

August 15, 2019

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Re: Comments in Response to Interim Final Rule: EOIR Docket No. 19-0504 / AG Order No. 4488-2019: Asylum Eligibility and Procedural Modifications

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to the Department of Justice Executive Office for Immigration Review (DOJ) and the Department of Homeland Security's (DHS) Interim Final Rule ("the IFR"): *Asylum Eligibility and Procedural Modifications* published in the Federal Register on July 16, 2019.¹

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence throughout the past twenty-one years. Our clients endure unimaginable atrocities such as human trafficking, domestic violence, forced marriage, honor crimes, and sexual assault. **Tahirih is firmly opposed to the IFR, as it unlawfully bars asylum for highly vulnerable refugees such as our clients whom our asylum system was rightfully designed to protect. Instead, we urge DOJ and DHS to abandon the IFR in favor of policies and practices that recognize asylum seekers' dire need for safe haven, and the perilous conditions they face as they make their way to the United States southern border.**

I. The IFR is Unlawful

The IFR bars asylum for any applicant seeking protection at the southern U.S. border unless she: a) applied for but was denied protection in at least one country of transit; b) was the victim of a severe form of human trafficking; or c) did not pass through any country that is a signatory to the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees (the "Convention"). Guatemala and Mexico are signatories to the Convention.

The IFR violates both the Immigration and Nationality Act ("INA") and Administrative Procedure Act ("APA"). The IFR exceeds the authority given to the executive branch by Congress in the INA, and the explanation the IFR provides for its sweeping changes to asylum law is impermissibly arbitrary and capricious under the APA.

A. The IFR Is Not a Valid Exercise of Authority Under 8 U.S.C. § 1158(b)(2)(C)

The INA permits the executive branch to "establish additional limitations and conditions * * * under which an [individual] shall be eligible for asylum." 8 U.S.C. § 1158(b)(2)(C). Those limitations and conditions, however, must be "consistent with" the other provisions of § 1158. *Id.* The IFR is inconsistent with (1) the general rule in § 1158(a)(1) permitting asylum applications; (2) Congress's specification that an asylum seeker's method of arriving in the United States is immaterial; (3) Congress's carefully

¹ <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>

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crafted statements regarding the circumstances in which asylum seekers must seek relief from other countries; and (4) the provisions of § 1158 related to unaccompanied children.

1. The IFR unlawfully nullifies the general rule that individuals may seek asylum in the United States

In 8 U.S.C. § 1158(a), Congress crafted a general rule, with very specific, narrowly drawn exceptions,² allowing individuals to apply for asylum as follows:

Any [individual] who is physically present in the United States (whether or not at a designated port of arrival and including an [individual] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [individual's] status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1).

The IFR, however, nullifies the general rule in § 1158(a)(1). The IFR prohibits anyone, with certain narrow exceptions, who arrives at the southern border from a country other than Mexico, from establishing eligibility for asylum. The “safe-third-country” agreement between the United States and Canada similarly prohibits almost anyone who approaches the northern border from seeking asylum in the United States.

Thus, under the IFR, the only individuals who *can* claim asylum in the United States are (1) Mexican and Canadian citizens and residents; (2) individuals who fall into an exception to the safe-third-country agreement with Canada; (3) individuals who survive a sea journey to the United States; and (4) the small number of individuals who have the resources to purchase airfare to the United States. Of these exceptions, the one for Mexican nationals is easily the most numerically significant—and Mexican nationals accounted for only 6% of the asylum applications filed in immigration courts between 2001 and 2019. TRAC, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum>. The result is that, under the IFR, the exceptions swallow the rule: While Congress expressly mandated that individuals must generally be allowed to apply for asylum, under the IFR, individuals generally are prohibited from doing so.

2. The IFR is inconsistent with the parenthetical language in § 1158(a)(1)

The IFR also contradicts § 1158(a)(1) in a second way. The parenthetical language in that section specifies that an individual may apply for asylum “whether or not” she arrived “at a designated port of arrival” and even if she was “brought to the United States after having been interdicted in international or United States waters.” 8 U.S.C. § 1158(a)(1). Congress therefore made clear that an individual’s method of arrival in the United States does not affect her eligibility to apply for, or receive, asylum. The IFR, however, seeks to do just that: It attempts to bar from asylum eligibility anyone who enters the United States via the southern land border with narrow exceptions.

3. The IFR is inconsistent with Congress’s existing requirements for when asylum seekers must pursue relief in other countries

The IFR is similarly inconsistent with Congress’s requirements for when individuals must apply for asylum in another country to remain eligible for asylum in the United States. Congress enacted two statutory provisions on that topic. One provision, the “[s]afe third country” exception, states that an individual “may be removed, pursuant to a bilateral or multilateral agreement, to a [third] country * * * in which the

² See § 1158(a)(2) & (b)(2).

[individual's] life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the [individual] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." 8 U.S.C. § 1158(a)(2)(A).

The second provision renders ineligible for asylum any individual who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). An individual is presumed to have firmly resettled in another country if she has "an offer of permanent resident status, citizenship," or equivalent status from that country. 8 C.F.R. § 208.15. Because evidence of persecution in the third country rebuts a showing of firm resettlement, an individual ineligible for asylum in the United States under this provision has "by definition" found a safe home in another country. *Arrey v. Barr*, 916 F.3d 1149, 1159-60 (9th Cir. 2019).

Three features of these provisions are immediately apparent. First, they are very narrowly drawn. Second, they require asylum seekers to look to another country only if that country provides a "safe option." *E. Bay Sanctuary Covenant v. Barr*, ___ F. Supp. 3d ___, 2019 U.S. Dist. LEXIS 124268, at *39, 2019 WL 3323095 (citing *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013)). And third, they take careful account of whether an asylum seeker has already received protection from the third country or, at the least, can avail herself of a full and fair asylum procedure in that country. Thus, to be consistent with § 1158, any regulations requiring additional individuals to seek asylum in a third country must apply to only narrow classes of individuals and must take account of both the safety of those countries and the fairness of their asylum procedures.

The IFR satisfies none of these requirements. Where Congress enacted provisions that require only small numbers of asylum seekers to seek refuge elsewhere, the IFR – although merely a regulation – represents the most sweeping restriction on asylum in the United States ever proposed. Where Congress required asylum seekers to seek protection only in *safe* third countries, the IFR says nothing at all about whether Mexico, or any other country through which asylum seekers pass to arrive at the southern border of the United States, is safe. And where Congress carefully took account of the fairness of other countries' asylum procedures, the IFR looks only to whether a country has a "functioning" system. 84 Fed. Reg. at 33,838. The IFR is therefore in no way "consistent" with Congress's requirements for when asylum seekers must seek relief in other countries.

4. The application of the IFR to unaccompanied children is inconsistent with the INA

As it applies to unaccompanied children, the IFR is inconsistent with § 1158 in still other ways. In recognition of their particular vulnerability, Congress has made clear that unaccompanied children are entitled to seek asylum in the United States in the non-adversarial context of interviews with asylum officers. 8 U.S.C. § 1158(b)(3)(C). And Congress further made clear that children are entitled to do so even if they would otherwise be subject to the safe-third-country exception. 8 U.S.C. § 1158(a)(2)(E). The IFR attempts to override Congress by rendering most unaccompanied children ineligible for asylum altogether.

In short, the IFR is a valid exercise of authority under § 1158(b)(2)(C) *only* if it is consistent with § 1158. It does not meet that test. To the contrary, the IFR improperly arrogates to the executive branch the power to overrule Congress's considered judgment and express intent.

B. The IFR Is Not a Proper Exercise of Authority Under 8 U.S.C. § 1158(d)(5)(B)

The IFR also asserts that it is based on a grant of authority in 8 U.S.C. § 1158(d)(5)(B). That section does not, and cannot, provide a plausible justification for the IFR's restrictions on asylum. Statutory language must be read in its context. *E.g.*, *FCC v. AT&T*, 562 U.S. 397, 407 (2011). And the context of § 1158(d)(5)(B)

makes clear that it allows the executive branch to enact certain procedures related to the consideration of asylum applications. *See, e.g.*, 8 U.S.C. § 1158(d) (“Asylum Procedure”); *id.* § 1158(d)(1) (instructing the Attorney General to “establish a procedure for the consideration of asylum applications”); *id.* § 1158(d)(5)(A) (listing required aspects of the procedure implemented under § 1158(d)(1)). The IFR, which seeks to impose a sweeping and categorical ban on asylum rather than mere “procedures,” therefore cannot be grounded in the authority provided by § 1158(d)(5)(B).

C. The IFR Is Arbitrary and Capricious

In addition to being inconsistent with the INA, the IFR rests on rationales that are arbitrary and capricious. The IFR states that it is designed to do three things: (1) “ensure that the ever-growing influx of meritless asylum claims do[es] not further overwhelm the country’s immigration system”; (2) “aid U.S. negotiations on migration issues with foreign countries”; and (3) “promote the humanitarian purposes of asylum by speeding relief to those who need it most (*i.e.*, individuals who have no alternative country where they can escape persecution or torture or who are victims of a severe form of trafficking and thus did not volitionally travel through a third country to reach the United States) and by curtailing human smugglers.” 84 Fed. Reg. at 33,840. But the IFR’s first purported goal is based on two assertions that run counter to the available evidence, and the IFR advances neither treaty negotiations nor humanitarian interests.

1. There is no “influx of meritless asylum claims”

The IFR cites no evidence to support its assertion that there has been an “influx of meritless asylum claims.” 84 Fed. Reg. at 33,840. Instead, the IFR bases that assertion on the conflation of “meritless” claims with claims that are not “ultimately granted.” 84 Fed. Reg. at 33,831; *see also id.* at 33,839. Those two categories are distinct: An individual who is not ultimately granted asylum is not necessarily an individual whose claim lacked merit. The INA itself demonstrates as much. Under the IFR’s interpretation of 8 U.S.C. § 1158(b)(1)(A), the government may *deny* asylum relief even to individuals whose claims satisfy *all* of the prerequisites to asylum. *See* 84 Fed. Reg. at 33,832.

The disconnect between meritorious claims and granted claims is not only a statutory artifact. Overwhelming evidence shows that the grant rate for asylum applications filed in immigration court critically depends on two factors unrelated to the merits of the application. One is whether the asylum seeker was represented by counsel. From 2001 until the present, more than half of asylum seekers represented by counsel received either asylum or other relief in defensive proceedings. TRAC, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum>. In contrast, only 17.5% of those lacking counsel received relief. *Id.*; *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 48-58 (2015) (finding similar differences from 2007-2012). This stark difference persists in recent cases: In fiscal year 2017, for instance, 46.6% of represented asylum seekers—but only 10% of those without representation—received asylum in immigration court. TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, <https://trac.syr.edu/immigration/reports/491>. And given the limited availability of lawyers in many locations where immigrants enter the country or are detained, there is no basis for believing that those without representation generally have weaker cases than those who obtained representation.³

The other critical factor influencing whether asylum seekers receive relief is the identity of the immigration judge. From fiscal year 2013 through fiscal year 2018, an asylum seeker’s chance of relief ranged

³ The absence of legal representation—and the extreme difficulty of navigating complicated, adversarial processes in a foreign language—is also sufficient to explain why the vast majority of cases in which those who are found to have a credible fear of persecution do not go on to file asylum applications. *See* 84 Fed. Reg. at 33,839.

from 0% to 97%, depending on the judge hearing their claim. TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, <https://trac.syr.edu/immigration/reports/judge2018/denialrates.html>. And there is no evidence that this almost inconceivable disparity has any correlation to the strength of cases before individual judges. The evidence therefore demonstrates, contrary to the assumption in the IFR, that the outcome of asylum proceedings hinges on two factors that are beyond the control of the asylum seeker and that bear no relationship to the strength of the asylum seeker's claim.⁴

The IFR's more specific claims regarding the merit of asylum applications are likewise unsustainable. The IFR implies that asylum claims made by those who enter at the southern border are particularly likely to be unmeritorious. See 84 Fed. Reg. at 33,831. But the IFR includes no evidence suggesting that asylum claims brought by individuals who enter via the southern border are less likely to be meritorious (or even less likely to be granted) than asylum claims brought by individuals who enter the United States in other ways. Given that such evidence would be in the possession of the government if it existed, the only reasonable inference is that no such evidence exists.

Likewise, the IFR does not, because it cannot, cite any evidence supporting the contention that many asylum seekers "are simply economic migrants seeking to exploit" U.S. law. 84 Fed. Reg. at 33,839. The IFR does not, because it cannot, cite evidence supporting the contention that many crossing the border are "without a genuine need for asylum" in any country. *Id.* at 33,840. And the IFR does not, because it cannot, cite evidence supporting the contention that significant numbers of asylum seekers want not genuine relief from persecution but rather "a lengthy asylum process that will enable them to remain in the United States for years despite their statutory ineligibility for relief." *Id.* Thus, the IFR has manufactured a supposed influx of frivolous asylum applications with no evidence to support its claim.

2. The U.S. immigration system is not overwhelmed

The available evidence also contradicts the IFR's unsupported claim that the U.S. immigration system is "overwhelmed" by increases in asylum claims. 84 Fed. Reg. at 33,840; *see also id.* at 33,838-39. The fact that United States Citizenship & Immigration Services ("USCIS") asylum officers successfully completed more than 91,000 credible-fear interviews in fiscal year 2018 shows that those officers are quite capable of handling the increase in asylum claims. Any contrary argument is belied by the fact that, one week after issuing the IFR, DHS issued a Notice that would drastically *increase* the number of credible-fear interviews that asylum officers conduct by greatly expanding the number of individuals subject to the expedited-removal procedures in 8 U.S.C. § 1225.⁵ See DHS, *Designating Aliens for Expedited Removal*, <https://federalregister.gov/d/2019-15710> (July 23, 2019).

The immigration courts are also not overwhelmed with asylum filings. As of June 30, those courts have decided more cases in fiscal year 2019 than in fiscal year 2018. TRAC, *Asylum Decisions*. This reflects, among other things, the fact that the number of immigration judges has increased at a *higher* rate than the number of new proceedings in immigration court. See TRAC, TRAC, *Immigration Court Backlog Surpasses One*

⁴ To the extent that the justification for the IFR rests on an increase in asylum denials in the past two years, any such increase is due to new, illegal executive policies—including decisions of the Attorney General that unlawfully attempt to rewrite decades of precedent (*see, e.g., Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018)), and policies, such as the so-called "Migrant Protection Protocols," that serve to deny asylum seekers access to counsel (*see* TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/mpp/>).

⁵ Further, the IFR's complaint that too many people can demonstrate a credible fear of persecution (84 Fed. Reg. at 33,839) ignores the fact that Congress has explicitly set the standard for those interviews in 8 U.S.C. § 1225(b)(1)(B)(v). That standard therefore may not be changed, either explicitly or implicitly, by regulation.

Million Cases ("Backlog"), <https://trac.syr.edu/immigration/reports/536/>. Any increased burden on the immigration courts has therefore not been imposed by asylum seekers or other immigrants.

Any increased burden on the immigration courts instead stems directly from recent executive-branch policies. One recent decision of the Attorney General—*Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) - “removed 330,211 previously completed cases and put them back on the ‘pending’ rolls.” TRAC, *Backlog*. That decision alone accounts for *more than one-third* of the backlog cited in the IFR. See 84 Fed. Reg. at 33,839. The Remain in Mexico program, meanwhile, serves to overwhelm immigration courts at the southern border rather than allowing claims to be heard by courts throughout the United States. See, e.g., Brief of *Amicus Curiae* Local 1924 in Support of Plaintiffs-Appellees, *Innovation Law Lab v. McAleenan*, 9th Cir. No. 19-15716, Dkt. 39, at 25-26. And the “[s]hifting scheduling priorities” and shifting “legal standards” that immigration judges must apply likewise contribute to the backlog. TRAC, *Backlog*. It is unquestionably arbitrary for the IFR to blame asylum seekers for the predictable results of these ill-considered executive branch policies.

The IFR’s invocation of supposed complications caused by the fact that more families and unaccompanied minors, and fewer single adult males, are seeking asylum (84 Fed. Reg. 33,838) is similarly arbitrary. The IFR contends that “it is more difficult to expeditiously repatriate family units and unaccompanied” children. *Id.* But that contention amounts to nothing more than an empty complaint that vulnerable populations are claiming protection intended for vulnerable populations. Moreover, given the absence of any evidence that the United States faces a crisis of frivolous asylum claims, the IFR’s contention amounts to a complaint that it is too difficult for the United States to uphold the *non-refoulement* obligations imposed by international law.

3. There is no evidence that the IFR aids treaty negotiations

The IFR also claims to advance “negotiations with foreign nations on migration issues.” 84 Fed. Reg. at 33,831. Specifically, it suggests that restricting asylum “will better position the United States as it engages in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries (Guatemala, El Salvador, and Honduras).” *Id.*; see also *id.* at 33,840. That, however, is a blatant *ipse dixit*; the IFR articulates no specific connection between its provisions and treaty negotiations. *East Bay*, 2019 U.S. Dist. LEXIS 124268, at *51. The treaty justification for the IFR is therefore also arbitrary.

4. The IFR has no plausible humanitarian purpose

Finally, the IFR’s claim to advance humanitarian objectives (see 84 Fed. Reg. at 33,831, 33,840) is transparently pretextual. There is no plausible set of circumstances under which a rule prohibiting the vast majority of asylum seekers from applying for asylum will serve the humanitarian purposes of asylum. It is therefore unsurprising that the IFR’s attempts to justify this rule cannot survive cursory scrutiny.

a. Far from protecting those who most need protection, the IFR leaves them vulnerable to violence and persecution

The main pretense offered by the IFR is that it aims to allow asylum for those who “need it most”- “individuals who have no alternative country where they can escape persecution or torture.” 84 Fed. Reg. at 33,840. If the IFR actually sought to advance that objective, it would exempt individuals who fear persecution in the countries through which they pass *en route* to the United States. That description applies to, among other individuals, “the LGBTQ community” and “people with indigenous heritage.” Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers?* 2, https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf (“*Is Mexico Safe?*”). Such individuals “have no alternative to U.S.-based

asylum relief” (84 Fed. Reg. at 33,831), reach the U.S. with no prior “opportunity” to apply for asylum in a country where they will not be persecuted (*id.* at 33,839) and might well not survive the asylum application process in Mexico or Guatemala. Yet far from protecting them, the IFR instead slams the door.

Any asylum-limiting regulation with a plausible humanitarian purpose would also exempt unaccompanied children. The IFR itself notes that the “long and arduous journey” across Central American countries and Mexico “brings with it a great risk of harm” to children (*id.* at 33,838). Yet, it fails to mention that *remaining* in those countries is equally, if not more, dangerous for children. And the IFR, far from protecting unaccompanied children, requires the United States to turn a blind eye to violence perpetrated against children in those countries.

A regulation with a humanitarian purpose would also take account of the pervasive violence faced by women in Mexico. Many women seeking asylum are fleeing various forms of gender-based persecution in their home countries. But gender-based violence, including femicide, remains widespread in Mexico. *See, e.g.,* Amnesty International, *Mexico 2017/2018*, <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>; NACLA, *Surviving One of Mexico’s Most Dangerous Places for Women*, <https://nacla.org/news/2019/02/04/surviving-one-mexico%E2%80%99s-deadliest-places-women> (Apr. 2, 2019); World Health Organization, *Femicide 3*, https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1. This prevalence of gender-based violence means that women and girls seeking asylum are extremely vulnerable to violence in Mexico.

The IFR, however, makes no attempt to protect them—just as it makes no attempt to protect unaccompanied children or other groups vulnerable to persecution in Mexico while waiting for asylum claims to be processed there. These failures make clear that the IFR has no humanitarian purpose. Instead, its true purpose—one that it pursues regardless of the cost in human life—is to diminish the number of asylum seekers who ask for relief from the United States.⁶

b. The IFR arbitrarily fails to consider whether Mexico and Guatemala are safe or have full and fair asylum processes

The IFR seeks to support its pretense of humanitarianism by asserting that those it bars from seeking asylum do *not* need protection in the United States. The IFR asserts that such individuals are “misusing the [U.S.] asylum system,” because they “transited through another country where protection was available, and yet did not seek protection.” 84 Fed. Reg. at 33,831. Those assertions are, however, flatly untrue for the groups discussed above, for whom protection would not be available in those countries.

The assertions are also untrue as a more general matter. The reason that asylum seekers ask for protection in the United States rather than Mexico is simple and clear. As the “overwhelming evidence” in the record when the IFR was issued unequivocally shows, asylum seekers in Mexico—the country through which everyone approaching the southern border must transit—“are (1) subject to violence and abuse from third parties and government officials, (2) denied their rights under Mexican and international law, and (3) wrongly returned to countries from which they fled persecution.” *East Bay*, 2019 U.S. Dist. LEXIS 124268, at *67; *see also id.* at *58-*67 (canvassing the record evidence). Mexico is, in other words, not safe. In a moment of candor, the government conceded as much: Deputy Assistant Attorney General Scott Stewart, in the argument held on plaintiffs’ motion for a temporary restraining order in *CAIR Coalition v. Trump*, D.D.C. No. 19-cv-2117 (July 22, 2019), admitted that migrants who seek to transit through Mexico might be subject

⁶ Indeed, this purpose of forcibly diminishing the use of the U.S. asylum system is the *only* plausible explanation for the combination of the various executive-branch policies discussed in this comment.

to “murders” or other violence. The IFR, however, improperly ignores the irrefutable evidence that asylum seekers are applying for relief in the first *safe* country in which they arrive.⁷

Moreover, although the IFR contends that Mexico has a “functioning” asylum system that “receive[s]” thousands of asylum applications each year (84 Fed. Reg. at 33,838-39), Mexico does not have a full and fair asylum system. As recently as 2017, Mexico had ceased to consider asylum applications altogether, with 13,000 claims still suspended. Patrick Timmons, *Mexico facing two-year backlog as asylum requests soar*, https://www.upi.com/Top_News/World-News/2018/08/31/Mexico-facing-two-year-backlog-as-asylum-requests-soar_/2031535567041/ (“Two-year backlog”). Although Mexico now formally accepts asylum applications, numerous fundamental shortcomings in its system leave it incapable of providing protection to those fleeing persecution. Mexico also illegally turns back asylum seekers⁸ and lacks a robust, fair appeals process for those whose applications are denied. And because Mexico enforces a draconian 30-day deadline for filing an asylum application, many asylum seekers who have been forced to wait in Mexico by the U.S. government are now ineligible for asylum in that country. *East Bay*, 2019 U.S. Dist. LEXIS 124268, at *76.

Despite Mexico’s large (and growing) backlog, the government has slashed the budget for COMAR – the Mexican asylum agency – by more than 27% despite a 200% increase in asylum applications filed this year. COMAR has also failed to issue decisions within the timeframe required under Mexican law in 22,000 other cases. Another 15,000 asylum seekers are also still awaiting decisions. Along with the 13,000 suspended claims described above, the backlog now totals over 50,000 claims. Increasing application receipt numbers do not equate to an increase in processing capacity; the Mexican asylum system is hardly a “robust protection regime” as claimed by DHS in the IFR.⁹

There is also no evidence to support the notion that Central American countries through which some asylum seekers pass *en route* to the United States are safer, or have more robust asylum processes, than Mexico. For instance, asylum seekers traveling overland from Honduras, El Salvador, and other countries south of Guatemala must pass through Guatemala to reach Mexico. Nevertheless, when the IFR was issued, “the administrative record contain[ed] no information about” the asylum system in Guatemala. *East Bay*, 2019 U.S. Dist. LEXIS 124268, at *68 n.25.

That omission reflects the fact that Guatemala is not a safe country for asylum seekers—as both the large number of Guatemalans applying for asylum elsewhere and numerous United States government reports make clear. See U.S. Dep’t of State, *Guatemala 2018 Human Rights Report*, <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>; U.S. Dep’t of State, *2019 Trafficking in Persons Report: Guatemala*, <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/Guatemala>; Congressional Research Service, *Guatemala: Political & Socioeconomic Conditions and U.S. Relations 2*, <https://fas.org/sgp/crs/row/R42580.pdf>; UNHCR, *Global Trends: Forced Displacement in 2018*, at 42. It also reflects the fact that Guatemala’s asylum “system” barely exists and is likewise ill equipped to assess, adjudicate, and manage the cases of the many Hondurans, Salvadorans, and others that transit through on their way to seek safe haven.

⁷ Furthermore, the IFR’s assertion that it “is in keeping with the efforts of other liberal democracies to prevent forum-shopping by directing asylum-seekers to present their claims in the first safe country in which they arrive” (84 Fed. Reg. at 33,840 (emphasis added)) simply begs the question. If Mexico is not a safe country for asylum seekers—and it is not—then the IFR is *not* in keeping with the efforts of other countries.

⁸ Human Rights First, *Is Mexico Safe? 2*; See also Amnesty International, *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum*, <https://www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-americans-seeking-asylum/>

⁹ See IFR at 22.

Since 2015, Guatemala has received roughly 92 cases a year for asylum processing. In 2018, there was a 75% increase from 2017, yet the number increased to a mere 262 claims. UNHCR, *Guatemala*, at <https://www.acnur.org/5cacfd7a4.pdf> (last accessed July 30, 2019). That year, Guatemala's National Migration Institute approved 20 of these claims. Given that Guatemala has a total of only 12 officials who work on any aspect of its asylum process, with only 3 staff interviewing applicants (Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* 2, https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf), that number represents effectively the most applications that the "system" can process.¹⁰ Nonetheless, since 50,000 Hondurans and Salvadorans applied for asylum in the United States in 2018, the IFR will potentially send well over this number to Guatemala each year—numbers that the Guatemalan system would be patently incapable of handling.¹¹

Finally, a key feature of a fully functioning asylum system is meaningful access to counsel and interpreters, which asylum seekers in Mexico and Guatemala have very limited access to.¹²

c. The IFR's other "humanitarian" justifications are similarly arbitrary

The remaining "humanitarian" justifications put forward by the IFR likewise lack merit. In light of the significant human suffering that the IFR would cause, the fact that it excepts one very narrow category of individuals—those brought to the United States as involuntary trafficking victims—does not validate the IFR's broad claim to humanitarianism. After all, there can be no question that those who have "an urgent or genuine need for asylum" likewise arrive in the United States out of desperation and in grave fear for their lives. 84 Fed. Reg. at 33,831.

The IFR's final claim in this regard is that it will "curtail" human smugglers "[b]y reducing the incentive for [individuals] without an urgent or genuine need for asylum to cross the border." 84 Fed. Reg. at 33,831; *see also id.* at 33,840. But there is no evidence that human smuggling is, as the IFR asserts (*id.*), a byproduct of meritless asylum claims. Rather, human smuggling is, like the increased backlog in immigration courts, largely a problem of the U.S. government's own making.

The executive branch's adoption of the policy of "metering" asylum seekers at official ports of arrival provides a prime example. Under this policy, the government unlawfully gives asylum seekers a number and requires them to wait in dangerous Mexican border cities for that number to be called. *See Al Otro Lado v. McAleenan*, 2019 U.S. Dist. LEXIS 126173 (S.D. Cal. July 29, 2019). This process takes months, a period that has been greatly extended because of the executive branch's choice to allow in only small numbers of asylum seekers each day. *See, e.g.,* Dara Lind, *Asylum-Seekers Who Followed Trump Rule Now Don't Qualify Because of New Trump Rule*, <https://www.propublica.org/article/asylum-seekers-that-followed-trump-rule-now-dont-qualify-because-of-new-trump-rule> (July 22, 2019) (no asylum seekers allowed to enter at San Ysidro for 9 of 14 days prior to issuance of the IFR); Ryan Krause, <https://twitter.com/krausewords/status/1158079335791767553> (no asylum seekers allowed to enter at San Ysidro on August 4, 2019, with more than 10,000 waiting in Tijuana).

¹⁰ The inability of Mexico or Guatemala to fairly process claims for asylum highlights the arbitrary nature of the IFR's claim that asylum applications are overwhelming the U.S. immigration system. The IFR uses that asserted incapacity to force asylum claims on other countries. But the U.S. immigration courts decided over 42,000 asylum cases in fiscal year 2018 (TRAC, *Asylum Decisions*)—more than 161 times as many as Guatemala's system.

¹¹ https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf

¹² *See* <https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-migrants-refugees-asylum-comar.html>

By the IFR's own standards, this unlawful metering policy accounts for recent increases in human smuggling. The IFR predicts that asylum seekers are so attuned to changing incentives that putting its provisions through notice and comment would produce a "surge" of asylum seekers crossing the border during the comment period. 84 Fed. Reg. at 33,841. Assuming *arguendo* that this prediction is correct, it follows ineluctably that the "metering" policy—which requires asylum seekers to wait in dangerous conditions for months—incentivizes individuals to cross the border between official ports of entry. In other words, by the IFR's own standards, the problem of human smuggling is largely caused by the metering policy, not by the illusory avalanche of meritless claims.¹³

II. The IFR Violates Standards of Treatment of Asylum Seekers Under the Convention

The IFR will require asylum seekers at the southern border to first file unsuccessful claims in Mexico and/or Guatemala to be eligible for protection in the United States. However, the international body tasked with overseeing implementation of the Convention - the UNHCR - prohibits state parties from simply returning an asylum seeker to a country of transit unless certain standards of treatment are met:

"As a precondition to return...it is crucial to establish that s/he has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards...the standards of treatment ...go beyond protection from refoulement...the person needs to be granted access to a fair and efficient asylum procedure...the third state [must] provide...access to means of subsistence sufficient to maintain an adequate standard of living and to undertake steps to enable the progressive achievement of self-reliance."¹⁴

As detailed above, despite being signatories to the Convention, neither Mexico nor Guatemala provide meaningful international protection from persecution for asylum seekers. Mexico is overwhelmed, with applicants facing long delays, unfair procedures, and very limited access to counsel and other critical services. Refugees also report that authorities try to dissuade them from pursuing claims by emphasizing the lengthy detention time during the process.¹⁵

It is also well-documented that asylum seekers returned to Mexico under the Administration's so-called Migrant Protection Protocols ("MPP") have been subjected to grievous [harm](#) including rape, kidnapping, assault, trafficking, forced prostitution, and extortion with no recourse.¹⁶ There is no reason to believe they will be safe there while awaiting adjudication of their claims there. This is especially true for gender-nonconforming migrants, women, and children, particularly where they must sleep outside or stay in shelters with little to no security.¹⁷ El Salvador, Honduras, Guatemala, and Mexico were four of the top five countries for asylum grants in 2017, according to the EOIR statistical yearbook. Protection from persecution/torture is not "available" in these countries.

¹³ Nevertheless, as the IFR concedes, the number of entries between official ports of arrival was "higher two decades ago than it is today." 84 Fed. Reg. at 33,838.

¹⁴ <https://www.refworld.org/pdfid/5acb33ad4.pdf>

¹⁵ See <https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-migrants-refugees-asylum-comar.html>

¹⁶ See <https://www.cbsnews.com/news/remain-in-mexico-advocates-say-controversial-policy-turns-migrants-into-a-marketable-commodity/>; See also <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>; See also <https://www.womensrefugeecommission.org/rights/resources/1763-chaos-confusion-and-danger>

¹⁷ Tahiri attorneys met with women at the Benito Juarez open-air shelter last year who expressed that they felt unsafe and had no tents for privacy. They were showering out in the open and subjected to unwanted touching from others. There were not enough beds so some were sleeping outside the shelter as well.

A small sample of Tahirih clients seeking asylum, who endured such crimes while in countries of transit include:

- A 20-year-old woman from Honduras who was raped in Mexico after fleeing her country with her two young sons, ages 2 and 4
- A 19-year-old Salvadoran woman traveling with her younger brother who was kidnapped in Mexico by the Gulf Cartel *en route* to the United States and was sexually assaulted by one of her kidnappers
- A 16-year-old girl from Honduras who was raped and sex trafficked in Mexico
- A 17-year-old Honduran girl, a 16-year-old Guatemalan girl, and a 15-year-old Guatemalan girl, who were raped in Mexico after fleeing home

Persecutors are also able to locate and continue to threaten survivors who flee persecution in their home countries, while traveling to and upon arrival in Mexico. In one example, Beatrice*, a woman whom Tahirih counseled, fled Central America after suffering years of domestic abuse including regular beatings and rapes. Beatrice's husband became increasingly violent toward both her and their children over time. Beatrice fled to Tijuana, found a shelter, and applied for asylum. After several weeks, however, she realized that she and her children were no longer safe in Mexico either. Her husband's relative, also from their country, managed to find them in Tijuana and violently attack them. In addition, El Salvador, Guatemala, Honduras, and Nicaragua all participate in a regional free movement agreement that grants their citizens entrance to these countries with minimal border controls. This in turn allows persecutors to track and follow asylum seekers with ease throughout the region.

Finally, the IFR's provisions relating to unaccompanied minors also run afoul of UNHCR's guidelines with regard to 'first country of asylum' policies, that require individual assessments prior to transfer to third countries of particularly vulnerable groups such as unaccompanied and separated children. The best interests of the child must be given primary consideration in this context.¹⁸

III. The IFR is Ill-Conceived and Should be Abandoned as a Matter of Policy

The United States asylum program exists to protect vulnerable asylum seekers. Imposing sweeping restrictions such as the IFR to curtail life-saving protection is cruel and ultimately harmful to United States interests. While the IFR ostensibly targets those fleeing persecution in the Northern Triangle, it will effectively bar asylum for those fleeing a wide range of countries worldwide such as Cameroon, Cuba, Eritrea, Nicaragua, Russia, and Venezuela. Those enduring persecution such as Female Genital Mutilation/Cutting (FGM/C), forced marriage, domestic abuse, and honor violence all merit international protection yet under the IFR the majority of survivors' claims will now be summarily rejected.

While purporting to serve a "humanitarian" purpose, the Administration also seeks to justify the IFR using false claims about lack of detention space and high rates of absconding by asylum seekers. In reality, the Administration has deliberately chosen to pack detention facilities instead of releasing eligible asylum seekers on parole, who are neither a flight risk nor a danger to the community or national security. Furthermore, less than 2% of asylum seekers released from detention who received a final decision on their cases in FY 2018 (464 out of 22,686) received an *in absentia* removal order according to data released to [TRAC](#). And, the vast majority of cases have not been completed yet with [TRAC's](#) data showing "almost six out of every seven families released from custody had shown up for their initial court hearing."

¹⁸ <https://www.refworld.org/pdfid/5acb33ad4.pdf>

The Administration's preference for widespread, arbitrary detention of asylum seekers¹⁹ in lieu of proven effective, less expensive alternatives reveals its true motives of deterrence and punishment rather than protection. While claiming a lack of resources to adjudicate asylum claims at the southern border, and bemoaning the high cost of detention of asylum seekers, the Administration itself chose to shutter alternatives to detention that would conserve resources while ensuring asylum seekers receive the support they need to meet ICE and immigration court obligations. Furthermore, asylum seekers will still be able to pursue withholding of removal and/or Convention Against Torture proceedings under the IFR, if they pass their initial RFI screening (Reasonable Fear Interview). Unlike asylum, these remedies require individual filings and related litigation; derivative family members' claims cannot be subsumed into a "principal" application. As a result, a reduction in post-IFR asylum claims will be offset by a dramatic increase in withholding of removal claims. In addition, children presenting highly sensitive testimony directly to government officials in an adversarial setting, while trying to meet a higher standard of proof, will endure extreme re-traumatization in the process. Re-traumatization in this context in turn compromises a child's ability to present and participate effectively in her otherwise meritorious case.

Finally, the IFR fails to address the root causes of the humanitarian crisis at our southern border. Attributing the crisis to "human smugglers," the Administration ignores the role that in-country conditions and the Administration itself has played in exacerbating displacement. Cutting critical assistance and anti-corruption mechanisms in Central America, and then forcing asylum seekers to apply for protection there, will not solve the problem.

III. Conclusion

For all the reasons outlined above, the IFR is a blatant violation of the INA, the APA, and international human rights standards. It is also unsound policy that neither conserves government resources, nor alleviates the dire conditions that give rise to refugee protection needs. Rather, the IFR perpetuates punitive, inhumane, and unnecessary deterrence policies that will -by design - keep the most vulnerable asylum seekers including children and survivors of horrific gender-based violence from accessing safety. United States policies should instead seek to maximize the well-being of survivors as Congress intended. **Tahirih therefore urges DHS and DOJ to promptly withdraw the IFR.**

We look forward to your detailed feedback on these comments, and please contact me at irenas@tahirih.org or 571-282-6180 for additional information.

Respectfully,



Irena Sullivan
Senior Immigration Policy Counsel

*Pseudonym

¹⁹ In [Damus v. McAleenan](#), D.C. District Court issued a preliminary injunction blocking the arbitrary detention of asylum seekers. The Administration has also attempted to end the bond eligibility for asylum seekers who crossed the border between ports of entry - in [Matter of M-S-](#), which is set to go into effect imminently.