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**RE: Request for Comments: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes (Mar 24, 2020) HHS Docket No. CDC-2020-0033, 85 FR 16559**

April 23, 2020

Dear Mr. McGowan,

The Migrant Rights and Justice (MRJ) Program of the Women's Refugee Commission (WRC) writes in opposition to the Centers for Disease Control (CDC) HHS Docket No. CDC-2020-0033, Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes published in the Federal Register on March 24, 2020<sup>1</sup> (hereinafter, the Rule) and the March 20, 2020 CDC order "Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists" (Order) based on the [Rule](#).

The WRC is a non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. The WRC is a leading expert on the needs of refugee women and children, and the policies and programs that can protect and empower them. The MRJ Program focuses on the right to seek asylum in the United States. It strives to ensure that refugees, including women and children, are provided with humane reception in transit and in the United States, given access to legal protection, and protected from exposure to gender discrimination or gender-based violence.

Since 1996, the MRJ team has made numerous visits to the southwest border region, including along Mexico's northern border, as well as to immigration detention centers for adult women and families and to shelters housing unaccompanied children throughout the country. Based on the information that we collect on these visits and our legal and policy analysis of the issues, we advocate for improvements through various methods, including meetings with government officials and service providers, and by documenting our findings through fact sheets, reports, backgrounders, and other materials. We make

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<sup>1</sup> See Federal Regulation No. 57, Vol. 85 at 16559-16567.

recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency could improve its compliance with the relevant standards.<sup>2</sup>

The WRC is deeply concerned about the impact of this Rule which purports to authorize the Director of the CDC to “prohibit the introduction into the United States of persons from designated foreign countries [], only for such period of time that the Director deems necessary for the public health,” through issuance of an order.<sup>3</sup> On March 20, 2020, the CDC issued the Order invoking its authority under the rule to suspend the introduction of individuals without documentation who seek to enter the United States via Mexico or Canada. The Government has since used the Rule to begin summarily expelling migrants including asylum seekers and unaccompanied migrant children in contravention of U.S. and international law. As a result, the Rule, which is purportedly<sup>4</sup> intended to minimize the spread of disease and protect human life, is instead putting the lives of children and asylum seekers at serious risk. For the reasons discussed below, we urge that the CDC withdraw the Rule and revoke the Order issued under its authority.

## I. THE RULE FAILS TO COMPLY WITH DOMESTIC AND INTERNATIONAL LEGAL OBLIGATIONS TO ASYLUM SEEKERS

Through the Rule, the CDC is purporting to grant the Government expansive powers to expel individuals at the border and from the interior of the United States, including asylum seekers. However, the Rule fails to offer or guarantee any legal process whatsoever to individuals subject to the Rule, in violation of U.S. refugee and immigration [laws](#) which explicitly guarantee individuals an opportunity to request protection at ports of entry or after crossing into the United States (8 U.S.C. § 1158(a)(1)).

Expulsions under the Rule without any of the required legal process would contradict U.S. international treaty obligations under the Refugee Convention and Refugee Protocol (Refugee Act of 1980, Pub. L. No.

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<sup>2</sup> WRC, LAWG, et. al., *Forced Return to Danger*, December 5, 2019; WRC, AILA, et. al, *Congress Should Conduct Significant Oversight of Remain In Mexico and Use of Tent Courts by DHS and DOJ*, letter to Congress, October 2, 2019; WRC, *Separation of families via the ‘Migrant Protection Protocols’*, Complaint to DHS, August 16, 2019; WRC, *How the Trump Administration Caused the Humanitarian Crisis at the Border and What Congress and the Administration Can Do to Fix It*, July 2019; WRC, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, June 2019; WRC, *Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso*, September 2019, WRC, *Comments to ICE in response to the Department of Homeland Security and the Department of Health and Human Services’ Proposed Regulations to the Flores Settlement Agreement*, November 2018; WRC, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement*, March 2019; WRC, *Five Ways Trump’s Enforcement Regime is Devastating Children and Families*, November 2018; WRC, *Backgrounder: Memorandum of Agreement Between DHS and HHS Emphasizes Immigration Enforcement Over Child Safety*, June 2018; WRC and KIND, *Family Separation at the Border*, November 2018; WRC, *Why Mexico Does Not Qualify as a Safe Third Country*, May 2018; WRC, et. al, *Joint Complaint to Department of Homeland Security’s Office of the Inspector General and Office of Civil Rights and Civil Liberties on Forcible Separation of Families in Customs and Border Protection Custody*, December 2017; WRC, et al, *Joint Complaint to Department of Homeland Security’s Office of the Inspector General and Office of Civil Rights and Civil Liberties on ICE Raids Targeting Sponsors of Unaccompanied Children*, December 2017; WRC, et. al., *Letter to Secretary Kelly Urging Him to Abandon Any Plans to Pursue This Costly Expansion*, May 3, 2017; WRC, *10 Things to Know about How Trump’s Executive Order will Harm Women & Children Seeking Protection*, January 2017.

<sup>3</sup> 85 FR 16559.

<sup>4</sup> Joanna Maples-Mitchell, “There is No Public Health Rationale for a Categorical Ban on Asylum Seekers,” Just Security (April 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

96-212), which require the United States not to send individuals to places where they may face serious harm amounting to persecution. UNHCR, the U.N. Refugee Agency, has clarified in guidance on COVID-19 that states cannot impose “blanket measure[s] to preclude the admission of refugees or asylum-seekers” in response to the COVID-19 pandemic.<sup>5</sup> Yet the CDC Order implementing the Rule is just that: a blanket measure that effectively bans all asylum-seekers from protection. Guidance provided to the U.S. Border Patrol instructing agents to expel individuals under the authority provided by this Rule also makes no reference to protections for asylum-seekers under the Refugee Protocol.<sup>6</sup> Alarming, the guidance demonstrates that the Government is – without justification<sup>7</sup> – using the Rule to override mandatory obligations under domestic and international law, putting vulnerable asylum seekers at danger of persecution or other serious harm through the expulsion process.

The Rule also violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which the United States is a party (Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see 8 C.F.R. § 208.16(c)). Article 3 of the Convention states that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The UN’s Subcommittee on Prevention of Torture stated unequivocally that this protection cannot be forgone even under the current pandemic.<sup>8</sup> The expulsions that the Government has undertaken under the Rule and Order involve returning individuals to the countries they have fled as well as to dangerous Mexican border cities without appropriate screenings in violation of the principle of non-*refoulement* under CAT. Reports show that migrants have been [tortured](#) in these Mexican cities. While an internal [guidance](#) document [reportedly](#) circulated by DHS to U.S. Border Patrol indicates that asylum seekers might be referred to an asylum officer if the asylum seeker makes an “affirmative, spontaneous, and reasonably believable claim” they might be tortured, this is a novel legal standard that does not exist in U.S. immigration law and on which Border Patrol agents have not been trained in practice.<sup>9</sup> It is also likely to be ineffectual as it’s highly unlikely that someone who was tortured or persecuted would communicate this effectively and without any prompting to a uniformed (and likely armed) officer or agent.

Finally, though the text accompanying the Rule states that CDC will consult with the Department of State regarding U.S. international legal obligations in fashioning orders based on the rule, the Rule 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. There is also no indication of any such

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<sup>5</sup> U.N. HIGH. COMM’R FOR REFUGEES, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* para. 1 (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> [*hereinafter* UNHCR COVID-19 Legal Considerations].

<sup>6</sup> Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law,” ProPublica (April 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>7</sup> Letter from Senator Leahy et al. to DHS Acting Secretary (April 7, 2020), <https://www.leahy.senate.gov/imo/media/doc/4.7.20%20FINAL%20Jud%20letter%20to%20DHS%20re%20Title%2042%20-%20SIGNED.pdf>.

<sup>8</sup> Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (March 25, 2020), <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

<sup>9</sup> Associated Press, US Expels Thousands to Mexico After Largely Halting Asylum, N.Y. TIMES (April 9, 2020), <https://www.nytimes.com/aponline/2020/04/09/us/ap-us-virus-outbreak-border-enforcement.html>.

coordination with the Department of State by either the CDC in issuing the March 20, 2020 Order under this rule's authority or by DHS in issuing implementation guidance to Border Patrol following the CDC's Order.

## **II. THE RULE IS BASED ON INSUFFICIENT AND INNACURATE INFORMATION REGARDING THE BORDER**

In addition to filing to ensure that the Rule complies with the U.S.' legal obligations to asylum seekers, the rule relies on [inaccurate](#) information supplied by DHS to assert that non-citizens such as asylum seekers and unaccompanied children without permanent immigration status who arrive at a land port of entry or who have crossed into the United States, lack places where they could isolate and that they must be held in congregate settings. Yet a recent study by the US Immigration Policy Center found that over 90% of asylum-seekers have family or close friends in the United States who could provide them with a place they could safely practice self-isolation, when needed.<sup>10</sup> This finding is consistent with MRJ's recent fieldwork and extensive interviews with asylum seekers at the U.S. border and in detention centers around the country.

Further, DHS is not required to hold asylum-seekers in congregate settings, such as in the custody of Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE), as DHS has legal [authority](#) (8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5) to expeditiously parole asylum-seekers into the United States to await their asylum proceedings in U.S. immigration courts. Moreover, CBP's own [standards](#) call for the minimization of time spent in CBP custody and suggest that adults should not be held in CBP facilities for more than 72 hours. Similarly, and as discussed below, federal law mandates the transfer of unaccompanied children out of CBP custody within 72 hours. Instead of engaging in detention or expulsions, DHS could choose to 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.

Confusingly, the Rule also fails to address why it appears to single out asylum seekers and unaccompanied children for expulsion while making exceptions for other categories of individuals, without regard to whether or not those individuals lack places to self-isolate and/or have been in congregate settings where COVID-19 outbreaks have happened.<sup>11</sup> Because the Rule does not apply to individuals based on infection or exposure to the novel coronavirus, but instead targets them based on their immigration status it serves no true public health purpose and instead is serving as a pretext to block these specific individuals from requesting protection in the United States.

## **III. THE RULE FAILS TO COMPLY WITH MANDATORY LEGAL PROTECTIONS FOR UNNACOMPANIED CHILDREN**

The Rule, in allowing the Government to bar and expel individuals at the U.S. border, directly violates the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), a federal law designed to protect

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<sup>10</sup> Tom K. Wong, *Seeking Asylum: Part 2*, U.S. IMMIGRATION POL'Y CENTER 13 (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

<sup>11</sup> Lucas Guttentag, "Coronavirus Border Expulsions: CDC's Assault on asylum-seekers and Unaccompanied Minors," Just Security (April 13, 2020).

unaccompanied children from human trafficking and other harm.<sup>12</sup> Unaccompanied children make up a small percentage -- [less than 10%](#) -- of people encountered at the southern border, but are among the most vulnerable groups seeking help and protection in the U.S. These children – which include young children under the age of 12 have fled to the U.S. to escape serious danger in their home countries including violence, exploitation and persecution. Their young age, development stage, and past trauma histories present unique obstacles to their navigation of the U.S. immigration system and place them in particular danger of being exploited, trafficked or harmed during or after their journeys to safety in the U.S. 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 harm them.<sup>13</sup>

Under the TVPRA, Customs and Border Protection (CBP) officers or agents must screen and determine whether children they encounter 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. If children arrive at the southern border with unrelated adults, including a relative other than a parent or legal guardian, CBP must – by law—refer that child to ORR custody. 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. 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. 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. Despite these requirements, [media reporting](#) and [government guidance](#) indicate that DHS is summarily expelling unaccompanied children without providing them proper screening, placing them into immigration court proceedings, or referring them to ORR. Troublingly, the same guidance indicates that CBP has used the Rule as a basis to rewrite the definition of what constitutes an unaccompanied child and is now expelling children under 18 who arrive with relatives as [“family units”](#) rather than transferring that child to ORR custody. Moreover, it appears that the Government is failing to do [any](#) screenings whatsoever to determine whether the adults arriving with these children are relatives or not.<sup>14</sup> This is plainly contrary to the letter and spirit of the TVPRA which was passed into law with a large bipartisan majority to [prevent](#) the U.S. from summarily returning children to potentially dangerous situations - exactly what the Rule and accompanying CDC Order purports to permit DHS to do now. By failing to conduct these TVPRA-mandates screenings, the Government risks potentially expelling children with traffickers or into dangerous situations where they might be exploited. Neither the Rule nor the Order issued by the CDC under powers granted by the Rule

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<sup>12</sup> William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171) [*hereinafter* TVPRA].

<sup>13</sup> *See, e.g.*, Cong. Record (House), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Dec. 10, 2008, at H10902, Statement of Rep. Smith (NJ) (“By protecting the victims and not sending them back to their home country where they are often exploited in a vicious cycle of exploitation, we say to the victims we will make every effort to make you safe and secure.”); *id.* at 10903, Statement of Rep. Loretta Sanchez (CA) (The TVPRA “provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.”).

<sup>14</sup> Hamed Aleaziz, “The Trump Administration Is Now Deporting Unaccompanied Immigrant Kids Due To The Coronavirus,” BUZZFEED (Mar. 30, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/coronavirus-unaccompanied-minors-deported>.

provide any explanation or legal justification for the Government's failure to comply with the mandatory legal protections and obligations under the TVPRA.<sup>15</sup>

The failure of the Rule and accompanying CDC Order to comply with the TVPRA's legal protections places unaccompanied children in [danger](#), leaving them vulnerable to human trafficking, or forcible return to countries where their lives or safety are at risk. Instead of endeavoring to protect the some of the most vulnerable individuals arriving at the southern border, the Rule appears to be nothing more than the Administration exploiting a crisis to accomplish its [longstanding goal](#) of weakening or eliminating protections for unaccompanied children.<sup>16</sup>

#### IV. CONCLUSION

As outlined above, it is the WRC's expert opinion that this Rule violates both domestic and international law and will unquestionably lead to the *refoulement* of vulnerable asylum seekers, including women and children to countries where they are at risk of harm, torture, or death. It will also lead to the summary return of vulnerable unaccompanied children to situations where they might be exploited, trafficked, or otherwise harmed. While we support the adoption of all necessary measures to reduce the transmission rate of COVID-19, we believe that border restrictions can be [managed](#) in a manner which protects public health while respecting domestic and international human rights and refugee protection standards, including the principle of non-refoulement. WRC therefore urges the Government to immediately rescind this harmful Rule and accompanying Order and to ensure that its response to the COVID-19 pandemic is consistent with obligations under domestic and international law.

Women's Refugee Commission appreciates the opportunity to submit comments on this Rule. Please do not hesitate to contact us with any questions or further information.

Sincerely,

/s/

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<sup>15</sup> Letter from Senator Leahy et al. to DHS Acting Secretary (April 7, 2020), <https://www.leahy.senate.gov/imo/media/doc/4.7.20%20FINAL%20Jud%20letter%20to%20DHS%20re%20Title%2042%20-%20SIGNED.pdf>.

<sup>16</sup> See, e.g. KIND, What are TVPRA Protections for Unaccompanied Children? (April 1, 2019), <https://supportkind.org/wp-content/uploads/2019/04/KIND-TVPRA-talking-points-4.1.19-FINAL.pdf> (analyzing repeated mischaracterizations by executive branch that TVPRA protections are "loopholes").