

## Comments of Human Rights First

### **On the Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes**

**HHS Docket No. CDC-2020-0033**

April 23, 2020

On March 20, 2020, the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services (HHS) issued an interim final rule (IFR), 85 FR 16559-16567, that would “create a procedure for CDC to suspend the introduction of persons from designated countries or places, if required, in the interest of public health.”

On the same day, CDC issued an order (Order), 85 FR 17060-17088, invoking the authority supposedly granted by the IFR to suspend the entry of persons without valid travel documents who seek to enter the United States via the land borders with Mexico and Canada on the ground that they could be “vectors” for transmission of COVID-19. The Order, which was originally in effect for 30 days, was extended for 30 days on April 20, 2020, and is subject to further 30-day extensions.<sup>1</sup>

Citing the CDC Order, the Department of Homeland Security (DHS) has blocked and expelled from the United States thousands<sup>2</sup> of individuals, families, and unaccompanied children, including many asylum seekers,<sup>3</sup> without any legal process. Migrants from Cuba, Ecuador, El Salvador, Honduras, Guatemala, and Mexico, including reportedly at least 400 children,<sup>4</sup> have

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<sup>1</sup> Centers for Disease Control and Prevention, “Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists” (Apr. 20, 2020), *available at*

<https://www.cdc.gov/quarantine/pdf/10-24-16-PRB-Members-Federal-Register-Notice-FY-2016-04-19-2020-p.pdf>.

<sup>2</sup> Customs and Border Protection (CBP), “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions,” *available at* <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (between March 21 and March 31, CBP officers and Border Patrol agents blocked or expelled 6,375 individuals at the southern border under the IFR and CDC Order) (last accessed on Apr. 23, 2020).

<sup>3</sup> During the first half of April 2020, referrals of individuals requesting asylum for credible fear interviews with an asylum officer have declined by 80% compared to the first half of March 2020 and by nearly 90% compared to the same period last year. U.S. Citizenship and Immigration Service, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions,” (Data from April 1, 2019 – April 15, 2020), *available at* <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

<sup>4</sup> Ted Hesson & Mica Rosenberg, “U.S. deports 400 migrant children under new coronavirus rules,” *Reuters* (Apr. 7, 2020), *available at* <https://www.reuters.com/article/us-health-coronavirus-usa-deportations/u-s-deports-400-migrant-children-under-new-coronavirus-rules-idUSKBN21P354>.

already been expelled to Mexico.<sup>5</sup> In some cases Border Patrol pushes unaccompanied children back into Mexico with adults whose relationship to the child has not been checked, placing children at risk of trafficking. The Border Patrol expels some individuals in the middle of the night in dangerous areas,<sup>6</sup> putting them at even greater risk of kidnapping and assault. DHS is also rapidly expelling some non-Mexican nationals to their home countries, including asylum seekers and hundreds<sup>7</sup> of unaccompanied children, without any legal process, to places where their lives are at risk. At U.S. ports of entry, Customs and Border Protection (CBP) officers turn away and expel asylum seekers and are not processing those who have waited months to request protection.<sup>8</sup>

Human Rights First is gravely concerned about the impact of the IFR and vehemently object to the orders subsequently issued by the CDC. Under the guise of a public health response to the COVID-19 pandemic, the IFR and CDC orders effectively carry out the administration's long-held goal of closing the southern border to people seeking life-saving protection in the United States. Blocking asylum seekers and unaccompanied children from requesting protection and expelling them without any of the legal process due to them violate U.S. refugee, immigration and antitrafficking laws passed by Congress, as well as due process and U.S. treaty obligations to protect people at risk of return to persecution and torture, and are completely contrary to child welfare standards.

We urge HHS to immediately rescind the IFR and the CDC orders implementing the IFR and ensure that any future regulations or orders related to border restrictions allow for the safe and orderly entry and processing of asylum seekers and unaccompanied children with appropriate public health safeguards while respecting U.S. laws that protect people seeking safety. Further, the administration should: 1) end all policies and practices that endanger refugees, create chaos, and violate U.S. law and treaties, including the Migrant Protection Protocols (MPP), and the Interim Final Rule issued on July 16, 2019, 84 FR 33829-33845, barring virtually all asylum seekers entering through the southern border from asylum eligibility, asylum cooperative agreements being used to transfer asylum seekers to Guatemala and potentially other dangerous Central American countries that lack effective refugee protection systems, as well as the Prompt Asylum Claim Review and the Humanitarian Asylum Review Process that effectively block asylum seekers from accessing legal representation before or during credible fear interviews; 2)

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<sup>5</sup> See, e.g., Tania Aguayo "Denuncian que INAMI obligó a hondureños a cruzar ilegalmente a Guatemala," *LatinUS* (Apr. 8, 2020), available at <https://latinus.us/2020/04/08/denuncian-inami-obligo-hondurenos-cruzar-ilegalmente-guatemala/> (reporting that U.S. Border patrol expelled a Honduran girl, her mother and another man to Reynosa, Mexico under the IFR and CDC Order after they requested asylum in the United States on March 22, 2020; the three were deported by Mexican migration officials who also denied them an opportunity to request asylum).

<sup>6</sup> "Trump deporta sin trámite y a deshoras; no aplica a migrantes protocolo por COVID-19," *Excelsior* (Apr. 4, 2020), available at <https://www.excelsior.com.mx/nacional/trump-deporta-sin-tramite-y-a-deshoras-no-aplica-a-migrantes-protocolo-por-covid-19/1374047>.

<sup>7</sup> Molly O'Toole, "Trump administration, citing coronavirus, expels 10,000 migrants in less than 3 weeks," *LA Times* (Apr. 9, 2020), available at <https://www.latimes.com/politics/story/2020-04-09/trump-cites-coronavirus-expel-migrants-at-border>.

<sup>8</sup> Stephanie Leutert, Savitri Arvey, Ellie Ezzell & Marianne Richardson, "Metering and COVID-19," Strauss Center for International Security and Law & Center for U.S.-Mexican Studies, (Apr. 2020), available at <https://www.strausscenter.org/images/MSI/MeteringCovid-19.pdf>.

ensure humane and safe conditions at all DHS facilities, in line with the recommendations of public health experts and meeting all legal standards including the Flores Settlement Agreement and DHS internal detention policies; and 3) address the actual causes of forced displacement in the region.<sup>9</sup>

We note that HHS is accepting comments only as to the IFR and claims that the March 20 Order and its April 20 extension, issued under the authority established by the IFR, are not subject to notice and comment. The administration's attempt to evade comment on these orders deprives the public of an opportunity to meaningfully comment on the impact of the IFR itself. The March 20 Order, which was issued simultaneously with the IFR, reflects the intended implementation of the IFR, and makes plain that the authority to suspend entry conferred under the IFR violates U.S. laws and treaty obligations and fails to actually address the public health concerns for which it was purportedly issued. Without an opportunity to comment on the Order, it is impossible for members of the public to comment on "all aspects of the interim final rule," including the costs of implementation and the potentials benefits of issuing the IFR. As such, the comment of Human Rights First addresses both the IFR and its implementing Order.

### **Human Rights First and Its Interest in This Issue**

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Convention Relating to the Status of Refugees, its 1967 Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy.

Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, Texas, and Washington D.C. Many of our clients who are fleeing persecution and torture in their home countries sought asylum at or after crossing the U.S. southern border.

Our experience working directly with refugees seeking protection in the United States serves as the foundation of our research and advocacy to protect asylum seekers. Human Rights First has conducted research and issued many recent reports on refugee protection, including: *A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico*,<sup>10</sup> *Human Rights Fiasco: The Trump's Administration's Dangerous Asylum Returns Continue*,<sup>11</sup> *Orders from Above: Massive Human Rights Abuses under Trump Administration Return to*

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<sup>9</sup> See Human Rights First, "Protecting Refugees and Restoring Order: Real Solutions to the Humanitarian Crisis" (June 2019) available at [www.humanrightsfirst.org/sites/default/files/Protecting-Refugees-Restoring-Order.pdf](http://www.humanrightsfirst.org/sites/default/files/Protecting-Refugees-Restoring-Order.pdf).

<sup>10</sup> Human Rights First, "A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico" (Jan. 2020) available at <https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf>.

<sup>11</sup> Human Rights First, "Human Rights Fiasco: The Trump's Administration's Dangerous Asylum Returns Continue" (Dec. 2019) available at [www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf](http://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf).

*Mexico Policy*,<sup>12</sup> *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process*,<sup>13</sup> *Barred at the Border: Wait "Lists" Leave Asylum Seekers in Peril at Texas Ports of Entry*,<sup>14</sup> *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico*,<sup>15</sup> *Dangerous Territory: Mexico Still Not Safe for Refugees*,<sup>16</sup> *Is Mexico Safe for Refugees and Asylum Seekers?*,<sup>17</sup> and *Is Guatemala Safe for Refugees and Asylum Seekers?*.<sup>18</sup>

This background in direct services and research informs the comments that follow below.

### Comments on Proposed Regulation

The IFR adopted by HHS purports to grant CDC sweeping and unprecedented powers to suspend the entry of and expel individuals who lack valid travel documents from the United States, including asylum seekers and unaccompanied children, at land ports of entry or who have otherwise crossed a U.S. land border. Such restrictions violate U.S. immigration, refugee, and anti-trafficking laws as well as due process and U.S. treaty obligations. The U.N. Refugee Agency (UNHCR) has stated that while governments may enact measures to protect public health during the COVID-19 pandemic, they should not enact policies, like the IFR, that cause “expulsions of asylum seekers resulting in refoulement” to persecution or torture.<sup>19</sup> While the IFR and Order were issued under the guise of a public health measure allegedly aimed at preventing the introduction of COVID-19 into the United States, the IFR and Order do not safeguard public health. Leading health experts have concluded that there is “no public health rationale”<sup>20</sup> to the IFR’s bar on individuals based on their immigration status.

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<sup>12</sup> Human Rights First, “Orders from Above: Massive Human Rights Abuses under Trump Administration Return to Mexico Policy” (Oct. 2019) available at [www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf](http://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf).

<sup>13</sup> Human Rights First, “Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process,” (Aug. 2019) available at [www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf](http://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf).

<sup>14</sup> Human Rights First, “Barred at the Border: Wait “Lists” Leave Asylum Seekers in Peril at Texas Ports of Entry” (Apr. 2019) available at [www.humanrightsfirst.org/sites/default/files/BARRED\\_AT\\_THE\\_BORDER.pdf](http://www.humanrightsfirst.org/sites/default/files/BARRED_AT_THE_BORDER.pdf).

<sup>15</sup> Human Rights First, “A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico” (Feb. 2019), available at [www.humanrightsfirst.org/sites/default/files/A\\_Sordid\\_Scheme.pdf](http://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf).

<sup>16</sup> Human Rights First, “Dangerous Territory: Mexico Still Not Safe for Refugees” (July 2017) available at [www.humanrightsfirst.org/sites/default/files/HRF-Mexico-Asylum-System-rep.pdf](http://www.humanrightsfirst.org/sites/default/files/HRF-Mexico-Asylum-System-rep.pdf).

<sup>17</sup> Human Rights First, “Is Mexico Safe for Refugees and Asylum Seekers?” (Nov. 2018) available at [www.humanrightsfirst.org/sites/default/files/MEXICO\\_FACT\\_SHEET\\_PDF.pdf](http://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf).

<sup>18</sup> Human Rights First, “Is Guatemala Safe for Refugees and Asylum Seekers?” (Nov. 2018) available at [www.humanrightsfirst.org/sites/default/files/GUATEMALA\\_SAFE\\_THIRD.pdf](http://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf).

<sup>19</sup> Tanvi Misra, “US border restrictions extended for another month,” *Roll Call* (Apr. 20, 2020) available at <https://www.rollcall.com/2020/04/20/u-s-border-restrictions-extended-for-another-month/>.

<sup>20</sup> Joanna Naples-Mitchell, “There is No Public Health Rationale for a Categorical Ban on Asylum Seekers,” *Just Security* (Apr. 17, 2020) available at <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

## The IFR Masquerades as A Public Health Measure

Although purportedly a measure to prevent the introduction of COVID-19 into the United States, the IFR in fact lacks a “public health rationale.” Instead, it appears tailored to prevent asylum seekers and unaccompanied children from seeking protection in the United States. The IFR authorizes CDC to bar individuals who lack permanent immigration status at land ports of entry and to “halt the travel”<sup>21</sup> of those who have already entered the United States, but does not apply to citizens or legal permanent residents. CDC’s March 20 Order and April 20 extension, which implement the IFR, block individuals who lack valid travel documents seeking to enter the United States at ports of entry or who otherwise crossed a border, a category which includes most asylum seekers and unaccompanied children seeking protection in the United States.

According to public health experts and social scientists, categorical bars of this type lack a public health basis as a measure to combat COVID-19. A recent study by the U.S. Immigration Policy Center at the University of California, San Diego, found no relationship between the number of asylum seekers who apply for protection at the southern border or who are permitted to enter the United States at the southern border to continue their asylum proceedings and the prevalence of infectious diseases like the flu.<sup>22</sup> Professor Lawrence Gostin, director of the O’Neill Institute for National and Global Health Law at Georgetown University, notes that “there is no scientific evidence” to support the use of a “categorical classification” as a measure to halt COVID-19 at the border.<sup>23</sup>

HHS claims that the IFR is necessary to prevent the introduction of individuals for whom isolation or quarantine is not a practical solution and/or where individuals have been in congregate settings “(i.e., ships, aircraft, trains, and road vehicles) or terminals with shared sitting, sleeping, eating, or recreational areas, all of which are conducive to disease transmission.”<sup>24</sup> Yet the IFR does not apply to individuals who have been in congregate settings like cruise ships, where significant outbreaks of COVID-19 have already occurred, nor does it apply to airports or cruise terminals – transportation hubs the IFR refers to as “conducive to disease transmission.” Further, DHS issued a permissive travel restriction, 85 FR 16547, on March 20 for cross-border U.S.-Mexico traffic that provides broad exceptions for travel related to education, trade and commerce, as well as other non-essential travel at the discretion of the CBP Commissioner. In reviewing the measures taken by the administration, Dr. Monik Jiménez, Assistant Professor at Harvard Medical School and Harvard T.H. Chan School of Public Health, concluded that the restrictions imposed under the IFR and Order are “not based on sound epidemiological evidence of groups that may be at higher or lower risk” of COVID-19 infection.<sup>25</sup>

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<sup>21</sup> 85 FR 16563.

<sup>22</sup> U.S. Immigration Policy Center at the University of California, San Diego, “COVID-19 and the Remaking of U.S. Immigration Policy? Empirically Evaluating the Myth of Immigration and Disease,” (Apr. 22, 2020) *available at* <https://usipc.ucsd.edu/files/usipc-myth-immigration-disease-final.pdf>.

<sup>23</sup> See Naples-Mitchell, “There is No Public Health Rationale for a Categorical Ban on Asylum Seekers.”

<sup>24</sup> 85 FR 16560-61.

<sup>25</sup> See Naples-Mitchell, “There is No Public Health Rationale for a Categorical Ban on Asylum Seekers.”



Indeed, the IFR is not aimed at monitoring or restricting the entry of individuals who are infected with, exposed to, or at elevated risk of COVID-19, but instead targets, through the CDC Order, individuals who lack valid travel documents at or near land borders, including the vast majority of asylum seekers and unaccompanied children. But as Dr. Ronald Waldman, physician and professor of global health at George Washington University and president of Doctors of the World – USA has noted, “[t]here is no reason why asylum seekers would be more likely to be at risk of contracting or transmitting the virus than any other group of people.”<sup>26</sup>

Yet the Order relies on misleading<sup>27</sup> and unsubstantiated<sup>28</sup> assertions provided by DHS to CDC to conclude that allowing these individuals into the United States risks transmissions of COVID-19 because they must be held in DHS congregate detention facilities and that they lack family members in the United States with whom they could self-isolate or self-quarantine. In fact, the vast majority of asylum seekers have homes in the United States where they could safely practice self-isolation, when needed. For example, an October 2019 study of 607 asylum seekers subject to MPP found that nearly 92 percent had family or close friends in the United States.<sup>29</sup> Further, DHS is not required to hold asylum seekers in congregate settings, such as in the custody of CBP or Immigration and Customs Enforcement, as DHS has legal authority under 8 U.S.C. § 1182(d)(5)(A) to expeditiously parole asylum seekers into the United States to await their asylum proceedings in U.S. immigration courts.<sup>30</sup>

Instead of detention or expulsions, DHS could engage in non-discriminatory screening and self-isolation measures that would respond to public health concerns while preserving the right to seek asylum and protections for unaccompanied children. The Office of the High Commissioner for Human Rights, the International Organization for Migration, UNHCR and the World Health Organization have made clear that during the COVID-19 pandemic “there are ways to manage border restrictions in a manner which respects international human rights and refugee protection standards, including the principle of non-refoulement.”<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Human Rights Watch, “Human Rights Watch Letter to the Centers for Disease Control and Prevention and Department of Homeland Security Regarding Orders Related to Suspending Travel Across US Borders,” (Apr. 1, 2020) available at <https://www.hrw.org/news/2020/04/01/human-rights-watch-letter-centers-disease-control-and-prevention-and-department>.

<sup>28</sup> Amnesty International USA, Doctors Without Borders/Médecins Sans Frontières USA, Human Rights First, Physicians for Human Rights, Refugees International, and Women’s Refugee Commission, “Responding to the COVID-19 Crisis While Protecting Asylum Seekers,” (Mar. 25, 2020) available at <https://www.humanrightsfirst.org/press-release/responding-covid-19-crisis-while-protecting-asylum-seekers-update>.

<sup>29</sup> U.S. Immigration Policy Center at the University of California, San Diego, “Seeking Asylum: Part 2,” (Oct. 29, 2019) available at <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

<sup>30</sup> See 8 C.F.R. § 212.5 (parole regulations).

<sup>31</sup> Office of the High Commissioner for Human Rights, International Organization for Migration, U.N. High Commissioner for Refugees & World Health Organization, “OHCHR, IOM, UNHCR and WHO joint press release: the rights and health of refugees, migrants and stateless must be protected in COVID-19 response,” (Mar. 31, 2020), available at <https://www.who.int/news-room/detail/31-03-2020-ohchr-iom-unhcr-and-who-joint-press-release-the-rights-and-health-of-refugees-migrants-and-stateless-must-be-protected-in-covid-19-response>.

## The IFR is Inconsistent with U.S. Asylum Law and Treaty Obligations

The Immigration and Nationality Act (INA) guarantees that any noncitizen “who is physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival . . . may apply for asylum.”<sup>32</sup> Binding U.S. treaty obligations also limits the circumstances under which a refugee can be expelled from a country where they seek protection: the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees prohibit sending a person to a country “where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group.”<sup>33</sup> UNHCR has clarified in legal guidance that the United States cannot impose “blanket measure[s] to preclude the admission of refugees or asylum-seekers” in response to the COVID-19 pandemic and concluded that “(d)enial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.”<sup>34</sup> The Convention against Torture forbids sending someone to a country where they would more likely than not be tortured.<sup>35</sup> The U.N. Subcommittee on Prevention of Torture has affirmed that this protection cannot be overridden during the current pandemic.<sup>36</sup>

The authority cited by the administration as justification to expel asylum seekers and unaccompanied children, 42 U.S.C. § 265, does not supersede the United States’ domestic law and international obligations. As U.S. Senator Patrick Leahy and other senators wrote in expressing their grave concern about the expulsions being carried out by DHS under the auspices of the IFR and CDC Order, the agency “blatantly misinterpret[s] its limited authorities” under the CDC order in an attempt “to override existing federal statutes.”<sup>37</sup> Indeed, nothing in the

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<sup>32</sup> 8 U.S.C. § 1158(a)(1).

<sup>33</sup> Convention relating to the Status of Refugees, 189 UNTS 137 (July 28, 1951), *available at* [www.unhcr.org/en-us/3b66c2aa10](http://www.unhcr.org/en-us/3b66c2aa10); Protocol Relating to the Status of Refugees, 606 UNTS 267 (Jan. 31, 1967), *available at* [www.refworld.org/docid/3ae6b3ae4.html](http://www.refworld.org/docid/3ae6b3ae4.html) (ratified by the United States on Nov. 1, 1968); *see* Refugee Act of 1980, Pub. L. No. 96-212 (implementing U.S. obligations under the Refugee Protocol).

<sup>34</sup> UNHCR, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response,” (Apr. 23, 2020), *available at* <https://www.refworld.org/docid/5e7132834.html>; *see* European Commission, “COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement,” (Apr. 16, 2020) *available at* <https://ec.europa.eu/info/sites/info/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf> (“Any restrictions in the field of asylum, return and resettlement must be proportional, implemented in a nondiscriminatory way and take into account the principle of *non-refoulement* and obligations under international law.”).

<sup>35</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Dec. 10, 1984), *available at* [www.ohchr.org/en/professionalinterest/pages/cat.aspx](http://www.ohchr.org/en/professionalinterest/pages/cat.aspx) (ratified by the United States on Oct. 21, 1994); *see* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 8 C.F.R. § 208.16(c) (implementing U.S. obligations under the Convention Against Torture).

<sup>36</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,” (Mar. 25, 2020) *available at* <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>

<sup>37</sup> Letter to DHS Acting Secretary Wolf from ten U.S. Senators (April 7, 2020), *available at* <https://www.leahy.senate.gov/imo/media/doc/4.7.20%20FINAL%20Jud%20letter%20to%20DHS%20re%20Title%2042%20-%20SIGNED.pdf>.

provision cited in the CDC order permits the administration to derogate its legal obligations under U.S. immigration law and treaties

Although the text accompanying the IFR states that CDC will consult with the Department of State regarding U.S. international legal obligations in fashioning orders based on the rule, the IFR itself does not explicitly reference any such relevant international obligations nor does it provide an exception for individuals seeking asylum protection in the United States. Furthermore, the CDC Order fails to even reference U.S. domestic and treaty obligations to asylum seekers. By contrast, earlier COVID-19 related travel restrictions on travel from China,<sup>38</sup> Iran,<sup>39</sup> the Schengen zone,<sup>40</sup> and the United Kingdom<sup>41</sup> all include explicit exceptions for those seeking protection in the United States.

The Trump administration has failed to, and cannot possibly, implement the restrictions authorized by the IFR and CDC Order without violating U.S. asylum law and treaty obligations. Expelling refugees to countries where their lives or freedom are at risk, or transferring them to countries where they cannot find effective refugee protection, violates U.S. obligations under the Refugee Convention, its Protocol and the Convention Against Torture, which together prohibit the United States from refouling individuals to persecution or torture. Indeed, non-Mexican asylum seekers and other migrants returned to Mexico by DHS under MPP have frequently been targeted for kidnappings, rape, violent assault and even murder, on the basis of their nationality, status as migrants, race, gender identity, sexual orientation, and other protected grounds. As of February 28, 2020, Human Rights First had tracked over 1,000 such publicly reported attacks against individuals sent to Mexico by DHS.<sup>42</sup>

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<sup>38</sup> “Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus,” Proclamation 9984 (Jan. 31, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

<sup>39</sup> “Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus,” Proclamation 9992 (Feb. 29, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus/>.

<sup>40</sup> “Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” Proclamation 9993 (Mar. 11, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus-2/>.

<sup>41</sup> “Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus,” Proclamation 9996 (Mar. 14, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/>.

<sup>42</sup> Human Rights First, “Publicly reported cases of violent attacks on individuals returned to Mexico under the ‘Migrant Protection Protocols’,” (Feb. 28, 2020), *available at* <https://www.humanrightsfirst.org/sites/default/files/Publicly%20Reported%20MPP%20Attacks%20-%2028%20Feb%202020.pdf>.



In addition, an internal guidance document<sup>43</sup> reportedly<sup>44</sup> circulated by DHS to Border Patrol instructs agents to rapidly expel individuals encountered at the border and makes no reference to U.S. domestic or international legal obligations to provide asylum protection. Alarming, the guidance demonstrates that the administration interprets its authority under the IFR as superseding its mandatory *non-refoulement* duty. The guidance document indicates that Border Patrol agents may refer individuals for screening for a fear of torture but only if the individual makes an “affirmative, spontaneous, and reasonably believable claim.” Giving Border Patrol agents discretion to make determinations about the credibility and legal viability of an individual’s fear of torture violates the clear requirements under U.S. immigration laws and regulations that border enforcement officers must refer all individuals who express a fear of persecution or torture to an immigration officer trained in conducting asylum interviews.<sup>45</sup> Permitting only those individuals who can clearly communicate their fear in the moments after they have been encountered by a uniformed (and likely armed) officer without any explanation of the need to do so is plainly designed to prevent refugees from receiving the protection in the United States due to them under domestic law and U.S. treaty obligations.

### **The IFR Fails to Ensure the United States Upholds Laws Protecting Unaccompanied Children**

The IFR also fails to provide an exception for unaccompanied children and does not even acknowledge the special provisions Congress enacted to protect unaccompanied children from human trafficking and ensure that they are afforded a fair opportunity to seek asylum in the United States. The CDC Order similarly fails to protect unaccompanied children from being turned-away or expelled at the border. DHS has interpreted the IFR and Order as providing the agency authority to violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the federal law designed to protect unaccompanied children from being summarily returned to danger.

The TVPRA was adopted by Congress in recognition of the unique vulnerabilities of unaccompanied children and to prevent their return to human trafficking and other harm. The Act mandates that CBP determine whether children it encounters at the border are unaccompanied, transfer these children to the Office of Refugee Resettlement (ORR), and make efforts to promptly reunify them with family members or other sponsors while their legal claims are decided. The TVPRA also requires the government to screen children to determine whether they are survivors of trafficking or at risk of being trafficked or persecuted. Congress also provided important procedural protections<sup>46</sup> for unaccompanied children’s legal claims, including the right to apply for asylum in a non-adversarial process and to have their cases heard

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<sup>43</sup> “COVID-19 CAPIO” available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

<sup>44</sup> Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law” *ProPublica* (Apr. 2, 2020), available at <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>45</sup> 8 U.S.C. § 1158(b); 8 C.F.R. § 1208.30; 8 C.F.R. § 1208.31.

<sup>46</sup> Women’s Refugee Commission, Kids in Need of Defense & the Young Center, “Protecting Unaccompanied Children: The Office of Refugee Resettlement (ORR) and the Trafficking Victims Protection Reauthorization Act (TVPRA),” (Dec. 2019) available at <https://s33660.pcdn.co/wp-content/uploads/2020/04/Protecting-UACs-ORR-and-TVPRA-Dec-2019-002.pdf>.

before an immigration judge. These requirements help to ensure that U.S. government officials identify signs of trafficking and afford children the time, care, and access to services essential to processing trauma, obtaining legal counsel, and gathering evidence—all steps necessary to establish whether they are in need of protection. Congress recognized that, absent such safeguards, the U.S. government would too often return unaccompanied children into the hands of traffickers, abusers, or persecutors who take advantage of their vulnerabilities.

Despite these requirements, media reports<sup>47</sup> and the internal Border Patrol guidance, which also fails to reference the special procedures required for unaccompanied children, indicate that DHS is summarily expelling unaccompanied children without proper screening, placing them into immigration court proceedings, or referring them to ORR as required under the TVPRA. A letter from members of the Congress to DHS noted their concern that the agency is expelling unaccompanied children “to countries where they fear violence, in violation of their legal rights” under the TVPRA.<sup>48</sup> The failure of the IFR and accompanying CDC Order to comply with the TVPRA’s legal protections places children in grave danger,<sup>49</sup> leaving them vulnerable to human trafficking or forcible return to countries where their lives or safety are at risk. Unaccompanied children turned away by CBP to Mexico have been victims of serious violence there.<sup>50</sup> In December 2018, two unaccompanied teenagers from Honduras who had been traveling with other individuals intending to seek asylum in the United States were tortured and murdered in Tijuana, Mexico.<sup>51</sup> Instead of endeavoring to protect some of the most vulnerable individuals arriving at the southern border, the administration is exploiting a public health crisis through the IFR to accomplish its longstanding goal of weakening or eliminating protections for unaccompanied children.

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<sup>47</sup> Arelis R. Hernandez & Nick Miroff, “Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border,” *Washington Post* (Apr. 3, 2020), available at [https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html).

<sup>48</sup> Letter from Sens. Dianne Feinstein & Richard Durbin, Reps. Jerrold Nadler & Zoe Lofgren to DHS Acting Secretary Wolf, (Mar. 30, 2020), available at [https://judiciary.house.gov/uploadedfiles/3.30.2020\\_letter\\_to\\_dhs\\_re\\_tvpra.pdf](https://judiciary.house.gov/uploadedfiles/3.30.2020_letter_to_dhs_re_tvpra.pdf).

<sup>49</sup> Letter regarding expulsions of unaccompanied children to Acting DHS Secretary Wolf and CDC Director Redfield, (Apr. 16, 2020) available at <https://supportkind.org/wp-content/uploads/2020/04/Organizational-Sign-on-Letter-Regarding-UAC-Expulsions-4.16.20.pdf>.

<sup>50</sup> See, e.g., Kids in Need of Defense, “Blocked from Safety: Unaccompanied Children along the U.S.-Mexico Border,” (Apr. 29, 2019), available at <https://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf> (documenting dangers unaccompanied children face as a result of recent U.S. programs and policies turning back unaccompanied children to Mexico in violation of the TVPRA).

<sup>51</sup> Ed Vuilliamy, “Tricked, abducted and killed: the last day of two child migrants in Mexico,” *The Guardian* (Feb. 16, 2019), available at <https://www.theguardian.com/world/2019/feb/16/tijuana-migrant-child-murders-mexico-us-asylum>.