

March 23, 2020

Chad F. Wolf, Acting Secretary of Homeland Security (by electronic mail)

Re: U.S. Government's Stated Intention to Expel Asylum Seekers is Illegal

Dear Acting Secretary Wolf:

Our organizations write to make absolutely clear that: (i) expulsions of migrants without adequate fear screenings and subsequent due process would be illegal under U.S. and international law; and (ii) government officials following instructions to implement such expulsions would be acting in furtherance of illegal orders. We call on the U.S. government to clarify immediately how actual and potential asylum seekers' rights are protected under these new protocols, including full transparency on guidance sent to CBP officers and agents and CBP's operational plan.

At a press conference yesterday you announced that starting at midnight on Saturday March 21, 2020, DHS will be immediately returning all non-citizens who enter or attempt to enter the United States without travel authorization.¹ While there is uncertainty about particulars -- and initially Mexico's Foreign Minister Ebrard stated that it will not accept non-Mexicans outside the "Remain in Mexico" policy² -- you indicated rapid removals will take place.³ Acting CBP Commissioner Morgan stated on FOX News that the announcement is a "game changer," agreeing that "all asylum applications [are] suspended" between ports of entry⁴ (which contradicts his own agency's statement that migrants "are being assessed on a case by case basis"⁵).

CBP says that at ports of entry "CBP will suspend processing of inadmissible individuals," a category including asylum seekers,⁶ and that "[i]n between POEs, Border Patrol agents will be given tools necessary to identify [non-citizens] at the border and to adjudicate some cases in the field at initial encounter. This will enable our agents to rapidly make a decision whether to take someone into custody, or to send them *without any further Title 8 processing* to the nearest Port of Entry to expel them to Mexico or Canada."⁷ (Emphasis added.) For persons not amenable to expulsion north or south, according to the Centers for Disease Control order on which DHS's action is based "DHS will, where necessary use repatriation flights to move covered [non-citizens] on a space-available basis, as authorized by law [*sic*]."⁸ The CDC order does not address why the Department of Justice continues dangerous and unnecessary prosecutions of some migrants for entry/reentry offenses.

No explicit provision is made for inquiring into fear of return to Mexico, Canada, or an individual's country of origin. Border Patrol agents are generally not trained to conduct fear screenings: life-or-death determinations that are impossible to conduct fairly "in the field at initial encounter."⁹ This appears to mean that no credible-fear interviews will be conducted and

that persons fleeing persecution, who are otherwise eligible for consideration of their asylum claims, will be summarily removed from the United States without any process whatsoever.¹⁰

The United Nations High Commissioner for Refugees emphasized in a legal analysis released on March 16 that “while States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, *such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement. . . . Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.*” (Emphasis added).¹¹ Expert organizations including Doctors Without Borders and Physicians for Human Rights have this week urged the administration not to use public health as an unsupported cover for immigration-policy changes: “Turning back men, women and children seeking refuge is not in accordance with public health guidance and will only endanger more lives and will make all of us less safe.”¹²

As a party to the U.N. Protocol Relating to the Status of Refugees, the United States has an obligation under that treaty and its implementing U.S. statute, the 1980 Refugee Act, not to “remove an alien to a country if [DHS] decides that 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.” 8 U.S.C. § 1231(b)(3)(A); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). In addition, prior to U.S. ratification of the U.N. Convention Against Torture, also implemented via domestic law,¹³ *see INS v. Stevic*, 467 U.S. 407, 429-30 (1984), the Department of State emphasized that the Convention’s explicit prohibition of *all* torture, *regardless of the circumstances*, was understood by CAT’s drafters as “necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.”¹⁴ Both these legal obligations of the United States are at serious risk of repeated violations under DHS’s hasty and counterproductive commands.

In a brief expressing their opposition to the “Remain in Mexico” policy (MPP), current USCIS employees previously urged that “[a]sylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation’s legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.”¹⁵ Once again, DHS is now placing federal officials in untenable moral and legal jeopardy by ordering asylum seekers to be returned without adequate fear screening or due process. We are united in condemning DHS’s illegal course of action and urge its reversal.

Please contact Sirine Shebaya, Executive Director, National Immigration Project of the National Lawyers Guild at sirine@nipnlg.org to discuss this urgent matter.

Sincerely,

The Advocates for Human Rights

African Services Committee

Al Otro Lado

Aldea - The People's Justice Center

Alliance San Diego

America's Voice

American Civil Liberties Union

American Friends Service Committee

Amnesty International USA

Asian Americans Advancing Justice | AAJC

Asian Americans Advancing Justice-Atlanta

ASISTA

Asylum Seeker Advocacy Project

Asylum Seeker Assistance Project

Bellevue Program for Survivors of Torture

Black Alliance for Just Immigration (BAJI)

Catholic Legal Immigration Network, Inc.

Center for Constitutional Rights

Center for Gender & Refugee Studies

Center for Safety & Change

Center for Victims of Torture

Central American Resource Center – DC

Christian Community Development Association

Church World Service

Coalition for Humane Immigrant Rights (CHIRLA)
Columban Center for Advocacy and Outreach
Columbia Law School Immigrants' Rights Clinic
Community Resource Center
Daughters of Charity of St. Vincent de Paul, USA
Disciples Refugee & Immigration Ministries
Don't Separate Families
DRUM- Desis Rising Up and Moving
Evangelical Lutheran Church in America
Families Belong Together
First Friends of NJ & NY
The Florence Immigrant & Refugee Rights Project
Fordham Law School Feerick Center for Social Justice
Franciscan Action Network
Freedom Network USA
Haitian Bridge Alliance
HealthWorks Ending Detention
HIAS
Hofstra Asylum Clinic, Maurice A. Deane School of Law at Hofstra University
Hope Border Institute
Human Rights First
Human Rights Initiative of North Texas
Human Rights Watch
Immigrant & Non-Citizen Rights Clinic - CUNY Law School
Immigrant Defenders Law Center

Immigration Services and Legal Advocacy (ISLA)
International Refugee Assistance Project
International Rescue Committee
John Elledge & Assoc PC
Juntos
Justice for Migrant Families WNY
Justice Strategies
Keep Tucson Together Community Legal Clinic
Kids in Need of Defense
Kino Border Initiative
Latin America Working Group
Lawyers' Committee for Civil Rights for the San Francisco Bay Area
The Leadership Conference/Education Fund
Leadership Conference of Women Religious
Legal Aid Justice Center
MADRE, Inc.
Mennonite Central Committee U.S. Washington Office
Migrant Center for Human Rights
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Social Workers
National Council of Churches
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National Lawyers Guild, Indiana Chapter

Network in Solidarity with the People of Guatemala (NISGUA)
New Sanctuary Coalition
New York Law School Asylum Clinic
Northern Manhattan Coalition for Immigrant Rights (NMCIR)
Northwest Immigrant Rights Project
Oxfam America
Physicians for Human Rights
Project South
Public Counsel
Quixote Center
Reformed Church of Highland Park
RGV Rapid Response -RGVEVN
Rian Immigrant Center
Safe Passage Project
San Diego Immigrant Rights Consortium
Sanctuary for Families
Santa Fe Dreamers Project
Service Employees International Union (SEIU)
Sisters of Mercy of the Americas - Justice Team
Snohomish Immigration Advocacy
Sojourners
South Bay People Power
Southern Border Communities Coalition
Southern California Immigration Project
Southern Poverty Law Center

Still Waters Anti-trafficking Program

Survivors of Torture, International

T’ruah: The Rabbinic Call for Human Rights

U.S. Committee for Refugees and Immigrants (USCRI)

Union for Reform Judaism

Unitarian Universalist Service Committee

The United Methodist Church - General Board of Church and Society

United We Dream

University of the District of Columbia Law School Immigration & Human Rights Clinic

University of Maryland Carey Immigration Clinic

Washington Office on Latin America

Welcoming Immigrants Housing Project

Witness at the Border

Women’s Refugee Commission

Young Center for Immigrant Children’s Rights

¹ Subsequently, the Centers for Disease Control released an emergency interim final rule, based on a 1944 public-health statute, 42 U.S.C. §§ 265, 268 see <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>. That rule and statute cannot supersede the protection obligations described in this letter.

² See <https://twitter.com/diazbrisen/status/1241017890322747399?s=20>. On Saturday March 21, 2020, the Washington Post reported that Mexico would “accept deportees from . . . Guatemala, Honduras and El Salvador – as long as they are adults in good health,” directly from Border Patrol “field processing tents,” implying that not even the bare process under Remain in Mexico will be accorded. See <https://t.co/OMgwtjwmAV>. Remain in Mexico was recently declared unlawful by the U.S. Court of Appeals for the Ninth Circuit but allowed to continue by the Supreme Court pending resolution of the case’s legal merits.

Responding to the Saturday report, an unnamed Mexican official stated that “Central Americans will be accepted if they are in MPP or get a humanitarian visa. . . . If not — Mexico will make a decision case by case.” <https://twitter.com/Haleaziz/status/1241455273618722816?s=20>. For the Mexican government’s

official statement, see <https://www.gob.mx/sre/documentos/nota-informativa-relaciones-exteriores-no-11>.

³ From DHS's representations this week, it is uncertain whether these removals would even adhere to the paltry process of expedited removal under 8 U.S.C. § 1225.

⁴ The Ingraham Angle (Mar. 20, 2020), <https://youtu.be/Y139y21A7s0>

⁵ "Trump administration to impose new restrictions at border, leaving asylum seekers in limbo." ABC News (Mar. 20, 2020), <https://abcnews.go.com/Politics/trump-administration-impose-restrictions-border-leaving-asylum-seekers/story?id=69717143>

⁶ CBP is apparently also eliminating asylum applications at ports of entry, promising on March 20, 2020 to "suspend or reduce routine queue management procedures at the limit line," meaning that its current metering policy (see <https://www.splcenter.org/presscenter/trump-asylum-transit-ban-blocked>) of making asylum seekers wait for weeks or months will be even worsened. "Officials did not say whether any asylum-seeker will be referred to a USCIS screening." <https://twitter.com/camiloreports/status/1241166425747849216?s=20>

⁷ Statement available at <https://twitter.com/lorenzoazueta/status/1241062362779660290?s=20>.

⁸ Centers for Disease Control, "Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists." (Mar. 20, 2020), 16, https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf

⁹ The few CBP field personnel who have recently been trained are not capable of providing unbiased screening, see <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/asylum-officers-are-being-replaced-cbp-agents>

¹⁰ According to two unnamed "U.S. officials," "migrants from nations like Cuba, Haiti and China will be held in U.S. detention and placed on deportation flights." Nick Miroff, "Mexico to begin taking back Central American deportees as emergency border crackdown takes effect." Washington Post (Mar. 21, 2020), <https://t.co/OMgwtjwmAV>

¹¹ Refoulement is when a government returns migrants to a country where their lives or liberty may be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. 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), <https://www.refworld.org/docid/5e7132834.html>

¹² "Responding to the COVID-19 Crisis While Protecting Asylum Seekers." (Mar. 19, 2020), <https://docs.google.com/document/d/1beORFZsFhKgSd17qoOLkes9A0FeNCIyoGB5MiWosBKU/edit>

¹³ The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) announced the policy of the United States not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Michael John Garcia, Congressional Research Service, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens* (Jan. 21, 2009), 5, <https://fas.org/sgp/crs/intel/RL32276.pdf>.

¹⁴ President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. TREATY DOC. NO. 100-20, reprinted in 13857 U.S. Cong. Serial Set at 5 (1990) (quoted in Michael John Garcia, Congressional Research Service, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens* (Apr. 4, 2006), 2-3, <https://trac.syr.edu/immigration/library/P1339.pdf>).

¹⁵ Quoted in National Citizenship and Immigration Services Council 119, "Union Statement on the Current State of the US Refugee Program." (Letter to Rep. Zoe Lofgren, Mar. 4, 2020), 6, <https://docs.house.gov/meetings/JU/JU01/20200227/110569/HHRG-116-JU01-20200227-SD033.pdf>