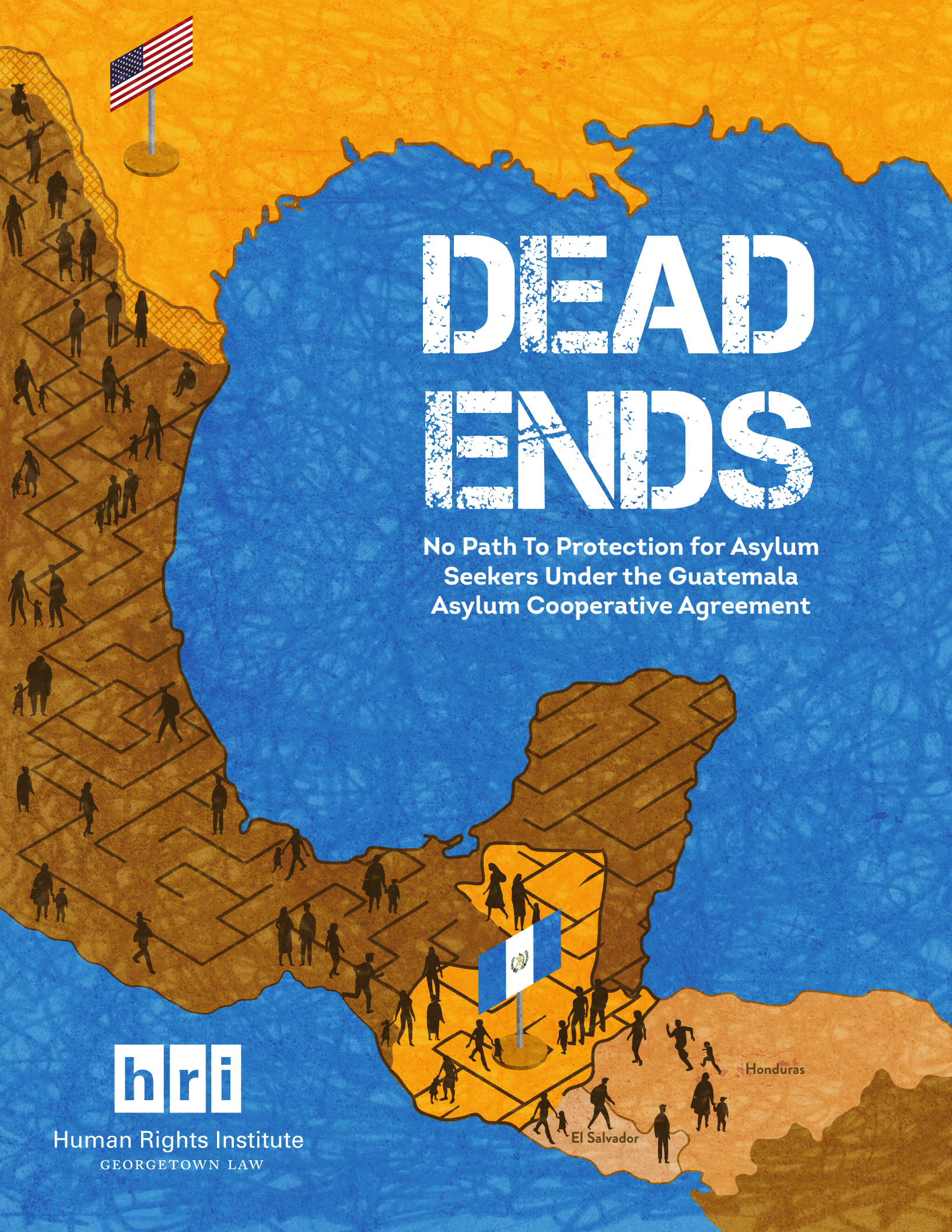




# DEAD ENDS

No Path To Protection for Asylum  
Seekers Under the Guatemala  
Asylum Cooperative Agreement



Human Rights Institute  
GEORGETOWN LAW

# GEORGETOWN LAW HUMAN RIGHTS INSTITUTE

## Human Rights Fact-Finding Project

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June 2020

GEORGETOWN LAW

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JUNE 2020



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GEORGETOWN LAW

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# I. ABBREVIATIONS AND DEFINITIONS

## Acronyms and Abbreviations

**ACA:** Asylum Cooperative Agreement

**CBP:** U.S. Customs and Border Protection

**CAT:** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**CONARE:** National Commission for Refugees (Comisión Nacional para Refugiados)

**DHS:** U.S. Department of Homeland Security

**DOJ:** U.S. Department of Justice

**GDM:** General Directorate of Migration (Dirección General de Migración)

**Guatemala ACA:** 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

**ICCPR:** International Covenant on Civil and Political Rights

**ICE:** U.S. Immigration and Customs Enforcement

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

**INA:** U.S. Immigration and Nationality Act

**IOM:** International Organization for Migration

**NGO:** Non-Governmental Organization

**NMA:** National Migration Authority (Autoridad Migratoria Nacional)

**ODHAG:** Office of Human Rights of the Archbishop of Guatemala (Oficina de Derechos Humanos del Arzobispado de Guatemala)

**OHCHR:** Office of the High Commissioner for Human Rights

**ORMI:** Office of International Migratory Relations (Oficina de Relaciones Migratorias Internacionales)

**PMH:** Ministry of Human Mobility (Pastoral de Movilidad Humana)



**STCA:** Safe Third Country Agreement

**UDHR:** Universal Declaration of Human Rights

**UN:** United Nations

**UNGA:** United Nations General Assembly

**UNHCR:** United Nations High Commissioner for Refugees

**USCIS:** United States Citizenship and Immigration Services

## Definitions

**Asylum Seeker:** Someone whose request for sanctuary has yet to be processed.<sup>1</sup>

**Migrant:** A person who is outside of a State of which the migrant is a citizen or national, or, in the case of a stateless migrant, the migrant's State of birth or habitual residence.<sup>2</sup>

**Customary International Law:** International obligations arising from established international practices.<sup>3</sup> Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.<sup>4</sup>

**Northern Triangle:** Region in Central America, referring to the countries of Guatemala, Honduras and El Salvador.

**Non-refoulement:** International legal principle where an individual shall not be returned to a

territory where his/her "life or freedom would be threatened on account of his/[her] race, religion, nationality, membership of a particular social group or political opinion"<sup>5</sup> or where "there are substantial grounds for believing that [s]/he would be in danger of being subjected to torture."<sup>6</sup>

**Refugee:** "[A person who,] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/[her] nationality and is unable or, owing to such fear, is unwilling to avail himself/[herself] of the protection of that country; or who, not having a nationality and being outside the country of his/[her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."<sup>7</sup>

1 U.N. HIGH COMMISSIONER FOR REFUGEES, *Asylum-Seekers*, [www.unhcr.org/asylum-seekers.html](http://www.unhcr.org/asylum-seekers.html) (last visited March 10, 2020).

2 Avinoam Cohen et al., *International Migrants Bill of Rights With Commentary*, 28 GEO. IMMIGR. L. J. 23, 33 (2013).

3 LEGAL INFO. INST., *Customary International Law*, [www.law.cornell.edu/wex/customary\\_international\\_law](http://www.law.cornell.edu/wex/customary_international_law) (last visited Nov. 21, 2019).

4 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §102(2) (AM. LAW. INST., REVISED 1987).

5 Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85, 113, S. Treaty Doc. No. 100-20 (1988), 23 I.L.M. 1027 (1984) [hereinafter Convention against Torture].

7 Refugee Convention, *supra* note 5, art. 1(A)(2). Note, the Cartagena Declaration on Refugees, to which Guatemala is a Party, has a broader definition of refugee:

[P]ersons 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.

Organization of American States [OAS], Cartagena Declaration on Refugees, conclusion no. 3, OAS/Ser.L/V/II.66, doc. 10, rev. 1, at 190-93 (Nov. 22, 1984) [hereinafter Cartagena Declaration on Refugees].



## II. EXECUTIVE SUMMARY

*"I told them, if you send me to Guatemala you might as well send me to Honduras, as either way we are going to be killed . . . All I have left is the mercy of God to protect us now."*

*As Isabella waited in Guatemala to go back to Honduras, she said, "of course I'm scared. The only safe place we could go [the U.S.] turned its back on us."*

*—Isabella<sup>8</sup>*

Isabella, an asylum seeker, arrived at the U.S. border with her infant daughter seeking protection from violence in her home country, Honduras.<sup>9</sup> However, for asylum seekers like Isabella, the implementation of the *Agreement between the Government of the United States of America (U.S.) and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims* (Guatemala ACA), a safe third country agreement (STCA), has restricted the right to seek asylum in the U.S.<sup>10</sup> STCAs offer a mechanism for States to cooperate to provide asylum, and the U.S. can designate a third country as safe if: 1) the asylum seeker's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion (*non-refoulement*); and 2) the asylum seeker would have access to a full and fair asylum procedure.<sup>11</sup> Under the Guatemala ACA, the U.S. designated Guatemala as a safe third country. As a result of the Guatemala ACA, Isabella and her infant daughter were removed to Guatemala by the U.S.

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8 Interview with Isabella, Guatemala City (January 2020).

9 *Id.*

10 8 U.S.C.A. § 1158(a)(1) (2019).

11 *Id.* § 1158(a)(2)(A).

This report presents the findings of Georgetown University Law Center’s fact-finding investigation into the legality of the Guatemala ACA and its impact on the human rights of asylum seekers. To make this assessment, the research team conducted over fifty interviews in Guatemala City in January 2020 with asylum seekers, Guatemalan government officials, members of civil society, including lawyers and journalists, and representatives from international organizations.

This report follows the journey of asylum seekers from Honduras and El Salvador subject to the Guatemala ACA, and documents the dead ends they face in their search for protection. Their journeys begin when they flee their country of origin, often due to life-threatening circumstances, to seek protection elsewhere.<sup>12</sup> Once asylum seekers subject to the Guatemala ACA arrive in the U.S., they are given little information about the process, and have limited or no opportunity to speak with an asylum officer. The Guatemala ACA requires asylum seekers from Honduras and El Salvador to independently raise a fear that they would be tortured or persecuted if removed to Guatemala, a country in which they may have little or no experience. These vulnerable asylum seekers are not permitted access to a lawyer, they have no ability to present evidence, and in some cases, no knowledge that the U.S. government is removing them to Guatemala. They face a burden of proof higher than any other threshold inquiry in any other immigration context, forced to prove it is “more likely than not” they will be persecuted or tortured if removed to Guatemala. As written, the procedures outlined in the implementing regulations of the Guatemala ACA are too limited to assess if an asylum seeker is at risk of persecution or torture in Guatemala. Our research uncovered that U.S. officials failed to follow the few procedural safeguards that do exist. By failing to engage in a meaningful individualized determination as required by U.S. and international law, or provide adequate procedural safeguards, the U.S. risks violating the principle of *non-refoulement* and threatens asylum seekers’ rights to life and to be free from torture, or cruel, inhuman or degrading treatment.<sup>13</sup>

Upon arrival in Guatemala, asylum seekers have no viable path to protection. The government does not provide adequate information, assistance, or time for asylum seekers to make a meaningful choice regarding filing for asylum, particularly considering their recent disorientation and deprivation of essential needs in the process of detention and removal from the U.S. In addition, asylum seekers report that Guatemala poses similar or heightened risks compared to their country of origin, meaning that asylum seekers remain at risk after they are transferred to the new “safe” third country. Asylum seekers feel they have no other choice but to return home as every other option resulted in a dead end. This results in *de facto refoulement* of asylum seekers to their country of origin, even if they have meritorious claims for protection, by depriving them of any meaningful choice to seek asylum.<sup>14</sup> As a result, the Guatemalan government fails to fulfill its obligations to protect the right to seek asylum, and protect against *non-refoulement*. Finally, if asylum seekers wish to apply for asylum in Guatemala, they lack clear access to the process, due, in part, to significant gaps in the text and implementation of Guatemala’s 2016 Migration Code. Therefore, Guatemala does not provide “access to full and fair asylum procedures,” in direct violation of the INA. Instead, the Guatemalan government shifts the responsibility of providing critical humanitarian aid and guidance in filing asylum claims to members of civil society. Additionally, the Guatemalan government fails to protect asylum seekers’ rights to work, health, and education, and therefore deprives them of durable solutions in violation of UNHCR guidance.<sup>15</sup>

12 See *infra* Section V, Phase 1, Reasons Individuals and Families Seek Asylum in the United States.

13 See *infra* Section V, Phase 2, Asylum Seekers’ Arrival in the United States: Disregarded and Detained.

14 See *infra* Section V, Phase 3, Arrival in Guatemala.

15 See *infra* Section V, Phase 4, Applying for Asylum in Guatemala.

This report concludes that the Guatemala ACA violates U.S. law and risks violating the fundamental human rights of asylum seekers guaranteed by international law. The U.S. and Guatemala risk violating the principle of *non-refoulement*, and Guatemala does not have a full and fair asylum procedure. Therefore, this report recommends that:

- The U.S. government terminate the Guatemala ACA because it violates U.S. domestic and international law.
- If not terminated, the U.S. government revise the Agreement, implementing regulations to safeguard against violations of *non-refoulement* in order to comply with U.S. and international law.
- The Guatemalan government amend the 2016 Migration Code and its regulations to protect the rights of asylum seekers and provide fair and efficient asylum procedures in accordance with the UNHCR Guidelines and fulfill their obligations under the Refugee Convention and the Convention Against Torture.
- The Guatemalan government bring current practices regarding the asylum system in compliance with the provisions of the 2016 Migration Code and its regulations amended as above to offer a realistic path to asylum in Guatemala.





### III. REPORT METHODOLOGY AND PURPOSE

This report evaluates how the Asylum Cooperative Agreement between the United States and Guatemala impacts the human rights of asylum seekers and examines whether it fulfills the requirements for Safe Third Country Agreements under U.S. and international law. This research study and its research methods were informed by consultations with experts in migration, refugee law, immigration law and policy, specifically asylum law, policy, and human rights. Georgetown University's Institutional Review Board reviewed and approved this study.

The research team from Georgetown University Law Center's Human Rights Institute included six students (three J.D. students and three L.L.M. students), the Human Rights Institute's Dash-Muse Teaching Fellow (a human rights attorney), and two adjunct professors of law who specialize in and practice human rights in the Americas.

To answer the research question, the team completed human rights research during the 2019-2020 academic year and conducted a week-long fact-finding mission to Guatemala City in January 2020, including five-days of on-the-ground interviews with:

- a. asylum seekers transferred or returned to Guatemala pursuant to the Guatemala ACA, as well as migrants in Guatemala;
- b. representatives of international and intergovernmental organizations focused on the rights of migrants and refugees, migration, and the asylum process;
- c. civil society members who work with migrants, such as human rights defenders, employees or volunteers of non-governmental organizations who serve or advocate on behalf of migrants, attorneys who represent migrants, and other individuals who protect and promote the rights of migrants;

- d. government officials, including immigration policy officers, members and former members of Congress, and judges.

The research team conducted over fifty interviews during five days of the fact-finding mission.

Convenience and snowball sampling techniques were used to recruit interview subjects directly and through Non-Governmental Organizations (NGOs).<sup>16</sup> The research team obtained written informed consent from all interview subjects. Participation in the research was voluntary and interview subjects did not receive any incentives or compensation for participating in the research. Spanish-English interpreters aided the researchers to collect accurate accounts from interview participants and, when given permission by participants, the interview was recorded to enable additional verification of quotations and testimony. To protect the confidentiality and privacy of the people interviewed and reduce the likelihood of harm resulting from participation in the research, the team collected minimal personal, directly identifying information during interviews. The names used for asylum seekers and migrants in this report are pseudonyms, and their statements have been anonymized. Other interviewees were given the option to remain anonymous.

The U.S. and Guatemala began implementing the Guatemala ACA in November 2019. The first asylum seeker subject to the Agreement was reportedly transferred from the U.S to Guatemala on November 21, 2019.<sup>17</sup> Between late November 2019 and our fact-finding mission in early January 2020, fifty-two people had been transferred to Guatemala over a six week period.<sup>18</sup> During the week the research team was on-the-ground, implementation accelerated with seventy-three asylum seekers transferred from the U.S.; twelve on Monday, thirty-three on Tuesday, and twenty-eight people on Thursday. The research team interviewed individuals from 10 family units returned that week. Individuals interviewed often described their personal motivations and experiences, as well as those of others in their family who traveled with them. Through interviewing one or more individuals in family units, the research team was able to gather information about twenty-five of the seventy-three asylum seekers returned the week of our field research. Therefore, this research reflects the experiences of 34% of all asylum seekers returned the week the research team was in Guatemala, which, at the time, was the week with the most returned asylum seekers.

Interviews with individuals and families who had been returned from the U.S. to Guatemala pursuant to the Guatemala ACA were conducted at Casa del Migrante, a shelter in Guatemala City that receives and provides humanitarian support to migrants travelling north to the U.S., as well as asylum seekers after they are transferred from the U.S. to Guatemala pursuant to the Agreement.<sup>19</sup> As of March 17, 2020, the date on which Guatemala's Foreign Minister Pedro Brolo announced that "all flights under [the Asylum Cooperation Agreement]" were suspended because of COVID-19, 939

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16 See Chaim Noy, *Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research*, 11 INT'L J. SOC. RES. METHODOLOGY 327, 330 (2008) ("A sampling procedure may be defined as snowball sampling when the researcher accesses informants through contact information that is provided by other informants.")

17 Sofia Menchu, *Shifting Asylum 'Burden,' U.S. Sends Guat. First Honduran Migrant*, REUTERS (Nov. 21, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala/u-s-sends-guatemala-first-honduran-migrant-under-asylum-deal-idUSKBN1XV1WM>.

18 Patrick J. McDonnell & Molly O'Toole, *Mex. Balks at U.S. Plan to Send Mexican Asylum Seekers to Guat.*, L.A. TIMES (Jan. 7, 2020), <https://www.latimes.com/world-nation/story/2020-01-07/mexico-balks-on-u-s-plan-to-send-mexican-asylum-seekers>.

19 Interview with Casa del Migrante, Guatemala City (January 2020).

asylum seekers from Honduras and El Salvador had been sent from the United States to Guatemala pursuant to the Agreement.<sup>20</sup>

## **Asylum Seekers and Migrants Interviewed (All Names are Pseudonyms)**

**Ana Sofia** is from El Salvador. She was traveling with her husband and her daughter, Gabriela (a child). Her family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Damián** is a teenager from Honduras. He was traveling with his mother and brother, and they were returned to Guatemala from the U.S. border under the Guatemala ACA.

**Daniel** is from Honduras. He was travelling alone. He was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Emilia** is from Honduras. She was traveling with her husband and two daughters (a toddler and a child). Her family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Erika** is from Honduras and was traveling with her husband. They were traveling through Guatemala to go north.

**Felipe and Lucia** (husband and wife) are from Honduras and were traveling with their daughters (both children). Their family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Gabriel** is from Honduras. He was travelling alone. He was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Hugo** is from El Salvador and was traveling with his wife and two daughters. They were traveling through Guatemala to go north.

**Isabella** is from Honduras and was traveling with her husband and daughter (an infant). Her family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Julietta** is from El Salvador and was traveling with her two daughters. Her family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Maria Victoria** is from Honduras and was traveling with her son (a toddler). Her family was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Mateo** is from Cuba. He was traveling through Guatemala to go north.

**Rosa** is from El Salvador. She travelled to the U.S. border alone. She was returned to Guatemala from the U.S. border under the Guatemala ACA.

**Tom** is from Guatemala. He was returned to Guatemala after living in the U.S. for 25 years.

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20 Yael Schacher et al., *Deportation with a Layover: Failure of Protection Under the U.S.-Guat. Asylum Co-operative Agreement*, REFUGEES INT'L & HUM. RTS. WATCH 6 (May 2020), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5ec3f0b370656c62ed7daa24/1589899466780/Guatemala+ACA+Report+-+May+2020+-+FINAL.pdf>; Jeff Abbott, *Guat. Suspends All Deportation Flights from U.S. over COVID-19*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/guatemala-suspends-deportation-flights-co-vid-19-200317181333967.html>.



The experiences of asylum seekers reflected in this report are illustrative of the journeys of individuals fleeing violence, persecution, and torture in Honduras and El Salvador. They provide evidence of the ways in which the fundamental human rights of asylum seekers subject to the Guatemala ACA are being violated through the implementation of the Agreement. This report evaluates the legality of the Guatemala ACA and conveys how the United States and Guatemala are failing to fulfill their domestic and international obligations.

We hope these findings contribute to greater understanding of the legal, policy and human rights implications of the Guatemala ACA.

The research team made generalized recommendations based upon these findings. These recommendations are intended to provide a basis for policy and legal actions to ensure that the Guatemala ACA is compliant with international legal standards and U.S. immigration law. More broadly, through this report and its recommendations, we aim to shed light on the experiences of asylum seekers and migrants in Guatemala and bring about greater protection for their rights.



## IV. BACKGROUND AND OVERVIEW

*"[W]e evaluate their story, we try to create a space of trust. The [migrant child] tells us why she left. We tell her of her right to seek asylum and not have her rights violated. We also talk about the right to migrate."*  
—Director of Special Protection, El Refugio de La Niñez<sup>21</sup>

On July 26, 2019 the United States and Guatemala signed the Guatemala ACA, formally the 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.<sup>22</sup> The U.S. Department of Homeland Security (DHS) has recognized this Agreement as a "Safe Third Country Agreement" (STCA).<sup>23</sup> As an STCA, it must satisfy certain fundamental protection requirements under international and U.S. law.

### **History of State Responsibility to Protect the Right to Seek Asylum**

Following the horrors of World War II, nation-States worked to agree on an international legal framework to protect the human rights of asylum seekers and to ensure that no person would be expelled or returned to a country where they face serious threats to their life or freedom. This framework includes the 1951 Convention Related to the Status of Refu-

<sup>21</sup> Interview with Director of Special Protection, Refugio de La Niñez, Guatemala City (January 2020).

<sup>22</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, Guat.-U.S., July 7, 2019, FR Doc. 2019-25288 [hereinafter Guatemala ACA].

<sup>23</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act, 84 Fed. Reg. 223, 63994 (Nov. 19, 2019) [hereinafter Interim Final Rule] (proposing an interim final rule and requesting comments).

gees (Refugee Convention) and its 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture (CAT), which all outline important human rights.

A person who fears serious violence or persecution in their country of origin has a right to leave and seek asylum elsewhere, as articulated in Article 14 of the Universal Declaration of Human Rights (UDHR).<sup>24</sup> The right to seek asylum has been emphasized in various United Nations General Assembly Resolutions (UNGA resolutions),<sup>25</sup> and forms the basis of the Refugee Convention<sup>26</sup> and its Protocol relating to the Status of Refugees.<sup>27</sup> The Refugee Convention defines a “refugee” as a person who is outside his or her country of nationality or habitual residence and who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.<sup>28</sup>

Where an asylum seeker experiences a form of persecution that is not covered by one of these five protection grounds in the Refugee Convention, a person may nevertheless be eligible to receive international protection. The Cartagena Declaration, which applies to Central American countries, extends refugee status to people 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>29</sup> The purpose of this extended definition is to encompass a broader category of persons in need of international protection, including those who may not meet the Refugee Convention definition.<sup>30</sup>

## International Rights and Obligations regarding Seeking Protection

Asylum seekers require special human rights protections due to their vulnerable status as they flee violence and persecution in their home countries.<sup>31</sup> Independent of the asylum process a State puts in place, it must respect the human rights obligations that are binding upon that State, either through customary international law<sup>32</sup> or the international treaties that the State has ratified. At the core of these human rights obligations, as outlined in the UDHR, is the principle that all humans are free and equal in dignity and rights.<sup>33</sup>

Many of the asylum seekers interviewed for this report shared their experiences of fleeing violence in their home countries.<sup>34</sup> They shared that their lives were being threatened<sup>35</sup> and that they

24 G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 8, 1948) [hereinafter Universal Declaration of Human Rights].

25 UNGA Resolutions are resolutions adopted by the United Nations General Assembly. See e.g., G.A. Res. 2312 (XXII), Declaration on Territorial Asylum (Dec. 14, 1967); G.A. Res. 50/152, ¶ 4 (Dec. 21, 1995).

26 U.N. HIGH COMMISSIONER FOR REFUGEES, *The Convention and Protocol Relating to the Status of Refugees* (Dec. 2010), [www.unhcr.org/3b66c2aa10](http://www.unhcr.org/3b66c2aa10).

27 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

28 Refugee Convention, *supra* note 5, art. 1(A)(2).

29 Cartagena Declaration on Refugees, *supra* note 7, art. 3.

30 *Id.*

31 Refugee Convention, *supra* note 5, art. 34.

32 LEGAL INFO. INST., *supra* note 3.

33 Universal Declaration of Human Rights, *supra* note 24, art. 1.

34 Interview with Ana Sofia, Guatemala City (January 2020); Interview with Julietta, Guatemala City (January 2020); Interview with Rosa, Guatemala City (January 2020).

35 Interview with Emilia, Guatemala City (January 2020).

feared torture and persecution.<sup>36</sup> All of these asylum seekers have the right to life,<sup>37</sup> and the right to be free from torture and cruel, inhuman or degrading treatment.<sup>38</sup> These rights are safeguarded in the ICCPR,<sup>39</sup> to which both the U.S. and Guatemala are parties. In order to safeguard the right to life, States have an obligation to ensure no one is arbitrarily deprived of this right.<sup>40</sup> The right to be free from torture and cruel, inhuman or degrading treatment is additionally safeguarded in CAT, to which the U.S. and Guatemala are both parties.<sup>41</sup> It is of an absolute nature so that no exceptions or derogations are allowed.<sup>42</sup> Additionally, serious violations of economic, social and cultural rights such as degrading living conditions<sup>43</sup> and the lack of medical treatment<sup>44</sup> have also been considered as dangers to the right to life and the freedom from torture and cruel, inhuman or degrading treatment or punishment.<sup>45</sup>

Once an asylum seeker enters the territory of a specific country, including the U.S. or Guatemala, and is accessing the asylum system, the right to life and the right to be free from torture place a specific obligation upon that State. In order to protect these rights, States that are a party to CAT and the Refugee Convention must not return an individual to a State where “there are substantial grounds for believing that [s/]he would be in danger of being subjected to torture,”<sup>46</sup> or where his/her life or freedom would be threatened on account of his/her “race, religion, nationality, membership of a particular social group or political opinion,” a concept known as *non-refoulement*.<sup>47</sup> The Committee Against Torture, monitoring the implementation of CAT, has further clarified that the protection against *refoulement* includes the danger of torture by non-State actors where the receiving State has no or only partial de facto control, or where the State is unable to prevent or counter those non-State actors.<sup>48</sup> This ensures that people receive the protection they need and are not removed to a country where they may suffer irreparable harm, such as violation of their right to life<sup>49</sup> or right to be

36 Interview with Damián, Guatemala City (January 2020).

37 International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967) [hereinafter ICCPR]; see also Universal Declaration of Human Rights, *supra* note 24, art. 3.

38 Convention against Torture, *supra* note 6; ICCPR, *supra* note 37, art. 7.

39 ICCPR, *supra* note 37.

40 *Id.* art. 6.

41 Convention against Torture, *supra* note 6.

42 *Id.*

43 M.S.S. v. Belgium & Greece, App. No. 30696/09, 2011-I Eur. Ct. H.R. 255.

44 Human Rights Committee, C v Australia, App. No. 900/1999; Paposhvili v Belgium, No. 41738/10, Eur. Ct. H.R. (2016); Advisory Opinion OC-21/14, 19 Inter-Am. Ct. H.R. 229 (2014).

45 U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Principle of Non-Refoulement under International Human Rights Law*, [www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciple-Non-RefoulementUnderInternationalHumanRightsLaw.pdf](http://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciple-Non-RefoulementUnderInternationalHumanRightsLaw.pdf).

46 “[T]he term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as 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, 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 a public official or other person acting in an official capacity.” Convention against Torture, *supra* note 6.

47 Refugee Convention, *supra* note 5, art. 33(1).

48 U.N. Committee Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, ¶ 30, U.N. Doc. CAT/C/GC/4 (Feb. 9, 2018) [hereinafter UN Committee Against Torture General Comment 4].

49 ICCPR, *supra* note 37, art. 6.

free from torture.<sup>50</sup> Returning refugees to third countries where they may be subject to torture or fear for their life or freedom is a violation of the *non-refoulement* principle.<sup>51</sup> The principle of *non-refoulement* is also intended to protect persons from being transferred to a State which may not itself threaten the individual, but which would not effectively protect the person against onward transfer in violation of the principle of *non-refoulement*, known as indirect, chain or secondary *refoulement*.<sup>52</sup> Therefore, if the U.S. transferred an asylum seeker with a fear of Guatemala to Guatemala, or if after the U.S. sent an asylum seeker to Guatemala, Guatemala transferred an asylum seeker with a fear of their home country to that country, the State obligation of *non-refoulement* would be violated, and the rights to life and freedom from torture or cruel, inhuman or degrading treatment would not be adequately protected.

Finally, once asylum seekers are settled within a country, either as they navigate the asylum process or after they receive refugee status, their rights to work, education, and health become especially important, notably so that the asylum seeker has access to durable solutions.<sup>53</sup> These rights are all outlined in the UDHR<sup>54</sup> and are safeguarded in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>55</sup> Some argue that the UDHR has become customary international law and is thus binding on all States, including Guatemala and the United States.<sup>56</sup> Additionally, Guatemala is a party to the ICESCR, and is therefore required to respect and ensure these rights for all those within its territory.<sup>57</sup> Therefore, as asylum seekers are returned to Guatemala under the Guatemala ACA, it is the responsibility of the Guatemalan government to ensure these rights are adequately protected. Furthermore, asylum seekers returned to Guatemala that are members of vulnerable groups, such as women,<sup>58</sup> children,<sup>59</sup> and LGBTQI+ persons,<sup>60</sup> may be entitled to additional protections under international law.

50 *Id.* art. 7.

51 U.N. HIGH COMMISSIONER FOR REFUGEES, UNHCR Note on the Principle of Non-Refoulement (Nov. 1997), [www.refworld.org/docid/438c6d972.html](http://www.refworld.org/docid/438c6d972.html).

52 Tilman Rodenhäuser, *The Principle of non-refoulement in the migration context: 5 key points*, HUMANITARIAN L. & POLICY (Mar. 18, 2018), <https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/>.

53 See *infra* Section V, Phase 4, Applying for Asylum in Guatemala.

54 Universal Declaration of Human Rights, *supra* note 24, art. 23, 25, 26.

55 ICCPR, *supra* note 37, art. 6 (defining the right to work); *id.*, art. 12 (defining the right to health); *id.*, art. 13 (defining the right to education).

56 Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INTL & COMP. L. 287, 319 (1996) (quoting Louis Henkin, *The Age of Rights* 19 (1990)); see also Vladimir Kar-tashkin, Working paper on the observance of human rights by States which are not parties to United Nations human rights conventions, ¶ 4, UN Doc. E/CN.4/Sub.2/1999/29 (June 15, 1999).

57 ICCPR, *supra* note 37 art. 2.

58 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1981).

59 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1990).

60 Per the ICCPR, States cannot discriminate on the basis of sex. ICCPR, *supra* note 37, art. 26. The Human Rights Committee has noted that “in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 [of the ICCPR] is to be taken as including sexual orientation.” *Toonen v. Australia*, Communication No. 488/1992, Human Rights Comm., U.N. Doc. CCPR/C/50/D/488/1992 ¶ 87 (1994).

## The U.S. Asylum System

The Office of Refugee Resettlement in the Department of Health and Human Services highlights that the U.S. refugee policy is based on “our core values and our tradition of being a safe haven for the oppressed.”<sup>61</sup> The U.S. Congress adopted the first refugee legislation following WWII<sup>62</sup> and then in 1980 passed the Refugee Act.<sup>63</sup> The purpose of the Refugee Act was to bring the United States in line with its obligations set out in the Refugee Convention and Protocol,<sup>64</sup> and it laid the foundation for every asylum seeker who arrives at the border or inside the territory of the United States to have the opportunity to apply for asylum in the United States.<sup>65</sup>

Recent U.S. immigration policy developments have limited access to the U.S. asylum and immigration system, particularly for Central American migrants.<sup>66</sup> The creation of Asylum Cooperative Agreements (ACAs) with Guatemala, El Salvador, and Honduras exemplify this shift. Safe Third Country Agreements (STCAs) limit access to the U.S. asylum system because their existence creates an exception to the right to apply for asylum in the U.S. on the basis that the individual can request asylum in the Safe Third Country.<sup>67</sup> The U.S. implemented an ACA, also known as a STCA, with Guatemala in November 2019.<sup>68</sup>

## Safe Third Country Agreements

STCAs offer a mechanism of cooperation to share among States the ‘burden’ of processing asylum requests and providing asylum and equivalent temporary protection to individuals who need it,<sup>69</sup> particularly in response to situations where large numbers of people flee violence and persecu-

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61 *History*, OFFICE OF REFUGEE RESETTLEMENT (Apr. 23, 2019), <https://www.acf.hhs.gov/orr/about/history>.

62 *Id.*

63 *The Refugee Act*, OFFICE OF REFUGEE RESETTLEMENT (Aug. 29, 2012), <https://www.acf.hhs.gov/orr/resource/the-refugee-act>.

64 *Negusie v. Holder*, 555 U.S. 511, 520 (2009).

65 The Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 102 [hereinafter Refugee Act].

66 One such policy includes the Migrant Protection Protocol (MPP), “a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings.” implemented in January 2019. *Migrant Protection Protocols*, DEP’T OF HOMELAND SEC. (Jan. 24 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>. While investigating the impact of the MPP is outside of the scope of this report, several reports have captured the human rights violations occurring as a result of the policy. *Human Rights Fiasco: The Trump Administration’s Dangerous Asylum Returns Continue*, HUMAN RIGHTS FIRST (Dec. 5, 2019), <https://www.humanrightsfirst.org/resource/human-rights-fiasco-trump-administration-s-dangerous-asylum-returns-continue>; “*We Can’t Help You Here*: U.S. Returns of Asylum Seekers to Mex.,” HUMAN RIGHTS WATCH (July 2, 2019), [hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico](http://hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico).

67 § 1158(a).

68 Interim Final Rule, 84 Fed. Reg. at 64003 (proposing an interim final rule and requesting comments).

69 U.N. High Commissioner for Refugees, *Background Note on the Safe Third Country Concept and Refugee Status*, (July 26, 1991), <https://www.unhcr.org/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html>; see also Refugee Convention, *supra* note 5, pmb1. (“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.”).

tion.<sup>70</sup> The formation of an STCA in no way reduces a State's international or domestic obligations to asylum seekers, including with respect to providing human rights protections and upholding the principle of *non-refoulement*.<sup>71</sup> Indeed, a "fundamental criterion when considering resort to the notion (of [a] safe third country), was protection against *refoulement*."<sup>72</sup>

The United Nations High Commissioner for Refugees (UNHCR), as the guardian of the Refugee Convention and its Protocol,<sup>73</sup> has developed international guidelines regarding the creation and implementation of STCAs. These guidelines are designed to ensure that STCAs conform with other obligations defined in international and human rights law.<sup>74</sup> According to UNHCR, prior to transferring asylum seekers pursuant to a bilateral agreement, it is important to assess if the third country will: "1) readmit the person, 2) grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs, 3) permit the person to remain while a determination is made, and 4) accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including – but not limited to – protection from *refoulement*."<sup>75</sup> For the asylum procedure to be fair and efficient, UNHCR suggests that procedures must include an independent body that assesses appeals to ensure an effective remedy against a negative decision in the first instance, and an allocation of sufficient personnel and resources to these authorities.<sup>76</sup> Additionally, UNHCR guidelines suggest there be a meaningful connection between the asylum seeker and the third country,<sup>77</sup> work opportunity,<sup>78</sup> durable solutions,<sup>79</sup> and an individualized assessment of asylum claims.<sup>80</sup>

70 See María-Teresa Gil-Bazo, *The Third Safe Country Concept in International Agreements on Refugee Protection - Assessing State Practice*, 33 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 1, 71 (2015).

71 See Gil-Bazo, *supra* note 70; Sophia Genovese, *Indirect Refoulement: Why the US Cannot Create a Safe Third Country Agreement with Mexico*, LEXISNEXIS IMMIG. LAW (Aug. 6, 2018).

72 Guy Goodwin-Gill, *THE REFUGEE IN INT'L LAW* (1996), quoting Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/781 para. 34 (Oct. 1991).

73 U.N. High Commissioner for Refugees, *The 1951 Refugee Convention*, <https://www.unhcr.org/en-us/1951-refugee-convention.html>.

74 U.N. High Commissioner for Refugees, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, paras. 3–4, 6 (May 2013), [www.refworld.org/docid/51af82794.html](http://www.refworld.org/docid/51af82794.html) [hereinafter U.N. Guidance Note].

75 U.N. High Commissioner for Refugees, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries, ¶ 4 (Apr. 2018), [www.refworld.org/docid/5acb33ad4.html](http://www.refworld.org/docid/5acb33ad4.html) [hereinafter Legal Considerations Regarding Access to Protection].

76 U.N. High Commissioner for Refugees, *A Guide to International Refugee Protection and Building State Asylum Systems*, 154 (2017) <https://www.unhcr.org/en-us/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html>.

77 Legal Considerations Regarding Access to Protection, *supra* note 75, ¶ 6.

78 *Id.*, para. 8.

79 U.N. Guidance Note, *supra* note 74, ¶ 3(vi); U.N. High Commissioner for Refugees, 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(i) (Feb. 2003), [www.refworld.org/docid/3fe9981e4.html](http://www.refworld.org/docid/3fe9981e4.html) [hereinafter Summary Conclusions on the Concept of Effective Protection].

80 Legal Considerations Regarding Access to Protection, *supra* note 75, ¶ 3.

In the United States, the Immigration and Nationality Act (INA) codifies the right to seek asylum and positions STCAs as an exception to this right.<sup>81</sup> Regarding STCAs, the INA allows that, pursuant to a bilateral or multilateral agreement, an asylum seeker may be removed to a country:<sup>82</sup>

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,<sup>83</sup>

and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection...<sup>84</sup>

While the law is clearly referencing the obligation of *non-refoulement*, it does not define the provision that asylum seekers have "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" in the third country.<sup>85</sup> Although not without controversies,<sup>86</sup> the U.S.-Canada Safe Third Country Agreement provides insight into how the U.S. has interpreted the INA provisions on STCAs in the past. The U.S.-Canada Agreement emphasizes that Canada has a generous asylum system that is consistent with principles of protection,<sup>87</sup> and the proposed implementing rule for the agreement stated that "[w]hile the asylum systems in Canada and the U.S. are not identical, both country's asylum systems meet and exceed international standards and obligations..."<sup>88</sup>

At a minimum, in order to act lawfully, the U.S. must comply with the legal obligations contained in CAT and the Refugee Convention, as well as comply with U.S. law governing STCAs. Additionally, following the guidelines on STCAs as outlined by UNHCR would bring the U.S. closer to complying with best practices and the intention of the obligations laid out in international human rights conventions.

## The U.S.-Guatemala Asylum Cooperative Agreement

Under the Guatemala ACA, persons seeking protection subject to the Agreement,<sup>89</sup> who have entered the United States through a point of entry or between points of entry, may be transferred

81 § 1158(a)(1).

82 *Id.* § 1158.

83 *Id.* § 1158(a)(2)(A).

84 *Id.*

85 *Id.*

86 In 2007, the Canadian Federal Court determined that the U.S. was in violation of its international obligations as prescribed by being a party to the Protocol, and therefore, because asylum seekers were not receiving a proper adjudication of their claims, the court found Canada was also in violation of its international obligations. *Canadian Council for Refugees v. Her Majesty the Queen*, [2007] F.C.R. 1262, ¶ 338 (Can. Ont.).

87 Agreement between the Government of Canada and the Government of the United States of America, For cooperation in the examination of refugee status claims from nationals of third countries, Can.-U.S., Dec. 5, 2002, 2002 U.S.T. LEXIS 125 [hereinafter U.S.-Canada Agreement].

88 Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 10620 (proposed Mar. 8, 2004).

89 Note, Articles 4 and 5 of the Agreement provide that the responsibility for determining and concluding requests for protection will rest with the U.S. in cases where it is in the public interest, for unaccompanied minors, and for those with valid U.S. documentation. See Guatemala ACA, *supra* note 22.



to Guatemala.<sup>90</sup> The Agreement places an obligation on both parties to develop procedures to implement the Guatemala ACA (*but do not outline the specifics of any such procedures*),<sup>91</sup> and places an explicit obligation on Guatemala not to return or expel asylum applicants transferred to Guatemala by the United States unless their application is abandoned or formally rejected.<sup>92</sup> The Guatemala ACA does not apply to Guatemalan citizens, unaccompanied minors or those with valid visas or documentation.<sup>93</sup>

## Formation of the ACA with Guatemala

During the fact-finding mission, several interview subjects highlighted the controversies surrounding the process by which the Guatemala ACA was created, signed, and implemented. First, Guatemala is reported to have signed the Guatemala ACA amidst economic and political threats from U.S. President Donald Trump.<sup>94</sup> These threats, combined with the secrecy surrounding the Guatemala ACA,<sup>95</sup> raise concerns that Guatemalan government officials may have been coerced into signing the Agreement.<sup>96</sup> The Guatemala ACA has not been officially published in Guatemala, and it has never been published in Spanish in the United States, further adding to the secrecy and its ambiguous legal status in Guatemala.<sup>97</sup> Guatemala and the U.S. have established procedures for implementation of the Agreement, but these annexes to the Guatemala ACA are not publicly available in either State.<sup>98</sup>

Second, per the Guatemalan Constitution, one function of the President of Guatemala is to “direct [the] foreign policy and [the] international relations; to celebrate, ratify, and denounce treaties and agreements in accordance with the Constitution.”<sup>99</sup> However, interviewees noted that the Guatemalan Constitution requires Congress to approve international agreements before they can take effect.<sup>100</sup> Since the Guatemala ACA has not received congressional approval, the Guatemala ACA’s legal status remains uncertain.<sup>101</sup>

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 Donald J. Trump (@realDonaldTrump), Twitter (July 23, 2019, 8:23 AM), <https://twitter.com/realDonaldTrump/status/1153641906699681795> (“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,” ...); *id.* (“...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.”).

95 Interview with Marcel Arevalo, FLACSO-Guatemala, Guatemala City (January 2020).

96 Interview with Gabriela Mundo Rodriguez, Office of the Ombudsman, Guatemala City (January 2020) (noting the U.S. and Guatemala were not on equal footing during negotiations and the Guatemalan Government said yes to everything proposed by the Trump Administration).

97 Interview with Alexander Aizenstatd, Lawyer, Guatemala City (January 2020) (“It has been highly controversial here. Not much information has been shared. In fact the text of the Agreement has not been published in Guatemala. We’ve only had access to it because it has been published in the United States. That is a big issue of transparency. Not only is it not published here, it wasn’t published in Spanish so people don’t really know about it. They have been very secretive about it.”).

98 Interview with Lawyer 1, Guatemala City (January 2020).

99 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [CONSTITUTION] May 31, 1985, art. 183(o).

100 Interview with Alexander Aizenstatd, *supra* note 97; Interview with Constitutional Court, Guatemala City (January 2020); Interview with Lawyer 1, *supra* note 98; Interview with Gabriela Mundo Rodriguez, *supra* note 96.

101 Interview with Lawyer 1, *supra* note 98.

Third, there is also a lack of transparency and clarity regarding the U.S. processes pertaining to the implementation of the Guatemala ACA. For example, the Interim Final Rule for the Guatemala ACA states “[f]irst . . . prior to implementation of an ACA subject to this rule, the Departments will make a generalized determination as to whether the third country grants asylum seekers ‘access to a full and fair procedure’ within the meaning of INA 208(a)(2)(A).”<sup>102</sup>

On February 5, 2020, Senator Elizabeth Warren, along with twenty of her Senate colleagues, wrote to Secretary of State Mike Pompeo, Attorney General Bill Barr, and Acting Secretary of Homeland Security Chad Wolf requesting copies of “any determinations made by DOJ and DHS and any related documentation of discussions” of whether Guatemala was determined to have a “full and fair procedure.”<sup>103</sup> According to the letter, DHS provided written representation to the Senators that “[t]he Attorney General and Secretary of Homeland Security determined that Guatemala’s asylum system provides full and fair access to individuals seeking protection, as required by U.S. law, prior to the Guatemala ACA entering into force on November 15.”<sup>104</sup> To the best of our knowledge, information regarding the Attorney General and the Secretary of the Department of Homeland Security’s determination that “Guatemala’s asylum system provides full and fair access to individuals seeking protection,”<sup>105</sup> was not made publicly available prior excerpts of the administrative record being made available in a court filing in late March of 2020.<sup>106</sup>

Due to this lack of transparency prior to the issuance of the Interim Final Rule and the implementation of the Guatemala ACA, it was unclear on what basis, if any, the U.S. made a determination that Guatemala provides asylum seekers access to full and fair asylum procedures. Without complete transparency on the full administrative record there is little assurance Guatemala has the capacity to assess the protection claims of an increasing number of asylum seekers returned under the Guatemala ACA and respect their human rights. Notwithstanding these concerns, the United States implemented the Guatemala ACA through an Interim Final Rule issued on November 19, 2019.<sup>107</sup> It further provided guidance to the U.S. Citizenship and Immigration Services (USCIS) on November 11, 2019 on the implementation of the Guatemala ACA.<sup>108</sup> The first asylum seeker from Honduras was returned from the United States to Guatemala pursuant to the Guatemala ACA on November 21, 2019.<sup>109</sup>

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102 Interim Final Rule, 84 Fed. Reg. at 63997.

103 Letter from Sen. Elizabeth Warren et al. to Sec’y Pompeo, Att’y General Barr, and Acting Secretary Wolf (Feb. 5 2020), <https://www.warren.senate.gov/imo/media/doc/2020.02.05%20Letter%20to%20State,%20DOJ,%20DHS%20about%20Northern%20Triangle%20Asylum%20Cooperative%20Agreements.pdf>.

104 *Id.*

105 *Id.*


106 Defendants’ Appendix Under Local Civil Rule 7(n)(1), *U.T. v. Barr*, 1:20-cv-00116-EGS, doc 85 (D.D.C. March 27, 2020).

107 Interim Final Rule, 84 Fed. Reg. at 63,994.

108 USCIS Screening Guidance, *infra* note 148.

109 Sonia Perez, *1st Honduran Returned to Guat. Under U.S. Asylum Accord*, ASSOCIATED PRESS (Nov. 21, 2019), <https://apnews.com/50f77fd8b67f49db8744daa788914187>.





## V. EXPERIENCES OF ASYLUM SEEKERS SUBJECT TO THE GUATEMALA ACA

### Phase 1

#### Reasons Individuals and Families Seek Asylum in the United States

*"I wouldn't have wanted to leave if so many things hadn't happened. The same gangs killed all of my siblings in the last few years and last September, they disappeared my sister. I told my husband that I wasn't waiting anymore. I left to come to the [United] States to seek protection and asylum. We didn't leave [El Salvador] with bad intentions."*

—Ana Sofia<sup>110</sup>

Interviews with asylum seekers returned to Guatemala pursuant to the Guatemala ACA substantiated the well-documented phenomenon<sup>111</sup> that Hondurans and Salvadorans seeking asylum in the United States face life-threatening risks related to gang violence in

110 Quotations are drawn directly from interview records. Every effort has been made to accurately reflect Ana Sofia's voice and experience. Interview with Ana Sofia, *supra* note 34.

111 See, e.g., Thomas Boerman & Adam Golob, *Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A Non-Traditional Model of Human Trafficking*, J. HUMAN TRAFFICKING (2020), <https://www.tandfonline.com/doi/full/10.1080/23322705.2020.1719343>; Azam Ahmed, *Inside Gang Territory in Honduras, "Either They Kill Us or We Kill Them,"* N.Y. TIMES (May 13, 2019) <https://www.nytimes.com/interactive/2019/05/04/world/americas/honduras-gang-violence.html>; Jason Motlagh, *Inside El Salvador's battle with violence, poverty, and U.S. policy*, NAT'L GEOGRAPHIC MAGAZINE (March 2019), <https://www.nationalgeographic.com/magazine/2019/03/el-salvador-violence-poverty-united-states-policy-migrants/>; INSIGHT CRIME AND THE CTR. FOR LATIN AM. & LATINO STUDIES, *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction*, <https://www.justice.gov/eoir/page/file/1043576/download>; Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L. J. 417 (2010–2011).

their countries of origin that may place them in need of international protection under the Refugee Convention and CAT.<sup>112</sup> Notably, UNHCR considers that people perceived by a gang to be contravening its rules or resisting its authority, persons in professions or positions susceptible to extortion, and persons perceived as “gang traitors” face risks that may place them in need of protection under the Refugee Convention.<sup>113</sup> UNHCR also considers women and children who are targeted by gangs to require protection in some instances.<sup>114</sup> This is because these threats may constitute persecution based on (imputed) political opinion or membership of a particular social group, which would qualify the individual as a refugee.<sup>115</sup> Most of the asylum seekers interviewed *prima facie* fall into the UNHCR risk profiles. Individuals consistently spoke of the dominance and control of Mara Salvatrucha (*MS-13*) and the 18<sup>th</sup> Street (*Barrio 18*) gangs and the lack of protection provided by government officials in the face of serious harm or death.<sup>116</sup>

Damián, a Honduran teenager, was forced to flee Honduras with his family because he was being targeted by *MS-13* and *Barrio 18*. Damián lived in a neighborhood controlled by *Barrio 18* but went to school in a neighborhood controlled by *MS-13*. *MS-13* targeted, kidnapped and tortured Damián and set him up to look like an informant on *Barrio 18*. They later took him out of the place he was being held to shoot him. While being tortured, the perpetrators took photos that made it appear as though Damián was part of the *Barrio 18* gang and sent these photos to their *MS-13* gang members in El Salvador, Honduras and Guatemala.<sup>117</sup> These gangs are reported to track down and kill those who are accused of having betrayed them.<sup>118</sup> The family members of ‘traitors’ may also be the targets of reprisals.<sup>119</sup> Perceived as a “traitor,” Damián would likely be in need of international refugee protection under the UNHCR guidelines.<sup>120</sup>

Damián may also be in need of international protection because he is at continued risk of “child-specific forms and manifestations of persecution” by *MS-13* and *Barrio 18*, transnational gangs which operate across borders in the Northern Triangle.<sup>121</sup> UNHCR reports that children and youth in Honduras, El Salvador and Guatemala, who live and go to school in areas controlled by different gangs are particularly at risk of being the target of gang violence “at school and while they

112 Interview with Emilia, *supra* note 35; Interview with Damián, *supra* note 36; Interview with Isabella, *supra* note 8; Interview with Felipe and Lucia, Guatemala (January 2020); Interview with Julietta, *supra* note 34.

113 U.N. High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, 30–35, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016), <https://www.refworld.org/pdfid/56e706e94.pdf> [hereinafter UNHCR Eligibility Guidelines for El Salvador].

114 *Id.* at 36–38.

115 *Id.* at 30–35.

116 Interview with Damián, *supra* note 36; Interview with Emilia, *supra* note 35; Interview with Julietta, *supra* note 34.

117 Interview with Damián, *supra* note 36.

118 U.N. High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, 50–51, U.N. Doc. HCR/EG/HND/16/03 (July 2016) [hereinafter UNHCR Eligibility Guidelines for Honduras].

119 *Id.*; U.N. High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, 44–45, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018) [hereinafter UNHCR Eligibility Guidelines for Guatemala]; UNHCR Eligibility Guidelines for El Salvador, *supra* note 113 at 34–35.

120 UNHCR Eligibility Guidelines for Honduras, *supra* note 118 at 51.

121 *Id.* at 52–53.

travel to school.”<sup>122</sup> In recent years, gangs in Honduras have reportedly intensified efforts to recruit children and youth and view schools as “fundamental to their organization.”<sup>123</sup> UNHCR draws attention to the fact that “[t]here are reports of children who left Honduras and who subsequently returned, either voluntarily or involuntarily, having been killed very shortly after they return.”<sup>124</sup> Additionally, Damián may have a claim for protection under CAT because he was tortured in his country of origin.

Other families interviewed also spoke of their fear of gang violence targeted towards their children. Julietta was forced to leave El Salvador because *MS-13* was targeting and attempting to recruit her two young daughters.<sup>125</sup> Aware that her resistance or refusal would result in certain harm to herself, her daughters, or other family members in El Salvador, Julietta immediately sent her daughters ahead to Mexico while she paid off debts to the gangs.<sup>126</sup> She then left behind her mother and her job to seek protection for herself and her daughters in the U.S. “Who is in charge? It is the gangs. If you say anything, they kill you.”<sup>127</sup> When asked if she ever tried to find help from local authorities, she said “[t]he authorities are the ones that betray you the most.”<sup>128</sup>

Emilia fled Honduras after her husband was severely beaten because the family was unable to pay the extortion fees demanded by the gang for them to continue to run their transportation business.<sup>129</sup> They didn’t report the violence against her husband as some of the men who came to their house to beat him were dressed as police and they do not trust the police.<sup>130</sup> When they had made previous complaints to the police after their bus was stolen, the police never did anything. Emilia said it was hard to tell if the police were part of the gang, as many former police officers are members of neighborhood gangs.<sup>131</sup> She said there is “[r]eally no point in going to the police. There is no security in the country. The police don’t help. They work with the gangs to extort people.”<sup>132</sup> UNHCR guidelines acknowledge that those in the transportation business may be especially vulnerable to this type of violence and targeted by gangs, requiring international protection.<sup>133</sup>

Such cases of targeted and relentless violence point to a failure from the countries of origin to safeguard and protect the human rights of these individuals, including their right to life<sup>134</sup> and the right to be free from torture and cruel, inhuman or degrading treatment or punishment<sup>135</sup> granted unequivocally to all people under international law. The reach and intensity of violence coupled

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122 *Id.* at 53; UNHCR Eligibility Guidelines for Guatemala, *supra* note 119 at 45–46; UNHCR Eligibility Guidelines for El Salvador, *supra* note 113 at 35.

123 UNHCR Eligibility Guidelines for Honduras, *supra* note 118 at 52.

124 *Id.* at 54.

125 Interview with Julietta, *supra* note 34.

126 *Id.*

127 *Id.*

128 *Id.*

129 Interview with Emilia, *supra* note 35.

130 *Id.*

131 *Id.*

132 *Id.*

133 UNHCR Eligibility Guidelines for Honduras, *supra* note 118 at 46.

134 ICCPR, *supra* note 37, art. 6; see also Universal Declaration of Human Rights, *supra* note 24, art. 3.

135 ICCPR, *supra* note 37, art. 7; Convention Against Torture, *supra* note 6, art. 2; see also Universal Declaration of Human Rights, *supra* note 24, art. 5.

with the ineffectiveness and incapacity of state authorities to address it pushed many individuals and families to leave and seek protection in countries where their human rights are respected and protected.<sup>136</sup> "Imagine you live in a city run by the *MS-13* and *Barrio 18* gangs. If you find yourself in a zone you're not supposed to be in, they kill you. It's better to leave or you put your family at risk."<sup>137</sup>

The journey to the United States placed individuals and families at further risk of human rights violations, especially placing at risk their right to life. Isabella, travelling with her husband and infant daughter, were kidnapped and held for one week as they passed through Mexico.<sup>138</sup> They were forced to pay five thousand U.S. dollars in order to be freed.<sup>139</sup> Other asylum seekers spoke of being robbed during transit or extorted by gangs or authorities at State borders.<sup>140</sup> For families travelling with young children, navigating the natural terrain, including harrowing river crossings, was physically and mentally exhausting and, at times, placed their lives at risk. Julietta remembered,

"[I]t was really terrifying at the time... I didn't have the strength to get out of the water. My daughter kept telling me, 'Mom, you can't give up!'"<sup>141</sup>

When these individuals presented themselves to the U.S. border to seek out an immigration officer and present their case, their international protection needs granted them certain rights and imposed obligations on the States to protect those rights. In their minds, the U.S. offered the only escape from the threats they were fleeing.<sup>142</sup>

Finding:

- *Asylum seekers removed to Guatemala pursuant to the Guatemala ACA reported that they felt forced to leave Honduras and El Salvador and seek asylum in the U.S. as their lives were at imminent risk following incidents and threats of gang violence, sexual violence, and attempted gang recruitment of their children, coupled with the ineffectiveness and incapacity of local authorities to protect them from such harms. These asylum seekers may be in need of international protection under the Refugee Convention and Convention Against Torture.*

136 See *supra* Section IV, Background and Overview.

137 Interview with Julietta, *supra* note 34.

138 Interview with Isabella, *supra* note 8.

139 *Id.*

140 Interview with Felipe and Lucia, *supra* note 112.

141 Interview with Emilia, *supra* note 35.

142 Interview with Felipe and Lucia, *supra* note 112; Interview with Emilia, *supra* note 35.

## Phase 2

### Asylum Seekers' Arrival in the United States: Disregarded and Detained

*Upon arriving at the U.S. border, Ana Sofia was immediately apprehended by U.S. Customs and Border Protection officials and then separated from her niece and nephew, who are nine and eleven years old.*

*Then she began a two-week period of detention in the United States. Ana Sofia and her family showered approximately once every five days, and wore the same clothes, including the same underwear, for the entire two-week period. They ate frozen burritos and sandwiches. She became sick. "There was a lot of coughing," she said.*

*After her niece and nephew were separated from her, Ana Sofia asked for asylum in the United States for herself, her husband, and her daughter. She never had the opportunity to speak to a judge. She was given one phone call with an asylum official to explain her story to him. She spoke through an interpreter who, from Ana Sofia's perspective, showed none of the feeling or fear behind her words. No one explained the purpose of the conversation. She explained to the officer why she had fled El Salvador, but he told her that her story was not credible, and that instead she needed to go to Guatemala. She told him she could obtain proof with a phone call, but he said nothing in response. Ana Sofia explained that she feared the same situation in Guatemala that she had experienced in El Salvador. "How is it possible that we should seek asylum in Guatemala when these people are fleeing the same violence in Guatemala? It makes no sense." It did not matter. "In the moment, with the man, I didn't have the opportunity for anything -- nothing" she relayed later.*

*"From this sole person," she said, "we were deported to Guatemala."*

*No one explained to Ana Sofia that she had just been determined ineligible to apply for asylum in the United States. Immigration officials gave her a paper to sign. It was in English, which Ana Sofia does not speak or read. No one explained to her what the paper said. Ana Sofia asked about her niece and nephew, but does not know what has happened to them.*

*After arriving in Guatemala, Ana Sofia and her husband plan to return briefly to Honduras and then attempt again to enter the United States, fleeing the same risks that pushed them to leave the first time.<sup>143</sup>*

143 Interview with Ana Sofia, *supra* note 34.



The administrative process leading to Ana Sofia and her family's removal to Guatemala, as well as her treatment and detention following her arrival in the United States, are problematic for a number of reasons. Ana Sofia, and others who are similarly apprehended entering the United States without a visa, have the right to be free from arbitrary detention,<sup>144</sup> and the right to humane and non-degrading treatment.<sup>145</sup>

In addition to these rights, people like Ana Sofia who have fled persecution or torture in their home country and arrive in the United States seeking protection, have the additional right to be protected from *refoulement* -- being returned to a place where they would be in danger of irreparable harm.<sup>146</sup>

Ana Sofia's account of her treatment in the United States and the process of her removal to Guatemala is concerning because it suggests that the United States violated these important rights and protections. This reflects a significant departure from the asylum process the United States employed before the implementation of the Guatemala ACA.

### A. Guatemala ACA Fails to Preserve Historic Protections for Asylum Seekers

The first contact an asylum seeker arriving at the United States southern border has is likely with an immigration officer from U.S. Customs and Border Protection (CBP).<sup>147</sup> The immigration officer asks the asylum seeker a number of questions to determine if they are "amenable" to the Guatemala ACA, or part of the cohort that the Guatemala ACA currently applies to.<sup>148</sup> As of March 2020, an asylum seeker amenable to the Guatemala ACA is one who is from Honduras or El Salvador, is not a citizen of Guatemala and does not reside in Guatemala, is claiming fear of their home country, and has not been admitted to the United States.<sup>149</sup>

However, the Guatemala ACA includes exceptions for individuals who are unaccompanied minors,<sup>150</sup> have arrived in the United States with a valid visa or without the United States requiring the individual to have a visa,<sup>151</sup> or for whom the United States chooses to exercise its discretion to examine an asylum claim because it is in the public interest to do so.<sup>152</sup> Individuals who meet one of these exceptions are not subject to the Guatemala ACA and therefore will have their asylum claim assessed pursuant to the usual asylum process that applies absent the Guatemala ACA. That is, if an exception applies to individuals from Honduras and El Salvador who express they wish to apply

144 ICCPR, *supra* note 37, art. 9.

145 *Id.* art. 7.

146 Refugee Convention, *supra* note 5, art. 33(1); Refugee Protocol, *supra* note 27.

147 8 C.F.R. § 208.30(e)(7) (2019) (contemplating that an "immigration officer", not an asylum officer, will first determine whether the individual is subject to the terms of the Guatemala ACA).

148 § 208.30(e)(7); see also U.S. CITIZENSHIP & IMMIGR. SERV., US - GUATEMALA ASYLUM COOPERATION AGREEMENT (ACA) THRESHOLD SCREENING: GUIDANCE FOR ASYLUM OFFICERS AND ASYLUM OFFICE STAFF 6 (Nov. 11, 2019) ("CBP makes an initial determination whether the individual is amenable to ACA") [hereinafter USCIS Screening Guidance].

149 USCIS Screening Guidance, *supra* note 148 at 10 (stating the amenable population and exception); see also, Mica Rosenberg, *U.S. implements plans to send Mexican asylum seekers to Guatemala*, REUTERS (Jan. 6, 2020), <https://www.reuters.com/article/us-usa-immigration/us-implements-plan-to-send-mexican-asylum-seekers-to-guatemala-idUSKBN1Z51S4>.

150 Guatemala ACA, *supra* note 22, art. 4.1(a).

151 *Id.* art. 4.1(b).

152 *Id.* art. 5.

for asylum, fear persecution or torture, or fear returning to their country, those individuals will not participate in the subsequent interview to determine whether they will be removed to Guatemala. Instead, they will be entitled to a different threshold screening process for assessing their eligibility for international protection, which employs a less onerous standard of proof to that which must be met by asylum seekers subject to the Guatemala ACA.<sup>153</sup>

Once an immigration officer has made a determination that the individual is subject to the Guatemala ACA, and therefore may be subject to removal to Guatemala, an asylum officer conducts a “threshold screening interview.”<sup>154</sup> The purpose of this threshold interview is to allow the individual an opportunity to affirmatively assert fear of persecution or torture if removed to Guatemala, and verify whether the individual is ineligible to apply for asylum in the United States.<sup>155</sup>

Importantly, at this step, the asylum officer is obliged under U.S. federal immigration regulations to provide the asylum seeker information about the Guatemala ACA, its exceptions, and the process of removal.<sup>156</sup> The Regulations require that asylum seekers potentially subject to removal under the Guatemala ACA be provided with “written notice” that they must affirmatively tell an immigration officer of any fear of persecution or torture if they were removed to Guatemala.<sup>157</sup> The asylum seekers are not otherwise asked if they fear persecution or torture if removed to Guatemala. The Regulations also require that the asylum seekers subject to the Agreement be told that they will be removed to Guatemala and any claim for asylum or complementary protection should be pursued there.<sup>158</sup>

According to USCIS guidance, this information should be provided in a document described as a “tear sheet,”<sup>159</sup> shown in Figure 1.

As asylum seekers navigate this process, those subject to the Guatemala ACA do not have important procedural safeguards otherwise available to asylum seekers in expedited removal. Under the normal expedited removal process, when individuals present themselves at the U.S. southern border and express that they wish to apply for asylum, fear persecution or torture, or fear returning to their country, the examining immigration officer is required to ask them about such fears, record information about their fear or concern, and refer them for a credible fear interview with an asylum officer.<sup>160</sup> They are provided written notice with information on the credible fear interview process.<sup>161</sup> They have a right to consult with someone, including a lawyer, prior to their interview.<sup>162</sup> The lawyer, or another “consultant,” may be present during the interview.<sup>163</sup> They have the opportunity to present evidence<sup>164</sup> and an interpreter shall be arranged if needed.<sup>165</sup> They are provided

153 USCIS Screening Guidance, *supra* note 148 at 22.

154 8 C.F.R. § 208.30(e)(7).

155 Interim Final Rule, 84 Fed. Reg. at 63,997; *see also* USCIS Screening Guidance, *supra* note 148 at 10, 15.

156 § 208.30(e)(7).

157 *Id.*

158 8 C.F.R. § 208.30(e)(7)(i)(A).

159 USCIS Screening Guidance, *supra* note 148 at 6-8.

160 8 C.F.R. § 235.3(b)(4).

161 *See id.*

162 *Id.* § 235.3(b)(4)(i) (2012); § 208.30(d)(4).

163 § 208.30(d)(4).

164 *Id.*

165 *Id.* § 208.30(d)(5).

Figure 1

- You have been inspected and determined not to be admissible to the United States. You are subject to removal proceedings as described in the documents provided to you for the removal process. Nothing in this tear sheet changes that removal process.
- You have been identified as an alien who is potentially amenable to removal to Guatemala for consideration of your asylum or other protection claim(s) in accordance with the Agreement Between the Government of the United States and the Government of Guatemala on Cooperative Regarding the Examination of Protection Claims (“Asylum Cooperative Agreement”) and section 208(a)(2)(A) of the Immigration and Nationality Act (8 U.S.C. § 1158(a)(2)(A)).
- You will be referred for an interview with a U.S. asylum officer, so a determination can be made whether you meet any exceptions to the Asylum Cooperative Agreement or section 208(a)(2)(A) of the Act, and that you may otherwise be removed to Guatemala under the terms of the agreement.
  - You may qualify for an exception to the Asylum Cooperative Agreement or section 208(a)(2)(A) if: (1) you are an unaccompanied minor; (2) you have arrived with a validly issued visa or other valid admission document, other than a transit visa issued by the United States; or you are not required to obtain a visa to the United States; or (3) it is determined in the agency’s discretion that it is in the public interest for the United States to allow you to seek asylum in the United States.
- No Established Exceptions to the Asylum Cooperative Agreement or Section 208(a)(2)(A): If you are NOT determined to meet an exception to the Asylum Cooperative Agreement or section 208(a)(2)(A), you may be removed to Guatemala pursuant to the Agreement. If you are determined to not meet an exception to the Agreement or section 208(a)(2)(A), and that you are otherwise removable under the terms of the agreement, you may not apply for asylum or other protection in the United States, but you will have access to a full and fair procedure for pursuing asylum or equivalent temporary protection in Guatemala.
- Established an Exception to the Asylum Cooperative Agreement or Section 208(a)(2)(A): If you are determined to meet an exception to the Asylum Cooperative Agreement or Section 208(a)(2)(A) or otherwise not removable to Guatemala under the terms of the agreement, you will be permitted to seek protection (including, if applicable, asylum) in the United States. You will receive more information after your interview.
- You may affirmatively state a fear of being removed to Guatemala or a fear of persecution or torture in Guatemala. If you affirmatively state a fear of removal to Guatemala, you will be afforded the appropriate process.
- If you have such a fear, please inform the immigration officer who provided you this form or any other immigration officer, or please ask to speak to a supervisor.

An excerpt of a “tear sheet” that should be given to all asylum seekers subject to the Guatemala ACA

with a written record of the decision made by the asylum officer.<sup>166</sup> Any negative decision is subject to review by an immigration judge.<sup>167</sup> The burden of proof in a credible fear interview is generous to the asylum seeker. It only requires establishing a “significant possibility” of success on the merits of a claim for asylum or withholding of removal.<sup>168</sup>

These minimal procedural safeguards in the expedited removal process are meant to ensure that the United States does not violate its *non-refoulement* obligations by returning someone to a country where they will be persecuted or tortured.<sup>169</sup> Only later does the asylum seeker have to meet a higher burden of proof, demonstrating a “well-founded fear of persecution” for a grant of asylum,<sup>170</sup> or that, if removed, it is “more likely than not” they would be persecuted for a grant of withholding of removal or tortured for protection under CAT.<sup>171</sup> The “more likely than not” standard is the highest

166 *Id.* § 208.30(e)(1).

167 *Id.* § 208.30(e)(5)(ii).

168 *Id.* § 208.30(e)(2)–(3).

169 See *Credible Fear: A Screening Mechanism in Expedited Removal*, Issue Brief, Human Rights First (Feb. 2018), [https://www.humanrightsfirst.org/sites/default/files/Credible\\_Fear\\_Feb\\_2018.pdf](https://www.humanrightsfirst.org/sites/default/files/Credible_Fear_Feb_2018.pdf).

170 *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987) (holding that a well-founded fear of persecution could be as little as a 10% chance).

171 8 C.F.R. § 208.16(c).

required standard of proof required to avoid being removed to a country where your life or freedom would be threatened on the basis of persecution or torture.<sup>172</sup>

The Interim Final Rule implementing the Guatemala ACA modifies the expedited removal process.<sup>173</sup> Now, if an asylum seeker from El Salvador or Honduras reaches the southern border of the United States and expresses a fear of persecution or torture, or fear returning to their country, instead of making a referral for a credible fear interview, there is the threshold screening to determine if they are ineligible for asylum pursuant to the Agreement.<sup>174</sup> No written account of their fear is taken.<sup>175</sup> Instead of having to present evidence of a fear of torture or persecution in Honduras or El Salvador, they must present evidence of fear or torture *in Guatemala* to avoid removal. While they are to be provided written notice that they must affirmatively tell an immigration officer of any fear of persecution or torture if they were removed to Guatemala,<sup>176</sup> they have no right to consult with a lawyer or any other person, either prior to or during the interview.<sup>177</sup> They have no right to present evidence.<sup>178</sup> They must show that it is “more likely than not” that they would be persecuted on account of a protected ground or tortured in Guatemala.<sup>179</sup> If they are unable to meet this high standard, a determination is made they are ineligible for asylum in the United States and they are removed to Guatemala.

Without the normal procedural protections available to asylum seekers in a credible fear interview, asylum seekers subject to the Guatemala ACA must meet the highest standard of proof to avoid removal to Guatemala. Proving this standard relies on individuals being aware they may be removed to Guatemala and thus put on notice of their need to assert any fear they have of being removed there. Another barrier is that asylum seekers may be unfamiliar with Guatemala. Even if they had a right to present evidence about Guatemala, they are unlikely to be able to gather it while held in immigration detention.

Instead of enjoying a generous standard of proof meant to uphold the U.S.’ obligations under the Refugee Convention and CAT to protect the right to life and right to be free of torture of those fleeing persecution and violence, asylum seekers from El Salvador and Honduras found “amenable” to the Guatemala ACA must meet the highest standard of proof with no ability to present evidence and no right to have a lawyer guide them through the process. Under the circumstances, this is an impossible standard to meet.

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172 8 C.F.R. § 208.16(b)(1)–(2).

173 Interim Final Rule, 84 Fed. Reg. at 63,997.

174 § 208.30(e)(7).

175 See *id.* (specifying that § 208.30(d)(2) and (4) does not apply).

176 *Id.* (“The alien shall be provided written notice that if he or she fears removal to the prospective receiving country because of the likelihood of persecution on account of a protected ground or torture in that country and wants the officer to determine whether it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in that country, the alien should affirmatively state to the officer such a fear of removal.”).

177 *Id.*

178 *Id.* (specifying that § 208.30(d)(2) and (4) does not apply).

179 *Id.*

## B. Implementation of the Guatemala ACA Risks Violation of Non-Refoulement Obligation

In practice, the implementation of the Agreement further deviates from the few procedural safeguards available to asylum seekers required by the implementing regulations of the Agreement. These deviations from the few procedural safeguards available to asylum seekers subject to the Guatemala ACA increase the risk asylum seekers will be removed to a country where their right to life may be threatened or their right to freedom from torture may be violated. As our analysis of the evidence gained from individuals removed to Guatemala under the Guatemala ACA demonstrates in the following sections, the entire process poses serious risks of violation of the U.S. *non-refoulement* obligation; both directly and indirectly impacting the right to life and the right to be free from torture and cruel, inhuman, or degrading treatment of many individuals and families. According to the Committee Against Torture, such danger is deemed to exist when it is “foreseeable, personal, present and real.”<sup>180</sup> The assessment must be individual,<sup>181</sup> made in accordance with due process,<sup>182</sup> and take into account all the relevant circumstances; including but not limited to, “the nature of the treatment, the sex, age and state of health and vulnerability of the victim.”<sup>183</sup> Consistent patterns of gross, flagrant or mass violations of human rights shall also be taken into account.<sup>184</sup> Protection from torture under CAT also includes violence by non-State actors, such as gangs, where the receiving State has no or only partial de facto control, or where the State is unable to prevent or counter of those none-State actors.<sup>185</sup>

To understand how immigration officials determine which individuals from Honduras and El Salvador will be sent to Guatemala, we spoke with eleven asylum seekers who had arrived in the United States and then were deported to Guatemala. Their stories often included the experiences of family members also on the journey—twenty-five people in total. We spoke to at least one member of family units representing 34% of migrants returned the week of our research. See *Section III* for details on the total number of asylum seekers returned to Guatemala during our trip.

All of the asylum seekers we spoke with confirmed that, upon arriving at the U.S. border, they affirmatively asserted their intention to apply for asylum in the United States.<sup>186</sup> Ten people, across different families, brought documents or photographs with them to prove their fear for their life in Honduras or El Salvador.<sup>187</sup> Asylum officers showed no interest in these documents.<sup>188</sup> Detention officers confiscated everything, including documentation depicting death threats and torture.<sup>189</sup>

180 U.N. Committee Against Torture General Comment 4, *supra* note 48, ¶ 11.

181 *Id.* at ¶ 13.

182 *Id.*

183 *Id.*

184 Convention Against Torture, *supra* note 6, art. 3(2).

185 See UN Committee Against Torture General Comment 4, *supra* note 48, ¶ 30.

186 See, e.g., Interview with Emilia, *supra* note 35 (responding, “We want to apply for asylum,” when asked, “what is your reason for being here?”); Interview with Damián, *supra* note 36 (asking to become a refugee).

187 See, e.g., Interview with Damián, *supra* note 36 (showing immigration officers photos, insurance documents); Interview with Emilia, *supra* note 35; Interview with Isabella, *supra* note 8 (carrying documentation of death threats against her husband); see also Interview with Ana Sofia, *supra* note 34 (stating that many people had documentation but she did not).

188 Interview with Damián, *supra* note 36 (carrying photos depicting torture); Interview with Felipa and Lucia, *supra* note 112.

189 Interview with Damián, *supra* note 36; Interview with Emilia, *supra* note 35; see also Interview with Julietta, *supra* note 34 (“Immigration took everything we had, our cell phones and our money.”); Interview with Felipe and Lucia, *supra* note 112.

Critically, the guidelines provided in the Interim Final Rule establish that there will be an “individualized threshold screening that provides an opportunity for an alien to establish fear” of persecution in Guatemala.<sup>190</sup> In practice, asylum seekers did not have an adequate opportunity to establish their fear, if they had an opportunity at all.

Notably, some asylum seekers did not know they were going to Guatemala, despite that they must be told in writing that they are being removed to Guatemala, and that they will have an opportunity in Guatemala to pursue protection claims.<sup>191</sup> Emilia did not know that she, her husband, and their two children were being sent to Guatemala in advance of arriving in Guatemala City. They were only told they were “going home.”<sup>192</sup> They had no opportunity to present or explain the reasons why their family had a fear of being removed to Guatemala, as they never spoke with an immigration official about their claim for asylum or any fear of being removed to Guatemala during the entire month they were held in immigration detention.<sup>193</sup>

Emilia and her family were not the only asylum seekers who did not understand they were being sent to Guatemala.<sup>194</sup> The asylum seekers with whom we spoke were largely unaware they were going to Guatemala. Asylum seekers were told they were “going back home”<sup>195</sup> or were not told anything at all.<sup>196</sup> Julietta told us, “I had no idea what was happening, or why I was being deported.”<sup>197</sup> Many Honduran asylum seekers thought the plane would continue past Guatemala and take them to Honduras,<sup>198</sup> or that they were going to Guatemala to pursue a claim for asylum in the United States.<sup>199</sup> Before the deportation, immigration officials took photos,<sup>200</sup> vital signs,<sup>201</sup> and fingerprints<sup>202</sup> without providing any explanation as to why. The asylum seekers were not told what was happening.<sup>203</sup> Our interview with Casa del Migrante confirmed that many asylum seekers were told they were “going home” and didn’t understand they were being sent to Guatemala, a fact that was confirmed in contemporary news reports.<sup>204</sup> This poses a serious risk to the violation of the obli-

190 Interim Final Rule, 84 Fed. Reg. at 63,994, 63,997

191 § 208.30(e)(7)(i)(A).

192 Interview with Emilia, *supra* note 35.

193 *Id.*

194 Interview with Casa del Migrante, *supra* note 19.

195 Interview with Emilia, *supra* note 36. Interview with Daniel and Gabriel, Guatemala City (January 2020) (“I understood I was going back to Honduras.”); Interview with Rosa, *supra* note 35 (“I asked where I was going, and he told me I was going to El Salvador.”).

196 Interview with Julietta, *supra* note 34; Interview with Felipe and Lucia, *supra* note 112 (learning from a stranger they were being removed to Guatemala, but not told by officials).

197 Interview with Julietta, *supra* note 34.

198 Interview with Emilia, *supra* note 35; Interview with Damián, *supra* note 36; Interview with Daniel and Gabriel, *supra* note 195.

199 Interview with Rosa, *supra* note 34.

200 Interview with Julietta, *supra* note 34.

201 Interview with Rosa, *supra* note 34.

202 Interview with Felipe and Lucia, *supra* note 112.

203 Interview with Julietta, *supra* note 34.

204 Kevin Sieff, *The U.S. is Putting Asylum Seekers on Planes to Guat. – Often Without Telling Them Where They’re Going*, WASH. POST (Jan 14, 2020, 4:21 P.M.) [https://www.washingtonpost.com/world/the\\_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1\\_story.html](https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1_story.html) (“They arrive here without being told that Guatemala is their destination.”).

gation of *non-refoulement*, as asylum seekers cannot articulate a fear of persecution or torture in Guatemala if they have no knowledge of being sent there prior to their arrival.

For those that understood they were being sent to Guatemala, our interviews revealed a lack of genuine opportunity for asylum seekers to have their protection concerns heard. During brief conversations with immigration officials,<sup>205</sup> someone they believed to be a judge,<sup>206</sup> or both,<sup>207</sup> asylum seekers were asked if they had any fear of Guatemala,<sup>208</sup> and in one instance, if they had any fear of the government in Guatemala.<sup>209</sup> However, as Julietta told us, “you can’t speak face to face with a judge, it’s only by phone.”<sup>210</sup>

Of the asylum seekers who did have a chance to speak with immigration officials about their fear of Guatemala, five asylum seekers, speaking for themselves and their families, explained that they feared being killed, tortured or exploited by gangs; the gangs operated internationally and with impunity, as the authorities consistently failed to prevent or remedy violence.<sup>211</sup> At least four asylum seekers further specifically stated that a life in Guatemala presented the same circumstances they had fled in their home countries, raising serious protection concerns.<sup>212</sup>

For example, Julietta and her daughter, in separate conversations with immigration officers, explained that they feared going to Guatemala because they feared gangs, specifically *MS-13*, would kill them.<sup>213</sup> Isabella told the official, while crying, that she could not go to Guatemala because she feared that the gangs that had threatened her family in Honduras could influence or bribe individuals in Guatemala to kill them, and the Guatemalan government would not be able to protect her.<sup>214</sup> Similarly, school-age *Damián*, who had visible scars on his body, said he did not want to go to Guatemala because it presented the same threats as Honduras. As described in *Section V, Phase 1*, *Damián* was targeted, kidnapped and tortured by *MS-13* - a gang present in Guatemala.<sup>215</sup> When *MS-13* was torturing *Damián* the perpetrators took photos that made it appear *Damián* was affiliated with the *Barrio 18* gang and disseminated these photos to all *MS-13* members in the region, including Guatemala.<sup>216</sup> *Damián* specified that both gangs would persecute him: *MS-13* because the photographs falsely identified him as a gang “member” and *Barrio 18* because it looked like he had betrayed them to *MS-13*.<sup>217</sup> The evidence *Damián* brought with him to demonstrate these fears,

205 Interview with Felipa and Lucia, *supra* note 112.

206 Interview with *Damián*, *supra* note 36; Interview with Isabella, *supra* note 8 (speaking only by phone); Interview with Julietta, *supra* note 34 (believing the person to whom she spoke by phone was a judge).

207 Interview with Felipa and Lucia, *supra* note 112; Interview with Maria Victoria, Guatemala City (January 2020).

208 See, e.g., Interview with *Damián*, *supra* note 36; Interview with Maria Victoria, *supra* note 207; Interview with Isabella, *supra* note 8; Interview with Rosa, *supra* note 34.

209 Interview with Felipe and Lucia, *supra* note 112.

210 Interview with Julietta, *supra* note 34.

211 See, e.g., Interview with Daniel and Gabriel, *supra* note 195; Interview with Julietta, *supra* note 34.

212 See e.g., Interview with Daniel and Gabriel, *supra* note 195; Interview with *Damián*, *supra* note 36; Interview with Isabella, *supra* note 8.

213 Interview with Julietta, *supra* note 34.

214 Interview with Isabella, *supra* note 8.

215 Interview with *Damián*, *supra* note 36.

216 *Id.*

217 *Id.*

including photographs and other documents, were never examined by U.S. authorities.<sup>218</sup> Damián was subsequently deported to Guatemala.<sup>219</sup>

Damián, Julietta, and Isabella’s fears highlight what is already well established: the presence of transnational, violent gangs in Guatemala;<sup>220</sup> posing threats to the right to life and the right to be free from torture and cruel, inhuman or degrading treatment of many individuals and families. However, regardless of explicitly mentioned fears and well established facts confirming high risks to essential human rights, U.S. immigration officers did not investigate these fears further or acknowledge the credibility of the asylum seekers’ claims. Rather than inquire further to determine whether asylum seekers’ fears might translate to a risk of irreparable harm in Guatemala, officials said nothing at all; failing to safeguard the essence of the *non-refoulement* obligation.<sup>221</sup> None of the asylum seekers’ accounts were investigated beyond a forty-five minute conversation, if they were investigated at all.<sup>222</sup> Asylum seekers stated they were not given adequate opportunity to explain their fears of persecution or violence in Guatemala,<sup>223</sup> and that their fears did not seem to matter in making the decision to deport them to Guatemala.<sup>224</sup> “They don’t ask you anything,” Julietta shared, “[the officials] just ask you to sign something and then deport you.”<sup>225</sup>

Even when asylum seekers expressed a fear that their life or freedom would be threatened if sent to Guatemala, it did not change the outcome. They received the following responses from immigration officials: “Whatever, you’re going to Guatemala;”<sup>226</sup> “The only option is to go to Guatemala;”<sup>227</sup> “You’re going to Guatemala;”<sup>228</sup> “We aren’t taking any more migrants.”<sup>229</sup> During these conversations, asylum seekers felt it was clear that there was no “opportunity for anything, nothing.”<sup>230</sup> It was clear to asylum seekers that there was no path to contest the dismissive conversation.<sup>231</sup>

U.S. officials made the decision that the “more likely than not” threshold was not met for each returned asylum seeker. Officials made this determination despite failing to review all available evidence, a lack of follow-up questions, and the well-documented literature establishing the presence of violent, transnational gangs.<sup>232</sup> Furthermore, none of the asylum seekers interviewed said that the purpose or implications of their conversation with the immigration official or the requisite

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218 *Id.*

219 *Id.*

220 See *supra* Section V, Phase 1, Reasons Individuals and Families Seek Asylum in the United States; UNHCR *Eligibility Guidelines for Honduras*, *supra* note 118, pt. III(A)(6).

221 See, e.g., Interview with Julietta, *supra* note 34.

222 Interview with Maria Victoria, *supra* note 207.

223 See, e.g., Interview with Maria Victoria, *supra* note 207; Interview with Daniel and Gabriel, *supra* note 195; Interview with Damián, *supra* note 36.

224 See e.g., Interview with Julietta, *supra* note 34.

225 *Id.*

226 Interview with Isabella, *supra* note 8.

227 Interview with Julietta, *supra* note 34; Interview with Daniel and Gabriel, *supra* note 195.

228 Interview with Isabella, *supra* note 8.

229 Interview with Maria Victoria, *supra* note 207.

230 Interview with Ana Sofia, *supra* note 34; see also Interview with Rosa, *supra* note 34 (stating she knew she could not ask for anything or call her husband).

231 See, e.g., Interview with Maria Victoria, *supra* note 207 (refusing to contest the decision because she felt that she was given no right to do so); Interview with Rosa, *supra* note 34 (“I know I couldn’t go against them.”).

232 See, e.g., Boerman & Golob, *supra* note 111; Ahmed, *supra* note 111; Motlagh, *supra* note 111; InSight Crime and the Center for Latin American & Latino Studies, *supra* note 111; Fogelbach, *supra* note 111.



threshold was explained to them.<sup>233</sup> There are no known guidelines on how the “more likely than not” standard could be met in this context.

On top of failures to consider the asylum seekers’ real and substantial protection concerns, the process to assess risks of essential human rights violations if the individual were to be returned to Guatemala lacks serious due process components. No one we spoke with received legal counsel or other assistance throughout this process.<sup>234</sup> Asylum seekers were given different information regarding access to counsel. Emilia was told she did have the right to legal assistance when she first arrived in the U.S., but was not provided any contact information or method of contacting assistance and never spoke to an immigration official again before being sent to Guatemala without her prior knowledge.<sup>235</sup> In contrast, Maria Victoria asked for a lawyer and was told she could not get one.<sup>236</sup> Finally, the decision on asylum claims is not appealable under U.S. law,<sup>237</sup> which raises additional concerns regarding the lack of essential due process components.

The blatant disregard for protection concerns explicitly mentioned by asylum seekers raises significant questions concerning the United States’ commitment to uphold its obligation of *non-refoulement*. Individuals subject to the Guatemala ACA face serious risks to their lives and freedom. These risks are foreseeable given the U.S. Government’s acknowledgement of the transnational nature of criminal organizations in the region.<sup>238</sup> The U.S. neglects and endangers the human rights of numerous individuals and families by returning asylum seekers to Guatemala without adequate individual assessments of protection claims, if they are conducted at all.

### C. Deliberate Manipulation and Cruelty, Increasing the Difficulty in Articulating Claims of Fear

#### 1. PRESSED TO SIGN FORMS WITHOUT INFORMATION

The INA and the Interim Final Rule require that asylum seekers be given written notice explaining that they should affirmatively assert a fear of removal to Guatemala if they have one.<sup>239</sup> Of the eleven asylum seekers we spoke with, only one confirmed she received the required written notice, or “tear sheet.”<sup>240</sup> Such notice, if distributed to other asylum seekers, was not done in a manner they could understand.

After a brief opportunity to explain a fear of Guatemala, if there was an opportunity at all, asylum seekers were asked or told to sign papers.<sup>241</sup> They were woken up in the middle of the night—often

233 See, e.g., Interview with Julietta, *supra* note 34.

234 See, e.g., Interview with Rosa, *supra* note 34 (specifically mentioning she had no lawyer, no money, and no one helping her throughout her time in detention).

235 Interview with Emilia, *supra* note 35.

236 Interview with Maria Victoria, *supra* note 207.

237 8 U.S.C. 1158(a)(3).

238 See, e.g., U.S. DEP’T OF STATE, Bureau of Western Hemisphere Aff., Strategy for Central America: Report to Congress 1 (2018); CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 3 (2016); H.R. 2619, 115th Cong. (2019) (recognizing gang violence as a driver of migration from the Northern Triangle).

239 8 C.F.R. § 208.30(e)(7); Interim Final Rule, 84 Fed. Reg. at 63,997.

240 Interview with Rosa, *supra* note 34.

241 See e.g., Interview with Maria Victoria, *supra* note 207.

at 2:00 a.m. —to complete the paperwork.<sup>242</sup> Immigration officials said, “come and sign” and did not provide any more explanation.<sup>243</sup> During the paperwork process, officials took photos of asylum seekers and their children without explanation.<sup>244</sup> All but one person<sup>245</sup> we spoke with reported that they did not know the contents of the documents; one woman reported that she does not read,<sup>246</sup> and others stated that the document was in English, which they do not speak or read.<sup>247</sup> Some asylum seekers did not know the content of the documents because, when they asked, they received varied, misleading, or false responses from officials, often with the effect of coercing asylum seekers into signing the paperwork.

Officers told Rosa that the document was an application for asylum in the United States and that, if it was successful, she would wait somewhere else but receive asylum in the United States.<sup>248</sup> She was later told that the paper was related to her removal from the United States and deportation to Guatemala, but she left the United States believing she would pursue her claim for asylum in the United States while in Guatemala.<sup>249</sup>

Isabella was told by an official who covered the form with his arm to obscure it from her vision that, if she signed the form, she could speak with a judge.<sup>250</sup> She signed the form on this understanding.<sup>251</sup> She never spoke to a judge and was deported to Guatemala shortly after, despite expressing a fear of being transferred.<sup>252</sup>

Similarly, when Felipe and Lucia asked about the contents of the paper they were being asked to sign, the officer responded that he could not tell them.<sup>253</sup> The officer instead told them that they would be going to a shelter. Lucia was never told she was being deported until another detainee informed her.<sup>254</sup>

Asylum seekers presented paperwork to us that indicated they had signed a Notice and Order of Expedited Removal.<sup>255</sup> By signing this form, the asylum seekers, knowingly or unknowingly, acknowledged that they illegally entered the United States and are inadmissible for reentry for a specified period of time, of five years or more.<sup>256</sup>

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242 Interview with Emilia, *supra* note 35 (asked to sign paperwork at 10:00 p.m.); Interview with Julietta, *supra* note 34 (woken up at about 2:00 a.m. to sign documentation); Interview with Rosa, *supra* note 34 (woken from a deep sleep at about 2:00 a.m. and told to sign papers); Interview with Felipa and Lucia, *supra* note 112 (removed from tents at 2 a.m. or 3 a.m. to sign paperwork).

243 Interview with Rosa, *supra* note 34 (“venga y firma”).

244 Interview with Julietta, *supra* note 34.

245 See, e.g., *id.*

246 *Id.*

247 Interview with Ana Sofia, *supra* note 34; Interview with Felipa and Lucia, *supra* note 112; Interview with Rosa, *supra* note 34.

248 Interview with Rosa, *supra* note 34.

249 *Id.*

250 Interview with Isabella, *supra* note 8.

251 *Id.*

252 *Id.*

253 Interview with Felipe and Lucia, *supra* note 112.

254 *Id.*

255 See, e.g., Interview with Julietta, *supra* note 34; Interview with Rosa, *supra* note 34.

256 Interview with Julietta, *supra* note 34.

## 2. DELIBERATE CRUELTY

Many of the asylum seekers we spoke with reported that the entire process was made more difficult because of how immigration officials treated asylum seekers and their families.<sup>257</sup> The purpose of the fact-finding trip was not to investigate detention conditions or policies at the U.S. border. However, the inhuman treatment asylum seekers received while in United States' custody cannot be ignored, especially because it poses a serious risk to the right to be free from torture and cruel, inhuman, or degrading treatment.<sup>258</sup>

**Families are separated.** Asylum seekers we spoke with confirmed what various reports<sup>259</sup> have made clear: there is still family separation at the U.S. border. Families are separated within the detention facilities and are not permitted to see or speak to one another despite requests.<sup>260</sup> Emilia was detained with her toddler, but was separated from her husband and her older daughter for the month they were detained.<sup>261</sup> Damián, a minor, was separated from his parents.<sup>262</sup>

Even more troubling, some families are separated permanently. Ana Sofia traveled with her young niece and nephew, nine and eleven years old, after her sister's murder.<sup>263</sup> Ana Sofia had promised her sister, the children's mother, that she would help the children escape the gang violence in El Salvador, which had killed all five of their siblings.<sup>264</sup> U.S. officials took Ana Sofia's niece and nephew from her upon their arrival at the U.S. border. She was never given more information about what happened to them, despite asking.<sup>265</sup> She was deported to Guatemala without her niece and nephew.

**Detention conditions are inhumane.** Asylum seekers confirmed many of the reports of inadequate and inhumane conditions in immigration detention,<sup>266</sup> including pervasive sickness that went untreated, routine sleep deprivation, unacceptable sanitation and hygiene, and lack of adequate food.<sup>267</sup> Emilia stated, "we went through hell living in that place with no idea what our rights were."<sup>268</sup>

Asylum seekers' reports of detention conditions suggested intentional sleep deprivation. Damián told us that "they [the guards] woke us up really early and afterwards wouldn't let us sleep. They were changing us from cell to cell and making us go places. They didn't let us sleep during the daytime."<sup>269</sup> Rosa described similar conditions.

257 Interview with Daniel and Gabriel, *supra* note 195.

258 Convention Against Torture, *supra* note 6 at 113; ICCPR *supra* note 37, art. 7.

259 See, e.g., Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME (Oct. 25, 2019), <https://time.com/5678313/trump-administration-family-separation-lawsuits/>; Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump's Negligence*, NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence>.

260 See, e.g., Interview with Emilia, *supra* note 35; Interview with Damián, *supra* note 36.

261 Interview with Emilia, *supra* note 35.

262 Interview with Damián, *supra* note 36.

263 Interview with Ana Sofia, *supra* note 34.

264 *Id.*

265 *Id.*

266 See, e.g., *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, ACLU *et. al.* (2018), [https://www.aclu.org/sites/default/files/field\\_document/coderedreportdeathsicedetention.pdf](https://www.aclu.org/sites/default/files/field_document/coderedreportdeathsicedetention.pdf).

267 See, e.g., Interview with Emilia, *supra* note 35; Interview with Rosa, *supra* note 34; Interview with Maria Victoria, *supra* note 207.

268 Interview with Emilia, *supra* note 35.

269 Interview with Damián, *supra* note 36; see also Interview with Rosa, *supra* note 34 (confirming the lights were on for five days, including at night time).

“They gave me a little mattress. The food was instant soup and water. The same thing was for dinner, and the same thing was given to us at 10 p.m. It was freezing cold. The lights were on, day and night. They never turned them off. From Saturday to Thursday, the lights were on. The little kids couldn’t sleep. We wanted to sleep but because of the light we could not sleep for five days. People just get one thin blanket. The people leaving detention leave their blankets behind to try to help each other and so others can have them. So we can sleep and not be so cold.”<sup>270</sup>

Many people highlighted pervasive sickness, a lack of access to medical treatment, and conditions that exacerbated existing health issues.<sup>271</sup> Maria Victoria, six months pregnant, and her young son arrived in Guatemala visibly ill. Maria Victoria had a chest cough and swollen feet, and her son had a runny nose and cough. Maria Victoria explained that she asked to see a doctor to relieve symptoms related to their illness and her pregnancy: “I spoke to them, but they did nothing to help.”<sup>272</sup> She said, “We slept on the floor. They didn’t give us any clothing. Children were not allowed to play. The children got sick. We were in detention for seventeen days.”<sup>273</sup> Emilia told us she was separated from her daughter, who developed a flu so serious she was hospitalized for six days.<sup>274</sup> Julietta’s daughter also developed the flu.<sup>275</sup>

The sickness and exhaustion is exacerbated by inadequate food and lack of basic hygiene. Damián explained to us, “[the guards] were really strict and there was one guy who wouldn’t let us bathe for five days and he got really weird when we would go to bathe.”<sup>276</sup> Emilia told us that they were fed rotten food, food that had hair in it, and ate frozen burritos everyday for one month.<sup>277</sup> She explained that the salt content was so strong their mouths became chapped and almost burned.<sup>278</sup> Emilia reported that she and her husband, who is diabetic, each lost a significant amount of weight.<sup>279</sup> No accommodations were made for babies or young children.<sup>280</sup> Emilia told us that “even the baby only got burritos and chips... [they] would not give the toddler milk or a bottle.”<sup>281</sup>

**The transfer process is inhuman and degrading.** In a continuation of the U.S. approach to the Guatemala ACA’s implementation, individuals are transferred to Guatemala by a process that is unresponsive to their individual needs and circumstances.

The transfer process itself under the Guatemala ACA dehumanizes families, men, women and children. Many individuals described their fear and confusion at being treated like criminals.<sup>282</sup> The

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270 Interview with Rosa, *supra* note 34.

271 See, e.g., Interview with Emilia, *supra* note 35; Interview with Maria Victoria, *supra* note 207.

272 Interview with Maria Victoria, *supra* note 207.

273 *Id.*

274 Interview with Emilia, *supra* note 35.

275 Interview with Julietta, *supra* note 34.

276 Interview with Damián, *supra* note 36.

277 Interview with Emilia, *supra* note 35.

278 *Id.*

279 *Id.* (explaining that she lost 20 to 30 pounds of weight and her husband lost a significant amount of weight).

280 *Id.*

281 *Id.*

282 Interview with Rosa, *supra* note 34; Interview with Emilia, *supra* note 35; Interview with Isabella, *supra* note 8.

transfer often begins between 2 a.m. and 3 a.m.<sup>283</sup> Asylum seekers then wait up to two hours for a bus to collect them.<sup>284</sup> Once on the airplane, the instructions provided before takeoff are reportedly only in English.<sup>285</sup> On the flight, which for some is their first time on a plane,<sup>286</sup> asylum seekers who travel without their families are chained around their wrists, ankles and waist.<sup>287</sup> Families with babies and small children were not offered any specific care (beyond not being handcuffed).<sup>288</sup> Individuals and families also reported that they did not eat, or barely ate, during the transfer process because the food provided on the plane, a “frozen ham sandwich,”<sup>289</sup> was inedible.<sup>290</sup> If they had to use the bathroom, U.S. officials un-cuffed just one hand and did not afford them privacy, keeping the door propped open with their fingers to “keep watch.”<sup>291</sup> Asylum seekers transferred to Guatemala commented on the careless and degrading way in which U.S. officials treated them, which made them feel as if they were not “worth anything.”<sup>292</sup>

These conditions of detention and transfer mean asylum seekers arrive in Guatemala exhausted and disoriented. Asylum seekers reported this made it more difficult to understand how they might apply for asylum in Guatemala. Additionally, as included in the right to be free from torture, detained migrants are guaranteed the right to humane treatment.<sup>293</sup> The right to be free from torture, cruel, inhuman, or degrading treatment goes beyond physical pain, and includes “acts that cause mental suffering. . . .”<sup>294</sup> Some argue that humane treatment includes adequate conditions, food, medicine and protection from violence.<sup>295</sup> The conditions asylum seekers are subjected to while in detention in the U.S., such as family separation, lack of medical treatment, inadequate food, and sleep deprivation, suggest the imposition of inhuman or degrading treatment upon asylum seekers, and therefore a violation of this right.

283 Interview with Rosa, *supra* note 34 (stating they came for her at 2 a.m.); Interview with Felipe and Lucia, *supra* note 112 (stating that they waited for a bus around 2 a.m. or 3 a.m.); Interview with Damián, *supra* note 36 (“They got us out of the tents and had us sleep in a bus, probably starting around 3 or 4 in the morning.”).

284 Interview with Rosa, *supra* note 34.

285 *Id.*

286 *Id.* (stating that it was not her first time on an airplane but it was for many people).

287 Interview with Felipe and Lucia, *supra* note 112.

288 Interview with Isabella, *supra* note 8.

289 Interview with Maria Victoria, *supra* note 207; Interview with Casa del Migrante, *supra* note 19; Interview with Felipe and Lucia, *supra* note 112; Interview with Rosa, *supra* note 34.

290 Interview with Ana Sofia, *supra* note 34; Interview with Rosa, *supra* note 34; Interview with Isabella, *supra* note 8.

291 Interview with Felipe and Lucia, *supra* note 112; Interview with Daniel and Gabriel, *supra* note 195; Interview with Isabella, *supra* note 8; Interview with Damián, *supra* note 36; Interview with Maria Victoria, *supra* note 207.

292 Interview with Isabella, *supra* note 8; Interview with Rosa, *supra* note 34.

293 Convention Against Torture, *supra* note 6 at 113; ICCPR, *supra* note 37, art. 7.

294 U.N. Human Rights Committee, General Comment No. 20 (1992) concerning Article 7 of the ICCPR Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (Mar. 10, 1992).

295 U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, 11, U.N. Doc. CMW/C/GC/2 (Aug. 28, 2013).

## D. Findings regarding Fear Assessments and Detention in the U.S.

- *Requiring asylum seekers to affirmatively assert and prove that it is “more likely than not” they would be tortured or persecuted in Guatemala is too high a standard for a threshold inquiry. It imposes a heavy burden on asylum seekers that is exceedingly difficult for them to meet without access to a lawyer, the opportunity to present evidence, or knowledge of Guatemala. The required individualized assessment does not meet due process requirements, increasing the risk of removing asylum seekers to a place where they may face violations of their right to life and right to be free from torture. This standard fails to adequately address the protection concerns of asylum seekers being removed to a third country that is potentially not safe for them, in violation of the obligation of non-refoulement.*
- *The current implementation of the Guatemala ACA violates the limited procedural safeguards required by the Interim Final Rule. Asylum seekers are deprived of their opportunity to express any fear of being removed, further contributing to refoulement. In violation of the Interim Final Rule:*
  - » *Some asylum seekers are not being told that they are going to Guatemala, depriving them of any opportunity to express a fear of being sent to Guatemala.*
  - » *Not all asylum seekers are given written notice explaining that they need to affirmatively assert a fear of removal to Guatemala.*
  - » *Not all asylum seekers are informed they can pursue an asylum claim in Guatemala.*
  - » *Some asylum seekers are given misinformation or misled about the process of removal.*
  - » *Not all asylum seekers are interviewed by an asylum officer.*
- *Asylum seekers confirmed many of the widely reported problematic conditions in U.S. immigration detention,<sup>296</sup> including untreated sickness, sleep deprivation, and lack of adequate food. Asylum seekers subject to the Guatemala ACA reported that these conditions made it harder for them to understand their rights and the process, further increasing the difficulty of affirmatively articulating a fear of being removed to Guatemala and meeting the “more likely than not” standard. This makes it more likely they will be removed to Guatemala despite their fear of being sent there, increasing the risk of refoulement.*
- *Regarding the process for transferring asylum seekers from the U.S. to Guatemala, asylum seekers reported that it made them feel as if they are criminals and is unnecessarily dehumanizing and cruel, such that it undermines their ability to seek protection when they arrive in Guatemala.*

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296 Other reports have extensively documented how detention conditions may violate the right to be free from torture, or cruel, inhuman or degrading treatment. See e.g., AMNESTY INT'L, USA: YOU DON'T HAVE ANY RIGHTS HERE: ILLEGAL PUSHBACKS, ARBITRARY DETENTION & ILL TREATMENT OF ASYLUM-SEEKERS IN THE UNITED STATES (2018), <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

## Phase 3

## Arrival in Guatemala

*Maria Victoria arrived in Guatemala barefoot and six-months pregnant. Her own shoes had been thrown out in U.S. detention and her swollen feet had broken through the shoes provided to her. After getting off the plane in Guatemala, officials gave her two options. She could "voluntarily return" to her home country, Honduras, or stay in Guatemala. If she returned to Honduras, the officials told her, she would receive a free ride to the Honduran border in a few days. If she decided to stay, she would have seventy-two hours to leave Guatemala. She was given no information about asylum, and when she asked, she was told it "would be a lot of paperwork." She decided to return to Honduras.*

*"That's the only option I have at this point," she told us. She had sought asylum in the U.S. fleeing her domestic abuser, and she was afraid to go back to Honduras. She relayed, "it's the same here [in Guatemala] because it is close. If I stay here, he might find me." When Maria Victoria goes back to Honduras, she doesn't plan on staying there. She hopes to seek asylum again, this time in Spain.*

—Maria Victoria<sup>297</sup>

### A. The Rights of Asylum Seekers upon Arrival and the Obligations of a "Safe Third Country"

Safeguarding the important rights described in *Section IV*, including the right to life and the right to be free from persecution and torture, hinges on asylum seekers, like Maria Victoria, being able to access international protection. The Guatemala ACA itself reaffirms the obligations of both the U.S. and Guatemala to "provide protection to refugees who meet the requirements and who are physically in their respective territories" as required under the Refugee Convention and its 1967 Protocol.<sup>298</sup> However, a State cannot simply discharge its international protection obligations by physically moving asylum seekers out of its territory. As acknowledged in U.S. law governing STCAs<sup>299</sup> and stated in the Guatemala ACA, "the distribution of responsibility for requests for protection must guarantee in practice, that people in need of protection be identified, and that violations of the basic principle of *non-refoulement* be avoided, and, [that] each applicant... [has] access to a full and fair procedure for the determination of their claim."<sup>300</sup>

297 Interview with Maria Victoria, *supra* note 207.

298 Guatemala ACA, *supra* note 22, pmbl. para. 6.

299 8 U.S.C. § 1158(a)(2)(A).

300 Guatemala ACA, *supra* note 22, pmbl. para. 6.

The obligation of *non-refoulement* encompasses the obligation not to subject asylum seekers to chain *refoulement*. The Guatemala ACA reflects this aspect of the obligation of *non-refoulement* by providing in Article 3 that “Guatemala will not return or expel applicants for asylum in Guatemala.”<sup>301</sup> This provision in the Guatemala ACA acknowledges the U.S.’ obligation to “protect persons from being transferred to a State which may not itself threaten the individual, but which would not effectively protect the person against onward transfer in violation of the principle of *non-refoulement* (indirect, chain or secondary *refoulement*).”<sup>302</sup> The obligation to ensure individuals are not subject to chain *refoulement* is reflected in the INA requirement that asylum seekers transferred to Guatemala have access to a full and fair asylum system.<sup>303</sup> As such, there is a relationship between State obligations to provide access to a full and fair asylum system and avoiding *refoulement* in violation of Article 33 of the Refugee Convention,<sup>304</sup> Article 3 of Convention Against Torture,<sup>305</sup> as well as the INA’s requirements for a STCA.<sup>306</sup>

The obligation in Article 3 of the Guatemala ACA to not *refoule* an asylum seeker continues “unless the application is abandoned by the applicant or is formally rejected through an administrative decision.”<sup>307</sup> Typically, if an asylum seeker chooses to return to their country of origin, they abandon or terminate their asylum claim.<sup>308</sup> This is because, on its face, if the asylum seeker “voluntarily returns,” the government interprets this action to indicate that the asylum seeker no longer fears persecution in their country of origin.<sup>309</sup> Voluntary repatriation is also recognized as a durable solution, discussed in more detail in *Section V, Phase 4, Subsection C(3)*, below.

However, if the asylum seeker only returns to his/her country of origin as a result of pressure, coercion, fear, or lack of access to a system to determine their claim for protection, this return is not voluntary, and is therefore not an indication that the initial fear of persecution has been abandoned.<sup>310</sup> Rather, it is an indication of an equal or greater fear in their present country, and strips the individual of any true choice to seek asylum or return.<sup>311</sup>

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301 *Id.*, art. 3.

302 Rodenhäuser, *supra* note 52.

303 See Interim Final Rule, 84 Fed. Reg. at 63,997 (“Refugees may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection.”).

304 Refugee Convention, *supra* note 5, art.33(1); Refugee Protocol, *supra* note 27.

305 Convention Against Torture, *supra* note 6, art. 3 (“No State Party shall expel, return 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.”).

306 § 1158(a)(2)(A).

307 Guatemala ACA, *supra* note 22, art. 3.

308 § 1158(c)(2).

309 DEP’T OF HOMELAND SEC., Fact Sheet: Traveling Outside the United States as an Asylum Applicant, an Asylee, or a Lawful Permanent Resident Who Obtained Such Status Based on Asylum Status (2006).

310 U.N. OFF. OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Expert Meeting on Protecting the Human Rights of Migrants in the Context of Return* (Mar. 6, 2018), <https://www.ohchr.org/Documents/Issues/Migration/Return/InformalSummary.pdf> (“Regarding voluntary return, it was noted that migrants should have access to free, prior, and informed consent, and that when there is evidence of coercion or threat—for example, inadequate reception conditions, withdrawal of social benefits, or prolonged detention—voluntariness will not be present.”).

311 *Id.*



**B. “Welcome to Guatemala:” Utilizing Destabilization to Incentivize Return**

Asylum seekers transferred under the Guatemala ACA arrive in Guatemala City’s La Aurora Airport in a section operated by the Guatemalan military, separate from the commercial terminal.<sup>312</sup> Most planes arrive from Houston, Brownsville, Miami, and El Paso.<sup>313</sup> The Guatemalan government receives limited information regarding the demographics of returnees until the plane arrives.<sup>314</sup> Officers from the U.S. Immigration and Customs Enforcement (ICE) send information on the number of planes one or two days prior to arrival.<sup>315</sup> A few hours before the flight lands, Guatemala’s General Directorate of Migration (GDM)<sup>316</sup> is given the number of people on the plane, but it does not know the demographics of those returned until they land.<sup>317</sup> According to GDM, upon arrival, returned Guatemalans are taken off the plane first, with women and minors receiving priority.<sup>318</sup> Next, those returned under the Guatemala ACA are taken off the plane.<sup>319</sup>



The military section of La Aurora Airport, where asylum seekers transferred under the Guatemala ACA arrive

Asylum seekers disembark the plane in Guatemala confused,<sup>320</sup> disoriented,<sup>321</sup> exhausted,<sup>322</sup> hungry,<sup>323</sup> and often unwell<sup>324</sup> following their detention in the United States and transfer to Guatemala commencing in the early hours of the morning.<sup>325</sup> Asylum seekers are handed a plastic bag, marked with their names and country of origin and containing the possessions confiscated from them upon their arrival in the United States.<sup>326</sup> Many are discovering in real time they have been transferred to Guatemala.<sup>327</sup>

312 Report on Airport Observations and Reflections, Guatemala City (January 2020).  
 313 Interview with the General Directorate of Migration, Guatemala City (January 2020).  
 314 *Id.*  
 315 Interview with the General Directorate of Migration, *supra* note 313.  
 316 Now the Migration Institute. Código de Migración, *infra* note 390, art. 243.  
 317 *Id.*  
 318 *Id.*  
 319 *Id.*  
 320 Interview with Isabella, *supra* note 8 (stating that she thought she was coming to Guatemala to see a judge about her asylum application in the United States).  
 321 Interview with Rosa, *supra* note 34 (told she was returning to her country of origin); Interview with Emilia, *supra* note 35; Interview with Felipe and Lucia, *supra* note 112 (saying that she had only been told by another detainee, not an official, that she was going to Guatemala.).  
 322 Interview with Casa del Migrante, *supra* note 19.  
 323 Interview with Isabella, *supra* note 8 (noting that a woman had told officials that she was hungry while on the plane).  
 324 Interview with Isabella, *supra* note 8 (arrived in Guatemala with flu and cough symptoms); Interview with Felipe and Lucia, *supra* note 112 (arrived in Guatemala with severe headache and was denied medication while on the plane); Interview with Maria Victoria, *supra* note 207 (arrived in Guatemala sick, with no shoes, and six months pregnant).  
 325 Interview with Emilia, *supra* note 35; Interview with Daniel and Gabriel, *supra* note 195; Interview with Isabella, *supra* note 8.  
 326 Interview with the General Directorate of Migration, *supra* note 313.  
 327 Interview with IOM, Guatemala City (January 2020); Interview with Rosa, *supra* note 34 (told she was returning to her country of origin); Interview with Emilia, *supra* note 35 (learning that she was in Guatemala only upon arriving at the Guatemala City airport).

Next, asylum seekers are taken to a separate room in the airport, not accessible to civil society. Outside, in the main airport reception area, some civil society actors wait to provide services, though many have specialized cohorts in mind, such as returning Guatemalan migrants and unaccompanied migrant children.<sup>328</sup> For example, Te Conecta, run by volunteers and without government funding, provides training and connects returned Guatemalans to work opportunities.<sup>329</sup> Once the arrivals of the Guatemalan returnees have been processed, GDM registers the non-Guatemalan ACA returnees and delivers a short verbal briefing.<sup>330</sup> The International Organization for Migration (IOM) indicated that they understand asylum seekers are presented with two options and told they must make a choice within seventy-two hours: the asylum seekers may either indicate that they would like to seek asylum in Guatemala, or they may return to their home country free of charge with the assistance of the IOM.<sup>331</sup> The Ombudsman, which through a consultant collects information related to the Guatemala ACA transfer process, noted that “when someone arrives the airport they indicate that they want to file for asylum [to] people present from the International Office of Migratory Relations.”<sup>332</sup>

Asylum seekers arriving in Guatemala reported that their physical and mental state, as well as the disorientation and confusion they felt upon their arrival, made it difficult to meaningfully understand and consider their options when presented. It is likely that asylum seekers might struggle to recall the details of a brief verbal briefing they receive while disoriented and exhausted.<sup>333</sup> When Rosa, an asylum seeker from El Salvador, arrived in Guatemala, her treatment in detention in the U.S. still weighed on her.<sup>334</sup> Rosa said that even if she might have been safer in Guatemala, she was not in a position to immediately make a decision about whether to apply for asylum.<sup>335</sup> She would first return to her home country “to recover” from her treatment in U.S. detention (referring specifically to the inadequate food she was given in detention).<sup>336</sup> To ask individuals to make a significant decision for

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328 See Interview with Casa del Migrante, *supra* note 19. As of January 2020, certain governmental actors and civil society organizations wait at the airport in anticipation of planes of returned migrants. From the government: the Ministry of Foreign Relations, which provides snacks and a bottle of water; the Ministry of Social Well-being, which helps to receive unaccompanied Guatemalan minors; the Ministry of Public Health; the Ministry of Labor; the Department of Huehuetenago, which used to but no longer supplies transport; the National Registry of Persons, which provides Guatemalan identification cards to Guatemalans; and Procuraduría General de la Nación (Attorney General office). From civil society, in addition to Casa del Migrante: FLACSO helps returning migrants by offering phone calls and Te Conecta connects returning Guatemalans with job opportunities. See also Interview with Te Conecta, Guatemala City (January 2020) (describing how other organizations-- Association of Returned Guatemalans; local police; CONAMIGUA; and the GDM, who registers returnees and maintains the legal registry -- also generally wait at the airport in anticipation of planes of returned migrants and asylum seekers.).

329 Interview with Te Conecta, *supra* note 328.

330 Interview with IOM, *supra* note 327.

331 *Id.*

332 Interview with Ernesto Archilla, Consultant for the Office of the Ombudsman, Guatemala City (January 2020) (noting if asylum seekers wish to apply for asylum later they may do so).

333 See, e.g., J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 *Dialogues Clin. Neurosci.* 445, 461 (2006) (describing preclinical and clinical studies that have shown alterations in memory function following traumatic stress); see also M.E. Stepan et al., *Effects of Sleep Deprivation on Procedural Errors*, 148 *J. OF EXPERIMENTAL PSYCHOLOGY* 1828, 1833 (2019) (describing study results that sleep-deprived individuals should not perform procedural tasks that require memory maintenance of task-relevant information).

334 Interview with Rosa, *supra* note 34.

335 *Id.*

336 *Id.*

them and their family under these conditions and generally with no prior notice stacks the weight on the scale for the asylum seekers to return to their home country. "It's an expulsion, they're already disoriented. It's a pressure tactic. They've been through a traumatic situation and then they have to make this choice of whether to stay or to go [once they arrive in Guatemala]." <sup>337</sup>

### C. Immigration Officials Place Another Weight on the Scale toward Return

The way that the Guatemalan migration officials present information to arriving asylum seekers left many asylum seekers with the distinct impression that applying for asylum in Guatemala was not an available option. <sup>338</sup> Rather, many asylum seekers saw two options: return to their home country for free with the IOM, or, if they decide to return after seventy-two hours, pay their own way home. <sup>339</sup> Maria Victoria shared, "they gave no information about asylum here. I asked and they told me there would be a lot of paperwork. We are all returning." <sup>340</sup> A staff member from Casa del Migrante told us "the asylum door closed the minute they landed in Guatemala." <sup>341</sup> Based on the accounts of asylum seekers arriving at Casa del Migrante, officials at the airport make it "very clear" that asylum seekers have seventy-two hours to decide, or else they become "illegals." <sup>342</sup>

At the airport, asylum seekers transferred to Guatemala are given a "voluntary return" sheet that they may sign if they wish to return to their home country, but are given no written documentation regarding their right to asylum or how to apply. <sup>343</sup> When Damián arrived in Guatemala, officials emphasized to him that he would have to figure out the process for applying for asylum on his own, that he wasn't going to receive any money or support if he wanted to seek asylum, and that it was left to each individual as to what they would choose to do. <sup>344</sup> Instead, if Damián wanted to know any additional information about asylum, he was told he could go to Casa del Migrante, the non-governmental shelter for migrants, and that they might provide some support or guidance. <sup>345</sup>

The way that the options for asylum seekers are framed by officials upon arrival lead asylum seekers to believe the only feasible next step available to them is to return to their home country. When asked if she considered her decision to return to Honduras to be voluntary, Maria Victoria did not hesitate in her response: "No, I don't feel like it is voluntary. That's the only option I have at this point." <sup>346</sup>

<sup>337</sup> Interview with Casa del Migrante, *supra* note 19.

<sup>338</sup> See, e.g. Interview with Maria Victoria, *supra* note 207.

<sup>339</sup> See, e.g. *id.* However, some asylum seekers transferred under the Guatemala ACA do not know they can apply for asylum in Guatemala. Interview with Casa del Migrante, *supra* note 19 ("Some people know when they get [to Casa del Migrante], but other people hear first from Casa del Migrante.").

<sup>340</sup> Interview with Maria Victoria, *supra* note 207.

<sup>341</sup> Interview with Casa del Migrante, *supra* note 19.

<sup>342</sup> *Id.*

<sup>343</sup> Interview with Rosa, *supra* note 34.

<sup>344</sup> Interview with Damián, *supra* note 36.

<sup>345</sup> *Id.*

<sup>346</sup> Interview with Maria Victoria, *supra* note 207.

## D. Impossible Choice: Fear of the Familiar and Fear of the Unknown

According to Guatemala's General Directorate of Migration, out of the ninety-seven individuals who had been returned to Guatemala under the Agreement as of January 2020, only six had applied for asylum, and only one continued to pursue their claim.<sup>347</sup> This information was contradicted by the lawyers at Pastoral de Movilidad Humana (PMH) working with the six asylum seekers who had applied for asylum in Guatemala. When we spoke with PMH, they said they had no reason to believe that any of the six individuals had abandoned their claims for asylum and were surprised to hear that had been reported in the news.<sup>348</sup> They confirmed the asylum seekers had completed all of the necessary steps required at that point in the process.<sup>349</sup> Not enough time had passed for their applications to be considered to be abandoned through neglect, and while it was possible they had taken affirmative steps to withdraw their application, the lawyers at PMH thought this to be unlikely, particularly as they had just met with two of the applicants the day before our interview.<sup>350</sup> This raises serious concerns that even the small number of applicants for asylum in Guatemala are being pushed out of the system, left with no choice but to return home. The process for asylum seekers pursuing a claim in Guatemala is discussed in more detail in *Section V, Phase 4*, below.

The asylum seekers we spoke to who had chosen to return to their home countries expressed to us that it was not for lack of fear, but because of what they felt was a lack of choice.<sup>351</sup> Once transferred to Guatemala, there was no substantive choice to stay to seek asylum as, in Guatemala, they have equal or greater fears as in their country of origin.<sup>352</sup> As individuals and families who left their home to seek asylum protections, their transfer to a State with the same risks moots the core purpose of these protections.

Damián said that he chose to return to his home country because he knew that gangs in Guatemala would target him, he was unfamiliar with Guatemala, and had no family there.<sup>353</sup> "It is worse [in Guatemala]," he said, "because they require you to kill people, and if you don't do it they will kill my mother or kill my family."<sup>354</sup> Prior to her removal to Guatemala, Isabella told U.S. immigration officials, "If you send me to Guatemala, you might as well send me to Honduras, as either way we are going to be killed."<sup>355</sup> Like many others, Isabella felt she would be in danger in both places as Guatemala posed the same risks, but Guatemala also lacked the familial support she would at least have in her home country.<sup>356</sup>

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347 Interview with the General Directorate of Migration, *supra* note 313.

348 Interview with Pastoral de Movilidad Humana [PMH], Guatemala City (January 2020).

349 *Id.*

350 *Id.*

351 See *e.g.*, Interview with Damián, *supra* note 36; Interview with Isabella, *supra* note 8; see also Interview with Director of Special Protection, *supra* note 21 (sharing that asylum seekers know they're returning to really high levels of risk, but they are exhausted from their journey, from detention, and they are going back to the risk).

352 See *e.g.*, Interview with Damián, *supra* note 36; Interview with Isabella, *supra* note 8.

353 Interview with Damián, *supra* note 36.

354 *Id.*

355 Interview with Isabella, *supra* note 8.

356 *Id.*

E. Failing to Protect the Most Vulnerable and At-Risk Asylum Seekers



As our interviews revealed, the IOM has deemed several asylum seekers too at-risk to be returned to their country through the assistance of IOM. This leaves the most vulnerable without support to return home, without resources to remain in Guatemala to seek asylum, and unable to find protection elsewhere.

Following their arrival at the airport, asylum seekers are transferred by government buses to Casa del Migrante. If asylum seekers inform Casa del Migrante that they want to return to their

home country, the staff will call IOM.<sup>357</sup> IOM will then go to the shelter to retrieve the individual, bring them back to their offices, and conduct an individualized assessment of the voluntariness of their return.<sup>358</sup> In this approximately hour-long interview, IOM determines if a person has a risk to their life or integrity in their home country.<sup>359</sup> If the IOM identifies that a person is facing such a risk, IOM will not take them to their home country and will instead return them to Casa del Migrante or another shelter, Refugio de la Niñez, with the view that they should apply for asylum in Guatemala.<sup>360</sup> However, a staff member at Casa del Migrante noted:

“it is [the asylum seeker’s] decision to return or to stay... Guatemala has the same risk factors as the countries of origin. People do not want to stay here...They don’t want to die of hunger in Guatemala. The majority can’t go home, but they also can’t die of hunger here.”<sup>361</sup>

Accordingly, most of the cohort of asylum seekers that the IOM deems at too high a risk for return to their home country end up stranded, alone, and with limited resources. Casa del Migrante explained that an asylum seeker usually stays a few days at Casa del Migrante while they look for family or friends to help them or send them money.<sup>362</sup> Some decide to go home and some go on to Mexico.<sup>363</sup> Casa del Migrante gives them a map, shows them what buses to take, and recommends stops along the way where they can ask to be returned.<sup>364</sup> If a person doesn’t have the money, they hitchhike.<sup>365</sup>

The staff member explained that IOM has refused to take “several” asylum seekers it has deemed to be facing too high risks in their home country:

357 Interview with IOM, *supra* note 327.  
 358 *Id.*  
 359 *Id.*  
 360 *Id.*  
 361 Interview with Casa del Migrante, *supra* note 19.  
 362 *Id.*  
 363 *Id.*  
 364 *Id.*  
 365 *Id.*

“[IOM] have a responsibility to protect...They have to determine the risk of it if they [asylum seekers] are returned and something happens to them. It’s complicated. If they [asylum seekers] want to go back and we refuse, we are denying their right to choose... We can’t detain people. We need a middle ground to let people do what they want.”<sup>366</sup>

It is unclear what has or will happen to this lost population of at-high-risk individuals. The ultimate irony is that this cohort, identified by IOM as needing the highest level of protection, receives the least protection while the responsibility for ensuring the individual has access to protection is passed around between actors—from the U.S., to Guatemala, to Casa del Migrante, to IOM, and back to Casa del Migrante—until that asylum seeker ultimately falls between the cracks. The system of the Guatemala ACA is, by design, failing to protect the most vulnerable.

Additionally, because of IOM’s key role in this process, it may soon encounter an issue with capacity. IOM is capable of conducting these more detailed interviews now because there have been relatively few returns under the Guatemala ACA so far.<sup>367</sup> However, as the number of returned asylum seekers increases, IOM will require additional personnel, including personnel with backgrounds in psychology, to continue to conduct the interviews in a timely and appropriate manner.<sup>368</sup> An additional concern is that it is unclear to IOM the number of people who are returned in a given period of time, making it difficult for the organization to prepare and anticipate what might be required to meet the needs of those in need of assistance.<sup>369</sup>

Having addressed the constrained nature of an asylum seeker’s access to the asylum system in Guatemala upon arrival, the next section addresses the asylum process an individual would need to navigate, should they seek asylum in Guatemala. That section analyses in more detail Guatemala’s asylum system against the INA requirement that an asylum seeker can be removed to a country with a full and fair asylum system.<sup>370</sup>

## F. Findings regarding Asylum Seekers’ Arrival in Guatemala and Subsequent Departure

- *The process of arrival in Guatemala and return to the country of origin within the mandated seventy-two hour period fundamentally undermines the purpose of asylum protections and results in de facto refoulement, ultimately depriving returnees of their right to seek asylum and placing them at risk of persecution, torture, and the deprivation of their life.*
  - » Upon arrival, asylum seekers are informed by Guatemalan government officials that they have seventy-two hours to decide whether to make an asylum claim or to return to their country of origin.

<sup>366</sup> *Id.*

<sup>367</sup> Interview with IOM, *supra* note 327.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> 8 U.S.C. § 1158(a)(2)(A).

- » These individuals and families are offered no written information or support by the Guatemalan government to understand the asylum process or make this decision in seventy-two hours.
  - » The individuals' state of sleep deprivation, stress and disorientation due to the conditions of detention and transfer further impedes their ability to make these important decisions in such a short period of time.
  - » The Guatemalan government does not consistently present asylum as a feasible option to asylum seekers, sometimes emphasizing the administrative burden of asylum claims or failing to mention the option to file an asylum claim at all.
  - » This process, as implemented, deprives asylum seekers of any meaningful choice on whether to seek asylum in Guatemala.
- *Many asylum seekers viewed Guatemala as presenting similar or heightened risks of persecution or torture, or threats to their life, than those which they faced in their country of origin, effectively depriving them of a realistic option to seek protection in Guatemala and of their right to seek asylum.*
  - *The Guatemalan government fails to ensure asylum seekers are not returning to a country where they face a risk of torture or persecution. Because of the lack of administrative support to file an asylum claim, and lack of opportunity to seek protection, asylum seekers have no choice but to return to their country of origin even if they have meritorious claims for protection; in de facto violation of Guatemala's obligations against refoulement.*

## The U.S.' Determination regarding Guatemala's Asylum System

*"The Attorney General and Secretary of Homeland Security determined that Guatemala's asylum system provides full and fair access to individuals seeking protection, as required by U.S. law, prior to the Guatemala ACA entering into force on November 15."*

—U.S. Department of State<sup>371</sup>

## The Reality of Guatemala's Asylum System

*"If we had, in two years, 472 cases and we were not able to resolve them, what is going to happen if we have thousands of cases or hundreds each day? We are not going to be able to resolve them. We don't resolve the cases because the [National] Migration Authority, the institution responsible for resolving the cases, is not interested in resolving them... Asylum is not a priority for our country."*

—Gabriela Mundo Rodriguez, Office of the Ombudsman<sup>372</sup>

### A. Requirements for a Full and Fair Asylum Procedure in a "Safe" Third Country

As detailed in the *Background and Overview* section, the Guatemala ACA is invalid under U.S. law unless Guatemala provides "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."<sup>373</sup> However, the lack of access to a full and fair asylum procedure in Guatemala not only calls into question the legality of the Guatemala ACA under U.S. law, but also violates international human rights obligations binding on the U.S. and Guatemala.

While U.S. law does not define "access to full and fair procedure for determining a claim to asylum or equivalent temporary protection," the U.S.-Canada Safe Third Country Agreement provides insight into how the U.S. has previously interpreted its legal obligations and made a categorical determination that a country meets the requirements for a STCA under the INA. The text of the U.S.-Canada Agreement emphasizes that Canada has a generous asylum system that is consistent

371 Letter from Sen. Elizabeth Warren to Sec'y Pompeo, *supra* note 103 (citing U.S. Dep't of State, Answer to Question for the Record to Deputy Sec'y of State Nominee Stephen Biegun by Sen. Bob Menendez (#235), Submitted November 20, 2019).

372 Interview with Gabriela Mundo Rodriguez, *supra* note 96.

373 § 1158(a)(2)(A) (requiring the third country to provide such procedures); see *supra* Section IV, Background and Overview.



with principles of protection.<sup>374</sup> The proposed implementing rule for the agreement states that “[w]hile the asylum systems in Canada and the U.S. are not identical, both country’s asylum systems meet and exceed international standards and obligations...”<sup>375</sup> The U.S.-Canada Agreement lists procedural principles that should guide the asylum processes in both countries, including the standard of review for determining if an applicant qualifies for an exception; the possibility for an applicant to seek review of the determination if they qualify for an exception; and the opportunity for legal representation (or other third party support) during certain proceedings.<sup>376</sup>

Guidance can also be found in international standards from UNHCR. UNHCR Guidelines, while not binding on States, are persuasive authority for interpreting and implementing international law. Furthermore, UNHCR guidance has been “recognized as useful aids in interpreting” provisions of U.S. law implementing the Refugee Convention and its 1967 Protocol obligations.<sup>377</sup>

UNHCR has provided a list of basic requirements for an effective assessment of refugee status as well as detailed requirements for the level of protection that must be guaranteed to asylum seekers removed to a third country under a STCA. These guidelines are designed to ensure that STCAs conform with the rights and obligations defined in international and human rights law.<sup>378</sup>

A basic assessment of refugee status must include the following safeguards: guidance on the procedure should be given to the applicant, the authority in charge of examining requests must be clearly identified, there must be an individualized assessment of asylum claims,<sup>379</sup> there must be ability to appeal a decision in a reasonable time, and the necessary facilities, such as an interpreter, must be available to the asylum seeker.<sup>380</sup>

According to the UNHCR’s detailed requirements, prior to transferring asylum seekers pursuant to a STCA, it is important to assess if the third country will “1) readmit the person, 2) grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs, 3) permit the person to remain while a determination is made, and 4) accord the person standards of treatment commensurate with the 1951 [Refugee] Convention and international human rights standards, including—but not limited to—protection from refoulement.”<sup>381</sup>

In comparing UNHCR guidance on STCAs with U.S. law, the closest corollary to the requirement that the third country “provide access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection” is UNHCR’s requirement that the third country provide “access to a fair and efficient procedure for determination of refugee status and other international protection needs.” According to UNHCR, “fair and efficient” asylum procedures must include the designation of an expert authority for making refugee status determinations in the first instance,

374 U.S.-Canada Agreement, *supra* note 87.

375 Implementation of the Agreement Between the Government of the U.S. and the Government of Can. Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. at 10620.

376 U.S.-Canada Agreement, *supra* note 87.

377 See 84 Fed. Reg. at 64000 n.10.

378 U.N. Guidance Note, *supra* note 74.

379 Legal Considerations Regarding Access to Protection, *supra* note 75, at 1, para. 3.

380 U.N. HIGH COMMISSIONER FOR REFUGEES, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 42, para. 192 (Apr. 2019), [www.refworld.org/docid/5cb474b27.html](http://www.refworld.org/docid/5cb474b27.html).

381 Legal Considerations Regarding Access to Protection, *supra* note 75, at 2, para. 4.

an independent expert authority to assess appeals and ensure an effective remedy for negative refugee status determinations, a single procedure to identify all international protection needs, and an allocation of sufficient personnel and resources to these authorities.<sup>382</sup>

UNHCR has also supported the concept of “effective protection” in the context of secondary movements of asylum seekers to third countries. In addition to ensuring that an asylum seeker has no well-founded fear of persecution in the third country and that they would have “access to fair and efficient procedures for the determination of refugee status,” effective protection in the safe third country context includes that the third country will respect fundamental human rights, the asylum seeker would not be *refouled* by the third state, and the asylum seeker will have access to a “means of subsistence sufficient to maintain an adequate standard of living.”<sup>383</sup>

Additionally, under UNHCR guidance, asylum seekers should also have access to support, including work opportunities,<sup>384</sup> and durable solutions in the third country, both while their claim for asylum is ongoing and after it has been approved.<sup>385</sup>

As will be described in the section below, when applying these standards of interpretation, Guatemala clearly falls short of providing access to full and fair asylum procedures required under U.S. law, or opportunity for a fair and efficient assessment, as recommended by UNHCR.

## B. Guatemala’s Asylum Process on Paper

### THE 2016 MIGRATION CODE AND ITS IMPLEMENTATION

Despite Guatemala’s Constitutional provision that Guatemala will grant asylum “in accordance with the international practices,”<sup>386</sup> the former Attorney General of Guatemala has attested that the right to seek asylum has been “historically neglected by the government.”<sup>387</sup> Only recently has Guatemala begun to develop a systematized regulatory framework for processing asylum claims in Guatemala.<sup>388</sup> Although Guatemala now has a detailed Migration Code (the “Code”) that the Ombudsman’s office regards as a piece of legislation that incorporates human rights standards,<sup>389</sup> it lacks key protections for those seeking asylum and provides an inadequate framework for assessing asylum claims.

382 Francis Nicholson & Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems*, U.N. HIGH COMMISSIONER FOR REFUGEES 154 (2017), <https://www.unhcr.org/3d4aba564.pdf>.

383 Summary Conclusions on the Concept of Effective Protection, *supra* note 79, para. 15.

384 Legal Considerations Regarding Access to Protection, *supra* note 75, at 4, para. 8.

385 U.N. Guidance Note, *supra* note 74; Summary Conclusions on the Concept of Effective Protection, *supra* note 79, para. 15.

386 Constitución Política de la República de Guatemala [Constitution], May 31, 1985, art. 27.

387 Declaration of Claudia Paz y Paz Bailey at para. 6, *U.T. v. Barr*, 1:20-cv-00116-EGS (D.D.C. Feb. 28, 2020).

388 *Id.*

389 Interview with Gabriela Mundo Rodriguez, *supra* note 96.

The Guatemalan Migration Code entered into force in May 2017.<sup>390</sup> It places human rights before or at the same level as national security.<sup>391</sup> The language of the Migration Code incorporates international human rights standards, including provisions that safeguard migration as a right;<sup>392</sup> require equal access to essential services such health, education, employment and housing;<sup>393</sup> and enshrine specific protections for victims of torture.<sup>394</sup> The *reglamentos*, or implementing regulations of the Code, reference the Cartagena Convention,<sup>395</sup> which provides for a broader definition of refugee compared to that of the Refugee Convention.<sup>396</sup> The Migration Code also created new migration institutions, such as the National Migration Authority (NMA),<sup>397</sup> which is responsible for creating the National Commission for Refugees (CONARE),<sup>398</sup> and the Guatemalan Migration Institute.<sup>399</sup> While not explicitly mentioned in the Code, the Office of International Migratory Relations (ORMI) is a body within the auspices of the Guatemalan Migration Institute.<sup>400</sup>

CONARE is constituted of representatives from the Ministry of Foreign Relations, the Ministry of Labor and Social Welfare, the Ministry of Interior, and the Guatemalan Migration Institute.<sup>401</sup> UNHCR participates in an advisory capacity.<sup>402</sup> The NMA is comprised of the Minister of Foreign Relations, the Minister of Social Development, the Minister of Labor and Social Welfare, the Minister of Interior, the Director of the Guatemalan Migration Institute, and the Executive Secretary of the National Migrant Services Council of Guatemala and is led by the Vice President of the Republic.<sup>403</sup>

390 See Interview with Marcel Arévalo, *supra* note 95; Código de Migración, Diario de Centro América 18-10-2016 (Guat.); INT'L ORGANIZATION FOR MIGRATION, *Migration Governance Snapshot: Republic of Guat.* 2 (Aug. 2018), <https://migrationdataportal.org/sites/default/files/2018-11/MGI%20Guatemala%20EN.pdf>.

391 Interview with Carolina Escobar Sarti, La Alianza, Guatemala City (January 2020) (commenting on her experience developing the Migration Code with other civil society actors).

392 Código de Migración, *supra* note 390, art. 1.

393 *Id.* art. 2.

394 Código de Migración, *supra* note 390, art. 12; see also Código de Migración, *supra* note 390, art. 170 (extending these protections to unaccompanied children and adolescents).

395 *Id.* art. 177; see also *Acuerdo de Autoridad Migratoria Nacional No. 02-2019, Reglamento del Procedimiento para la Protección, Determinación y Reconocimiento del Estatuto de Refugiado en el Estado de Guat.* [Nat'l Migration Authority Agreement No. 02-2019, Regulation of the Procedure for the Protection, Determination and Recognition of the Refugee Stat. in the State of Guat.].

396 U.N. HIGH COMMISSIONER FOR REFUGEES, *Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration* (Jul. 2014), <https://www.refworld.org/docid/53c52e7d4.html>.

397 Código de Migración, *supra* note 390, art. 116.

398 Código de Migración, *supra* note 390, art. 177; see also *Acuerdo de Autoridad Migratoria Nacional No. 02-2019, supra* note 395, art. 12 (creating CONARE).

399 Código de Migración, *supra* note 390, art. 120. This Institute replaces the General Directorate of Migration. *Id.* art. 243.

400 Oficina de Relaciones Migratorias Internacionales (ORMI), INSTITUTO GUATEMALTECO DE LA MIGRACIÓN [Guatemalan Migration Institute] (Aug. 18, 2017), <https://igm.gob.gt/datos-oficina-de-relaciones-migratorias-internacionales-ormi/#>.

401 Código de Migración, *supra* note 390, art. 177; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019, supra* note 395, art. 12.

402 Código de Migración, *supra* note 390, art. 177; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019, supra* note 395, art. 12; see also Interview with UNHCR Guatemala, Guatemala City (January 2020) (referencing the advisory role of UNHCR within CONARE).

403 Código de Migración, *supra* note 390, art. 177; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019, supra* note 395, art. 3.

Under the Code, CONARE is responsible for accepting and reviewing each case.<sup>404</sup> CONARE conducts interviews, helps applicants fill in their applications, and collects and verifies evidence of asylum claims.<sup>405</sup> CONARE reviews the application and determines if requirements to qualify as a refugee are satisfied.<sup>406</sup> According to the *reglamentos*, CONARE has to meet at least twice per month<sup>407</sup> and has thirty days upon the conclusion of the investigation to review an application and make provisional recommendations to the NMA.<sup>408</sup> At this stage, CONARE issues advice and recommendations to NMA.<sup>409</sup> While the NMA considers the recommendations from CONARE when making a decision, it makes a final decision on the asylum case independent from these recommendations.<sup>410</sup> According to the *reglamentos*, the NMA must meet every three months.<sup>411</sup>

When the NMA denies the asylum request, the individual has ten days starting from the notification of the rejection to appeal before the NMA, who then reviews its own adverse eligibility finding.<sup>412</sup> After that, the NMA may investigate the file until it can be resolved, and from that point has five days to issue its permanent decision.<sup>413</sup> While an asylum seeker could, theoretically, apply to the Guatemalan Constitutional Court to seek an *amparo* (similar to an injunction) of the NMA decision, this action would be difficult for an asylum seeker to bring without considerable legal support and has not generally been applied in an immigration context.<sup>414</sup>

If an asylum seeker does not want to continue with his or her asylum application, the applicant may withdraw their claim at any time during the process.<sup>415</sup> If an applicant has not acted for more than six months, the NMA deems the request abandoned and closes the file.<sup>416</sup>

According to the Code, applicants have the right to legal assistance and to an interpreter during all phases of the process.<sup>417</sup> While waiting for the resolution of their cases, asylum seekers receive

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404 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 13.

405 *Id.* (stating that CONARE conducts interviews and assists in filling out the applications).

406 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 14(a); see also Interview with Alejandra Mena, Spokeswoman, General Directorate of Migration, Guatemala City (January 2020).

407 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 16.

408 *Id.* art. 17(3).

409 Código de Migración, *supra* note 390, art. 177; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 14; see also Interview with UNHCR Guatemala, *supra* note 402.

410 *Acuerdo de Autoridad Migratoria Nacional 01-2018, Reglamento Interno de Funcionamiento de la Autoridad Migratoria* [Nat'l Migration Authority 01-2018, Internal Regulation for the Operation of the Migration Authority], art. 4(i); *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, arts. 11, 17(3-4) (stating that CONARE will make a recommendation as to approve or deny refugee status, and NMA will make a decision based on the recommendation as to whether to approve or deny) (emphasis added); Interview with the Guatemalan Ministry of Foreign Relations, Guatemala City (January 2020).

411 *Acuerdo de Autoridad Migratoria Nacional 01-2018*, *supra* note 410, art. 7.

412 Código de Migración, *supra* note 390, art. 182; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 18; Interview with Alejandra Mena, *supra* note 406. *But see* Interview with UNHCR Guatemala, *supra* note 402 (stating that the appeal must occur within ten days but can be appealed to NMA or to a different body).

413 Código de Migración, *supra* note 390, art. 182; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 18.

414 Declaration of Claudia Paz y Paz Bailey, *supra* note 387 at para. 10.

415 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 19.

416 *Id.* art. 20.

417 Código de Migración, *supra* note 390, art. 180.

a special identification document that purportedly grants access to education and health services, and the right to work in Guatemala.<sup>418</sup>

The Guatemalan Migration Code reflects many critical human rights protections. However, these protections have not been fully implemented through *reglamentos*, or the *reglamentos* were only issued recently despite the Code's Congressional adoption in 2016.<sup>419</sup> There is no existing *reglamento* that incorporates Guatemala's obligations under the Convention against Torture.<sup>420</sup> Despite the Code's theoretical recognition of refugee status for victims of torture, the Code insufficiently incorporates Guatemala's *non-refoulement* obligation under CAT.<sup>421</sup> Within Guatemalan civil society, there is confusion as to whether all of the *reglamentos* are publicly available.<sup>422</sup> Indeed, the formal online platform for the *reglamentos* is incomplete.<sup>423</sup>

The Code, even if fully implemented, does not establish any process for independent or impartial review of adverse asylum decisions. Asylum seekers must appeal directly to NMA, who reviews its own adverse findings. Nothing in the Migration Code or *reglamentos* requires the political members of the NMA to give any weight to the recommendations of CONARE beyond a cursory review,<sup>424</sup> despite CONARE's role as the advisory body, including a representative of UNHCR in its composition.<sup>425</sup> Except for CONARE's UNHCR representative, both CONARE and the NMA are comprised of non-experts, Ministers or representatives of government Ministries that have broad portfolios beyond asylum. Further, the NMA is led by the Vice President of Guatemala, and made up of other senior ministers, including the Minister of Foreign Relations, and the Executive Secretary of the National Migrant Services Council of Guatemala.<sup>426</sup> This raises concerns that the asylum process is overly political and is not structured in such a way that experts in standards of protection are making decisions about cases, nor is there a process for independent review.

Similarly, although the Code does include provisions restricting the possible timeframe for decision making—such as limiting the review period by CONARE to thirty days and the appeal decision by NMA to five days—these time periods begin only after the acting body has determined that the case is ready for resolution. CONARE and NMA have no time period under which they must conclude their investigation prior to resolution, creating an amorphous standard for timely resolution.

418 *Id.* art. 53; see also *id.* art. 6 (granting foreign citizens in Guatemala the right to work); *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 8 (granting refugees in Guatemala the right to work provided they have the appropriate authorization).

419 See Marco Legal, Instituto Guatemalteco de la Migración [Guatemalan Migration Institute] (Sep. 6, 2017), <http://igm.gob.gt/marco-legal/> (containing a list of agreements issued by the National Migration Authority, each of which implements provisions of the code through specific *reglamentos*).

420 *Id.* (containing the list of all *reglamentos*, none of which addresses protections under CAT).

421 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, arts. 12, 46, 83.

422 Interview with Carolina Escobar Sarti, *supra* note 391. As of May 23, 2020, the formal online platform for the *reglamentos* is also incomplete.

423 See Marco Legal, *supra* note 419 (including Agreements No. 1 and No. 3 from 2018 but omitting Agreement No. 2 from 2018).

424 See Interview with Alejandra Mena, *supra* note 406; Interview with UNHCR Guatemala, *supra* note 402 (stating that CONARE advises but doesn't decide on asylum applications. The Vice President of Guatemala, Vice Minister of Foreign Affairs, and other ministers make the decision. UNHCR makes recommendations but doesn't vote).

425 Código de Migración, *supra* note 390, art. 177.

426 Código de Migración, *supra* note 390, art. 177; *Acuerdo de Autoridad Migratoria Nacional 01-2018*, *supra* note 410, art. 3.

The very agency that will be restricted to thirty or five days is the agency that determines when this period begins. All essential timeframes are thus discretionary.

The Guatemalan asylum system as written in the Migration Code and *reglamentos* falls short of providing a fair and efficient asylum system as defined by UNHCR. Guatemalan law lacks a clear identification of an *expert* authority with responsibility for examining applications for refugee status and making a decision in the first instance.<sup>427</sup> Instead, the NMA, a body made up of government Ministers with no particular expertise in asylum, is the authority that makes decisions in the first instance upon the advice of CONARE.<sup>428</sup> Guatemalan law lacks an *independent* expert authority to assess appeals and ensure an effective remedy for negative refugee status determinations, as NMA reviews its own refugee status determinations on appeal.<sup>429</sup> Guatemalan law lacks a single procedure for the identification of all international protection needs beyond refugee status and contains insufficient protections against *refoulement* under the Convention Against Torture.<sup>430</sup>

### C. Guatemala's Asylum Process in Practice

Guatemala's asylum system in practice falls short of what is required under the Migration Code and implementing *reglamentos*. Despite provisions that provide for regular meetings of officials responsible for asylum determinations, these meetings rarely occur, if at all, which leads to a long and inefficient asylum process. Furthermore, some of the key provisions that help safeguard the rights of asylum seekers, such as a right to legal assistance throughout the asylum process, are not followed in practice. Critical protection responsibilities that should be handled by the Guatemalan government fall on civil society. Finally, conditions in Guatemala limit the prospects for durable solutions for asylum seekers.

#### 1. THE ASYLUM PROCESS DEPARTS FROM GUATEMALAN LAW IN PRACTICE

*"The authorities here in Guatemala are not giving information about asylum. It is my understanding that [when] they[asylum seekers] come to the office of migration [ORMI], they finish the procedure in two minutes. I don't know, what can you say in two minutes?"*  
—Gabriela Mundo Rodriguez, Office of the Ombudsman<sup>431</sup>

427 U.N. HIGH COMMISSIONER FOR REFUGEES, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable Int'l Standards* (Sept. 2, 2005), <https://www.refworld.org/pdfid/432ae9204.pdf>.

428 *Acuerdo de Autoridad Migratoria Nacional 01-2018*, *supra* note 410, art. 4(i); *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, arts. 11, 17(3-4) (stating that CONARE will make a recommendation as to approve or deny refugee status, and NMA will make a decision based on the recommendation as to *whether* to approve or deny) (emphasis added); Interview with the Guatemalan Ministry of Foreign Relations, *supra* note 410.

429 Código de Migración, *supra* note 390, art. 182; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 18; Interview with Alejandra Mena, *supra* note 406. *But see* Interview with UNHCR Guatemala, *supra* note 402.

430 See Marco Legal, *supra* note 419.

431 Interview with Gabriela Mundo Rodriguez, *supra* note 96.

In practice, the asylum system in Guatemala departs from the Migration Code in ways that create confusion for asylum seekers and the civil society actors supporting them, resulting in a long and inefficient process.

The differences in the system start at the beginning of the process for asylum seekers. For example, although the Migration Code provides that CONARE will conduct the initial asylum screening process, this is not how the system works in practice. According to the General Directorate of Migration, the first step of the asylum process is for ORMI to accept and review each case.<sup>432</sup> Although neither the Code nor the *reglamentos* designate ORMI with this responsibility, the General Directorate of Migration states that ORMI conducts the first interview with individuals returned under the Guatemala ACA, asking asylum seekers why they left their home country and traveled to the U.S.<sup>433</sup> During this process, asylum seekers must show evidence to support their claims.<sup>434</sup> ORMI then makes a provisional recommendation to CONARE,<sup>435</sup> the body that receives the formal application.<sup>436</sup>

Although the Code provides protections against *refoulement* and an opportunity to appeal a negative decision, in practice, asylum seekers in Guatemala are at risk of deportation without a review of any negative determinations. For example, if CONARE determines that the requirements for refugee protection are not met, the applicant is removed from Guatemala.<sup>437</sup> The effect of this recommendation is a practical rejection of the asylum application and leads to a risk of *refoulement*. To this end, CONARE's recommendations act as a filter for cases before they are sent to NMA.<sup>438</sup>

The process for appeal also differs from the law in practice. Distinct from the Migration Code's provision that asylum seekers may only appeal a NMA decision before the NMA itself within ten days,<sup>439</sup> In our interview with the spokesperson of GDM, she represented that asylum seekers may appeal an application rejection to CONARE, who would review their own decision, but referred us to a provision of the Migration Code that gives the authority to NMA.<sup>440</sup> Furthering the confusion, UNHCR describes the appeal as an application which can be reconsidered by the same body, or appealed to a different body, a very contentious administrative process.<sup>441</sup>

Even if the initial interview, application, and appeal process proceeded according to the law, there is confusion as to how often CONARE and NMA are supposed to meet, and they meet far less frequently than provided for under the Migration Code and *reglamentos*. For example, in our interview with the General Directorate of Migration, the spokesperson stated that, to their knowledge, there

432 Interview with Alejandra Mena, *supra* note 406 (adding that ORMI collects and verifies evidence).

433 *Id.*

434 *Id.*

435 Interview with Alejandra Mena, *supra* note 406; see also Interview with Director of Special Protection, *supra* note 21 (confirming that a case goes from ORMI to CONARE).

436 Interview with Lambda, Guatemala City (January 2020).

437 Interview with Alejandra Mena, *supra* note 406.

438 *Id.*

439 Código de Migración, *supra* note 390, art. 182; *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 18; see also Interview with Alejandra Mena, *supra* note 406; Interview with UNHCR Guatemala, *supra* note 402.

440 Interview with Alejandra Mena, *supra* note 406.

441 Interview with UNHCR Guatemala, *supra* note 402.

is no existing provision regarding how often CONARE should meet,<sup>442</sup> despite the fact that this provision has been in the *reglamentos* since 2019.<sup>443</sup>

The practicalities for how often CONARE and NMA are supposed to meet is also a concern. For example, a consultant for the Ombudsman and former UNHCR employee, Ernesto Archilla, expressed concern that these high level representatives of the government will not have the time to meet and resolve these cases.<sup>444</sup> Requiring such high level government officials to come together to assess and resolve individual asylum cases significantly increases the likelihood “that they just aren’t able to come together, to meet. And because of this, the cases aren’t being resolved.”<sup>445</sup> According to Achilla, Guatemala has nearly zero capacity to carry out individualized risk assessments as required under *non-refoulement* standards.<sup>446</sup>

Additional differences in how ORMI, CONARE, and NMA operate in practice compared to what is provided in the Code and *reglamentos* are depicted below in the table below.

	The Guatemalan Migration Code and its <i>reglamentos</i>	The Guatemalan asylum system in practice
<b>ORMI</b>	Support staff is in charge of receiving requests for the Refugee Statute, conducting interviews, and filling out the applications. <sup>447</sup>  Support staff <b>must have the necessary technical and professional capacity</b> to address and follow up on the requests for refugee status. <sup>448</sup>	<b>ORMI has fewer than ten staff members</b> and potentially as few as four. <sup>449</sup>
<b>CONARE</b>	CONARE has a <b>time limit of 30 days</b> to make recommendations to the NMA to grant or deny refugee status. <sup>450</sup>  CONARE will hold its ordinary sessions <b>twice a month</b> with extra sessions as needed. <sup>451</sup>	CONARE met at most <b>two or three times total in 2019</b> , despite increasing pressure to make decisions from ORMI. <sup>452</sup>

442 Interview with Alejandra Mena, *supra* note 406.

443 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 16.

444 Interview with Ernesto Archilla, *supra* note 332; see also Interview with UNHCR Guatemala, *supra* note 402 (noting that, at least in the first three months of government, nothing will get done on this committee with the Vice President as lead decision maker).

445 Interview with Ernesto Archilla, *supra* note 332.

446 *Id.*

447 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 13.

448 *Id.*

449 Interview with Jeff Abbott, Independent Journalist in Guatemala, Guatemala City (January 2020); see also Statement of Facts at 13, U.T. v. Barr, No. 1:20-cv-00116-EGS, (D.D.C. Feb. 28, 2020) (referring to full-time employees” at ORMI).

450 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 17(3).

451 *Id.* art. 16.

452 Interview with Alejandra Mena, *supra* note 406 (sharing that CONARE met two or three times in 2019); Interview with Director of Special Protection, *supra* note 21 (stating that CONARE did not meet at all in 2019).



	The Guatemalan Migration Code and its <i>reglamentos</i>	The Guatemalan asylum system in practice
<b>NMA</b>	<p>The NMA <b>must be formed within sixty days</b> of the Code’s entry into force (2017).<sup>453</sup></p> <p>The NMA shall <b>meet at least once every three months</b>.<sup>454</sup></p>	<p>While the NMA issued <i>reglamentos</i> for the Migration Code, according to the spokesperson of the GDM, as of January 2020, the NMA had yet to be constituted.<sup>455</sup></p> <p>The NMA has not met at least once every three months, and according to the GDM, had yet to meet to discuss asylum cases.<sup>456</sup></p>
<b>Overall time-frame for the resolution of asylum claims</b>	<p>Officials or employees shall proactively seek to conduct all of their duties within <b>reasonable time frames</b>.<sup>457</sup></p> <p>The process of obtaining and normalizing refugee status shall conclude <b>within ninety days</b> following the submission of an application.<sup>458</sup></p>	<p><b>No asylum claims have been resolved</b> in the last one to two year(s).<sup>459</sup></p> <p><b>There remain somewhere between 472 and 750 unresolved</b> asylum requests from the last two years.<sup>460</sup></p> <p><b>Average processing time is now one<sup>461</sup> to two<sup>462</sup> years.</b></p>

Key protections for asylum seekers are also ignored in practice. For example, while the Migration Code provides that an asylum seeker has the right to legal assistance during all phases of the process,<sup>463</sup> this is not the case in practice.

453 Código de Migración, *supra* note 390, art. 227.

454 *Id.* art. 117.

455 Interview with Alejandra Mena, *supra* note 406.

456 *Id.*

457 Código de Migración, *supra* note 390, art. 112.

458 *Id.* art. 189.

459 Interview with UNHCR Guatemala, *supra* note 402 (estimating no applications were resolved last year); Interview with Gabriela Mundo Rodriguez, *supra* note 96 (estimating no applications were resolved in the last two years). *But see* Declaration of Claudia Paz y Paz Bailey, *supra* note 387 at para. 16.

460 Interview with Gabriela Mundo Rodriguez, *supra* note 96 (estimating 750); Interview with Lambda, *supra* note 436 (estimating 472); *see also* Interview with Director of Special Protection, *supra* note 21 (mentioning a 2018 study that showed 378 unaddressed cases); *see also* Statement of Facts, *supra* note 449 at 19–20 (noting 423 unresolved asylum cases out of 466 submissions between January 2018 and August 2019 as well as 632 unresolved claims by the end of 2019).

461 Interview with Casa del Migrante, *supra* note 19.

462 Interview with Director of Special Protection, *supra* note 21; *see also* Interview with Gabriela Mundo Rodriguez, *supra* note 96 (stating authorities did not resolve any cases in the past two years).

463 Código de Migración, *supra* note 390, art. 180.

The lack of legal assistance for asylum seekers impacts their ability to navigate the asylum system. Asylum seekers are unable to see the process for seeking asylum or the status of their case online.<sup>464</sup> In fact, if an individual is not connected directly with someone at the UNHCR office, he or she is unable to see the status of their case until a final decision is issued.<sup>465</sup> Regarding legal aid, there is no budget and no institutions within the government that provide asylum seekers with legal counsel during the application process.<sup>466</sup> According to the GDM, counsel is viewed as unnecessary.<sup>467</sup> Similarly, according to UNHCR, “a person can go through the asylum process without [UNHCR]. . . it’s a personal process,” and it is not necessary to have a lawyer present except for in the appeals process.<sup>468</sup> Lawyers who would be available to help navigate the application process or the appeals process are said to come from PMH and Refugio de la Niñez,<sup>469</sup> other civil society organizations, and UNHCR partners.<sup>470</sup> However, while the GDM asserted that applicants may have a lawyer with them if they choose,<sup>471</sup> PMH reported that they are not permitted to appear with their clients or on their clients’ behalf until they are appealing a negative determination and their team of two lawyers does not formally accompany asylum seekers during the application process.<sup>472</sup> Similarly, Casa del Migrante has a team of six legal advisors who help individuals, inside and outside the shelter, in the asylum process.<sup>473</sup> However, counsel from Casa del Migrante do not accompany asylum seekers during the entire process; asylum seekers go to interviews, sometimes several, alone.<sup>474</sup>

Critically, one cannot appeal a denial of refugee status without a lawyer.<sup>475</sup> Once a denial of refugee status is issued and an appeal commences, PMH’s team of two lawyers is available to assist during this process.<sup>476</sup> However, each denial has the exact same wording, and does not provide a rationale for the decision.<sup>477</sup> No judicial reasoning or arguments are provided.<sup>478</sup>

According to Alexander Aizenstatd, “[m]igrants are not provided with legal counsel at all, I mean, zero.”<sup>479</sup>

Asylum seekers also do not have access to work permits for the full duration available under Guatemalan law. In theory, asylum seekers can obtain a temporary right to work after their second in-

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464 *Id.*

465 *Id.*

466 Interview with Alexander Aizenstatd, *supra* note 97; Interview with Ernesto Archila, *supra* note 332.

467 Interview with Alejandra Mena, *supra* note 406.

468 Interview with UNHCR Guatemala, *supra* note 402.

469 Interview with Ernesto Archila, *supra* note 332 (stating asylum legal aid is provided by Refugio de la Niñez); Interview with PMH, *supra* note 348 (stating PMH provides legal services to asylum seekers). *But see* Interview with Director of Special Protection, *supra* note 21 (stating Refugio de la Niñez accompanies only unaccompanied minors [who are not subject to the Guatemala ACA] in the asylum process).

470 Interview with UNHCR Guatemala, *supra* note 402.

471 Interview with Alejandra Mena, *supra* note 406.

472 Interview with PMH, *supra* note 348.

473 Interview with Casa del Migrante, *supra* note 19.

474 *Id.*

475 Interview with UNHCR Guatemala, *supra* note 402.

476 Interview with PMH, *supra* note 348.

477 *Id.* (referring to four case resolutions from CONARE that contained identical wording).

478 *Id.*

479 Interview with Alexander Aizenstatd, *supra* note 97; *see also* Interview with Jean-Paul Briere, Former Guatemalan Congressman, Guatemala City (January 2020).

interview with ORMI.<sup>480</sup> However, the process takes time<sup>481</sup> and practical requirements such as providing a criminal record make the process difficult.<sup>482</sup> In practice, the work permit must be renewed monthly,<sup>483</sup> contrary to the representation from a lawyer we interviewed that work permits are renewed annually.<sup>484</sup>

In reflecting on the incomplete implementation and partial protections offered, one civil society actor referred to the Migration Code as a “letter to Santa Claus,” or a wish list from civil society for expanded laws that include important human rights protections.<sup>485</sup>

Of concern is the fact that the process that applies to asylum seekers returned pursuant to the Guatemala ACA deviates even further from existing Guatemala law and practice. The 72-hour provision that applies to Guatemala ACA asylum seekers appears nowhere in the Migration Code or *reglamentos*, and does not apply to any other category of asylum seekers applying for refugee status in Guatemala. It also appears that some legal protections normally available to those applying for refugee status in Guatemala are not available to those sent to Guatemala pursuant to the ACA. For example, when pressed on the point, the spokesperson for General Directorate of Migration stated that she was unsure whether the Guatemala ACA applies to forms of protection other than refugee status, such as protections under the Convention Against Torture.<sup>486</sup>

What our investigation revealed is that the provisions of the Migration Code and *reglamentos* are not clearly understood nor consistently applied, and there are further deviations applicable to asylum seekers returned pursuant to the Guatemala ACA. Consequently, providing the asylum seekers with guidance on the procedure or a clear identification of the authority in charge of examining requests is a near impossibility.

In light of the inconsistencies between the Code and the implemented practices, and the confusion amongst civil society actors working in the system, the potential for asylum seekers to be confused about the process is very high, creating barriers to protection. Further, interviews did not indicate any evidence of the Guatemalan government’s efforts to ensure that asylum seekers receive a correct and consistent description of the asylum law and process in Guatemala. Nor is there any evidence that the Guatemalan government is supporting asylum seekers in their navigation of the system. The concerning result of Guatemala’s lack of capacity to resolve asylum claims is that most asylum seekers transferred pursuant to the Guatemala ACA return to their home country.<sup>487</sup>

In practice, the asylum system in Guatemala falls far short of UNHCR guidance on even the basic requirements of an asylum system that a country should put in place in order to ensure asylum

480 Interview with Casa del Migrante, *supra* note 19.

481 *Id.* (saying the process is slow and inefficient).

482 *Id.*

483 *Id.*

484 Interview with Immigration Lawyer from Guatemala, Guatemala City (January 2020).

485 See Interview with Carolina Escobar Sarti, *supra* note 391.

486 Interview with Alejandra Mena, *supra* note 406.

487 Interview with Gabriela Mundo Rodriguez, *supra* note 96; Interview with Casa del Migrante, *supra* note 19; see, e.g., Interview with Maria Victoria, *supra* note 207.

seekers are “provided with certain essential guarantees.”<sup>488</sup> Contrary to UNHCR guidance, in effect, there is no clearly identified authority in charge of examining requests, in light of the significant confusion about the roles of ORMI, CONARE and NMA. This, coupled with the lack of guidance given to asylum applicants, makes it extremely difficult for asylum seekers to identify the relevant authority and navigate the asylum process. Further, the delays by CONARE and NMA in considering and approving asylum requests poses a practical barrier for asylum seekers being able to have an individualized assessment of their claims. Lastly, there are practical constraints on the ability of asylum seekers to appeal any decisions regarding their claims.

## 2. CRITICAL PROTECTION NEEDS FALLING ON CIVIL SOCIETY

The government of Guatemala has the primary responsibility to ensure the protection of asylum seekers within its territory and to uphold its human rights and *non-refoulement* obligations under international law. However, our investigation revealed that the government of Guatemala frequently fails to uphold its responsibilities or attempts to shift such responsibilities to civil society. The result is that asylum seekers returned pursuant to the Guatemala ACA are left to attempt to navigate a complex web of government, civil society, and international organizations, without clear guidance on who is ultimately responsible for meeting their protection needs.

As explained in *Section V, Phase 3*, the Guatemalan government provides nearly no information about accessing and navigating Guatemala’s asylum system to the asylum seekers arriving at the airport.<sup>489</sup> A consultant to the Ombudsman monitoring the process at the airport observed, “the Guatemalan State really doesn’t do much;” they provide asylum seekers legal entrance into the country, but that is “where their role stops.”<sup>490</sup> Humanitarian and other support is provided through civil society organizations.<sup>491</sup> According to a representative from Guatemala’s General Directorate of Migration, if someone applies for refugee status in Guatemala, they would have the support of UNHCR, but UNHCR would not help the asylum seeker complete the form to apply for asylum.<sup>492</sup> The representative also emphasized that Casa del Migrante, the central shelter for migrants in Guatemala City, would help asylum seekers with their asylum claim.<sup>493</sup>

However, UNHCR emphasizes that it is not responsible for, nor did it participate in the creation of, the Guatemala ACA,<sup>494</sup> implying that ultimate responsibility for implementation lies with the Guatemalan government. UNHCR partners with civil society actors and government agencies to provide technical training to assist those interacting with asylum seekers in asking the right questions to help determine protection needs, and funding.<sup>495</sup> Notably, this training pre-existed the Guatemala ACA, and as of January 2020, no new arrangements had been made to expand or

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488 Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, *supra* note 380.

489 Interview with Casa del Migrante, *supra* note 19 (explaining asylum seekers are told “you can stay or you can go”); Interview with Ernesto Archila, *supra* note 332; see *supra* Section V, Phase 3, Arrival in Guatemala.

490 Interview with Ernesto Archila, *supra* note 332.

491 *Id.*

492 Interview with Alejandra Mena, *supra* note 406.

493 *Id.*

494 Interview with UNHCR Guatemala, *supra* note 402.

495 Interview with UNHCR Guatemala, *supra* note 402; see also Interview with Alejandra Mena, *supra* note 406.

modify the role of UNHCR in response to the new influx of asylum seekers returned to Guatemala under the Agreement.<sup>496</sup>

Civil society is bearing the burden of not only providing asylum seekers with information and legal support during the asylum process, but also addressing their immediate physical, psychological, and humanitarian needs.<sup>497</sup> Notwithstanding the crucial role these organizations are providing, the Ombudsman and Casa del Migrante reported not receiving any information or support from the Guatemalan government.<sup>498</sup> Employees at Casa del Migrante explained that the Guatemalan government is not taking responsibility for the cohort of asylum seekers transferred under the Guatemala ACA and that, without the services provided by civil society, asylum seekers would be “in the streets, trying to find a way to survive.”<sup>499</sup>

The Guatemalan government buses asylum seekers from the airport to Casa del Migrante.<sup>500</sup> There, a small team of volunteers interviews all incoming asylum seekers to determine their medical and psychological needs, and gives them advice or referrals to other civil society organizations for help with the asylum process if necessary.<sup>501</sup> Casa del Migrante provides information to those who decide to seek asylum.<sup>502</sup>

Casa del Migrante also emphasized that civil society is not the party who signed the Guatemala ACA.<sup>503</sup> Casa del Migrante is not receiving funding from the Guatemalan government to provide services and assistance to the increasing number of asylum seekers transferred under the Guatemala ACA.<sup>504</sup> While Casa del Migrante receives some funding from the U.S.,<sup>505</sup> it has the capacity to house only sixty-six people at a time, and its limited resources are not changing with the influx of hundreds of asylum seekers.<sup>506</sup> Nonetheless, last year Casa del Migrante helped support 300 asylum seekers with the process and allowed asylum seekers to stay at their shelter for a duration up to three months during the processing of their claims.<sup>507</sup>



One of the rooms in Casa del Migrante

496 *Id.*

497 Interview with Casa del Migrante, *supra* note 19.

498 Interview with Casa del Migrante, *supra* note 19; Interview with Jordan Rodas, Human Rights Ombudsman, Office of the Ombudsman of Guatemala, Guatemala City (January 2020).

499 Interview with Casa del Migrante, *supra* note 19 (explaining that all the Guatemalan government does is send migrants in need of protection to civil society organizations).

500 *Id.*

501 *Id.*

502 *Id.* (sharing that Casa del Migrante is in the process of creating written documentation to provide to asylum seekers).

503 *Id.*

504 Interview with Alejandra Mena, *supra* note 406.

505 *Id.*

506 Interview with Casa del Migrante, *supra* note 19.

507 *Id.*

The Guatemalan government's practice of outsourcing to civil society the role of providing information and support to asylum seekers without providing appropriate funding or governmental support, creates a situation in which asylum seekers do not have practical access to an asylum system. The clear strains on civil society indicate the government has not assured itself of civil society's capacity to provide asylum seekers with accurate and comprehensive information on the process, legal support throughout their claim, or humanitarian resources upon their arrival in Guatemala. Accordingly, the government leaves to chance whether asylum seekers will be able to navigate the system and present an asylum claim, or will fall through the cracks.

Acknowledging the limited support that civil society actors endeavor to offer, asylum seekers are not aware of, or readily able to access humanitarian support enabling them to pursue an asylum claim in Guatemala.<sup>508</sup> When asked what support was available to migrants arriving in Guatemala, former Guatemalan Congressman Jean-Paul Briere answered, "[n]othing. They have rights, but, de facto, nothing is available."<sup>509</sup> The government does not provide asylum seekers with resources or assistance in obtaining shelter, food, or employment.<sup>510</sup>

While asylum seekers are in Guatemala, the Guatemalan government, not civil society, has an obligation to accord asylum seekers their international human rights.<sup>511</sup> This includes the requirement for the third state in a STCA to provide asylum seekers access to means of subsistence sufficient to maintain an adequate standard of living.<sup>512</sup> In addition, with respect to the transfer of asylum seekers from the U.S. to Guatemala, guidance from UNHCR states that transfer arrangements need to guarantee that each asylum seeker will be treated in accordance with accepted international standards (for example, access to health, education and basic services), in addition to being able to exercise the right to seek and enjoy asylum and/or access a durable solution.<sup>513</sup> The practical reality in Guatemala significantly departs from the UNHCR guidelines, with civil society bearing the burden of closing the gap left by the U.S. and Guatemala in protecting asylum seekers impacted by the Guatemala ACA.

Asylum seekers have no place to live.<sup>514</sup> Asylum seekers are granted a provisional stay permission while their asylum claim is being determined, but this permission has to be renewed every thirty days.<sup>515</sup> There are five organizations in civil society, including Casa del Migrante, that provide shelter for migrants and asylum seekers.<sup>516</sup> The consortium, collectively, has the capacity to assist 500 people per year, but UNHCR estimates 1800 possible cases requesting humanitarian assistance in 2020.<sup>517</sup>

508 See Interview with Alexander Aizenstatd, *supra* note 97 (saying that asylum seekers are not aware of their rights, just like the Guatemalan population is not aware of its rights either); Interview with Jeff Abbott, *supra* note 449 (highlighting asylum seekers are not given services or information on how to pursue an asylum claim); Interview with Te Conecta, *supra* note 328 (stating that no one returned to Guatemala has access to desperately needed mental health services).

509 Interview with Jean-Paul Briere, *supra* note 479.

510 Interview with Casa del Migrante, *supra* note 19.

511 See Legal Considerations Regarding Access to Protection, *supra* note 75, at 4, para. 9.

512 *Id.* (referring to Article 11 of the International Covenant on Economic, Social and Cultural Rights to which Guatemala is a State Party).

513 U.N. Guidance Note, *supra* note 74, at 2, paras. 3(vi)–3(vii).

514 Interview with Director of Special Protection, *supra* note 21.

515 Código de Migración, *supra* note 390, art. 82; Interview with UNHCR Guatemala, *supra* note 402.

516 Interview with Nery Rodenas, Director, Office of Human Rights of the Archbishop of Guatemala, Guatemala City (January 2020).

517 *Id.*



A poster promoting LGBTIQ+ inclusivity inside Casa del Migrante

As mentioned, Casa del Migrante provides sixty-six beds, and the average stay ranges from five days to two weeks.<sup>518</sup> Due to safety concerns, limited infrastructure, and legal liability, Casa del Migrante does not offer space to elderly people, disabled people, or unaccompanied minors.<sup>519</sup> Casa del Migrante has a specific room for migrants and asylum seekers who identify as LGBTIQ+; however, if others react negatively to their presence and create disruption, Casa del Migrante will ask LGBTIQ+ asylum seekers to leave due to limited resources available to resolve the conflict and an inability to ensure their safety.<sup>520</sup> One organization in Guatemala City specifically dedicated to assisting the LGBTIQ+ population, Lambda, has capacity to assist five to six people with shelter and humanitarian relief at one time, and is currently waiting on additional assistance from UNHCR.<sup>521</sup> ODHAG previously provided humanitarian assistance to twenty-two people per year, but is now being asked by UNHCR to provide assistance to fifteen to twenty people per month.<sup>522</sup> “Guatemala doesn’t have the capacity for this,” and “UNHCR doesn’t have capacity for this either,” ODHAG commented.<sup>523</sup>

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### 3. NO PROSPECTS FOR DURABLE SOLUTIONS

*“We’re [Guatemala] not a safe country. If we have violence and people have to leave because they’re going to get killed, this is not a safe country. We ourselves don’t even want to stay in our own country.”*

—ODHAG<sup>524</sup>

UNHCR recognizes that, once an individual is granted refugee status and immediate protection needs are addressed, the refugee may need support to find a long-term, durable solution.<sup>525</sup> UNHCR promotes three long-term or “durable solutions” for refugees as part of its core mandate: voluntary repatriation or return, discussed above in *Section V, Phase 3*; resettlement to a third country; and local integration.<sup>526</sup> Ensuring a refugee has a durable solution is important to realize the goal

518 Interview with Casa del Migrante, *supra* note 19.

519 *Id.*

520 *Id.*

521 Interview with Lambda, *supra* note 436.

522 Interview with Nery Rodenas, *supra* note 516.

523 *Id.*

524 *Id.*

525 U.N. HIGH COMMISSIONER FOR REFUGEES, *The 10-Point Plan in Action, Chapter 7: Solutions for refugees*, 186 (2017), <https://www.unhcr.org/protection/migration/50a4c17f9/10-point-plan-action-chapter-7-solutions-refugees.html>.

526 *Id.*

of all protection efforts, which is ultimately the reestablishment of a normal life.<sup>527</sup> An orientation towards solutions is inherent in the Refugee Convention.<sup>528</sup> The cessation of refugee status is not in itself a durable solution, but the successful attainment of a durable solution—whether through voluntary repatriation, integration or resettlement—will normally lead to cessation of refugee status,<sup>529</sup> and the resumption of a normal life.

Those who cannot be reasonably expected to return to their home country should have access to other durable solutions such as local integration and resettlement.<sup>530</sup> In order to achieve durable solutions, it is important that refugees are able to be self-reliant while waiting for an appropriate long-term solution.<sup>531</sup> Unless the individual refugee retains “economic and social ability. . . to meet essential needs in a sustainable manner and with dignity,” s/he does not have access to durable solutions.<sup>532</sup> Integration is characterized by an economic, social and cultural, and legal component,<sup>533</sup> for example, refugees being able to acquire permanent residency status, nationality or citizenship in their country of asylum.<sup>534</sup>

While asylum seekers are able to access temporary work permits from the Ministry of Labor,<sup>535</sup> they have no realistic pathway towards formal employment.<sup>536</sup> Further, the refugee card does not allow asylum seekers to open a bank account or to get a Guatemalan tax number (also known as a SAP).<sup>537</sup> As a consequence thereof, asylum seekers generally do not have the necessary documents and it becomes impossible to access the formal job market<sup>538</sup> or a job that pays at least the minimum wage.<sup>539</sup> Even if formal employment were possible, the high rates of unemployment in the country suggest that only the luckiest applicants secure a job.<sup>540</sup> Even when they do, chances are high that the job will be linked to the numerous gang activities in the country, forming part of the informal economy.<sup>541</sup>

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527 U.N.G.A., Note on International Protection, Exec. Comm. of the High Commissioner's Programme, Fifty-second session, para. 96, U.N. Doc. A/AC.96/951 (Sept. 13, 2001).

528 Refugee Convention, *supra* note 5; see also U.N.G.A., Note on International Protection, *supra* note 527, para. 96 n.45.

529 U.N.G.A. Note on International Protection, *supra* note 527, para. 96 n.45.

530 U.N. High Commissioner for Refugees, *Reach Out Refugee Protection Training Project, Module 9, Durable Solutions 5* (2005), <https://www.unhcr.org/4371fa4f2.pdf>.

531 The 10-Point Plan in Action, *supra* note 525.

532 *Id.* at 188.

533 U.N. High Commissioner for Refugees Core Group on Durable Solutions, *Framework for Durable Solutions for Refugees and Persons of Concern 24–25* (May 2003), <https://www.unhcr.org/en-us/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html>.

534 *Id.*

535 Interview with Lambda, *supra* note 436; Interview with Casa del Migrante, *supra* note 19.

536 Interview with Director of Special Protection, *supra* note 21.

537 *Id.*

538 Interview with Casa del Migrante, *supra* note 19 (stating that most asylum seekers find informal jobs, if they find jobs, because they do not have the requisite paperwork for formal employment); Interview with Director of Special Protection, *supra* note 21.

539 Interview with Te Conecta, *supra* note 328.

540 Interview with Te Conecta, *supra* note 328; see also Interview with Casa del Migrante, *supra* note 19.

541 See Interview with Carolina Escobar Sarti, *supra* note 391; Interview with Casa del Migrante, *supra* note 19.



Hence, most asylum seekers would rely on informal jobs to be able to sustain themselves and their families throughout the course of the lengthy asylum process in Guatemala.<sup>542</sup> Asylum seekers might sell sweets at traffic lights.<sup>543</sup> Women may resort to prostitution.<sup>544</sup> As representatives of Casa del Migrante told us, the asylum process takes too long, and people will do anything to help themselves and help their families.<sup>545</sup>

Further, although applying for asylum is free *as such* (excluding the costs of food and accommodation during the process),<sup>546</sup> refugees have to pay the equivalent of 200 U.S. dollars for permanent residency.<sup>547</sup> This leaves them in a precarious economic position, undermining their ability to find durable solutions.

The prospects for appropriate long-term integration solutions in Guatemala are limited. Many members of government and civil society emphasized that Guatemala cannot even guarantee the human rights of its own population and questioned how Guatemala could ever guarantee the human rights of incoming asylum seekers.<sup>548</sup> For example, former Guatemalan Congressman Jean-Paul Briere shared, “[w]e have no infrastructure, no money, and no capacity to serve the human rights of these people.”<sup>549</sup> Just before the governmental transition, an immigration lawyer stated, “Human rights are not on the agenda of this government, nor of the next one.”<sup>550</sup> There is strong xenophobic sentiment in Guatemala toward refugees and migrants.<sup>551</sup> There is a trend in discourse that asylum seekers and migrants are criminals, and are coming to take the jobs of Guatemalan people.<sup>552</sup>

Additionally, Guatemala struggles with malnutrition and inequality.<sup>553</sup> One child out of two is malnourished.<sup>554</sup> The Guatemalan Ministry of Public Health and Social Assistance communicated that they did not have the capacity to help all the people seeking the services they provide, such as medicine, mental health services, and primary care.<sup>555</sup>

There is further a severe lack of access to justice; for example, impunity numbers are as high as 98% for sexual violence.<sup>556</sup> Broadly, it is understood that if you report a police officer or a drug dealer,

542 Interview with Casa del Migrante, *supra* note 19.

543 *Id.*

544 *Id.*

545 *Id.*

546 Interview with Jean-Paul Briere, *supra* note 479.

547 *Acuerdo de Autoridad Migratoria Nacional No. 03-2018, Tarifario de Servicios Migratorios* [Nat'l Migration Authority Agreement No. 03-2018, Immigration Services Fee], art.3.5. *But see* Interview with Immigration Lawyer from Guatemala, *supra* note 484 (reporting conflicting information that this costs 2000 Guatemalan Quetzales; the equivalent of 300 U.S. dollars).

548 Interview with Carolina Escobar Sarti, *supra* note 391; Interview with Gabriela Mundo Rodriguez, *supra* note 96; Interview with the Guatemalan Ministry of Public Health and Social Assistance, Guatemala City (January 2020).

549 Interview with Jean-Paul Briere, *supra* note 479.

550 Interview with Alexander Aizenstatd, *supra* note 97.

551 Interview with Director of Special Protection, *supra* note 21.

552 *Id.*

553 Interview with Carolina Escobar Sarti, *supra* note 391; *see also* Interview with the Guatemalan Ministry of Public Health and Social Assistance, *supra* note 548; Interview with United Way, Guatemala City (January 2020).

554 Interview with Marcel Arévalo, *supra* note 95; Interview with Jean-Paul Briere, *supra* note 479.

555 Interview with the Guatemalan Ministry of Public Health and Social Assistance, *supra* note 548.

556 Interview with Carolina Escobar Sarti, *supra* note 391.

they will target you or your family.<sup>557</sup> And even when victims dare to report crimes, they are faced with a highly corrupt judicial system.<sup>558</sup> In Guatemala, nobody has access to justice unless they have money to pay the lawyers or if they have an organization helping them.<sup>559</sup>

While sexual orientation is a protected ground for refugee status in Guatemala,<sup>560</sup> asylum applications from LGTBQI+ individuals have decreased in the last years due to recent legislation that discriminates against LGTBQI+ persons and to the increasing violations of LGTBQI+ human rights in Guatemala.<sup>561</sup> Violence against LGTBQI+ people is normalized; LGTBQI+ individuals were stoned to death and these crimes did not receive [serious] investigations.<sup>562</sup> Because of this increased stigma, those who have the chance to survive further face many difficulties to access [dignified] work,<sup>563</sup> health, and/or education.<sup>564</sup> While the Office of the High Commissioner for Human Rights (OHCHR) and other human rights organizations have made recommendations to Guatemala to respect and protect the human rights of LGTBQI+ people, Guatemala has failed to follow and/or implement them.<sup>565</sup>

Given that Guatemala has resolved minimal to no asylum claims in the last two years,<sup>566</sup> there is limited data on whether asylum seekers are able to access a durable solution through integration in Guatemala. As UNHCR has stated, integration “is often a complex process which places considerable demands on both the individual and the receiving society.”<sup>567</sup> In light of the existing lack of resources, lack of access to justice, and violations of human rights in Guatemala, an additional influx of asylum seekers and refugees would likely cause further complexity and pressures with respect to integration.<sup>568</sup> In this context, even if an asylum seeker is able to successfully navigate the Guatemalan asylum system and be granted refugee status, there are limited durable solutions available to asylum seekers in Guatemala. Thus, in agreeing to the Guatemala ACA, the U.S. and Guatemala are acting inconsistently with UNHCR guidelines on STCAs.

Overall, there is a risk that asylum seekers and refugees will be denied their rights to work, health, and education.<sup>569</sup> This cannot be described as an adequate situation to wait in while looking for a long-term solution.

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557 *Id.*

558 *Id.*

559 Interview with Carolina Escobar Sarti, *supra* note 391; *see also* Interview with Jean-Paul Briere, *supra* note 479.

560 *Acuerdo de Autoridad Migratoria Nacional No. 02-2019*, *supra* note 395, art. 4(c).

561 Interview with Lambda, *supra* note 436.

562 *Id.*

563 Note, many don't even have access to work permits. *Id.*

564 *Id.*

565 *Id.*

566 Interview with UNHCR Guatemala, *supra* note 402 (estimating one year); Interview with Gabriela Mundo Rodriguez, *supra* note 96 (estimating two years). *But see* Declaration of Claudia Paz y Paz Bailey, *supra* note 387 at para. 16.

567 U.N. HIGH COMMISSIONER FOR REFUGEES, *Solutions*, <https://www.unhcr.org/en-us/solutions.html>.

568 *See e.g.*, Interview with UNHCR Guatemala, *supra* note 402 (saying there is also an integration problem [in addition to delays in the asylum process.]); Interview with Incoming Congressman, Guatemala City (January 2020) (“there needs to be a larger conversation about integration, but the state was built on exclusion and homogenization.”).

569 Interview with Marcel Arévalo, *supra* note 95.

## D. Findings regarding Applying for Asylum in Guatemala

*"It is as if the people are being asked to choose something behind three different doors. On the first door, it's their country, and on the other two doors it's a big question mark where they don't know what will happen."*

—Ernesto Archila, Ombudsman Consultant and Former UNHCR Employee<sup>570</sup>

- *The Guatemala ACA violates the INA and international human rights law because, as written, the Guatemalan Migration Code has significant gaps and failures and does not provide access to the "full and fair asylum procedure" required by the INA and further defined by UNHCR guidance. Specifically:*
  - » The *reglamentos* fail to implement Guatemala's obligations under the Convention Against Torture.
  - » The allotted time for review of claims is amorphous and discretionary.
  - » The National Migration Authority (NMA) reviews its own adverse decisions and is a political body composed of high-ranking officials, which renders it impossible to have independent review, violating UNHCR guidance for fair and efficient procedures requiring an independent body to assess appeals.
  - » Essential acting bodies such as the Office of Migratory International Relations (ORMI) are not mentioned in the Guatemalan laws.
- *The implementation of the asylum system departs from what is prescribed in the Migration Code and does not provide access to a "full and fair procedure" under the standards suggested in the Interim Final Rule and defined in UNHCR guidance for fair and efficient procedures because:*
  - » The requirements and procedures set out in the Migration Code and its *reglamentos* do not match with the government's implementation of the asylum system nor with the understanding and experience of the system by Guatemalan NGOs in practice. This confusion means asylum seekers are not clearly informed of the process to apply for asylum, the designated authorities for reviewing their claims, or the appellate bodies—in direct violation of UNHCR guidance on this matter.
  - » Crucial safeguards delineated in the Code are not afforded to asylum seekers: work permits are valid for thirty days rather than the prescribed year, access to legal counsel is extremely limited, and the typical timeframe to resolve asylum claims is more than one year.

<sup>570</sup> Interview with Alexander Aizenstatd, *supra* note 97.

- *The Guatemalan government has not demonstrated the necessary institutional coordination, financial and technical capacity to respond to the increasing number of asylum requests it is receiving pursuant to the Guatemala ACA. This is in breach of UNHCR guidance on access to fair and efficient asylum procedures, which requires the allocation of sufficient personnel and resources to asylum authorities.*
- *Guatemala fails to carry out its international and national obligations to guide asylum seekers through the process and provide critical humanitarian aid, instead shifting this responsibility to NGOs and members of civil society that do not have enough resources to appropriately take on this State burden.*
- *Guatemala fails to respect and protect the rights of asylum seekers to adequate living conditions, non-discrimination, work, education, and health, both during and after the asylum process. This undermines any prospect of seeking protection, both in the short and long-term, in a 'safe' third country, violating UNHCR guidance that the safe third country should provide durable solutions.*
- *In the absence of a full and fair asylum process and durable solutions during and after the asylum process, asylum seekers lack any real path toward protection. This puts individuals at high risk of de facto refoulement to their home countries, where their right to life and right to be free from torture, or cruel, inhuman or degrading treatment is endangered. Thus, the U.S and Guatemala are breaching their obligations against chain refoulement and de facto refoulement respectively under international law.*





## VI. SUMMARY OF FINDINGS

- *Asylum seekers removed to Guatemala pursuant to the Guatemala ACA reported that they felt forced to leave Honduras and El Salvador and seek asylum in the U.S. as their lives were at imminent risk following incidents and threats of gang violence, sexual violence, and attempted gang recruitment of their children, coupled with the ineffectiveness and incapacity of local authorities to protect them from such harms. These asylum seekers may be in need of international protection under the Refugee Convention and Convention Against Torture.*
- *Requiring asylum seekers to affirmatively assert and prove that it is “more likely than not” they would be tortured or persecuted in Guatemala is too high a threshold standard. It imposes a heavy burden on asylum seekers that is exceedingly difficult for them to meet without access to a lawyer, the opportunity to present evidence, or knowledge of Guatemala. This process means an asylum seeker’s removal to Guatemala is not individualized and/or does not meet due process requirements, increasing the risk of removing asylum seekers to a place where they may face violations of their right to life and right to be free from torture. This standard fails to effectively identify asylum seekers who will otherwise be removed inconsistent with the obligation against refoulement.*
- *The current implementation of the Guatemala ACA violates the limited procedural safeguards required by the Interim Final Rule. In violating these requirements, asylum seekers are deprived of their opportunity to express any fear of being removed, further contributing to refoulement. In violation of the Interim Final Rule:*
  - » *Not all asylum seekers are given written notice (a “tear sheet”) explaining that they need to affirmatively assert a fear of removal to Guatemala.*

- » Some asylum seekers are not being told that they are going to, and can pursue an asylum claim in, Guatemala; others are given misinformation regarding the process of removal.
- » Not all asylum seekers are interviewed by an asylum officer.
- *Asylum seekers confirmed many of the widely reported problematic conditions in U.S. immigration detention,<sup>571</sup> including untreated sickness, sleep deprivation, and lack of adequate food. Asylum seekers subject to the Guatemala ACA reported that these conditions made it harder for them to understand their rights and the process, further increasing the difficulty of affirmatively articulating a fear of being removed to Guatemala and meeting the “more likely than not” standard. This makes it more likely they will be removed to Guatemala despite their fear of being sent there, increasing the risk of refoulement.*
- *Regarding the process for transferring asylum seekers from the U.S. to Guatemala, asylum seekers reported that it made them feel as if they are criminals and is unnecessarily dehumanizing and cruel, such that it undermines their ability to seek protection when they arrive in Guatemala.*
- *The process of arrival in Guatemala and return to the country of origin within the mandated seventy-two hour period fundamentally undermines the purpose of asylum protections and results in de facto refoulement, ultimately depriving returnees of their right to seek asylum and placing them at risk of persecution, torture, and the deprivation of their life.*
  - » Upon arrival, asylum seekers are informed by Guatemalan government officials that they have seventy-two hours to decide whether to make an asylum claim or to return to their country of origin.
  - » These individuals and families are offered no written information or support by the Guatemalan government to understand the asylum process or make this decision in seventy-two hours.
  - » The individuals’ state of sleep deprivation, stress and disorientation due to the conditions of detention and transfer further impedes their ability to make these important decisions in such a short period of time.
  - » The Guatemalan government does not consistently present asylum as a feasible option to Guatemala ACA returnees, sometimes emphasizing the administrative burden of asylum claims or failing to mention the option to file an asylum claim at all.
  - » This process, as implemented, deprives asylum seekers of any meaningful choice on whether to seek asylum.
- *Many asylum seekers viewed Guatemala as presenting similar or heightened risks of persecution or torture, or threats to their life, than those which they faced in their country of origin, effectively depriving them of a realistic option to seek protection in Guatemala and of their right to seek asylum.*

571 Other reports have extensively documented how detention conditions may violate the right to be free from torture, or cruel, inhuman or degrading treatment. See e.g., AMNESTY INT’L, USA, *supra* note 296.

- *The Guatemalan government fails to ensure asylum seekers are not returning to a country where they face a risk of torture or persecution. Because of the lack of administrative support to file an asylum claim, and lack of opportunity to seek protection, asylum seekers have no choice but to return to their country of origin even if they have meritorious claims for protection, in de facto violation of Guatemala's obligations against refoulement.*
- *The Guatemala ACA violates the INA and international human rights law because, as written, the Guatemala Migration Code has significant protection gaps and failures and does not provide access to a "full and fair asylum procedure" required by the INA and further defined by UNHCR guidance. Specifically:*
  - » *The reglamentos fail to implement Guatemala's obligations under the Convention Against Torture.*
  - » *The allotted time for review of claims is amorphous and discretionary.*
  - » *The National Migration Authority (NMA) reviews its own adverse decisions and is a political body composed of high-ranking officials, which renders it impossible to have independent review, violating UNHCR guidance for fair and efficient procedures requiring an independent body to assess appeals.*
  - » *Essential acting bodies such as the Office of Migratory International Relations (ORMI) are not mentioned in the Guatemalan laws.*
- *The implementation of the asylum system departs from what is prescribed in the Migration Code and does not provide access to a "full and fair procedure" under the standards suggested in the Interim Final Rule and defined in UNHCR guidance for fair and efficient procedures because:*
  - » *The requirements and procedures set out in the Migration Code and its reglamentos do not match with the government's implementation of the asylum system nor with the understanding and experience of the system by Guatemalan NGOs in practice. This confusion means asylum seekers are not clearly informed of the process to apply for asylum, the designated authorities for reviewing their claims, or the appellate bodies—in direct violation of UNHCR guidance on this matter.*
  - » *Crucial safeguards delineated in the Code are not afforded to asylum seekers: work permits are valid for thirty days rather than the prescribed year, access to legal counsel is extremely limited, and the typical timeframe to resolve asylum claims is more than one year.*
- *The Guatemalan government has not demonstrated the necessary institutional coordination, financial and technical capacity to respond to the increasing number of asylum requests it is receiving pursuant to the Guatemala ACA. This is in breach of UNHCR guidance on access to fair and efficient asylum procedures, which requires the allocation of sufficient personnel and resources to asylum authorities.*
- *Guatemala fails to carry out its international and national obligations to guide asylum seekers through the process and provide critical humanitarian aid, instead shifting this responsibility to*



*NGOs and members of civil society that do not have enough resources to appropriately take on this State burden.*

- *Guatemala fails to ensure adequate living conditions for asylum seekers, including through realization of their rights to non-discrimination, work, education, and health, both during and after the asylum process. This undermines any prospect of seeking protection, both in the short and long-term, in a 'safe' third country, violating UNHCR guidance that the safe third country should provide durable solutions.*
- *In the absence of a full and fair asylum process and durable solutions during and after the asylum process, asylum seekers lack any real path toward protection. This puts individuals at high risk of de facto refoulement to their home countries, where their right to life and right to be free from torture, or cruel, inhuman or degrading treatment is endangered. Thus, the U.S and Guatemala risk breaching their obligations against chain refoulement and de facto refoulement respectively under international law.*



## VII. CONCLUSION

*"It's like they were taken out of hell and thrown back into hell."*  
—Casa del Migrante<sup>572</sup>

In a distortion of the core principles of the right to seek asylum, the Guatemala ACA deprives asylum seekers of critical access to protection. The Guatemala ACA includes insurmountable barriers such that almost all asylum seekers return to their country of origin and the life-threatening danger they had fled, or try to seek asylum again in the United States or elsewhere. The Guatemala ACA violates the Immigration and Nationality Act (INA) as well as international human rights standards in three primary ways. First, the U.S. and Guatemala are likely *refouling* hundreds of asylum seekers; the United States does not thoroughly assess meritorious claims of fear of being sent to Guatemala, and the arrival process in Guatemala is designed to discourage asylum seekers from seeking asylum. Second, the Guatemalan asylum procedures—as designed in their 2016 Migration Code and as occurring in practice—do not qualify as “full and fair.” Third and finally, the consequence of the Guatemala ACA’s implementation and these violations is that essential human rights of asylum seekers, including the right to life and the right to be free from torture, or cruel, inhuman or degrading treatment are significantly put at risk.

With respect to the first point, both the U.S. and Guatemala are disregarding the obligation of *non-refoulement*.<sup>573</sup> In implementing the Guatemala ACA, U.S. officials are discouraged from or actively avoid asking the questions necessary to adequately conduct an individualized assessment of the risk of removing an asylum seeker to Guatemala; contrary to what is required by international guidelines. Further, asylum seekers must prove

<sup>572</sup> Interview with Casa del Migrante, *supra* note 19 (describing on the experiences of asylum seekers removed to Guatemala).

<sup>573</sup> See discussion under Section V, Phase 2, Asylum Seekers' Arrival in the United States: Disregarded and Detained; Discussion under Section V, Phase 3, Arrival in Guatemala.

that they meet the higher standard, that it is “more likely than not” they will face persecution on a protected ground or torture in Guatemala. This higher standard applied as a threshold inquiry is problematic because they are required to meet the standard without having the opportunity to provide supporting evidence, without consultation with a lawyer, and while managing the physical and emotional effects of inadequate and inhumane detention conditions. In these circumstances, it is unlikely, if not impossible, that an asylum seeker would ever be able to successfully demonstrate a fear of harm in Guatemala such that they would not be removed to Guatemala. This U.S. practice fails to adequately assess asylum seekers’ protection concerns regarding Guatemala and thus risks violating the obligation of *non-refoulement*.<sup>574</sup>

Risks of violation of the obligation of *non-refoulement* also take place in Guatemala, where the arrival process ensures those returned by the U.S. are highly unlikely to seek asylum in Guatemala. Upon arrival, asylum seekers receive little to no information on if or how they can apply for asylum in Guatemala, or are actively discouraged from applying by Guatemalan authorities. Exhausted, distressed, and lacking the information necessary to understand they have a right to apply for asylum, asylum seekers are given only seventy-two hours to decide whether to receive free transportation to their home country or apply for asylum in Guatemala. Many asylum seekers feel they have no choice but to return to their country of origin. So far, hundreds have returned home, *de facto refouled* to the same dangers they initially fled.<sup>575</sup>

Second, Guatemala’s asylum system does not fulfill international obligations and does not provide access to a “full and fair asylum procedure,” as required by the INA and further defined by UNHCR guidelines. The Migration Code and *reglamentos*, as written, have significant gaps and are only partially implemented. The existing *reglamentos* lack important protections against *refoulement*, such as the implementation of Guatemala’s obligations under the Convention Against Torture. Further, key institutional players, such as ORMI, are not mentioned in the Code or accompanying *reglamentos*. Finally the Code provides no opportunity for independent review of asylum claims, as the NMA reviews their own adverse decisions.

In addition to the gaps in the Migration Code, the reality of the asylum procedures in Guatemala departs further from full and fair standards. The process of applying for asylum appears to be understood differently by the stakeholders responsible for its implementation, rendering clear direction and designation of competent authorities impossible. Crucial safeguards are not afforded to asylum seekers: work permits are valid for thirty-days rather than the prescribed year period, access to legal counsel is extremely limited, and the typical timeframe to resolve asylum claims is more than one year. At no point are asylum seekers provided with assistance from the government to access counsel or humanitarian support. Failing to meet its domestic and international obligations, Guatemala entirely outsources its responsibilities to civil society, which, despite performing crucial relief work, does not have the means to shoulder the burden and fill this significant protection gap.<sup>576</sup> On top of violating the requirements in the INA and international guidelines, Guatemala’s failure to provide access to a “full and fair procedure” creates a scenario where hundreds of asylum seekers

574 See discussion under Section V, Phase 2, Asylum Seekers’ Arrival in the United States: Disregarded and Detained.

575 See discussion *supra* Section V, Phase 3, Arrival in Guatemala.

576 See discussion *supra* Section V, Phase 4, Applying for Asylum in Guatemala.

cannot obtain protection in Guatemala, in *de facto* violation of Guatemala's *non-refoulement* obligation. In this context, inaccurately assessing Guatemala's procedures as "full and fair" also likely amounts to *chain refoulement* by the U.S.

Finally, the failure of both States to protect asylum seekers subject to the Guatemala ACA from *refoulement* puts their human rights at great risk; including their right to life and right to be free from torture, or cruel, inhuman or degrading treatment. Asylum seekers have no choice but to return to the very countries and dangers they were fleeing. Additionally, our interviews confirmed existing concerns about the detention conditions in the U.S.,<sup>577</sup> and suggested there is evidence of violations of due process safeguards. In Guatemala, the rights to work, health, education, adequate living conditions, and non-discrimination are seriously undermined, both during and after the resolution of asylum claims; making any short-term or long-term stay in Guatemala a danger to the human rights of asylum seekers and refugees.

The Guatemala ACA thus violates the INA and international standards because of the high risks that the U.S. and Guatemala are violating their obligation of *non-refoulement* and because the asylum procedures currently in place in Guatemala cannot qualify as "full and fair." The violations of international and human rights' obligations as well as of Guatemalan and U.S. laws expose asylum seekers to additional dangers, often similar to those prompting the original departure from their home countries. Both States must rescind the Guatemala ACA in order to bring their actions into compliance with their domestic and international legal obligations, and to respect the human rights of individuals seeking to apply for asylum in the United States.

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577 Existing human rights reports have documented how U.S. detention conditions may amount to violations of the right to be free from torture, or cruel, inhuman or degrading treatment. See e.g., AMNESTY INT'L, *supra* note 296.





## VIII. RECOMMENDATIONS

### UNITED STATES

To protect the fundamental human rights of asylum seekers, to bring the United States into line with its international obligations under the Refugee Convention, the Convention Against Torture, the International Covenant for Civil and Political Rights, and to adhere to its obligations under the Immigration and Nationality Act, this report makes the following recommendations to the United States' government.

#### THE U.S. GOVERNMENT SHOULD:

- Terminate the Guatemala ACA to prevent the ongoing transfer of asylum seekers to a country where they cannot access a “full and fair asylum procedure” or equivalent temporary protection, placing these individuals at risk of *refoulement*, and the U.S. in violation of its obligations under the Refugee Convention, the Convention Against Torture and the INA § 1108(2)(A).
- If not terminated, immediately suspend operation of procedures under the Guatemala ACA until the Guatemalan government has fully addressed legal gaps and deficiencies in its asylum laws as per the below recommendations, and has the demonstrated institutional, financial and technical capacity to provide every asylum seeker transferred pursuant to the Guatemala ACA with access to a full and fair asylum procedure and effective protection from *refoulement*.
- Revise the Interim Final Rule immediately to ensure that the process being applied to asylum seekers subject to the Guatemala ACA is consistent with U.S. and international law, at a minimum:
  - » Change the threshold screening for risks of persecution or torture in Guatemala from the “more likely than not” standard to a lower standard, in light of the serious repercussions of removing someone to a place where they could be killed or at risk of persecution or other serious violations of their human rights.

- » Ensure that asylum officers explicitly ask each asylum seeker, in a language they understand, if they have a fear of being transferred to and physically present in Guatemala.
- » Provide asylum seekers the right to consult with counsel prior to an interview, to have a lawyer present during interviews, and to present any evidence.
- » Require asylum officers to check that each asylum seeker understands the information provided to them, including that asylum seekers will not be continuing their claim for asylum in the U.S. but making a new claim for protection in Guatemala.
- » Require asylum officers to consider whether asylum seekers who have suffered persecution or torture in their country of origin may face the same or similar threats to their life or freedom in the third country due to the transnational nature of the threats and/or similar conditions in that country.
- » Safeguard asylum seekers' right to independent judicial review of safe third country determinations.
- Revise and reissue USCIS written policy guidance to comprehensively safeguard against violations of *non-refoulement* by ensuring that asylum seekers understand the process and can articulate any fear of removal to Guatemala:
  - » Guarantee that U.S. immigration and asylum officers inform each asylum seeker subject to the Guatemala ACA, verbally and in writing, of why the Guatemala ACA is being applied to them, what the process involves and could require of them, their next steps in the process, any options and support available, and expected timeframes.
  - » Redraft the current "tear sheet" into clear and appropriate language, removing or defining all legal and policy jargon, such as "amenability," to ensure that asylum seekers can understand the information provided to them.
  - » Include information in the "tear sheet" that enables asylum seekers to consider their options in Guatemala in advance of their arrival, for instance, rather than merely notifying asylum seekers that they will have the opportunity to apply for asylum in Guatemala, provide an overview of how they can make this claim.
- Train U.S. asylum officers and U.S. Customs and Border Protection to properly and fully follow the revised Interim Final Rule and Guidance, as described above.
- Refrain from inhumane detention practices, which, among other human rights impacts, cause asylum seekers to arrive in Guatemala exhausted, disorientated and distressed and undermines their ability to navigate the process upon arrival in Guatemala.
- Make the annexes of the Guatemala ACA publicly available in both English and Spanish.
- Work in partnership with Guatemala to ensure that asylum seekers have access to a full and fair asylum procedure and effective protection from *de facto refoulement* in Guatemala:
  - » Support capacity building of Guatemalan institutions tasked with administering the asylum system.

- » Provide technical training and assistance to Guatemalan asylum officers and humanitarian staff to expand Guatemala's capacity to offer and provide protection to an influx of asylum seekers.
- » Ensure that key civil society organizations are sufficiently supported through funding, training and personnel, to provide humanitarian assistance and support implementation of the Guatemala ACA.
- Consistent with Article 7.4 of the Guatemala ACA, monitor and evaluate implementation of the Guatemala ACA, including the conduct of U.S. officials, on an ongoing basis to ensure compliance with U.S. legal obligations under the text of the Agreement, the Immigration and Nationality Act, the Refugee Convention and the Convention Against Torture. This could be undertaken by UNHCR<sup>578</sup> or another independent entity.

## GUATEMALA

To protect the fundamental human rights of asylum seekers, to bring Guatemala in compliance with its international obligations under the Refugee Convention, the Convention Against Torture, the International Covenant for Civil and Political Rights, the International Covenant for Economic, Social and Cultural Rights, and to adhere to its obligations under the 2016 Migration Code and its *reglamentos*, this report makes the following recommendations to the Guatemalan government.

### THE GUATEMALAN GOVERNMENT SHOULD:

- Amend and supplement the current legislation to protect the rights of asylum seekers in line with its obligations under international law, including:
  - » Expressly include in the 2016 Migration Code and its *reglamentos* clear procedures for handling and properly addressing asylum seekers' claims for protection under the Convention Against Torture, and stringent protections against *refoulement*.
  - » Explicitly define and regulate the role of the Office of Migratory International Relations (ORMI) within the asylum system.
  - » Create a clear and accessible process for asylum seekers to appeal an adverse decision in their asylum case, including by: requiring both the National Commission for Refugees (CONARE) and the National Migration Authority (NMA) to communicate to the asylum seekers the specific reasons for their adverse decision; utilizing or establishing an independent judicial or appellate body to make determinations on appeals (ensuring the same political body is not reviewing its own decisions); and clearly describing in law, or in official, public guidance the process for judicial or other independent review of an adverse finding.

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<sup>578</sup> UNHCR acted as the monitoring body for the U.S.-Can. STCA. See, e.g., U.S.-Canada Agreement, *supra* note 87, art. 8(3).



- » Ensure that the body with authority for final decisions on asylum cases is politically independent and has the required technical expertise to make asylum decisions consistently with international law and guidance.
- » If the NMA retains authority for the final approval or rejection of asylum cases, amend its role by:
  - Creating a presumption that the NMA will follow the recommendations of ORMI and CONARE to ensure that final decisions on asylum cases are made independently of political considerations.
  - Amending the composition of the NMA to include technical experts with knowledge of international refugee law and guidance.
  - Ensuring that members of the NMA, which include the Vice President of Guatemala and other senior Ministers, can delegate final asylum decisions to representatives to ensure scheduling challenges do not halt the operation of the asylum system.
- Make the Guatemala ACA and all its annexes publicly available in Spanish, and clarify the Agreement's legal status in Guatemala.
- Bring the current practice regarding the asylum system in compliance with the provisions of the 2016 Migration Code and its *reglamentos*:
  - » Add necessary support staff in ORMI to support implementation of the asylum procedures, because the current number of fewer than ten staff members is too few to manage current, let alone, an increased, number of asylum claims.
  - » Require that CONARE meets at least as frequently as the law requires, increasing in frequency to meet caseload demands to ensure that asylum claims are adequately assessed and refugee status determinations are made within a reasonable time, as the current pace of two to three meetings a year renders the system inoperable in practice.
  - » Ensure that the NMA, as the competent authority for resolving refugee status determination, is established and operating not just on paper, but also in practice.
  - » Require the NMA to meet once every three months, as currently required by law, and create enforcement mechanisms to address the currently non-existent meeting practice.
  - » Monitor the overall time period to make final decisions on asylum cases to ensure the ninety-days deadline is consistently met, rectifying the current one to two years processing time for asylum claims.
  - » Guarantee the human rights of asylum seekers during the process, including their rights to work, health and education. Reduce the cost and documentation necessary to obtain access to these rights to ensure such rights are protected and enjoyed by

asylum seekers. For example, amend requirements related to criminal records and the one-year renewable period so that asylum seekers can work while their claim is being processed.

- Make information publicly available on Guatemala's asylum process and the steps an asylum seeker must take to apply for asylum in Guatemala:
  - » Provide asylum seekers arriving in Guatemala with information that clearly explains their rights and options; including their right to seek asylum, the process through which they can initiate an application, and the support services available to them. Explain and provide this information in writing, in a language they understand.
  - » Ensure that migration officers refrain from making statements that discourage asylum seekers from seeking asylum in Guatemala.
  - » Offer information to asylum seekers on how to access legal assistance and an interpreter, as well as information on employment, education, and health services.
  - » Remove the seventy-two hour time stipulation, currently presented only to asylum seekers arriving in Guatemala pursuant to the Guatemala ACA and which has no basis in Guatemalan law or policy, to enable all asylum seekers a reasonable opportunity to fully consider their options and make a free and meaningful choice on whether to apply for asylum in Guatemala.
- Ensure that the human rights of asylum seekers are protected while their asylum claims are under review and that they have access to durable solutions in Guatemala:
  - » Offer to provide government-sponsored legal assistance and interpreters to asylum seekers during the asylum process.
  - » Dedicate funding and technical assistance to civil society organizations providing essential humanitarian, legal and other support to asylum seekers.
  - » Offer asylum seekers assistance in accessing short-term and long-term adequate living conditions, education, health services, and employment opportunities, and safeguard all other rights, including their right to be free from torture or cruel, inhuman, or degrading treatment.
- Appropriate funding for ongoing monitoring, review and reporting by civil society or other independent organizations, to effectively oversee asylum seekers' access to a "full and fair asylum procedure" and the enforcement of Guatemalan laws guaranteeing asylum seekers' human rights.



# IX. ANNEXES

## **Annex I: U.S.-Guatemala Asylum Cooperative Agreement**



This document is scheduled to be published in the Federal Register on 11/20/2019 and available online at <https://federalregister.gov/d/2019-25288>, and on [govinfo.gov](https://govinfo.gov)

Billing Code 9110-9M

### **DEPARTMENT OF HOMELAND SECURITY**

#### **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**

**AGENCY:** Office of Strategy, Policy, and Plans, Department of Homeland Security.

**ACTION:** Notice of agreement.

**SUMMARY:** The Department of Homeland Security is publishing the 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.

The text of the Agreement is set out below.

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Valerie Boyd,  
Assistant Secretary for International Affairs,  
Office of Strategy, Policy, and Plans,  
U.S. Department of Homeland Security.

**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**

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA, hereinafter referred to individually as "Party" or collectively "the Parties".

CONSIDERING that Guatemala regulates its relations with other countries in accordance with international principles, rules and practices, with the purpose of contributing to the maintenance of peace and freedom, the respect and defense of human rights, and the strengthening of democratic processes and international institutions that guarantee the mutual and equitable benefit among the states. On the other hand, Guatemala will maintain relations of friendship, solidarity and cooperation with those states whose economic, social and cultural development is analogous to that of Guatemala, such as the right of people to migrate and their need for protection.

WHEREAS Guatemala currently incorporates a dynamic immigration law into its domestic legislation, which requires Guatemala to recognize the right of every person to emigrate or immigrate, thereby allowing any migrant to enter, remain, transit, leave and return to its territory in accordance with its domestic laws. Likewise, in situations not provided for by domestic legislation, the norm that most favors the migrant must be applied. As such, temporary shelter and care should be given to those who wish to enter Guatemala legally. For the above reasons it is necessary to promote cooperation agreements with other states that uphold the same values outlined in Guatemala's migration policy, which is regulated by the National Migration Authority.

CONSIDERING that Guatemala is a party to the 1951 Convention relating to the Status of Refugees, done at Geneva on July 28, 1951 (the "1951 Convention") and the Protocol Relating to the Status of Refugees, done at New York on January 31, 1967 (the "1967 Protocol"), to which the United States of America is a party and reaffirming the obligation of the Parties to provide protection to refugees who meet the requirements and who are physically in their respective territories, in accordance with their obligations under those instruments and subject to the respective laws, treaties, and declarations of the Parties.

RECOGNIZING, in particular, the obligation of the Parties to comply with the principle of non-refoulement, as outlined in the 1951 Convention and the 1967 Protocol, as well as the Convention against Torture and Other Treatment or Cruel, Inhuman or Degrading Penalties, signed in New York on December 10, 1984 (the "Convention against Torture"), subject to the Parties respective reservations, understandings, and declarations and reaffirming their respective obligations to promote and protect human rights and fundamental freedoms consistent with their international obligations;

RECOGNIZING and respecting the obligations of each Party in accordance with its domestic laws

and policies, and international agreements and arrangements;

UNDERSCORING that the United States and Guatemala offer refugee protection systems that are consistent with their obligations under the 1951 Convention and/or the 1967 Protocols;

DETERMINED to maintain the status of refuge or equivalent temporary protection, as an essential measure of the protection of refugees or asylees, and at the same time wishing to prevent fraud in the refugee or asylum application process –an action that undermines its legitimate purpose– and determined to strengthen the integrity of the official process for requesting asylum or refugee status as well as public support for said processes;

AWARE that the distribution of responsibility for requests for protection must guarantee in practice, that people in need of protection be identified and that violations of the basic principle of non-refoulement be avoided; and, therefore, committed to safeguarding for each applicant the status of refuge or asylum that meets the required conditions, access to a full and fair procedure for the determination of their claim;

AGREE to the following:

## ARTICLE 1

For the purposes of this Agreement:

1. "Request for Protection" refers to the request of a person of any nationality, to the government of one of the Parties to receive protection in accordance with their respective institutional obligations derived from the 1951 Convention, the 1967 Protocol or the Convention against Torture, and in accordance with the respective laws and policies of the Parties, enforcing compliance with said international obligations; as well as to receive any other type of equivalent temporary protection available under the migration law of the receiving party.
2. "Protection Applicant" refers to any person who submits a request for protection in the territory of one of the Parties.
3. "System to Determine Protection" refers to the set of policies, laws, administrative and judicial practices that the Government of each Party uses to make a decision on requests for protection.
4. "Unaccompanied Minor" refers to an applicant for protection who has not reached the age of eighteen (18) and whose parent or legal guardian is not present or available to provide care and physical custody in the United States, or in Guatemala, where the unaccompanied minor is located.
5. In the case of Guatemala immigration, law and migration policy refers to the rights of persons to enter, remain, transit and leave its territory in accordance with its domestic laws

and international agreements and arrangements, and immigration stay means the authorized period of time according to the immigration status granted to individuals.

## ARTICLE 2

This Agreement does not apply to applicants for protection who are citizens or nationals of Guatemala; or stateless individuals habitually residing in Guatemala.

## ARTICLE 3

1. To ensure that protection applicants transferred to Guatemala by the United States have access to a system to determine protection, Guatemala will not return or expel applicants for protection in Guatemala, unless the application is abandoned by the applicant or is formally rejected through an administrative decision.
2. During the transfer process, the persons subject to this Agreement will be the responsibility of the United States until the transfer process is completed.

## ARTICLE 4

1. The responsibility for determining and concluding requests for protection within its territory shall rest with the United States, when the United States establishes that that person:
  - a. is an unaccompanied minor; or
  - b. has arrived in the territory of the United States:
    - i. with a validly-issued visa or other valid admission document, other than a transit visa, issued by the United States; or
    - ii. without the United States requiring him to obtain a visa.
2. Notwithstanding paragraph 1 of this article, Guatemala will evaluate the request for protection on an individual basis, in accordance with what is established and authorized by the competent authority on immigration matters in its migration policies and laws and in its territory, of persons who meet the appropriate requirements under this Agreement and who arrive in the United States at a port of entry or between ports of entry, on or after the effective date of this Agreement. Guatemala will evaluate the request for protection, in keeping with the Initial Implementation Plan and the standard operating procedures referenced in Article 7.1 and 7.5.
3. The Parties shall apply this Agreement with respect to unaccompanied minors, in accordance with their respective domestic laws.

4. The Parties shall have procedures in place to ensure that the transfers from the United States to Guatemala of the persons covered by this Agreement are compatible with their respective obligations, domestic and international laws, and migration policies.]
5. The United States shall make the final decision that an individual qualifies for an exception under Articles 4 and 5 of this Agreement.

#### **ARTICLE 5**

Notwithstanding any provision of this Agreement, any Party may, at its discretion, examine any request for protection that has been submitted to that Party when it decides that it is in the public interest to do so.

#### **ARTICLE 6**

The Parties may:

1. Exchange information when necessary for the effective implementation of this Agreement, subject to national laws and regulations. Such information will not be disclosed by the recipient country except in accordance with its national laws and regulations.
2. The Parties may regularly exchange information regarding laws, regulations, and practices related to their respective systems to determine migration protection.

#### **ARTICLE 7**

1. The Parties shall develop standard operating procedures to assist in the implementation of this Agreement. These procedures shall incorporate provisions to notify Guatemala in advance of the transfer of any person pursuant to this Agreement. The United States will collaborate with Guatemala to identify the appropriate individuals to be transferred to Guatemala's territory.
2. The operating procedures shall incorporate mechanisms to resolve disputes that respect the interpretation and implementation of the terms of this Agreement. Unforeseen cases that cannot be resolved through these mechanisms will be resolved through diplomatic channels.
3. The United States plans to cooperate to strengthen the institutional capacities of Guatemala.
4. The Parties agree to regularly evaluate this Agreement and its implementation to correct any deficiencies found. The evaluations will be carried out jointly by the Parties, the first within a maximum period of three (3) months from the date of entry into operation of the Agreement with following evaluations occurring by the same terms. The Parties may invite, by mutual agreement, other relevant organizations with specialized knowledge on the subject, to participate in the initial evaluation and/or cooperate for the implementation of this Agreement.



5. The Parties intend to complete an initial implementation plan, which will contain gradual steps, and address, among other things: (a) procedures necessary to effectuate the transfer of individuals under this agreement; (b) the volume or number of individuals to be transferred; and (c) institutional capacity requirements. The Parties plan to operationalize this Agreement upon the completion of a phased implementation plan.

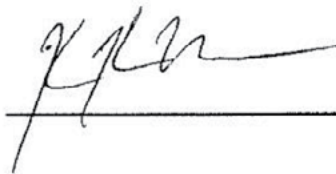
#### ARTICLE 8

1. This Agreement shall enter into force by means of an exchange of notes between the Parties indicating that each party has complied with the necessary domestic legal procedures for the Agreement to enter into force. For the term of two (2) years, renewable before its expiration with the exchange of diplomatic notes.
2. Any Party may terminate this Agreement by giving written notice to the other Party three (3) months in advance.
3. Any Party may, immediately after notifying the other Party in writing, suspend for an initial period of up to three (3) months the implementation of this Agreement. This suspension may be extended for additional periods of up to three (3) months, by means of written notification to the other Party. Any Party may, with the written consent of the other, suspend any part of this Agreement.
4. The Parties may in writing, by mutual agreement, make any modification or addition to this Agreement. These shall enter into force in accordance with the relevant legal procedures of each Party and the amendment or addition shall constitute an integral part of this Agreement.
5. Nothing in this Agreement shall be construed in such a way as to oblige the Parties to disburse or obligate funds.

IN FAITH WHEREOF, the undersigned, duly authorized by their respective governments, sign this Agreement.

SIGNED on the 26 day of July of the year 2019 in the English and Spanish languages, with both texts being authentic.

FOR THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA:  
Kevin K. McAleenan  
Acting Secretary of Homeland Security



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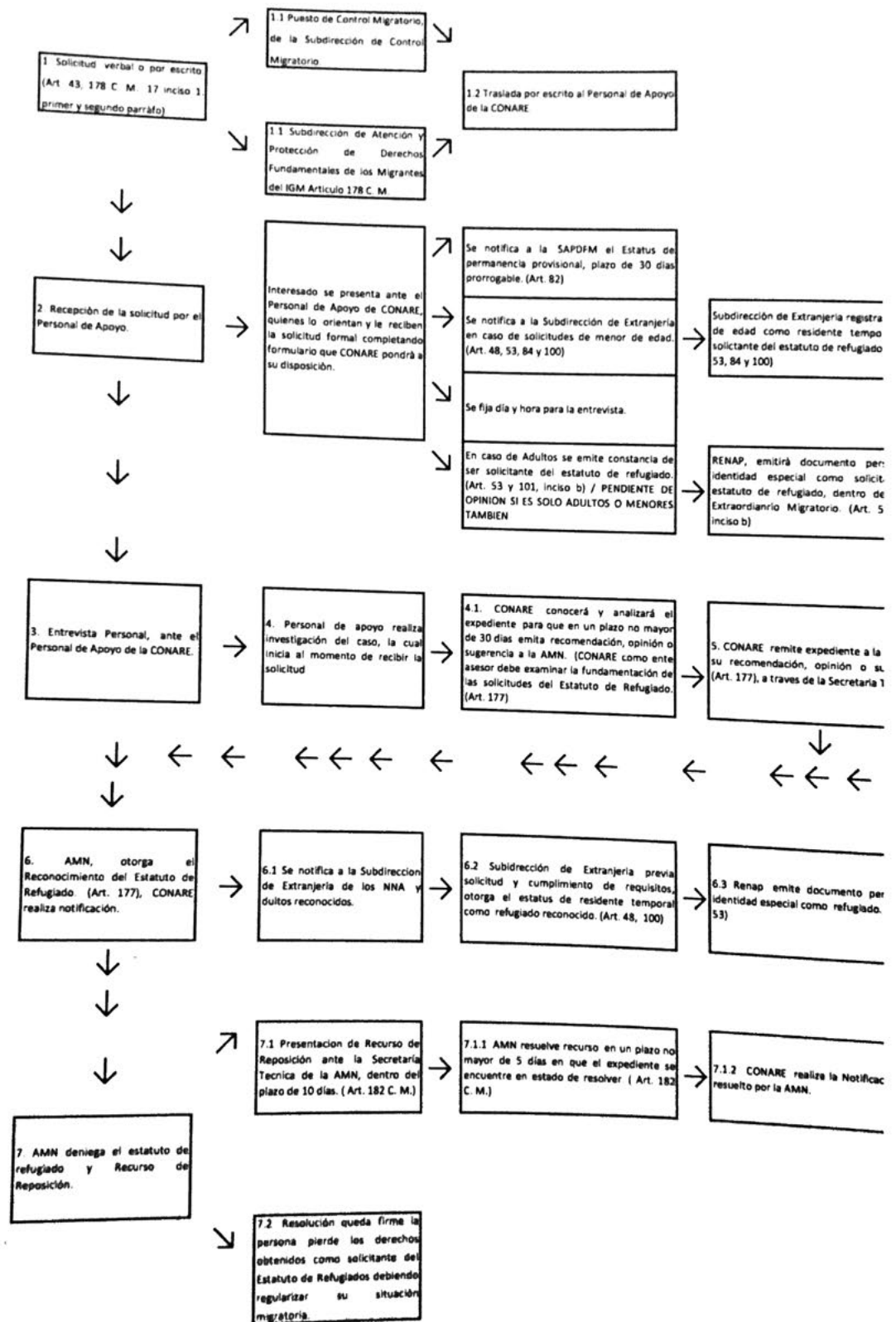
FOR THE GOVERNMENT OF THE  
REPUBLIC OF GUATEMALA:  
Enrique A. Degenhart Asturias  
Minister of Government



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## Annex II: Asylum Process in Guatemala

### ESQUEMA DEL PROCEDIMIENTO GENERAL DEL ESTATUTO DE REFUGIADO EN GUATEMALA







Human Rights Institute  
GEORGETOWN LAW