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Refugees International submits this comment relating to the Rule implementing “Asylum Cooperative Agreements” (ACAs). The Rule would allow the Department of Homeland Security (DHS) to send asylum seekers at the southern U.S. border to any country with which it negotiated such an agreement, regardless of whether the asylum seekers had ever been to that third country and without adequate assessment of whether the asylum seekers would be safe there. This comment refutes the legal basis for the ACAs. The Rule’s proposed screening process at the U.S. border fails to abide by international legal standards, and the countries with which the United States has so far signed ACAs (Guatemala, Honduras, and El Salvador, hereafter ACA countries) do not have the “full and fair” procedures for determining asylum as required by the Immigration and Nationality Act (INA). Nor are they safe countries to which to return asylum seekers. The implementation of the ACAs undermines the right to seek asylum and could lead to refoulement, or the return of asylum seekers to harm and persecution.

Refugees International is a non-governmental organization that advocates for lifesaving assistance and protection for displaced people in parts of the world impacted by conflict, persecution, and forced migration. We do not accept government or United Nations funding, which helps ensure that our advocacy is impartial and independent. Refugees International supports the building of asylum capacity and access to protection for displaced people in countries around the world, including the United States. Refugees International sees the ACAs not, as the Rule suggests, an attempt to “share the burden” of protection between countries, but as an effort by the United States to shift the responsibility of protection to those countries less able to bare it. Indeed, supplementary information accompanying the Rule makes clear that the main reason for the ACAs is to “reduce the flow” of asylum seekers to the United States as quickly as possible. Implementation of the ACA with Guatemala has already returned asylum seekers there without adequate screening and from there to their home countries of Honduras and El Salvador without
knowledge of their rights to protection.¹ DHS soon plans to send Mexicans to Guatemala as well and to send Guatemalans to Honduras under the agreement with that country.² As Refugees International has documented, the ACA countries lack adequate protection for their own returned nationals, let alone nationals of other countries.³

The supplementary information accompanying the Rule argues that the ACAs are legal in that that they abide by the provisions in the Immigration and Nationality Act that describe “Safe Third Country Agreements.” INA 208 (a) (2) (A) requires that the third country to which an asylum seeker is returned under such an agreement provide the asylum seeker with “access to full and fair procedures for determining a claim to asylum or equivalent temporary protection.” The ACA countries do not have effective asylum systems to fulfill this requirement. According to the United Nations High Commissioner for Refugees (UNHCR), Guatemala’s identification and referral mechanisms for potential asylum seekers are “inadequate” and the U.S. State Department reported last year that “both migration and police authorities [there] lacked adequate training concerning the rules for establishing refugee status.”⁴ Reportedly, there are fewer than four asylum officers in the country, which has adjudicated just 18 claims of the 200 received.⁵ In an August 2019 report, the Inter-American Commission on Human Rights (IACHR) noted that in a period of more than eleven years, from January 2008 through July of 2019, only 299 requests for asylum were registered with the National Institute for Migration in Honduras, and 50 people were recognized as refugees.⁶ The IACHR noted that there were severe delays in processing asylum requests, a defect also acknowledged by the U.S. Department of State.⁷ El Salvador’s asylum system is so “underdeveloped” that its President recently said the country did “not have asylum capacities.”⁸

The supplementary information accompanying the Rule also argues that ACAs are in accord with international law by providing asylum seekers at the border with “individualized threshold screenings” where they can claim fear of being sent to an ACA country. But the screenings offered at the U.S. border are overly demanding, cursory, rushed, and lacking procedural protections. Asylum officers do not affirmatively ask asylum seekers about their fear of being returned to Guatemala (even though these officers have been given training materials describing violence and

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persecution committed with impunity in Guatemala).9 According to the Rule, to avoid being subject to the soon-to-be-implemented ACA with Honduras, an asylum seeker from Guatemala arriving at the U.S. border would have to affirmatively prove—without being given any time to prepare or any help from an attorney—that he would more likely than not be persecuted or tortured if sent to Honduras, a country he may never have been to. The Rule also prohibits immigration judges from reviewing the officer’s determination that an asylum seeker is properly subject to an ACA. The UNHCR has condemned10 the ACAs in part because they do not provide the kind of individualized assessment with procedural safeguards required before sending an asylum seeker to a third country. This must include giving the asylum seeker the opportunity to consult with a lawyer, rebut the presumption that she or he will be protected in the third country, and appeal a finding that they are subject to the asylum transfer agreement.11 Forcibly transferring an individual to a country without first affirmatively examining whether they might be harmed there plainly violates refoulement – particularly in this context, when the United States is seeking to transfer individuals to countries asylum seekers regularly flee.

The supplementary information accompanying the Rule asserts that the “minimalistic” screening procedures at the U.S. border are appropriate given that “the ACA country of removal did not prompt” the asylum seeker’s original claim, not being the country from which the asylum seeker initially fled. But just because a country did not “prompt” an asylum seeker’s claim does not mean that the asylum seeker could not face persecution or torture in that country, particularly given that all three of the ACA countries are extremely dangerous. In these countries, criminal violence goes unpunished and victims lack access to justice. Contrary to the positions taken by the Departments of Justice (DOJ) and Homeland Security, the State Department has expressly identified Honduras, El Salvador, and Guatemala as unsafe. Human traffickers in El Salvador exploit men, women, and children from neighboring countries—particularly Nicaragua, Guatemala, and Honduras—in sex trafficking and forced labor. Recently there have been cases of Nicaraguans who attempted to seek asylum in Honduras but in the process were killed due to the lack of safe conditions in Honduras and their perpetrators finding them there.12

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10 UNHCR, “Statement on New U.S. Asylum Policy, November 19, 2019, https://www.unhcr.org/5dd426824?fbclid=IwAR2kbGZrz3E7zCpf9ji2-08GFHrqAIq1xW6UPFr5je03Wga7nyYzeABDPM
UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, March 23 2016, https://www.refworld.org/docid/563ee3f4.html
LAWG and the AFL-CIO, KIND, WRC, CGRS, Alianza Americas, and WOLA, Dec. 5, 2019, Forced Return to Danger: Civil Society Concerns with the Agreements Signed between the United States and Guatemala, Honduras, and El Salvador.
Finally, the supplementary material accompanying the Rule claim the ACAs are legally and procedurally akin to the Safe Third Country agreement between the U.S. and Canada and to the Dublin agreements in the European Union. These faulty comparisons betray a desperate attempt to find any justification for agreements that will lead to refoulement.

Canada is safer and has a more robust asylum system than any of the ACA countries, and yet the rule governing the U.S.-Canada agreement provides more safeguards and protections to accommodate asylum seekers than does the Rule. The rule governing the U.S.-Canada agreement gives asylum seekers time to consult with attorneys before they are screened. It also provides an exception such that those asylum seekers with close family members in the United States will not be subject to the agreement, acknowledging the UNHCR’s conclusion that the choices of asylum seekers as to their country of refuge “should as far as possible be taken into account” especially when the asylum seeker has “a connection or close link” with that country.  

Despite these protections and exceptions, UNHCR monitors of the U.S.-Canada agreement during its first year found that several asylum seekers were “directed back from Canada to the United States…and subsequently removed to their country of origin without having their claims processed by the Canadian Government under the Agreement.” In recent years, as the United States has increased detention of asylum seekers, drastically limited asylum eligibility, and established the Remain in Mexico program, returns of asylum seekers to the United States by Canada via the Safe Third Country agreement has jeopardized asylum seekers’ ability to obtain fundamental legal protections and has led to indirect refoulement. The legality of the Safe Third Country agreement is currently being challenged in federal court in Canada.  

The analogy to the Dublin regulation in Europe is misplaced for numerous reasons, most obviously because it was a multilateral agreement abolishing internal border controls within Europe and because there are no common asylum standards in the Americas akin to that in the European Union. The UNHCR and the European Court of Human Rights monitor transfers of asylum seekers within the European Union to guard against illegal expulsions and chain refoulement. No such monitoring of the ACAs is taking place. The ACAs reinforce border controls within the Americas and, so far, has mostly facilitated repatriation of asylum seekers to the countries they have fled.  

For the reasons outlined, Refugees International respectfully submits that the Rule should be rejected and urges DHS and DOJ to refrain immediately from taking any further steps to implement asylum cooperative agreements with Guatemala, El Salvador, and Honduras.

Sincerely,

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Refugees International

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13 UNHCR. September 2019, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, Page 5, 14 and 15