



6 Everett St., Suite 3103
Cambridge, MA 02138
hirc@law.harvard.edu
(617) 384-8165

April 23, 2020

Via Federal e-Rulemaking Portal

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

RE: HHS Docket No. CDC-2020-0033, 85 FR 16559

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program (“HIRC”) writes to express our strong opposition to the above-referenced interim final rule (“Rule”) published in the Federal Register on March 24, 2020.

HIRC is deeply concerned about the impact of the Rule, which purports to authorize 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)” through issuance of an order. On the same day the Rule was issued, CDC issued an order (“Order”)¹ invoking its authority under the Rule to suspend the introduction of persons without documentation who seek to enter the United States via Mexico or Canada, which was subsequently extended through May 20, 2020.² The Order illustrates how the Rule is being used to eviscerate asylum protections and safeguards for the very immigrants who HIRC seeks to assist in vindicating their rights, and securing their and their families’ wellbeing.

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants’ rights while teaching students important lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a

¹ See Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (Mar. 24, 2020).

² See Extension of Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424 (Apr. 20, 2020).

range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. They also regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with hundreds of immigrants and refugees since its founding in 1984. HIRC's advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRC has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HIRC regards the Rule as especially problematic because, if implemented, it would severely undermine the protections the United States is required to provide under domestic and international law to individuals who fear return to persecution or torture. Stated plainly, the Rule—which tellingly makes no mention of U.S. obligations under either the Refugee Convention and its 1967 Protocol or the Convention against Torture (“CAT”)—would jeopardize the lives and safety of countless refugees and immigrants eligible for protection. We urge HHS and CDC to immediately withdraw their current proposal.

1. The Rule Violates the United States' International & Statutory Obligations to Refugees & Asylum Seekers

By acceding to the 1967 Protocol Relating to the Status of Refugees,³ the United States bound itself to the protection imperatives guaranteed by the 1951 Refugee Convention.⁴ In *INS v. Cardoza-Fonseca*, the Supreme Court recognized that Congress enacted the Refugee Act of 1980 in order “to bring United State refugee law into conformance with the 1967 Protocol” and therefore the Refugee Convention.⁵ U.S. refugee law thus directly incorporates international treaty obligations.⁶ Legislative history demonstrates that Congress aimed to “give statutory meaning to our national commitment to human rights and humanitarian concerns” precisely by “enacting the Refugee Act of 1980,” which purposefully embraced the Convention and Protocol's definition of “refugee.”⁷ In passing the Refugee Act, Congress sought to excise the ideological maneuvering that had characterized U.S. refugee determinations up to that point.⁸

³ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

⁴ 1951 Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987)

⁶ Deborah E. Anker, *LAW OF ASYLUM IN THE UNITED STATES* 22–23 (2019 ed.)

⁷ *Matter of S-P-*, 21 I.&N. Dec. 486, 492 (BIA 1996) (quoting S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144); see also H.R. Rep. No. 96-781, at 1 (1980) (Conf. Rep.) (noting that the Refugee Act aimed to “establish a more uniform basis for the provision of assistance to refugees”); S. Rep. No. 96-590, at 1 (1980) (Conf. Rep.) (same).

⁸ See Deborah Anker, *The Refugee Act of 1980: An Historical Perspective*, 5 *IN DEFENSE OF THE ALIEN* 77–78 (1982); see also *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (stipulating that “foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.”); Jimmy Carter, “Refugee Act of 1980 Statement on Signing S. 643 into Law” (Mar. 18, 1980) (stating that the “new admissions policy . . . will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin”).

Under Article 33 of the Refugee Convention, when a person meets the Convention’s definition of a refugee, a state party is forbidden from returning the person “in any manner whatsoever to the” country where she fears persecution.⁹ The United States codified this obligation through the Refugee Act’s requirement that “the Attorney General may not remove an alien to a country . . . [where] the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰ As the Supreme Court has recognized for decades, Congress expected and intended this *non-refoulement* protection to be mandatory rather than discretionary.¹¹ Concordantly, the Refugee Act also created a statutory right to apply for asylum for “any alien who is physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival . . . irrespective of such alien’s status.”¹² Thus, when Congress enacted expedited removal procedures in 1996 it ensured that the United States would continue to meet its treaty obligations by requiring a “credible fear” interview for anyone at the border who expresses a fear of return or desire to apply for asylum.¹³

Yet highly disturbingly, the Department of Homeland Security (“DHS”) in purported reliance on the aforementioned CDC Order has reportedly begun to expel immigrants without regard for the above-described statutory procedures and treaty obligations.¹⁴ Indeed, a Border Patrol memo obtained by a journalist earlier this month indicates that, in direct violation of expedited removal requirements under U.S. law, border officials are not even inquiring why people without proper documentation are seeking to enter the United States, nor asking if these individuals fear harm.¹⁵

As such, the Rule proposes to create a mechanism by which HHS together with DHS can eschew the above-described legal obligations to provide humanitarian protection by facilitating categorical expulsions of immigrants without even minimal screening as to whether they fear return to their countries of origin. This is impermissible under both U.S. and international law, which each provide for extremely narrow, rather than categorical, exclusions to the *non-refoulement* obligation.¹⁶ Indeed, the United Nations High Commissioner for Refugees (“UNHCR”) recently specified that categorical exclusions like the Rule contemplates (and that DHS is apparently already implementing), “would not meet international standards,” and would violate Article 33’s *non-refoulement* requirement.¹⁷ In order to address COVID-19 related concerns, UNHCR proposes instead that state parties adopt measures “proportionate and

⁹ See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

¹⁰ See 8 U.S.C. § 1231(b)(3).

¹¹ See *INS v. Stevic*, 467 U.S. 407, 421 n.15 (1984) (explaining that Congress in passing the Refugee Act “substituted mandatory language for what was previously a grant of discretionary authority to the Attorney General to withhold deportation.”).

¹² See 8 U.S.C. § 1158(a).

¹³ See 8 U.S.C. § 1225 (b)(1)(a)(ii).

¹⁴ See, e.g., Arelis Hernandez & Nick Miroff, “Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border,” *The Washington Post* (Apr. 3, 2020).

¹⁵ See Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law,” *ProPublica* (Apr. 2, 2020).

¹⁶ See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 at Art. 1(F), Art. 33(2); 8 U.S.C. 1101(a)(42); 8 U.S.C. § 1231(b)(3)(B).

¹⁷ See UN High Commissioner for Refugees (UNHCR), “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), *available at*: <https://www.refworld.org/docid/5e7132834.html>

reasonable to the aim of protecting public health,” in the wake of the current pandemic, including but not limited to “screening of travellers on arrival and the use of quarantine for persons who have been identified as suffering from the disease or who may have been exposed to the virus.”¹⁸ The Supreme Court has recognized that UNHCR’s treaty interpretations, such as the foregoing, “provide [] significant guidance in construing the Protocol, to which Congress sought to conform,”¹⁹ and courts regularly rely on UNHCR materials to elucidate the Refugee Act’s provisions.²⁰

The prospect of categorical expulsions of refugees raised by the Rule is of extreme concern and importance to HIRC, whose clients include victims of genocide, anti-corruption political advocates, and women and children who have suffered extreme physical and sexual violence. There is no valid legal basis for the U.S. to abandon its obligations to such refugees.²¹

2. The Rule Violates of the United States’ Independent *Non-Refoulement* Obligation Under the Convention Against Torture

The Rule additionally violates CAT, to which the United States is a party.²² 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 federal regulations implementing this treaty obligation provide that where an immigrant can show she is more likely than not to be tortured in a country, she cannot be returned to it.²³ Critically, this obligation is independent and in addition to the *non-refoulement* imperative imposed by the Refugee Convention and Protocol, as incorporated by the INA.

And as is true of refugee *non-refoulement* protection, this guaranty cannot be forgone because of the current pandemic. The UN Subcommittee on Prevention of Torture recently explained “the prohibition of torture, cruel inhuman or degrading treatment or punishment cannot be derogated from, even during exceptional circumstances and emergencies which threaten the life of the nation”²⁴ HIRC is deeply concerned the Rule proposes to do just that.

¹⁸ See *id.*

¹⁹ See *Cardoza-Fonseca*, 480 U.S. at 421, 439 n. 22.

²⁰ See, e.g., *Grace v. Whitaker*, 344 F. Supp. 3d. 96, 124 (D.D.C. 2018).

²¹ The *non-refoulement* obligation applies whether or not an individual has already sought protection or has already been recognized as a refugee or asylee because the duty against *refoulement* is absolute. As the UNHCR explained in its Handbook on Procedures:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the [refugee] definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 28, U.N. Doc. HCR/IP/4/Eng/REV.1 (reissued 2019), available at <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

²² See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see also 8 C.F.R. § 208.16(c) (regulations implementing CAT obligations).

²³ See 8 C.F.R. § § 1208.06–18.

²⁴ See United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive

Thus far, the “expulsions” DHS has undertaken under the Rule and Order contemplate return of individuals to the countries they have fled as well as to dangerous Mexican border cities without appropriate screenings in violations of the principle of non-*refoulement* under CAT.

According to the leaked memo, border officials have been instructed to expel everyone immediately except those who spontaneously express a fear of torture. If an asylum seeker does spontaneously express a fear of torture, the frontline border patrol officer must determine if the fear is “reasonably believable,” a legal standard that does not exist in U.S. immigration law and on which border patrol officers have not been trained. If the officer determines that the asylum seeker’s fear is reasonably believable, they must then get the approval of a superior officer, the chief patrol agent for the sector. Only after these steps is the asylum seeker allowed to express their fear of torture to an asylum officer. All others are summarily turned back.

These ad hoc procedures bear no resemblance to the credible fear process Congress created and that special DHS asylum officers have historically been trained to implement.²⁵ While this purported mechanism for safeguarding immigrants who qualify for CAT protection is insufficient and indeed *ultra vires*, the Rule itself entirely lacks any safeguard mechanism that would ensure the U.S. would continue to observe its mandatory non-*refoulement* obligations under Article 3 of CAT, and likewise under the Refugee Convention and Protocol.

In sum, we urge the HHS and CDC to rescind the current proposals and instead promote greater compliance with the U.S. international and domestic legal obligations as part of a humane response to the urgent humanitarian crises that are driving so many refugees to seek freedom and safety in the United States.

We appreciate the opportunity to provide comments on this proposed rule. If you have questions, please contact us by phone at 617-384-8165 or by email at hirc@law.harvard.edu.

Sincerely,

Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street, Suite 3103 (WCC)
Cambridge, MA, 02138

Mechanisms relating to the Coronavirus Pandemic” (Mar. 25, 2020) *available at* <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

²⁵ See 8 U.S.C. § 1225(b)(2); 8 C.F.R. § 208.3.