IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

U.T., *et al*., ***Plaintiffs,*** **v.** **William Barr, *et al*.,** ***Defendants.***	Case No. 1:20-cv-00116 The Honorable Emmet G. Sullivan

BRIEF OF *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICUS CURIAE[1]

For over thirty-five years, the Harvard Immigration and Refugee Clinical Program ("HIRC") at Harvard Law School has been a leader in the field of refugee and asylum law. In addition to representing individual applicants for asylum and related relief, HIRC assists in developing theories, policy, and national advocacy related to refugee and asylum law. HIRC has filed briefs as *amicus curiae* in numerous cases before the U.S. Supreme Court, the federal district and circuit courts, the Board of Immigration Appeals, and various international tribunals. Through these efforts, HIRC has experience with the interpretation and application of U.S. obligations under international law, as well as the incorporation of such obligations into domestic law. HIRC has an interest in the appropriate application and development of U.S. asylum and immigration law.

HIRC submits this brief out of concern that the Interim Final Rule (the "Rule") at issue in this case, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,995 (Nov. 19, 2019), and the Asylum Cooperative Agreements ("ACAs") with Guatemala, Honduras, and El Salvador, restrict the availability of asylum in violation of international law.[2] In particular, this brief addresses HIRC's concern that the designation of Guatemala as a "safe third country" breaches U.S. obligations under international law.

SUMMARY OF ARGUMENT

The United States is bound by international treaty obligations concerning asylum-seekers and refugees, including those outlined in the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol" or "the Protocol")[3] and the Convention Against Torture and Other Cruel,

[1] HIRC certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus* brief.

[2] HIRC also shares plaintiffs and other *amici*'s concerns that the Rule and the ACAs further violate the Immigration and National Act ("INA"), the Administrative Procedure Act, and the Suspension Clause of the U.S. Constitution.

[3] Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Inhuman or Degrading Treatment or Punishment ("CAT"), treaties to which the United States is a party, and the 1951 Convention Relating to the Status of Refugees ("1951 Convention"),[4] which is incorporated by reference in the 1967 Protocol (together, the "Refugee Convention"). These treaties define core procedural and substantive rights that State parties must honor, and which are codified and incorporated into U.S. domestic law through the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, 94 Stat. 102, and the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B, § 2242, 112 Stat. 2681, 822–23 (codified as 8 U.S.C. § 1231 note (2012)). The ACA with Guatemala conflicts with these obligations in several ways.

First, the Rule puts individuals at grave risk of direct or indirect *refoulement* in violation of the Refugee Convention and CAT, along with the statutes Congress enacted to effect U.S. obligations under these treaties. The principle of *non-refoulement* prohibits states from expelling or returning a refugee "in any manner whatsoever" to a state where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 1951 Convention art. 33(1). Importantly, this obligation bars removal, *directly* or *indirectly*, to a place where a refugee's life or freedom would be threatened because of a protected ground. The United Nations High Commissioner for Refugees ("UNHCR"), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol ¶ 8 (2007) (hereinafter "UNHCR, Non-Refoulement Obligations"). CAT, likewise, requires that the United States protect individuals from direct or indirect *refoulement* to a state where a person would be in danger of being tortured. By facilitating the transfer of refugees to a country with a record of human rights violations and inadequate protections from *refoulement*, the Guatemala ACA violates U.S. obligations under domestic and international law.

[4] July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

Second, the Rule fails to provide refugees with effective protection, in violation of the Refugee Convention and international law standards. In keeping with U.S. obligations under the Refugee Convention, the Protocol, and CAT, any transfer agreement must contain certain safeguards and procedures to protect refugees from *refoulement*. As a threshold matter, the transferring country is charged with ensuring refugees will be afforded rights underlying the Refugee Convention and international human rights law in the receiving country. In addition, the transferring state must implement an individualized assessment for each refugee's case, with basic due process and procedural safeguards to ensure that he or she is protected from *refoulement* and receives effective protection from human rights violations. Here, the Rule and the ACA with Guatemala fail to provide refugees with either.

Third, the Rule's comparisons of the Guatemala ACA to the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (the "Dublin Convention"), June 15, 1990, 1997 O.J. (C 254), and the Agreement Between the Government of Canada and the Government of the United States For Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries (the "Canada Agreement"), December 5, 2002, fall apart under any reasonable scrutiny. Aside from the basic fact that those two agreements also concern transferring asylum-seekers, the Dublin Convention and the Canada Agreement share little in common with the Guatemala ACA. For one, the Dublin Convention and the Canada Agreement were developed over years-long processes, involving substantial consultation with UNHCR. As a result, both agreements contain multiple procedural safeguards for protecting refugees' rights during the transfer process. Furthermore, the Dublin Convention and Canada Agreement both concern reciprocal transfers of refugees between countries with similar resources and asylum systems. None of those features hold true for the hastily constructed Guatemala ACA. That agreement contains no procedural safeguards, shows little concern for international law, and unilaterally sends asylum-seekers to a country with inadequate resources to address their claims.

ARGUMENT

I. The United States Has Binding Obligations Under the 1967 Protocol and 1951 Convention.

Protection against *refoulement* is the "most essential component" of international refugee and asylum law. Exec. Comm. of the High Commissioner's Programme, Note on *Non-Refoulement*, U.N. Doc. EC/SCP/2 (1997) (hereinafter "UNHCR, Note on *Non-Refoulement*").[5] The United States has an obligation to uphold the principle of *non-refoulement* contained in Article 33 of the 1951 Convention—as incorporated in the 1967 Protocol—and Article 3 of CAT. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n. 19 (1993); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). The *non-refoulement* obligation enshrined in these treaties prohibits states from returning, removing, or expelling individuals to a country where they would likely face persecution, torture, or other forms of ill-treatment and human rights abuses. By allowing removal of persons to Guatemala, a country without adequate protection from these harms, the Guatemala ACA violates the United States' binding international law obligations.

A. The 1951 Convention and 1967 Protocol Are Binding on the United States.

The 1951 Convention and the 1967 Protocol serve as the "cornerstone of the international system for the protection of refugees," one that the United States has long recognized. G.A. Res. 49/169 (Dec. 23, 1994). At their core, these treaties uphold the fundamental principle of *non-refoulement*. The United States played an instrumental role in drafting the 1951 Convention and subsequently ratified the Protocol, which incorporates the substantive provisions of the 1951 Convention. The U.S. Supreme Court has expressly recognized that the obligations under these

[5] The United States is a member of the Executive Committee of the High Commissioner's Programme, the governing body of UNHCR. The Executive Committee's functions include advising the High Commissioner and issuing Conclusions on International Protection. Adopted by the consensus of its member states (currently 106 members), the Conclusions reflect states' understanding of international legal standards on the protection of refugees and act as "international guidelines to be drawn upon by States, UNHCR, and others when developing or orienting their policies on refugee issues." *See Gen. Conclusion on Int'l Protection, Rep. of Exec. Comm. on Its Fortieth Session,* ¶ p, U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989).

treaties are binding and that Congress incorporated those obligations into U.S. law through the 1980 Refugee Act. *Cardoza-Fonseca*, 480 U.S. at 436.

In 1950, the United States and other states together drafted an international agreement that would ensure "individuals . . . are not turned back to countries where they would be exposed to the risk of persecution." Andreas Zimmerman & Claudia Mahler, Article 1A, Para. 2, in The 1951 Convention Relating to the Status of Refugees & Its 1967 Protocol: A Commentary 281, 337 (Andreas Zimmerman et al. eds., 2011). The states' efforts resulted in the 1951 Convention, which enshrines the principle of *non-refoulement*. *See* 1951 Convention art. 33(1). While the 1951 Convention was primarily concerned with those seeking asylum from persecution following World War II, its protections were universalized in the 1967 Protocol. *See* 1951 Convention art. 1(A); 1967 Protocol. The United States acceded to the 1967 Protocol, binding itself to the treaty's international refugee rights and protection provisions in Articles 2 through 34 of the 1951 Convention. *See Cardoza-Fonseca*, 480 U.S. at 428.

Article 33 of the 1951 Convention prohibits states from expelling or returning ("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." 1951 Convention art. 33(1). As the U.S. Supreme Court has noted, Article 33 imposes a "mandatory duty" on the United States not to return a person to any country where he would be in danger of persecution because of a protected ground. *Cardoza-Fonseca*, 480 U.S. at 429.

To bring "United States refugee law into conformance" with the Refugee Convention, Congress enacted the 1980 Refugee Act. *Cardoza-Fonseca*, 480 U.S. at 436. The Act amended the then-existing INA with the intent to "protect refugees to the fullest extent of the [United States]' international obligations." *Yusupov v. Attorney Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (footnote omitted). As a result, the 1980 Refugee Act prohibits the United States from removing a refugee to any country where that person's life or freedom would be threatened because of a protected ground. 8 U.S.C. § 231(b)(3)(A).

B. The United States Has Obligations of Direct and Indirect *Non-refoulement* Under the Refugee Convention and Protocol.

Although agreements to share the responsibility of adjudicating asylum claims are permissible under international law, such agreements must be compatible with the Refugee Convention. *See* UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers ¶ 10 (2019) (hereinafter "UNHCR, Onward Movement Guidance"). UNHCR has the responsibility and authority to supervise states' interpretation and application of international treaties for the protection of refugees, including the Refugee Convention. G.A. Res. 428(v), annex, UNHCR Statute ¶ 8(a) (Dec. 14, 1950). UNHCR exercises its supervisory authority by issuing interpretive guidance concerning the Refugee Convention, including the Handbook on Procedures & Criteria for Determining Refugee Status & Guidelines on International Protection, U.N. Doc. HCR/1P/4/ENG/REV.4 ¶ 9 (4th ed. 2019) (hereinafter "UNHCR Handbook"). The United States played an instrumental role in ensuring both the 1951 Convention and the 1967 Protocol specifically recognized UNHCR's supervisory role. *See* 1951 Convention pmbl., art. 35; 1967 Protocol art. II; Submission of UNHCR as Intervener ¶ 89, R v. Sec'y of State for Foreign & Commonwealth Affairs [2006] EWCA Civ. 1279 (Eng.), reprinted in 20 Int'l J. Refugee L. 675, 697 (2008).[6]

Federal courts consistently rely upon UNHCR guidance in interpreting U.S. obligations under the Refugee Convention. *See Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (relying on UNHCR guidance on asylum law); *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc) (citing UNHCR guidance on child asylum claims); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 124 (D.C. Dist. Ct. 2018).[7] As the Supreme Court has recognized,

[6] Congress, therefore, was aware of the UNHCR Handbook provisions and UNHCR's supervisory role when it passed the 1980 Refugee Act to implement the Refugee Conventions into law. *See M.A. v. INS*, 899 F.2d 304, 321 n.6 (4th Cir. 1990).

[7] Most recently, on February 28, 2020, the Ninth Circuit Court of Appeals issued an Opinion in which the Court relied on UNHCR guidance in finding that the new interim final rule and proclamation affecting asylum eligibility violated U.S. obligations under the Refugee Convention and the Protocol. *East Bay Sanctuary Covenant v. Trump, et al.*, No. 18-17274, 18-17436, 2020 WL 962336 (9th Cir. Feb. 28, 2020).

the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 432 n. 22.

According to the UNHCR Handbook, states must set up procedures with adequate safeguards in line with their "particular constitutional and administrative structure" to ensure that asylum-seekers are protected from *refoulement*. UNHCR Handbook ¶ 189 et seq. Importantly, the UNHCR has recognized that the *non-refoulement* obligation enshrined in the Refugee Convention includes protection from both direct and indirect *refoulement*:

> [W]here States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, *directly or indirectly*, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.

UNHCR, Non-Refoulement Obligations (emphasis added). Thus, states are prohibited from removing asylum-seekers to a country where they likely will face persecution *or* a country that will not provide them with protection from *refoulement*. *See id*. Indeed, limiting the United States' obligation to direct *non-refoulement* would be inconsistent with the intent of the Refugee Convention. *See Asakura v. Seattle,* 265 U.S. 332, 342 (1924). ("[W]hen two constructions are possible, one restrictive of rights which may be claimed under it, and the other favorable to them, the latter is preferred.").

C. The United States Has Direct and Indirect *Non-refoulement* Obligations Under CAT.

The United States also agreed to the mandatory obligations of *non-refoulement* under CAT, ratified in 1994. Under Article 3 of CAT, "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[8] In determining whether there are "substantial

[8] Torture under CAT is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person,

grounds" that a person will be subject to torture, the CAT directs States to "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." CAT art. 3(ii).

The United States incorporated CAT into domestic law by enacting FARRA with the explicit intent "to implement the obligations of the United States under Article 3 of [CAT]."[9] Mirroring the text in Article 3, FARRA announced "the policy of the United States not to expel or otherwise effect involuntary removal of any person to a country where there are substantial grounds for believing he or she would be in danger of being subjected to torture." *Id*. By incorporating CAT into domestic law, the United States agreed to uphold CAT's *non-refoulement* obligations.

The Committee Against Torture, a body of independent experts established by CAT and charged with interpreting and monitoring the implementation of CAT ("CAT Committee"), has provided guidance on CAT's *non-refoulement* obligations.[10] *See* CAT art. 17; *see also* U.N. Comm. Against Torture, Gen. Comm. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (2018) (hereinafter "CAT Committee, Gen. Comm. 4"). Specifically, the CAT Committee interprets Article 3 of CAT as imposing obligations of direct and

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or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity." Convention Against Torture art. 1. In incorporating CAT into domestic law, FARRA imported the exact same definition of torture. *See* Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B, § 2242(f)(1), 112 Stat. 2681, 823.

[9] Section (b) of FARRA provides that: "Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." The only reservation the United States entered related to Article 3 was its understanding that "substantial grounds" means "more likely than not." The primary implementing regulation is codified in 8 CFR § 208.18 ("Implementation of the Convention Against Torture").

[10] Notably, CAT Committee members are elected by state parties, including the United States. CAT art. 17.

indirect *non-refoulement* on State parties—"without any form of discrimination and regardless of the nationality" of the person seeking protection. *See* CAT Committee, Gen. Comm. 4 ¶ 10.

The CAT Committee interprets the principle of *non-refoulement* broadly in keeping with the treaty's intent and purpose. Article 3 of CAT prohibits state parties from deporting or removing individuals to a country where they would face a "foreseeable, personal, and real" risk of torture. *Id*. (interpreting "substantial risk" under CAT). Evaluating such risk requires consideration of whether the receiving country has a pattern of human rights violations, including harassment and violence against minority groups, situations conducive to genocide, and widespread gender violence. CAT art. 3; CAT Committee, Gen. Comm. 4 ¶ 11. Similarly, Article 16 of CAT obligates State parties to prevent acts of cruel, inhuman, or degrading treatment or punishment ("ill-treatment") even if those acts do not rise to the level of torture. The CAT Committee further affirmed that the *non-refoulement* obligation under CAT includes indirect *refoulement. Id*. ¶ 12 (explaining that a person "should never be deported to another State where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing he/she would be in danger of being subjected to torture.").

Overall, determining whether CAT's *non-refoulement* obligations are satisfied requires a review of the actual conditions and policies of the receiving county. General assurances and the fact that another country is a party to CAT are insufficient bases upon which to rest compliance with CAT's *non-refoulement* obligation. *Id*. ¶¶ 19, 20.

II. The ACA Rule Contradicts International Legal Standards for Transfers of Responsibility.

At bottom, through the Guatemala ACA the United States is divesting itself of its longstanding obligations under the Refugee Convention and CAT. The state in which asylum is sought has the primary responsibility to ensure that asylum-seekers have access to the rights outlined in the Refugee Convention. *See* UNHCR, Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy ¶ 9

(Nov. 2010), (hereinafter "UNHCR, Extraterritorial Processing Paper"); *see also* UNHCR, Note on Transfer Agreements ¶ 3(ii).

States must not exploit transfer agreements as loopholes to "divest [themselves] of responsibility" or excuse their obligations under the Refugee Convention and international human rights law. Extraterritorial Processing Paper ¶ 49; *see also* Exec. Comm. of the High Commiss'r (ExCom), General Conclusion on International Protection No. *87 (L)*, Oct. 8, 1999. Rather, such agreements should aim to distribute the responsibility of adjudicating asylum claims fairly and reflect "a spirit of international solidarity and burden-sharing." UNHCR, Extraterritorial Processing Paper ¶ 3; *see also* ExCom, Conclusion on International Protection No. *85 (XLIX)* (Oct. 9, 1998).[11]

UNHCR has set forth specific guidance for procedural protections and safeguards in bilateral transfer agreements, which the United States has failed to incorporate in the ACA. First, in keeping with its treaty obligations, the United States must ensure that refugees transferred to a third country will enjoy the rights guaranteed by the Convention and international human rights standards. UNHCR, Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers ¶ 3 (May 2013), (hereinafter "UNHCR, Bilateral Transfer Guidance"). Actual protection from *non-refoulement* under Article 33(1) of the Convention requires that the United States conduct a good-faith assessment of the third state's actual practice in safeguarding these rights. *Id.* As a precondition to the transfer of responsibility, this assessment must scrutinize whether the third country avails substantial access to a "fair and efficient" asylum procedure. *Id*.; UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the

[11] As a threshold matter, a bilateral arrangement must be set forth in a legally binding agreement "enforceable in a court of law" by affected asylum-seekers. UNHCR, Note on Transfer Agreements ¶ 3(v). The agreement must sufficiently "clarify the responsibilities of each State and the procedures to be followed." Extraterritorial Processing Paper ¶ 8. It must also provide "certain objective standards of protection in the third state" and state the "firm undertakings by [the third] country that those returned will have access to protection, assistance and solutions," including a fair and efficient procedure for seeking asylum, lawful status in the country pending determination, and standards of treatment commensurate with the 1951 Convention. UNHCR, Safe Third Countries ¶ 5.

Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries ¶ 9 (Apr. 2018), (hereinafter "UNHCR, Legal Considerations"). In addition to protecting against *refoulement*, the receiving country must also guarantee other fundamental rights under the Convention and international law, such as non-discrimination, freedom from detention, right to engage in employment, and right to stay in the country while the asylum claim is pending. UNHCR, Bilateral Transfer Guidance ¶ 3; UNHCR, Legal Considerations ¶ 9.

Second, taking into account the life-altering impact of an erroneous decision, the United States must conduct individualized assessments "accompanied by appropriate procedural guarantees" on the risk of *refoulement* and provide effective protection from other human rights violations. UNHCR, Bilateral Transfer Guidance ¶ 3(vi). The United States cannot transfer an asylum-seeker to a third state without first considering each individual's particular needs and circumstances, including, among other things, whether he or she will face a risk of persecution or torture in the receiving state or *refoulement* to another country. This individual assessment should include procedural safeguards, including affirmative notice to the asylum-seeker of the transfer agreement, a fair standard of proof, the right to consult counsel, and the right to appeal a negative finding of risk of *refoulement*. UNHCR, Onward Movement Guidance.

A. Transfer Arrangements Must Contain Safeguards to Protect Rights under the Refugee Convention and Other International Human Rights Standards.

The 1951 Convention sought to provide refugees with "the widest possible exercise of the fundamental rights and freedoms" under the Charter of the United Nations and the Universal Declaration of Human Rights. 1951 Convention, preamble. In addition to the core tenet of *non-refoulement*, Articles 2 to 34 of the Convention delineate some of the basic rights that should be accorded to refugees, such as non-discrimination, the freedom to practice their religion, right of association, access to courts, right to engage in employment, right to access public education and basic services, and non-penalization for their entry or presence. 1951 Convention, arts. 3, 4, 15, 16, 17, 22, 31, 33. Moreover, the United States is also bound to honor its obligations under international human rights law, including a duty not to return anyone to the risk of being subjected

to torture or cruel and degrading treatment or punishment, arbitrary deprivation of the right to life, or irreparable harm. *See* UNHCR, Extraterritorial Processing Paper ¶ 13; CAT, art. 3; 8 C.F.R. §§ 1208.16–18; International Covenant on Civil and Political Rights, arts. 6–7, Dec. 9, 1966, 999 U.N.T.S. 171 (ratified June 8, 1992).

Significantly, international law requires transferring countries to consider whether the dangers of living in another country will prevent asylum seekers from effectively accessing asylum in that country. "Unless the fundamental rights of refugees as human beings (to life, liberty and security of person, to freedom from torture, from cruel, inhuman or degrading treatment or punishment, from slavery, etc.) are safeguarded," explains UNHCR, "other rights and benefits guaranteed by international instruments and legal principles, as well as by municipal law, are of little use." UNHCR, The Personal Security of Refugees, ¶ 2 (May 1992). For that reason, transferring states cannot overlook the threats to personal safety and security that a refugee will face in another country. *See id.* at ¶ 3 (recognizing that states are responsible for "preventing violations of the rights and safety of refugees and asylum-seekers."); UNHCR ExComm Conclusion No. 72, (Oct. 8, 1993) ("Reaffirming the responsibility of States to respect and ensure the fundamental human rights of refugees and asylum-seekers *to life, liberty and security of person* as well as to freedom from torture or other cruel, inhumane or degrading treatment or punishment[.]") (emphasis added).

Generally, state parties to the Refugee Convention should process the claims of asylum-seekers within their jurisdiction. *See* UNHCR, Extraterritorial Processing Paper ¶ 2. In implementing transfer agreements, actual protection from *non-refoulement* requires States to conduct a good-faith assessment of the receiving state's actual practice in safeguarding the rights protected by the Refugee Convention. *Id.* At a minimum, states must assess whether refugees will have their asylum claims adjudicated fairly and efficiently in the third state and whether removal would risk their lives or freedom because of protected grounds. UNHCR, Onward Movement Guidance ¶ 7. Additionally, transferring states need to ensure that refugees will be able to enjoy fundamental human rights in accordance with international standards, including but not

limited to making sure there is (1) no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State; (2) no real risk to the life of the person in the third State; and (3) no real risk that the person would be deprived of his or her liberty in the third State without due process. UNHCR, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), ¶ 15(b) February 2003. Beyond those basic guarantees, states must also ensure that asylum-seekers "have access to means of subsistence sufficient to maintain an adequate standard of living." *Id.* at ¶ 15(g).

Importantly, a state's responsibilities do not stop once it has transferred a refugee. Post transfer, the state continues to be responsible for monitoring and reviewing the receiving compliance with international standards. UNHCR, Note on Transfer Agreements ¶ 3 (viii). If the third country fails to meet these standards, the transferring state must admit individuals to its own asylum system. *Id*. ¶ 3(vii).[12]

An assessment of a third country's guarantees of protection from *non-refoulement* and standards of treatment includes looking at that country's "actual practice of implementation" of such protections. *Id*. ¶ 3 (noting that "review of the actual practice of the State and its compliance with these instruments is an essential part of this assessment"). A state's formal acts alone, such as ratifying the Refugee Convention or enacting domestic law, are insufficient protections. UNHCR, Onward Movement Guidance ¶ 21; *see* UNHCR, Global Consultations on International Protection: Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems ¶ 14, EC/GC/01/17, Sept. 4, 2001, (hereinafter "UNHCR, Global Consultations") ("[T]he general question of 'safety' . . . cannot be answered solely on the basis of formal criteria, such as whether or not the third State is a party to the 1951 Convention and 1967

[12] In line with these obligations, the 1980 Refugee Act imposes an obligation on the Attorney General to determine, prior to removal, that the transferred individual will have "access to a full and fair procedure" for seeking asylum or equivalent temporary protection in the third country. 8 U.S.C. § 1158(a)(2)(A).

Protocol and/or relevant international human rights treaties."). Instead, the United States must consider whether rights are "effectively" and "durably guaranteed" through "actual practice indicating consistent compliance" with international legal obligations. UNHCR, Onward Movement Guidance ¶ 21; UNHCR, Safe Third Countries ¶ 10.

The Guatemala ACA purports to be consistent with U.S. treaty and statutory obligations because the Acting Secretary of the Department of Homeland Security and the Attorney General declared that Guatemala provides "access to a full and fair procedure" to asylum-seekers—without supplying any specific factual findings. Memorandum from Acting Secretary of the Department of Homeland Security Kevin K. McAleenan (Oct. 16, 2019) DHSFF1282 (hereinafter "McAleenan Memo"); Memorandum From Attorney General (Nov. 7, 2019) DOJFF6-7.[13] In reality, even the U.S. Department of State has recognized that asylum-seekers do not have access to fair and efficient procedures for status determination in Guatemala. U.S. Dept. of State, Guatemala 2018 Human Rights Report, at 13. Given the reality of Guatemala's asylum system, individuals removed there will be, at best, in a state of limbo where they cannot enjoy the rights guaranteed under the Refugee Convention and, in all likelihood, will be in danger of persecution, ill-treatment, or other human rights violations. Such a scenario is precisely what the Refugee Convention aims to prevent.

B. The ACA "Threshold Screening" Lacks Adequate Procedural Safeguards to Guard Against *Refoulement* and Safeguard Rights.

The asylum procedures under the ACAs are insufficient to meet U.S. obligations under international law. In the first place, these agreements do not implement an adequate screening process. Specifically, the ACAs improperly omit meaningful individualized assessments, place

[13] In a two-page memo, Secretary McAleenan asserts that the Guatemalan asylum system satisfies the basic requirements of a "full and fair procedure," but fails to cite any sources to substantiate this claim and pays little heed to the "actual practice" in Guatemala. *See* McAleenan Memo, pp. 1-2.

the burden of asserting a fear of removal on the asylum-seeker, and impose a heightened standard of establishing fear of removal that conflicts with the Refugee Convention.

UNHCR has specified the procedures that must be in place in the state where asylum is sought to ensure the state meets its obligations of *non-refoulement*. Proper implementation of transfer agreements requires states to conduct individualized assessments of the appropriateness of each transfer, including whether the third state will (1) admit the person, (2) grant the person access to a fair and efficient procedure for determination of protection needs, (3) permit the person to remain while a determination is made, (4) accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, and (5) permit the person to be granted a lawful stay if he or she is determined to be a refugee. UNHCR, Safe Third Countries ¶ 4; UNHCR, Onward Movement Guidance ¶ 22. *See also* UNHCR, Background Paper No. 2: The Application of the "Safe Third Country" notion and its impact on the management of flows and of the protection of refugees, at 3 (2001) (emphasizing that the "analysis of whether the asylum-seeker can be sent to a third country for determination of his/her claim must be done on an individualized basis" and "advis[ing] against the use of 'safe third country lists'").

States must provide an individualized "screening process" to determine whether removing an asylum-seeker will put him or her at risk of *refoulement*. In line with international human rights standards, the assessment should be "sensitive and flexible" in handling the claims of asylum-seekers who have special protection needs or heightened risks, such as victims of torture or sexual violence, children, people with physical or mental disabilities, and trafficked persons. UNHCR, Global Consultations ¶ 50(n); UNHCR, Legal Considerations ¶ 5 (noting the importance of pre-transfer individual assessments for "vulnerable groups, including unaccompanied and separated children, with the best interests of the child being given primary consideration").[14] Transfer

[14] For example, UNHCR recommends that female asylum-seekers who are accompanied by male relatives be informed in private of their right to make an independent asylum application. UNHCR, Global Consultations ¶ 50(n). Female asylum-seekers should preferably also be interviewed by skilled female interviewers and interpreters. *Id.*

assessments should also take into account the need to maintain family unity to avoid separating families in the United States and different ACA countries. UNHCR, Legal Considerations ¶ 6 (pointing to the need to consider "connections based on family or other close ties" in assessing the "viability of the return or transfer from the viewpoint of both the individual and the State"); UNHCR, Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum-Seekers and Migrants, at 2 (Mar. 2016), ("[F]amily unity needs to be maintained, and any family links mitigating against transfer need to be respected"). Screening procedures must provide the asylum-seeker with affirmative notice of the transfer agreement with a third state, assess the asylum-seeker's fear of removal to the third state under a fair standard of proof, allow access to counsel, and provide mechanisms for properly assessing the risk of *refoulement*. UNHCR, Onward Movement Guidance ¶¶ 19-25, 29; *see also* UNHCR Handbook ¶ 192.

Although the Rule provides a limited screening process, the ACA screening procedures lack basic safeguards and do not provide refugees with the opportunity to contest whether they have access to full and fair procedures in the receiving country. Specifically, the current procedures fail, *inter alia*, to screen asylum-seekers affirmatively for a fear of harm in the receiving country, to provide access to counsel in the screening procedure, to afford asylum-seekers a mechanism for appealing a negative decision, and to assure asylum-seekers of due process in their full asylum hearings. *See* UNHCR, Onward Movement Guidance ¶ 19; UNHCR Handbook ¶ 192.

What is more, the Rule impermissibly places the burden to initiate a "fear screening" on the asylum-seeker. Under the ACA, officers are not instructed to affirmatively ask whether asylum-seekers have any concern about being transferred to a third country during the "threshold screening." 84 Fed. Reg. 63,994, 63,998, 64,002. Only if an asylum-seeker affirmatively brings up a fear of removal to Guatemala will an asylum officer assess whether there is a danger of persecution or torture under the ACA. *Id*. As a result of this flawed procedure, the United States

already has transferred asylum-seekers to Guatemala without evaluating their fears and sometimes without even informing them of their destination.[15]

Furthermore, the standard for establishing fear under the ACA is inconsistent with standards under international law. International guidance requires that any screening provision for assessing fear of removal must use a threshold low enough to prevent *refoulement.* Yet in the ACA screening, the asylum-seeker must prove, without any time to meaningfully prepare, that it is "more likely than not" that he or she will be persecuted or tortured in each and every ACA country—a much higher standard than permitted under international law.

Finally, the Rule does not allow asylum-seekers adequate time to prepare for the interview, to consult with counsel, or even to have consult present during the interview. USCIS, US-Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening: Guidance for Asylum Officers and Asylum Office Staff, Nov. 19, 2019. The Rule also strips asylum-seekers of any meaningful administrative or judicial review, including a hearing before a judge and the opportunity to appeal the assessment. 84 Fed. Reg. 64,004.

In short, the United States cannot transfer an asylum-seeker under an ACA without first considering each individual's particular needs and circumstances, including whether he or she will face a risk of persecution, torture, or other human rights violations in the receiving state. The Rule bypasses the United States' binding international obligations and own statutory safeguards by substituting a cursory screening for third country removal. That screening unreasonably risks removing refugees to countries where they will face persecution or torture through either direct or indirect *refoulement*.

C. The Designation of Guatemala as a Safe Third Country Violates the United States' *Non-refoulement* Obligations.

By sending individuals to Guatemala without making any serious attempt to evaluate the dangers they would face, the United States is placing them at risk of both direct and indirect

[15] *See* Kevin Sieff, "The U.S. is putting asylum seekers on planes to Guatemala—often without telling them where they're going," Washington Post, Jan. 14, 2020.

refoulement. That approach blatantly disregards the United States' obligations under the Refugee Convention and CAT.

First, removal to Guatemala risks violating the United States' obligation of direct *non-refoulement*. Guatemala has some of the highest levels of violence and inequality in the Central American region. Congressional Research Service, Guatemala: Political and Socioeconomic Conditions and U.S. Relations (2019). The latest U.S. State Department's human rights country report revealed a high rate of human rights violations, including crimes involving violence and threats thereof targeting individuals based on gender, sex, and other minority groups. U.S. Dep't of State, 2018 Country Reports on Human Rights Practices: Guatemala (Mar. 13, 2019). Immediately before taking office in January 2020, Guatemala's president acknowledged that Guatemala could not fulfill the requirements necessary to be a safe third country. Sonia Pérez D., *President-Elect Says Guatemala Can't Do Migrant Deal with US*, Assoc. Press (Aug. 13, 2019). In fact, in 2018 alone, 33,000 Guatemalans fled the country and sought asylum in the United States for protection from persecution and human rights violations in their home country. UNHCR Global Trends, Forced Displacement (2018).

Second, the ACA contravenes U.S. obligations of indirect *non-refoulement*. Guatemala lacks adequate procedures and actual protection against *refoulement* of refugees transferred from the United States. For one thing, the Guatemalan Migration Institute, the organization charged with processing asylum claims, has a staff of just eight.[16] In 2017, Guatemala had only 259 asylum applications—a fraction of the applications filed in the United States and Mexico—and did not approve a single one.[17] Similarly, in 2018, Guatemala received 257 new refugee applications and approved only 17—the rest were not processed at all.[18] According to the New York Times, even

[16] Michael D. Shear & Zolan Kanno-Youngs, *Trump Officials Argued Over Asylum Deal With Guatemala. Now Both Countries Must Make It Work*, N.Y. Times, Aug. 2, 2019, available at https://www.nytimes.com/2019/08/02/us/politics/safe-third-guatemala.html.

[17] Asylum Application and Refugees From Guatemala, WorldDataInfo.com (https://www.worlddata.info/america/guatemala/asylum.php).

[18] *Id*.

Secretary of State Pompeo has told President Trump that the Guatemala ACA is a mistake because the Guatemalan government cannot carry out its terms.[19] Given the state of its asylum system, Guatemala cannot guarantee asylum-seekers protection from *non-refoulement*.

III. The Rule Draws Facile and Disingenuous Comparisons to the Dublin Convention and the Canada Agreement.

As precedents for the Guatemala ACA, the Rule tries to compare the ACA to the Dublin Convention and the Canada Agreement. *See* Rule § IV(C) (citing the Dublin Convention to show that the Rule complies with international practice); Rule § IV(D) (describing the Canada Agreement as precedent for the Rule). Those agreements do not justify the ACA; rather, any serious comparison highlights the ACA's shortcomings under international law.

A. The Rule Lacks the Dublin Convention's Safeguards.

The Dublin Convention is an agreement among European Union Member States for determining which Member State is responsible for evaluating a refugee's asylum application. The Rule notes that UNHCR praised the Dublin Convention's "commendable efforts to share and allocate the burden of review of refugee and asylum claims," in an effort to show compliance with international practice.[20] In comparing the ACA to the Dublin Convention, however, the Rule overlooks the significant distinctions between them.

The context for the UNHCR's comment about the Dublin Convention is critical. The Rule quotes the UNHCR Position on Conventions Recently Concluded in Europe (Dublin & Schengen Conventions), written in 1991.[21] That guidance is part of a larger series of UNHCR papers on European Union refugee law, outlining the principles of permissible transfer agreements that protect refugee rights. *See, e.g.*, UNHCR, Revisiting the Dublin Convention: Some Reflections

[19] Michael D. Shear & Zolan Kanno-Youngs, *Trump Officials Argued Over Asylum Deal With Guatemala. Now Both Countries Must Make It Work*, N.Y. Times, Aug. 2, 2019, available at https://www.nytimes.com/2019/08/02/us/politics/safe-third-guatemala.html.

[20] 84 Fed. Reg. 64,000.

[21] UNHCR Position on Conventions Recently Concluded in Europe (Dublin & Schengen Conventions), 3 Eur. Series 2, 385 (1991).

by UNHCR in Response to the Commission Staff Working Paper (2001). As that guidance illustrates, the UNHCR worked closely with the European Union and its Member States on how best to implement common asylum agreements, such as the Dublin Convention, in accordance with international law. By contrast, the Attorney General here did not seek, much less incorporate, UNHCR feedback during the development of the Rule.

More critically, the Dublin Convention contains multiple procedural safeguards for ensuring that its member states will provide transferred individuals with protection, support, and a fair and efficient asylum process. *See T.I. v. United Kingdom*, 2000-III Eur. Ct. H.R. 435, 446 (2000). In contrast to the ACA's screening process, the Dublin Convention provides detailed guidelines for interviewing asylum applications, including the opportunity to submit information regarding family members in Member States. *See* Dublin Convention, art. 4. Moreover, during that screening process, Member States may not detain individuals solely because they may be transferable. *Id.* at art. 28.

Importantly, the Dublin Convention also contains procedural safeguards for challenging transfer decisions. *See* § IV. When a Member State notifies an individual about a possible transfer decision, it must also provide information about available legal remedies and about entities that may provide legal or linguistic assistance during that process. *Id.*, at art. 26. Furthermore, the Member States must also provide a reasonable amount of time for the person concerned to exercise his or her right to challenge and appeal any transfer decision. *Id*., at art. 27. During the pendency of any challenge or appeal, the transfer is suspended automatically. *Id.* at art. 27(3). Together, those safeguards help to ensure that an individual has a meaningful opportunity to challenge any transfer decision.

As proof that those procedures work, asylum-seekers have challenged transfer decisions successfully. For example, in *M.S.S. v. Belgium and Greece* (2011) 53 EHRR 2, the European Court of Human Rights determined that the transfer of an Afghan asylum-seeker from Belgium to Greece violated his rights because of deficiencies in the asylum system and living conditions for

asylum applicants in Greece. Notably, the court's analysis not only examined Greece's asylum procedures on paper, but also looked at how those procedures worked in practice.

Generally, the state parties to the Dublin Convention have similar resources and asylum systems. As *M.S.S.* illustrates, however, the ability to challenge transfer decisions provides refugees with a safeguard in case conditions within a Member State deteriorate. On the other hand, as discussed *supra*, the Rule provides no such protections, let alone any mechanism through which asylum-seekers can challenge their transfer decisions. This is especially concerning given that Guatemala has far fewer resources to address asylum-seekers' claims in comparison to the countries party to the Dublin Convention. At bottom, rather than being precedent for the Guatemala ACA, the Dublin Convention exposes its flaws.

B. The Rule Lacks the Canada Agreement's Safeguards.

The Rule and its accompanying guidance also compare the Guatemala ACA to the Canada Agreement. *See* DHS Guidelines Regarding New Regulations Providing for the Implementation of Asylum Cooperative Agreements ("While the joint interim final rule differs in some ways from the existing framework for the United-Canada Agreement, the rule also replicates several key aspects of the Agreement."). As with the Dublin Convention, the differences between the Canada Agreement and the ACA reveal more than their similarities do.

To begin, the manner in which the parties drafted the Canada Agreement stands in stark contrast to the ACA's creation. The process for drafting the Canada agreement included public meetings with U.S. government officials and the UNHCR, publication of the draft agreement, and a hearing before the House Immigration Subcommittee.[22] Not only was the drafting process lengthy, but the accompanying regulations also followed regular notice-and-comment procedures. By contrast, the Trump administration signed the Guatemala ACA without meaningful deliberation

[22] *See* U.S. & Canada Safe Third Country Agreement: Hearing Before the H. Subcomm. On Immigr., Border Security, and Claims 107th Cong. 17 (Oct. 16, 2002).

about how to implement the agreement. In its rush to implement the ACA, the United States issued the Rule without following its usual notice and comment procedures.

The Canada Agreement also contains more procedural safeguards than the Guatemala ACA. Specifically, it requires that asylum applicants have opportunities (1) to understand the basis for any proposed determination; (2) to provide corrections or additional relevant information; and (3) to appeal any proposed determination. *See* Statement of Principles (4). Moreover, it allows applicants to be represented during any transfer proceedings, *see* Statement of Principles (1), and provides important exceptions for family unification, art. 4(2). To further ensure that both sides fulfill their obligations under international law, the agreement also allows UNHCR to monitor its implementation. *Id.*, art. 8(3). Even though these procedures are vital to ensuring compliance with international law, the Guatemala ACA includes none of them.

Lastly, the United States and Canada have similar resources and asylum systems.[23] The Canada-Agreement expressly recognizes Canada's "generous system[] of refugee protection" and the country's "tradition[] of assistance to refugees and displaced persons," consistent with principles of international refugee protection. Canada Agreement pmbl. Significantly, the transfer mechanism under the Canada Agreement is mutual, not unidirectional. That is, either country can transfer an individual to the other. Conversely, the Rule unilaterally shifts the burden for asylum adjudication to Guatemala—a country without sufficient capacity to "receive refugees, address their basic needs, and provide them with international protection." UNHCR, Onward Movement Guidance ¶ 53. Put simply, the Guatemala ACA is not about reciprocal burden sharing of refugees; instead, it simply attempts to outsource U.S. obligations under international law.

[23] Peter Margulies, *The Administration's New Asylum Rule Exceeds Statutory Authority*, Roger Williams University (Jul. 16, 2019,), *available* at https://www.lawfareblog.com/administrations-new-asylum-rule-exceeds-statutory-authority (describing Canada as "a country whose rule-of-law institutions and [asylum] commitments parallel those of the United States.").

CONCLUSION

HIRC is concerned that the asylum policy reflected in the Rule conflicts with the United States' obligations under international law. As such, it respectfully requests that the Court consider those obligations when evaluating the Plaintiffs' Motion for Summary for Judgment.

Dated: March 6, 2020

Respectfully submitted,

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