



Kyle McGowan
Office of the Chief of Staff
Centers for Disease Control and Prevention
1600 Clifton Road NE, MS H21-10
Atlanta, GA 30329
Telephone: 404-498-7000
cdcregulations@cdc.gov

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RE: Amnesty International USA Comments on “Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes”

Amnesty International USA submits the following comment in response to the U.S. Department of Health and Human Services’ (HHS) interim final rule providing for the suspension of persons into the United States for public health purposes, which was issued on March 20, 2020. **As implemented, this rule has empowered the Trump administration to radically rewrite the humanitarian protection system at the U.S. border in a manner that violates our legal obligations to asylum-seekers and unaccompanied children while failing to promote public health.**

Amnesty International is the world’s largest grassroots human rights organization, comprising a global support base of millions of individual members, supporters, and activists in more than 150 countries and territories. A top priority for the U.S. section of Amnesty International for the past several years has been the protection of the right to seek asylum. Our opposition to the rule at hand is rooted in our expertise in the international human rights standards governing asylum law and our past engagement in research, policy, and litigation related to access to asylum in the United States and the wider region.

Amnesty International is deeply concerned about the impact of this interim final rule, which authorizes the Director of the Centers for Disease Control and Prevention (CDC) to “prohibit the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions and regions thereof), only for such period of time that the Director deems necessary for the public health,” through issuance of an order.

On the same day the rule was issued, CDC issued an order invoking its authority under the interim final rule to suspend the introduction of persons without documentation who seek to enter the United States via Mexico or Canada, purportedly based on concerns of transmission of COVID-19. Far from promoting public health, the rule as implemented is empowering what one expert has described as “medical gerrymandering,” allowing the Trump administration to

unilaterally excise protections for asylum-seekers and unaccompanied children.¹ It has served as the engine for mass, unlawful expulsions across the southwest border: over 10,000 individuals, including hundreds of unaccompanied children, were reportedly expelled in just the first two weeks after the rule went into effect.²

The interim final rule fails to meaningfully address public health concerns

While the rule is ostensibly grounded in concerns about disease transmission, as implemented, it fails to meaningfully address these concerns.

For one, while the rule is aimed at preventing the introduction of individuals who have previously been in congregate settings or who cannot quarantine or self-isolate, it does not actually apply to such individuals universally. For example, the rule exempts U.S. citizens and permanent residents, even if these individuals lack places to self-isolate or have previously been in congregate settings, like cruise ships, where significant outbreaks of COVID-19 have already occurred.

Furthermore, in the case of COVID-19, the rule is being applied to restrict only certain travelers at land borders – even though transportation hubs, like airports and cruise terminals, are also “conducive to disease transmission,” as the text accompanying the rule notes.³ The rule is not being used to bar travel by tourists arriving by plane or ship, even though these modes of transportation are explicitly listed by HHS as congregate settings with higher risk of disease transmission than land travel. A travel restriction issued the same day as the rule limits border travel to “essential” travel only, but still provides broad exceptions for travel related to education, trade and commerce.⁴ The rule is thus being used to target certain classes of noncitizens in a manner unrelated to potential public health risks.

While the order on which the rule is based assumes that noncitizens without documentation must be barred from entry because they otherwise will be introduced into congregate settings such as detention centers, this is simply not true. The U.S. Department of Homeland Security (DHS) is not required to hold asylum-seekers in congregate settings; it has legal authority to expeditiously parole asylum-seekers into the United States to await their asylum proceedings in U.S. immigration courts.⁵ And 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 the Migrant Protection Protocols, otherwise known as the “Remain in Mexico” program, found that nearly 92 percent had family or close friends in the United States.⁶

¹ Lucas Guttentag, “Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors,” Just Security, Apr. 13, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

² Nina Lakhani, “US using coronavirus pandemic to unlawfully expel asylum seekers, says UN,” The Guardian, Apr. 17, 2020, <https://www.theguardian.com/world/2020/apr/17/us-asylum-seekers-coronavirus-law-un>.

³ 85 Fed. Reg. 16559, 16561.

⁴ 85 Fed. Reg. 16547.

⁵ See 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5.

⁶ Tom K. Wong, “Seeking Asylum: Part 2,” U.S. Immigration Policy Center at UC San Diego, Oct. 29, 2019, <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>, at 13.

The interim final rule has empowered mass violations of the right to seek asylum

The new rule grants the United States expansive powers to expel individuals without affording them access to an asylum procedure, as domestic and international law require.

Although the text accompanying the interim final rule states that the CDC will “coordinate with the Secretary of State in order to ensure compliance with the international legal obligations of the United States,” the rule, as implemented, demonstrates no such compliance. In practice, the rule has empowered potential mass *refoulement* of people seeking safety at U.S. borders.

A core legal obligation of the United States is the duty not to return individuals to places where they may face persecution or torture (otherwise known as the principle of non-*refoulement*). To comply with non-*refoulement*, states must screen individuals for fear of possible persecution or torture prior to transferring or returning them. Failure to do so contradicts U.S. international treaty obligations under the 1951 Convention Relating to the Status of Refugees and its accompanying Protocol, as well as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which require the United States not to send individuals to places where they may face serious harm amounting to persecution or torture.⁷ Those obligations are reflected in domestic law, which explicitly guarantee individuals an opportunity to request protection at ports of entry or after crossing into the United States.⁸

The United Nations High Commissioner for Refugees, which interprets states’ legal obligations under the Refugee Convention and Protocol, has clarified in recent guidance that states cannot impose “blanket measure[s] to preclude the admission of refugees or asylum-seekers” in response to the COVID-19 pandemic.⁹ Yet the rule, as implemented through the order, has proved to be exactly that: a blanket measure that effectively bans all asylum-seekers from protection.

Guidance reportedly provided to the U.S. Border Patrol instructing agents to expel individuals under the authority provided by this rule also fails to make reference to protections for asylum-seekers under the Refugee Protocol or domestic law.¹⁰ Alarmingly, the guidance demonstrates that the administration is interpreting its authority under the rule as superseding its mandatory duty of non-*refoulement*.¹¹ Instead, asylum-seekers are referred to asylum officers only if they make an “affirmative, spontaneous, and reasonably believable claim” they might be tortured.

⁷ UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>, art. 33; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, United Nations Treaty Series, vol. 1465, p. 85, <https://www.refworld.org/docid/3ae6b3a94.html>, art. 3.

⁸ 8 U.S.C. § 1158(a)(1) (asylum); 8 U.S.C. § 1231(b)(3) (withholding of removal); 8 C.F.R. § 208.16(c) (CAT).

⁹ U.N. High Commissioner for Refugees, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response,” Mar. 16, 2020, <https://www.refworld.org/docid/5e7132834.html>. Similarly, the UN Subcommittee on Prevention of Torture has publicly stated that the prohibition on *refoulement* contained in the Convention Against Torture cannot be ignored during the COVID-19 crisis. “Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,” Mar. 25, 2020, <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

¹⁰ Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law,” April 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

¹¹ “COVID-19 CAPIO,” available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

This woefully inadequate “screening” is unlikely to offer any meaningful protection in practice: a person who has faced or who fears facing torture would be unlikely to spontaneously communicate this fact, without any prompting, to a uniformed border agent.

The interim final rule is eviscerating vital protections for unaccompanied children

The new rule has also allowed the Trump administration to overwrite congressionally mandated protections for unaccompanied children that are vital to their safety and wellbeing.

The rule itself is alarmingly silent on safeguards for unaccompanied children. The implementation of the rule has exploited that silence, empowering DHS to bar and expel children at the U.S. border, in direct violation of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), a federal law designed to protect unaccompanied children from human trafficking and other harm.¹² Neither the rule nor the CDC order issued based on powers granted by the rule provide any explanation or legal justification for failure to comply with these mandatory legal obligations.

While unaccompanied children make up fewer than 10% of people encountered at the southern border, they are among the most at-risk groups seeking protection in the United States.¹³ Prior to the passage of the TVPRA, unaccompanied children were summarily turned away at the U.S.-Mexico border, leading many to end up in the hands of smugglers and traffickers seeking to exploit or otherwise harm them.¹⁴

Under the TVPRA, U.S. Customs and Border Protection (CBP) officials must determine whether children it encounters are unaccompanied, and if they are, to transfer them from CBP custody to the custody of the Office of Refugee Resettlement (ORR) within 72 hours.¹⁵ Once in ORR custody, the TVPRA then requires the government to make efforts to reunify these children with family members or other sponsors while their legal claims are decided.¹⁶ The TVPRA also requires the government to screen children to determine whether they were survivors of trafficking or at future risk of being trafficked or persecuted in the U.S. or their home countries.¹⁷ Finally, the TVPRA provides important procedural protections for unaccompanied children’s legal claims, including the right to apply for asylum in a non-adversarial process and to have their cases heard before an immigration judge.¹⁸

Under the new rule, however, DHS is flouting these critical requirements, summarily expelling unaccompanied children without providing them proper screening, placing them into immigration court proceedings, or referring them to ORR. Reported U.S. Border Patrol guidance fails to even reference protections for unaccompanied children under the TVPRA.¹⁹

¹² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457).

¹³ Letter from Sen. Dianne Feinstein, Rep. Jerry Nadler, et al., to Acting DHS Secretary Chad Wolf, Mar. 20, 2020, available at https://judiciary.house.gov/uploadedfiles/3.30.2020_letter_to_dhs_re_tvpra.pdf.

¹⁴ Women’s Refugee Commission et al., “Protecting Unaccompanied Children: The Office of Refugee Resettlement and the TVPRA,” Dec. 2019, <https://www.womensrefugeecommission.org/research-resources/protecting-unaccompanied-children-the-office-of-refugee-resettlement-orr-and-the-trafficking-victims-protection-reauthorization-act-tvpra/>.

¹⁵ 8 U.S.C. § 1232(b)(3).

¹⁶ *Id.* § 1232(c).

¹⁷ *Id.* § 1232(a)(4).

¹⁸ *See supra* note 13.

¹⁹ *See supra* note 11.

The failure of the Rule and accompanying CDC Order to comply with the TVPRA's legal protections places unaccompanied children in danger, placing them at risk of trafficking and forcible return to countries where their lives or safety are at risk. In the mere weeks the rule has been in effect, hundreds of unaccompanied children have been "expelled" without access to procedures meant to ensure their safety.²⁰

For all these reasons, Amnesty International USA urges HHS to immediately rescind this rule and ensure that humanitarian protections at U.S. borders are not gutted under the guise of public health. Any future regulations regarding border restrictions during the COVID-19 pandemic must be informed by public health expertise and consistent with binding obligations under U.S. and international law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charanya', with a long, horizontal flourish extending to the right.

Charanya Krishnaswami
Americas Advocacy Director
Amnesty International USA

²⁰ Camilo Montoya-Galvez, "U.S. expels 6,300 migrants at the border, shuts off asylum under coronavirus order," CBS News, Apr. 9, 2020, <https://www.cbsnews.com/news/coronavirus-us-expels-6300-migrants-border-asylum/>.