakening of migrant and refugee protections that leaves millions of people more vulnerable and increases instability and the potential for conflict.

One striking example of the effort to eviscerate long-standing American protection policy is the set of agreements the Trump administration signed with El Salvador, Guatemala, and Honduras, the so-called “Asylum Cooperative Agreements” (ACAs). These agreements follow a pattern of unlawful maneuvers designed to close off legal pathways to protection in the United States.<sup>4</sup> Starting in the spring of 2019, the Trump administration began negotiations with Guatemala, Honduras, and El Salvador on the series of agreements, which stem from a little-known “safe third country” provision of U.S. immigration law. The ACAs serve as mechanisms to repel asylum seekers from the United States and relocate them in the signatory Central American countries to pursue asylum claims there. Designed not just to export U.S. refugee obligations, but to do so, for example, by sending Hondurans to Guatemala and Guatemalans to Honduras in a cynical game of musical chairs in one of the most violent regions of the world, the ACAs are particularly damaging both to the people seeking asylum and to America's global leadership.

Since their inception, the ACAs with Guatemala, Honduras, and El Salvador have provoked grave concerns within the U.S. government, within the foreign governments negotiating the agreements, and among external experts. Based on these concerns, and in furtherance of its oversight responsibilities, the Senate Foreign Relations Committee (SFRC) Democratic Staff investigated the ACAs.

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<sup>1</sup> See Annex 1 for definitions of key terms.

<sup>2</sup> Michael D. Shear et al., “We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said,” *The New York Times*, Oct. 21, 2020; Nick Miroff, “Trump Cuts Refugee Cap to Lowest Level Ever, Depicts Them on Campaign Trail as a Threat and Burden,” *The Washington Post*, Oct. 1, 2020; “Playing Politics with Humanitarian Protections: How Political Aims Trumped U.S. National Security and the Safety of TPS Recipients,” Democratic Staff Report, Senate Committee on Foreign Relations, Nov. 7, 2019.

<sup>3</sup> “Global Trends: Forced Displacement in 2019,” *United Nations High Commissioner for Refugees (UNHCR)*, June 18, 2020, <https://www.unhcr.org/globaltrends2019/>.

<sup>4</sup> See Annex 2.

This report examines the ACAs' impact on the lives of refugees and asylum seekers, their tenuous foundation in U.S. law, and their role in U.S. foreign policy toward Central America. The Report is based on information gleaned through Committee hearings, travel to the region, rigorous oversight of the State Department, and consultations with international organizations and human rights advocates—information learned despite the Trump administration's obstruction and efforts to hide relevant documentation. Annexes to this report include previously unpublished written material provided by the State Department to SFRC Democratic Staff. The report's annexes also include key documents related to the ACAs that the Trump administration refused to disclose to SFRC, ensuring they are now freely accessible to the public. SFRC Democratic Staff has found the ACAs to be alarmingly abusive in every respect. Specifically, SFRC Democratic Staff found that:

- The ACAs appear to violate U.S. law and international obligations by sending asylum seekers and refugees to countries where their lives or freedom would be threatened;
- Determinations by the Attorney General and DHS Acting Secretary that Guatemala provides “full and fair” access to asylum were based on partial truths and ignored State Department concerns;
- The Trump administration radically distorted the intent and meaning of the “safe third country” provision in U.S. law, constructing the ACAs to function as a broad bar to asylum rather than an exception to the right to seek asylum;
- Asylum seekers transferred from the United States to Guatemala under the ACA were subjected to degrading treatment and effectively coerced to return to their home countries of Honduras or El Salvador, where many feared persecution and harm;
- The White House and DHS used coercive tactics to compel the governments of Guatemala, Honduras, and El Salvador to sign the ACAs; and
- The Trump administration has sought to maintain secrecy, obstruct accountability, and hide its actions from Congress and the American public in its pursuit of ACA implementation.

This report reveals that the ACAs effectively punish people attempting to reach safety in the United States by sending them to highly dangerous countries where access to protection from persecution and violence exists only on paper. **Since implementation of the U.S.-Guatemala ACA began over one year ago, not one of the 945 asylum seekers transferred from the United States to Guatemala has been granted asylum.**<sup>5</sup> Instead, the vast majority have been left with the grievous options of returning to face serious threats of violence and persecution in their home countries, or risking abuse on another journey northward. Although ACA implementation was suspended due to COVID-19, **these counterproductive and unlawful agreements must never resume and must be terminated as soon as possible.**

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<sup>5</sup> United Nations High Commissioner for Refugees Guatemala office meeting with SFRC Democratic Staff, Oct. 21, 2020.

- II -  
**Subverting U.S. Asylum Law**

The ACAs provide a disturbing example of how the Trump administration has distorted and deliberately disregarded the intent and statutory language of U.S. asylum law. Although the Refugee Act of 1980 codified the right to seek asylum in the United States, the Trump Administration has taken the one of the few, limited exceptions to this right and applied it far beyond the meaning of the law.<sup>6</sup> Citing the “safe third country” provision in Section 208(a)(2)(A) of the Immigration and Nationality Act (INA), the Trump administration created the ACAs with Guatemala, Honduras, and El Salvador as mechanisms to remove asylum seekers from the United States without due process.<sup>7</sup> Refugees and others in need of protection from torture arriving at the U.S. Southwest border have little chance of remaining in the United States as a result of the ACAs, based on the fraudulent premise that they will have access to protection in Guatemala, Honduras, or El Salvador. The stated purpose of the ACAs is to transfer responsibility to help alleviate “the burdens associated with adjudicating asylum claims.”<sup>8</sup>

This goal of *transferring* responsibility distorts the vision Congress had for *sharing* responsibility for refugee protection when it adopted the safe third country provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>9</sup> Prior to the law’s enactment, surging numbers of asylum applications prompted some members of Congress to advocate for restrictions on access to asylum in the United States and they considered mandating that asylum seekers be returned to transit countries, such as the United Kingdom, that offered protections similar to the United States.<sup>10</sup> The Immigration and Naturalization Service had proposed a “Discretionary Denial of Asylum” regulation in 1994.<sup>11</sup> The outcome of the immigration reform debate was that Congress rejected mandated returns, and instead agreed on the discretionary safe third country provision as a compromise.<sup>12</sup> The statute states:

INA Section 208 (a)(2)(A) Safe third country

[The right to apply for asylum in the United States] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral

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<sup>6</sup> Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1): “In general, any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section....”

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and U.S. Department of Justice, Executive Office of Immigration Review, Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act, 84 Fed. Reg. 63995, Nov. 19, 2019.

<sup>9</sup> See [Section 604](#) of Division C of the Omnibus Consolidated Appropriations Act, 1997 ([H.R. 3610/P.L. 104-208](#)).

<sup>10</sup> Rep. Romano Mazzoli, *H.R. 1153, H.R. 1355, and H.R. 1679, Asylum Reform Act of 1993*, Hearing before the House Judiciary Committee, Subcommittee on International Law, Immigration, and Refugees, Asylum and Inspections Reform, Apr. 27, 1993, at 215.

<sup>11</sup> U.S. Department of Justice, Immigration and Naturalization Service, Final Rule, [Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization](#), 59 Fed. Reg. 62295, Dec. 5, 1994.

<sup>12</sup> “Eight Days and Counting: Panel Continues Reform Bill Mark-Up, Promises End is Near,” 72 No. 41 Interpreter Releases 1447, Oct. 23, 1995, at 3.

or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

This provision created an exception to the right to seek asylum with three clear requirements. First, there must be a bilateral or multilateral agreement in place. Second, the Attorney General must determine that the country of removal is a place where the individual's life or freedom would not be threatened on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion). With this language, the provision upholds a principle of international human rights law known as *non-refoulement*, which protects asylum seekers and refugees from removal not only to their country of origin but to any country where they would face persecution, torture, or other harm.<sup>13</sup> The provision thus echoes the withholding of removal provision established in the 1980 Refugee Act that implements the *non-refoulement* obligation in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.<sup>14</sup>

Lastly, the safe third country provision requires a determination that the asylum seeker would have access to a “full and fair” asylum procedure or “equivalent temporary protection” in the third country. A recent ruling by the U.S. Court of Appeals for the Ninth Circuit underscored the principle girding the safe third country provision's requirements by stating: “A critical component of [the safe third country provision] is the requirement that the alien's ‘safe option’ be genuinely safe.”<sup>15</sup>

## Background: U.S.-Canada Safe Third Country Agreement

Prior to the ACAs, the United States had utilized the safe third country provision only once. The United States signed its first safe third country agreement with Canada in December 2002 after careful consideration of U.S. international legal obligations to protect refugees. The U.S.-Canada Safe Third Country Agreement (STCA) took over *three years* of detailed negotiations to enter into force and included substantial consideration of public comments as it sought to fulfill the statute's requirements.<sup>16</sup> In a hearing of the House Subcommittee on Immigration, Border Security, and Claims on

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<sup>13</sup> See Annex 1.

<sup>14</sup> 8 U.S.C. § 1231(b)(3)(A) states “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.” Article 33 of the 1951 Refugee Convention and 1967 Refugee Protocol states: “No 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.”

<sup>15</sup> *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 845–47, 859 (9th Cir. 2020). The Ninth Circuit cited as precedent its 1999 *Andriasian v. INS* decision: The safe-place requirements embedded in the safe third country provision “ensure that if [the United States] denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution”—an outcome which “would totally undermine the humanitarian policy underlying the regulation.” *Id.* at 30.

<sup>16</sup> U.S. Department of Justice, Executive Office of Immigration Review, “Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry, 69 Fed. Reg. 69490, Nov. 20, 2004.



the draft agreement, a State Department witness testified that the U.S. and Canadian asylum systems are “two of the world’s most generous and are both fully in keeping with international protection standards,” and that, “[p]roperly crafted, safe third country agreements are fully consistent with refugee protection obligations under the 1951 Refugee Convention and the 1967 Protocol,” including the prohibition on *refoulement*.<sup>17</sup>

The U.S.-Canada STCA applies only to asylum seekers at land ports of entry who have transited or been physically present in the other country or who are in transit during removal from the other country. Notably, it allows access to legal counsel, includes exceptions for family reunification, and invites input from non-governmental organizations (NGOs) and monitoring by the UN Refugee Agency to ensure its consistency with international refugee law.<sup>18</sup> The U.S.-Canada STCA thus stands as an example of faithful interpretation of the safe third country provision enshrined in the INA, even if its execution is now in question in Canada, due to court challenges alleging that the Trump administration’s degrading treatment of asylum seekers does not make the United States “safe.”<sup>19</sup>

## Asylum Cooperative Agreements

By contrast, the Trump administration hastily crafted separate ACAs with Guatemala, Honduras, and El Salvador—with **less than two months** between the start of negotiations and signature for each agreement—and ensured that the agreements provide broad authority to transfer asylum seekers from the United States to the agreed countries. Under these agreements, the United States is responsible for providing asylum screening only to unaccompanied children and individuals arriving with legal status on its territory. Guatemala, Honduras, and El Salvador agreed to receive transfers of any other asylum seekers arriving irregularly at or between U.S. ports of entry, except for their own nationals or stateless habitual residents and convicted criminals.<sup>20</sup>

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<sup>17</sup> Statement of J. Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State, *United States and Canada Safe Third Country Agreement*, Hearing before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims, Oct. 16, 2002.

<sup>18</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and U.S. Department of Justice, Executive Office of Immigration Review, Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act, 84 Fed. Reg. 64002-03, Nov. 19, 2019; *see also* Government of Canada, “Final Text of Safe Third Country Agreement,” *Refworld*, Dec. 5, 2002, <https://www.refworld.org/pdfid/42d7b9944.pdf>.

<sup>19</sup> *See Canadian Council for Refugees v. Minister for Immigration and Minister for Public Safety*, 2020 FC 770, Canada Federal Court, July, 22 2020, available at <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482757/index.do>. The Court found the agreement invalid, but suspend the effect of the decision for 6 months.

<sup>20</sup> 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. 64095, Nov. 20, 2019; *see also* Agreement Between the Government of the United States of America and the Government of the Republic of Honduras on Cooperation Regarding the Examination of Protection Claims, 85 Fed. Reg. 25462, May 1, 2020; *see also* “Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador on Cooperation Regarding the Examination of Protection Claims,” <https://www.documentcloud.org/documents/6427712-US-El-Salvador-Cooperative-Agreement.html> (last visited on Dec. 17, 2020).



The agreements anticipate implementation plans for the transfer process. The implementation plans completed for the Guatemala and Honduras ACAs specify certain nationalities as eligible for transfer and specify the number of transfers and their frequency.<sup>21</sup> The agreements indicate U.S. support for strengthening the “institutional capacities” of Guatemala, Honduras, and El Salvador, and provide for joint evaluation or review three months after entry into force. Although the preambles to the agreements refer to each country’s obligations under international law to protect refugees and uphold the principle of *non-refoulement*, there is no mechanism to monitor or enforce these obligations. The agreements therefore make it difficult for the United States to ensure that asylum seekers will not be *refouled* from the country of transfer.<sup>22</sup> Additionally, and in further contrast to the U.S.-Canada STCA, there are no provisions allowing access to legal counsel, exceptions for family reunification, or invitations for input and monitoring by international humanitarian organizations.

## Distorting the Law’s Meaning and Intent

In creating the ACAs, the Trump administration distorted the intent of the INA’s safe third country provision in at least two important ways. First, although the legislative history makes clear that Congress intended the safe third country provision to *return* asylum seekers in the United States to a country of transit, the Trump administration exploited the lack of specificity in the statute, deliberately crafting the ACAs to allow for the *transfer* of asylum seekers with no connection whatsoever to the agreed country of removal.<sup>23</sup> Although they have not yet been implemented in this way, **the ACAs allow asylum seekers of any nationality to be transferred from any location in the United States to the agreed third country, regardless of whether they transited through that country.** Under the ACAs, asylum seekers in the United States could be apprehended at an airport (not just the U.S.-Mexico land border) and forcibly sent to a country they have never transited or visited and where they have no family, friends, or cultural links. For example, the implementation plan for the U.S.-Honduras ACA would allow U.S. authorities to transfer a Brazilian or Mexican asylum seeker to Honduras even if that person never passed through Central America.<sup>24</sup>

Second, although Congress intended the safe third country provision to be used as a limited exception to the right to seek asylum enshrined in U.S. law, **the Trump administration has employed the ACAs as a broad bar to any asylum screening by U.S. officials.**<sup>25</sup> The ACAs deny asylum seekers the opportunity to claim a “credible” fear of persecution or torture that serves as the standards for initial protection screening under U.S. law, and shift responsibility for asylum adjudication onto countries that do not provide full and fair access to asylum. In decisions to remove individual

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<sup>21</sup> “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, Annex 1: Initial Implementation Plan; Phased Initial Implementation Plan,” Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116-EGS (D.D.C. Mar. 27, 2020).

<sup>22</sup> See, e.g., Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 Michigan J. Int’l L. 223, 263–268 (2007).

<sup>23</sup> See Rep. Romano Mazzoli, *H.R. 1153, H.R. 1355, and H.R. 1679, Asylum Reform Act of 1993*, Hearing before the House Judiciary Committee, Subcommittee on International Law, Immigration, and Refugees, Asylum and Inspections Reform, Apr. 27, 1993, at 215; U.S. Department of Justice, Immigration and Naturalization Service, Final Rule, [Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization](#), 59 Fed. Reg. 62295, Dec. 5, 1994; “Eight Days and Counting: Panel Continues Reform Bill Mark-Up, Promises End is Near,” 72 No. 41 Interpreter Releases 1447, Oct. 23, 1995, at 3.

<sup>24</sup> Dagoberto Rodriguez, “Honduras recibirá a migrantes de cinco nacionalidades,” *La Prensa*, Jan. 9, 2020.

<sup>25</sup> 8 U.S.C. § 1158(a)(2), titled “Exceptions,” lists a series of limited exceptions to the right to seek asylum in the United States as established in 8 U.S.C. § 1158(a)(1).

asylum seekers, the ACAs apply the higher standard of being “more likely than not”—proving a probability greater than 50 percent—that the asylum seeker would face persecution or torture in the third country.<sup>26</sup> The “more likely than not” would normally only be required at a full hearing before an immigration judge on withholding of removal or a Convention Against Torture claim—notably a higher standard than the “well-founded” fear for asylum claims at a full hearing. For asylum seekers without any meaningful connection to the third country under the ACA or without full information that they will be removed to the third country, it could be exceedingly difficult to prove that their fear meets this higher standard.<sup>27</sup>

The administration’s approach distorts the discretion to grant asylum codified in the law by turning an exception into a rule that denies any opportunity for asylum in the United States while purporting to uphold the law’s prohibition on *refoulement*.<sup>28</sup> According to the UN Refugee Agency, “withholding of removal does not provide an adequate substitute for the asylum process... and does not fully implement [the 1967 Refugee Protocol] Article 33(1)’s prohibition on *refoulement*.”<sup>29</sup> This distortion of the law is so egregious that a union of approximately 700 U.S. Citizenship and Immigration Services (USCIS) asylum and refugee officers filed an *amicus brief* in a court challenge to the ACAs, asserting that these agreements force them “to take actions that violate their oath to uphold the nation’s laws.”<sup>30</sup>

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<sup>26</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and U.S. Department of Justice, Executive Office of Immigration Review, “Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act,” 84 Fed. Reg. 63996, Nov. 19, 2019.

<sup>27</sup> In a brief of *amici curiae* submitted in support of the plaintiffs in *U.T. v. Barr*, the National Citizenship and Immigration Services Council 119, representing approximately 700 asylum and refugee officers tasked with implementing the ACAs wrote: “The stringent ‘more likely than not’ standard required by the ACA Rule has traditionally been reserved for use in full-scale removal proceedings administered by immigration judges. And for good reason. In those proceedings, applicants are afforded substantial protections, such as a full hearing, notice of rights, access to counsel, time to prepare, and the rights to administrative and judicial review—protections that are not available under the ACA Rule.” Brief for National Citizenship and Immigration Services Council as Amici Curiae Supporting Plaintiffs, at 4, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. 2020).

<sup>28</sup> Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A).

<sup>29</sup> Brief for United Nations High Commissioner for Refugees as Amici Curiae Supporting Plaintiffs, at 21, *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 845-47 (9th Cir. 2020).

<sup>30</sup> Brief for National Citizenship and Immigration Services Council as Amici Curiae Supporting Plaintiffs, *U.T. v. Barr*, at 4, Case no. 1:20-cv-00116 (D.D.C. 2020).

- III -

## Bullying Tactics as Foreign Policy

The White House and DHS pushed through the ACAs with bullying tactics and haste, dismissing serious objections by the State Department, Congress, Guatemalan authorities, civil society, and others. From initial negotiations to entry into force, the United States concluded the Guatemala ACA with unusual speed—less than six months—compared to over three years required to complete the U.S.-Canada Safe Third Country Agreement.<sup>31</sup> The Honduras ACA entered into force after less than nine months of negotiations on March 25, 2020.<sup>32</sup> During this intense period, the ACAs dominated U.S. foreign policy in the region, underscoring President Trump’s singular focus on curbing irregular migration without regard for humanitarian or other foreign policy interests.

Throughout its tenure, the Trump administration has aggressively pushed migrants and asylum seekers back to Central America. It surged U.S. deportations to Guatemala, Honduras, and El Salvador, even deporting dozens of COVID-positive individuals to Guatemala and exacerbating the pandemic’s spread.<sup>33</sup> Under U.S. pressure and with U.S. funding, Mexican National Guard troops forcibly pushed back to Guatemala hundreds of Central American migrants who were part of a caravan headed for the United States in January 2020.<sup>34</sup> SFRC Democratic Staff uncovered a reckless and unauthorized DHS operation in January 2020 to transport Honduran migrants in Guatemala back to the border with Honduras.<sup>35</sup> In March 2019, President Trump disrupted relations with Guatemala, Honduras, and El Salvador by abruptly cutting off most U.S. foreign aid to the three countries, halting over \$400 million for programs designed to address poverty, violence, and other drivers of migration to the United States.<sup>36</sup> The White House’s suspension of foreign aid instantly weakened the Central American governments’ negotiating positions.

According to the DHS timeline of ACA negotiations with the Government of Guatemala, a senior U.S. government delegation “with Executive Leadership from DHS and DOS” began negotiations with Guatemalan government officials during a trip to Guatemala on June 12-13, 2019.<sup>37</sup> Six weeks

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<sup>31</sup> Negotiations on the U.S.-Canada STCA began on December 3, 2001. *See* Statement of J. Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State, *United States and Canada Safe Third Country Agreement*, Hearing before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims, Oct. 16, 2002.

<sup>32</sup> Agreement Between the Government of the United States of America and the Government of the Republic of Honduras on Cooperation Regarding the Examination of Protection Claims, 85 Fed. Reg. 25462, May 1, 2020.

<sup>33</sup> TRAC database, “Latest Data: Immigration and Customs Enforcement Removals,” queried by citizenship and fiscal year, <https://trac.syr.edu/phptools/immigration/remove/> (last visited Oct. 27, 2020); Press Release, Senator Bob Menendez, “Menendez, Durbin Press Trump Administration on Deportation of Covid-19 Positive Migrants,” May 2, 2020, <https://www.foreign.senate.gov/press/ranking/release/menendez-durbin-press-trump-administration-on-deportation-of-covid-19-positive-migrants>.

<sup>34</sup> Kevin Sieff, “U.S.-bound Migrants Clash with Mexican Forces at Guatemala Border,” *The Washington Post*, Jan. 20, 2020.

<sup>35</sup> “DHS Run Amok? A Reckless Overseas Operation, Violations, and Lies,” Democratic Staff Report, Senate Committee on Foreign Relations, Oct. 13, 2020.

<sup>36</sup> “U.S. ending aid to El Salvador, Guatemala, and Honduras over migrants,” *Reuters*, Mar. 30, 2019; *see also* “U.S. Strategy for Engagement in Central America,” *Congressional Research Service*, June 30, 2020, <https://fas.org/sgp/crs/row/IF10371.pdf>.

<sup>37</sup> “Timeline of DHS Engagement with Government of Guatemala re: Asylum Agreement, Asylum Processes and Procedures,” Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116-EGS (D.D.C. Mar. 27, 2020).

later on July 26, while the State Department was still gathering basic information on the country's asylum capacity and designing programs to help strengthen it, DHS' Acting Secretary and Guatemala's Interior Minister signed the ACA in a ceremony at the White House. Guatemala remained woefully unprepared when ACA implementation began less than four months after the agreement was signed, with the first transfer flight arriving on November 21, 2019.<sup>38</sup>

U.S. negotiations with the government of Guatemala set a precedent that facilitated similarly hasty negotiations with Honduras and El Salvador. Both the Honduras and El Salvador agreements were signed in September 2019 after only two months of negotiations. When SFRC Democratic Staff traveled to the region in October 2019 shortly after the ACAs were signed, officials in El Salvador's office of the Director General of Migration and Immigration said they had not seen the text of the agreement. These two agreements have yet to be implemented.

## Internal Government Objections

As negotiations began, on June 12, 2019 the U.S. Embassy in Guatemala City transmitted to Washington a diplomatic cable containing its assessment of the Guatemalan asylum system. Although the assessment approved by the U.S. Ambassador did not expressly object to the Guatemala ACA, it detailed a number of concerns that would preclude the agreement from meeting the law's requirements to uphold the principle of *non-refoulement* and to provide "full and fair" access to asylum. For example, the cable reported concerns that Guatemala "does not provide sufficient safeguards against refoulement," and provided detailed data demonstrating that Guatemala was "among the most dangerous countries in the world."<sup>39</sup>

**Within the State Department, concerns about the agreement with Guatemala grew so serious that some of its lawyers resorted to the rarely used "dissent channel" to ensure their concerns reached the highest levels.**<sup>40</sup> Secretary Pompeo reportedly voiced last-ditch objections to the agreement two hours before the July 26, 2019 Oval Office signing ceremony, telling President Trump the agreement was flawed and a mistake, and arguing the Guatemalan government would not be able to carry out its terms. He lost the argument to DHS Acting Secretary Kevin McAleenan, however, who persuaded the President that the agreement would stem the flow of migrants to the United States.<sup>41</sup>

In Guatemala, both candidates heading into the nation's presidential run-off election and the Catholic Church explicitly opposed the agreement.<sup>42</sup> Guatemala's human rights ombudsman, Jordán

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<sup>38</sup> See Annex 4 (Document 2): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State, to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019; see also Geneva Sands, Priscilla Alvarez & Michelle Men-doza, "Trump Administration Begins Deporting Asylum Seekers to Guatemala," *CNN*, Nov. 21, 2020.

<sup>39</sup> Annex 3 (Document 3): U.S. Embassy Guatemala, Diplomatic Cable 19 Guatemala 536, "Assessment of the Guatemalan Asylum System," June 12, 2019.

<sup>40</sup> "Facing the world blindfolded: The dereliction of American diplomacy," *The Economist*, Aug. 13, 2020.

<sup>41</sup> Michael D. Shear & Zolan Kanno-Youngs, "Trump Officials Argued Over Asylum Deal With Guatemala. Now Both Countries Must Make It Work," *The New York Times*, Aug. 2, 2019.

<sup>42</sup> Matthew Borges, "Guatemala high court blocks agreement to have migrants apply for asylum there rather than in US," *Jurist*, July 16, 2019.

Rodas, and other prominent Guatemalans petitioned the Constitutional Court to block the agreement, arguing that “Guatemala utterly lacks the institutions able to offer migrants the minimal conditions with respect to human rights.”<sup>43</sup> Guatemala’s Constitutional Court issued an injunction on July 14, 2019, instructing the government not to enter into an ACA without approval from the Guatemalan Congress.<sup>44</sup>

## High-Level Coercion

President Trump then intensified his coercive tactics, tweeting on July 23 that Guatemala “has decided to break the deal they had with us on signing a necessary Safe Third [sic] Agreement... Now we are looking at the “BAN,”... Tariffs, Remittance Fees, or all of the above.”<sup>45</sup> Then-president Jimmy Morales approved the agreement and his Interior Minister Enrique Degenhart signed the ACA on July 26, 2019.<sup>46</sup> The Guatemalan government released a statement explaining that the agreement was signed “with the objective of preventing serious economic and social repercussions.”<sup>47</sup>

The lesson was clear for the leaders of Honduras and El Salvador: sign the ACAs or face bullying directly from the U.S. President. Honduran foreign ministry officials expressed misgivings that their government was bowing to pressure from Washington.<sup>48</sup> Nevertheless, two months later, the foreign ministers of El Salvador and Honduras each signed ACAs with the United States that are modeled on the Guatemala ACA on September 20, 2019 and September 25, 2019, respectively.<sup>49</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Donald Trump, @realDonaldTrump, “Guatemala, which has been forming Caravans and sending large numbers of people, some with criminal records, to the United States, has decided to break the deal they had with us on signing a necessary Safe Third Agreement. We were ready to go. Now we are looking at the ‘BAN,’...,” July 23, 2019, <https://twitter.com/realDonaldTrump/status/1153641906699681795>; *see also* Donald Trump, @realDonaldTrump,

“...Tariffs, Remittance Fees, or all of the above. Guatemala has not been good. Big U.S. taxpayer dollars going to them was cut off by me 9 months ago,” July 23, 2019, <https://twitter.com/realdonaldtrump/status/1153641907781873664>.

<sup>46</sup> Urías Gamaro, “Degenhart: Guatemala dará refugio a salvadoreños y hondureños para frenar viajes a EE. UU.,” *Prensa Libre*, Aug. 15, 2019.

<sup>47</sup> Gobierno Guatemala, @GuatemalaGob, “Guatemala y Estados Unidos suscriben importante acuerdo de cooperación,” July 26, 2019, <https://twitter.com/GuatemalaGob/status/1154847498135113728>.

<sup>48</sup> David C. Adams, “Honduras and US close to signing new immigration agreements,” *Univision*, Sept. 12, 2019.

<sup>49</sup> Colleen Long & Astrid Galvan, “US, El Salvador Sign Asylum Deal, Details to be Worked out,” *Associated Press*, September 20, 2019; *see also* U.S. Customs and Border Protection, Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, Nov. 7, 2019, [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-north-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-north-central-america-agreements_v2.pdf).

- IV -

## Trump Administration Secrecy and Obstruction

Despite overtly pressuring foreign countries to enter into the agreements and touting them publicly, the Trump administration refused to disclose details of the ACAs to the public and Congress. Without justification, the Trump administration repeatedly refused congressional requests to review the ACAs and associated documents, including legal determinations allowing the agreements' entry into force, implementation plans, and other annexes. Since their inception in mid-2019, Senator Menendez and dozens of other members of Congress have expressed serious concerns about the ACAs and requested relevant documents related to the agreements and their implementation. Senator Menendez and SFRC Democratic Staff have repeatedly requested relevant documents for over a year. The Trump administration's complete refusal to comply with these requests has indicated a concerted effort to maximize secrecy and obstruct any accountability related to implementation of these agreements. Even after many of the primary documents were disclosed through litigation, the Departments of State and Homeland Security continued to refuse requests to provide them directly to Congress.<sup>50</sup> The Trump administration has continued to refuse to provide primary documents associated with the agreements, including legal determinations allowing the agreements' entry into force, implementation plans, and other annexes. To this day, the administration has refused to even provide a log of such documents so that the public and Congress have clearer knowledge of their existence and the full extent of the legal architecture the administration put into place to subvert the rights of asylum seekers in the United States.

At a SFRC hearing on U.S. Policy in Mexico and Central America in September 2019, in response to a direct request from Senator Menendez, the Acting Assistant Secretary of State for Western Hemisphere Affairs publicly committed to provide copies of “all the migration-related instruments, binding or nonbinding, annexes, appendices, implementation plans, guidance, and other related documents that the administration has signed, agreed to, or otherwise joined” regarding Central America.<sup>51</sup> Following the hearing, Senator Menendez submitted written questions again requesting all relevant ACA documents. The State Department did not respond to these questions until three months later, in late December 2019. The Department's responses were largely inadequate—failing to comply with the request for documents and revealing a disturbing lack of knowledge about the asylum systems of Guatemala, Honduras, and El Salvador. For example, in responses submitted long after all three ACAs had been signed and a month **after implementation had begun in Guatemala, the State Department admitted it was still “seeking specific information” about the budgets and staffing of each government agency responsible for processing asylum claims and could not “yet provide an accurate estimation of Guatemala’s asylum processing capacity.”**<sup>52</sup> The State Department's responses were so inadequate that SFRC Democratic staff took the highly unusual step of returning the questions to the State Department twice – in January 2020 and again in

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<sup>50</sup> See Annex 3 for copies of key documents related to the U.S.-Guatemala Asylum Cooperative Agreement.

<sup>51</sup> *U.S. Policy in Mexico and Central America: Ensuring Effective Policies to Address the Crisis at the Border*, Hearing before the Senate Committee on Foreign Relations, Sept. 25, 2019.

<sup>52</sup> See Annex 4 (Document 2): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State (Dec. 23, 2019), to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019.

February 2020, offering second and third opportunities to provide substantive information. The official responses from the Trump administration are included in the annex of this report and have not previously been made available for public review.<sup>53</sup>

With growing concern after implementation of the Guatemala ACA began, Senator Menendez and 20 other Democratic senators wrote to the leadership of the Departments of State and Homeland Security in early February 2020 to request information and documents related to the ACAs.<sup>54</sup> The State Department failed to respond to this request at all, and DHS predictably did not produce the requested documentation in its deficient response. After Senator Menendez sent two more letters requesting documents pursuant to the ACAs—to the Assistant Secretary of State for Legislative Affairs in April 2020 and to Secretary Pompeo in May 2020—the State Department still refused.<sup>55</sup> In sum, the State Department and DHS have refused five formal requests by Senator Menendez for documents related to the ACAs, as well as dozens of follow up requests from SFRC Democratic Staff.

Only in February 2020 did the State Department provide SFRC Democratic Staff with limited substantive information about the ACAs in writing. This information raised new concerns about the agreements. For example, the State Department wrote in February 2020—nearly 6 months after the ACA was signed—that: “The Embassy asked but was unable to obtain a[n asylum] capacity estimate from the government [of El Salvador].”<sup>56</sup> The fact that the administration refused to be transparent with Congress has only further fueled distrust in the ACAs’ consistency with U.S. laws and foreign policy interests.

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<sup>53</sup> See Annex 4.

<sup>54</sup> See Annex 5 (Document 1): Letter from Senators Menendez, Warren, et al. to Secretary of State Michael Pompeo, Attorney General William Barr, and Acting Secretary of Homeland Security Chad Wolf, Feb. 5, 2020.

<sup>55</sup> See Annex 5 (Document 3): Letter from Senator Menendez to Assistant Secretary of State for Legislative Affairs Mary E. Taylor, Apr. 27, 2020; (Document 4): Letter from Senator Menendez to Secretary of State Michael Pompeo, May 27, 2020.

<sup>56</sup> Annex 4 (Document 3): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State (Feb. 14, 2020), to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019.



## Protection Conditions in Central America's Northern Triangle

There is broad acknowledgement, even within the Trump administration, that Guatemala, Honduras, and El Salvador lack institutional capacity to provide protection to asylum seekers transferred under the ACAs. Although these governments have indicated a willingness to do so, their leaders readily admit that their capacity to protect refugees and asylum seekers is seriously deficient. **Since ACA implementation began one year ago, Guatemala's lack of capacity is confirmed by the numbers: of the 945 asylum seekers whom the United States transferred to Guatemala, not one has been granted asylum.**<sup>57</sup>

Guatemala, Honduras, and El Salvador each joined the *Marco Integral Regional para la Protección y Soluciones* (MIRPS, the Comprehensive Regional Protection and Solutions Framework), a regional, state-led initiative supported through the UN High Commissioner for Refugees and Organization of American States that aims to implement the Global Compact on Refugees adopted in 2017.<sup>58</sup> However, their asylum laws and procedures remain nascent while their people suffer high levels of violence, human rights abuses, and displacement. As Guatemala's then president-elect, Alejandro Giammattei said in August 2019, just after the outgoing government signed the ACA, "I do not think Guatemala fulfills the requirements to be a third safe country. That definition doesn't fit us. If we do not have the capacity for our own people, just imagine other people."<sup>59</sup> Honduras' autonomous National Human Rights Commissioner asserted that Honduras lacks the capacity and resources necessary to provide "dignified treatment" to individuals transferred under the ACA.<sup>60</sup> In response to the question of whether El Salvador was ready to receive asylum seekers through the ACA, President Bukele said in December 2019, "[w]ell, not right now. We don't have asylum capacities, but we can build them."<sup>61</sup>

The State Department acknowledged the need to build these countries' asylum capacities and continued to seek details about their asylum staffing and resources even as DHS began ACA implementation.<sup>62</sup> The State Department's Bureau of Population, Refugees, and Migration poured unprecedented levels of funding into building protection capacity, including asylum capacity, in Guatemala, El Salvador, and Honduras soon after the ACAs were signed.<sup>63</sup> DHS Acting Secretary McAleenan announced the State Department's \$47 million contribution to the UN Refugee Agency (UNHCR) and International Organization for Migration (IOM) to help strengthen Guatemala's asylum capacity

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<sup>57</sup> United Nations High Commissioner for Refugees Guatemala meeting with SFRC Democratic Staff, Oct. 21, 2020.

<sup>58</sup> United Nations High Commissioner for Refugees, "About the MIRPS," *Global Compact on Refugees Digital Platform*, Oct. 8, 2020, <https://globalcompactrefugees.org/mirps-en/about-mirps>.

<sup>59</sup> Sonia Pérez D., "President-elect Says Guatemala Can't do Migrant Deal with US," *AP*, Aug. 14, 2019.

<sup>60</sup> "Acuerdo con EEUU debe ser Aprobado por el Congreso: Roberto Herrera Cáceres," *La Prensa* (Honduras), Nov. 12, 2019.

<sup>61</sup> Sharon Alfonsi, "Our Whole Economy is in Shatters: El Salvador's President Nayib Bukele on the Problems Facing his Country," *60 Minutes*, Dec. 19, 2019.

<sup>62</sup> Statement of Michael J. Kozak, Acting Assistant Secretary of State, Bureau of Western Hemisphere Affairs, U.S. Department of State, *U.S. Policy in Mexico and Central America: Ensuring Effective Policies to Address the Crisis at the Border*, hearing before the Senate Committee on Foreign Relations, Sept. 25, 2019.

<sup>63</sup> U.S. Department of State, Bureau of Population, Refugees, and Migration, "Fiscal Year 2019 Summary of Major Activities: Year in Review," June 2020, <https://www.state.gov/wp-content/uploads/2020/06/FY-2019-PRM-Summary-of-Major-Activities-Year-In-Review.pdf>.

on September 23, 2019.<sup>64</sup> In response to a written question from Senator Menendez, the State Department admitted in December 2019—after implementation of the Guatemala ACA had begun—that: “The United States government is actively working with our partners and the Government of Guatemala to better understand its current capacities.”<sup>65</sup>

## Nascent Institutional Capacity

U.S. officials were fully aware that the asylum systems in ACA countries ranged from extremely weak to non-existent. In Guatemala, the most advanced of the three countries in terms of asylum capacity, the U.S. Embassy’s June 2019 assessment of Guatemala’s asylum system noted that the *Comisión Nacional para Refugiados* (CONARE, the National Commission for Refugees) had no dedicated full-time staff, that “asylum is only one of their many portfolios,” and that these staff lacked sufficient training. The assessment stated that some provisions of Guatemala’s Migration Code “may not be fully compatible with the principles of *non-refoulement*,” that it “does not clearly state a prohibition on returning individuals who may face torture,” and that “documentation issued to refugees lacks recognition by many public and private institutions.” SFRC Democratic Staff find that these statements presented red flags regarding the ACA’s compliance with the safe third country provision in U.S. law. The embassy further assessed that, “[h]istorically, Guatemala has had capacity to process about 100-150 cases per year,” or roughly 8-12 cases per month.<sup>66</sup> This number is alarmingly below the expected 1,620 individual monthly transfers described in the agreement’s initial implementation plan or the 945 asylum-seekers actually transferred to Guatemala since the ACA became operational over one year ago.<sup>67</sup>

After Senator Menendez returned the State Department’s incomplete responses to his written questions for revision, in July 2020 the State Department submitted evidence to SFRC showing that asylum capacity in Honduras and El Salvador is far weaker than in Guatemala. Neither Honduras nor El Salvador has any full-time staff dedicated to refugee or asylum determinations, according to the State Department. In 2019, Honduras adjudicated only 46 asylum claims and El Salvador adjudicated none.<sup>68</sup> The State Department’s 2019 *Country Report on Human Rights Practices* in Honduras stated: “The government has a nascent system to provide protection to refugees, the effectiveness of which had not been fully proven by year’s end.”<sup>69</sup> The State Department’s July 2020 responses to

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<sup>64</sup> “Acting Secretary McAleenan’s Prepared Remarks to the Council of Foreign Relations,” *U.S. Department of Homeland Security*, Sept. 23, 2019, <https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenans-prepared-remarks-council-foreign-relations>.

<sup>65</sup> See Annex 4 (Document 2): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State (Dec. 23, 2019), to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019.

<sup>66</sup> Annex 3 (Document 3): U.S. Embassy Guatemala, Diplomatic Cable 19 Guatemala 536, “Assessment of the Guatemalan Asylum System,” June 12, 2019.

<sup>67</sup> “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, Annex 1: Initial Implementation Plan; Phased Initial Implementation Plan,” Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. Mar. 27, 2020).

<sup>68</sup> Annex 4 (Document 3): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State (Feb. 14, 2020), to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019.

<sup>69</sup> Bureau of Democracy, Human Rights, and Labor, “2019 Country Reports on Human Rights Practices: Honduras,” *U.S. Department of State*, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/honduras/>.

SFRC Democratic Staff noted that “UNHCR estimates El Salvador can adjudicate five cases per year with its current personnel and resources.”<sup>70</sup>

## Grave Dangers on the Ground

Beyond their limited institutional capacity, Guatemala, Honduras, and El Salvador are plagued by such high levels of violence, pervasive corruption, and widespread human rights abuses that they cannot reasonably be expected to provide conditions of safety or adequate protection to refugees and asylum seekers. The U.S. Embassy’s asylum system assessment described Guatemala as “among the most dangerous countries in the world,” citing a homicide rate approaching 22 per 100,000 inhabitants “driven by narco-trafficking activity, gang-related violence, a heavily-armed population, and police/judicial system unable to hold many criminals accountable.”<sup>71</sup> The State Department’s 2019 *Country Report on Human Rights Practices* in Guatemala noted that “[v]iolence against women, including sexual and domestic violence, remained widespread and serious,” and also identified violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals as a major concern.<sup>72</sup> In August 2020, a transgender asylum seeker in Guatemala was killed after fleeing gender-based violence and persecution by gangs in El Salvador.<sup>73</sup> As a result of these dangerous conditions, by the end of 2019 more than half a million Guatemalans had fled their homes, including over 142,000 refugees and asylum seekers and over 200,000 internally displaced persons.<sup>74</sup>

Conditions in Honduras and El Salvador are even more dangerous, with gang violence persisting throughout both countries, the highest rates of femicide in the entire Western Hemisphere, and serious violence and threats against LGBTI persons, according to the State Department’s 2019 Country Reports on Human Rights Practices.<sup>75</sup> Honduras’ murder rate increased in 2019 to 41.2 homicides per 100,000 individuals and El Salvador had 36 homicides per 100,000 people.<sup>76</sup> In El Salvador, according to a 2020 U.S. Department of State Overseas Security Advisory Council (OSAC) report, “[v]iolent, well-armed street gangs ... concentrate on street-level drug sales, extortion, arms trafficking, murder for hire, carjacking, and aggravated street crime.”<sup>77</sup> By the end of 2019, violent conditions in Honduras had compelled over 247,000 Hondurans to flee internally and nearly 150,000

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<sup>70</sup> Annex 4 (Document 3): Responses from Assistant Secretary Kirsten D. Madison and Acting Assistant Secretary Michael G. Kozak, U.S. Department of State (Feb. 14, 2020), to Questions for the Record Submitted by Ranking Member Bob Menendez, Senate Committee on Foreign Relations, Sept. 25, 2019.

<sup>71</sup> Annex 3 (Document 3): U.S. Embassy Guatemala, Diplomatic Cable 19 Guatemala 536, “Assessment of the Guatemalan Asylum System,” June 12, 2019.

<sup>72</sup> U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, “2019 Country Reports on Human Rights Practices: Guatemala,” <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/guatemala/>.

<sup>73</sup> “Death of transgender asylum seeker in Guatemala highlights increased risks and protection needs for LGBTI community,” *United Nations High Commissioner for Refugees (UNHCR)*, Aug. 6, 2020, <https://www.unhcr.org/en-us/news/press/2020/8/5f2bb1494/death-transgender-asylum-seeker-guatemala-highlights-increased-risks-protection.html>.

<sup>74</sup> “Global Trends: Forced Displacement in 2019,” *United Nations High Commissioner for Refugees (UNHCR)*, June 18, 2020, <https://www.unhcr.org/globaltrends2019/>; see also “GRID 2020: Global Report on Internal Displacement,” *Internal Displacement Monitoring Centre*, Apr. 2020.

<sup>75</sup> “Latin America, the Caribbean and Spain (19 countries): Femicide or femicide, most recent data available (In absolute numbers and rates per 100,000 women),” *Gender Equality Observatory for Latin America and the Caribbean*, <https://oig.cepal.org/en/indicators/femicide-or-femicide>.

<sup>76</sup> Parker Asmann & Eimhin O’Reilly, “InSight Crime’s 2019 homicide round-up,” *InSight Crime*, Jan. 28, 2020.

<sup>77</sup> “El Salvador 2020 crime & safety report,” *U.S. Department of State Overseas Security Advisory Council*, March 31, 2020.

Hondurans to flee the country entirely as refugees and asylum seekers. At the same time, over 450,000 Salvadorans were internally displaced by the end of 2019, and nearly 180,000 Salvadorans sought protection abroad as refugees and asylum seekers.<sup>78</sup> Taken together, the nearly 470,000 refugees and asylum seekers from Guatemala, Honduras, and El Salvador represent a six-fold increase over the past five years.<sup>79</sup>

## International Condemnation

In light of these dangerous conditions and weak institutional capacities, international condemnation of the ACAs has been swift and unrelenting. While ACA negotiations were underway on July 23, 2019, the Inter-American Commission on Human Rights (IACHR) expressed concerns about U.S. policies toward Central American migrants, with specific attention to the ACAs, stating:

The acts of violence and human rights violations that the IACHR has monitored ... regarding Guatemala show that these countries would not comply with conditions necessary to offer the security guarantees that a safe third country must guarantee. This agreement could increase the conditions of vulnerability for migrants and refugees and could expose them to greater risks than those that led them to move originally.<sup>80</sup>

As soon as the Guatemala ACA was published in the Federal Register, the Office of the UN High Commissioner for Refugees (UNHCR) issued a statement expressing its “serious concerns” and calling the ACA “an approach at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers.” UNHCR described the asylum systems of Guatemala, Honduras, and El Salvador as “still very nascent.”<sup>81</sup>

Non-governmental human rights advocates have condemned the ACAs even more forcefully. Amnesty International called them “‘unsafe third country’ agreements because that is in fact what they are.”<sup>82</sup> The American Immigration Council said the Guatemala ACA “will place thousands of asylum seekers at risk in a country ill-prepared to process a high volume of applications for protection and with safety problems of its own.”<sup>83</sup> Refugees International stated it “sees the ACAs not, as the [Federal Register publication] suggests, an attempt to ‘share the burden’ of protection between countries,

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<sup>78</sup> “GRID 2020: Global Report on Internal Displacement,” *Internal Displacement Monitoring Centre*, Apr. 2020; see also “Global Trends: Forced Displacement in 2019,” *United Nations High Commissioner for Refugees (UNHCR)*, June 18, 2020, <https://www.unhcr.org/globaltrends2019/>.

<sup>79</sup> “UNHCR Global Report 2019: The Americas,” *United Nations High Commissioner for Refugees (UNHCR)*, [https://reporting.unhcr.org/sites/default/files/gr2019/pdf/04\\_Americas.pdf#\\_ga=2.143638197.1456126713.1603124234-507706218.1582099492](https://reporting.unhcr.org/sites/default/files/gr2019/pdf/04_Americas.pdf#_ga=2.143638197.1456126713.1603124234-507706218.1582099492).

<sup>80</sup> “IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America,” *Inter-American Commission on Human Rights*, July 23, 2020, [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/180.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/180.asp).

<sup>81</sup> “Statement on new U.S. asylum policy,” *UNHCR*, Nov. 19, 2019, <https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html>.

<sup>82</sup> Charanya Krishnaswami, Advocacy Director for the Americas at Amnesty International USA, Interview with Noah Lanard, *Mother Jones*, Feb. 28, 2020.

<sup>83</sup> Royce Murray, “Why a Safe Third Country Agreement with Guatemala is Unsafe and Unworkable,” *Immigration Impact*, July 29, 2019, <https://immigrationimpact.com/2019/07/29/why-a-safe-third-country-agreement-with-guatemala-is-unsafe-and-unworkable/#.X5sR3YhKgdV>.

but as an effort by the United States to shift the responsibility of protection to those countries less able to bare it.”<sup>84</sup> Physicians for Human Rights warned that the Guatemala ACA “violates the provisions of U.S. law which prohibit ‘safe third country’ relocation of asylum seekers unless that third country can ensure their protection from persecution and guarantee a full and fair asylum process.”<sup>85</sup>

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<sup>84</sup> Andrew Davidson & Lauren Alder Reid, “Refugees International Opposes Asylum Cooperative Agreements with Guatemala, El Salvador, and Honduras,” *Refugees International*, Dec. 23, 2019.

<sup>85</sup> “U.S. government’s new ‘safe third country’ deal with Guatemala puts asylum seekers at grave risk,” *Physicians for Human Rights*, Nov. 20, 2019.

- VI -

## Implementation in Violation of Human Rights

To fulfill the safe third country provision under U.S. law and enable ACA implementation, the Attorney General and DHS Secretary each had to make a determination that transferred migrants would not be *refouled* and that the country of transfer provides “full and fair” access to asylum.<sup>86</sup> These determinations would ensure that the United States fulfills its obligations under international laws to uphold the principle of *non-refoulement* as well as the right to seek asylum. Given the highly dangerous conditions in Guatemala, Honduras, and El Salvador, and the fact that their asylum systems are nascent at best, Senator Menendez and SFRC Democratic Staff sought to understand how Attorney General William Barr and DHS Acting Secretary McAleenan determined that the law’s requirements had been met. As documents obtained by SFRC Democratic Staff show, both officials signed memoranda attesting, “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).”<sup>87</sup> Although the Honduras ACA took effect on March 25, 2020 and the El Salvador ACA took effect on December 15, 2020, and despite repeated requests by Senator Menendez and SFRC Democratic Staff, the Trump Administration has continued to hide the determinations by the Attorney General and DHS Secretary that enabled that agreements’ entry into force.

### Determinations Based on Partial Truths

The determinations for the Guatemala ACA relied entirely on laws and procedures that exist only on paper, never grappling with inconvenient facts on the ground demonstrating that Guatemala is largely unsafe for asylum seekers. The Department of Justice memo drafted by Gene Hamilton, counselor to the Attorney General, and the corresponding DHS memo, relied on responses to detailed questionnaire, that the Government of Guatemala produced with coaching by Trump administration officials.<sup>88</sup> The memos ignored significant concerns about gaps in Guatemalan domestic law, minimal operational capacity, and dangerous country conditions that the U.S. Embassy clearly identified. The memos also failed to consider whether processes outlined in existing laws are routinely implemented. SFRC Democratic Staff’s analysis finds that:

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<sup>86</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and U.S. Department of Justice, Executive Office of Immigration Review, Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act, 84 Fed. Reg. 63997, Nov. 19, 2019.

<sup>87</sup> Annex 3 (Document 1): Memorandum from the Attorney General re “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),” Nov. 7, 2019, at 2; Annex 3 (Document 2): Memorandum from the Secretary re “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),” Oct. 16, 2019, at 2.

<sup>88</sup> See Annex 3 (Document 1): Memorandum from the Attorney General re “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),” Nov. 7, 2019, at 2; see also Annex 3 (Document 2): Memorandum from the Secretary re “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),” Oct. 16, 2019, at 2; see also 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; Questions Regarding Access to Full and Fair Procedures, Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. Mar. 27, 2020).

- The Attorney General and DHS Acting Secretary’s determinations cite Article 46 of Guatemala’s Migration Code as fulfilling its *non-refoulement* obligations under the Refugee Convention and Protocol, but fail to consider the gaps identified in U.S. Embassy’s assessment related to *non-refoulement* and torture;
- Both determinations cite Article 12 of Guatemala’s Migration Code as guaranteeing that all migrants are not to be subject to “any form of violence,” yet fail to acknowledge the extreme levels of violence faced by citizens and non-citizens across the country;
- Neither determination considers whether violent gangs committing persecution in Honduras and El Salvador would threaten asylum seekers transferred to Guatemala;
- Neither determination discusses the deadly risks faced by women and LGBTI individuals in Guatemala; and,
- Neither determination considers whether refugee protection would suffer if the volume or speed of transfers far exceeds Guatemala’s capacity to process asylum claims and provide reception services, as envisioned in the implementation plan.

## Degrading Conditions During Transfer

Within days of DOJ and DHS issuing their determinations, DHS proceeded with implementation despite clear risks to individuals’ safety and with little consideration for overwhelming Guatemala’s capacity. The initial implementation plan agreed to between the Trump administration and Guatemalan authorities to transfer asylum seekers from the United States to Guatemala limited transfers to adult nationals of Honduras and El Salvador.<sup>89</sup> Shortly after transfer flights began, however, DHS began sending families with children in apparent violation of the agreed implementation plan. The agreement exempts unaccompanied children and the implementation plan makes exceptions for persons with special needs and certain health conditions.<sup>90</sup> However, other highly vulnerable asylum seekers, such as LGBTI individuals and survivors of gender-based violence, were transferred under the Guatemala ACA because neither the text of the agreement, the implementation plan, nor the guidance to DHS asylum officers referring individuals for ACA transfers provides such humanitarian exceptions.<sup>91</sup>

Additionally, ACA transfers arrive at the same reception center at the airport just outside Guatemala City that receive deportees from the United States, including convicted criminals.<sup>92</sup> When ACA implementation began in late November 2019, this reception center was still under construction following an infusion of \$1 million from USAID.<sup>93</sup>

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<sup>89</sup> “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, Annex 1: Initial Implementation Plan; Phased Initial Implementation Plan,” Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. Mar. 27, 2020).

<sup>90</sup> Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning Cooperation Regarding the Examination of Protection Claims, 84 Fed. Reg. 64095, Nov. 20, 2019.

<sup>91</sup> U.S. Citizenship and Immigration Services, US-Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening Guidance for Asylum Officers and Asylum Office Staff, Nov. 19, 2019.

<sup>92</sup> “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, Annex 1: Initial Implementation Plan; Phased Initial Implementation Plan,” Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. Mar. 27, 2020)

<sup>93</sup> International Organization for Migration (IOM) Central America Meeting with Senate Foreign Relations Committee Democratic Staff, Oct. 16, 2020.



The Trump administration's rush to implement the ACA exposed both U.S. officials' cruel treatment of asylum seekers and Guatemala's lack of institutional capacity and experience in refugee protection. Migrants transferred under the ACA described abusive conditions and degrading treatment while in the custody of U.S. Customs and Border Patrol (CBP), including being denied medical care and children being separated from their parents.<sup>94</sup> CBP agents grievously misinformed asylum seekers, telling them the United States "wasn't giving asylum anymore," and denied them meaningful access to an attorney.<sup>95</sup> Of those who received accurate information, many without English language skills or legal counsel misunderstood and believed they would be able to apply for U.S. asylum from Guatemala.<sup>96</sup> ACA transferees were shackled and transported on the same flights as criminal deportees.<sup>97</sup>

## Coercion and Fear in Guatemala

Once in Guatemala, many ACA transferees, including small children, waited hours on the tarmac without adequate food, water, or medical assistance.<sup>98</sup> At the airport, transferees were required to tell immigration officials whether they intended to apply for asylum in Guatemala, seek assistance from the International Organization for Migration to return to their country of origin, or depart on their own.<sup>99</sup> After their initial decision, transferees only had 72 hours to change their status. This arbitrary 72-hour deadline, imposed by Guatemalan authorities, forced transferred individuals and families to make major decisions about their future under intense time pressure and without sufficient information. Guatemalan officials initially refused to allow NGOs to provide information or assist migrants at the reception center.<sup>100</sup> The Guatemalan government provides no money to civil society organizations to care for ACA transferees after their arrival.<sup>101</sup>

Given the dangerous and intimidating conditions they faced, it is not surprising that very few asylum seekers transferred under the ACA actually applied for asylum in Guatemala. The degrading treatment, arbitrary time pressure, and inadequate information provided both in the United States and in

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<sup>94</sup> Maya Srikrishnan, "Border Report: Complaints Detail Abuses Against Asylum-Seekers in U.S. Custody," *Voices of San Diego*, Feb. 24, 2020, <https://www.voiceofsandiego.org/topics/news/border-report-complaints-detail-abuses-against-asylum-seekers-in-u-s-custody/>.

<sup>95</sup> Cora Currier, "Redirecting Asylum-Seekers from U.S. to Guatemala was a cruel farce, report finds," *The Intercept*, May 19, 2020.

<sup>96</sup> Rachel Schmidtke, Yael Schacher, & Ariana Sawyer, "Deportation with a Layover: Failure of protection under the U.S.-Guatemala Asylum Cooperative Agreement," *Refugees International*, May 19, 2020, <https://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement>.

<sup>97</sup> Nick Miroff, "ICE Air: Shackled deportees, air freshener and cheers. America's one-way trip out," *The Washington Post*, Aug. 10, 2019; see also Reynaldo Leños Jr., "Asylum-Seekers Reaching U.S. Border are Being Flown to Guatemala," *NPR*, Mar. 11, 2020.

<sup>98</sup> Rachel Schmidtke, Yael Schacher, & Ariana Sawyer, "Deportation with a Layover: Failure of protection under the U.S.-Guatemala Asylum Cooperative Agreement," *Refugees International*, May 19, 2020, <https://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement>.

<sup>99</sup> "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, Annex 1: Initial Implementation Plan; Phased Initial Implementation Plan," Doc. 85, *U.T. v. Barr*, Case no. 1:20-cv-00116 (D.D.C. Mar. 27, 2020).

<sup>100</sup> International Organization for Migration (IOM) Central America Meeting with SFRC Democratic Staff, Oct. 16, 2020.

<sup>101</sup> Schmidtke, Schacher, & Sawyer, *Deportation with a Layover*, at 30.

Guatemala, all contributed to a coercive context for asylum seekers’ decision-making that was further compounded by fear of the country’s high levels of violence, and the psychological traumas of persecution and displacement. Of the 945 asylum seekers transferred to Guatemala under the ACA, only 18 (less than two percent) are actively pursuing asylum claims there, and not one has received a decision.<sup>102</sup> Many transferred asylum seekers said they felt unsafe in Guatemala and that their only option was to return to Honduras or El Salvador where at least they could access support networks while they decide their next move. One Honduran woman transferred under the ACA said: “Guatemala? It’s the same as Honduras. The difference is that in Guatemala I don’t have relatives.”<sup>103</sup> Another Honduran woman said of the gang members who threatened to kill her and her son: “Guatemala is the first place they would look for me.” She went into hiding in Honduras following her ACA transfer to Guatemala.<sup>104</sup>

**Table 1: ACA Transfers to Guatemala, November 2019 - March 2020<sup>105</sup>**

Total ACA Transfers	945	
Indicated protection concerns	108 of 130	83%
ACA Asylum applications	34	3.5%
Abandoned	16	1.6%
Active	18	1.9%
Guatemala ACA asylum decisions	0	0

Neither the State Department, DHS, or any other component of the U.S. government is responsible for monitoring the safety of asylum seekers transferred to Guatemala under the ACA. Without an ability to follow up, **it is difficult to confirm, but seems highly likely that there are specific cases in which the ACA has violated the prohibition on *refoulement* in U.S., Guatemalan, and international law.** Civil society groups were able to interview only 130 ACA transferees upon reception in Guatemala, but found that a large proportion (108 out of 130) indicated they had protection concerns.<sup>106</sup> Based on this assessment, a rate of protection concerns of 83 percent and an asylum application rate of less than two percent, it is clear to SFRC Democratic Staff that the vast majority of asylum seekers transferred under the Guatemala ACA did not have “full and fair” access to asylum.

<sup>102</sup> UNHCR Guatemala meeting with SFRC Democratic Staff, Oct. 21, 2020.

<sup>103</sup> Kirk Semple, “Asylum Seekers Say U.S. is Returning Them to the Dangers They Fled,” *The New York Times*, March 17, 2020.

<sup>104</sup> *Id.*

<sup>105</sup> UNHCR Guatemala meeting with SFRC Democratic Staff, Oct. 21, 2020. The percentages reflected on this table are based on the number of individuals that UNHCR and its partners were able to interview and not on the total number of ACA transfers.

<sup>106</sup> *Id.*

## COVID-19 and Displacement Trends

The outbreak of the COVID-19 pandemic resulted in border closures and travel restrictions around the world, including Guatemala's decision to suspend ACA implementation. Although the Honduras ACA entered into force on March 25, 2020 and the El Salvador ACA entered into force on December 15, 2020, the requisite determinations by the Attorney General and the DHS Acting Secretary of "full and fair" access to asylum in Honduras and El Salvador have not been made available to Congress or the public. The COVID-19 pandemic has delayed the start of ACA transfer flights from the United States to Honduras. Still, international organizations and NGOs have expressed concern that the Honduras ACA's implementation plan indicates it would apply to nationals of Mexico, Guatemala, El Salvador, Brazil and Nicaragua, noting that two asylum seekers from Nicaragua were brutally murdered in Honduras in 2019.<sup>107</sup> Surging migrant apprehensions at the U.S. southern border, ongoing migrant caravans from Central America, and other data show that anti-immigrant policies have not had the deterrent effect intended by the Trump administration.<sup>108</sup> Evidence of Guatemala ACA transferees re-grouping to journey again towards the United States demonstrates the futility of "burden shifting" policies when asylum seekers are forced to flee persecution, violence, and other grave threats to their lives and freedom at home and throughout the region. Dangerous conditions in Central America, compounded by economic contractions related to COVID-19 and the devastating impact of Hurricanes Eta and Iota, are push factors more powerful than U.S. immigration policy.<sup>109</sup>

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<sup>107</sup> "Human Rights First Warns Against Implementation of Honduras Asylum Agreement During Pandemic," *Human Rights First*, Apr. 30, 2020, <https://www.humanrightsfirst.org/press-release/human-rights-first-warns-against-implementation-honduras-asylum-agreement-during>; see also "Cuerpos de nicaragüenses refugiados en Honduras son enviados a su país," *La Tribuna*, June 29, 2019, <https://www.latribuna.hn/2019/06/29/cuerpos-de-nicaraguenses-refugiados-en-honduras-son-enviados-a-su-pais/>.

<sup>108</sup> Nick Miroff, "Migrant Arrests at the U.S. Border Rose to a 13-month High in September," *The Washington Post*, Oct. 14, 2020.

<sup>109</sup> Natalie Kitroeff, "Two Hurricanes Devastated Central America. Will the Ruin Spur a Migration Wave?" *The New York Times*, Dec. 4, 2020.

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## Conclusion, Findings, and Recommendations

During negotiations with the Trump administration, the Government of Guatemala sought to change the name of the agreement from “safe third country agreement” to “Cooperation Agreement for the Assessment of Protection Requests.”<sup>110</sup> In agreeing to this request, the Trump administration’s decision to remove the word “safe” from the name of all three agreements was an implicit acknowledgement that Guatemala, Honduras, and El Salvador are not actually *safe* for the transfer of asylum seekers. In this way, the name change suggests that the agreements do not comply with the “safe third country” provision of U.S. law.

As the Trump administration pursued the ACAs, it shrouded the details of the agreements in secrecy and obstructed oversight by members of Congress, attempting to hide its callous abuse of the human rights of vulnerable people. President Trump’s bullying tactics bruised U.S. relations in the region, and resulted in agreements that the governments of Guatemala, Honduras, and El Salvador do not have the capacity to implement. But the most shameful aspects of the ACAs are their grave consequences for refugees and asylum seekers who—under the Guatemala ACA—suffered degrading treatment and were coerced into situations where their lives and freedom remain in danger.

In an era of historic levels of forced displacement in the Western Hemisphere and around the world, the ACAs are especially cruel and counterproductive. They distort U.S. asylum law and accompany a series of pernicious policies to exclude asylum seekers and refugees from protection in the United States. As the director of the American Immigration Lawyers Association, Ruben Reyes said: “The purpose of this administration’s policy with asylum seekers is to put one more finger around the necks of refugees...[t]o try and make it so difficult, so onerous, so awful that they just give up.”<sup>111</sup>

The ACAs inflict harm not only on the lives of individuals and families, but on U.S. national interests. Eighteen states and the District of Columbia called the Guatemala ACA “inimical to the interest of the States and the public in ensuring that those in need of protection are not sent into the hands of their persecutors,” and noted “asylees’ significant economic and community contributions.”<sup>112</sup> Former White House chief of staff Denis McDonough has said that “the United States’ historic commitments to refugees, immigration, and asylum are sources of great strength rather than sources of weakness or threat.”<sup>113</sup> When the United States demonstrates leadership in protecting refugees and asylum seekers, other countries often follow suit, taking critical steps toward global cooperation to address instability and resolve conflicts and crises. Simply put, protection of refugees and asylum seekers is in the interest of the American public and U.S. national security.

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<sup>110</sup> Sam Levin, “Trump Says Agreement Reached with Guatemala to Restrict Asylum Seekers,” *The Guardian*, July 26, 2019.

<sup>111</sup> Megan Janetsky, “Asylum Seekers in Limbo Look to US election With Hope and Fear,” *Al Jazeera*, Nov. 1, 2020.

<sup>112</sup> Amicus Curiae Brief of the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia in Support of Plaintiffs’ Motion for Summary Judgment and Permanent Injunction, *U.T. v. Barr*, at 12, Case no.1:20-cv-00116 (D.D.C. 2020).

<sup>113</sup> “Denis McDonough on the Future of Migration,” *Georgetown Journal of International Affairs*, Nov. 30, 2018, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/11/29/denis-mcdonough-on-the-future-of-migration>.

The Trump administration views the ACAs as a model to be replicated with other countries around the world.<sup>114</sup> This is precisely the opposite of what needs to happen. Shifting responsibility for refugee protection onto countries so dangerous their own citizens are fleeing *en masse* only demonstrates inhumanity and cruelty while exacerbating the dire conditions that fuel the ongoing global forced migration crisis. Especially in an era of unprecedented levels of forced displacement around the world, these harmful policies must end. The United States must terminate the ACAs. Congress must pass legislation to clarify its intent and strengthen accountability for legitimately *safe* third country agreements. More broadly, U.S. policies must restore our leadership in upholding the right to seek asylum and in protecting refugees at home and around the world. The latter is imperative to truly and sustainably increase responsibility sharing with other countries so that future safe third country agreements might be possible, but more importantly, so that refugees and asylum seekers find protection and displacement crises are resolved.

## PRINCIPAL FINDINGS:

- **The ACAs appear to violate U.S. law and international obligations by posing serious risks of *refoulement*. Guatemala, Honduras, and El Salvador are not safe places for refugees and asylum seekers as the law underpinning these agreements requires.** These countries are among the most dangerous countries in the world. High levels of violence, especially gang violence and gender-based violence, pose grave risks for many refugees and migrants. All three countries have “nascent” asylum systems that lack institutional capacity to screen asylum seekers transferred under the ACAs and to uphold their legal obligations to protect refugees from *refoulement*.
- **Of the 945 asylum seekers transferred to Guatemala under the ACA since November 2019, to date not one has been granted asylum.** The numbers underscore the fact that asylum seekers subject to the ACA lack access to asylum and remain doubly at risk of *refoulement* to Guatemala as their country of transfer and to their country of origin.
- **Determinations by the Attorney General and DHS Acting Secretary that Guatemala provides “full and fair” access to asylum were based on partial truths and ignored critical State Department input and widely held information about the country’s general level of violence.** They relied on a paper review of the country’s Migration Code that failed to consider the U.S. Embassy’s assessment of Guatemala’s asylum capacity and dangerous conditions, as well as other evidence that Guatemala does not meet the requirements of the safe third country provision in U.S. law.
- **The Trump administration radically distorted and willfully disregarded the intent and statutory language related to safe third country agreements.** Although Congress intended the safe third country provision to *return* asylum seekers in the United States to a safe country of transit, the Trump administration crafted the ACAs to allow asylum seekers of any nationality to be *transferred* from any location in the United States to the agreed third country. The ACAs serve not as an exception to the right to seek asylum enshrined in U.S. law, but as a broad bar to any asylum screening by U.S. officials.

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<sup>114</sup> Elliot Spagat, “Top Trump Advisor Wants More Nations to Field Asylum Claims,” *Associated Press*, Oct. 24, 2020.

They deny asylum seekers the opportunity to claim a reasonable fear of persecution, and hold them to the higher standard of being “more likely than not” to face persecution or torture in the country of removal.

- **Asylum seekers transferred to Guatemala under the ACA were subjected to degrading treatment and effectively coerced to return home where many feared persecution and harm.** Although a large proportion of transferees indicated protection concerns, they were not fully informed about their right to seek asylum, lacked legal counsel, and faced arbitrary deadlines and other conditions that precluded “full and fair” access to asylum. DHS did not provide guidance to exempt highly vulnerable asylum seekers from transfer, such as LGBTI individuals and survivors of gender-based violence. Transferring responsibility for asylum processing exacerbates the problem of forced displacement rather than resolving it.
- **The White House and DHS used coercive tactics to hastily conclude the ACAs,** dismissing serious objections by Guatemalan authorities, civil society, the State Department, and others. The State Department took a subordinate role in ACA negotiations. President Trump rejected State Department concerns, and bullied the government of Guatemala into signing the agreement with threats of visa sanctions and tariffs.
- **The Trump administration continues to maintain secrecy and obstruct accountability in its pursuit of ACA implementation.** It has repeatedly refused to provide documents related to the ACAs to Congress for over a year and failed to respond fully to written questions from Senator Menendez and SFRC Democratic Staff.

## RECOMMENDATIONS:

1. **The Biden administration must immediately terminate the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador:** Pending termination, the United States should immediately suspend all implementation. Any future consideration of countries for negotiation of safe third country agreements (STCAs) should not occur without a set of clear criteria established by the State Department, in consultation with international and non-governmental organizations, as to what is a safe place for the transfer of asylum seekers. STCA negotiations should not begin until such criteria are met.
2. **Congress must ensure it plays a more active role in the enactment and implementation of all future safe third country agreements, either by:**
  - a. Passing legislation requiring the State Department to submit the details of a Safe Third Country Agreement to Congress for review and for Congress to approve or disapprove each agreement; or
  - b. Requiring the Secretary of State to submit to Congress a certification before the transfer of aliens pursuant to a Safe Third Country Agreement begins that such country meets certain requirements prior to the use of relevant appropriations.
3. **Congress must amend INA Section 208(a)(2)(A) to:**
  - a. Ensure that asylum seekers are not transferred to safe third countries that they have not transited or to which they have no meaningful connection;

- b. Require that the Secretary of DHS, in consultation with the Secretary of State, establish in each future safe third country agreement clear and specific criteria for exceptions based on humanitarian and public interests;
  - c. Require determinations concerning whether a potential safe third country provides “full and fair” access to asylum to be made jointly by Secretary of State, Attorney General, and Secretary of Homeland Security, and that it be informed by input from the United States Ambassador, to the relevant country; and
  - d. Authorize judicial review of executive branch safe third country determinations.
4. **The DHS Inspector General and Office of Civil Rights must investigate and review abusive conditions and degrading treatment of ACA transferees:** Without discrimination, asylum seekers in custody at the U.S. southern border should be treated with dignity and respect for human rights. They should be provided accurate and full information by trained USCIS asylum officers about their right to seek asylum in the United States, and be allowed access to legal counsel and language interpretation. U.S. officers must make special accommodations in their treatment of highly vulnerable asylum seekers such as pregnant women, LGBTI individuals, survivors of gender-based violence, and children.
5. **U.S. foreign policy toward Central America should take a holistic approach to addressing the drivers of forced displacement:** Rather than the Trump administration’s singular focus on stemming irregular migration, U.S. policies and programs should aim to reduce gang violence and gender-based violence, to combat corruption and strengthen access to justice, and to reduce poverty and protect human rights, particularly for LGBTI individuals and other marginalized populations. The State Department should continue to strengthen asylum systems, responses to internal displacement, resettlement processing, and other protection mechanisms in Central America through support to international organizations and should authorize Migration and Refugee Assistance funding to NGOs working in the region.
6. **The Governments of Guatemala, Honduras, and El Salvador should dedicate resources to strengthen their capacity to protect refugees, asylum seekers, and internally displaced persons:** They should implement national action plans to advance the Comprehensive Regional Protection and Solutions Framework (*MIRPS*) in coordination with international organizations.



## ANNEX 1

### Definitions of Key Terms

**Refugee:** A refugee is “any person who is outside of any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>115</sup> This definition under U.S. law largely mirrors the refugee definition outlined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Having acceded to the Refugee Convention and Protocol, Guatemala, Honduras, and El Salvador agreed to this definition. They also have adopted the broader refugee definition under the 1984 Cartagena Declaration, which includes “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>116</sup>

**Asylum-Seeker:** The UN Refugee Agency defines an asylum-seeker as an individual who is seeking international protection and whose request for asylum has not yet been finally decided on.<sup>117</sup> Although not every asylum-seeker will ultimately be recognized as a refugee, every refugee was initially an asylum-seeker.

**Migrant:** The International Organization for Migration defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) the length of the stay.<sup>118</sup>

**Protection:** In the context of international humanitarian action, the Inter-Agency Standing Committee defines protection as “all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e., international human rights law, international humanitarian law, international refugee law).”<sup>119</sup> Protection includes measures to stop or prevent violence, abuse, coercion and deprivation of civilians affected by crises as well as efforts to restore safety and dignity to their lives. Governments have primary responsibility for the protection of persons on their territory. Major protection chal-

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<sup>115</sup> See INA 101(a)(42), 8 U.S.C. § 1101(a)(42).

<sup>116</sup> See Article III(3) of the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, Nov. 22, 1984, <https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>.

<sup>117</sup> UN High Commissioner for Refugees, *The 10-Point Plan in Action, 2016 - Glossary*, Dec. 2016, <https://www.refworld.org/docid/59e99eb94.html>.

<sup>118</sup> United Nations, Global Issues, “Migration,” <https://www.un.org/en/sections/issues-depth/migration/index.html> (last visited Dec. 16, 2020).

<sup>119</sup> Inter-Agency Standing Committee, “Policy: Protection in Humanitarian Action,” Oct. 2016, at 2.

lenges for refugees and asylum seekers often include barriers to asylum, lack of access by humanitarian organizations to those in need of assistance, gender-based violence, family separation, and forcible recruitment into armed groups, among others.

***Non-refoulement***: A cardinal principle of refugee protection codified in Article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, *non-refoulement* most commonly refers to the obligation or principle of not returning a refugee to a territory where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion, although the concept could apply to broader forms of harm as well. Article 3 of the 1984 Convention Against Torture contains a *non-refoulement* obligation with respect to torture. The principle of *non-refoulement* applies not only with respect to the individual's country of origin but to any country where he or she would face persecution. Properly applied, the principle protects those who are seeking international protection even if they have not been formally recognized as a refugee.<sup>120</sup> Indeed, the threat of *refoulement* is often a concern where a country lacks effective systems or procedures for determining refugee status or conducts mass deportations. The United States implements its *non-refoulement* obligations through a provision on withholding of removal in INA Section 241(b)(3).

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<sup>120</sup> UN High Commissioner for Refugees, *Note on Non-Refoulement (Submitted by the High Commissioner)*, 38<sup>th</sup> Session, Aug. 23, 1977, <http://www.refworld.org/docid/3ae68ccd10.html>.

## ANNEX 2

### Legal Challenges to Trump Administration Immigration Policies

The Trump administration has pursued a series of restrictive immigration policies that have faced serious challenges in U.S. courts. While not an exhaustive list, the policies facing legal challenges below indicate a pattern of unlawful maneuvers to close pathways for refugees and asylum seekers in need of protection in the United States.

#### 1. Family Separation at the U.S.-Mexico Border

The lawsuit *Ms. L v. ICE* and a writ for habeas corpus was filed in the U.S. District Court for the Southern District of California on February 26, 2018 by an asylum seeker from the Democratic Republic of Congo who was forcibly separated from her then-six-year old daughter. Represented by the American Civil Liberties Union, the plaintiff sued U.S. Immigration and Customs Enforcement (ICE), the U.S. Department of Homeland Security (DHS), and other government agencies for the forcible separation of over 2,000 asylum-seeking families who arrived at the southern border without documentation. In June 2018, the judge issued a preliminary injunction requiring U.S. immigration authorities to reunite most separated families within 30 days and to reunite children younger than age five within two weeks, however the Trump administration continued to separate families. The case is ongoing in the district court.<sup>121</sup>

#### 2. State and Local Consent for U.S. Refugee Admissions Program

On November 21, 2019, HIAS, Inc., Church World Service, Inc., and Lutheran Immigration & Refugee Service, Inc. filed the lawsuit *HIAS, Inc. v. Trump* in the U.S. District Court for the District of Maryland. The plaintiffs, challenged the “Enhancing State and Local Involvement in Refugee Resettlement” Executive Order 13888, alleging that this action by the Trump Administration violates the Refugee Act of 1980, the Administrative Procedure Act (APA), and principles of federalism. The plaintiffs argued that Executive Order 13888 makes an unprecedented change to the refugee resettlement process by mandating that refugees not be resettled in the United States unless the state and locality where they are to be resettled take the affirmative step of providing written consent. On January 15, 2020, Judge Peter J. Messitte granted the plaintiffs’ motion for a preliminary injunction and ultimately issued a nationwide injunction enjoining Executive Order 13888. The Fourth Circuit affirmed the nationwide preliminary injunction on January 8, 2021.<sup>122</sup>

#### 3. Termination of Temporary Protected Status

The lawsuit *NAACP v. DHS* was filed in the U.S. District Court of Maryland on January 24, 2018. Represented by its own counsel, the NAACP challenged DHS’ November 2017 termination of Temporary Protected Status (TPS) for Haitians living in the United States. On March 23, 2020, the judge granted the defendants’ motion to stay proceedings due to the interconnected nature of parallel litigation and the COVID-19 pandemic. This case is ongoing.<sup>123</sup> Nine TPS recipients and five U.S. citizen children of TPS holders filed the class action lawsuit

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<sup>121</sup> See *Ms. L v. United States Immigration & Customs Enft (“ICE”)*, 415 F. Supp. 3d 980 (S.D. Cal. 2020).

<sup>122</sup> Miriam Jordan, “Judge Halts Trump Policy That Allows States to Bar Refugees,” *The New York Times*, Jan. 15, 2020; see also *HLAS, Inc. v. Trump*, 415 F. Supp. 3d 669 (D. Md. 2020); Ann E. Marimow, “Trump’s Refugee Resettlement Policy Blocked by Federal Appeals Court,” *Washington Post*, Jan. 8, 2021; see also *HLAS, Inc. v. Trump*, Case no. 20-1160, 2021 WL 69994 (4th Cir. Jan. 8, 2021).

<sup>123</sup> See *NAACP v. United States Dep’t of Homeland Sec.*, Case No. 18-0239, 2020 U.S. Dist. LEXIS 49818 (D. Md. 2020).

*Ramos et al v. Nielsen* in the U.S. District Court in the Northern District of California on March 12, 2018. The plaintiffs argued that the new DHS rule for determining whether to end TPS designations for immigrants from countries facing various crises violated their rights under the Fifth Amendment as well as requirements set out by the APA. On October 3, 2018, the judge granted a preliminary injunction in which the court determined that plaintiffs would suffer irreparable harm, including family separation and being forced to move back to countries where neither the children nor adults have any remaining ties. DHS subsequently appealed the decision to the Ninth Circuit. On September 14, 2020, the Ninth Circuit vacated the preliminary injunction having found that the district court did not have jurisdiction to review the plaintiffs APA claim because the TPS statute itself states that the Secretary of Homeland Security possesses full and unreviewable discretion in designating foreign states under the statute. After vacating the preliminary injunction, the Ninth Circuit remanded the case to the district court for further proceedings. The plaintiffs are likely to challenge the Ninth Circuit’s decision.<sup>124</sup>

Four noncitizens, on behalf of a proposed class of Temporary Protected Status recipients, filed the lawsuit *Moreno v. Nielsen* against DHS and the U.S. Citizenship and Immigration Services (USCIS) on February 22, 2018. The case was filed in the U.S. District Court for the Eastern District of New York to challenge the defendants’ denial of their applications for lawful permanent resident status. On May 18, 2020, the court denied the plaintiffs’ motion for a preliminary injunction. The court stated that the plaintiffs failed to make a “strong showing” of irreparable harm needed to obtain injunctive relief. The case is ongoing.<sup>125</sup>

#### 4. Asylum Cooperative Agreements

On January 15, 2020, the lawsuit *U.T. v. Barr* was filed in U.S. District Court for the District of Columbia by six plaintiffs, along with the Tahirih Justice Center and Las Americas Immigrant Advocacy Center. Represented by the Americans Civil Liberties Union, National Immigrant Justice Center, Center for Gender & Refugee Studies, and Human Rights First, the lawsuit challenged the Trump Administration’s new policy of removing asylum seekers to Guatemala pursuant to an “asylum cooperative agreement.” The plaintiffs alleged that the government’s new policy violated the APA, the Immigration and Nationality Act (INA), and Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). The case is ongoing.<sup>126</sup>

#### 5. The “Interim Final Rule”

The East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and the Central American Resource Center in Los Angeles filed the lawsuit *East Bay Sanctuary Covenant v. Barr* with the U.S. District Court in the Northern District of California on July 16, 2019. Represented by the American Civil Liberties Union, Southern Poverty Law Center, and the Center for Constitutional Rights, the plaintiffs challenged an interim final rule promulgated by the Attorney General and Acting Secretary of Homeland Security, which made noncitizens who transit through another country prior to reaching the southern border of the United States ineligible for asylum. On July 24, 2019, the plaintiffs’ motion for a preliminary injunction to prevent the government from taking any further action to implement the interim final rule was granted by the court. On August 16, 2019, the Ninth Circuit denied a stay for the application of the injunction inside its boundaries, but granted

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<sup>124</sup> See *Ramos v. Nielsen*, 975 F.3d 872 (9th Cir. 2020).

<sup>125</sup> See *Moreno v. Nielsen*, 460 F. Supp. 3d 291 (E.D.N.Y. 2020).

<sup>126</sup> See *U.T. v. Barr*, Case no. 1:20-cv-00116-EGS (D.D.C. 2020).

the stay for all locations outside the Ninth Circuit. On September 9, 2019, the judge granted the plaintiffs’ motion to restore the nationwide scope of the injunction, which was subsequently appealed by the defendants. The Supreme Court stayed the re-instated injunction on September 11, 2019 pending the Ninth Circuit’s decision on the appeal.<sup>127</sup> The Ninth Circuit affirmed the injunction in July 2020 and the case is ongoing.<sup>128</sup>

## 6. Migrant Protection Protocols

On February 14, 2019, Innovation Law Lab and its co-plaintiffs filed the lawsuit *Innovation Law Lab v. Wolf* before the U.S. District Court for the Northern District of California. Co-plaintiffs of Innovation Law Lab include Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, University of San Francisco School of Law Immigration & Deportation Defense Clinic, and Tahirih Justice Center. The co-plaintiffs alleged that the Trump administration’s Migrant Protection Protocols, commonly referred to as the “Remain in Mexico” policy, violates the INA, the APA, and the United States’ duty under domestic and international law to not return people to dangerous conditions. On April 8, 2019, the district court judge ruled that the policy is unlawful and temporarily blocked its implementation. On May 7, 2019, the Ninth Circuit stayed the lower court’s injunction. While a panel of the Ninth Circuit held that the policy is unlawful and lifted the stay in February 2020, the Supreme Court ultimately granted the federal government’s application for a stay of the lower court’s preliminary injunction that had blocked the implementation of the “Remain in Mexico” policy on March 11, 2020. The stay will remain in place until the Supreme Court resolves the government’s appeal from the Ninth Circuit proceedings.<sup>129</sup>

## 7. Revisions to Existing Asylum Practices

On December 21, 2020, Pangea Legal Services and Immigration Equality filed separate lawsuits, *Pangea Legal Services v. DHS* and *Immigration Equality v. DHS*, in the U.S. District Court for the Northern District of California to block the implementation of a final rule issued by the Department of Homeland Security and the Department of Justice on December 11, 2020. The rule, scheduled to go into effect on January 11, 2021, would have radically changed U.S. legal standards for asylum claims, including by barring aliens from asylum if they spent significant time in a third country before arriving in the United States, and effectively establishing a presumption against asylum claims rooted in gender-based persecution.<sup>130</sup> On January 8, 2021, the court granted a nationwide preliminary injunction against the rule pending further proceedings, in part based on the likelihood of irreparable harm without injunctive relief.<sup>131</sup>

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<sup>127</sup> *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (Sept. 11, 2019).

<sup>128</sup> *East Bay Sanctuary Covenant v. Barr*, Case no. 10-16485, (9th Cir. 2020).

<sup>129</sup> Stephen Manning, “Innovation Law Lab v. Wolf,” *Innovation Law Lab*, Feb. 28, 2020, <https://innovationlawlab.org/cases/innovation-law-lab-v-wolf/>; see also Ramon Valdez, “U.S. Supreme Court Allows ‘Remain in Mexico’ To Stay In Effect,” *Innovation Law Lab*, Mar. 11, 2020, <https://innovationlawlab.org/press-releases/u-s-supreme-court-allows-remain-in-mexico-to-stay-in-effect/>.

<sup>130</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 8 C.F.R. parts 208, 235, 1003, 1208, 1235 (Dec. 11, 2020).

<sup>131</sup> *Pangea Legal Services v. U.S. Dep’t of Homeland Sec.*, Case no. 20-Cv-09253-JD, 2021 WL 75756, at \*1 (N.D. Cal. Jan. 8, 2021).