

December 16, 2019

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Submitted via <https://www.regulations.gov/docket?D=USCIS-2019-0021>

Re: Comments in Response to Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019), USCIS-2019-0021, EOIR Docket No. 19-0021

Dear Mr. Davidson and Ms. Reid:

The Tahirih Justice Center (“Tahirih”) submits the following comments in response to the interim final rule (“IFR”) concerning the implementation of safe-third-country agreements (renamed “asylum cooperative agreements” in the IFR).¹ The IFR purports to allow the government to remove almost any asylum seeker—without regard to their country of origin, their method of transit to, or entry into, the United States, their language, or the reason for the persecution that drove them to seek refuge in the United States—to *any* country with which the United States has a signed and effective safe-third-country agreement. The IFR presently allows the government to remove asylum seekers to Guatemala and will also allow removals to both Honduras and El Salvador as soon as agreements with those countries take effect.

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of

¹ All references to “safe-third-country agreements” in this comment are to be construed as including “asylum cooperative agreements.”

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gender-based violence throughout the past twenty-one years. Our clients endure unimaginable atrocities such as human trafficking, domestic violence, forced marriage, honor crimes, and sexual assault.

As explained in detail below, the IFR flatly violates the Immigration and Nationality Act (“INA”), makes a mockery of U.S. treaty obligations, runs roughshod over the due process rights of asylum seekers, and will force countless individuals to face foreseeable and avoidable persecution, torture, and death. In light of all of those infirmities, it is no surprise that the rationale presented for the IFR is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”) and that the IFR was improperly issued without prior notice and comment. The IFR must accordingly be withdrawn in its entirety.

I. The IFR Violates the INA and U.S. Treaty Obligations

The IFR represents the most sweeping restriction on asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”) ever contemplated in the United States. On its face, the IFR has effectively no exemptions: It renders everyone not covered by an exception to a safe-third-country agreement categorically ineligible for all three types of relief. The agreements that the IFR implements—the so-called “asylum cooperative agreements” signed by Guatemala, Honduras, and El Salvador—have exceptions only for unaccompanied minors and individuals who have, or do not need, visas to enter the United States.²

Moreover, although the IFR contains procedures purportedly designed to ensure *non-refoulement*, those procedures set a standard that will be impossible for asylum seekers to meet. The IFR, in other words, effectively renders everyone who falls outside of the narrow exceptions in safe-third-country agreements ineligible for asylum, withholding of removal, or CAT relief. That result cannot possibly be reconciled with the plain text of the INA.

A. The IFR Is Inconsistent with 8 U.S.C. § 1158(a)(1)

As an initial matter, the INA makes clear that any individual “who is physically present in the United States or who arrives in the United States *** may apply for asylum.” 8 U.S.C. § 1158(a)(1). Moreover, the statute unambiguously states that this right to apply for asylum applies “irrespective of” whether the individual has status in the United States (*id.*), and it expressly contemplates that those who lack required entry documents may apply for asylum (*id.* § 1225(b)(1)(A)(i)). The INA also cannot support excluding adults and families from asylum protections in favor of only unaccompanied minors. *See id.* § 1158(a)(2)(E) (exempting unaccompanied children

² The agreements also exempt individuals who are nationals or residents of the signatory country—but those individuals would remain subject to the other agreements. A Honduran national, for example, is excepted from the agreement with Honduras but subject to the agreements with Guatemala and El Salvador.

from some restrictions on asylum). The IFR’s drastic winnowing of asylum eligibility therefore directly contradicts the statute and cannot stand.

B. The IFR Violates, Rather Than Implements, the Safe-Third-Country Provision of the INA

It is no answer to say that the IFR is authorized by the INA’s safe-third-country provision, 8 U.S.C. § 1158(a)(2)(A). It is not. The application of that provision must satisfy two prerequisites: The first statutory requirement is that the country at issue be one “in which the [individual’s] life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* And the second requirement is that the third country at issue must be one “where the [individual] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.” *Id.* The IFR does not fulfill either of these prerequisites—as exemplified by its current or foreseeable application to agreements signed with Guatemala, Honduras, and El Salvador.

1. The IFR Will Result in the Removal of Countless Asylum Seekers to Persecution and Torture in Third Countries

Under the INA, individuals may not be removed to countries where they will face persecution. But the IFR was promulgated shortly after DHS signed safe-third-country agreements with Guatemala, El Salvador, and Honduras.

Those countries are not safe for large populations of asylum seekers. In particular, a multitude of sources makes clear that survivors of violence based on gender and gender identity. Azam Ahmed, *Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out*, N.Y. Times Aug. 18, 2019, available at <https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html>; see also, e.g., Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016), available at <https://www.refworld.org/docid/584aaeac4.html>; U.S. Dep’t of State, *Guatemala 2018 Human Rights Report* 16 (2018) (“Guatemala Report”), <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>; U.S. Dep’t of State, *El Salvador 2018 Human Rights Report* (2018), <https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf>; U.S. Dep’t of State, *Honduras 2018 Human Rights Report* (2018), <https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf>; *Teenage Girls Most at Risk Amid Rising Sexual Violence in El Salvador—Report*, The Guardian, <https://www.theguardian.com/global-development/2019/apr/17/teenage-girls-el-salvador-rising-sexual-violence-report>; Immigration & Refugee Board of Canada, *El Salvador: Information Gathering Mission Report—Part 2. The Situation of Women Victims of Violence and of Sexual Minorities in El Salvador*, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=57f7ac384>. The same sources demonstrate that women are generally subject to severe violence,

including rape and murder, in the Northern Triangle countries because they are women.

The IFR contains purported safeguards to prevent the non-refoulement of individuals who would be persecuted or tortured in the Northern Triangle countries—but those supposed safeguards are no more than a sham. In effect, the IFR requires individuals to prove, without preparation or the ability to gather evidence, that they are more likely than not to be subject to persecution or torture in every supposedly “safe” third country. Moreover, individuals must do so with no more prompting than a written sheet in unspecified languages that many or most asylum seekers will not understand. And sub-regulatory guidance from DHS that has never been published in the Federal Register (*see USCIS, US-Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening* (Nov. 19, 2019)) makes clear that individuals must succeed at this task without the assistance of lawyers or others.³

This standard is impossible to meet. In fact, given that the procedure applies even to asylum seekers who know nothing about Guatemala, have never set foot in Guatemala, have no ties to Guatemala, and do not speak either English or Spanish there can be little doubt that it is designed to be impossible to meet. And a similar—and similarly illegal—procedure employed as part of the inaptly named “Migrant Protection Protocols” (*see Memorandum from Kirstjen M. Nielsen to L. Francis Cissna, Kevin K. McAleenan, and Ronald D. Vitiello* (Jan. 25, 2019)) has resulted in almost no findings that asylum seekers will be persecuted in Mexico. It has also resulted in hundreds, and probably thousands, of instances in which asylum seekers returned to Mexico were raped, kidnapped, disappeared, murdered, or otherwise persecuted. *See, e.g., Latin America Working Group, All About the “Remain in Mexico” Policy,* <https://www.lawg.org/all-about-the-remain-in-mexico-policy/>; Taylor K. Levy, *My City Used to Welcome Refugees. “Remain in Mexico” Means We Can’t Anymore*, Washington Post Nov. 19, 2019, <https://washingtonpost.com/outlook/2019/11/19/my-city-used-welcome-refugees-remain-mexico-means-we-cant-anymore/>. There can be no doubt that the implementation of the IFR will replicate both of these results.

To be sure, sub-regulatory and unenforceable guidance from DHS suggests that, at least for the moment, the provisions of the IFR will be applied only to nationals of the three Northern Triangle countries. But nothing in the IFR compels, or even suggests, that its provisions apply only to nationals of certain countries. And this apparently restricted implementation of the IFR does not render its provisions somehow consistent with the INA. In particular, there is no reason to believe that survivors of gender- and gender identity-based violence in one Northern Triangle country are less likely to be subject to additional persecution in other Northern Triangle countries than survivors of other nationalities.

³ This restriction is itself illegal. Because it is not contained in the IFR, however, we do not separately address it here.

2. The IFR Impermissibly Permits Removals to Countries Lacking Full and Fair Asylum Procedures

Any attempt to describe the asylum systems in Guatemala, Honduras, or El Salvador as providing “full and fair procedure[s]” would be laughable.⁴ Guatemala, for example, heard only 262 asylum claims in 2018. David C. Adams, *Guatemala’s “embryonic” asylum system lacks capacity to serve as safe U.S. partner, experts say*, Univision Aug. 2, 2019, <https://www.univision.com/univision-news/immigration/guatemala-embryonic-asylum-system-lacks-capacity-to-serve-as-safe-u-s-partner-experts-say>. And Guatemala cannot handle more claims, as it has only 12 officials who work on any aspect of the asylum process, including only 3 who interview applicants. The asylum systems in Honduras and El Salvador are similarly incapable of handling substantial numbers of claims. See, e.g., Daniella Silva, *U.S. signs asylum deal with Honduras that could force migrants to seek relief there*, NBC News Sept. 25, 2019, <https://www.nbcnews.com/news/us-news/u-s-signs-asylum-deal-honduras-could-force-migrants-seek-n1058766>; Michelle Hackman and Juan Montes, *U.S., El Salvador Reach Deal on Asylum Seekers*, Wall Street Journal Sept. 20, 2019, <https://www.wsj.com/articles/u-s-el-salvador-reach-deal-on-asylum-seekers-11569006377>.⁵

C. The IFR Violates the Government’s Statutory and Treaty-Based Non-Refoulement Obligations

The U.S. government has a legal obligation not to “expel or return (refoul) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.” 1951 United Nations Convention Relating to the Status of Refugees, art. 33. This obligation stems from the United States’ adoption of the 1967 Protocol Relating to the Status of Refugees and the Convention Against Torture (“CAT”). See 1967 Protocol, arts. 1(1) & 7(1); CAT art. 3. And the *non-refoulement* obligation has been codified by Congress in 8 U.S.C. § 1231. Because the only process under which the IFR theoretically allows individuals to escape removal to a third country is a sham, the IFR will inevitably lead to repeated, routine violations of the government’s *non-refoulement* obligation. The IFR therefore

⁴ Doubtless for this reason, DHS has not even attempted to offer an explanation for its apparent determination that the Guatemalan asylum system provides full and fair procedures. See *Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims*, 84 Fed. Reg. 64,095 (Nov. 20, 2019).

⁵ The agreements implemented by the IFR are therefore different in kind from European Union’s Dublin III Regulation, which “is based on the underlying premise that all State Parties have similar asylum systems and safeguards.” Maria-Teresa Gil Bazo, The Safe Third Country Concept in International Agreements of Refugee Protection: Assessing State Practice, *Netherlands Quarterly of Human Rights*, vol. 33/1, at 66 (2015), available at <https://www.unhcr.org/59c4be077.pdf>.

violates the INA in at least three separate ways and also allows the United States to ignore its clearly delineated obligation under international law.

II. The IFR Violates Due Process

The Supreme Court made clear decades ago that immigrants “within the territory of the United States,” including those who are “unlawfully present,” are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). That protection unquestionably extends to individuals who file claims for asylum, withholding of removal, and/or CAT relief in the United States.

The IFR violates the due process rights of asylum seekers. The “specific dictates of due process” derive from “three distinct factors”: (1) “the private interest that will be affected” by a government action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value *** of additional or substitute procedural safeguards”; and (3) “the Government’s interest.” *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Here, the private interest at stake is literally life or death; the IFR operates to ensure that countless individuals will be wrongfully removed to persecution and torture in Guatemala and other countries; and the government’s only legitimate interest runs contrary to the IFR.

The private interest affected by the Notice is the weightiest interest conceivable. The Supreme Court has repeatedly recognized that removal “may result in poverty, persecution, and even death” (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and deprivation of “life” or “all that makes life worth living” (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). Lives are unquestionably at risk when asylum seekers are erroneously returned to their home countries. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). And the same is true for asylum seekers who are removed to third countries where they will be persecuted or tortured.

As shown above, the risk to survivors of gender-based violence is particularly acute in Guatemala, Honduras, and El Salvador, because such survivors form a vulnerable population not protected by the governments of those countries. And as demonstrated above, the procedural aspects of the IFR ensure that effectively no one will be able to escape removal to those countries. There is accordingly no doubt that, under the IFR, survivors (and others) will be routinely sent to countries in which they will suffer persecution and torture. Moreover, this result could be avoided if the government hewed to the clear requirements of the INA by allowing individuals to be removed *only* to countries in which they would not face persecution and would have meaningful access to a full and fair asylum system.

The government’s interests do not plausibly outweigh the need for additional safeguards. As discussed below, the IFR identifies no colorable interest that it can plausibly advance to support its chosen procedures. And the government’s true interest here is one the IFR ignores entirely: the strong interest in preventing wrongful removals, “particularly to countries where [individuals] are likely to face

substantial harm.” *Nken v. Holder*, 556 U.S. 418, 436 (2009). There can thus be little question that all factors relevant to a due-process analysis weigh against the IFR.

III. The IFR Is Arbitrary and Capricious

In addition to violating the constitution, the INA, and U.S. treaty obligations, the IFR violates the APA in both substantive and procedural ways. As a substantive matter, the agencies have offered no non-arbitrary justification for the IFR.

The chief basis asserted for the indiscriminate removal of asylum seekers to the Northern Triangle that the IFR enables is that “the U.S. asylum system remains overtaxed.” 84 Fed. Reg. at 63,994; *see also id.* at 63,995. That is false. The fact that USCIS asylum officers successfully completed more than 91,000 credible-fear interviews in fiscal year 2018 shows that those officers are quite capable of handling the increase in asylum claims. Furthermore, DHS has recently assigned Border Patrol officers to conduct credible-fear interviews. *See Memorandum of Agreement Between U.S. Customs and Border Protection (CBP) and U.S. Citizenship & Immigration Services (USCIS)* signed July 3, 2019 and July 10, 2019. That action, while illegal, unquestionably increases the processing capacity of the U.S. asylum system. And any argument that USCIS asylum officers are overwhelmed is belied by the fact that DHS has recently enacted other illegal policies that dramatically increase both the number of credible-fear interviews and the complexity of those interviews. *See, e.g., DHS, Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019); DHS & Executive Office for Immigration Review, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019).

The immigration courts are also not overwhelmed with asylum filings. To the contrary, those courts have been able to decide over 67,000 asylum claims in fiscal year 2019—nearly 25,000 more than in fiscal year 2018. TRAC, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum/>. This reflects, among other things, the fact that the number of immigration judges has increased at a higher rate than the number of new proceedings in immigration court. See TRAC, *Immigration Court Backlog Surpasses One Million Cases (“Backlog”)*, <https://trac.syr.edu/immigration/reports/536/>. Any increased burden on the immigration courts therefore does *not*, contrary to the IFR, trace to an increase in the filing of asylum applications. 84 Fed. Reg. at 63,995.

Any increased burden on the immigration courts instead stems directly from recent, illegal executive-branch policies. One recent decision of the Attorney General that contravenes published DOJ regulations—*Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), *held invalid by Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)—“removed 330,211 previously completed cases and put them back on the ‘pending’ rolls.” TRAC, *Backlog*. The Remain in Mexico program, meanwhile, serves to bottleneck immigration courts at the southern border rather than allowing claims to be heard by courts throughout the United States. *See, e.g., Brief of Amicus Curiae Local 1924 in Support of Plaintiffs-Appellees, Innovation Law Lab v.*

McAleenan, 9th Cir. No. 19-15716, Dkt. 39, at 25-26. And the chaotic “[s]hifting scheduling priorities” and shifting “legal standards” that immigration judges must apply likewise contribute to the backlog. TRAC, *Backlog*. It is unquestionably arbitrary for the IFR to restrict the eligibility of asylum seekers for relief in the U.S. in order to obviate the predictable results of these ill-considered and illegal executive branch policies.

This arbitrariness is compounded by the fact that, as shown above, the asylum systems of the Northern Triangle countries *would* be overwhelmed by any substantial number of additional asylum claims. The “equitable” distribution of asylum cases among the relevant nations (84 Fed. Reg. 63,997) is therefore one in which the United States voluntarily accepts the overwhelming majority of cases—not one in which it sends any asylum seeker it sees fit to another country.

The IFR, like other recent rules enacted by DHS and DOJ, also suggests that the vast majority of asylum claims filed in the U.S. are categorically unmeritorious or even fraudulent. *See, e.g.*, 84 Fed. Reg. at 63,994-95. That, too, is false—because there is a significant disconnect between asylum claims that are denied and those that lack merit. The INA itself demonstrates as much. Under the IFR’s interpretation of 8 U.S.C. §1158(b)(1)(A), the government may deny asylum relief even to individuals whose claims satisfy all of the prerequisites to asylum.

But the disconnect between meritorious claims and granted claims is not only a statutory artifact. Overwhelming evidence shows that the grant rate for asylum applications filed in immigration court critically depends on two factors unrelated to the merits of the application. One is whether the asylum seeker was represented by counsel. From 2001 until the present, more than half of asylum seekers represented by counsel received either asylum or other relief in defensive proceedings. TRAC, *Asylum Decisions*. In contrast, only 17.5% of those lacking counsel received relief. *Id.*; *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 48-58 (2015) (finding similar differences from 2007-2012). This stark difference persists in recent cases: In fiscal year 2017, for instance, 46.6% of represented asylum seekers—but only 10% of those without representation—received asylum in immigration court. TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, <https://trac.syr.edu/immigration/reports/491>. And given both the fact that many migrants with strong claims will not be able to afford counsel and the limited availability of lawyers in many locations where immigrants enter the country or are detained, there is no basis for believing that those without representation generally have weaker cases than those who obtained representation.

The other critical factor influencing whether asylum seekers receive relief is the identity of the immigration judge. From fiscal year 2013 through fiscal year 2018, an asylum seeker’s chance of relief ranged from 0% to 97%, depending on the judge hearing their claim. TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, <https://trac.syr.edu/immigration/>

[reports/judge2018/denialrates.html](#). And there is no evidence that this almost inconceivable disparity has any correlation to the strength of cases before individual judges. The evidence therefore demonstrates, contrary to the assumption in the IFR, that the outcome of asylum proceedings hinges on two factors that are beyond the control of the asylum seeker and that bear no relationship to the strength of the asylum seeker’s claim.⁶

The IFR next invokes the supposed requirement that DHS “devote significant resources towards detaining many” individuals pending final adjudication of their asylum claims. 84 Fed. Reg. 63,995; *see also id.* at 63,995-96. That claim is not just false but flagrantly false. In reality, DHS has deliberately chosen to pack detention facilities instead of releasing eligible asylum seekers on parole, who are neither a flight risk nor a danger to the community or national security. And it has done so without giving individuals bond hearings—in clear violation of the requirements of due process. *See, e.g., Padilla v. ICE*, W.D. Wash. No. 18-cv-928, Dkt. 149 (July 2, 2019).

IV. The IFR Is Procedurally Defective

The IFR also was impermissibly issued without notice and comment. The IFR itself argues that two exceptions to the APA’s normal procedures allowed the government to forgo these steps. But neither of those exceptions even colorably applies. The agencies—as DHS and DOJ have repeatedly done in recent months—trot out the shopworn theory that a comment period would somehow lead to a “surge” of migrants at the border. 84 Fed. Reg. 64,006-08. But the IFR, like prior rules, provides no evidence to support the view that this policy will cause a surge, or that any prior policy caused a surge. That absence is telling: It renders the agencies’ reliance on this theory purely pretextual.

The foreign affairs rationale presented for the IFR is equally pretextual. No evidence is presented that the United States is currently in negotiations with any country to reach a safe-third-country deal. And even assuming, *arguendo*, that such a country exists, there is no reason to believe that negotiations would be materially different if the agencies had issued a proposed policy instead of an interim final policy.

⁶ To the extent that the IFR assertedly rests on an increase in asylum denials in the past two years, any such increase is due to new, illegal executive policies—including decisions of the Attorney General that unlawfully attempt to rewrite decades of precedent (*see, e.g., Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018)); policies, such as the return of asylum seekers to Mexico, that operate to deny access to counsel (*see TRAC, Details on MPP (Remain in Mexico) Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/mpp/>); and the third-country transit ban, which illegally renders the vast majority of individuals ineligible for asylum without respect to the strength of their claims (*see DHS & Executive Office for Immigration Review, Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019)).

Indeed, the IFR does not even attempt to provide any such reason. The IFR's attempt to invoke the APA's foreign-affairs exception is thus, like its attempt to invoke the APA's good-cause exception, nothing more than an unsupported *ipse dixit*.

In short, the IFR is contrary to law, arbitrary, capricious, and procedurally defective. It goes without saying that the IFR is also morally reprehensible. The IFR must accordingly be withdrawn in its entirety.

Sincerely,

s/Richard Caldarone

Richard Caldarone
Litigation Counsel