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Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services):

"Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers"

CIS No. 2692-21, DHS Docket No. USCIS 2021-0012, A.G. Order No. 5369-2022

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I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits the comments below on the Interim Final Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, proposed by the U.S. Department of Justice and U.S. Department of Homeland Security (*hereinafter* "the IFR"). These comments focus on those aspects of the Proposed Rule which are of particular interest to UNHCR and may have a significant impact on asylum-seekers' capacity to obtain protection in the United States in accordance with international standards.

This submission is offered consistent with UNHCR's supervisory responsibility as set out under its Statute[1] and reiterated in the 1967 United Nations Protocol Relating to the Status of Refugees (the "1967 Protocol")[2] and the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention").[3] The United States is a signatory and State party to the 1967 Protocol, and is therefore bound to comply with the obligations deriving from the 1967 Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention.[4] Furthermore, as a State party, the United States has agreed to cooperate with UNHCR to facilitate the Office's duty of supervising, in particular, the application of the provisions of the Protocol, and, as incorporated therein, the 1951 Convention.[5]

One of the means by which UNHCR exercises its supervisory responsibility is by providing to States party its guidance and interpretations of the 1951 Convention, the 1967 Protocol, and other international refugee instruments, particularly as relevant to policies and laws being considered by the country in question. UNHCR's guidance on such matters is informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system and standards of international refugee protection.

UNHCR has long acknowledged that the United States is facing significant challenges associated with ongoing flows of asylum-seekers amongst mixed movements within the sub-region. In this context, we recognize that the U.S. asylum system is under strain and in need of reform, and we appreciate the ongoing engagement with the Department of Justice and Department of Homeland Security on ways to improve the fairness, quality and efficiency of the system and reduce the current asylum backlog. UNHCR stands ready to continue supporting the U.S. government in grappling with these complex challenges, with a view towards building a more resilient, adaptable, fair, and efficient domestic asylum system that upholds international legal standards.[6]

UNHCR presents these comments to provide feedback on which aspects of the IFR align with international standards for fair and efficient asylum processing, and which raise concerns and, in some cases, diverge from the United States' international legal obligations. Like the proposed

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[1] G.A. Res. 428(v), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950) [hereinafter UNHCR Statute].
[2] Protocol Relating to the Status of Refugees, art. II, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) [hereinafter Protocol].
[3] Convention Relating to the Status of Refugees art. 35, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter Refugee Convention]. UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." UNHCR Statute ¶ 8(a).
[4] *See* Protocol.
[5] "The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." Protocol, art. II.
[6] In addition, UNHCR observes that President Biden issued an executive order early in his term that calls upon certain U.S. government agencies to consult and plan with international organizations, as well as non-governmental organizations, "to develop policies and procedures for the safe and orderly processing of asylum claims at the United States land borders, consistent with public health and safety and capacity constraints." Exec. Order No. 14010 of Feb. 2, 2021, "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border," 86 Fed. Reg. 8267, § 4(i) (Feb. 5, 2021).

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iteration of this rule, the IFR revises the framework for receiving and processing those who may be in need of international protection, which, UNHCR fully acknowledges, is an area in which modification and transformation is much needed and welcome. UNHCR appreciates the responsiveness of the Government to comments received in response to the Proposed Rule, and there are, indeed, more positive directions in the IFR, including enhancements to the non-adversarial adjudication process and expanded grounds for parole. However, the IFR also includes worrying changes that could undermine the framework for refugee protection, among them certain procedures and timeframes for pursuing protection claims post-credible fear that may force asylum-seekers to put forward their claims in full soon after arrival without adequate access to legal assistance and representation. UNHCR has set out these concerns in detail below, while also presenting some principles for fair and efficient asylum procedures drawn from best practices in other countries.

UNHCR has a strong interest, in fulfilment of its supervisory responsibility, in ensuring that U.S. asylum law and policy aligns with the international treaty obligations that the United States helped to create and respectfully offers its guidance on these obligations.

II. Overarching Comments on the Proposed Rule's Alignment with the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

A. Overview

UNHCR appreciates the decades-long engagement between our agency and the U.S. government on technical aspects of international refugee law and its domestic realization, including asylum adjudication procedures. In this context, UNHCR opens its observations with some overarching comments on the IFR's alignment with the 1967 Protocol and related guidance. The IFR puts forward a number of changes that, if implemented, would bring the U.S. closer to the international standards necessary for fair and efficient adjudication of asylum claims. For instance, adjudication in the first instance in a non-adversarial setting is very welcome. However, there are other provisions which, if put into practice without essential procedural safeguards, might place asylum-seekers in a less favorable position than they are currently, further from international standards necessary to preserve the integrity of the asylum system.

While the 1951 Convention and the 1967 Protocol do not set out procedures for the determination of refugee status, UNHCR considers that fair and efficient procedures are an essential element in the full and inclusive application of the international legal framework for refugee protection. Such procedures enable a State to identify those who should benefit from international protection, as well as those who should not. The necessity to conduct refugee status determination procedures in the context of individual asylum systems also stems, in particular, from the principle of non-refoulement under Article 33 of the 1951 Convention and customary international law, as well as from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from other international and regional human rights instruments.[7] Furthermore, for more than forty years, the UNHCR Executive Committee has issued conclusions recommending that such procedures satisfy certain basic requirements.[8] The relatively recent U.N. Global Compact on Refugees aims to strengthen the

[7] *See* Inter-American Commission on Human Rights, *Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection*, OEA/Ser.L/V/II, doc. 255, ¶¶ 133, 138, 197 (Aug. 5, 2020) [hereinafter *Due Process in Procedures*].

[8] *See* Exec. Comm. of the High Comm'r's Programme, *Conclusion No. 8 (XXVIII) – 1977 on Determination of Refugee Status* (Oct. 12, 1977), *available at* https://www.refworld.org/docid/3ae68c6e4.html [hereinafter ExCom Conclusion No. 8]; Exec. Comm. of the

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functioning of the international refugee regimes, emphasizes the importance of national asylum systems that operate with fairness, efficiency, adaptability, and integrity.[9]

B. Key Principles

UNHCR takes this opportunity at the outset to note some key principles for asylum adjudication garnered from UNHCR's seven decades of experience globally. To work well for asylum-seekers and adjudicating authorities alike, asylum systems must be fair and efficient. Once asylum-seekers have been able to access territory—a presupposition and a necessary requirement for realizing the right to seek asylum[10]—they must also be able to access asylum adjudication procedures with certain minimum standards and basic safeguards.[11] While it is left to each State to establish the procedure most appropriate to that State's constitutional, legislative, and administrative structure, asylum procedures must be conducted in full respect of due process standards.[12] These requirements are grounded in international and regional human rights law, including on the fairness of procedures and the right to an effective remedy.[13] Given the serious consequences of an erroneous determination—i.e., refoulement—these protections and guarantees are fundamental at all stages of the procedure.[14] In the asylum context—whether at the border or elsewhere—fairness is premised on respect for the standards in this non-exhaustive list:

- The right to information about the asylum process is essential for people who express the wish to seek asylum and / or have apparent international protection needs.[15] **Legal information** should be guaranteed by States at all stages of the process, including in detention.[16] Information in this context should cover rights and obligations in the asylum process, including deadlines and appeals, the interview process, and the right to legal assistance and representation. This helps ensure that inaccurate information asylum-

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High Comm'r's Programme, *Refugees Without an Asylum Country No. 15 (XXX) – 1979* (Oct. 16, 1979), *available at* https://www.refworld.org/docid/3ae68c960.html [hereinafter ExCom No. 15]; Exec. Comm. of the High Comm'r's Programme, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) – 1983* (Oct. 20, 1983), *available at* https://www.refworld.org/docid/3ae68c6118.html [hereinafter ExCom Conclusion No. 30]; Exec. Comm. of the High Comm'r's Programme, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection* No. 58 (XL) – 1989* (Oct. 13, 1989), *available at* https://www.refworld.org/docid/3ae68c4380.html. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983; No. 55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74 (XLV) – 1994; No. 81 (XLVIII) – 1997; No. 82 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 93 (LIII) – 2002; No. 103 (LVI) – 2005. *See also Due Process in Procedures*, ¶ 200. The Executive Committee of the UNHCR Programme is a group of 51 countries that advises UNHCR in the exercise of its protection mandate. The Executive Committee, among other things, issues Executive Committee Conclusions, which are arrived at by consensus among the 51 Member States, including the United States, and which serve under international law as evidence of evolving State practice with respect to refugee protection. *See Executive Committee*, UNHCR (last accessed May 31, 2022), https://www.unhcr.org/executive-committee.html.

[9] United Nations, *Global Compact on Refugees*, ¶ 61 (2018), *available at* https://www.unhcr.org/5c658aed4.pdf.

[10] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights*, ¶ 3.1.5 (Feb. 5, 2018), *available at* https://www.refworld.org/docid/5a9d6e414.html; *see also* Refugee Convention, art. 31 (indicating that "States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . .").

[11] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 192 (Apr. 2019), *available at https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html* [hereinafter Handbook].

[12] Handbook, ¶¶ 189-192; UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, at 15 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5e870b254.html.

[13] For procedural standards, see Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, 2017*, Chapter 7 (2017), *available at* https://www.unhcr.org/3d4aba564.pdf [hereinafter *A Guide to International Refugee Protection*].

[14] ExCom Conclusion No. 30.

[15] UNHCR, *Effective Processing of Asylum Applications: Practical Considerations and Practices*, ¶ 26 (Mar. 2022), *available at* https://www.refworld.org/docid/6241b39b4.html [hereinafter *Effective Processing of Asylum Applications*].

[16] *See Due Process in Procedures*, ¶ 203.

seekers may have previously received from other sources is rectified.[17] Please see the next section for further discussion of the right to information.

- All communications with asylum applicants must be in a **language that the asylum-seeker understands** and in which s/he is able to communicate clearly.[18] This includes any oral or written information provided to asylum-seekers from the moment they express fear or a desire to seek asylum or otherwise have apparent international protection needs. Applicants should have access to the services of trained and qualified interpreters at all stages of the asylum process.[19] The impartial and neutral role of the interpreter should be maintained, including by ensuring that interpreters fully respect the confidentiality of the process. Also, wherever possible, applicants should be given the option to communicate with interpreters of the sex they prefer.[20] Likewise, notifications of asylum decisions should be carried out in a language the applicant understands.

- **Legal assistance and representation** are essential to ensuring that asylum-seekers can navigate the asylum process in full exercise of their rights.[21] Legal assistance and representation focus primarily on the specific elements of the individual asylum claim and on representing the asylum-seeker in the procedure. To maximize efficiency and fairness, asylum-seekers should have access to legal assistance and representation throughout the process, ideally from the outset. Counseling is especially critical in the context of a highly complex system, and providing legal assistance and representation can advance efficiency by strengthening an asylum-seeker's understanding of the process, helping them prepare, improving the quality of decision-making, reducing appeals, and tightening adjudication timeframes.[22] Please see the next section for further discussion of legal assistance and representation.

- The essence of the asylum procedure and an important due process guarantee is the **right to be heard**, which is normally fulfilled through an **asylum interview** (also known as the refugee status determination interview).[23] UNHCR global practice, under its own mandate Refugee Status Determination (RSD) operations and as reflected in UNHCR's Procedural Standards for Refugee Status Determination, generally requires that all applicants undergoing an individual RSD procedure have the opportunity to participate in an RSD interview to present their claims in person before a competent asylum authority and that claims for refugee status not be decided based solely on a paper review alone in

[17] Counseling could also include other advisory functions, on psycho-social or medical issues for instance. UNHCR, *Recommandations du HCR relatives au conseil et à la représentation juridique dans la nouvelle procédure d'asile en Suisse*, at 13 (Mar. 2019), *available at* https://www.refworld.org/docid/5cae4b424.html.

[18] *Effective Processing of Asylum Applications*, ¶ 26.

[19] UNHCR, *UNHCR RSD Procedural Standards Unit 2.5: Interpretation in UNHCR RSD Procedures,* § 2.5.1 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5f3113ec4.html [hereinafter *UNHCR RSD Procedural Standards: Interpretation*] (providing guidance on qualification and training, remote participation, impartiality, duty of confidentiality and access of interpreters to individual files, and supervision and oversight).

[20] *UNHCR RSD Procedural Standards: Interpretation*, § 2.5.1; *see also Due Process in Procedures,* ¶ 213.

[21] *Effective Processing of Asylum Applications*, ¶ 29.

[22] *Effective Processing of Asylum Applications*, ¶ 29.

[23] *See Due Process in Procedures,* ¶ 231; *see also Effective Processing of Asylum Applications*, ¶ 25; UNHCR*, Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determinations Under UNHCR's Mandate*, at 4 (2020), *available at* https://www.refworld.org/docid/5a2657e44.html [hereinafter *Aide-Memoire & Glossary of Case Processing Modalities*].

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the first instance.[24] The interview must be held in a safe, confidential, and suitable environment.[25]

The interview is the core element of the first stage of the asylum process, which is non-adversarial in many jurisdictions and when conducted by UNHCR. This is because **non-adversarial processes offer the optimal format** by promoting full and reliable disclosure of the applicant's claim,[26] and fostering "trust and respect so that the applicant feels comfortable enough to tell his/her story as coherently and completely as possible."[27] UNHCR's Handbook on Criteria and Procedures for Determining Refugee Status,[28] considered to offer authoritative guidance by the U.S. Supreme Court,[29] is not prescriptive on the characteristics of the first-instance asylum process.[30] Nonetheless, its guidance supports a non-adversarial approach, when noting that given that the asylum applicant who "can provide evidence of all his statement will be the exception rather than the rule (…) the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner," and said examiner is expected to work with the applicant to draw out the full story.[31] In UNHCR's observation, non-adversarial processes, when properly implemented, are faster, less costly, more specialized, and more adaptable than the immigration court system to process asylum applications with sufficient fairness and efficiency at first instance.

- Asylum-seekers have a right to an **effective remedy** under international human rights law and should be able to appeal the factual and legal findings of a negative decision before an independent and impartial administrative or judicial tribunal or other body.[32] The

[24] UNHCR, *UNHCR RSD Procedural Standards, Unit 4: Adjudication of Refugee Status Claims,* § 4.3.1 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5e87075d0.html [hereinafter *UNHCR RSD Procedural Standards: Adjudication*]. There may be some cases in which an interview might not be needed, such as in those involving claims where there is a high presumption of inclusion and where the applicant can be recognized based on information from registration or other available sources. UNHCR notes that State Members of the OAS, such as the United States, the right to an interview in individual RSD procedures is a necessary step before asylum authorities can reach a negative decision on the merits of the claim. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,"* Inter-Am. Ct. H.R., ¶ 232 (Aug. 19, 2014), *available at* https://www.refworld.org/cases,IACRTHR,54129c854.html; *Advisory Opinion OC-25/18, The Institution of Asylum, and Its Recognition as a Human Right Under the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8) in Relation to Article 1(1) of the American Convention on Human Rights)*, Inter-Am. Ct. H.R., ¶¶ 195-96 (May 30, 2018), *available at* https://www.refworld.org/cases,IACRTHR,5c87ec454.html.

[25] *UNHCR RSD Procedural Standards: Adjudication*, § 4.3.2.

[26] UNHCR, *UNHCR RSD Procedural Standards*, *Unit 2.7: Legal Representation in UNHCR RSD Procedures*, § 2.7.4 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5f3114a74.html [hereinafter *UNHCR RSD Procedural Standards: Legal Representation*]; *see also UNHCR RSD Procedural Standards: Adjudication*, § 4.6.1 (noting that Eligibility Officers should adopt a non-adversarial, information-gathering approach throughout the RSD interview).

[27] *Due Process in Procedures,* ¶ 234.

[28] *See generally* Handbook.

[29] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, n. 22 (1987) (stating that the Handbook "provides significant guidance in construing the Protocol").

[30] Handbook, ¶¶ 189-192.

[31] Handbook, ¶ 196; *Due Process in Procedures*, ¶¶ 20, 247. On the shared burden of proof of immigration authorities in establishing a risk of serious harm under Article 3 of the European Convention on Human Rights, see *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, ¶¶ 96-98 (Aug. 23, 2016), *available at* https://www.refworld.org/cases,ECHR,57bc18e34.html.

[32] *Effective Processing of Asylum Applications*, ¶ 30; *see also Due Process in Procedures,* ¶ 197; UNHCR, *UNHCR Note on the Principle of Non-Refoulement* (Nov. 1997), *available at* https://www.refworld.org/docid/438c6d972.html [hereinafter *Note on the Principle of Non-Refoulement*]; UNHCR, *Fair & Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, at 4 (Sep. 2, 2005), *available at* https://www.refworld.org/pdfid/432ae9204.pdf [hereinafter *Fair and Efficient Asylum Procedures*]; U.N. Human Rights Comm. (HRC), *General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, CCPR/C/GC/32, ¶ 9 (Aug. 23, 2007), *available at* https://www.refworld.org/docid/478b2b2f2.html [hereinafter *General Comment No. 32*] ("Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality o statelessness, or whatever their status, whether asylum-seekers, refugees, migrant workers, unaccompanied children or other persons, who may find

possibility for an asylum applicant to lodge an appeal with suspensive effect before a removal decision is implemented is a fundamental safeguard in all asylum procedures, including accelerated procedures. This minimizes the risk of erroneous decisions, and, therefore, that of refoulement.[33]

- Asylum-seekers should be **protected from the arbitrary deprivation of liberty.** As seeking asylum is a lawful act, detention of asylum-seekers normally should be avoided and used only as a measure of last resort.[34] When detention is used, it must not be arbitrary. Detention is arbitrary when it is not necessary in the individual's case, proportionate to a legitimate purpose (namely, public order, public health, or national security), reasonable in all circumstances, and required by law.[35] Further, failure to consider less coercive or intrusive means could render detention arbitrary.[36] Mandatory and indefinite detention are always arbitrary because they fail to meet these criteria.[37] Other restrictions on free movement beyond detention, such as limiting asylum-seekers' choice of residence or freedom of movement to designated locations, similarly must not be unlawful or arbitrary.[38]

In all of the above, UNHCR observes that adequate provision should additionally be made for asylum-seekers with special needs who generally require additional legal, as well as other, assistance.[39] This would include, among others: children, people with disabilities, individuals with mental health issues or intellectual capacity challenges, people with low literacy, people with language access issues, and victims of violence, torture or other traumatic experiences.

C. Best Practices

In furtherance of the principles laid out above, UNHCR notes that there are several "building blocks" that, in UNHCR's observation and consultation with States around the world, serve as good practices in establishing fair and efficient asylum systems. The purpose of any asylum system should be to grant asylum early to those who need it and to reject applications of those not in need of international protection in a timely fashion.[40] Good practices in moving toward such a system include:[41]

1) **Integrated border processing, reception and registration**, that ensures asylum-seekers are identified as early as possible, have access to a range of services responsive

themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual 's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence.").

[33] *Note on the Principle of Non-Refoulement*; *Due Process in Procedures,* ¶ 267.

[34] UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, ¶ 2 (2012), *available at* https://www.refworld.org/docid/503489533b8.html [hereinafter Detention Guidelines].

[35] Detention Guidelines, ¶ 18.

[36] Detention Guidelines, ¶ 18.

[37] Detention Guidelines, ¶ 20.

[38] *See* Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 97 (discussing restrictions on freedom of movement and noting that closed reception centers would amount to detention); Human Rights Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person*, CCPR/C/GC/35, ¶¶ 2, 5 (Dec. 16, 2014) (providing examples of various forms of deprivation of liberty, such as house arrest, confinement to restricted areas in an airport, involuntary transportation, and solitary confinement, among others).

[39] *Fair & Efficient Asylum Procedures,* at 3.

[40] Fair and efficient procedures can benefit both refugees and persons not in need of international protection. *See* Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 155. Refugees benefit because "they can receive a decision promptly, be assured of safety, and begin to rebuild their lives," and prompt identification of individuals not entitled to international protection may increase the chance of successful return to their countries of origin, as that may occur in a timely and efficient manner and before they have started to settle and integrate in the host country. *Id.*

[41] *See generally Effective Processing of Asylum Applications*.

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to their needs and vulnerabilities, receive basic humanitarian assistance, and have access to information and legal orientation about the asylum process. Such reception arrangements reduce overcrowding at ports of entry, minimize delays and inefficiencies, efficiently identify those with possible fear of return and claims for international protection, and meet humanitarian needs of vulnerable groups.

2) **Legal information, legal assistance, and legal representation**, which, if provided at the earliest possible moments, promotes fairness and efficiency. This can entail cooperation between border officials, adjudicators, and legal service providers. UNHCR is encouraged by U.S. innovation on this front (for example, some programs from EOIR) and urges that it form a vital part of border processing as early as possible in the procedure.

3) **Non-adversarial adjudication**, in which adjudicators work with applicants to establish necessary facts and analyze them in accordance with international standards.[42] In UNHCR's experience, non-adversarial adjudication is both more efficient and more appropriate for asylum-seekers, leading to more accurate results. This approach is more conducive to asylum-seekers sharing their personal experiences in a safe and dignified manner than adversarial procedures, thereby promoting full and reliable disclosure. It allows the asylum-seeker to present their claims for protection as truthfully and comprehensively as possible and the adjudicator to ascertain information as objectively and comprehensively as possible, helping reduce delays in the adjudicatory process.

4) **Case triaging and differentiated processing modalities**, which apply clear, objective, and non-discriminatory criteria to channel, or "triage," an applicant's case based on their profile into differentiated case processing streams.[43] For example, claims that appear to have less complex legal or factual issues—e.g., those with a profile likely to be manifestly well-founded (cases deemed meritorious at the pre-screening stage) or manifestly unfounded (cases that are clearly fraudulent, abusive, or not related to the criteria for asylum)—can be triaged into accelerated and / or simplified procedures. This allows for regular processing for the remaining cases, including those which were initially triaged for accelerated or simplified procedures but were found to include complex and / or sensitive elements requiring a more thorough assessment. This case management approach, applied with appropriate safeguards, allows authorities to enhance protection and build efficiencies by dedicating greater resources to the adjudication of complex claims and by promoting specialization with the corps of adjudicators.

UNHCR offers these general comments as indicative of the foundational principles and practices in establishing fair and efficient asylum systems and bases the following specific comments on these principles, among others.[44] In addition to the specific comments below, UNHCR stands ready to engage further with its U.S. government partners on these general principles, including through examination of good practices from UNHCR operations and from other States receiving asylum-seekers in similarly complex settings.

[42] Relevant information to be collected includes personal facts and circumstances, country of origin information, and supporting documentation. *See* Handbook, ¶¶ 196-97, 201 (discussing key principles governing fact-gathering and the need to ascertain "a wide range of circumstances"); UNHCR, *UNHCR RSD Procedural Standards, Unit 3: Reception & Registration for Mandate RSD*, § 3.2.1 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5e87075b2.html [hereinafter *UNHCR RSD Procedural Standards: Reception & Registration*] (noting the neeed to collect information related to the reasons and circumstances of an asylum-seeker's departure from the country of origin as part of the RSD application procedure); Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 156 (discussing the need for country of origin and other information services to support a fair and efficient asylum system).

[43] *See generally Aide-Memoire & Glossary of Case Processing Modalities*.

[44] Other relevant principles, for example, include ensuring confidentiality. *See generally* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (May 2015), *available at* https://www.refworld.org/pdfid/55643c1d4.pdf.

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III. Provision of Information and Access to Legal Assistance and Representation

In this section, UNHCR offers general principles and best practices regarding provision of information and access to legal information, assistance, and representation, which constitute key due process standards for fair and efficient asylum procedures. This is followed by a discussion of one of its principal concerns related to the IFR—asylum-seekers' access to legal information, assistance, and representation throughout the procedure—which is relevant to virtually every step of the process and fundamental to the overall success of the rule. The next section considers the application of these principles in the context of various specific provisions of the IFR.

A. General Principles and Best Practices

Provision of information and access to legal information, assistance, and representation are, as underscored above, essential due process safeguards in asylum processing. Procedures that incorporate these, as well as other standards, promote consistency in decision-making and are essential for the integrity of a national asylum system based on the rule of law.[45] Asylum-seekers have the right to be informed, in a language they understand, of the different stages of the procedure, their rights and obligations at each step, and the means to exercise their rights and fulfill their duties.[46] In principle, such information should be provided by competent authorities that the individual encounters first, who should be properly trained and qualified to provide it.[47] It may be complemented by information provided by NGOs and legal aid organizations.[48]

High-quality legal aid is instrumental to upholding the integrity, fairness, and transparency of the asylum procedure and crucial in ensuring that legal assistance and legal representation is provided.[49] Making legal service providers an integral part of the asylum system is essential both to facilitating access to legal aid and to advancing efforts by the State to maintain the integrity, fairness, and efficiency of the procedure.[50] Provision of legal assistance and counsel not only upholds asylum-seekers' rights, but it significantly strengthens the quality of decision-making and contributes to the efficiency of the asylum procedure, as it can improve an applicant's understanding of the process, streamline the identification of meritorious cases, discourage frivolous or fraudulent cases, reduce the number of appeals and requests to reopen cases, and shorten the time required to decide a claim.[51]

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[45] *Effective Processing of Asylum Applications*, ¶ 24.

[46] *Effective Processing of Asylum Applications*, ¶ 26.

[47] *Effective Processing of Asylum Applications*, ¶ 27; *Due Process in Procedures,* ¶ 171.

[48] *Effective Processing of Asylum Applications*, ¶ 27; *see also* Handbook, ¶ 192 (providing that, among other safeguards, asylum applicants should receive the necessary guidance as to the procedure to be followed and the necessary facilities for submitting their cases to the appropriate authorities); UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights*, ¶ 3.2.2. (Feb. 5, 2018), *available at* https://www.refworld.org/docid/5a9d6e414.html (citing ExCom Conclusion No. 8 (XXVIII) 1977, ¶ 53(6) and ExCom Conclusion No. 30 (XXXIV) 1983, ¶ 97(2)); *UNHCR RSD Procedural Standards: Reception & Registration*, § 3.1.3, ("Each UNHCR Office should develop materials and procedures to disseminate relevant information to all asylum-seekers in an accessible and easy to understand format and language.").

[49] *Effective Processing of Asylum Applications*, ¶ 29.

[50] *See Effective Processing of Asylum Applications*, at 3 (noting that "[c]lose coordination between relevant actors, such as border control, policy, and asylum authorities, as well as the participation of legal aid providers and civil society from the onset of the asylum procedure, can further make the asylum process faster and fairer").

[51] *Effective Processing of Asylum Applications*, ¶ 29; *see also UNHCR RSD Procedural Standards: Legal Representation*; *Evaluation externe de la phase de test relative à la restructuration du domaine de l'asile, protection juridique: conseil et representation juridiques* (Rapport final) (Nov. 17, 2015), *available at* https://boris.unibe.ch/136104/8/160419_Rapport_final_phase_test_asile_f.pdf; Off. of the Inspector General, U.S. Dep't of Justice, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*, at 33 (Oct. 2012), https://oig.justice.gov/reports/2012/e1301.pdf ("EOIR advised us that a lack of representation can significantly delay proceedings because of the extra time needed to provide explanations to, and solicit information from, the [noncitizens]"). In Switzerland, for example, UNHCR notes that the provision of timely access to information, counseling, and legal

The U.N. Human Rights Committee has noted that "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."[52] This is certainly the case for asylum-seekers, who may not be able to proceed with an asylum claim without the assistance of a qualified attorney or representative because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of their host country.[53] The serious consequences of erroneous decisions in the asylum context—principal among them, refoulement—make the provision of legal assistance and representation all the more important.

In this context, government facilitation of and funding for legal aid constitutes a critical safeguard, enhances the efficiency and integrity of the asylum system, and is a vital part of asylum processing, including that at the border. In UNHCR's opinion, it is a best practice for the government to facilitate the organization and fund legal assistance programs, as well as representation by qualified legal professionals—that is, those with specialized knowledge and experience in asylum matters—for all asylum-seekers from the very outset of the procedure.[54] Free legal aid must be made available to asylum-seekers who cannot afford legal assistance and representation on their own, and this is especially important in cases involving complex asylum claims or applicants with special needs who require additional assistance navigating the process.[55]

Through its global experience, UNHCR has observed that provision of information about the process and, in particular, legal representation enhance both the fairness and efficiency of the procedure. For example:

- **Spain** utilizes an accelerated asylum procedure at its border that incorporates special due process guarantees as compared to its ordinary inland procedure.[56] These reflect the applicant's risk of refoulement in case of an erroneous decision.[57] One of those guarantees is mandatory legal assistance from the beginning of the procedure by a specialized legal aid lawyer provided by the local bar association, a specialized NGO lawyer from an organization funded by the State, or a private lawyer.[58] In the event that legal assistance is not provided, the process is invalidated, and the individual is able to access territory.[59]

- **Switzerland** implements an accelerated procedure, and, to preserve the fairness of the procedure and comply with due process standards, asylum-seekers subject to it are entitled to free legal counseling, as well as free legal representation, by a qualified lawyer

representation by a lawyer of a non-governmental organization has improved applicants' trust in the system as well as led to an improved understanding of the process and what is expected from the applicant. *Effective Processing of Asylum Applications*, at 27.

[52] Human Rights Comm., *General Comment No. 32,* ¶ 10.

[53] *Fair & Efficient Asylum Procedures*, at 3 (Sept. 2, 2005).

[54] Where government-funded legal aid is not possible, however, at a minimum it should be assured that non-governmental legal aid providers can provide representation in any part of the procedure and have access to their clients in any facilities receiving asylum-seekers.

[55] *See Fair & Efficient Asylum Procedures,* at 3; *UNHCR RSD Procedural Standards: Legal Representation*, §§ 2.7.2, 2.7.4 (offering guidance on the right to legal representation, qualifications, appointment and termination of legal representation, and the role and responsibilities of the legal representative). Free legal representation is provided in Switzerland and The Netherlands at all stages of the procedure. It was also included in the latest EU Proposal for an Asylum Procedures Regulation. *See* UNHCR, *UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulation*, COM (2016) 467, at 15 (Apr. 2019), *available at* https://www.refworld.org/docid/5cb597a27.html (providing guidance on the right to legal representation, qualifications, appointment and termination of legal representation, and the role and responsibilities of the legal representative).

[56] *Effective Processing of Asylum Applications*, at 22-23.

[57] *Effective Processing of Asylum Applications*, at 22-23.

[58] *Effective Processing of Asylum Applications*, at 23.

[59] *Effective Processing of Asylum Applications*, at 23.

from the very beginning of the procedure.[60] There exist standards and obligations regarding legal representation to advance the efficiency and quality of legal aid.[61] An evaluation last year revealed that "the provision of legal aid in the federal asylum centres is overall running well, the quality of the legal submissions is solid and have a positive impact on the quality of the asylum process."[62]

While these countries' accelerated border procedures may face their own challenges, they do contain sound and solid procedural safeguards, like guaranteed legal aid, which UNHCR finds instructive to strengthening State practice elsewhere.[63]

B. Concerns Regarding Access to Legal Information, Assistance, and Representation During the IFR's New Procedure

While UNHCR observes that asylum-seekers retain a right to obtain their own counsel under the IFR and welcomes other positive changes that promote a fairer and more efficient system, UNHCR notes with concern that the rule does not guarantee or expand access to legal information, assistance, and representation at any step of the process. As described in the subsequent sections in greater detail, this gap is particularly concerning given the narrow window of time asylum-seekers will have to present their claims. Legal support is essential both to understanding the timelines and to preparing and submitting a meaningful claim in such a short timeframe, and it allows for greater efficiencies as it saves adjudication time when a coherent, quality asylum claim is presented. Moreover, the short timeframes leave little time for asylum-seekers to find and obtain counsel. Asylum procedures in the United States—from pre-screening, to recognition or denial, and through appeal—are highly complex and difficult to navigate for anyone not well-informed about the system but especially for those with low levels of literacy, language access issues, or other special needs. Accordingly, UNHCR is troubled that, without anything specific in terms of legal orientation or representation, the IFR's new adjudicatory framework may not uphold and advance this core due process standard. As a result, asylum-seekers may receive erroneous decisions and face a higher risk of refoulement, and it will limit efficiency gains in the new procedure, such as by generating an increased rate of appeal.

UNHCR has serious concerns about the rapid timeframe for the procedure outlined by the rule, which may make it difficult for asylum-seekers to access counsel, begin to process any trauma suffered, gather critical evidence, and otherwise adequately prepare to present their cases effectively. This is especially so since the rule is not complemented by expanded and guaranteed access to legal aid. It appears that the Government envisions this process will be completed within approximately five to six months—including a fear pre-screening within a month of arrival, an asylum merits interview and decision within two months of a positive fear determination, and immigration judge review of a denied asylum application within around three months, with some flexibility and exceptions for certain cases. While in some countries with less complex asylum systems this timeframe might be reasonable, in the U.S. context UNHCR is concerned that it could be problematic given the highly involved domestic procedure, with many steps, exacting evidentiary rules, and complex jurisprudence. Despite the move to a more non-adversarial procedure (discussed in more detail below), asylum-seekers may nonetheless find it particularly

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[60] *Effective Processing of Asylum Applications*, at 27. UNHCR notes that this is not yet the case for people lodging asylum applications while in detention or prison. *Id.*

[61] *Effective Processing of Asylum Applications*, at 27.

[62] *Effective Processing of Asylum Applications*, at 27-28; Anne-Laurence Graf et al., Swiss Competence Center for Human Rights, *Évaluation PERU: Protection Juridique et Qualité des Décisions Rapport Final (Résumé)* 13 (Aug. 16, 2021), *available at* https://www.skmr.ch/cms/upload/pdf/2021/210826_Evaluation_PERU_Kurzbericht_FR.pdf.

[63] *Effective Processing of Asylum Applications*, at 24.

challenging to navigate the procedure in such a short time frame without an attorney, though, even with representation, there could be difficulties related to the expedited nature of the process.[64]

UNHCR observes with concern that representation rates are low for certain categories of asylum-seekers in the United States, and that being represented correlates with a more than threefold better chance of gaining protection.[65] It is UNHCR's understanding that, in the United States, it often can take asylum-seekers months, if not longer, to look for and obtain legal counsel.[66] Legal service providers have noted the disparity between the IFR's timeline and the length of time it frequently takes for asylum-seekers to access counsel. One publication, for instance, highlights that "[m]any legal service providers have weeks or months-long waits for an initial legal consultation and simply will not be able to assist asylum-seekers forced into this rushed process."[67]

Moreover, even persons seeking international protection who have counsel may face challenges in meeting these rapid deadlines, and UNHCR notes with concern that the timeframes could be untenable for an efficient, fair process. Often, for example, qualified legal representatives must meet with their asylum-seeking clients for a number of hours, frequently over the course of multiple interviews and meetings, to sufficiently build trust and understand and develop the facts and basis of the claim such that the case can be presented effectively to adjudicators, and they

[64] *See infra* fn. 68 (describing the current realities of asylum practice in the United States).

[65] UNHCR observes that, under the INA, individuals have a right to counsel in immigration court proceedings, but at no expense to the government. 8 U.S.C. § 1362. As a result, in the majority of cases, individuals must pursue their claims for protection or relief *pro se* due to a variety of barriers to representation, including financial and geographic obstacles. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (Dec. 2015). One study found that "only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation." *Id.* More recently, data available from EOIR indicates that, during the first quarter of 2022, 53 percent of respondents were represented. Exec. Off. for Immigration Rev., *Adjudication Statistics* (Jan. 19, 2022), *available at* https://www.justice.gov/eoir/page/file/1062991/download. Different sources appear to use distinct methods of calculating representation rates. *See id.* (explaining how representation status is recorded); Eagly & Shafer, at 13-16 (discussing the method used to calculate representation rates). Nevertheless, data has consistently shown that those with representation fare far better than those proceeding *pro se*. Individuals in removal proceedings with representation are five-and-a-half times more likely to succeed on their claims than those without counsel. Eagly & Shafer, at 2. While legal assistance generally is highly beneficial to asylum-seekers, UNHCR also notes that individuals who do consult with or retain representation can face challenges due to fraudulent practices, which are often referred to as the "unauthorized practice of immigration law" (UPIL). A long-standing problem, UPIL "results in serious consequences including devastating financial loss and severe immigration ramifications such as deportation." *Avoiding the Unauthorized Practice of Immigration Law*, AM. BAR ASS'N (July 13, 2021), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/avoiding-the-unauthorized-practice-of-immigration-law/; *About Notario Fraud*, AM. BAR ASS'N (Nov. 11, 2020), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/.

[66] A 2012 study by EOIR found that in cases where noncitizens requested continuances to obtain counsel, immigration judges most of the time limited continuances to two, and the average length of each continuance to seek representation was 53 days. Off. of the Inspector General, U.S. Dep't of Justice, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*, at 35-36 (Oct. 2012), https://oig.justice.gov/reports/2012/e1301.pdf. More recently, during the first seven months that the Dedicated Docket—an accelerated procedure intended to provide decisions to asylum seeking families within 300 days of their initial master calendar hearing—was implemented between May and December 2021, data revealed that only 15.5 percent of asylum-seekers on the Dedicated Docket were represented by counsel, despite the fact that Dedicated Docket court locations were within established communities of legal service providers. TRAC, *Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts* (Jan. 13, 2022), https://trac.syr.edu/immigration/reports/674/. The report continues, "Representation rates on asylum cases which were decided during this same period—almost all on a regular, rather than expedited, docket—show 91.1 percent had attorneys. Thus, there is still a significant gap between the current representation rates for asylum-seekers on the Dedicated Docket—even those whose cases began at least six months ago—and the overall representation rates for asylum-seekers whose cases were decided during this period." *Id.*

[67] Human Rights First, *Asylum Process Rule Includes Welcome Improvements, But Critical Flaws Remain to Be Resolved*, at 2 (May 6, 2022), *available at* https://www.humanrightsfirst.org/sites/default/files/AsylumProcessIFRFactSheet.pdf. Another comment underscores that "the rule's short deadlines for submission of evidence and swift adjudication of cases will mean that it will be practically impossible for law school clinics . . . to represent asylum-seekers with positive credible fear or reasonable fear determinations as we have been doing for years." Philip G. Schrag & Andrew I. Schoenholtz, Center for Applied Legal Studies, Georgetown University Law Center, Comment on CIS No. 2692-21; DHS Docket No. USCIS-2021-0012, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, published at 87 Fed. Reg. 18978 (Mar. 29, 2022), at 2. In addition, the comment goes on to note, "It will ordinarily take [asylum applicants] several months to find pro bono counsel that is open for intake." *Id.* at 7.

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may require time to identify and gather evidence, particularly that coming from asylum-seekers' countries of origin. While adjudicators have a shared duty to ascertain facts, applicants with more time can better prepare, with the help of their attorneys, to present their claims, meaning that adjudicators can spend less time gathering information themselves. This supports a more efficient process. In the context of the existing evidentiary burden under U.S. law, the asylum system should enable people to meet the basic requirements.[68] This may require either flexibility in terms of timelines and / or adjusted evidentiary standards concerning what is required within the time allotted. Such balance is essential to ensure that asylum-seekers are not unduly denied protection.

UNHCR notes that the United States has previously undertaken innovative and welcome initiatives with respect to legal information and assistance, including through the Legal Orientation Program run by EOIR. Similar efforts should be incorporated into this procedure outlined by the IFR, acknowledging that now the individual's case will be processed entirely in the first instance outside of EOIR's purview. Nevertheless, UNHCR observes that this type of program may not be sufficient to uphold this core due process standard that includes access to legal assistance and representation.

UNHCR recommends that the IFR not be implemented without ensuring that asylum-seekers are provided with legal information, assistance, and, for those who desire it, representation, from the outset through the end of the procedure. Legal aid should be provided to enhance fairness and efficiency, particularly in the early stages of the process. Frontloading the procedure in this manner will help ensure that grantable cases are decided accordingly by USCIS, promoting a quality procedure and minimizing the unnecessary addition of more cases to the immigration court backlog.

UNHCR urges the Government to ensure that information as well as legal assistance and representation are accessible throughout the asylum process, including prior to and throughout the credible fear interview.[69] The Government should facilitate and fund legal assistance, as well as full representation. More specifically, UNHCR recommends that:

- The Government guarantee that from the moment of encounter, asylum-seekers at the border receive meaningful and accurate information about the procedure for seeking international protection, including the credible fear process, and about the right to legal

[68] The standard for corroboration in asylum cases under U.S. law has become increasingly difficult for applicants to meet, making their ability to submit corroborating evidence even more critical. Since the passage of the REAL ID Act in 2005, an immigration judge can require an applicant to provide corroborating evidence to sustain his or her burden of proof, even if the immigration judge finds the applicant's testimony credible, persuasive, and specific. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302 (codified at 8 U.S.C. § 1158(b)(1)(ii) (2014)); 8 U.S.C. § 1158(b)(1)(B)(ii) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.'"); U.S. Citizenship & Immigration Services, *Asylum Officer Basic Training, Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, Evidence*, at 7 (Sep. 14, 2006) ("If the asylum officer 'determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."); Marisa Moore Apel, *"You Should Have Known": The Need for Evidentiary Notice Requirements in Immigration Court*, 90 U. CIN. L. REV. 688, 691-96 (2021), *available at* https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1431&context=uclr (discussing corroboration under the REAL ID Act of 2005 and trends in how its requirements have been applied across jurisdictions). Legal service providers already have expressed concern over the impact of the IFR's timeline on representation of asylum-seekers in this procedure. One comment underscores that "the timelines in the rule do not take account of the realities of asylum practice which require months of time for applicants to obtain counsel and more months before counsel can collect all the necessary evidence pursuant to the REAL ID Act, much of which must come from witnesses in their clients' home countries who in many cases are themselves terrified of being persecuted." Philip G. Schrag & Andrew I. Schoenholtz, Center for Applied Legal Studies, Georgetown University Law Center, Comment on CIS No. 2692-21; DHS Docket No. USCIS-2021-0012, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, published at 87 Fed. Reg. 18978 (Mar. 29, 2022), at 8-9.

[69] See *infra* section III.E, which offers recommendations on appropriate due process and legal representation in appeals procedures.

representation. This step requires training and equipping border authorities with information and resources, and such information must be made available at government expense. UNHCR further recommends that the Government ensure that NGOs and UNHCR can complement that information, including through direct access to asylum-seekers.

- NGOs be capacitated to provide legal assistance, whether in groups or through individual consultations, to all who want it. This should happen as early as possible and throughout the procedure, regardless of custodial arrangement. It is a best practice for the Government to fund such assistance.

- The Government ensure that NGOs, legal aid organizations, and other lawyers have access to all facilities in which asylum-seekers going through the new procedures are being held, including prior to and during the credible fear process. This will enable asylum-seekers to exercise the existing right to obtain legal assistance and representation at all stages of the procedure, including when the application is prepared, filed, amended, or supplemented.

- The Government fund legal representation for asylum-seekers subject to this new adjudicatory procedure. Free legal aid should be offered to all asylum-seekers who are unable to afford it on their own, and particular attention should be given to cases involving complex claims and asylum-seekers with special needs, including, but not limited to, children, people with disabilities, individuals with mental health issues or intellectual capacity challenges, people with low literacy, people with language access issues, and victims of violence, torture or other traumatic experiences.

IV. Observations on Specific Provisions of the Interim Final Rule

In this section, UNHCR offers observations and comments on certain aspects of the IFR.[70] The below analysis generally mirrors the structure of the discussion in the IFR for ease of reference, providing in each case discussed an overview of how the proposed change will affect persons seeking international protection, followed by consideration of the relevant international legal standards.

A. Credible Fear Pre-Screening Process

The IFR reinstates several key aspects of previous pre-screening procedures used in expedited removal that existed prior to changes advanced by the previous administration, which intended to elevate the threshold to access full adjudicatory procedures, and it removes other features of the earlier framework.[71] UNHCR observes that, in certain key aspects, the credible fear pre-screening

[70] UNHCR submitted comments in response to the proposed iteration of this rule. UNHCR, Comments of UNHCR on the Proposed Rule from DOJ and DHS: "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers" (Oct. 19, 2021), *available at* https://downloads.regulations.gov/USCIS-2021-0012-5192/attachment_2.pdf [hereinafter UNHCR, Comments on Proposed Rule (Oct. 2021)].

[71] *See* Interim Final Rule, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18,078, 18,091-95 [hereinafter Interim Final Rule]. The IFR provides an explanation of why the Government has decided to amend related provisions that appeared in the Global Asylum Rule. *Id.* UNHCR submitted extensive comments to the Global Asylum Rule, strongly recommending that it not be implemented because its provisions are incompatible with international legal standards and likely could have grave consequences for individuals seeking protection in the United States. *See* UNHCR, Comments of UNHCR on "Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review" (July 15, 2020), *available at* https://www.regulations.gov/comment/EOIR-2020-0003-5471; *see also* UNHCR, Comments of UNHCR on "Security Bars and Processing" (Aug. 10, 2020), *available at* https://www.refworld.org/cgi-

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within expedited removal has, since its inception, diverged from international standards for accelerated procedures and that the changes introduced by the IFR would not fundamentally alter this assessment. Nonetheless, the changes to the credible fear pre-screening put forward in the IFR are, on the balance, positive.

Standards for Fear Pre-Screenings

The IFR would recodify the "significant possibility" standard for fear screenings, to be applied in evaluations of all three types of claims for protection—asylum, withholding of removal, and protection under CAT—thereby undoing the higher "reasonable possibility" standard that the prior administration sought to implement for withholding of removal and CAT claims.[72] Realigning the credible fear standard with its original articulation moves in the direction of realizing its protective intent and helps advance the fundamental protections of the 1951 Convention and its 1967 Protocol. Nevertheless, UNHCR remains concerned that the "significant possibility" standard reinstated by the IFR may preclude access to asylum procedures for people in need of international protection, leading to a greater risk of refoulement.

As a preliminary matter, UNHCR notes that the credible fear pre-screening is meant to determine whether an individual is admitted into the asylum system for a full merits procedure. Such "admission procedures" do not align with the uses of "accelerated procedures" considered appropriate under international standards. Instead, as a general matter, "accelerated procedures," which can serve as a case management tool, should guarantee full merits consideration of an asylum claim conducted on a truncated timeline and incorporate safeguards to ensure fair and efficient claim determination.[73] Claims initially identified as likely to be manifestly unfounded—those that are fraudulent, clearly abusive, or not related to the criteria for granting refugee status—may be channeled, or "triaged," into an accelerated procedure that includes full merits consideration in a shortened timeframe.[74] Given its truncated nature, the credible fear pre-screening is somewhat akin to an accelerated procedure, but there are important aspects that distinguish it from acceptable use under international standards: the absence of full consideration of the claim; the absence of the full range of procedural safeguards that would accompany full consideration; and an inappropriate standard for rejection which is inconsistent with UNHCR's "manifestly unfounded or clearly abusive" test.[75]

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bin/texis/vtx/rwmain?page=search&docid=60f846854&skip=0&query=comments&coi=USA; UNHCR, Comments of UNHCR on "Security Bars and Processing; Delay of Effective Date" (Apr. 21, 2021), *available at* https://downloads.regulations.gov/USCIS-2020-0013-5106/attachment_1.pdf; UNHCR, Comments of UNHCR on "Security Bars and Processing; Delay of Effective Date" (Feb. 28, 2022), *available at* https://downloads.regulations.gov/USCIS-2020-0013-5135/attachment_1.pdf.

[72] Interim Final Rule, at 18,091-92. *See also* Notice of Proposed Rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,268 (June 15, 2020). The "significant possibility" standard requires that an individual demonstrate a "substantial and realistic possibility of success" on the merits of an application for asylum, withholding of removal, or CAT protection; the individual does not have to "show that he or she is more likely than not going to succeed when before an immigration judge." U.S. Citizenship & Immigration Services, *Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations*, at 14-16 (Feb. 13, 2017). Thus, in the credible fear of torture context, "the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country." *Id.* at 36. The "reasonable possibility" standard, which sets a higher threshold than "significant possibility," is the same as a well-founded fear of persecution in an asylum case. U.S. Citizenship & Immigration Services, *Reasonable Fear of Persecution and Torture Determinations*, at 11 (Feb. 13, 2017). It requires that an applicant establish a reasonable possibility that he or she would be persecuted or tortured in the country of removal. *Id.* at 10.

[73] *See Aide-Memoire & Glossary of Case Processing Modalities*, at 8; *Effective Processing of Asylum Applications*, at 14, 16.

[74] *See Effective Processing of Asylum Applications*, at 15 (explaining that manifestly unfounded cases will have very low protection rates and can be streamlined through accelerated procedures).

[75] UNHCR observes that the IFR refers to credible fear pre-screenings as a type of accelerated procedure. *See* Interim Final Rule, at 18,119. Under international law, accelerated procedures are distinct from admissibility procedures. UNHCR views the U.S. government's credible fear pre-screening as an admissibility procedure. An accelerated procedure involves a full consideration of the merits, has due process safeguards in place, and proceeds on an accelerated timeline. Credible fear pre-screening is not a full merits adjudication and lacks key procedural safeguards. Thus, UNHCR would not consider it on its own an accelerated procedure.

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In terms of the standard applied, given that the credible fear pre-screening determines access to the U.S. asylum procedure, the standards applied therein must guard against the risk that refugees are returned to places where they face persecution (direct refoulement) or onward removal to an unsafe country (indirect refoulement), which would violate the core principle of non-refoulement that is enshrined in Article 33(1) of the 1951 Convention. Putting UNHCR's concerns about the "admission" nature of the credible fear pre-screening aside, in order to better align with international standards, at a minimum the standard applied to find "credible fear" should align with the internationally recognized standard of "manifestly unfounded—that is, only those claims that are clearly fraudulent, abusive, or not related to the criteria for granting refugee status should be "screened out."[76] All other claims should proceed for a full determination on the merits. The "significant possibility" standard previously adopted by the United States was already out of step with the international standard,[77] and, although returning to such a standard is a move in the right direction, additional modifications are needed to mitigate the risk of refoulement.

Considering that, in this new framework, the credible fear interview takes on additional significance because the written record generated through the fear determination will serve as the asylum application, efforts to make legal information, assistance, and representation as accessible and robust as early as possible will be important to preserve asylum-seekers' rights and enhance the efficiency of the procedure. More specifically, in advance of the credible fear interview, asylum-seekers should receive information about the asylum process, and that must be provided in a manner and language which the individual understands.[78] This should comprise information about rights the asylum-seeker has in the asylum process itself, including applicable deadlines, the right to legal representation, the interview, and appeals. Legal representation itself should be accessible *throughout* the process, at every stage, including during credible fear pre-screening.

UNHCR recommends that, as a general matter, credible fear pre-screenings not be used without remedying the distinctions between those and accelerated procedures. As suggested above, this would include complete consideration of the claim and a corresponding and comprehensive set of safeguards. Until that time, all asylum-seekers should have access to full proceedings.

If the credible fear procedure is to exist, however, UNHCR recommends that the Government not implement the burden of proof re-established under the IFR. While UNHCR would welcome a move back to "significant possibility" if the alternative were retaining "reasonable possibility," it urges the Government to revise the burden of proof to align with international standards. Accordingly, UNHCR considers "manifestly unfounded" the most appropriate standard to apply during pre-screening[79]—that is, unless a person's claim is assessed to be clearly unrelated to the

[76] ExCom Conclusion No. 30, ¶(e). The Executive Committee of UNHCR, during its 34th Session, recognized that it may be useful to derive consensus among States on how to address applications that are considered "clearly abusive" or "manifestly unfounded." UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/G/01/12, ¶¶ 27-28 (May 31, 2001), *available at* https://www.refworld.org/docid/3b36f2fca.html [hereinafter *Global Consultations*]; UNHCR, *Fair & Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, at 4-5 (July 25, 2018), *available at* https://www.refworld.org/docid/5b589eef4.html; *see also* Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 175 (2017).

[77] When the U.S. Congress created the credible fear pre-screening, it recognized that the "substantial possibility" standard exceeded the internationally recognized "manifestly unfounded" standard, but nonetheless specified that the former was "intended to be a low screening standard for admission into the usual full asylum process." *See* 142 Cong. Rec. S11491-02 (Sep. 27, 1996) (statement of Sen. Hatch); *see also* Brief for UNHCR as Amicus Curiae, *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487, 19-16773, 2019 WL 5396739, at 21-22 (9th Cir. Oct. 15, 2019) (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).

[78] *See Due Process in Procedures*, ¶ 203.

[79] UNHCR acknowledges that the "significant possibility" standard is statutory, not regulatory. *See* 8 U.S.C. § 1225(b)(1)(B)(v); Interim Final Rule, at 18,130 (discussing the use of the "significant possibility" standard in credible fear pre-screenings). That fact, however,

criteria for granting asylum, or other protective status, or clearly fraudulent or abusive during the credible fear interview, they should have access to full proceedings.

In addition, UNHCR recommends that, similar to identifying manifestly unfounded claims, asylum officers screen to identify manifestly well-founded claims during the credible fear process. Manifestly well-founded claims could be granted more expeditiously than claims that are more complex—whereas complex claims would be assessed under full proceedings, manifestly well-founded claims, for instance, could potentially be adjudicated after a shorter, less involved follow-up interview to the credible fear pre-screening.[80] Not only would such mechanism advance granting protection more quickly to certain asylum-seekers, it would leverage the investment of human and other resources made in the credible fear pre-screening to prevent adding unnecessarily to an already large caseload of pending applications.

Non-Application of Mandatory Bars During Pre-Screening

The IFR amends regulations such that mandatory bars would not apply during the credible fear pre-screening determination.[81] As it did with the proposed iteration of this rule, UNHCR welcomes this provision affecting an early step in U.S. asylum procedures, as exclusion issues are not appropriately dealt with in accelerated procedures. Implementing mandatory bars during pre-screening could lead to the denial of access to territory and full asylum procedures for some asylum-seekers with valid claims for protection. Especially in view of the potentially serious consequences of an erroneous determination—an asylum-seeker who wrongfully receives a negative fear determination could be returned to a place where they will suffer persecution, violence and even death—UNHCR considers it inappropriate in principle to consider bars to asylum during pre-screening.[82]

Under international standards concerning the identification of international protection needs, as noted above, only those claims that are identified on their face as likely to be manifestly well-

does not cure the discrepancy between U.S. pre-screening practices and international standards. UNHCR encourages the U.S. government to revise the applicable statutory provision, if necessary, or to re-interpret "significant possibility" to include all claims that are not manifestly unfounded—in other words, all claims that are not clearly fraudulent, abusive, or unrelated to the criteria for determining refugee status. UNHCR observes that, in times when the "significant possibility" standard has been interpreted more generously, the passage rate has been around 75-80%. *See* U.S. Dep't of Homeland Security, *Credible Fear Cases Completed and Referrals for Credible Fear Interview* (last accessed May 9, 2022), https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview. It is critical to ensure, however, that all those individuals with claims that are not clearly fraudulent, abusive, or unrelated to the criteria for refugee status have an opportunity to access full asylum procedures.

[80] *See Effective Processing of Asylum Applications*, at 14-16 (discussing manifestly well-founded, manifestly unfounded, and complex cases, as well as describing regular, simplified, and accelerated adjudication procedures). This recommendation aligns with previous recommendations made by the U.S. Commission for International Religious Freedom (USCIRF) in its prior assessments of the impact of expedited removal on asylum-seekers. *See* USCIRF, Report on Asylum Seekers in Expedited Removal – Volume 1: Findings & Recommendations 8 (Feb. 2005), *available at* https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf. Examples of systems in other countries demonstrate how this approach can work well. In Canada, for example, authorities have expanded the use of triaging and fast-tracking refugee claims to either a paper-based review or short hearing in recent years. UNHCR, Effective Processing, ¶ 19. In some cases, Canadian authorities can decide a case without a hearing if identity is established by reliable documents, evidence regarding risk to the applicant is clear, complex legal or factual issues are not present, and the country or claim type has an acceptance rate of 80 percent or higher. *Id.* To maintain procedural fairness, "only positive claims are decided through the file-review process." *Id.* Short hearings, which typically can be completed within two hours, may be used if the country or claim type has an acceptance rate of 80 percent or more or an acceptance rate of 20 percent or less, typeically requires the resolution of just one or two determinative issues, and complex legal or factual issues do not arise at the hearing. *Id.* "To support the triaging and make files hearing ready, Adjudicative Claim Officers (ACO) have been recruited to support the IRB members to open and prepare the case files, using data-driven key searches for the purpose of triaging. Based on set out crtieria and information available on the file, an ACO can further propose to the [Immigration and Refugee Board] members if a claim can be decided with no hearing, a short hearing, or a full hearing." *Id.*

[81] Interim Final Rule, at 18,092-94.

[82] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees,* ¶ 31, HCR/GIP/03/05 (Sept. 4, 2003), *available at* https://www.refworld.org/docid/3f5857684.html ("Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures . . . .").

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founded or manifestly unfounded should, subject to appropriate procedural safeguards, be assessed in an accelerated procedure.[83] UNHCR's position is that it is contrary to international law to deprive asylum-seekers of access to a full examination of the substance of their claim based on the summary application of an exclusion ground. Exclusion is a complex inquiry into factual and legal questions involving not only international refugee law, but in many cases international human rights, humanitarian law, and international criminal law. This cannot be adequately assessed in a screening interview, particularly given the procedural shortcomings (such as truncated timelines, lack of legal assistance, current gaps in information about the procedure, difficulties accessing translation and interpretation, and absence of time to recover from recent trauma) that often occur in these contexts.

UNHCR has acknowledged that accelerated procedures can benefit both States and applicants by allowing for the efficient identification of individuals with possible international protection needs.[84] However, international law requires that certain due process considerations be taken into account in the use of accelerated procedures to minimize the risk of a flawed decision.[85] In UNHCR's experience, it is often challenging for asylum-seekers to obtain representation during pre-screening, and those without counsel may have received limited or no legal information or might not have a full understanding of their rights or the consequences of failing to exercise them. In this setting, it would be nearly impossible for an asylum-seeker to have sufficient support, or for an adjudicator to have ample time to gather information and evidence, for a proper exclusion determination.

UNHCR recommends that the Government implement this provision that proscribes application of mandatory bars to protection during pre-screening procedures.

Preservation of DHS Authority to Reconsider Negative Fear Determinations

In a welcome change from the Proposed Rule, the IFR preserves DHS's authority to reconsider negative credible fear findings affirmed by an immigration judge (IJ), though with new time and numerical limitations.[86] More specifically, under the IFR, DHS may continue to reconsider negative credible fear determinations as long as such reconsideration is requested or initiated within seven days of the IJ's decision to affirm USCIS's negative fear finding or prior to the asylum-seeker's removal, whichever comes first.[87] In addition, according to the revised provisions, only one request for reconsideration will be permitted, and reconsideration will only be allowed after IJ review, not while such review is pending.[88]

Under international law, asylum-seekers have a right to be heard with due process guarantees.[89] As a general rule, the right to be heard requires that asylum-seekers have an opportunity to present their claims in person, and claims should not be decided on the basis of a paper review

[83] ExCom Conclusion No. 30, ¶ 97(2)(e); *see also* UNHCR, *Global Consultations*, ¶¶ 4-5.
[84] *See, e.g.*, UNHCR, *Fair & Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, at 5-6 (July 25, 2018), *available at* https://www.refworld.org/docid/5b589eef4.html.
[85] UNHCR, *Fair & Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, at 13; *see also* UNHCR, *UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures (in the European Context)*, ¶¶ 11-12 (Jan. 1992), *available at* https://www.unhcr.org/en-us/protection/operations/4deccc639/unhcr-statement-right-effective-remedy-relation-accelerated-asylum-procedures.html.
[86] Interim Final Rule, at 18,094-95; *see also* Notice of Proposed Rulemaking, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906, 46,915 (Aug. 20, 2021) [hereinafter Proposed Rule].
[87] Interim Final Rule, at 18,094-95.
[88] Interim Final Rule, at 18,219.
[89] *Effective Processing of Asylum Applications*, ¶ 25.

alone in the first instance.[90] Considering that an asylum-seeker's own testimony is often the primary, if not the only, source of relevant information, an individual interview generally is essential to establishing the facts of the claim.[91] Through this interview, authorities should be able to identify the material elements of the asylum-seeker's claim, gather all necessary information from the asylum-seeker regarding those material elements, and probe the asylum-seeker's credibility.[92]

Recognizing the inherent challenges in accurately assessing refugee claims in pre-screening procedures, UNHCR observes that reconsideration of negative decisions by DHS has, at least in some instances, been critical to identifying cases that merit full consideration which previously failed.[93] In other words, the ability to seek reconsideration can be essential to upholding asylum-seekers' right to be heard. For instance, advocates have documented issues with the ability of asylum-seekers "to present evidence or participate meaningfully" in the IJ review procedure.[94] As a result, UNHCR is pleased that this additional pathway for re-examination of claims remains, for example in case an asylum-seeker may have new or supplementary facts, circumstances, or evidence to offer, to help reduce the risk of refoulement.

UNHCR recommends that the Government implement this piece of the IFR that preserves the authority of DHS to reconsider negative credible fear determinations, as it helps ensure that asylum-seekers may have their claims properly screened before removal, without imposing numerical or time constraints that might compromise an asylum-seeker's right to be heard. In addition, UNHCR notes that more robust access to legal assistance and representation as early as possible, including at the credible fear stage, will make the need for requests for reconsideration less acute and further advance the goal of implementing an efficient asylum procedure.[95]

B. Applications for Asylum

The IFR implements a new process for the filing and adjudication of asylum claims by individuals with credible fear in expedited removal.[96] Instead of asylum-seekers filing a claim themselves, under the IFR, "the written record of the credible fear determination created by USCIS during the credible fear process, and subsequently served on the individual together with the service of the credible fear decision itself, will be treated as an 'application for asylum.'"[97] In other words, USCIS would prepare and submit applications on behalf of asylum-seekers based on the elements of the claim disclosed during the credible fear interview. The application would be considered filed or received as of the time of service on the asylum-seeker for purposes of the one-year filing deadline and starting the clock for work authorization eligibility, and the IFR allows asylum applicants a defined, relatively brief timeframe during which they may amend, correct, or supplement the application.[98]

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[90] *Effective Processing of Asylum Applications*, ¶ 25; *see also UNHCR RSD Procedural Standards: Adjudication*, § 4.3.1.
[91] *UNHCR RSD Procedural Standards: Adjudication*, § 4.3.1.
[92] *UNHCR RSD Procedural Standards: Adjudication*, § 4.3.1.
[93] *See, e.g.*, Kathryn Shepherd & Royce Bernstein Murray, American Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* 23-24 (May 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf [hereinafter The Perils of Expedited Removal] (describing challenges in the IJ review process that may follow a negative credible fear determination).
[94] *See, e.g.*, The Perils of Expedited Removal, at 23-24.
[95] See *infra*, section III.B, which outlines UNHCR's recommendations on legal assistance and representation.
[96] Interim Final Rule, at 18,095-96; *see also* Proposed Rule, at 46,915-16.
[97] Interim Final Rule, at 18,095. Unlike in current practice, where a Form I-589 serves as the application, the application for asylum would comprise "the record of the positive credible fear determination, including copies of the asylum officer's notes, the summary of material facts, and other materials upon which the determination was based." Interim Final Rule, at 18,096.
[98] Interim Final Rule, at 18,095-96.

During the credible fear interview—which DHS anticipates will occur within thirty days of referral from Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE)[99]—the asylum officer would advise the individual of the consequences of filing a frivolous application, elicit relevant biographical information and facts to evaluate the fear claim, create a summary of material facts, read that back to the individual, and provide an opportunity for the individual to correct any errors.[100] Using this information from the credible fear interview, USCIS would generate the application, which is to include the asylum officer's notes from the screening and the basis for the positive fear determination.[101] The IFR anticipates that those who pass credible fear screenings "would have an asylum application on file with the Government within days," thereby meeting the one-year deadline and "avoiding the risk of filing delays."[102] The rule does not explicitly provide for access to counsel in this stage of the procedure. A second, more comprehensive interview before a USCIS asylum officer would then be scheduled for full evaluation of the asylum claim.[103]

Under international standards, procedures for determining refugee status must meet certain basic due process requirements. States are given considerable leeway to establish procedures, so long as they meet those standards and achieve their obligation of non-refoulement, as well as ensure that refugees are identified and can secure international protection.[104] Where possible, asylum-seekers who can complete their applications independently should be allowed to take it away to do so and to return it subsequently to the adjudicatory authority.[105] In principle, however, the notion that the government is an integral player in preparing the application is not incompatible with international standards, so long as key safeguards are in place to protect asylum-seekers' due process rights. Those key safeguards include the notion that the application should be put together in a timeframe and setting that account for the vulnerable situations asylum-seekers frequently face, given the importance of the factual information included in the initial application.[106]

In particular, asylum-seekers should have sufficient time first to receive and read information on the asylum procedure in a language they understand; to consider and gather the facts, circumstances, or evidence that may be relevant to their claims; and to complete all sections of the application, including where done with the assistance of a government official.[107] It is crucial that asylum-seekers have access to necessary facilities for submitting their cases, including access to legal assistance, qualified legal representatives, and competent interpreters who can help them.[108] UNHCR notes that both legal aid and interpretation can be harder to obtain for asylum-seekers in detention, which is a significant concern in light of the continued reliance on detention prior to and during the credible fear interview—this despite the clarifications in the IFR to parole-based regime.[109] In any event, individuals should have adequate space, privacy, and time to rest during this process prior to filing the application.[110]

In certain respects, the IFR, like the Proposed Rule, aligns with international standards on lodging asylum applications. Specifically, the procedure for preparing and filing applications set forth under the rule may aid asylum-seekers in advancing their claims, in part through the provision of

[99] Interim Final Rule, at 18,126.
[100] Interim Final Rule, at 18,095.
[101] Interim Final Rule, at 18,096.
[102] Interim Final Rule, at 18,096.
[103] Interim Final Rule, at 18,095-96.
[104] Handbook, ¶¶ 189-92.
[105] *See UNHCR RSD Procedural Standards: Reception & Registration*, § 3.2.4.
[106] *See UNHCR RSD Procedural Standards: Reception & Registration*, § 3.2.4; Handbook, ¶ 190.
[107] *See UNHCR RSD Procedural Standards: Reception & Registration*, § 3.2.4.
[108] *See UNHCR RSD Procedural Standards: Reception & Registration*, § 3.2.4; Handbook, ¶ 192(iv).
[109] *See infra* Section IV.E (addressing concerns over possible detention of asylum-seekers).
[110] *See UNHCR RSD Procedural Standards: Reception & Registration*, § 3.2.4; Handbook, ¶ 192(iv).

some necessary facilities (presumptively interpreters, at least), and by establishing a mechanism to submit applications efficiently. For example, having the government facilitate filing of applications on behalf of those without certain language skills or access to critical resources, such as those who do not speak English and may not be able to obtain an interpreter (particularly if they are detained), may help ensure that asylum-seekers who would not have otherwise been able to file an application can pursue their claims. In addition, this will support timely submission in advance of the one-year deadline,[111] enhance earlier processing, and promptly start the clock for work authorization. Further, it is essential for applicants to have the ability to correct or modify their applications prior to full adjudication. These measures—particularly those related to necessary facilities and timely submission of the application—may further access to international protection and lessen the risk of refoulement.

In other ways, however, the IFR risks diverging from international standards. UNHCR appreciates that, according to the IFR, asylum-seekers may amend or correct biographic or credible fear information or supplement information collected in pre-screening up until seven days before the asylum merits interview or, for documents submitted by mail, postmarked no later than 10 days before the asylum merits interview.[112] Finding good cause, USCIS may consider amendments or supplements submitted after those deadlines or may grant an extension to submit additional evidence, but, in the absence of exigent circumstances, extensions cannot prevent an asylum merits decision from issuing within 60 days of the service of the credible fear determination.[113] UNHCR understands this to mean that, if an asylum merits interview will occur within 21 to 45 days after the service of the positive fear determination, asylum-seekers generally have 14 to 38 days, or at most 53 days with an extension,[114] to amend their applications.[115] UNHCR views as worrisome the implementation of such rapid deadlines for application amendments, particularly where asylum-seekers do not have guaranteed access to legal assistance and counsel and for those detained throughout this process.

In addition, government officials would have responsibility for generating and lodging asylum applications without the necessary safeguards in place to protect asylum-seekers' rights to due process. If the Government is to derive the application from the credible fear interview, UNHCR strongly urges that such safeguards be provided from the outset of the expedited removal process, including at the credible fear interview. International standards provide for an interplay between adjudicator and asylum-seeker to develop the claim,[116] but this must be executed carefully, and in consideration of these three major concerns:

- First, while the rule does provide for input from and approval by the asylum-seeker on the application at a later point, UNHCR is concerned that there is **potentially insufficient time for asylum-seekers to prepare their cases prior to the credible fear interview.** Asylum-seekers should be given the assistance, time, and facilities needed to prepare his or her case and interview at the earliest opportunity. The initial interview can occur within days of arrival, before asylum-seekers have had time to recover from the trauma of the

[111] While recognizing the desire of States to promptly receive claims to maintain a fair and efficient asylum system, UNHCR considers the protection of applications from rejection based solely on timing or other procedural grounds to be "a fundamental safeguard." UNHCR, *Global Consultations*, ¶ 20; ExCom Conclusion No. 15, ¶ (i). Under Article 1 of the 1951 Convention, "failure to meet formal, technical requirements such as time limitations [as to the submission of claims] does not negate the refugee character of [a] person." UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 9 (Apr. 2001), *available at* https://www.refworld.org/docid/3b20a3914.html. Therefore, an asylum-seeker's failure to submit an application within a certain period of time, as well as failure to fulfill other formal requirements, "should not in itself lead to an asylum request being excluded from consideration." UNHCR, *Global Consultations*, ¶ 20.
[112] Interim Final Rule, at 18,096.
[113] Interim Final Rule, at 18,216-17.
[114] Theoretically at least, if an asylum officer is able to issue a decision the same day as the asylum merits interview.
[115] *See* Interim Final Rule, at 18,216-17. This is unless there exist exigent circumstances. *Id.* at 18,096.
[116] *See* Handbook, ¶ 196.

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journey, understand the procedure before them, and assemble evidence. Asylum-seekers have often fled traumatic experiences and undertaken exhausting journeys, and, in many cases, they arrive with limited or no resources that help enable them to present their claims effectively. Starting the asylum application without adequate time to rest or prepare for their interview likely places asylum-seekers, especially those who are unrepresented and / or have special needs, at a disadvantage moving forward.

- Second, UNHCR is concerned that the IFR, like the Proposed Rule, **does not expressly provide for adequate information about the process**—including that asylum-seekers may apply for asylum in their full proceedings, even if only issued a positive decision concerning credible fear of torture—delivered via means and in a language the asylum-seeker can understand, *prior to the credible fear interview*. While UNHCR welcomes efforts to provide interpretation during the interview itself, UNHCR notes that international standards require that the asylum-seeker receive necessary information in a language they understand prior to the interview. Without such information, the asylum-seeker is left unaware of the process they are undertaking and may be unable to comprehend in full their rights and obligations.

- Third, UNHCR urges the Government to **ensure that adequate legal assistance and / or access to qualified legal representatives is provided** prior to the credible fear interview. Asylum-seekers have the right to consult with a legal representative and receive other legal assistance throughout this process. Indeed, this serves both the asylum-seeker (through greater understanding of their rights and obligations) and the Government (through increased efficiency). Without guaranteed access to legal aid at the credible fear stage, *including prior to the credible fear interview*, it is highly unlikely that the timeframes laid out in these procedures uphold asylum-seekers' due process rights.

UNHCR further notes that individuals with special needs—such as children (including those who have claims independent of their parents' claims), people with disabilities, individuals with mental health issues or intellectual capacity challenges, people with low literacy, people with language access issues, and victims of violence, torture or other traumatic experiences—may require additional time and assistance to complete their applications.[117] There may also be complex cases that require more time than may be available under the new framework. These complex cases might, for example, involve certain fact patterns (e.g., gang-related or gender-based claims) or challenging evidentiary issues that require greater time or resources to address adequately. While UNHCR recognizes that the IFR provides for extensions of time beyond the general limitations to amend, correct, or supplement the application prior to the asylum merits interview "in exigent circumstances,"[118] it encourages the Government to interpret this phrase broadly and to clarify what it may encompass.

Under the rule's framework, the consequences of a rushed or inaccurate credible fear interview are significant. Currently in section 240 proceedings, notes from the pre-screening interview are not automatically part of the record unless introduced by the government attorney (typically used to impeach the credibility of the applicant). According to this procedure, however, the pre-screening notes could not only be used for impeachment but also as the very basis of the

[117] Other individuals with specific needs may include adolescents, older persons, pregnant women or girls, single parents with minor children, victims (or potential victims) of trafficking, persons with diverse sexual orientation and/or gender identity, persons with physical and mental disabilities, stateless persons, members of ethnic and religious minorities, indigenous peoples, victims/survivors of torture, rape or other serious forms of psychological, physical or sexual abuse, and traumatized persons. Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 181.
[118] *See* Interim Final Rule, at 18,216-17.

application. The lack of time and legal assistance, as well as potential unmet language access needs, in this setting is of concern to UNHCR.

UNHCR recommends that any changes to the filing of an asylum application preserve asylum-seekers' right to due process, while recognizing that the interplay between adjudicator and asylum-seeker can help develop a claim, especially in non-adversarial settings. Considering the increased importance of the credible fear interview in the proposed framework, UNHCR recommends that certain safeguards be put in place, including:

- Adequate and reasonable time for the asylum-seeker to prepare for the credible fear interview;

- Sufficient information and guidance about the entire procedure in a language the asylum-seeker understands and access to interpretation when necessary, provided prior to the credible fear interview at government expense, with NGOs able to supplement any government-issued information.[119] This should expressly address the ability of individuals found to have a credible fear of torture to apply for and pursue a claim for asylum in their full proceedings before an asylum officer, as well as any relevant timelines for amending their application;

- Legal counseling available to all, at government expense, through the provision of "know-your-rights" or other such sessions, with individualized counseling made available to those who wish to avail themselves of it;[120]

- Access to qualified legal representatives prior to, during, and after the credible fear interview, in part to ensure that the asylum-seeker can clarify the application if needed. Legal representatives must have physical and telephonic access to all facilities in which asylum-seekers are held. It is a best practice for the government to pay for representation for asylum-seekers, including those who cannot afford it themselves and with particular attention given to those with complex cases or special needs;[121]

- Accommodations and flexible timeframes for amending or supplementing the application, notably for individuals with special needs and / or complex cases, including a generous interpretation of the "good cause" standard for late-filed evidence as well as an application of evidentiary standards that reflect the tight timeframes in this procedure and the risks at stake for asylum-seekers.[122]

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[119] *See supra* Section III.B (offering UNHCR's full recommendations on legal assistance and representation). Confidentiality should also be ensured. *See generally* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (May 2015), *available at* https://www.refworld.org/pdfid/55643c1d4.pdf.
[120] *See supra* Section III.B, offering UNHCR's full recommendations on legal assistance and representation.
[121] *See supra* Section III.B, offering UNHCR's full recommendations on legal assistance and representation. Children's cases involve special considerations. *See* UNHCR, *Technical Guidance: Child Friendly Procedures*, § 6.4 (2021), *available at* https://www.refworld.org/docid/61b7355a4.html.
[122] *See supra* fn. 68.

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C. Proceedings for Further Consideration of the Application for Asylum by USCIS Asylum Officer in Asylum and Withholding Merits Hearing for Noncitizens with Credible Fear

Asylum Merits Interviews

Adapting provisions from the Proposed Rule, the IFR outlines procedures for adjudication of applications for asylum and related protection by individuals found to have credible fear.[123] Under the IFR, asylum officers in USCIS will review full asylum claims in the first instance during a non-adversarial hearing pursuant to a novel process lodged under section 235 of the INA.[124] Asylum officers would record the hearing so that a verbatim transcript can be prepared,[125] and USCIS must provide interpreters instead of relying on applicants to secure their own, as had been the prevailing practice in affirmative asylum interviews (at least prior to the COVID-19 pandemic).[126] In cases involving dependent spouses or children who did not file separate applications, asylum officers will elicit information to determine whether there exists a significant possibility that they have experienced or fear harm that would be an independent basis for protection in the event that the principal applicant is not granted asylum, and if so, inform the spouse or child accordingly.[127]

In the event that asylum officers do not grant asylum after a positive fear determination, the IFR calls for them to assess whether the applicant is eligible for withholding of removal or protection under CAT, but they will not issue removal orders and make final decisions about these.[128] Following such assessment, asylum officers will refer the case to immigration court for consideration of their protection claims in "streamlined" section 240 proceedings (please see next section).[129] Where a spouse or child included on the claim does not file a separate application that is adjudicated by USCIS, the principal's asylum application will be deemed by EOIR to satisfy EOIR's application filing requirements for the spouse or child as principal applicants, enabling them "to exercise their right to seek protection on an independent basis without the need for delaying the proceedings" to file a Form I-589.[130] Should an asylum-seeker fail to appear for their merits interview, they could be referred to section 240 proceedings, or USCIS may use its discretion to excuse the failure to appear.[131]

Under the IFR, the asylum merits interview will incorporate several other "procedural safeguards." This includes allowing asylum-seekers to have counsel present, as well as to submit witness affidavits and other evidence.[132] The asylum-seeker or their attorney will have an opportunity "to

[123] Interim Final Rule, at 18,096-98; *see also* Proposed Rule, at 46,916-19.
[124] Interim Final Rule, at 18,096-98 In cases where an immigration judge vacates a negative credible fear determination by an asylum officer, provisions within the Proposed Rule would enable the judge to refer the case back to USCIS for an asylum hearing. *Id*. at 18,096.
[125] Interim Final Rule, at 18,096, 18,150-51.
[126] Interim Final Rule, at 18,096.
[127] Interim Final Rule, at 18,097, 18,216-17.
[128] Interim Final Rule, at 18,097-98. In response to comments received regarding the Proposed Rule, the Departments decided against authorizing asylum officers to issue removal orders and make final decisions on withholding of removal and protection under CAT, as had been initially proposed. *Id*. UNHCR supports this change to not authorize asylum officers to issue removal orders. Doing so may risk putting asylum officers in an enforcement-oriented or adversarial role, which could undermine some of the benefits of an otherwise non-adversarial procedure. Rather, to keep the focus of asylum officers' work on identifying refugees, UNHCR favors a process under which other DHS officers, such as those within ICE, or immigration judges are tasked with issuing removal orders.
[129] Interim Final Rule, at 18,097.
[130] Interim Final Rule, at 18,097-98, 18,216.
[131] Interim Final Rule, at 18,096. This part of the procedure is distinct from what had been proposed in the initial iteration of the rule, which would have authorized asylum officers to issue removal orders in such circumstances. *See* Proposed Rule, at 46,919.
[132] Interim Final Rule, at 18,096.

make a statement or comment on the evidence presented,"[133] and the attorney may ask follow-up questions of the applicant and any witnesses.[134] Such role of counsel during the interview appears relatively narrow when compared to that an attorney typically has in full section 240 proceedings before an immigration judge. Unlike during a merits hearing in immigration court where attorneys may present opening statements, conduct direct examination of the asylum-seeker and expert and lay witnesses, and offer a closing statement,[135] in the new procedure, counsel has a more limited role in presenting an asylum-seeker's case to the adjudicator. The Government acknowledged these concerns in its discussion of the IFR's provisions and declined to make modifications that would have, for instance, given counsel a more active part in the asylum merits interview.[136]

Under refugee protection principles, while States are given leeway to establish appropriate procedures for determining who is entitled to protection, this process must uphold key safeguards, including a proper assessment of the substantive merits of a claim for international protection.[137] In particular, asylum-seekers have the right to be heard within a reasonable period of time[138] and are entitled to a full interview or hearing on their claims in person during which adjudicators work with applicants to develop necessary facts and analyze them to determine whether the individual is a refugee.[139] Such assessments should be conducted in an environment that is safe, confidential, and suitable.[140] This process is optimized when non-adversarial because it promotes full and reliable disclosure of the applicant's claim[141] and fosters trust and respect so that asylum-seekers feel comfortable enough to tell their accounts as coherently and completely as possible.[142] While UNHCR guidance is not prescriptive on the characteristics of the first instance asylum process, it conforms with the non-adversarial approach, especially in noting that some applicants may not easily be able to provide evidence and that the adjudicator is expected to work with the applicant to draw out the full story.[143] Further, UNHCR has observed, from its own experience in performing refugee status determination and through its review of various State practices, that non-adversarial processes tend to be faster, less costly, more specialized, and more adaptable than court systems in processing asylum applications efficiently.

As it expressed in comments to the Proposed Rule, UNHCR generally welcomes the introduction of a non-adversarial process for the adjudication by USCIS of asylum claims of individuals arriving at the border. UNHCR, along with policy experts and civil society, have long recommended that USCIS, as a specialized and highly qualified first instance authority, be fully entrusted with processing asylum claims at the border, with the possibility of appeal to a court.[144] In light of the

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[133] In a change from the Proposed Rule, the Interim Final Rule incorporates a provision from existing regulations concerning USCIS discretion to limit the length of the statement or comment and to require its submission in writing. *See* Interim Final Rule, at 18,082, 18,217; 8 C.F.R. § 208.9(d)(1).
[134] Interim Final Rule, at 18,096.
[135] *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, *Immigration Court Practice Manual*, ch. 4.16(d) (Nov. 16, 2020) (outlining the conduct of individual hearings before an immigration judge and indicating that parties should be prepared to make an opening statement, raise any objections to the other party's evidence, present witnesses and evidence on all issues, cross-examine opposing witnesses and object to testimony, and make a closing statement).
[136] Interim Final Rule, at 18,149-50. The IFR describes feedback from commenter, for example, that suggested representatives be allowed "to make an opening statement, elicit testimony from the applicant during the hearing, and provide a closing statement," as well as to ask follow-up questions *during* the interview, which commenters suggested could enhance efficiency and due process. *Id.* at 18,149.
[137] Handbook, ¶ 190; UNHCR, *Global Consultations*, ¶ 20; ExCom Conclusion No. 15, ¶ (i).
[138] *Due Process in Procedures*, ¶ 231.
[139] Handbook, ¶ 196; *see also Effective Processing of Asylum Applications*, ¶ 25.
[140] *UNHCR RSD Procedural Standards: Adjudication*, § 4.3.2.
[141] *UNHCR RSD Procedural Standards: Legal Representation*, § 2.7.4.
[142] *Due Process in Procedures*, ¶ 234.
[143] Handbook, ¶ 196; *Due Process in Procedures*, ¶¶ 20, 247; UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* ¶¶ 9-12 (Dec. 16, 1998), https://www.refworld.org/pdfid/3ae6b3338.pdf.
[144] *See, e.g.*, Doris Meissner, Migration Policy Inst., *Rethinking the U.S.-Mexico Border Immigration Enforcement System*, at 6 (Oct. 2020).

need for expertise on refugee and asylum matters, cross-cultural interviewing skills, frequent use of interpreters and the application of a shared burden of proof between adjudicators and asylum-seekers, UNHCR considers the non-adversarial process far better suited to first instance asylum adjudication than adversarial procedures, which are procedurally complex and may not provide an appropriately secure, confidential, and comfortable environment for the disclosure of highly personal, sensitive information. In cases involving asylum-seekers with special needs—such as children who are lead claimants, people with disabilities, individuals with mental health issues or intellectual capacity challenges, people with low literacy, people with language access issues, and victims of violence, torture or other traumatic experiences—who may encounter greater challenges to presenting their claims in court, the need for a non-adversarial process is that much greater. Accordingly, UNHCR anticipates that non-adversarial proceedings for asylum-seekers at the border will enhance both the fairness and efficiency of the system, strengthen the integrity of the process, and ultimately may help reduce the risk of refoulement.

UNHCR supports efforts to move toward non-adversarial interviews before asylum officers on the merits of applications for international protection in the first instance, as well as protections for the rights of spouses and children included on asylum-seekers' applications, and it recommends the adoption of quality assurance mechanisms to monitor and evaluate these proceedings, particularly in any instances where they may be conducted remotely, to ensure fairness and the right to be heard.[145] Please see the following subsection for additional considerations and recommendations regarding this piece of the procedure.

Adjudicatory Timeframe

The IFR details the timeframe for an asylum merits interview and decision. Asylum officers are to conduct this interview within 21 to 45 days after service of the positive fear determination, though an asylum-seeker could request in writing an earlier interview or that their interview be rescheduled due to exigent circumstances.[146] The applicable provision suggests that "exigent circumstances" may include "the unavailability of the asylum officer to conduct the interview, the inability of the applicant to attend the interview due to illness, the inability to timely secure an appropriate interpreter . . . or the closure of the asylum office."[147] It does not mention, for example, extra time needed to consult with or obtain an attorney. As discussed above, asylum-seekers generally may file supplemental evidence, or amend or correct their applications, up until 7 days prior to the interview or, for documents submitted by mail, postmarked no later than 10 days before the interview, with discretion for asylum officers to consider late-filed materials or to grant limited extensions.[148] UNHCR understands this to mean that asylum-seekers generally are expected to file evidence within 14 to 38 days of receiving their positive credible fear determination (or 11 to 35 days if submitting it by mail), which they may have "within days" after their fear screenings (i.e., potentially days, or mere weeks, upon arrival).[149] Relatedly, this signifies that asylum-seekers, if they want an attorney and do not already have one, may have only around two

[145] *See Effective Processing of Asylum Applications*, ¶¶ 40-41 (discussing quality assurance mechanisms and highlighting as an example the Canadian framework); Immigration & Refugee Board of Canada, *Quality Assurance Framework for Decision-Making* (last accessed May 31, 2022), https://irb.gc.ca/en/transparency/qa-aq/Pages/qaf-caq.aspx (outlining and detailing key components of the quality assurance mechanisms followed in Canada); *UNHCR RSD Procedural Standards: Adjudication*, § 4.3.2 (discussing remote interviewing considerations, standards, and guidelines).
[146] Interim Final Rule, at 18,096.
[147] Interim Final Rule, at 18,216.
[148] Interim Final Rule, at 18,096, 18,216. The IFR provides asylum officers discretion to consider amendments or supplements to the application filed after the 7- or 10-day (depending on the method of submission) deadline. *Id.* at 18,216. In addition, asylum officers have some flexibility to grant extensions to receive additional evidence, but they generally may not grant extra time that would prevent a decision from issuing within 60 days of filing the application. *Id.* at 18,216-17.
[149] *See* Interim Final Rule, at 18,096 (noting that "[u]nder this rule, noncitizens who receive a positive credible fear determination would have an asylum application on file with the Government within days of their credible fear screenings").

to five weeks to obtain counsel and have counsel assist in preparing their claims—potentially all while detained if they are not paroled. Decisions are expected within 60 days of service of the positive fear determination (or, stated differently, within 15 to 39 days of the interview).[150]

UNHCR notes with significant concern that the IFR sets forth a rapid adjudicatory timeline without ensuring that asylum-seekers will have meaningful, effective access to legal assistance and counsel, which is not clearly available in the rule's provisions and an essential consideration related both to efficiency and fairness. While the new timeframe does promote efficiency in some respects and could be beneficial to asylum-seekers with easily grantable claims, it likely will be detrimental to asylum-seekers with complex claims, who suffered profound trauma, have low levels of literacy, or do not speak English well—particularly those who are not able to access or secure legal aid prior to their fear screenings and / or asylum merits interviews. Providing asylum-seekers with time—and only a meager amount at that—to seek legal assistance and representation is critical but insufficient on its own to guarantee this key safeguard, especially for detained asylum-seekers.[151]

Rather, additional, proactive measures that enable asylum-seekers to access or actually provide them with legal aid should complement these windows of time built into the process, such as "Know Your Rights" materials and presentations, something akin to EOIR's Legal Orientation Program (since this part of the procedure is outside of the purview of EOIR), and government funding for representation of, at the very least, asylum-seekers who cannot afford it themselves and with particular attention given to those with complex cases or special needs. Access to legal assistance and representation increases efficiency by promoting accurate decision making, thereby reducing appeals, and is critical to ensuring that asylum-seekers receive the fair process to which they are entitled. Without more, however, these swift timeframes may lead to erroneous decisions and raise the risk of refoulement.

UNHCR recommends that non-adversarial hearings be implemented in a manner that does not circumscribe asylum-seekers' rights. Specifically, UNHCR urges the Government to consider non-adversarial first-instance asylum hearings in a context that corresponds with international standards on detention and affords asylum-seekers sufficient time and opportunity to recover from trauma, gather information about their case, and access legal assistance and representation.[152]

D. Streamlined Section 240 Removal Proceedings Before the Immigration Judge

Procedural Considerations

The IFR outlines a distinct process for the review of applications for asylum, withholding of removal, and protection under CAT as compared to that detailed in the Proposed Rule. Under the IFR, asylum-seekers whose applications USCIS does not grant will be placed into "streamlined" section 240 removal proceedings before an immigration judge.[153] While existing rights that apply

[150] Interim Final Rule, at 18,096.
[151] The American Bar Association (ABA) has documented the challenges that detained noncitizens face accessing counsel. *See* Amer. Bar Ass'n, *Achieving America's Immigration Promise: ABA Recommendations to Advance Justice, Fairness and Efficiency* (2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf. According to a study cited in a recent ABA publication, "In 2017 . . . only 30 percent of detained individuals were represented by counsel in removal proceedings, compared to 65 percent of non-detained individuals." *Id.* at 11. The disparate rate of representation has profound consequences. "Those detained throughout their removal proceedings were more than 1,000 percent more likely to succeed with counsel than without." *Id.*
[152] See *supra* Section III.B (offering UNHCR's full recommendations on legal assistance and representation).
[153] Interim Final Rule, at 18,098.

in section 240 proceedings will continue to apply in this procedure,[154] the new process will include novel measures "to streamline the process while continuing to ensure fairness."[155] Generally, the procedure will entail a master calendar hearing followed by a status conference, after which time IJs will decide whether a merits hearing is required or whether the case can be decided on the documentary record.[156] Each of these steps, as well as any corresponding filings, are to occur on a specific timeline, which is discussed further, below.[157] The IFR justifies these measures by suggesting that, unlike in other cases, asylum-seekers subject to this rule "will have had a full opportunity to present their protection claims to an asylum officer," and IJs and parties "will have the benefit of a fully developed record and decision prepared by USCIS."[158]

Under international law, asylum-seekers whose claims are examined in accelerated procedures must have access to an effective remedy against a negative decision.[159] "The right to an effective remedy exists when the individual has an arguable claim," which is a claim "supported by demonstrable facts and not manifestly lacking grounds in law."[160] "To be effective, that remedy must provide for a review of the claim by a court or tribunal" [161]—one independent from the authority with responsibility for adjudicating the claim in the first instance[162]—and "the review must examine both facts and law based on up-to-date information."[163] It should be effective in both law and practice,[164] and the right to legal aid is an essential component of an effective remedy and fair trial.[165]

Procedures to adjudicate individuals' claims for protection must uphold key due process safeguards, including those at the border and in accelerated or otherwise shortened procedures.[166] It is generally recognized that fair and efficient asylum procedures are an essential element in the full and inclusive application of the 1951 Convention. This allows States to identify those who qualify (and those who do not) under the refugee definition fairly and efficiently to protect against refoulement, afford international protection to those who need it, and uphold standards of treatment in accordance with the 1951 Convention and other human rights instruments.[167] In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure. A fair and efficient procedure

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[154] The IFR highlights that individuals in section 240 removal proceedings "have a wide range of well-established rights," including the right to representation at no expense to the Government; a reasonable opportunity to examine evidence, present evidence, and cross-examine evidence witnesses; the right to seek various forms of relief; the right to file a motion to continue; and the right to appeal certain decisions to the Board of Immigration Appeals and to later file a petition for review in the appropriate U.S. Court of Appeals. Interim Final Rule, at 18,098.
[155] Interim Final Rule, at 18,098.
[156] Interim Final Rule, at 18,223-26.
[157] *See* Interim Final Rule, at 18,223-26; *infra* Subsection IV.D "Adjudicatory Timeframe."
[158] Interim Final Rule, at 18,098-99.
[159] *See* UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* 255 (Mar. 2010), *available at* https://www.unhcr.org/4c7b71039.pdf; UNHCR, *UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures*, ¶ 21 (May 21, 2010), *available at* https://www.refworld.org/pdfid/4bf67fa12.pdf.
[160] UNHCR, *Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures*, ¶ 23.
[161] UNHCR, *Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures*, ¶ 21.
[162] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 127.
[163] UNHCR*, Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures*, ¶ 21. In previous research, UNHCR has found that permitting full and rigorous scrutiny of negative decisions is key "to safeguard against the risk of denial of applicants' substantive rights to asylum and to refugee status under the 1951 Convention and other forms of protection." *Id.* ¶ 22.
[164] UNHCR, *Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures*, ¶ 23.
[165] UNHCR, *UNHCR Comments on the Draft Law Amending the Law of the Republic of Lithuania on the Legal Status of Aliens (Reg. No. XIIIP-5109)*, ¶ 16 (Sep. 2020), *available at* https://www.refworld.org/pdfid/605e06a84.pdf.
[166] Handbook, ¶¶ 189-204.
[167] Article 33(1) of the 1951 Convention codifies the fundamental principle of non-refoulement, which refers to the obligation of States not to expel or return (refouler) a person to territories where his or her life or liberty would be threatened. *See* Nonrefoulement, Black's Law Dictionary 1157 (9th ed. 2009); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), *available at* http://www.unhcr.org/refworld/docid/45f17a1a4.html.

decreases the overall demands on the reception system, discourages misuse of the asylum system, and avoids protracted periods of uncertainty for the asylum-seeker.

UNHCR's Executive Committee, of which the U.S. has been a member since its establishment in 1955, has recommended that procedures satisfy certain basic requirements, including that: the applicant be given guidance on the procedure itself; the applicant be given the necessary facilities, including a competent interpreter, for submitting his case; and the applicant should have ability to appeal and remain on the territory until a final decision has been made on the claim.[168] In addition, the opportunity to present relevant evidence is critical to procedural fairness, as it affects applicants' ability to establish that they meet the refugee definition set forth under Article 1A(2) of the 1951 Convention.[169]

UNHCR welcomes a number of changes made to the Proposed Rule and reflected in the IFR's "streamlined" section 240 proceedings and considers the opportunity to appeal a negative decision indispensable under international standards. However, it remains concerned that this accelerated procedure may lack sufficient procedural safeguards—namely, access to legal information, assistance, and representation. UNHCR supports lodging the streamlined proceedings within section 240, not section 235, of the INA, which affords asylum-seekers greater procedural protections; forgoing heavy evidentiary burdens on asylum-seekers included in the Proposed Rule; and making it less cumbersome for individuals to pursue complementary forms of protection.[170] In addition, from UNHCR's viewpoint, it is positive that immigration judges will, in addition to reviewing the asylum claim, honor any decisions by the asylum officer regarding eligibility for withholding of removal or protection under CAT.[171] This move promotes efficiency since asylum officers already will have gathered, in a non-adversarial interview, factual information relevant to deciding claims for withholding of removal and protection under CAT, obviating the need for immigration judges to spend time in court doing the same when instead they can simply recognize the favorable findings made by asylum officers.[172]

UNHCR is pleased to see other new provisions that appear to promote efficiency in the procedure, but it is concerned about others that may do the opposite and fail to uphold essential due process safeguards. Requiring a status conference, for example, promotes a negotiating posture and has the potential to enhance efficiency of the procedure, as well as reduce the adversarial nature of the immigration court process.[173] In addition, giving IJs authority to grant asylum without holding a merits hearing in many cases will advance efficiency in a protection-forward way by focusing limited court resources on complex or contested cases. Such arrangements also help mitigate the risk of unnecessarily re-traumatizing asylum-seekers by requiring them to recount repeatedly the circumstances of their persecution. On the other hand, in certain scenarios, IJs are authorized to decide—meaning, grant *or deny*—cases based on the documentary record alone without holding a hearing, which impinges on asylum-seekers' right to be heard and could lead to

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[168] Handbook, ¶ 192; ExCom Conclusion No. 8, ¶ (e) (enumerating basic procedural requirements); *see also* UNHCR, *Global Consultations*; UNHCR, *UNHCR Public Statement in Relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'immigration pending before the Court of Justice of the European Union* (May 21, 2010), available at https://www.refworld.org/docid/4bf67fa12.html; U.N. Gen. Assembly, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 2(3) (Dec. 16, 1966) [hereinafter ICCPR] (providing for the right to an effective remedy).

[169] UNHCR, *UNHCR RSD Procedural Standards*, *Unit 7: Appeal of Negative RSD Decisions*, § 7.4.1 (Aug. 26, 2020), *available at* https://www.refworld.org/docid/5e8707600.html.

[170] UNHCR, Comments on Proposed Rule (Oct. 2021) (discussing and expressing concern over various aspects of the immigration judge review proceedings outlined in the Proposed Rule).

[171] UNHCR, Comments on Proposed Rule (Oct. 2021) (discussing and expressing concern over the proposed authority of immigration judges to review all decisions by asylum officers).

[172] The IFR highlights and discusses similar benefits and efficiency gains related to this aspect of the procedure. Interim Final Rule, at 18,106.

[173] Of course, for the status conference and negotiations to proceed fairly and most efficiently, asylum-seekers should have access to necessary facilities, including legal representation.

erroneous denials, precipitating appeals and / or cases of refoulement. Further, rules around and limits on continuances may lead to increased requests for additional time to obtain counsel, gather evidence, or otherwise prepare the case that IJs will have to consider and adjudicate, and denials of or constraints on requested time may hinder access to counsel and lead to erroneous decisions and more appeals.

Despite some modifications to the Proposed Rule and positive new measures appearing in the IFR, UNHCR reiterates its concern about asylum-seekers' potential lack of access to legal assistance and counsel in a highly complex, rapid procedure (please see next subsection regarding timeframe). Asylum-seekers may not have time or resources to assemble relevant evidence, especially from detention, and may not have access to legal assistance and representation that would assist with navigating the complex procedural requirements before the IJ, a process in which DHS always has an attorney. Even if a judge is required to guide the proceedings to elicit relevant information and otherwise fully develop the record, it is hard to see how, without counsel and other facilities, such as translators who can help asylum-seekers understand statements or other materials filed by DHS, some asylum-seekers may be able to satisfy this rule. *Pro se* asylum-seekers, especially those in vulnerable situations, may lack the language, technical, or other skills needed to evaluate, address, or contest, potentially in writing, the position of DHS, which may be provided in written statements.

Adjudicatory Timeframe

Under the IFR, there is a new schedule of proceedings. The timeline begins on the date that the Notice to Appear is served.[174] The IJ will hold a master calendar hearing 30 to 35 days after service of the NTA, followed by a status conference 30 to 35 days after the master calendar hearing.[175] Next, the IJ will conduct a merits hearing, if deemed necessary, 60 to 65 days after the master calendar hearing (or, around 25 to 35 days following the status conference).[176] In advance of the merits hearing, DHS and asylum-seekers may submit additional filings—DHS may do so no later than 15 days prior to the merits hearing, and the asylum-seeker may file no later than 5 days prior to the merits hearing. If needed, the IJ may hold a subsequent merits hearing "to resolve any lingering issues or complete testimony" no more than 30 days after the initial merits hearing.[177] The IFR encourages IJs to issue oral decisions on the date of the final merits hearing "whenever practical," and, if a decision does not issue that day, an oral or written decision must be made as soon as practicable, not later than 45 days after the final merits hearing.[178] Thus, the IFR appears to envision a procedure in immigration court that runs approximately two to four months.

An IJ may decide that a merits hearing is not necessary following a status conference in two scenarios: in one, where neither the asylum-seeker nor DHS request to present testimony and DHS intends to waive cross-examination of the asylum-seeker, and in another, where the asylum-seeker requests to present testimony, DHS indicates it intends to waive cross-examination and does not intent to present testimony or produce evidence, and the IJ concludes that the application

[174] *See* Interim Final Rule, at 18,099 (noting that the master calendar hearing will occur 30 to 35 days after service of the NTA). UNHCR is concerned that using the date of service of the NTA on the asylum-seeker, as opposed to the date of filing with the immigration court, could create confusion in the timeframe outlined by the IFR. It seems possible, for instance, that DHS may serve the NTA on the individual but be delayed in filing it with the court, or perhaps DHS files the NTA with the court, but the court may need time to process it. A lack of clarity in these, and potentially other, circumstances could lead to inconsistent application of the adjudicatory timeframe across courts and / or individual courtrooms. According to the IFR, if there is a change of venue, the schedule of proceedings begins again with the master calendar hearing at the new court. *Id.* at 18,226.
[175] Interim Final Rule, at 18,099.
[176] Interim Final Rule, at 18,099.
[177] Interim Final Rule, at 18,099.
[178] Interim Final Rule, at 18,099.

can be granted without further testimony.[179] In such event, the parties have an opportunity to submit supplemental filings responsive to status conference-related requirements.[180] DHS may file no more than 15 days after the status conference, and asylum-seekers may file no later than 25 days after the status conference.[181] The judge must issue an oral decision based on the documentary record no more than 30 days after the status conference, or, if that is not possible, an oral or written decision no later than 75 days after the status conference.[182]

Generally, in immigration proceedings, an individual can seek a continuance for "good cause,"[183] however, under the IFR, there will be limits on the length of continuances for good cause. IJs cannot grant continuances longer than 10 days unless they determine a longer continuance would be more efficient (e.g., for gathering evidence, securing availability of a witness).[184] The aggregate length of continuances and extensions requested by the asylum-seeker typically should not cause a merits hearing to take place more than 90 days after the master calendar hearing (or, more than 120 days after service of the NTA).[185] UNHCR understands this to mean there are about 30 days of flexibility for continuances or extensions in this process. Where the requests for continuances and extensions exceed that timeframe, heightened standards apply.[186] A continuance to seek representation is considered sufficient to qualify for heightened continuance standards in these proceedings, but, according to the IFR's discussion, this does not mean that a request for a continuance to seek counsel can never be denied, and decisions will be made on a case-by-case basis.[187]

The IFR provides certain exceptions from the timeframe for the new streamlined measures. More specifically, the rule exempts certain vulnerable asylum-seekers, such as persons under 18 years old on the date the NTA was served who are not in consolidated proceedings with adult family member and individuals who exhibit potential mental incompetency.[188] In addition, other types of cases may be exempted from the procedure, such as those where an individual produces evidence of prima facie eligibility for protection or relief other than asylum, withholding of removal, protection under CAT, or voluntary departure; where an individual raises a substantial defense to the removal charge; or, where the designated country of removal is different from the one that the asylum officer considered when adjudicating the application.[189]

Similar to its concerns raised in the previous section regarding USCIS's adjudicatory timeframe, UNHCR is troubled by the exceptionally brisk schedule of proceedings in immigration court, especially without any guarantee that asylum-seekers will have access to legal assistance, and counsel, and necessary facilities, like translators, that are potentially determinative as to whether they can adequately prepare, present, and counter challenges to their claims. Asylum-seekers, particularly those in detention,[190] might not have time or resources to identify and assemble

[179] Interim Final Rule, at 18,225.
[180] Interim Final Rule, at 18,101.
[181] Interim Final Rule, at 18,101.
[182] Interim Final Rule, at 18,099.
[183] Interim Final Rule, at 18,225-26.
[184] Interim Final Rule, at 18,225.
[185] Interim Final Rule, at 18,225.
[186] Interim Final Rule, at 18,225-26. If a request leads to a merits hearing 91 to 135 days after MCH, it must be necessary to ensure a fair proceeding and the need must exist despite the exercise of due diligence, or if a request leads to a merits hearing more than 135 days after the MCH, a failure to grant must be contrary to statute or the Constitution.
[187] Interim Final Rule, at 18,104, fn. 40.
[188] Interim Final Rule, at 18,226.
[189] Interim Final Rule, at 18,099.
[190] UNHCR observes that cases of detained asylum-seekers are currently heard on a prioritized docket, often in just a few months after referral to the immigration court by USCIS, and that detained asylum-seekers already face a variety of challenges to presenting their cases effectively. *See* Exec. Off. for Immigration Rev., U.S. Dep't of Justice, *Executive Office for Immigration Review Adjudication*

relevant evidence that they were not able to prior to their asylum merits interview, such as testimony by medical, psychological, or country conditions experts. In addition, UNHCR understands that asylum-seekers may have extremely limited windows of time to respond to filings by DHS. If DHS serves filings on asylum-seekers via mail, for example, those likely would not reach asylum-seekers for several days, giving individuals less than ten full days to respond—a timeline likely to be even more abbreviated for detained asylum-seekers. This may be exceptionally challenging for individuals who are unrepresented, do not speak English, may have suffered trauma, and / or have other hardships or special needs, and it is problematic in that it undermines fairness in the asylum procedure and could lead to the denial of recognizable claims.

UNHCR recommends that the Government revise the provisions on streamlined section 240 removal proceedings to ensure that they are implemented in a manner consistent with international standards. Access to legal assistance and representation is paramount to ensure robust, fair, and efficient procedures. UNHCR notes that all asylum-seekers must have opportunities to access legal information, assistance, and representation throughout and recommends that the Government facilitate and fund assistance and representation, especially for asylum-seekers who cannot afford it themselves and with particular attention given to those with special needs.[191]

E. Detention and Parole

Expanded Grounds for Parole

The IFR amends existing regulations, as well as those proposed in the initial iteration of this rule, that govern circumstances for parole from detention in expedited removal.[192] While current regulations permit parole of such asylum-seekers when necessary "to meet a medical emergency" or "for a legitimate law enforcement objective,"[193] the IFR expands parole considerations to the fullest extent under domestic law, as it would allow for parole on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit."[194] Using this detention framework, DHS could, for example, parole families arriving at the border for credible fear processing pursuant to section 235 of the INA instead of having to place them directly into section 240 proceedings—and thus, into the immigration court backlog—to facilitate release.[195]

Bearing in mind that seeking asylum is a lawful act, detention of asylum-seekers should be treated as a measure of last resort.[196] UNHCR has long recognized that detention of asylum-seekers should be an exceptional, rather than routine, occurrence and utilized only as a measure of last

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Statistics: Percentage of DHS-Detained Cases Completed Within Six Months (last accessed May 19, 2022), https://www.justice.gov/eoir/page/file/1163631/download (providing that 95 percent of cases involving individuals detained by DHS were completed within six months during the first quarter of 2022); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, at 7-8 (2009), *available at* https://www.corteidh.or.cr/tablas/r25623.pdf ("Detention also impacts the ability of an asylum seeker to establish his or her eligibility for asylum. Not only is it more difficult for a detained asylum seeker to gather documentation in support of his or her case, but it is also more difficult for that asylum seeker to secure legal representation.").

[191] See *infra* Section III.B (offering UNHCR's full recommendations on legal assistance and representation).

[192] Interim Final Rule, at 18,107-08; *cf.* Proposed Rule, at 46,913-14.

[193] *See* 8 C.F.R. § 235.3(b)(2)(iii). The Proposed Rule had proposed to allow for parole when "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)." Proposed Rule, at 46,913.

[194] *See* Interim Final Rule, at 18,107-08, 18,220; 8 U.S.C. § 1182(d)(5)(A) (allowing for parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit); 8 C.F.R. § 212.5(b) (outlining noncitizens who may be paroled on a case-by-case basis for urgent humanitarian reasons or significant public benefit if they present neither a security risk or risk of absconding).

[195] Interim Final Rule, at 18,108 (describing practical constraints and legal limits under the *Flores* Settlement Agreement concerning the detention of noncitizen families and suggesting how the IFR provides flexibility potentially to allow processing of families under this new framework outside of detention).

[196] Detention Guidelines, ¶ 2; *see infra* fn. 214 (discussing the idea of treating detention as a measure of last resort).

resort when no alternative exists.[197] Under international law, individuals have the right to seek asylum and if they do so, to be treated humanely and with dignity,[198] and Article 31(2) of the Refugee Convention prohibits States from restricting the free movement of asylum-seekers, unless restrictions are necessary and only until either the asylum-seeker's status is regularized in the host country or they obtain admission into another country.[199] Child asylum-seekers should not be detained for immigration-related purposes, including when accompanied by their parents or legal guardians who have entered or are present irregularly.[200] UNHCR further notes that asylum-seekers in detention often encounter greater obstacles to accessing counsel or support networks and might face other challenges, such as trauma from being held in custody, that bear on the fairness and efficiency of their proceedings.[201] Accordingly, UNHCR favors access to open reception arrangements, along with fair and efficient status determination procedures, as key pieces of an asylum framework.[202]

When detention is used, it must not be arbitrary. In order to avoid arbitrariness, the decision to detain must be based on an individual's particular circumstances,[203] and more specifically, detention must be determined to be necessary in the individual's case, reasonable in all the circumstances, proportionate to a legitimate purpose, and prescribed by law.[204] Mandatory detention is always arbitrary because it is not based on an individualized examination of the necessity or lawfulness of detention.[205] Any decision to detain must be subject to independent, periodic review.[206] Furthermore, detention must not be discriminatory.[207] Among other things, this requires that a State has an objective and reasonable basis for distinguishing between non-nationals in this regard, and an individual must always have an opportunity to challenge their detention on these grounds.[208] Finally, in cases where asylum-seekers are detained, detention in accordance with Article 31(2) of the 1951 Convention is lawful only if in designated places of detention that are properly equipped to ensure humane, dignified conditions, and otherwise in accordance with human rights standards,[209] and the use of facilities designated or operated as

[197] UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees, 2014-2019*, at 5 (2014), *available at* https://www.refworld.org/docid/536b564d4.html [hereinafter Beyond Detention].
[198] Beyond Detention, ¶ 2.
[199] Refugee Convention, art. 31(2) (prohibiting States from applying restrictions to the movement of asylum-seekers other than those which are necessary); *see also* ICCPR, art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.").
[200] Detention Guidelines, ¶ 51; *see also* U.N. Gen. Assembly, Convention on the Rights of the Child, 1577 U.N.T.S. 3, arts. 3, 22, 37(b) (Nov. 20, 1989).
[201] *See, e.g.*, Beyond Detention, at 5.
[202] Beyond Detention, at 5. Within the U.S. context specifically, for example, UNHCR has supported the development of an integrated reception model that, among other benefits, would favor alternatives to detention.
[203] It is impermissible to detain an individual for the purpose of deterrence. Detention Guidelines, ¶ 3. "There is no evidence that detention has any effect on irregular migration," and "[r]egardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain." *Id.*
[204] Detention Guidelines, ¶ 18. UNHCR notes that the IFR does not adopt the narrower parole standard outlined in the Proposed Rule, which would have permitted parole only where "required to meet a medical emergency, for a legitimate law enforcement objective, or because detention is unavailable or impracticable." Interim Final Rule, at 18,108. As underscored in its comments on the Proposed Rule, UNHCR observes that States' operational concerns, such as availability of bed space in detention, should not guide decisions over detaining people, as those do not account for the particulars of an individual's situation. UNHCR, Comments on Proposed Rule (Oct. 2021). International law details legitimate purposes for which States may resort to detention, including public order, public health, and national security, the analysis of each of which applies to the individual in question and not to government capacity. Detention Guidelines, Guideline 4.1. Approaching decisions to detain from a presumption of detention and permitting exceptions based on operational considerations, including the availability of bed space, does not fall within the permitted framework under international law. Accordingly, UNHCR reiterates that such factor should not be considered in any decision concerning detention.
[205] Detention Guidelines, ¶ 20.
[206] Detention Guidelines, ¶¶ 47(iii-iv).
[207] Detention Guidelines, ¶ 43.
[208] Detention Guidelines, ¶ 43.
[209] Detention Guidelines, ¶ 48.

prisons or jails should be avoided.[210] Any detention should be for the shortest period of time possible,[211] and decisions to detain must include minimum procedural safeugards, including the right for the individual concerned to be informed about the reason for detention, access to prompt and periodic judicial review of that decision, access to free legal counsel, and the ability to contact and be contacted by UNHCR.[212]

Particularly in light of varied and often restrictive prior interpretations of parole authority, UNHCR welcomes the clarifications of parole grounds and the more inclusive grounds for exercising that authority. However, within the context of the above international framework, UNHCR's concerns about the detention and parole parameters put forward in the IFR mirror those it expressed concerning provisions included in the Proposed Rule.[213] In particular, UNHCR is concerned that, despite the expanded section 235 parole parameters, many asylum-seekers may nonetheless experience prolonged or indefinite detention during the pendency of the asylum adjudication process. A parole-based regime is highly discretionary, and thus, in the future, these provisions could be applied restrictively, leading to widespread detention of asylum-seekers throughout their proceedings. In such a system, the risk of arbitrary detention could be reduced, for example, by automatically considering parole following a credible fear finding and establishing a presumption of parole, balanced by any risks of flight, danger to the community or national security.[214]

While UNHCR welcomes expanded grounds for parole available to individuals in expedited removal, beyond even those set forth under the Proposed Rule, it reiterates its view that this does not remedy the long-standing discrepancies between the U.S. approach to detention of asylum-seekers and the clear limitations on the use of detention under international law.[215] Integrating the complete grounds for parole at section 212(d)(5) of the INA into the IFR aligns the new framework more closely with international standards, however these grounds do not fully correspond with the absence of legitimate purposes for detention under international law, nor do they cure the risks of arbitrary detention in a parole-based regime. In addition, for detention not to be arbitrary, the decision to detain must be regularly reviewable by a judicial body independent of the detaining authority. Here, however, parole decisions fall to the detaining authority. UNHCR notes this is distinct from some applications for review of the decision to detain for those in section 240 proceedings, which are governed at least in part by the immigration courts.

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[210] Detention Guidelines, ¶ 48.

[211] For example, while a minimal period of detention may be lawful in order to carry out checks where identity is undetermined or in dispute, or public health or security risks exists, such detention must last only as long as reasonable efforts are required and made to establish identity, carry out such checks, or mitigate such risks. It is impermissible to prolong immigration-related administrative detention due to inefficient processing modalities or resource constraints.

[212] Detention Guidelines, ¶ 47; *see also* Exec. Comm. of the High Comm'r's Programme, *Conclusion on International Protection No. 85 (XLIX) – 1998*, ¶ (dd) (Oct. 9, 1998), *available at* https://www.refworld.org/docid/3ae68c6e30.html.

[213] UNHCR, Comments on Proposed Rule (Oct. 2021).

[214] UNHCR supported, for instance, the parole guidelines issued by ICE in December 2009 because they included automatic consideration, a presumption of release, and built-in internal quality assurance mechanisms. *See* U.S. Immigration & Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009) [hereinafter ICE, *Parole Guidelines*]. In the IFR, the Government disagreed with comments to the Proposed Rule that suggested incorporating into the regulations a presumption of parole or provision providing that detention will be used as a matter of last resort. Interim Final Rule at 18,214; *see also*, UNHCR, Comments on Proposed Rule (Oct. 2021) (proposing the use of a presumption of parole and treating detention as a measure of last resort). The IFR raises questions about whether such standards would be permissible under the INA and concluded that those "options would be inconsistent with DHS's discretionary parole authority." Interim Final Rule, at 18,124. Nevertheless, the 2009 ICE guidelines instituted a presumption of parole for individuals with credible fear within the framework of INA § 212(d)(5)(A). *See* ICE, *Parole Guidelines*, at ¶¶ 4.2-4.4, 6.1-6.2. Those guidelines explain that "the term 'public interest' is open to considerable interpretation" and "explain[] how the term is to be interpreted by [Detention and Removal Operations] when it decides whether to parole arriving aliens determined to have credible fear." *Id.* ¶ 4.4. While the policy emphasizes that each parole decision will be made on a case-by-case basis, it notes that "when an arriving [noncitizen] found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors . . . parole the [noncitizen] on the basis that his or her continued detention is not in the public interest." *Id.* ¶ 6.2. Thus, there is DHS precedent to establishing a presumption of parole, and the 2009 parole guidelines could inform an approach under the IFR.

[215] *See generally* Detention Guidelines; UNHCR, Comments on Proposed Rule (Oct. 2021).

UNHCR has long encouraged the U.S. government to take all necessary steps to bring the U.S. framework for detention of asylum-seekers in line with international law, specifically by incorporating the principles espoused in UNHCR's Detention Guidelines into national law.[216] This includes, among other procedural and substantive guarantees, ensuring that asylum-seekers be able to contact or be contacted by UNHCR, regardless of which DHS entity—CBP or ICE—has custody of them.[217] Similarly, stateless individuals in the United States often face detention throughout their proceedings, which represents an especially compelling hardship.[218] As with others, stateless individuals must be protected from arbitrary detention, and a person's status as stateless should be considered as a factor in detention decisions.[219]

In the interim period, until the U.S. immigration detention framework can be brought in line with international standards, **UNHCR recommends** that the Government modify the detention framework put forward in this rule so that asylum-seekers are not left in a situation which is more detrimental than the one they find themselves in under the current process governed by section 240. Specifically, UNHCR recommends that independent review by the immigration court of any decision to detain be retained, otherwise any parole-based detention framework will be arbitrary and will violate international law.

UNHCR recommends that the parameters for parole be aligned with international law. UNHCR recommends that the regulation include a presumption of release, with an individualized assessment of the decision to detain in every case. Any decision to detain should be premised on a legitimate purpose for detention, namely public order, public health, or national security in that individual case,[220] and the parole parameters established by this regulation should reflect those purposes. Any decision not to parole must be subject to periodic review.

Regardless of the framework for parole ultimately put forward in this regulation, the Government must ensure that those detained have the right to legal assistance and counsel.[221] Asylum-seekers should not be held in criminal or penal detention facilities; individuals must be informed of the right to legal counsel; legal counsel must be able to gain admittance to the detention facilities in question (both in person and through other methods such as telephonic communication); communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles, and lawyers must be able to meet with their clients in a private setting.[222]

Lack of Employment Authorization Pursuant to Parole

The IFR adopts without change the Proposed Rule's position that parole simply authorizes release from custody and cannot serve as an independent basis for employment authorization.[223] As emphasized in its comments to the Proposed Rule, UNHCR remains concerned that denying asylum-seekers an opportunity to seek work authorization pursuant to their parole status may improperly restrict their right to access the labor market and deprive them of an adequate standard

[216] *See generally* Detention Guidelines.
[217] Detention Guidelines, ¶ 47(vii).
[218] UNHCR, *Representing Stateless Persons Before U.S. Immigration Authorities: A Legal Practice Resource from the United Nations High Commissioner for Refugees*, at 34 (Aug. 2017), *available at* https://www.refworld.org/docid/5a15369d4.html %5Baccessed [hereinafter *Representing Stateless Persons*].
[219] *Representing Stateless Persons*, at 34.
[220] Detention Guidelines, ¶ 21.
[221] See *infra* Section III.B for UNHCR's recommendations on legal assistance and representation.
[222] Detention Guidelines, ¶¶ 47, 48(iv).
[223] *See* Interim Final Rule, at 18,127; Proposed Rule, at 46,913-14.

of living, which might indirectly compromise their ability to pursue their applications for protection adequately.[224] "In many instances, asylum-seekers are without means upon arrival," and they may require accommodation and other financial assistance to cover essential living expenses if access to employment is restricted.[225]

UNHCR observes that, as it stands, asylum-seekers in the United States often must wait until their asylum applications have been pending for at least 150 days to apply for a work permit,[226] but they typically must go months longer without permission to work because of the time required to submit an asylum application after arrival and the period during which the Government reviews and decides the application for employment authorization. This reality may leave asylum-seekers, particularly those part of a family with children or other dependents, in a precarious situation while they navigate complex asylum procedures and may be processing significant levels of trauma, as they frequently must go months or longer without an ability to provide for themselves.

Under international human rights law, everyone—including asylum-seekers—has the right to an adequate standard of living, and UNHCR has recognized that respect for these rights and their corresponding standards is essential, particularly in how they may guide reception arrangements.[227] While the 1951 Convention and 1967 Protocol do not expressly set forth detailed standards on all aspects of the reception of asylum-seekers, access to work or employment opportunities is recognized in the 1951 Convention, and asylum-seekers must be treated as favorably as possible or at least as favorably as other non-nationals in the same circumstances.[228] Further, it is generally accepted that "adequate reception conditions are a necessary component of fair and efficient asylum procedures."[229] Access to work for asylum-seekers is clearly linked to the quality of reception conditions, as it may be more challenging to fulfil individuals' basic needs if they are not able to provide for themselves and in the absence of adequate, accessible social protections.[230] Asylum-seekers whose basic needs are not met, which could occur as a result of a lack of access to work, cannot be expected to pursue their applications effectively.[231]

Furthermore, authorizing asylum-seekers to work at an early stage, ideally as soon as practicable upon their reception, offers a variety of benefits, both to asylum-seekers and to host communities.[232] "Allowing asylum-seekers to work during the asylum determination process, or at the very least, to be self-employed, helps to reduce their social and economic exclusion, and can alleviate the loss of skills, low self-esteem and mental health problems that often accompany prolonged periods of idleness."[233] With respect to potential gains by host communities, "[g]ranting asylum-seekers access to the labour market can help to reduce the cost of supporting asylum-

[224] *See* UNHCR, *Decent Work for Refugees: UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees* (July 2021), *available at* https://www.refworld.org/docid/60e5cfd74.html [hereinafter *Decent Work for Refugees*]; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 6 (Dec. 16, 1966); U.N. Comm. on Economic, Social & Cultural Rights, *Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights*, ¶ 3 (Mar. 13, 2017), *available at* https://www.refworld.org/docid/5bbe0bc04.html.

[225] UNHCR, *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, U.N. Doc. EC/GC/01/17, ¶ 12 (Sep. 4, 2001).

[226] *See* 8 C.F.R. § 208.7(a)(1)(ii); *AsylumWorks v. Mayorkas*, 1:20-cv-03815 (D.D.C. Feb. 7, 2022) (memorandum opinion) (vacating the rule that, among other measures, established a 365-day waiting period to apply for employment authorization as set forth at 85 Fed. Reg. 38,532 et seq. (June 26, 2020)).

[227] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 97.

[228] *See Decent Work for Refugees*, ¶ 14; Refugee Convention, arts. 17-19.

[229] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 97.

[230] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 97.

[231] *See* Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 97.

[232] *See Decent Work for Refugees*, ¶ 4.

[233] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 102.

seekers, and can benefit the local economy."[234] Thus, there are strong reasons that favor facilitating early access to work for asylum-seekers.

In UNHCR's view, greater parole of asylum-seekers in expedited removal proceedings, as envisioned under the IFR, presents an opportunity to improve access to work for that population by providing an alternative ground for work authorization eligibility that likely may materialize much more quickly for many, compared to the ground based on status as an asylum-seeker.[235] Instead of affirmatively rejecting this possibility, as suggested in comments to the Proposed Rule, a final iteration of this rule instead might provide definitively that paroled asylum-seekers *may* seek employment authorization pursuant to their parole, which potentially could significantly decrease their wait time to obtain a work permit and produce an array of benefits to these individuals and their host communities described in the preceding paragraphs.

It is UNHCR's opinion that, although asylum applications may be filed relatively soon upon arrival, per the procedures set forth under other provisions of the IFR, it remains preferable to provide the option of seeking employment authorization based on parole since it does not require the minimum five-month waiting period to apply that the other ground does.[236] Contrary to the IFR's assertion that providing parole-based employment authorization would disincentivize appearance by asylum-seekers at their interviews and hearings,[237] UNHCR sees parole-based employment authorization as a means to, among other benefits, help facilitate appearance by enabling asylum-seekers to start earning money that can cover transportation to their interview or hearing, as well as other basic necessities that may bear on an ability to participate in their cases.

Further, particularly considering the rapid adjudicatory timeframe set forth by the IFR, UNHCR is concerned that some asylum-seekers appealing decisions on their claims may not be able to access asylum-applicant-based employment authorization if they do not accrue 180 days post-filing prior to an immigration judge's denial of their case. Based on the timeline in the IFR, an immigration judge could deny an asylum application, and potentially other forms of protection, within approximately four months, if not more quickly.[238] If the asylum-seeker wishes to appeal that denial and they do not have 180 days on their 'asylum clock,' they will not be able to access employment authorization during the pendency of the appeal. Understanding that asylum appeals often take months if not years to adjudicate,[239] the lack of authorization to work could have significant detrimental impacts on asylum-seekers, their families, and communities. Providing parole-based employment authorization for asylum-seekers in expedited removal would help prevent such scenario.

[234] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 102; *see also* UNHCR, *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, ¶ 13 ("Not only will the need for assistance be diminished if the asylum-seeker is permitted to engage in employment, but dignity and self-respect are enhanced.").

[235] *See* 8 C.F.R. §§ 274.a12(c)(8), (c)(11).

[236] In practical terms, UNHCR supports an earlier opportunity for asylum-seekers to access work authorization, such as pursuant to their parole into the United States. UNHCR observes, nevertheless, that access to work authorization pursuant to parole could lead to disparate treatment of certain groups of asylum-seekers, as asylum-seekers who entered the United States on a valid visa, for example, and apply for asylum affirmatively would not necessarily have access to the same benefit at such an early stage of their procedure. However, instead of electing to subject all asylum-seekers to a lengthier wait for access to work, UNHCR recommends, in line with international standards, advancing the opportunity of all asylum-seekers in the United States to obtain employment authorization more quickly than possible under current practice.

[237] *See* Interim Final Rule, at 18,127-28.

[238] This might happen, for instance, if an asylum officer issues a decision within 60 days of the filing of the asylum application (i.e., the date of service of the positive fear determination) (or perhaps more quickly if the asylum merits interview occurs 21 days after filing), the case is referred to immigration court, and an immigration judge either decides the case without a hearing or holds a merits hearing and issues an oral decision denying asylum within 60 days of the service of the Notice to Appear.

[239] *See* Notice of Proposed Rulemaking, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, fn. 39 (Aug. 26, 2020) ("The median time for all appeals from immigration judge decisions in FY 2019 was 168 days. Excluding interlocutory appeals, appeals from custody redeterminations, and appeals from decision on motions to reopen, the median time to completion for case appeals in FY 2019 was 323 days. . .").

UNHCR recommends that the Government revise this provision to permit asylum-seekers to obtain work authorization pursuant to their parole.

F. Severability

UNHCR notes that the Proposed Rule called for feedback on the severability of various provisions of this rule, and in its comments to that initial iteration of the rule, UNHCR expressed concern over the potential implementation of a rule with severed provisions.[240] Although the Government acknowledged UNHCR's input regarding this question in the IFR, it concluded that "to the extent that any portion of the IFR is stayed, enjoined, not implemented, or otherwise held invalid by a court, the Departments intend for all other parts of the rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect."[241] Following the publication of the IFR, two lawsuits were filed challenging the rule, making this possibility even more real.[242] Accordingly, UNHCR reiterates its deep concern over the prospect of severability and the adverse consequences such action could have on asylum-seekers undergoing this new procedure and their ability to access protection.

While UNHCR would not normally comment on detailed administrative law issues recognizing that States have considerable leeway in establishing asylum procedures, in this instance, it emphasizes that there are various protective provisions in the IFR which render the overall proposal more in line with international standards. UNHCR is concerned that without them—if they were, for instance, to be severed from the proposed framework in ongoing litigation—the overall scheme would fall short of international standards for fair and efficient processing of asylum applications. Specifically, if provisions on parole or review, or any future provisions expanding access to legal assistance and representation, were to be circumscribed, struck down, or narrowed, the resulting procedure could be insufficient—indeed even considerably out of step with international standards—with the potential for asylum-seekers to be detained throughout proceedings, without time or assistance in presenting their claim at first instance or subsequently.

UNHCR recommends that the Government take care to put forward a rule that protects all necessary elements of a fair and efficient asylum procedure. UNHCR recommends that the Government weigh those provisions which are necessary to working toward a procedural framework in line with international standards (such as an appropriately limited detention framework and access to an independent review body) and make those inseverable from the body of the rule. UNHCR stands ready to engage in further conversation on how this can best be undertaken.

V. Conclusion

UNHCR recognizes the current and complex challenges associated with flows of asylum-seekers amidst mixed migration within the sub-region and the corresponding strains on an asylum system in need of reform and offers its continued support to the U.S. authorities to overcome these challenges and ensure consistency with international law. UNHCR further acknowledges the

[240] UNHCR, Comments on Proposed Rule (Oct. 2021).
[241] Interim Final Rule, at 18,184.
[242] *See* Texas v. Mayorkas, 2:22-cv-00094 (N.D. Tex. Apr. 28, 2022) (complaint); Arizona et al. v. Garland, 6:22-cv-01130 (W.D. La. Apr. 28, 2022) (complaint). Each lawsuit requests federal courts to halt implementation of the IFR, either in whole or in part, and both specifically target certain provisions within the rule, including those governing the parole of individuals in expedited removal. *See* Texas v. Mayorkas, 2:22-cv-00094 (N.D. Tex. Apr. 28, 2022) (complaint); Arizona et al. v. Garland, 6:22-cv-01130 (W.D. La. Apr. 28, 2022) (complaint).

Government's long-standing commitment to refugees and asylum-seekers and welcomes the decades-long record of consulting with UNHCR on implementation of the 1967 Protocol.

UNHCR recognizes a number of positive initiatives envisaged in the IFR. Leveraging efficiencies such that asylum-seekers can have their claims recognized more expeditiously and adjudicating claims in a non-adversarial setting in the first instance are welcome changes in line with international standards. However, UNHCR remains concerned that other provisions of the IFR retain existing discrepancies between U.S. practice and international standards and introduces elements which may create more obstacles to fair and efficient asylum hearings. As underscored in comments to the proposed iteration of this rule, adopting provisions that would ensure meaningful access to legal assistance and representation during the procedure would go far to mitigating these concerns. Otherwise, asylum-seekers, particularly those with complex cases or special needs that impact their ability to present their claim on their own, will struggle with procedural requirements and standards.

In line with UNHCR's supervisory responsibility and advisory role, our Office remains available to engage with the U.S. government in robust consultation, so that we might provide technical support and examples of good practices for making a procedure faster but still in line with international standards on fair and efficient procedures.