



Kyle McGowan
Office of the Chief of Staff
Centers for Disease Control and Prevention
1600 Clifton Road NE, MS H21-10
Atlanta, GA 30329

HHS Docket No. CDC-2020-0033
85 FR 16559

April 23, 2020

WOLA Comment on “Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes”

The Washington Office on Latin America (WOLA) respectfully submits this comment to the Department of Health and Human Services’ interim final rule, titled “Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” DHS Docket No. CDC-2020-0033, in the Federal Register at 85 FR 16559, issued March 20, 2020.

WOLA is a leading research and advocacy organization advancing human rights in the Americas. Through our partnerships with human rights defenders around the hemisphere, we are deeply familiar with the security threats that are causing so many of the region’s citizens to migrate to the United States and elsewhere. We have closely followed, and reported on, border and migration issues since 2011.

As noted below, a significant percentage of those coming to the United States’ southwest border seeking asylum have strong and urgent protection needs. As a result, we are concerned about the impact of this interim final rule (Rule) on this vulnerable population.

This rule, and CDC’s order (Order) suspending the introduction of persons without documentation, **effectively terminates the legal right to seek asylum at the U.S.-Mexico border**. The resulting expulsions of asylum seekers are likely to place many in danger: this is **refoulement**, a violation of human rights and of U.S. law and treaty obligations. The expulsions also threaten to worsen the propagation of COVID-19 in **Mexican border cities**. Furthermore, the Rule and Order are being implemented in a **legally dubious** way: they assume that their legal basis supersedes other laws, and they appear to be based on an erroneous assumption that undocumented border crossers pose a substantially higher risk of infection than people with proper travel documents.

1. Refoulement

In 2019, U.S. immigration courts granted some form of protection to asylum seekers in 31 percent of the 67,571 decisions that they handed down.^[4] The most conservative current estimate we have seen comes from ICE Acting Director Matthew Albence, who said in March 2020 that the current asylum grant rate is 10 percent.^[2]

Even that questionably low figure yields a one-in-ten probability that an asylum-seeking individual currently undergoing a 90-minute “expulsion” under the Rule and Order faces a very high risk of torture or death upon return. Customs and Border Protection (CBP) Acting Director Mark Morgan reported that 11,000 migrants were expelled between March 21 and April 10.^[3] If we assume a quarter of that population were asylum seekers (2,750—probably a smaller proportion than in recent years), then using Albence’s 10 percent estimate, the U.S. government, under this Rule and Order, denied protection to **at least 275 people who face real and imminent threats** to their lives following their expulsions.*

WOLA strongly believes that the population qualifying for protection in the United States is well over Albence’s 10 percent estimate. Thus the number placed in danger by this Rule and Order between March 21 and April 10 was likely much greater than 275.

This is the very definition of *refoulement*, the knowing repatriation of a non-citizen to danger of torture or death. It is a violation of the asylum provisions of the Refugee Act of 1980 (8 U.S.C. § 1158(a)(1)), the 1951 Refugee Convention, and the 1984 Convention Against Torture, 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)).

2. Public health impact in Mexican border cities, increasing risks to the United States. Migrant advocates interviewed by WOLA contend that the vast majority of U.S.-bound asylum seekers have family members, sponsors, or support networks with whom they could socially distance inside the United States, while awaiting hearings and covered by alternatives-to-detention programs. Instead, they are being expelled and deported through ports of entry into Mexico, where they join tens of thousands of asylum seekers who were already in these cities, forced to await their day in U.S. court under the Department of Homeland Security’s Migrant Protection Protocols or “Remain in Mexico” program, or still waiting to be processed at a port of entry under the “metering” policy.

This population of Central Americans, Cubans, Haitians, Brazilians, Mexicans fleeing violence and persecution, and other nationalities is not able to practice social distancing. They are jammed

* We use “a quarter” because in 2019, U.S. authorities encountered 977,509 undocumented people and received 211,794 asylum applications. A large portion of these applications were for family groups of more than one person. Some, though, were not the result of border apprehensions. We view “a quarter” to be a rough and very conservative estimate of the number of border encounters (apprehensions plus those deemed “inadmissible” at ports of entry) that resulted in asylum applications in 2019.

together in substandard housing, in charity-run shelters—some of which are closing or limiting access during the pandemic—and even in tent encampments like the 2,000 people gathered in Matamoros, across from Brownsville, Texas.^[4]

Living in such conditions places them at great risk of contracting and spreading the virus. Having such a large population living at close quarters also threatens to spread the virus throughout Mexican border cities, many of which already suffer from weak public health capacities. Reuters reports that Matamoros, a border city of half a million people, has “five public hospitals [that] have just 25 ventilators and 11 intensive care beds between them, according to the State Commission for Protection against Sanitary Risks.”^[5]

3. Legality. The statute underlying the Rule and Order (the Public Health Service Act of 1944, 8 U.S.C. § 265) contains no language determining that it may be implemented notwithstanding any other provision of law. The Rule and Order is overreaching when it assumes that 8 U.S.C. § 265—a public health provision, not an immigration provision—supersedes the Refugee Act and other U.S. laws and treaty obligations.

4. False link between undocumented status and disease propagation risk. 8 U.S.C. § 265 provides the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as the President shall designate in order to avert serious danger of the introduction of a communicable disease in a foreign country.

However, under the Rule and Order, residents of that foreign country who have proper travel documents, and whose travel is deemed essential under several categories including commerce, may freely enter the United States right now, even if their COVID-19 infection status is unknown. WOLA finds it curious that the Rule and Order are being applied to migrants without proper documentation, but not to others, as though one’s migratory status had any relation to one’s COVID-19 infection status. We note an April 2020 study by the University of California at San Diego, drawing on data from past influenza epidemics, finding no statistical correlation between documentation status and infection.^[6]

WOLA doesn’t recommend full closure of the border, a complete quarantine. However, if the border is to be kept selectively open, common sense dictates that the criteria used for admittance have some relation to public health. Instead, the Rule and Order are applying criteria related to immigration policy.

CBP has expressed concern about detaining asylum-seeking migrants in its facilities, which could propagate COVID-19 infection. We repeat the point above: that a strong majority of asylum-seeking migrants have family members and support networks with whom they could shelter in place in the United States. We note, meanwhile, that alternatives to detention programs—when implemented as “full service” programs, not electronic monitoring—have a strong track record of keeping asylum seekers in the system, with very few cases of flight, and at a fraction of the cost of detention.^[7]

In conclusion, WOLA understands the need to limit cross-border traffic in order to slow the spread of COVID-19. We find, however, that CDC's March 20 Rule and Order violate U.S. law and international commitments in their blanket application to asylum seekers. We find that the Rule and Order risk propagating the disease in cities bordering the United States. We find that the Rule and Order are based on a dubious interpretation of the Public Health Service Act's relationship to other acts of law. And we find that the Rule and Order appear to posit a curious link between one's documented status and one's likelihood of COVID-19 infection.

Sincerely,

Geoff Thale
President
Washington Office on Latin America

Notes

- [1] TRAC Reports. "Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more." Accessed on April 23, 2020.
<https://trac.syr.edu/phptools/immigration/asylum/>.
- [2] Morgan Phillips. "ICE chief: It will take 140 years to clear 'backlog' of illegal immigrants after US-Mexico border surge," *Fox News Channel*, March 11, 2020. Accessed on April 23, 2020.
<https://www.foxnews.com/us/ice-chief-140-years-illegal-immigrants-us-mexico-border-surge/>.
- [3] Mark Morgan (@CBPMarkMorgan). "Border containment measures are working. Since the @CDCgov's order on March 20, more than 11,000 illegal border crossers have been expelled from the US. This public health order has helped to reduce the spread of #COVID19 in our facilities and among @CBP agents and officers," Twitter, April 10, 2020, 9:12 p.m.
<https://twitter.com/CBPMarkMorgan/status/1248780817020653570>.
- [4] Erin Siegal McIntyre. "As Tijuana Locks Down, Migrants At U.S.-Mexico Border Stuck In Dangerous Limbo," *HuffPost*, April 3, 2020. Accessed on April 23, 2020.
https://www.huffpost.com/entry/asylum-seekers-mexico-border-coronavirus_n_5e86250fc5b63e06281abf22?guccounter=1.
- Ivan Flores. "A Desperate Scramble to Prevent the Pandemic at a U.S.-Mexico Border Camp," *Foreign Policy*, March 30, 2020. Accessed on April 23, 2020. <https://foreignpolicy.com/2020/03/30/a-desperate-scramble-to-prevent-the-pandemic-at-a-u-s-mexico-border-camp/>.
- [5] Julia Love, Mica Rosenberg. "Sprawling Mexican border camp ill-prepared for coronavirus," *Reuters*, March 22, 2020.
<https://www.reuters.com/article/us-health-coronavirus-mexico-matamoros/sprawling-mexican-border-camp-ill-prepared-for-coronavirus-idUSKBN2190ZD>
- [6] Tom K. Wong, PhD. "COVID-19 and the Remaking of U.S. Immigration Policy? Empirically Evaluating the Myth of Immigration and Disease" *U.S. Immigration Policy Center*, April 22, 2020. Accessed on April 23, 2020. https://usipc.ucsd.edu/_files/usipc-myth-immigration-disease-final.pdf.
- [7] Congressional Research Service report. "Immigration: Alternatives to Detention (ATD) Programs," *Congressional Research Service*, July 8, 2019. Accessed on April 23, 2020.
<https://fas.org/sgp/crs/homsec/R45804.pdf>.