

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

February 26, 2016

RE: TPS Designation Will Provide Some Needed Relief to Humanitarian Refugee Crisis
in Central America

Dear Mr. President:

We are a group of professors at U.S. law schools and universities with experience teaching, researching and practicing in the areas of immigration, human rights, and international law. We write to offer our counsel to you and your administration as you respond to the refugee emergency involving unaccompanied children and families with children from Central America.

We recognize the challenges are complex, and that you have taken some notable steps to respond to the ongoing humanitarian crisis, such as the recent decision to engage with the United Nations High Commissioner for Refugees (UNHCR) to screen those fleeing extreme and growing violence in Central America to determine if they are eligible for U.S. protection. While these steps may help as part of a regional response to the ongoing crisis, the United States has laws and policies in place to provide immediate protection to individuals who have fled the horrific and escalating violence in the region and are here.

We urge that that the Secretary of the U.S. Department of Homeland Security (DHS), in consultation with the Secretary of State, designate the countries of: El Salvador, Guatemala, and Honduras (an area known as the “Northern Triangle”) for Temporary Protected Status (TPS). These three countries warrant TPS designation in light of the pervasive violence that has precipitated a humanitarian crisis of persons fleeing the Northern Triangle countries.

The Legislative History and Purpose of Temporary Protected Status

Historically there has always been a need to provide temporary relief from deportation to countries whose conditions had become unsafe for those individuals already in the United States. For several decades prior to 1990, the Attorney General used Extended Voluntary Departure (EVD) to grant groups of non-citizens typically from war-torn countries the ability to remain in the United States for an extended period of time.¹ While EVD was a flexible tool for the executive branch, it was not codified in statute.

¹ See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1138-39 (6th ed. 2015). Between 1960-1990, EVD was granted to citizens of Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, Ethiopia, and China. See Susan Martin, Andy Schoenholtz & Deborah Waller, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. L.J. 543, 548 (1997).

Responding to criticisms that EVD designations lacked clear eligibility criteria and was being used for political reasons, Congress enacted TPS in the Immigration Act of 1990² to provide a legislative program that was separate from asylum.³ Congress intended this “generic’ safe haven program”⁴ for individuals fleeing violence who might not meet the narrow U.S. refugee definition. There are several different types of emergencies that Congress believed merited TPS designations by the Attorney General (and now, the Secretary of Homeland Security since the creation of the Department of Homeland Security in 2002⁵) after consultation with other relevant federal agencies, including:

- “an ongoing armed conflict within the state, and due to such conflict, requiring the return of aliens who are nationals of that state to that state (or part of the state) would pose a serious threat to their personal safety;”⁶ or
- “extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the [Secretary of Homeland Security] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.”⁷

Indeed, El Salvador was the first country to receive TPS and the only country to have been granted TPS by Congress itself, which initially designated El Salvador for TPS due to civil war in the Immigration Act of 1990.⁸ Although the congressional designation expired in 1992, the El Salvador received a new TPS designation in 2001 based on earthquakes that devastated the country. This designation has been renewed by subsequent administrations since that time. Likewise, Honduras received a TPS designation based on a natural disaster, Hurricane Mitch that destroyed a great deal of homes and infrastructure in 1998.

Since 1990, Administrations have applied this law to numerous situations of significant violence, natural disasters, or other extraordinary and temporary conditions, including: Angola (2000-2003); Bosnia-Herzegovina (1992- 2001); Burundi (1997-2009); Kosovo Province (1998-2000); Kuwait (1991-1992); Lebanon (1991-1993); Liberia (1991-2007); Montserrat (1997-2005); Rwanda (1995-1997); and Sierra Leone (1997- 2004).⁹ The United States currently provides TPS to over 300,000 foreign nationals from a total of 12 countries, including: El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone,

² Public Law 101-649 § 302 (codified at 8 U.S.C. § 1254a).

³ Professor T. Alexander Aleinikoff testified before the House Subcommittee on Immigration, Refugees and International Law on the need for legislation to provide temporary refuge to those fleeing generalized harm and armed conflict, Legomsky & Rodríguez, *supra* note 1, at 1140 (internal citations omitted).

⁴ Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 *FORDHAM INT’L L.J.* 328, 334 (1990).

⁵ Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135, enacted November 25, 2002.

⁶ 8 U.S.C. § 1254a (b)(1)(A).

⁷ 8 U.S.C. § 1254a (b)(1)(C).

⁸ MADELINE MESSICK & CLAIRE BERGERON, *TEMPORARY PROTECTED STATUS IN THE UNITED STATES: A GRANT OF HUMANITARIAN RELIEF THAT IS LESS THAN PERMANENT*, MIGRATION POLICY INSTITUTE (July 2, 2014) <http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

⁹ See LISA SEGHETTI, CONG. RESEARCH SERV., RS 20844, *TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES* (2015) available at <https://www.fas.org/sgp/crs/homesecc/RS20844.pdf>.

Somalia, Sudan, South Sudan, and Syria. For each designation, the objective has been to protect individuals' safety with respect to major violence, natural disaster, or other extraordinary and temporary conditions, consistent with the statutory criteria.

Current Country Conditions in the Northern Triangle Merit TPS Designations

Unaccompanied immigrant children and families who have arrived in increasing numbers in the last few years are fleeing armed criminal violence often caused by gangs or drug cartels as well as horrific abuse at home.¹⁰ These children and families are primarily fleeing from El Salvador, Guatemala, and Honduras, where murder rates mirror those of conflict zones. In 2015, the death toll in the Northern Triangle of Central America was 17,500, higher than in all but three zones of ongoing armed conflict: Iraq, Afghanistan, and Syria. They are not coming just to the United States—other Central American countries have witnessed dramatic increases in children and adults seeking refuge.¹¹ Human rights violations in El Salvador, Guatemala and Honduras are compounded by the inability of the governments to protect their own citizens.¹² Even the police chief and his family fled Honduras out of fear for his own safety.¹³ USA Today recently reported that killings grew 70 percent last year in El Salvador,¹⁴ which means El Salvador will likely become the murder capital of the world, unseating Honduras which had been the most violent and now will be second, behind El Salvador. Guatemala is close behind, as the sixth most violent country in the world. Women and girls are particular targets in these countries: El Salvador has had the highest femicide rate in the world, with Guatemala and Honduras not far behind.¹⁵

Indeed, UNHCR recently concluded that at least fifty-eight percent of unaccompanied children arriving from these countries were forcibly displaced and potentially in need of

¹⁰ U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 32 (2014) [hereinafter CHILDREN ON THE RUN], http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf. See also WOMEN'S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 1 (2012) (noting that unaccompanied minors are subject not only to violent gang attacks, but also face targeting by police who mistakenly assume that they are gang-affiliated; additionally girls in particular "face gender-based violence, as rape becomes increasingly a tool of control").

¹¹ *Id.* at 15. In combination, Mexico, Panama, Nicaragua, Costa Rica and Belize have documented a 432% increase in the number of asylum applications submitted by people from Honduras, Guatemala and El Salvador.

¹² See U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2 (2013), available at <http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf> (concluding that increases of migration are attributed to "generalized violence at the state and local levels and a corresponding breakdown of the rule of law"). In addition, UNHCR has documented a "1,185% increase in the number of asylum applications from citizens of these three countries in Mexico, Panama, Nicaragua, Costa Rica and Belize, combined, from 2008 to 2014." <http://unhcrwashington.org/children>

¹³ See <http://www.laprensa.hn/honduras/924042-410/por-amenazas-a-muerte-se-va-de-honduras-leandro-osorio-comisionado-de>.

¹⁴ See Alan Gomez, El Salvador: World's new murder capital, USA TODAY, Jan. 8, 2016, <http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/>.

¹⁵ The Geneva Declaration on Armed Violence and Development, "Global Burden of Armed Violence 2015," Fig. 3.4, p. 94, http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf; "Femicide: A Global Problem," Small Arms Survey Research Notes, Number 14, Figure 2, February 2012, http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-14.pdf.

international protection.¹⁶ The UNHCR has called upon all countries in the region to recognize that there is a growing refugee situation in parts of Central America. U.S. government data also confirms that many who flee these countries have a significant possibility of establishing eligibility for asylum: in the second quarter of fiscal year 2015, U.S. asylum officers found that 88 percent of families seeking asylum from family detention centers had a credible fear of persecution.¹⁷

Given the terrible violence in their societies and the inability of their governments currently to protect them, there is no doubt that those fleeing the Northern Triangle countries, who are predominantly children and adult women, have a well-founded fear of death. They present compelling humanitarian claims for international protection, whether or not they meet the narrow U.S. asylum definition. Temporary Protected Status affords the administration an important tool to provide temporary and regularized status to an extremely vulnerable population.

In order to address ongoing flows, the immediate response of states throughout the region, including Mexico, should also be to offer temporary protection to those fleeing this serious violence. To ensure that the neighboring states provide effective protection, UNHCR should closely monitor the implementation of such humanitarian programs.

TPS Will Enable the Administration to Focus its Limited Adjudicatory Resources on a Growing, Very Large Backlog of Cases

Not only do the children, women, and other vulnerable nationals fleeing the Northern Triangle countries deserve a safe haven, but TPS also will enable the administration to deploy its limited adjudicatory resources on its very large existing caseload that is significantly backlogged. TPS will allow the administration to know the whereabouts of this population without diverting asylum officers and immigration judges away from their primary missions. Right now, for example, many immigration courts are scheduling asylum merits hearings for applicants from non-Northern Triangle countries in 2019 and 2020—three and four years out! These backlogs continue to grow as the administration uses the asylum system as the only way to address this humanitarian crisis. TPS is a group protection mechanism that makes eminent programmatic sense in order to ensure that DHS and the Department of Justice handle their large, non-emergency caseload in a timely fashion. Historically, when these agencies and their predecessors have allowed backlogs to grow significantly, they have created political emergencies that could have been prevented. Now is the time to re-focus these agencies on their very important, substantial caseloads. TPS both provides an easily administered group protection to these vulnerable individuals from Central America, and allows the adjudication system to prioritize the very large numbers of non-citizens placed into removal proceedings whose cases are currently being neglected.

¹⁶ CHILDREN ON THE RUN, *supra* note 10, at 25.

¹⁷ <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf>.

This administration is well aware of the terrible violence that dominates these Northern Triangle countries. Given the urgent nature of this request and the risk placed on the lives of those who are deported, we request your timely designation of El Salvador, Guatemala, and Honduras for Temporary Protected Status. If you need additional information or have questions related to this request, please contact Erin B. Corcoran, Professor of Law at erin.corcoran@law.unh.edu or 603.513.5166.

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