

April 23, 2020

Submitted via <https://www.regulations.gov/document?D=CDC-2020-0033-0002>

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Re: Comments in Response to HHS / CDC Interim Final Rule: “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” Docket No. [CDC-2020-0033](#); 85 FR 16559; RIN 0920-AA76

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments to the United States Department of Health and Human Services’ (HHS) Centers for Disease Control and Prevention (CDC) in response to the [Interim Final Rule](#) (IFR) issued by the agency on March 20, 2020 entitled: “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes.”

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past twenty-two years. As outlined in detail below, our clients flee horrific abuses such as human trafficking, domestic violence, sexual assault, forced marriage, and honor crimes in search of safe haven in the U.S. **As an organization that promotes safety and justice for asylum seekers, we firmly oppose the IFR and urge HHS to promptly rescind it for reasons including the following.**

II. The IFR is Unlawful and Causes Irreparable Harm to Survivors of Persecution Including Gender-Based Violence (GBV)

1. The IFR is Unlawful under Domestic Laws

Per the IFR, the U.S. may exclude or expel individuals from certain countries or regions if deemed necessary to protect public health. When the CDC published the IFR, it simultaneously issued a related [Order](#) (Order) allowing suspension of admission of those seeking entry at our Northern and Southern land borders. The IFR and accompanying Order exceed the authority of the CDC under 42 U.S.C. § 265, because COVID-19 had already been introduced into the United States by the time

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they were put forth. The IFR and accompanying Order also violate 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 IFR's purported justification is impermissibly arbitrary and capricious under the APA.

a. The IFR Is Not a Valid Exercise of Authority Under 8 U.S.C. § 1158

The CDC's sweeping authority to expel asylum seekers under the IFR and the accompanying Order contravenes bipartisan Congressional intent. Under [U.S. immigration and asylum laws](#), as a general rule subject to very specifically, narrowly drawn exceptions not applicable here, those fleeing persecution have the right to seek asylum:

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 INA does permit 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 summarily denies asylum seekers access to the asylum process by authorizing their broad exclusion from the country with no opportunity for their claims to be heard. In this way, the IFR constitutes a "limitation" on eligibility that is patently *inconsistent* with the general rule at §1158(a)(1) permitting asylum applications. [Guidance provided to the U.S. Border Patrol](#) (Guidance) further reveals the administration's untenable position that the IFR overrides the binding asylum provisions of the INA. The Guidance does not cite legal authority to support this position.

Furthermore, 8 U.S.C. § 1158(d)(5)(B) 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). The context of § 1158(d)(5)(B) makes clear that the executive branch can 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 imposes a sweeping and categorical exclusion of individuals including asylum seekers rather than mere "procedures," therefore cannot be grounded in the authority provided by § 1158(d)(5)(B).

b. Application of the IFR to Unaccompanied Children is Inconsistent with the Trafficking Victims Protection Reauthorization Act (TVPRA)

In recognition of their particular vulnerability, a firmly bipartisan Congress has made it clear that unaccompanied children are entitled to seek asylum in the United States. According to the [TVPRA](#), if children are deemed unaccompanied by U.S. Customs & Border Protection (CBP), they must, among other protections, be transferred within 72 hours to the Office of Refugee

Resettlement (ORR) and screened to determine whether they have humanitarian claims for relief. The IFR impermissibly attempts to override Congress by including unaccompanied children within its sweeping reach and ignoring relevant [procedural safeguards](#) mandated by Congress. The IFR includes no [legitimate explanation](#) as to why legal protections afforded to unaccompanied children under the TVPRA may be disregarded and overridden by other legal authority. Current [reports](#) indicate that the U.S. is already violating the law in implementing the IFR by removing children rather than screening them for possible relief from human trafficking or other human rights abuses. The result is that already traumatized children are being put in greater danger and are now easy targets once again for human traffickers. This cruel, unnecessary, and avoidable outcome violates the will of Congress.

c. Application of the IFR to Asylum Seekers Is Arbitrary and Capricious in Violation of the APA

The aim of the IFR is purportedly to protect the public from those who pose a risk of COVID-19 transmission. The IFR excepts U.S. citizens and lawful permanent residents, however, providing this [explanation](#):

[T]he CDC believes that, at present, quarantine, isolation, and conditional release, in combination with other authorities, while not perfect solutions, can mitigate any transmission or spread of COVID-19 caused by the introduction of U.S. citizens or lawful permanent residents into the United States...Determining the appropriate protections...requires a complex balancing of numerous interests....

While a carceral setting is, by definition, hospitable to the spread of disease, U.S. citizens and lawful permanent residents are not required by law to be detained as a matter of course upon arrival or after entry. There is no public health concern with admitting these individuals based on the fact that they are to be detained. Yet, asylum seekers are likewise not legally required to be detained. They are similarly situated to U.S. citizens and lawful permanent residents in this regard. Rather, asylum seekers are [eligible for swift parole](#) into the U.S. pending review of their claims. [Many](#) have friends and family already in the U.S. that they could reside, quarantine, and isolate with.

Nonetheless, the IFR fails to except asylum seekers from its reach without any explanation. Their inclusion in the IFR is based on the false premise that their incarceration is inevitable rather than a policy choice. Instead of impermissibly and arbitrarily turning asylum seekers away under the IFR, Border Patrol can and should implement measures to simultaneously protect public health and comply with our asylum laws. Summarily excluding asylum seekers who don't, as a group, pose a uniquely heightened threat of COVID-19 transmission to the public is arbitrary and capricious.

d. The IFR violates the U.S.' International Humanitarian Obligations

The IFR violates international humanitarian commitments that the U.S. has pledged to uphold for decades. The IFR indicates that the Department of State will coordinate with the CDC regarding such commitments, but, unlike [previous COVID-19 travel restrictions](#), there is no express mention of exceptions to exclusion for asylum seekers. As a signatory to the [1951 United Nations](#)

[Refugee Convention and 1964 Protocol Relating to the Status of Refugees](#) (Refugee Convention), the U.S. cannot simply expel asylum seekers without providing meaningful access to protection from return to persecution or ‘*refoulement*.’ [Guidance from the United Nations](#) indicates that State parties such as the U.S. must not suspend refugee and asylum protections in order to address Covid-19. The U.S. is also a party to the [United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT). Article 3 of the CAT prohibits *refoulement* of an individual at risk of suffering torture at home. As with the Refugee Convention, [the United Nations has also prohibited](#) State parties from disregarding its CAT obligations due to Covid-19. The Border Patrol Guidance referred to above does permit a protection screening for those who make an “affirmative, spontaneous, and reasonably believable claim” of fear of torture. In reality, a traumatized individual will rarely be able to express her fear of torture proactively to satisfy this standard. This is particularly the case when the individual has been conditioned to fear armed, uniformed government officials as in the case of many torture survivors including survivors of GBV.

2. Implementation of the IFR Causes Irreparable Harm to Survivors of GBV

Instead of safeguarding public health, the Order and the Rule are further endangering traumatized women and girls fleeing GBV. U.S. asylum laws and international human rights commitments are intended to allow us to step in to protect those whose own governments either inflict harm directly, or fail to keep other persecutors from doing so. Meaningful access to asylum and CAT relief is therefore critical to ensuring the safety of survivors. Survivors are in [grave danger at home](#), often at the hands of extended family and community members who threaten severe social ostracization and retaliation for reporting intimate partner violence, for which there is no recourse from law enforcement. The following examples involving Tahirih clients are illustrative:

- “B,” from Niger, witnessed and experienced severe violence from a very young age. Her father beat her mother, one of four wives, so badly at times that she could not speak or eat for weeks. After refusing to undergo Female Genital Mutilation/Cutting (FGM/C) at age fifteen, “B” was denied food and then subjected to FGM/C nonetheless. At seventeen, she was forced to marry a man three times her age, who brutally raped and beat her over the next several years. “B” needed stitches but was turned away when she tried to go to the police because her husband had paid them to ignore her. She finally fled, but after desperately accepting help from strangers along the way, she was subjected to forced labor and rape again. She had to be hospitalized due to her trauma but eventually found safety as an asylee in the U.S.
- “C,” whose country had experienced political unrest, became a refugee and relocated to another country as a child. A family friend, “D,” who tried to recruit her parents to join his political movement, raped and cut her across her stomach with a knife. Upon learning of the assault, “C”’s community shunned her. Overcome with isolation, desperation, and shame, she tried slitting her wrists. Eventually, she and her family moved back to her home country, but “D” had become a ranking member within the dominant political party there. “C” feared that “D” would attack her younger sister, and when trying to protect her, “D” brutally raped and slashed “C”’s stomach again. “C” knew that reporting the crimes was futile in her country. She went on to become politically active in a party that was opposed to “D”’s, and

which was targeted for threats, torture, and murder by them. “D” began harassing “C” again and she finally escaped and won asylum.

- “R,” from Iran, grew up in a very conservative community and household, in which her father treated her and her mother like servants. He would beat and threaten to kill them, throwing a knife at “R”’s head when she was ten years old for not saying “hello” to her uncle. “R” sustained a severe injury but was not allowed to seek medical attention. “R”’s paternal relatives beheaded their wives and daughters for disobeying the men in the family, and for fleeing forced marriages. “R”’s father arranged for her to marry her cousin when she turned fifteen, and she and her mother escaped to spend the next seven years in hiding. “R” is now a translator for the U.S. military. Under the IFR, she would likely be needlessly turned away and forced to return to a life of severe trauma.
- “T” lived in a community surrounded by violence and corruption, with organized crime controlling shop owners, schools, and the police. “T” helped support her family while she attended school to fulfill her dreams of becoming a nurse. During lunch with a “friend” one afternoon, several men entered the restaurant, sat down with the two girls, and became aggressive. “T” quickly removed and destroyed her phone’s SIM card, preventing the men from finding her family’s contact information. Moments later, she was forced into a car at gunpoint, and the ringleader threatened to kill her. When the men suddenly released her “friend,” “T” realized they were traffickers and she had been set up. They drove for seven hours to an isolated house where she was confined to a small room and guarded by an armed man. He was instructed to kill her if she tried to escape. “T” was raped by her kidnapper every night. He threatened to locate and punish her family if she protested. One day, “T”’s guard seized her birth certificate because the men planned to sell her. On the way back to the city, “T” begged the guard to let her go. In a moment of compassion, he dropped her off at a bus station with a dire warning: “they will kill you if they find you.” “T” immediately took the bus home and arranged to meet her family in a safe place. “T”’s family had very little money, knew the journey would be perilous, and dreaded separation from “T,” but fearing the worst, her mother arranged for her to flee to the U.S. She is now safe after securing legal relief here and she looks forward to becoming a nurse and dedicating her life to helping others.

In addition to these examples of survivors who would likely be returned home under the IFR, women and girls also confront [extreme danger when returned to Mexican border towns](#) they traveled through after fleeing to the U.S. in search of safe haven. There, they face alarming rates of femicide, extortion, kidnapping, and sexual assault. A small sample of Tahirih clients 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; and

- 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.

Yet, the U.S. is returning survivors to Mexico to face extreme violence with no hope of safety in sight. Due process for asylum seekers is not optional, and survivors should not be summarily excluded or expelled in violation of U.S. domestic asylum, anti-trafficking, and administrative laws, as well as international treaty obligations as explained above.

III. Conclusion

Permitting exclusion from the U.S. of asylum seekers including survivors of GBV needlessly and cruelly punishes those who have already escaped life-threatening persecution at home. The IFR purports to be necessary to protect public health. In reality, there are alternative measures the U.S. can undertake that are both in line with public health norms and that ensure access to humanitarian relief for traumatized and vulnerable populations. **We therefore urge HHS to immediately abandon the IFR and accompanying Order in compliance with the law.** 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,



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