



August 15, 2019

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Falls Church, VA 22041  
Via Federal eRulemaking Portal: <https://www.regulations.gov>

**RE: EOIR Docket No. 19-0504; Comments on proposed rulemaking re: Asylum Eligibility and Procedural Modifications**

Dear Ms. Reid:

Kids in Need of Defense (“KIND”) submits the following comments on the interim final rule published by the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”, and together with DHS, the “Departments”) on July 16, 2019 under RIN 1615-AC44 (DHS) and RIN 1125-AA91 (DOJ), Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, & 1208) (the “IFR”).

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for over 18,300 children from 72 countries and has trained and mentored over 42,000 pro bono private sector attorneys, paralegals, and law students at over 600 law firms, corporations, law schools, and bar associations. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND has field offices in ten cities—Atlanta, Baltimore, Boston, Houston, Los Angeles, Newark, New York, San Francisco/Fresno, Seattle, and Washington, DC.

KIND’s Regional Team offers direct programming with children and adolescents in Central America. Through civil society partner organizations, KIND provides reintegration support services for unaccompanied and separated children repatriating from the United States to Guatemala and Honduras, as well as programming on prevention of sexual and gender-based violence for children in certain high-migration communities in those countries. The Regional Team also engages in research and fact finding relating to the root causes of child migration from Central America and develops recommendations on how to resolve the problems driving children to leave their homes.

KIND is intimately familiar with the issues and difficulties facing unaccompanied children seeking asylum. The vast majority of children served by KIND and its pro bono partners in recent years are children from Central America who transited Mexico, and often other countries, in their flight to

protection at the U.S. southern border. Many of these children have fled their countries of origin because of violence, abandonment, and other unsafe situations. They face enormous challenges along their journey, which may include language barriers, crime, deprivation of basic rights, exploitation, and abusive and inadequate government and law-enforcement agencies, even before they confront the challenges of navigating the U.S. immigration system.

We are concerned that if the IFR were to go into effect, these children would be barred entirely from the asylum system that Congress has established. This would be unlawful and would deprive these children of the protections to which they are entitled. Not only is the IFR flatly incompatible with its governing statute (and therefore unlawful), but it also represents a disastrous policy decision that would leave these vulnerable children at great risk of being wrongfully returned to countries where they will not be safe and may face harm. In addition, by subjecting children to an immigration process in which the only forms of available protection are withholding of removal or under the INA or the Convention Against Torture (CAT), the IFR ignores the significant social and psychological impact that uncertain immigration status has on a child's development. As discussed below, the very nature of withholding of removal, carrying with it a constant threat of return to another country and offering no mechanism for accessing citizenship, can be detrimental to a child's well-being.

Because Congress has provided protections that the IFR would foreclose, the Departments must withdraw the IFR.

## I. Executive Summary

One of the IFR's stated goals is "to further the humanitarian purposes of asylum" by "prioritiz[ing] individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a 'severe form of trafficking in persons' . . . ."<sup>1</sup> The IFR does nothing of the sort, creating untenable bars to asylum for most individuals, including the vast majority of children served by KIND, and requiring applicants to expose themselves to increased risk and danger in order to establish a claim to asylum.

Under the IFR, unaccompanied children and many others would be unlawfully barred from the asylum system that Congress has established for the protection of refugees, in conjunction with the United States' international treaty obligations and commitment to humanitarian protection. Consequently, the IFR is contrary to law because it runs afoul of the statutory system created by Congress in the Immigration and Naturalization Act ("INA").<sup>2</sup> Second, the IFR cannot be squared with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"),<sup>3</sup> under which the special needs of unaccompanied children seeking asylum are recognized, including special exemptions from the safe third country and one year filing bars to asylum and specialized procedures for considering unaccompanied children's claims. Third, the purported ability of children to seek asylum in a third country – the animating assumption of the entire IFR – is illusory: the asylum

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<sup>1</sup> 84 Fed. Reg. 33,829, at 33,831.

<sup>2</sup> See 8 U.S.C. §§ 1158 *et seq.*

<sup>3</sup> Public Law 110-457, title II, subtitle D, 122 Stat. 5044.

systems of countries such as Mexico and Guatemala are inadequate to handle the asylum claims of unaccompanied children. Fourth, by subjecting unaccompanied children to the very same dangers in a third country that they were fleeing in their home country – trafficking, exploitation, sexual and gender-based violence, violence perpetrated by organized criminal actors or networks, weak justice and protection systems, lack of access to education and safe facilities, and lack of adequate facilities – the IFR would exacerbate the dangers they face, even as it purports to put them in better, safer circumstances. These points are amply illustrated by a small selection of case examples derived from KIND’s files, demonstrating how difficult, if not impossible, it would be to meet the criteria established under the IFR. Finally, we note that even for those children who are denied access to asylum but are found eligible for withholding of removal, the resulting long-term psychological and social effects are contrary to the best interests of both the child and our country.

KIND urges that the Departments withdraw the IFR in view of the considerations detailed below.

## **II. The IFR Conflicts With Asylum Rights Granted by the INA.**

The IFR directly conflicts with, and effectively eliminates, asylum rights granted under the INA, and as such, is contrary to law and should be withdrawn. First, the IFR defies the INA’s specification that any additional restrictions of conditions on asylum be “consistent with” its provisions – an important restriction on the Attorney General’s power to place roadblocks in the way of asylum seekers. Second, the IFR circumvents or rewrites statutory limitations on two additional bars to asylum that are of particular relevance to unaccompanied children – the “safe third country” provision and the “firm resettlement” provision. Third, the IFR essentially eliminates any practical ability to obtain asylum relief. As the Ninth Circuit has held, “[t]he technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same.”<sup>4</sup> The IFR provides access to asylum relief for unaccompanied children in name only, not in effect, and thus conflicts with the asylum rights granted under the INA.

### **A. THE INA REQUIRES THAT ANY “ADDITIONAL LIMITATIONS OR CONDITIONS” ON ASYLUM BE “CONSISTENT WITH” ITS PROVISIONS.**

For the IFR to be a legally valid exercise of the Congressionally-delegated rulemaking discretion of the Attorney General, and by extension, the Departments more broadly, the IFR must be consistent with the INA, as the INA is the statutory authority under which the IFR is being promulgated. This requirement for consistency is codified in the INA itself: the INA expressly provides that any “additional limitations or conditions” proposed by the Attorney General “under which an alien shall be ineligible for asylum” must be “consistent with [the INA.]”<sup>5</sup>

This limitation on the Attorney General’s ability to obstruct access to the asylum system is critical to understanding how the IFR undermines the system Congress set up to protect asylum seekers. The Attorney General is not given unlimited license to withdraw the protections of the asylum system. To

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<sup>4</sup> *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1247 (9th Cir. 2018).

<sup>5</sup> 8 U.S.C. § 1158(b)(2)(C).

the contrary, the Attorney General must respect the parameters put in place by Congress through the governing statutory framework, including the limits on the Attorney General’s discretion contained in these provisions.

As we show below, however, the IFR is flatly inconsistent with the INA, particularly with respect to the two most relevant bars to consideration for a grant of asylum, both of which were statutorily codified in the INA: the “safe third country” provision<sup>6</sup> and the “firm resettlement” provision.<sup>7</sup> These Congressionally-enacted bars set forth specific circumstances in which applicants can be denied asylum on the basis of the availability of asylum or safe settlement in a third country. In issuing the IFR, the Departments have effectively and impermissibly rewritten or sidestepped<sup>8</sup> these carefully-tailored bars in favor of a blanket, categorical bar to eligibility, with no role for individualized determinations and/or bilateral or multilateral agreements to help ensure that actual protection of the asylum-seeker will be achieved.

#### B. THE IFR CIRCUMVENTS LIMITS ON THE SAFE THIRD COUNTRY BAR FOR UNACCOMPANIED MINORS.

With respect to the safe third country bar, the IFR is an attempt to circumvent Congress’s limited exception in favor of a much broader categorical bar. The safe third country bar, as codified in the INA, requires the existence of a satisfactory bilateral or multilateral agreement that provides an asylum seeker with access to a “full and fair procedure” to seek asylum in a third country where his or her life or freedom will not “be threatened on account of a [protected characteristic].”<sup>9</sup> The IFR omits consideration of any of these statutory factors, effectively writing them out of the INA, and instead relies only on whether the third country is a party to certain international accords.<sup>10</sup> As such, the IFR applies a categorical bar to potential asylum seekers without consideration of whether the asylum procedure available in the third country is full and fair, or whether true safety from existential threats will be available in such third country. This is an evasion of the Congressionally-designated considerations under the safe third country bar.

Of particular importance to KIND, the IFR’s inconsistency with the safe third country bar is shown in its treatment of the availability of asylum for unaccompanied alien children. The INA expressly provides that the safe third country bar **shall not apply** to unaccompanied children.<sup>11</sup> Unaccompanied children would not have the same protection from the IFR’s new restrictions on eligibility for asylum.<sup>12</sup> Under the IFR’s bar, unaccompanied children can be denied asylum in

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<sup>6</sup> 8 U.S.C. § 1158(a)(2)(A).

<sup>7</sup> 8 U.S.C. § 1158(b)(2)(A)(vi).

<sup>8</sup> See, e.g., *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) (acknowledging the existence of the “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate”); *Air All. Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018) (noting that “it is well established that an agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority”).

<sup>9</sup> 8 U.S.C. § 1158(a)(2)(A).

<sup>10</sup> See 8 C.F.R. § 208.12(c)(4)(iii).

<sup>11</sup> 8 U.S.C. § 1158(a)(2)(E).

<sup>12</sup> 84 Fed. Reg. 33,839 n.7 (July 16, 2019).

circumstances where the Attorney General, pursuant to the INA, would otherwise be prohibited from denying eligibility. Congress determined that even third-country agreements containing certain standards could not apply to unaccompanied children, which is flatly inconsistent with the agencies' action here, which would bar those children's claims even in the absence of such agreements. By effectively foreclosing a critically important path to asylum for unaccompanied children that was directly provided for by Congress in the INA, the IFR is facially not "consistent with" the INA's asylum provisions.

### **C. THE IFR REWRITES THE FIRM RESETTLEMENT BAR.**

With respect to the firm resettlement bar, the IFR effectively rewrites the INA's provision in a manner that is clearly contrary to Congress's enacted language. Congress provided that the firm resettlement bar would apply when an alien "was firmly resettled in another country prior to arriving in the United States,"<sup>13</sup> which has been interpreted, by courts and by the government itself in rulemaking, to mean that an alien may be denied asylum if he or she "received[] an offer of permanent resident status, citizenship, or some other type of permanent resettlement" in a third country.<sup>14</sup> By specifying a categorical bar to asylum eligibility based on the fact that an asylum seeker has merely passed through other countries on the way to the United States, the IFR effectively writes out of the statute the determination of whether he or she was "firmly resettled" in such other countries. It is inconceivable that the firm resettlement bar language requires no more than simple transit through a country, even if such country might have available asylum application processes.

Furthermore, the IFR negates the individualized analysis required by the firm resettlement bar that results from the definition of "firm resettlement" in the applicable regulations,<sup>15</sup> which definition is not modified by the IFR. The IFR effectively replaces this individualized analysis with a blanket bar that does not consider whether the third country is one in which the asylum seeker can safely resettle—an approach which "fundamentally conflicts with the one Congress took in enacting mandatory bars based on a safe option to resettle or pursue relief in a third country,"<sup>16</sup> and without providing a reasoned explanation for effectively rescinding the individualized-analysis regulation. The IFR also ignores a convincing body of judicial precedent that has "treated the regulations based on the firm resettlement bar as establishing the only circumstances under which 'an opportunity to stay in a third country justifies a mandatory or discretionary denial of asylum.'"<sup>17</sup>

### **D. THE IFR EFFECTIVELY ELIMINATES THE ABILITY TO SEEK ASYLUM UPON ARRIVAL AT THE SOUTHERN BORDER.**

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<sup>13</sup> 8 U.S.C. § 1158(b)(2)(A)(vi).

<sup>14</sup> *Sall v. Gonzalez*, 437 F.3d 229, 232 (2d Cir. 2006) (quoting 8 C.F.R. § 208.15).

<sup>15</sup> 8 C.F.R. § 208.15.

<sup>16</sup> *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073-JST, slip op. at 23 (N.D. Cal. July 24, 2019).

<sup>17</sup> *East Bay Sanctuary Covenant*, slip op. at 21 (quoting *Andriasian v. I.N.S.*, 180 F.3d 1033, 1044 (9th Cir. 1999) and further referencing as support for this proposition *Prus v. Mukasey*, 289 F. App'x 973, 976 (9th Cir. 2008), *Tandia v. Gonzales*, 437 F.3d 245, 249 (2d Cir. 2006) (per curiam), and *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004)).

In addition to its inconsistency with the two bars discussed above, the IFR is also inconsistent with section 208(a)(1) of the INA, which provides that an individual may apply for asylum whether he or she arrived in the United States through a designated port of entry or outside of such port.<sup>18</sup> Through this provision, Congress signaled an intention to allow for an opportunity to apply for asylum regardless of the precise geographic pathway through which an alien arrives in the United States.

In contrast, the IFR's new eligibility bar is explicitly conditioned on entry into the United States through the southern border, and not the northern border or any airport or seaport, thus effectively disallowing asylum applications from similarly-situated persons solely on the basis of where an individual has entered the United States. A person who has failed to apply for asylum in third countries, but who enters through the northern border or by aircraft would not face the IFR's new restrictions on eligibility for asylum.

Additionally, the difference between the ability of an individual to apply for asylum (which is the subject of Section 208(a)(1)) and eligibility for a grant of asylum (which is the mechanism by which the IFR's new rules will restrict asylum determinations) is not enough to justify the discrepancy between the intention of Congress demonstrated by Section 208(a)(1) and the Department's selective geographic application of the IFR's new restrictions. As the Ninth Circuit Court of Appeals observed in its decision in *East Bay Sanctuary Covenant v. Trump*, "[t]he technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same."<sup>19</sup>

Because of the multiple ways in which the IFR conflicts with the INA, the Departments should withdraw the IFR.

### **III. The IFR Violates the Protections Afforded to Unaccompanied Children under the TVPRA.**

By its own terms, the IFR "does not provide for a categorical exception for unaccompanied alien children," thus rendering an unaccompanied child subject to the IFR immediately ineligible for asylum, irrespective of the merits of her claim.<sup>20</sup> This wholesale bar to unaccompanied children seeking asylum violates procedural protections that Congress expressly authorized for that population through the TVPRA. For this reason as well, the IFR should be withdrawn.

When enacting the TVPRA, Congress recognized that unaccompanied children are particularly vulnerable. They usually do not know U.S. policies or their rights with respect to asylum and immigration. They may have been subjected to severe trauma as victims of trafficking, and frequently do not speak English when they arrive at the border.

Recognizing the vulnerability of unaccompanied children, Congress enacted certain procedures through the TVPRA to make laws banning human trafficking more meaningful. These procedures include among others: (1) referral to the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) within 72 hours for screening and placement in the least restrictive

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<sup>18</sup> 8 U.S.C. § 1158(a)(1).

<sup>19</sup> 909 F.3d 1219, 1247 (9th Cir. 2018).

<sup>20</sup> 84 Fed. Reg. at 33,839 n. 7.

setting “that is in the best interest of the child,” usually with a parent, relative or other sponsor in the United States, or if no sponsor can be found, under ORR custody in a shelter or foster home; (2) placement in removal proceedings with eligibility for voluntary departure under the Immigration and Nationality Act Section 240B without cost to the child; (3) access to *pro bono* counsel, “to the greatest extent practicable,” to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking; and (4) ensuring safe repatriation to those children who are found ineligible to remain in the United States.<sup>21</sup>

These procedures are necessary to humanely treat and protect the most vulnerable victims of severe forms of trafficking and other abuses against children, and recognize that all unaccompanied minors require special care and treatment. For example, unaccompanied children have a statutory right to present their case for asylum to a USCIS asylum officer, as opposed to an immigration judge in an adversarial setting.<sup>22</sup> This procedural mechanism provides unaccompanied children a less intimidating and less adversarial setting to recount the traumatic and sensitive details surrounding their claims for asylum.<sup>23</sup> In addition, the TVPRA requires that the “Secretary of Health and Human Services shall ensure, to the greatest extent practicable ... that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>24</sup> As Senator Feinstein explained, “[t]his bill seeks to protect children ... who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances. These children have seen their family members threatened, tortured and even murdered. Many have been targets of attacks themselves.”<sup>25</sup>

Under the IFR, however, unaccompanied alien children lose these protections because they are automatically considered ineligible for asylum if they have passed through other countries without seeking asylum. The IFR thus forces unaccompanied children asylum applicants, after a perfunctory denial of their claim at USCIS, back into an immigration system designed for adults. They must present their claims for statutory withholding of removal or protection under the Convention Against Torture to an immigration judge in an adversarial proceeding rather than before a skilled Asylum Office interviewer.<sup>26</sup> The IFR thus violates the TVPRA by removing the procedural protections Congress provided to care for the children who are victims of human trafficking under the TVPRA.

#### **IV. The Asylum Systems of Proposed Third Countries Mexico and Guatemala are Inadequate to Meaningfully Protect Access to Asylum for Unaccompanied Children.**

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<sup>21</sup> TVPRA § 235(a)(5), § 235 (b)(3), § 235 (c)(5) (2008).

<sup>22</sup> 8 U.S.C. § 1158(b)(3)(C); see *Harmon v. Holder*, 758 F.3d 728, 734 (6th Cir. 2014).

<sup>23</sup> Cf. 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein explaining the purpose of the TVPRA).

<sup>24</sup> TVPRA § 235(c)(5).

<sup>25</sup> 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008).

<sup>26</sup> *Id.*

The IFR's requirement for unaccompanied children to seek asylum in a third country before entering the United States ignores the realities of conditions in those countries, as well as the conditions these children have fled. Currently, the asylum procedures and systems of Mexico and Guatemala – the two countries most frequently identified as third countries – are not sufficiently developed and funded to give unaccompanied minors meaningful access to asylum protections.

**A. GUATEMALA'S ASYLUM SYSTEMS ARE INADEQUATE TO PROTECT THE RIGHTS OF UNACCOMPANIED CHILDREN.**

The IFR fails to consider the inadequacy of existing asylum systems in the Northern Triangle (Guatemala, Honduras and El Salvador) and Mexico, particularly with respect to children. Seeking asylum in Guatemala is not a viable option for these children because Guatemala's asylum system is brand new and barely functioning.<sup>27</sup> In May 2017, Guatemala's new migration code went into effect with provisions for Guatemala's asylum system.<sup>28</sup> The law, however, requires implementing regulations that were only issued in April 2019, and which have not yet been made public.<sup>29</sup> In the past two years, Guatemala has received roughly 350 applications for asylum, yet has only decided about 20-30 of these cases.<sup>30</sup> Guatemala decided zero asylum cases between March 2018 and May 2019, and the country only has three officers who interview asylum seekers.<sup>31</sup>

Nothing in the recent safe third country agreement between the United States and Guatemala changes this situation; to the contrary, meaningful protections to unaccompanied children remain beyond Guatemala's capacity.<sup>32</sup> The conditions with respect to the existing asylum system in Guatemala have not changed, and as described below in Section V, children in transit through Guatemala face many of the same dangers that they were fleeing in their countries of origin.

**B. MEXICO'S ASYLUM SYSTEMS DO NOT AFFORD UNACCOMPANIED CHILDREN MEANINGFUL ACCESS TO ASYLUM PROTECTION.**

Seeking refuge in Mexico would similarly not provide meaningful access to asylum or protections for unaccompanied children. The Mexican government agencies charged with protecting these children have not met the task in any meaningful sense. In many cases, Mexico deports unaccompanied

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<sup>27</sup> Declaration of Lisa Frydman, Vice President for Regional Policy and Initiatives at KIND, filed in *Capital Area Immigrants' Rights Coalition v. Trump*, Case No. 1:19-02117-TVK (D.D.C., July 19, 2019), ECF No. 19-2, at ¶ 14 (attached hereto as "Exhibit A") (hereinafter, "Frydman Decl."); Sofia Menchu, *Guatemala's shortcomings raise doubts about U.S. migration deal*, Thomson Reuters (July 31, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalas-shortcomings-raise-doubts-about-u-s-migration-deal-idUSKCN1UQ2I5>.

<sup>28</sup> Frydman Decl. at ¶ 14.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; Sofia Menchu, *Guatemala's shortcomings raise doubts about U.S. migration deal*, Thomson Reuters (July 31, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalas-shortcomings-raise-doubts-about-u-s-migration-deal-idUSKCN1UQ2I5>.

<sup>32</sup> *See id.*



children into dangerous conditions in violation of its own child protection laws.<sup>33</sup> Mexico's child protection officers (OPIs), charged with identifying international protection needs and protecting children in custody, work for the Mexican Immigration Agency (Instituto Nacional de Migración, or "INM") —the very agency detaining and seeking to deport them.<sup>34</sup> This is an inherent conflict of interest.

As of 2016, Mexico's general children's law and migration law require best interests determinations (BIDs), that is, whether deportation is in the best interest of the child, prior to the deportation of a child.<sup>35</sup> However, BIDs are rarely conducted prior to deportation due to lack of resources and capacity, and when BIDs are conducted, most children lack access to adequate (or any) representation.<sup>36</sup>

The agency responsible for asylum in Mexico is overwhelmed and unlikely to adequately afford protection to children. While Mexico's refugee agency (Comisión Mexicana de Ayuda a Refugiados, or "COMAR") has made some policy progress, Mexico has a long way to go to provide meaningful protection, particularly when it comes to unaccompanied children.<sup>37</sup> COMAR has had a nearly 200% increase in the filing of asylum applications in 2019, yet the agency has not grown to meet the need or number of claims being filed.<sup>38</sup> Rather than increase COMAR's budget to expand the agency and meet the need, Mexico has reduced the agency's budget by 20 percent.<sup>39</sup> Additionally, COMAR only has four offices, and fewer than 30 Asylum Officers in the entire country that are qualified to interview and adjudicate asylum cases.<sup>40</sup> Of the 30 Asylum Officers, only 5-6 interview children seeking asylum.<sup>41</sup>

Conditions for migrant children in Mexico at best discourage seeking asylum, and at worst prove dangerous to them.<sup>42</sup> For example, Mexican law prohibits the detention of children for migration

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<sup>33</sup> Frydman Decl. at ¶¶ 20-24; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>.

<sup>34</sup> Frydman Decl. at ¶ 21.

<sup>35</sup> *Id.* at ¶¶ 22, 24; KIND, *Blocked From Safety: Unaccompanied Children along the U.S.-Mexico Border* (June 3, 2019), <http://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶¶ 19-20; see KIND, *The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children along Mexico's Southern Border*, (July 26, 2019), <https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.

<sup>38</sup> Frydman Decl. at ¶ 23.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See KIND, *Blocked From Safety: Unaccompanied Children along the U.S.-Mexico Border*, (June 3, 2019), <http://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf>; and KIND, *The Protection Gauntlet: How the United States is Blocking Access to*

control purposes, yet the INM continues to detain children in INM detention centers under conditions that have been widely reported as unfit for children and in violation of international law.<sup>43</sup> These detention centers suffer from overcrowding, unhygienic conditions, mixing of unaccompanied children with unrelated adults, lack of education and recreation, and the use of isolation cells as punishment for misbehavior.<sup>44</sup> Even children placed in DIF (Mexico's child welfare agency) shelters endure conditions inappropriate for the long-term care of children.<sup>45</sup> Government officials often dissuade children from seeking asylum in Mexico by warning that they will face long-term detention if they do, and tell them that even if they are granted asylum, they will be institutionalized until their eighteenth birthday.<sup>46</sup>

Even if asylum laws in the Northern Triangle or Mexico could provide a safe or realistic option for children, such procedures in these countries are complex — there is little chance that unaccompanied children, without the support of a parent or legal guardian, could understand or navigate those procedures by themselves.<sup>47</sup> The State Child Protection Authority is responsible for the legal representation of migrant and refugee children, however, these organizations suffer from limited funding and limited capacity.<sup>48</sup> As a result, a child seeking asylum protection in Mexico is unlikely to receive assistance or representation to navigate the process and to ensure that their rights are preserved.

#### **V. The Interim Final Rule Will Subject Unaccompanied Children to Threats in Third Countries Similar to Those They Were Fleeing in Their Home Countries.**

Unaccompanied children transiting Central America, Mexico, and other countries face significant dangers, often similar or even identical to the threats they faced in their home countries. Insofar as the IFR would require those children to remain in a third country to seek asylum, it exposes them to

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*Asylum Seekers and Endangering the Lives of Children at the U.S. Border*, (December 21, 2018), [http://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet\\_12-21-18-FINAL.pdf](http://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet_12-21-18-FINAL.pdf).

<sup>43</sup> Frydman Decl. at ¶ 20.

<sup>44</sup> *Id.*; Amnesty International, *Amnesty International Report 2017/18: The State Of The World's Human Rights*, (February 22, 2018),

<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>; KIND, *The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children along Mexico's Southern Border*, (July 26, 2019), <https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.; KIND, *Blocked From Safety: Unaccompanied Children along the U.S.-Mexico Border*, (June 3, 2019), <http://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf>.

<sup>45</sup> Frydman Decl. at ¶ 20; KIND, *The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border*, (December 21, 2018), [http://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet\\_12-21-18-FINAL.pdf](http://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet_12-21-18-FINAL.pdf).

<sup>46</sup> Frydman Decl. at ¶ 21.

<sup>47</sup> *Id.* at ¶ 15, 21.

<sup>48</sup> KIND, *The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children along Mexico's Southern Border*, at 6-7, (July 26, 2019), <https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.

the same dangers, such as violence, sexual and gender-based violence, gang violence, trafficking, and insecure conditions, that form the basis for their claim to humanitarian protection. Thus, the IFR increases the risk of harm to unaccompanied children, rather than advancing its purported humanitarian goals.

**A. UNACCOMPANIED CHILDREN FLEE THEIR HOME COUNTRIES IN FEAR OF VIOLENCE AND TRAFFICKING, FROM WHICH THEIR GOVERNMENTS CANNOT PROTECT THEM.**

The proposed regulation fails to consider the dangerous conditions for children across Northern Triangle countries. The overwhelming reason that unaccompanied children leave Northern Triangle countries and seek safety in the United States is violence and the systemic failure to protect children against it, specifically violence by criminal gangs and drug cartels, sexual and gender-based violence, child abuse, and child trafficking.<sup>49</sup> Children who identify as lesbian, gay, bisexual, transgender, and/or intersex (LGBTI) face particularly high levels of sexual and gender-based violence.<sup>50</sup> Gangs currently dominate much of the urban areas of Guatemala, El Salvador, and Honduras, and are increasingly spreading to more rural areas.<sup>51</sup> Sexual violence perpetrated by gangs is one of the most common forms of violence that migrant children face.<sup>52</sup> These gangs use rape and the threat of rape as a tactic of control over children.<sup>53</sup> Girls are targeted for forced sexual relationships with gang members, and those who resist advances face violence or death.<sup>54</sup> Boys (and increasingly girls) are forcibly recruited by gangs, and resistance is met with threats, torture, and ultimately death.<sup>55</sup>

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<sup>49</sup> Frydman Decl. at ¶¶ 7, 11; UN High Commissioner for Refugees (“UNHCR”), *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of asylum-seekers from Guatemala*, (January 2018), <https://www.refworld.org/docid/5a5e03e96.html>.; Amnesty International, *Fleeing for Our Lives: Central American Migrant Crisis*, <https://www.amnestyusa.org/fleeing-for-our-lives-central-american-migrant-crisis/>; KIND, *The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children along Mexico’s Southern Border*, (July 26, 2019), <https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.

<sup>50</sup> Frydman Decl. at ¶¶ 7, 11; Amnesty International, *Amnesty International Report 2017/18: The State Of The World’s Human Rights*, (February 22, 2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

<sup>51</sup> Frydman Decl. at ¶ 11.

<sup>52</sup> *Id.*; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>.

<sup>53</sup> Frydman Decl. at ¶ 11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>.

Children targeted by gangs and cartels, LGBTI children, and children targeted for other sexual or gender-based violence cannot rely on the governments of their countries to protect them.<sup>56</sup> Accordingly, children from these countries have no faith in their governments' ability to protect them.<sup>57</sup> As a result, violence against children is highly underreported, and even those crimes that do get reported rarely result in justice.<sup>58</sup> This is at least partially due to the well-documented government corruption in Northern Triangle countries.<sup>59</sup> State security forces, including military police, army, and other security forces in the region frequently target adolescent boys from neighborhoods under control of organized crime.<sup>60</sup> Extrajudicial killings of youth by security forces have been well-documented, and other measures, including mass arrests or threats against the young males, erode public trust in law enforcement or security forces in the region.<sup>61</sup> Experts at the Salvadoran Women's Organization for Peace (ORMUSA), for example, have explained that one reason young girls who are victims of sexual and gender-based violence underreport is because they justifiably fear that contacting the police or other law enforcement will lead to broad scale repression or violence against young males in their neighborhood, including their own family members.<sup>62</sup>

In addition to the impunity, corruption, and repression, children from the Northern Triangle in need of protection cannot rely on their country's child welfare systems for help.<sup>63</sup> Child welfare agencies throughout the region are underfunded, inaccessible outside capital cities, and often have inappropriate living conditions for children.<sup>64</sup> Child welfare officials in the Northern Triangle countries have reported that they could not take children fleeing gang violence into shelters because they could not protect those children, leaving flight to another country as the only option.<sup>65</sup> High levels of physical and sexual abuse have been reported in Guatemala's child welfare shelters, and in 2017 over 40 children in one such shelter perished after being locked in a facility that caught fire.<sup>66</sup>

**B. UNACCOMPANIED CHILDREN ARE UNLIKELY TO FARE BETTER BY RELOCATING TO MEXICO OR ANOTHER NORTHERN TRIANGLE COUNTRY.**

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<sup>56</sup> Frydman Decl. at ¶ 8; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>.

<sup>57</sup> *Id.*; Amnesty International, *Amnesty International Report 2017/18: The State Of The World's Human Rights*, (February 22, 2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

<sup>58</sup> Frydman Decl. at ¶ 8.

<sup>59</sup> *Id.* at ¶ 9.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at ¶ 10.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at ¶¶ 10-11.

<sup>66</sup> Anastasia Moloney, *Guatemala's Orphanage Children Caged, Abused: Report*, Thomson Reuters (July 16, 2018), <https://www.reuters.com/article/us-guatemala-child-abuse/guatemalas-orphanage-children-caged-abused-report-idUSKBN1K7007>

Relocation from one Northern Triangle country to another is generally not a viable alternative for children fleeing violence in that region. Northern Triangle migrant children often find that the reach of criminal gangs extends beyond the borders of their home country and into neighboring countries, such that they do not feel safe – and have no basis for feeling safe – in asking for asylum in a neighboring country.<sup>67</sup> The problems of sexual and gender-based violence, forced gang recruitment, cartel violence, violence against LGBTI children and youth, and human trafficking exist throughout the Northern Triangle of Central America, as do the staggering rates of impunity and the weak child welfare systems.<sup>68</sup> As such, a child fleeing violence in one Northern Triangle country is highly likely to experience similar exposure in another Northern Triangle country. Experts on organized crime in the region have repeatedly reported that gangs and cartels have region-wide reach and can easily locate fleeing individuals throughout the region.<sup>69</sup>

Relocation in Mexico is equally unrealistic because there, too, children are at risk of the same types of violent crimes as their home countries, which typically occur with impunity and often at the hands of, or with the blessing of, Mexican government officials.<sup>70</sup> There are numerous documented cases in which police, military, and other Mexican government officials have been directly and indirectly involved in violence against migrants and refugees, including kidnapping and extortion.<sup>71</sup> These incidents increase migrants' fear and mistrust of authorities in Mexico and their feeling of insecurity there, especially for children.<sup>72</sup> Specifically, child migrants and refugees in Mexico are at particular risk of robbery, sexual violence, kidnapping, human traffickers, femicide, extortion, threats, and/or gender-based violence.<sup>73</sup> Moreover, Mexico's proximity to El Salvador, Honduras and Guatemala means that these children are still subject to violence at the hands of gang members from their own countries, who can easily travel to Mexico from the Northern Triangle.<sup>74</sup>

In this way, instead of furthering the humanitarian purposes of the asylum provisions of the INA and TVPRA, the IFR places unaccompanied children in the same dangers that they fled their home countries to avoid. For these reasons as well, the IFR should be withdrawn.

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<sup>67</sup> *Id.* at ¶¶ 12-13.

<sup>68</sup> *Id.* at ¶ 12; UN High Commissioner for Refugees (“UNHCR”), *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of asylum-seekers from Guatemala*, (January 2018), <https://www.refworld.org/docid/5a5e03e96.html>.; Amnesty International, *Fleeing for Our Lives: Central American Migrant Crisis*, <https://www.amnestyusa.org/fleeing-for-our-lives-central-american-migrant-crisis/>.

<sup>69</sup> Frydman Decl. at ¶ 13.

<sup>70</sup> *Id.* at ¶¶ 16-17; Amnesty International, *Amnesty International Report 2017/18: The State Of The World's Human Rights*, (February 22, 2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

<sup>71</sup> *Id.*

<sup>72</sup> Frydman Decl. at ¶ 16.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at ¶ 17-18.

## **VI. Cases Handled by KIND Illustrate the Failure of the IFR to Provide for Fair and Lawful Solutions for Unaccompanied Children**

The experience of children served by KIND and its pro bono partners bear out many of these general points: that there is no meaningful opportunity for them to access the protection systems as they transit Guatemala, Mexico, or other principal transit countries; and that the threats that drove them from their homes in the first place—persecution by gangs or other organized criminal entities, abusive family members, or human traffickers—followed them across international borders and rendered those transit countries equally unsafe.

- W,<sup>75</sup> from Honduras, was already a teenaged mother when she fled Honduras while pregnant. On her journey to the United States she was threatened with rape and death by drug cartels and forced into both labor and commercial sex work in Guatemala and Mexico. Once in the U.S. and under ORR care, she received valuable counseling from TVPRA-authorized programs, a trafficking certification letter, and, ultimately, an approved asylum application through USCIS. This summer, W became eligible to adjust status to a permanent resident based on that asylum grant. It is inconceivable that W could have accessed the Mexican or Guatemalan asylum systems while she was in the middle of being trafficked. And yet, had she entered under the IFR, W would have been barred from asylum and she would have been at serious risk of re-victimization if returned to Central America.
- X is from Eritrea. She fled religious persecution and violence at age 16 to a neighboring country, seeking protection, but was kidnapped and raped repeatedly for weeks. Then a sex trafficker ransomed her from her African captors, flying her to Brazil and transiting north into Mexico, where after a month of raping her daily, the captor let her go so she could seek protection in the United States. Under the IFR, X would be expected to have sought protection in one or more of the countries through which she was trafficked, despite being held in captivity.
- Y, a girl from Honduras, was sex trafficked across the border into Guatemala. She was then held for ransom and exchanged for her trafficker's freedom in Mexico, then sex trafficked again into the United States. Only after calling the police in Texas was she rescued from her captors. The IFR would have required Y to seek asylum in Mexico and Guatemala while she was held captive and trafficked.
- KIND learned about Z in a facility operated by DIF in Ciudad Juárez. Z had fled gang violence in El Salvador and had made it as far as Juárez before being taken into DIF's custody. Although Mexico's Child Protection Authority had determined that it was in Z's best interests to seek

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<sup>75</sup> The names and identifying details of children served by KIND and its partners are not included in this document to preserve their privacy. KIND may be able to provide additional detail about the cases described upon request by DOJ or DHS.

asylum in the United States, the Authority would neither accompany him to the port of entry nor allow him to approach the port of entry on his own. Nor did the Authority or DIF enable Z to present his claims for protection in the Mexican asylum system. Instead, Z was sent back to the life-threatening danger he had escaped.<sup>76</sup>

- Other children served by KIND who were in Mexican immigration detention have told KIND attorneys that officials warned them that if they applied for asylum in Mexico, they would be held in jail and fed only bread and water for a year or more to coerce them to agree to return to their home countries. That is, even children who may have considered applying for asylum in Mexico have been discouraged from doing so, yet the IFR would presume that the child had failed to access protection.

These specific examples from KIND's clients described above show the utter impracticality of the IFR's requirement that an unaccompanied child seek asylum in a third country. Unaccompanied children, such as those represented by KIND, face unique dangers that would only be exacerbated by the IFR. Because of this, the IFR should be withdrawn.

#### **VII. Under the IFR, Even Those Children Qualifying for Withholding of Removal Face Heightened Levels of Uncertainty and Stress**

While the above discussion fully addresses the unlawful and impractical nature of the IFR with respect to denying access to asylum in the United States, there are additional policy-based considerations for withdrawing the rule. Under the IFR, individuals barred from applying for asylum would remain eligible to seek withholding of removal under the INA or the Convention Against Torture, a minimal form of protection that only ensures that a child would not be removed to the country from which he or she fears persecution or torture.<sup>77</sup> Unlike asylum, withholding of removal offers no assurance that the United States would not seek to remove the individual to a third country or, under changed circumstances, even to the country from which he or she fled.<sup>78</sup> Nor does withholding of removal provide access to lawful permanent residence or citizenship. Individuals remain subject to greater oversight by government officials, have no ability to reunify with family members as made available to persons granted asylum<sup>79</sup>, and may not leave the United States. Essentially, persons granted withholding of removal live in a permanent state of limbo.

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<sup>76</sup> Unlike the other children described here, KIND never had an opportunity to provide legal services to Z.

<sup>77</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999).

<sup>78</sup> *El Himri v. Ashcroft*, 378 F.3d 932, 937–38 (9th Cir. 2004) (as amended).

<sup>79</sup> Compare 8 U.S.C. § 1158(b)(3) (permitting derivative asylum for spouses and children as defined in 8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)), and 8 C.F.R. § 1208.21, with 8 U.S.C. § 1231(b)(3) (failing to provide derivative withholding of removal); see also *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005). See also *Sumolang v. Holder*, 723 F.3d 1080, 1083 (9th Cir. 2013) (recognizing that the asylum

The difficulties of living under an order of withholding of removal have been recognized by the government itself, which permits a reconsideration of asylum denied on discretionary grounds when an individual is found to qualify for withholding of removal. Under 8 CFR 208.16(e), the justification for this review is based on a fundamental concern that withholding of removal precludes reunification with family, and thus when circumstances warrant, asylum rather than withholding of removal is the preferred legal outcome.

Thus, the government has already recognized that withholding of removal is an imperfect solution that should be avoided whenever possible. In the case of unaccompanied children seeking protection in the United States this logic is even more pronounced. Numerous studies have documented the negative psychological and social effects on children and families facing the uncertainty of removal.<sup>80</sup> Children, in particular, face additional developmental, health, and social adjustment issues when their future is uncertain.<sup>81</sup> These consequences are often heightened as adolescents approach adulthood, particularly when immigration status may affect their future choices.<sup>82</sup> Because withholding of removal is inherently uncertain, the possible impact on children prevented from qualifying for asylum based on this rule could be significant and long-lasting.

This rule creates the potential for a permanent underclass of children and young adults who have faced a harrowing past and look forward to a future of uncertainty and limitations, contrary to not only their own best interests, but to the country's best interests.

In short, deliberately reducing access to asylum on the basis of unlawful and impractical proposals will hurt both the children who are denied asylum in the first instance and those children who ultimately receive a grant of withholding of removal.

### **VIII. Conclusion.**

As demonstrated by these comments, the IFR is contrary to law, and falls far short of its stated purposes and policy goals. There is no sound reason to create barriers to asylum based on ephemeral opportunities to seek protection in another country, particularly where the outcome of such a requirement results in further risk to the life and well-being of individuals seeking protection, especially unaccompanied children. We respectfully call upon your Departments to withdraw the IFR.

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statute allows for derivative beneficiaries of the principal alien's application, but that the withholding of removal statute makes no such allowance).

<sup>80</sup> Lauren E. Gulbus and Luis H. Zayas, Exploring the Effects of U.S. Immigration Enforcement on the Well-Being of Citizen-Children in Mexican Immigrant Families, published online July 12, 2017, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6139667>.

<sup>81</sup> Heather Sandstrom and Sandra Huerta, The Negative Effects of Instability on Child Development: A Research Synthesis, September 2013, The Urban Institute, Low Income Working Families, Discussion Paper 3.

<sup>82</sup> Carola Suarez-Orozco, et. al, Growing Up in the Shadows: The Development Implications of Unauthorized Status, 81 Harvard Educational Review 438-473 September 2011.



Should you have any questions or require further information, please do not hesitate to contact KIND.

Sincerely,

\_\_\_\_\_/s

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