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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):

"Circumvention of Lawful Pathways"

CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023

Submitted 20 March 2023

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits the comments below on the Notice of Proposed Rulemaking on Circumvention of Lawful Pathways, put forward by the U.S. Department of Justice and U.S. Department of Homeland Security (*hereinafter* "the NPRM" or "Proposed Rule"). These comments focus on those aspects of the NPRM which may have a significant impact on asylum-seekers' ability to access territory and obtain protection in the United States in accordance with international norms and standards. UNHCR has a direct interest in this matter as the agency entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with governments, to seek permanent solutions to the problems of refugees.[1]

This submission is offered consistent with UNHCR's supervisory responsibility as set out under its Statute[2] and pursuant to the 1967 United Nations Protocol Relating to the Status of Refugees (the "1967 Protocol")[3] and the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention").[4] The United States is a 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.[5] 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.[6]

One of the means by which UNHCR exercises its supervisory responsibility is by providing to States party its guidance and interpretations of the meaning of provisions and terms contained in international refugee instruments, in particular 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 increased, ongoing arrivals of asylum-seekers amongst mixed and onward 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

[1] G.A. Res. 428(v), Statute of the Office of the United Nations High Commissioner for Refugees, ch. 1, ¶ 1 (Dec. 14, 1950) [hereinafter UNHCR Statute].
[2] *See id.*
[3] Protocol Relating to the Status of Refugees, art. II, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].
[4] Convention Relating to the Status of Refugees art. 35, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [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, *supra* note 1, ¶ 8(a).
[5] *See* Protocol, *supra* note 3.
[6] "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." *Id.*, art. II.

resilient, adaptable, fair, and efficient domestic asylum system that upholds international legal norms and standards.[7]

UNHCR presents these comments to provide its views and guidance on which aspects of the NPRM align with international norms and standards for access to territory and for receiving and assessing asylum claims, and which raise concerns that may contravene U.S. obligations under international refugee law. The NPRM asks specifically for feedback on whether "the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection."[8] In UNHCR's opinion, in line with international refugee law, the NPRM fails to provide such an opportunity, and as such UNHCR advises that the NPRM be rescinded in its entirety.

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

A. Relevant Foundational Principles of International Refugee Law

UNHCR is concerned that – as discussed in detail in the specific sections below – the NPRM runs afoul of several central principles of international refugee law binding on the United States. The United States is party to the 1967 Protocol, and, by incorporation, is bound by articles 2-34 of the 1951 Convention.[9] Nonetheless, the Proposed Rule threatens to violate key aspects of that treaty regime, among them the foundational principle of non-refoulement and the right to seek asylum.

UNHCR is concerned that the Proposed Rule will **lead to the refoulement of large numbers of asylum-seekers** of many different nationalities, ethnic backgrounds or religions, and of a very wide range of people at risk. Non-refoulement, a norm of customary international law, is the cornerstone of the 1951 Convention and its 1967 Protocol. The Proposed Rule, by impeding access to asylum through establishing a broad presumption of ineligibility, puts forward a regulatory framework at variance with international standards. If enacted, this framework will preclude access to the asylum system for many asylum-seekers, leading to the refoulement of individuals with international protection needs. Access to a fair and efficient refugee status determination procedure is an essential element in the full and inclusive application of the 1951 Convention and its 1967 Protocol, and indeed a safeguard to protect refugees and asylum-seekers from refoulement. States party to these instruments are required to provide access to such a procedure.[10]

UNHCR observes with concern that the Proposed Rule purports to remain in compliance with international obligations because of the continued availability of statutory withholding of removal.[11] First, UNHCR notes that **compliance with obligations under the 1951 Convention and 1967 Protocol is not brought about merely by complying with one article therein** (that is, non-refoulement obligations under Article 33). Instead, the United States should provide for a

[7] 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. 14,010, 3 C.F.R. 496 (2021), § 4(i) (Feb. 5, 2021).
[8] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11708 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).
[9] *See* Protocol, *supra* note 3.
[10] UNHCR, Rep. of the Second Meeting of Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures), ¶¶ 4-5, U.N. Doc. EC/GC/01/12 (May 31, 2001) [hereinafter Global Consultations on Fair and Efficient Asylum Procedures], https://www.refworld.org/docid/3b36f2fca.html.
[11] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11737.

determination of eligibility for refugee status pursuant to the criteria in Article 1 (inclusion as well as exclusion).[12] Those in need of international protection are entitled to the rights enumerated in the 1951 Convention, including but not limited to protection under Article 33.[13] Second, withholding of removal – which offers less robust protection with a more onerous standard of proof – is simply not an adequate replacement for access to asylum and cannot be used as a substitute.

Under international law, individuals who fulfill the criteria enumerated in Article 1A(2) of the 1951 Convention (or its Protocol), and who are not excluded under Articles 1D, 1E or 1F, are entitled to be recognized as such and protected under that instrument. For that reason, **asylum adjudication must correspond with international standards**. By putting forward a category of presumed ineligibility for asylum, the Proposed Rule creates a bar to asylum, in effect resulting in exclusion from refugee status, which is not permitted under the 1951 Convention. UNHCR notes that the 1951 Convention and 1967 Protocol establish an exhaustive exclusionary framework that governs when and how those who otherwise would qualify for protection may legally be excluded from that protection.[14] Going beyond that framework will lead to erroneous exclusion, refouling those who need protection and placing them at risk of persecution and / or death.

The NPRM is premised on discretionary factors articulated in INA Section 208, and yet **asylum is non-discretionary under international law**.[15] The NPRM relies on INA Section 208(b)(1) ("the Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied…" [emphasis added]) and INA Section 208(b)(2)(C) ("the Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum") as the authority to impose additional conditions on asylum eligibility.[16] Even prior to this NPRM, the U.S. practice of discretionary denial of asylum was at variance with international law, which does not recognize discretion as a factor in determining whether to provide protection to persons who are refugees at international law. Under international law, someone who meets the standards stipulated in Article 1 of the Convention and Article I of the Protocol "shall" be considered a refugee.[17] This definition of a refugee in Article 1A(2) has a declaratory character, that is, a person does not become a refugee because of recognition, but is recognized because s/he is a refugee.[18]

Fundamentally, the right to seek and enjoy asylum, included inter alia in Article 14 of the Universal Declaration on Human Rights, is implemented in part by States' obligations to provide

[12] Refugee Convention, *supra* note 4, art. 1F.
[13] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Refugee Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare* Huang v. Holder, 744 F.3d 1149, 1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting Al-Harbi v. I.N.S., 242 F.3d 882, 888 (9th Cir. 2001))), *with* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439–40 (1987) (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 42, U.N. Doc. HCR/1P/4/ENG/REV.4 (April 2019) [hereinafter UNHCR Handbook])). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification, freedom from arbitrary detention, and pathways to naturalization.
[14] Refugee Convention, *supra* note 4, arts. 1D, 1E, 1F.
[15] "Asylum" is used here to refer to international protection afforded to refugees under the 1951 Convention and its 1967 Protocol.
[16] Emphasis added. Circumvention of Lawful Pathways, 88 Fed. Reg. at 11,733 n.205.
[17] *See* Refugee Convention, *supra* note 4, art. 1A(2) (providing that "the term 'refugee' *shall* apply to" anyone who meets the definition under Article 1A(2)) (emphasis added).
[18] UNHCR Handbook, *supra* note 13, ¶ 28.

international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol. The United States delivers on this responsibility in part through the status of "asylee" – the outcome of a successful asylum claim. This cannot depend on the discretion of the adjudicator; protection under the 1951 Convention and its 1967 Protocol is not contingent on the discretion of adjudicating authorities.[19]

UNHCR has long acknowledged the United States is facing unprecedented challenges associated with new and increased flows of asylum-seekers. We recognize that the U.S. asylum system is under significant strain and in need of reform, and we appreciate the ongoing engagement with the Departments of Homeland Security and Justice on ways to improve the quality and efficiency of the system and reduce the current backlog. UNHCR applauds innovations that could provide for safer transit and more orderly border access such as parole pathways and the use of electronic entry management systems; however, as noted throughout this comment, such innovations cannot be implemented at the expense of access to territory to claim asylum. Programs like humanitarian parole and CBP One cannot be used as exclusive manners of entry. The exceptions to the presumption of ineligibility in this rule do not fundamentally address the breach of international legal standards stemming from the presumption of ineligibility for asylum.

UNHCR stands ready to support the U.S. government to grapple with these complex challenges, with a view to building a more resilient, fair, and efficient domestic asylum system that upholds international standards. To this end, these comments also include suggestions and recommendations in section VI, below.

B. Key Principles in Adjudication of Asylum Claims, Including the Importance of Legal Assistance

UNHCR takes this opportunity at the outset to note some key principles for asylum adjudication garnered from UNHCR's seven decades of experience globally.[20] 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[21]—they must also be able to present their claim by accessing asylum adjudication procedures with certain basic safeguards.[22] While it is left to each State to establish the procedure most appropriate to that State's constitutional and administrative structure, asylum procedures must be conducted in full respect of due process standards.[23] These requirements are grounded in international and regional human rights law,

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[19] *See* UNHCR Exec. Comm., Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶16, U.N. Doc. EC/SCP/54 (July 7, 1989) [hereinafter Implementation of the 1951 Convention] ("The legislative approach adopted by States to regulate refugee rights can, in itself, negatively influence their realization. In some countries, for example, the issue of refugee protection is approached as one of defining not the rights themselves but rather the powers vested in refugee officials. This means that the protection of refugee rights becomes an exercise of powers and discretions by those officials rather than enforcement of specific rights identified and guaranteed by law. In other cases the realization of refugee rights is left to depend ultimately on an exercise of ministerial discretion.").

[20] *See* UNHCR Exec. Comm. Conclusion No. 8 of its Twenty-Eighth Session, Determination of Refugee Status, ¶ (e), U.N. Doc. A/32/12/Add.1 (Oct. 12, 1977) [hereinafter ExCom Conclusion No. 8], https://www.unhcr.org/en-us/excom/exconc/3ae68c6e4/determination-refugee-status.html.

[21] Submission by the Office of the United Nations High Commissioner for Refugees as Third-Party Intervener, ¶ 3.1.5, D.A. and others v. Poland, App. No. 51246/17, (Feb. 5, 2018) [hereinafter D.A. v. Poland Submission], https://www.refworld.org/docid/5a9d6e414.html; *see also* Refugee Convention, *supra* note 4, 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 . . .").

[22] UNHCR Handbook, *supra* note 13, ¶ 192.

[23] UNHCR Handbook, *supra* note 13, ¶¶ 189-192.

including on the fairness of procedures and the right to an effective remedy.[24] Given the serious consequences of an erroneous determination, these protections and guarantees are fundamental at all stages of the procedure.[25] In the asylum context—whether at the border or elsewhere—fairness requires respect for the standards in this non-exhaustive list:

- The essence of the asylum procedure is the **asylum interview** (also known as the refugee status determination interview), an expression of the right to be heard as a component of due process.[26] UNHCR's global practice, under its own mandate Refugee Status Determination (RSD) operations and as reflected in UNHCR's Procedural Standards for Refugee Status Determination, requires that all applicants undergoing an individual RSD procedure have the opportunity to participate in an RSD interview to present their claims in person.[27] The interview must be held in a safe, confidential, and suitable environment.[28] 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,[29] and fostering "trust and respect so that the applicant feels comfortable enough to tell his/her story as coherently and completely as possible."[30] UNHCR's Handbook on Criteria and Procedures for Determining Refugee Status,[31] considered to offer authoritative guidance by the U.S. Supreme Court,[32] is not prescriptive on the characteristics of the first-instance asylum process.[33] Nonetheless, its guidance supports a non-adversarial approach, when noting that given that the asylum applicant who "can provide evidence of all his statements 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

[24] 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, ch. 7 (2017) [hereinafter IPU/UNHCR Handbook for Parliamentarians No. 27], https://www.unhcr.org/3d4aba564.pdf.

[25] UNHCR Exec. Comm., Conclusion No. 30 of its Thirty-Fourth Session, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, ¶ 97(2)(e), U.N. Doc. A/38/12/Add.1, (Nov. 8, 1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom Conclusion No. 30]. ("Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive [and] the grave consequences of an erroneous determination for the applicant[.]")

[26] *See* INTER-AM. COMM'N H.R., DUE PROCESS IN PROCEDURES FOR THE DETERMINATION OF REFUGEE STATUS AND STATELESSNESS AND THE GRANTING OF COMPLEMENTARY PROTECTION, ¶ 231, OAS Doc No. OEA/Ser.L/V/II Doc. 255/20 (Aug. 5, 2020) [hereinafter Due Process in Procedures], https://www.oas.org/en/iachr/reports/pdfs/dueprocess-en.pdf. *See generally* UNHCR, AIDE-MEMOIRE & GLOSSARY OF CASE PROCESSING MODALITIES, TERMS AND CONCEPTS APPLICABLE TO REFUGEE STATUS DETERMINATIONS UNDER UNHCR'S MANDATE (2020) [hereinafter Aide-Memoire & Glossary of Case Processing Modalities], https://www.refworld.org/docid/5a2657e44.html.

[27] UNHCR, UNHCR RSD PROCEDURAL STANDARDS, UNIT 4: ADJUDICATION OF REFUGEE STATUS CLAIMS, § 4.3.1 (Aug. 26, 2020) [hereinafter RSD Procedural Standards Unit 4], https://www.refworld.org/docid/5e87075d0.html. UNHCR notes that State Members of the OAS, such as the U.S., 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. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 232 (Aug. 19, 2014); 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), Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶ 195-6 (May 30, 2018).

[28] RSD Procedural Standards Unit 4, *supra* note 27, § 4.3.2.

[29] UNHCR, UNHCR RSD PROCEDURAL STANDARDS, UNIT 2.7: LEGAL REPRESENTATION IN UNHCR RSD PROCEDURES, § 2.7.4 (Aug. 25, 2020) [hereinafter RSD Procedural Standards Unit 2.7], https://www.refworld.org/docid/5f3114a74.html.

[30] Due Process in Procedures, *supra* note 26, ¶ 234.

[31] *See generally* UNHCR Handbook, *supra* note 13.

[32] *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (stating that the Handbook "provides significant guidance in construing the Protocol").

[33] UNHCR Handbook, *supra* note 13, ¶¶ 189-192.

draw out the full story.[34] In UNHCR's observation, non-adversarial processes (such as those in the Asylum Officer Rule in the United States) when properly implemented also tend to be faster, less costly, more specialized, and more adaptable than the court system to process asylum applications with sufficient fairness and efficiency at first instance (see Section VI for further discussion).

- 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. Applicants should have access to the services of trained and qualified interpreters at all stages of the asylum process.[35] 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.[36] Likewise, notifications of asylum decisions should be carried out in a language the applicant understands.

- **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. It should be guaranteed by States at all stages of the process, including in detention.[37] 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 representation. It helps ensure that inaccurate information asylum-seekers may have previously received from other sources is rectified.[38] 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.[39] It may be complemented by information provided by NGOs and legal aid organizations.[40]

- **Legal information, assistance, and representation** is essential to ensuring that asylum-seekers can navigate the asylum process in full exercise of their rights. Legal information, assistance, and representation will focus primarily on the specific elements of the individual asylum claim and on representing the asylum-seeker in the procedure. In order to maximize both efficiency and fairness, asylum-seekers should have access to legal representation throughout the process, including at the outset. The Human Rights

[34] UNHCR Handbook, *supra* note 13, ¶ 196; Due Process in Procedures, *supra* note 26, ¶¶ 20, 247. On the shared burden of proof of immigration authorities in establishing a risk of serious harm under Article 3 ECHR, see J.K. and Others v. Sweden, App. No. 59166/12, ¶¶ 96-98 (Aug. 23, 2016), https://hudoc.echr.coe.int/eng?i=001-154980.
[35] UNHCR, UNHCR RSD PROCEDURAL STANDARDS UNIT 2.5: INTERPRETATION IN UNHCR RSD PROCEDURES, § 2.5.1 (Aug. 26, 2020), https://www.refworld.org/docid/5f3113ec4.html (providing guidance on qualification and training, remote participation, impartiality, duty of confidentiality and access of interpreters to individual files, and supervision and oversight).
[36] *Id.*; *see also* Due Process in Procedures, *supra* note 26, ¶ 213.
[37] *See* Due Process in Procedures, *supra* note 26, ¶ 203.
[38] Counseling could also include other advisory functions, on psycho-social or medical issues for instance. UNHCR, RECOMMANDATIONS DU HCR RELATIVES AU CONSEIL ET A LA REPRESENTATION JURIDIQUE DANS LA NOUVELLE PROCEDURE D'ASILE EN SUISSE 13 (Mar. 2019), https://www.refworld.org/docid/5cae4b424.html.
[39] Due Process in Procedures, *supra* note 26, ¶ 171.
[40] UNHCR Handbook, *supra* note 13, ¶ 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); *see also* D.A. v. Poland Submission, *supra* note 21, ¶ 3.2.2 (citing ExCom Conclusion No. 8, *supra* note 20; ExCom Conclusion No. 30, *supra* note 25, ¶ 97(2)); UNHCR, UNHCR RSD PROCEDURAL STANDARDS, UNIT 3: RECEPTION AND REGISTRATION FOR MANDATE RSD, § 3.1.3 (Aug. 26, 2020) [hereinafter RSD Procedural Standards Unit 3], https://www.refworld.org/docid/5e87075b2.html ("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.").

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."[41] 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 a foreign country.[42] The serious consequences of erroneous decisions in the asylum context make the provision of legal information, assistance, and representation all the more important.

The availability of legal information, assistance, and representation from the very outset of the asylum process is not only critical to uphold the integrity of the procedure, it has also been shown to enhance efficiency by identifying early on the existence of international protection needs; discouraging frivolous or fraudulent claims; reducing the number of appeals and repeat claims; and shortening the time required to determine a claim.[43] In UNHCR's view, government-funded legal assistance and representation by qualified legal professionals—that is, those with specialized knowledge and experience in asylum matters—is therefore an important safeguard and is considered a best practice. This is especially important in complex asylum claims or for cases involving particularly vulnerable applicants.[44]

- Lastly, asylum-seekers have a right to an **effective review or appeal** 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 tribunal or other body.[45] The possibility for an asylum applicant to lodge an appeal with suspensive effect or its equivalent before a removal decision is implemented is a fundamental safeguard in all asylum procedures,

[41] Hum. Rts. Comm., *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter HRC General Comment No. 32], https://www.refworld.org/docid/478b2b2f2.html.

[42] UNHCR, FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS 3 (Sept. 2, 2005), https://www.refworld.org/docid/432ae9204.html [hereinafter Fair and Efficient Asylum Procedures].

[43] *See also* CENTRE SUISSE DE COMPETENCE POUR LE DROITS HUMAINS, EVALUATION EXTERNE DE LA PHASE DE TEST RELATIVE A LA RESTRUCTURATION DU DOMAINE DE L'ASILE, PROTECTION JURIDIQUE: CONSEIL ET REPRESENTATION JURIDIQUES (Nov. 17, 2015), https://boris.unibe.ch/136104/8/160419_Rapport_final_phase_test_asile_f.pdf.

[44] *See* Fair and Efficient Asylum Procedures, *supra* note 42, at 3. *See generally* RSD Procedural Standards Unit 2.7, *supra* note 29 (including 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), 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).

[45] UNHCR, UNHCR NOTE ON THE PRINCIPLE OF NON-REFOULEMENT (Nov. 1997) [hereinafter Note on the Principle of Non-Refoulement], https://www.refworld.org/docid/438c6d972.html; Fair and Efficient Asylum Procedures, *supra* note 42, at 4; *see also* HRC General Comment No. 32, *supra* note 41, ¶ 9. ("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 or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find 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."); Due Process in Procedures, *supra* note 26, ¶ 197.

including accelerated procedures. This minimizes the risk of erroneous decisions, and, therefore, that of refoulement.[46]

In all of the above, UNHCR observes that adequate provision should additionally be made for asylum-seekers with particular vulnerabilities who generally require additional legal, as well as other, assistance.[47] This would include, among others: unaccompanied children, individuals with mental health issues or intellectual capacity challenges, and victims of violence, torture or other traumatic experiences.

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Overall, the Proposed Rule re-orients the processing of asylum claims at the southwest border away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes or exacerbates extraordinary obstacles (including heightened standards, lack of legal aid, and other significant procedural burdens) that must be overcome by those same individuals, at moments when they are at their most vulnerable. As follows from our assessment below, the incorporation of exceptions and grounds for rebuttal are insufficient to address and prevent the stark effect on asylum-seekers. UNHCR is deeply concerned that the Proposed Rule would lead to a serious deterioration of the protection historically offered by this country, infringe on the right to seek asylum, and create a high risk of frequent refoulement of refugees and asylum-seekers arriving at the U.S. southern border.

UNHCR recommends that the Government refrain from adopting the Proposed Rule in its entirety in light of the Proposed Rule's inconsistency with foundational principles of international refugee law. In UNHCR's view, the presumption of ineligibility is fundamentally incompatible with international refugee law, and the exceptions and rebuttal factors cannot redress this fundamental flaw. UNHCR has endeavored to provide specific guidance and recommendations on these principles and others in the ensuing commentary.

III. Comments on Specific Substantive Provisions of the Proposed Rule

In this section, UNHCR offers observations and comments on certain aspects of the NPRM. The below analysis generally mirrors the structure of the discussion in the NPRM 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 norms and legal standards.

A. The Proposed Rule's Condition on Asylum Eligibility

The NPRM proposes that certain noncitizens who enter the United States at the southwest land border are subject to a "rebuttable presumption of ineligibility for asylum" unless certain conditions are met (discussed below).[48] The rebuttable presumption of ineligibility applies to those who have

[46] IPU/UNHCR Handbook for Parliamentarians No. 27, *supra* note 24, § 7.5 (Registering and Adjudicating Asylum Claims), § 7.2 (Fair and Efficient Asylum Procedures), § 7.7 (The Interview and Decision-making Process at First Instance), § 7.11 (Asylum-seekers with Specific Needs in the Asylum Procedure). Specifically on confidentiality, see *id.* § 7.4. *See also* Note on the Principle of Non-Refoulement, *supra* note 45; Due Process in Procedures, *supra* note 26, ¶ 267.
[47] Fair and Efficient Asylum Procedures, *supra* note 42, at 3.
[48] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11723 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).

traveled "through a country other than the [non-citizen's] country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees."[49] This will, in effect, shift to other States the responsibility for adjudicating asylum claims, providing appropriate reception arrangements, and granting international protection. This is true regardless of whether the individual is pursuing protection in the United States; the proposed policy would have a potential significant negative impact on those individuals, particularly in cases where they lack a reasonable connection or link to those States but do have one to the United States.

The Proposed Rule's conditionality based on transit vitiates the right to seek asylum and the core principle of non-refoulement. First, such conditionality amounts to a unilateral, de facto transfer of responsibility for adjudication to another State without the necessary safeguards in place, and second, the conditionality goes beyond the exhaustive exclusion framework contemplated in the 1951 Convention and its 1967 Protocol.

Asylum-seekers should ordinarily be processed in the State in which they seek asylum. As limited exception to this general rule, States may enter into an agreement with another State to facilitate the transfer of asylum-seekers. While international law does not prevent States from entering into responsibility-sharing arrangements which allocate responsibility for adjudicating asylum claims between them, it does require protections to ensure that the individual's rights are upheld (this can be formalized through a "safe third country" agreement, for example).[50] Any transfer of people who may be in need of international protection from one country to another must ensure that asylum-seekers receive the protection guaranteed to them by the 1951 Convention, including but not limited to, the protection from refoulement articulated in Article 33.

Prior to establishing policies that bring about such transfer of responsibility to another State, therefore, the transferring State would need to assess individually (and at minimum allow for individuals to challenge any generally operative presumption that the following safeguards will be guaranteed in their particular case) whether the receiving state will:

- (Re)admit the person and permit the person to remain while a determination is made,
- Grant the person access to a fair and efficient asylum determination procedure,
- Give the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including, but not limited to, protection from refoulement,
- Where the person is determined to be a refugee, recognize them as such and grant lawful stay[51] and / or provide access to a durable solution.[52]

UNHCR is seriously concerned that the NPRM's proposed condition on eligibility for asylum creates a de facto transfer of responsibility for adjudicating asylum claims to other States without ensuring that these conditions are in place.

Under international law, asylum-seekers need not apply for protection in the first, or any subsequent, country through which they transit before arriving in the country where they intend to

[49] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11750.
[50] UNHCR, LEGAL CONSIDERATIONS REGARDING ACCESS TO PROTECTION AND A CONNECTION BETWEEN THE REFUGEE AND THE THIRD COUNTRY IN THE CONTEXT OF RETURN OR TRANSFER TO SAFE THIRD COUNTRIES (Apr. 2018) [hereinafter Safe Third Country Paper], https://www.refworld.org/docid/5acb33ad4.html.
[51] *Id.* ¶ 4.
[52] *See* UNHCR, GUIDANCE NOTE ON BILATERAL AND/OR MULTILATERAL TRANSFER ARRANGEMENTS OF ASYLUM-SEEKERS ¶ 3(vi) (May 2013) [hereinafter Guidance on Transfer Arrangements], https://www.refworld.org/docid/51af82794.html.

seek asylum.[53] UNHCR emphasizes that the primary responsibility for international protection remains with the state where an asylum claim is sought.[54] While ensuring refugee protection is in the first instance the responsibility of the state where the refugees are and from whom it is sought, UNHCR acknowledges that at the same time, refugees do not have an unfettered right to choose their 'asylum country.'[55] Refugees' intentions ought to be taken into account when considering responsibility-sharing arrangements, as should connections to the country in which the refugee applies for asylum.[56] Rules that deny access to protection on the grounds that it ought to have been sought elsewhere are considered inappropriate and fail to recognize the need for responsibility-sharing in refugee protection globally.[57]

Second, though the NPRM provides for rebuttal of the presumption against eligibility (on limited grounds), it nonetheless effectively amounts to a new bar to asylum, as the application will lead to denial of protection in cases where this constitutes a breach of international standards and U.S. obligations under international refugee law. UNHCR is concerned that the proposed condition on eligibility will effectively function as an additional bar to asylum, in a manner far beyond the exhaustive grounds for exclusion prescribed by Articles 1D, 1E, and 1F of the Convention and Protocol.[58] In line with international standards, provisions for the exclusion of those who would otherwise qualify for protection must always be applied with the "utmost caution" and interpreted in a "restrictive manner", and they may only for the reasons stipulated and permitted in the Convention.[59] While these clauses are subject to interpretation, they cannot be amended or modified in the absence of an agreement by the contracting parties of the Convention in light of the possible serious consequences of denying protection to an asylum-seeker.[60] This contravenes fundamental principles guaranteed under the 1951 Convention, including non-discrimination, non-penalization for irregular entry or presence, and non-refoulement.

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[53] *See* UNHCR, GUIDANCE ON RESPONDING TO IRREGULAR ONWARD MOVEMENT OF REFUGEES AND ASYLUM-SEEKERS ¶ 14 (Sep. 2019) [hereinafter Guidance on Irregular Onward Movement], https://www.refworld.org/docid/5d8a255d4.html (explaining that while the 1951 Convention does not include the right of refugees to decide in which State they will receive international protection, asylum should not be refused solely because it could have been sought in another country); UNHCR Exec. Comm., Conclusion No. 15 of Its Thirtieth Session, Refugees Without an Asylum Country, ¶¶ (h)(iii-iv), U.N. Doc. A/34/12/Add.1 (Oct. 16, 1979) [hereinafter ExCom Conclusion No. 15] (noting that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" and that "[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State").

[54] Guidance on Irregular Onward Movement, *supra* note 53, 6 ¶ 16.

[55] Safe Third Country Paper, *supra* note 50, ¶ 2; *see also* Guidance on Irregular Onward Movement, *supra* note 53, ¶ 14; Guidance on Transfer Arrangements, *supra* note 52, ¶ 1.

[56] Safe Third Country Paper, *supra* note 50, ¶ 2.

[57] Guidance on Irregular Onward Movement, *supra* note 53, ¶ 14.

[58] Refugee Convention, *supra* note 4, arts. 1D (relating to persons receiving assistance from organs or agencies other than UNHCR), 1E (relating to persons recognized as having rights and obligations equal to nationality in their country of residence), 1F (relating to persons with serious reasons for considering commission of serious crimes or acts contrary to the United Nations).

[59] *See* UNHCR, STATEMENT ON ARTICLE 1F OF THE 1951 CONVENTION at 7, § 2.1 (July 2009), https://www.unhcr.org/4a5edac09.pdf. The purpose of Article 1F, for instance, was recognized by the travaux préparatoires as being twofold: firstly, to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are "serious reasons for considering" that they committed heinous acts or serious common crimes; and secondly, to ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts. This provision is therefore intended to protect the integrity of the institution of asylum and should be applied "scrupulously", as stated repeatedly by the Executive Committee. *See id.* at 6.

[60] UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 5: APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, ¶ 2 (Sept. 3, 2003) [hereinafter Guidelines on Exclusion Clauses], https://www.refworld.org/docid/3f5857684.html.

The Convention does acknowledge that persons who enjoy a secure residency status and rights akin to those of nationals in the country in which they have taken residence do not need, and may therefore be excluded from, refugee status in another country. Article 1E provides a precise test and sets a high threshold for determining whether exclusion is applicable on such ground: individuals "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection.[61] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[62]

The presumption of ineligibility based on transit put forward in the NPRM goes far beyond what is contemplated or permissible under the exclusion clause in Article 1F,[63] and as such puts asylum-seekers at risk of refoulement. UNHCR takes the position that "asylum should not be refused solely on the ground that it could be sought elsewhere."[64] In many cases, asylum-seekers move onward to seek international protection that is not in fact available in the place to which they have initially fled or through which they traveled subsequent to fleeing their countries of origin.[65] The fact that an asylum-seeker has moved onward does not affect his or her right to apply for asylum and be treated in conformity with international refugee and human rights law, including protection from refoulement.[66]

UNHCR recommends that the Proposed Rule establishing a presumption of ineligibility for asylum after traveling through a third country be rescinded in its entirety.

B. Exceptions to the Condition on Asylum Eligibility

The NPRM establishes three categories of exceptions to the presumption of ineligibility, but none of those three can remedy the international law violations discussed above. In fact, two of the exceptions effectively introduce penalties for circumventing pre-authorized entry into the United States, thus raising additional concerns that the NPRM violates international law. The NPRM asserts that an exception to the presumption of ineligibility applies if the individual, or a member of their family with whom they are traveling:

i) "Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

ii) "Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

[61] Refugee Convention, *supra* note 4, art. 1E.
[62] UNHCR, NOTE ON THE INTERPRETATION OF ARTICLE 1E OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, ¶ 6 (Mar. 2009) [hereinafter Note on Interpretation of Article 1E], https://www.refworld.org/docid/49c3a3d12.html.
[63] Refugee Convention, *supra* note 4, art. 1F (providing for exclusion of persons based on the existence of "serious reasons for considering that" they have committed serious non-political crimes, crimes against peace, war crimes, crimes against humanity, or are guilty of acts contrary to the principles of the United Nations, and not for passage through third countries).
[64] ExCom Conclusion No. 15, *supra* note 53, ¶¶ (h)(iv).
[65] Guidance on Irregular Onward Movement, *supra* note 53, at 2 ¶ 4.
[66] Guidance on Irregular Onward Movement, *supra* note 53, at 2 ¶ 11.

iii) "Sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application."[67]

When it comes to the first of these, parole, UNHCR welcomes the use of pathways to pre-authorized entry into to the United States, but insists that reliance on such pathways *at the expense of* other ways to access territory for persons seeking admission at the U.S.'s borders in order to seek asylum there violates international law. The international refugee law framework requires states to grant access to territory and examine the individual's claim to international protection.[68] Without doing so, the state risks refouling those in need of protection, regardless of whether or not the state also makes available pathways to pre-authorized entry for some classes of potential asylum claimants.

Likewise, while UNHCR supports the U.S. intention to incentivize and facilitate pre-authorized entry, conditioning entry and access to asylum on appearing at a port of entry with a prior appointment (or the ability to demonstrate by preponderance of the evidence that it was not possible to secure an appointment) violates international law. UNHCR is concerned that the operation of the presumption of ineligibility in conjunction with the exceptions connected to pathways (parole, appointments at ports of entry) amounts to penalization of irregular entry in violation of Article 31(1) of the 1951 Convention.[69] Under the NPRM, those who enter between ports of entry would be presumed to be ineligible for asylum, unless they meet an exception, or unless they can rebut the presumption. The rebuttal factors are insufficient to remedy the Article 31(1) violations.

The Convention "recognizes that the seeking of asylum can require refugees to breach immigration rules" and stipulates that refugees should not be subject to specific requirements or suffer penalties or discrimination for this reason.[70] Article 31(1) of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entry. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence."[71] The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties and encompasses "any administrative sanction or procedural detriment imposed on a person seeking international

[67] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).
[68] Submission by the Office of the United Nations High Commissioner for Refugees, ¶ 3.1.5, D.A. and others v. Poland, App. No. 51246/17 (Feb. 5, 2018) https://hudoc.echr.coe.int/eng?i=001-210855, *available at* https://www.refworld.org/docid/5a9d6e414.html; *see also* Refugee Convention, *supra* note 4, 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 . . ."); UNHCR Handbook, *supra* note 13, ¶ 192.
[69] UNHCR notes that the NPRM discusses E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640 (9th Cir. 2021), the case in which the Ninth Circuit "suggested that the rule is inconsistent with the United States' commitments under the 1967 Refugee Protocol, in which the United States adhered to specific provisions of the Refugee Convention." Circumvention of Lawful Pathways, 88 Fed. Reg. at 11739. While the NPRM asserts that the Ninth Circuit was "incorrect" on this point, UNHCR takes the position that penalization for irregular entry very much does fall outside the 1951 Convention and 1967 Protocol.
[70] Refugee Convention, *supra* note 4, Introductory Note.
[71] UNHCR notes that the requirement in Article 31(1) for asylum-seekers to have "come directly" – while not the precise topic of this proposed change – may nonetheless be relevant for consideration when crafting a framework in line with international law. For a detailed discussion of the "come directly" term in Article 31(1), see Cathryn Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES No. 34, PPLA/2017/01, § 4.2 (July 2017), https://www.refworld.org/docid/59ad55c24.html (noting "there is strong support for the view that all refugees are to be regarded as 'coming directly' except those who have found secure asylum elsewhere").

protection."[72] Disparate treatment of two groups of refugees—those who arrive at ports of entry and those who enter irregularly or who arrive at a port of entry without having secured an appointment—is exactly this type of detriment, as is denying the latter group access to rights enumerated in the 1951 Convention. Making unlawful entry a possible bar to asylum eligibility is a penalty that carries potentially serious consequences for someone seeking international protection, undermines the right to asylum and risk violations of the principle of non-refoulement.

As to the third exception – seeking asylum or other protection in a transit country and receiving a final denial – UNHCR notes that individuals are not required to apply for asylum in any country through which they travel, and by extension, cannot be required to present a denial. International law does not require asylum-seekers to apply for protection in the first, or any subsequent, country through which they transit before arriving in the country where they intend to seek asylum.[73] UNHCR emphasizes that the primary responsibility for international protection remains with the state where an asylum claim is lodged.[74] In many cases, asylum-seekers move onward to seek international protection that is not in fact available in the place to which they have initially fled.[75] The fact that an asylum-seeker has moved onward without having had his or her claim assessed in another country does not affect his or her right to apply for asylum and be treated in conformity with international refugee and human rights law, including protection from refoulement.[76] Thus, "asylum should not be refused solely on the ground that it could be sought elsewhere."[77]

Furthermore, it is important to note that under the 1951 Convention framework refugees cannot be denied access to asylum procedures even in cases where the prohibition on penalties under Article 31(1) is considered not to apply.[78] In other words, States must examine an individual's claim to refugee status before considering imposition of any penalties to ensure it meets its international obligations.[79] Such a decision is essential to uphold the rights of asylum-seekers and refugees.

UNHCR recommends that the NPRM be rescinded in its entirety. If it is to be finalized, UNHCR recommends that any exceptions be made as broad as possible, consistent with: the realities of refugee flight as acknowledged in Article 31(1) of the 1951 Convention; with the exhaustive nature of the Convention's framework for exclusion; with relevant standards for use of safe-third-country concepts (see above); and with adequate processing capacities. In particular, UNHCR recommends bringing exceptions fully in line with the right to seek asylum and with Article 31(1) such that circumventing pre-authorized entry into the United States is not, in effect, penalized by way of inadmissibility for asylum.

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[72] UNHCR, LEGAL CONSIDERATIONS ON STATE RESPONSIBILITIES FOR PERSONS SEEKING INTERNATIONAL PROTECTION IN TRANSIT AREAS OF 'INTERNATIONAL' ZONES AT AIRPORTS, ¶ 8 (Jan. 2019) [hereinafter Considerations on Transit Areas of International Zones], https://www.refworld.org/docid/5c4730a44.html.

[73] *See* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019) (explaining that while the 1951 Convention does not include the right of refugees to decide in which State they will receive international protection, asylum should not be refused solely because it could have been sought in another country); ExCom Conclusion No. 15, *supra* note 53, ¶¶ (h)(iii-iv) (noting that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" and that "[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State").

[74] Guidance on Irregular Onward Movement, *supra* note 53, 6 ¶ 16.

[75] Guidance on Irregular Onward Movement, *supra* note 53, 2 ¶ 4.

[76] Guidance on Irregular Onward Movement, *supra* note 53, 2 ¶ 11.

[77] ExCom Conclusion No. 15, *supra* note 53, ¶¶ (h)(iv).

[78] Guidance on Irregular Onward Movement, *supra* note 53, at 40.

[79] *Id.* ¶ 38; GUY GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION AND PROTECTION, ¶¶ 4-5, https://www.unhcr.org/3bcfdf164.pdf.

C. Rebutting the Condition on Asylum Eligibility

The NPRM proposes that noncitizens may rebut the presumption of ineligibility for asylum by establishing by a preponderance of evidence the existence of exceptionally compelling circumstances, including one of three scenarios that the rule identifies expressly or others that may be determined at the discretion of the adjudicator.[80] UNHCR notes with appreciation the NPRM's recognition of humanitarian needs which compel access to territory for immediate protection. However, UNHCR is concerned that some of these rebuttal provisions are framed too restrictively to provide effective access to territory under the Convention.

First, the NPRM provides that the noncitizen may demonstrate that they or an accompanying family member face "an acute medical emergency." The NPRM specifies that these "include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that cannot be adequately addressed outside of the United States." UNHCR notes that this rebuttal is limited to a very narrow range of circumstances which may exclude serious but non-life-threatening and other non-medical needs raising compelling humanitarian interests.

UNHCR recommends that this rebuttal ground be amended to permit adjudicators to favorably consider evidence of non-medical emergencies and non-life-threatening medical needs.

Second, noncitizens may provide evidence of an "imminent and extreme threat to their life or safety," citing as examples "threats of rape, kidnapping, torture, or murder that the noncitizen faced at the time the noncitizen crossed the SWB, such that they cannot wait for an opportunity to present at a port of entry" using CBP One "without putting their life or well-being at extreme risk."

This proposed rebuttal provision calls for a subjective assessment of the temporality and qualitative extremity of the threats faced by asylum-seekers as they exist at the time of entry, "such that they cannot wait for an opportunity to present at a port of entry." This is fundamentally inconsistent with the right to seek asylum laid out in the 1951 Convention and 1967 Protocol. Further, under Article 31(1) of the 1951 Convention, states are prohibited from imposing penalties on asylum-seekers "on account of their illegal entry or presence […] provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence."[81] The reference to "penalties" in Article 31(1) is not intended to be limited to criminal penalties and encompasses "any administrative sanction or procedural detriment imposed on a person seeking international protection.[82] This Article gives effect to a principle of non-discrimination between asylum-seekers on the basis of the form of their entry. Indeed, a "well-founded fear of persecution is recognized in itself as "good cause" for illegal entry."[83] Reserving access to territory for only victims of particularly repugnant and time-sensitive threats runs contrary to Article 31 of the 1951 Convention. Furthermore, the high temporal and qualitative thresholds put asylum-seekers unable to meet them, or, for other reasons unable to arrange for timely entry under the NPRM, at risk of chain refoulement to territories where their life or safety is in peril.

[80] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11723.
[81] Refugee Convention, *supra* note 4, art. 31(1).
[82] Considerations on Transit Areas of International Zones, *supra* note 72, ¶ 8.
[83] Costello, *supra* note 71, § 4.5.

UNHCR recommends that the rule not be implemented. If it is, however, UNHCR urges that this rebuttal ground be broadened such that adjudicators may favorably consider circumstances involving threats to life or safety that might not necessarily be considered as "imminent" or "extreme."

Third, a noncitizen may be a "victim of a severe form of trafficking in persons" pursuant to the Trafficking Victims Protection Act. UNHCR welcomes the Proposed Rule's consideration of the human rights situation of victims of severe forms of human trafficking and recommends that this rebuttal ground be preserved. The overarching requirement on noncitizens covered by the Proposed Rule to produce evidence to rebut the presumption of ineligibility of requests for protection nevertheless raises the possible negative effect of "[limiting] trafficking victims' access to justice and protection and decreases the likelihood that they will report their victimization to the authorities."[84]

UNHCR recommends that the rule not be implemented. If it is, however, UNHCR proposes that this rebuttal ground be broadened such that adjudicators may favorably consider circumstances in which individuals have not only experienced but may be at risk of trafficking and, in either case, regardless of degree of 'severity.'

Finally, adjudicators may, in the sound exercise of their judgment, recognize "other exceptionally compelling circumstances" to overcome the presumptive bar.

UNHCR recommends that this rule not be implemented. If it is, however, UNHCR recommends broadening the exceptions and shifting the burden of proof in line with international law (see section IV.A, *infra*).

D. Withholding of Removal Does Not Fulfill Non-Refoulement Obligations

The Proposed Rule asserts that "[t]he United States' non-refoulement obligation under Article 33 of the Convention is implemented by statute through the provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3)(A), for mandatory withholding of removal."[85] UNHCR takes this opportunity to emphasize, however, that statutory withholding of removal does not fulfill the obligations of the United States under the 1951 Convention and 1967 Protocol and cannot act as a substitute. Withholding of removal fails to meet non-refoulement commitments because it requires a higher standard of proof than asylum—"more likely than not" instead of well-founded fear—and, additionally, if obtained, it carries with it fewer benefits than asylum. Accordingly, treating withholding of removal as compliant with Article 33 of the 1951 Convention violates international standards and fundamental principles, including the right to seek and enjoy asylum and non-refoulement.

UNHCR recommends that the Government amend applicable law and policy to uphold its non-refoulement obligations by making asylum a mandatory form of protection. Among other things, this requires modifying 8 U.S.C. § 1158(b)(1)(A) by substituting "shall" for "may". In the meantime (and following any such changes), however, UNHCR urges the Government not to impose additional, unlawful barriers to asylum, including those reflected in this rule. UNHCR encourages the Government to cease relying on withholding of removal to fulfil non-refoulement obligations.

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[84] *Id.* § 3.3.
[85] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11739; *see also id*. at 11733.

E. Reliance on "Emergency" to Justify Temporary Applicability of the Proposed Rule

The NRPM proposes that the condition on eligibility will apply to those who enter between the effective date of the final rule and 24 months after that effective date,[86] and DHS asserts that "the proposed rule is an emergency measure that is intended to respond to the elevated levels of encounters anticipated after lifting of the Title 42 Order."[87]The Departments assert that "the rule would be subject to a review prior to its scheduled termination date, to determine whether rebuttable presumption should be extended, modified, or sunset as provided in the rule."[88]

Under international human rights law binding on the United States, access to territory cannot be suspended based on emergencies. While States have the sovereign power to regulate the entry of non-nationals, they may not do so in a manner that prevents seeking asylum from persecution.[89] Creating a presumption of ineligibility for asylum in the manner described above threatens the right to seek asylum, and that in turn risks refoulement.[90] States may, in emergencies, take certain measures to ascertain and manage risks at their borders (including public health risks), but those measures cannot include preclusion of access to asylum.[91] Any such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health. The NPRM threatens the right to seek asylum and puts individuals at risk of refoulement, putting the United States in violation of its international legal obligations. No timeframe or "sunset" provision can overcome that legal flaw.

UNHCR recommends that the NPRM not be implemented. The right to seek asylum cannot be suspended based on emergency justifications.

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[86] *Id.* at 11750, 11751. The NPRM specifies that the rule applies only after the end of the implementation of the Centers for Disease Control and Prevention's Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021. *Id.* at 11750. For those who entered during the two year period but for whom adjudication takes place after the sunset, the rebuttable presumption would still apply. *Id.*; *see also id.* at 11726.

[87] Press Release, Dep't Homeland Sec., DHS and DOJ Propose Rule to Incentivize Lawful Migration Processes (Feb. 21, 2023), https://www.dhs.gov/news/2023/02/21/dhs-and-doj-propose-rule-incentivize-lawful-migration-processes.

[88] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11708.

[89] UNHCR, KEY LEGAL CONSIDERATIONS ON ACCESS TO TERRITORY FOR PERSONS IN NEED OF INTERNATIONAL PROTECTION IN THE CONTEXT OF THE COVID-19 RESPONSE, ¶ 1 (Mar. 2020) [hereinafter Key Legal Considerations on Covid-19 Response], https://www.refworld.org/docid/5e7132834.html. *See also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) (providing that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.") The right to seek and enjoy asylum is affirmed in various regional legal instruments: Org. Am. States [OAS], American Declaration on the Rights and Duties of Man art. XXVII, May 2, 1948, Hein's No. KAV 7225 (referring to the right to seek and receive asylum); OAS, American Convention on Human Rights art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (referring to the right to seek and be granted asylum); Org. Afr. Unity [OAU], African Charter on Human and Peoples' Rights ("Banjul Charter") art. 12(3), June 27, 1981, OAU Doc. No. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (referring to the right to seek and obtain asylum); Charter of Fundamental Rights of the European Union art. 18, October 26, 2012, 2012 O.J. (C 326) 391, (referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law).

[90] Key Legal Considerations on Covid-19 Response, *supra* note 89, ¶ 2.

[91] *Id.* ¶ 6 (providing examples of permissible measures). *See* UNHCR Exec. Comm., Conclusion No. 22 of Its Thirty-Second Session, Protection of Asylum-Seekers in Situations of Large-Scale Influx, § II.A, U.N. Doc. A/35/12/Add.1 (1981).

IV. Comments on Specific Procedural Ramifications of the Proposed Rule

A. Placing Responsibility on Asylum-Seeker to Demonstrate an Exception or a Rebuttal Factor Applies

The Proposed Rule outlines several ways an asylum-seeker may proceed without the presumption of ineligibility applying, either through demonstrating an exception to the rule or by rebutting the presumption of ineligibility, as discussed above. [92] Both in demonstrating an exception and in demonstrating a rebuttal factor the burden is on the individual.[93] For example, an exception to the presumption of asylum ineligibility is available to individuals who can demonstrate by a preponderance of the evidence "that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." Likewise, if the presumption applies, an individual could successfully rebut it by demonstrating by a preponderance of the evidence that "exceptionally compelling circumstances exist," such as an acute medical emergency, imminent and extreme threats to life or safety, or potentially severe trafficking [94] In other words, it is to be incumbent upon the asylum-seeker to establish—to an exacting standard of proof—that they are excepted from the rule or that the rule does not apply to them.

The rule establishes a threshold condition for access to asylum which, as discussed above, is inconsistent with international law. While under international law, the relevant facts of an individual case generally are to be furnished in the first place by an individual themselves,[95] that is typically in the context of presenting a full asylum claim, not in the context of establishing access to the procedure. In most cases asylum applicants "will have arrived with the barest necessities and very frequently even without personal documents."[96] Here, UNHCR counsels drawing relevant principles from asylum adjudication and extrapolating to the Proposed Rule's threshold examination. Given that the asylum applicant "who can provide evidence of all his statements 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."[97] The examiner should work with the applicant to draw out the full story, noting that "very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained."[98]

UNHCR is concerned that putting the burden on asylum-seekers to show, in certain scenarios, that the rule does not apply or that they are excepted from application of the rule could preclude those individuals' access to protection and ultimately raise the risk of refoulement. Asylum-seekers, particularly those without access to legal representation, may not understand the intricacies of the new provisions in the rule regarding the application of or for what reasons they may rebut the presumption of asylum ineligibility. In addition, they may not have access to or be aware of what information is necessary or most critical to demonstrating the existence these circumstances sufficiently. As a result, UNHCR is troubled that adjudicators do not have any explicit obligation to elicit potentially relevant facts to help ensure that asylum-seekers to whom the rule should not apply or who might be excepted are not improperly subject to it.

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[92] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11750-51.
[93] *Id.*
[94] *Id.*
[95] UNHCR Handbook, *supra* note 13, ¶ 195.
[96] *Id.*, ¶ 196.
[97] *Id.*
[98] *Id.*, ¶ 201.

UNHCR recommends that the Government not implement the rule. If it does, however, UNHCR recommends that the Government apply a framework for pre-screening and merits adjudication in which adjudicators—at USCIS or EOIR—have a shared burden with asylum-seekers to develop relevant facts and can interview the asylum-seeker, preferably in a non-adversarial manner, to ascertain all pertinent information regarding asylum eligibility.

B. Using Elevated Evidentiary Thresholds in Pre-Screening Procedures

The Proposed Rule raises the standard of proof in certain scenarios from a "significant possibility" of being able to establish eligibility for protection in full proceedings to a "reasonable possibility" that the applicant would face persecution or torture.[99] UNHCR is concerned not only about the substance of this change, rendering the protection available as withholding of removal instead of asylum (see section III.D, *supra*), but also the evidentiary threshold that the asylum-seeker must meet. In cases where an asylum officer determines that an individual is covered by and fails to rebut the presumption of asylum ineligibility during credible fear procedures, the individual must establish a "reasonable possibility of persecution or torture" to pass the screening for statutory withholding of removal or CAT protection.[100] Individuals who receive a negative fear determination and have their cases reviewed by an immigration judge also must meet this same elevated standard if the immigration judge finds that the presumption applies and has not been rebutted.[101]

UNHCR observes that the Government, in a separate recent rule, rescinded a change that elevated pre-screening standards for statutory withholding of removal and CAT protection from "significant possibility" to "reasonable possibility."[102] With the Proposed Rule, however, the Government notes that it will once again adopt a higher pre-screening standard for those claims because doing so is expected to "lead to better allocation of resources overall."[103] It suggests, "[t]he fact that large numbers of migrants pass the credible fear screening, only to be denied relief or protection on the merits after a lengthy adjudicatory process, has high costs to the system in terms of resources and time."[104] While UNHCR recognizes the tremendous strain on the U.S. asylum system as it is currently structured, UNHCR is seriously concerned about the possibility that individuals will face higher standards and not be able to access U.S. asylum procedures for reasons legally irrelevant to evaluating their international protection needs.

UNHCR is also concerned that this heightened standard will reduce access to asylum procedures for people in need of international protection, elevating the risk of refoulement, as articulated in multiple sets of comments to prior rules.[105] Raising the threshold that individuals must meet to have their claims fully considered fails to advance the fundamental protections of the 1951 Convention and its 1967 Protocol. Given the very preliminary nature of screening of asylum and withholding claims, international law requires that the standards applied therein must guard against the risk that refugees are returned to places where they face persecution (direct

[99] *See* Circumvention of Lawful Pathways, 88 Fed. Reg. at 11724-25.
[100] *See id.*
[101] *See id.* at 11726.
[102] *See id.* at 11724-25, n.176.
[103] *See id.*
[104] *Id.* at 11716.
[105] *See* UNHCR, Comments of UNHCR on the Proposed Rules from DOJ and DHS: "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Interview" (July 15, 2020), § III.A.1, https://www.refworld.org/docid/60f846504.html; UNHCR, Comments of UNHCR on the Proposed Rule from DOJ: "Procedures for Asylum and Withholding of Removal" (Oct. 23, 2020), https://www.refworld.org/docid/60f845324.html; UNHCR, Comments of UNHCR on the Proposed Rule from DOJ and DHS: "Procedures for Credible Fear Screening and Consideraton of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers" (Oct. 19, 2021), § III.B, https://www.refworld.org/docid/63d3dfc04.html.

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—or that they are otherwise denied access to international protection.

As explained further below (see section VI, "Fair and Efficient Asylum Systems," *infra*), only those claims that are assessed on their merits as being manifestly unfounded or clearly abusive—that is, those claims that are clearly fraudulent or not related to the criteria for granting refugee status—may be 'screened out' of referral for examination in usual asylum procedures.[106] All other claims should proceed for determination in the usual asylum procedure, which, depending on the context and circumstances, could include some form of accelerated or simplified process.[107] The 'significant possibility' standard adopted by the United States was already out of step with the international standard, and further elevating the threshold to a reasonable possibility will widen that gap.[108]

UNHCR recommends that these heightened standards of proof not be implemented. Further, the existing standard of proof should be revisited and brought in line with international norms and standards.

C. Condition on Asylum Eligibility Applied Inappropriately

The Proposed Rule indicates that the rebuttable presumption of asylum ineligibility would apply at multiple stages of adjudication, including during credible fear pre-screening procedures, and directs asylum officers, as well as immigration judges reviewing negative fear determinations, to evaluate first whether the presumption applies before assessing international protection needs and the inclusion criteria of the refugee definition.[109] This engenders two problems. First, UNHCR is concerned about the possibility of conducting such a complex, delicate analysis during pre-screening because of the risk that individuals entitled to refugee status will be wrongly denied access to full procedures and unable to obtain critical protection. Second, even in cases where asylum-seekers do access full procedures, UNHCR is troubled that exclusionary factors, such as a presumption against asylum eligibility, would be considered before inclusion criteria. Each is discussed further, below:

Application of the Condition on Asylum Eligibility During Pre-Screening

Under international standards concerning the identification of international protection needs, as noted above, those claims that are identified as likely on their face to be manifestly well-founded or manifestly unfounded should, subject to appropriate procedural safeguards, be assessed in an

[106] ExCom Conclusion No. 30, *supra* note 25, ¶ 97(2)(e).
[107] *See* Guidelines on Exclusion Clauses, *supra* note 60, ¶ 31. *See also* UNHCR, BACKGROUND NOTE ON THE APPLICATION OF EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶ 99 (Sept. 4, 2003) [hereinafter Background Note on Exclusion Clauses], https://www.refworld.org/docid/3f5857d24.html ("[G]iven the exceptional nature of the exclusion clauses, the applicability of the exclusion clauses should be examined within the regular refugee status determination and not in either admissibility or accelerated procedures.").
[108] When the U.S. Congress created the credible fear 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 Supporting Plaintiffs-Appellees at 21-22, E. Bay Sanctuary Covenant v. Barr, 950 F.3d 1242 (9th Cir. 2020) (Nos. 19-16487, 19-16773), https://www.refworld.org/docid/5dcc03354.html (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).
[109] *See* Circumvention of Lawful Pathways, 88 Fed. Reg. at 11724-26, 11750.

accelerated procedure.[110] 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 claims based on the summary application of an exclusion ground—and at that, one that is outside the exhaustive list of exlusion grounds outlined under the 1951 Convention. Exclusion is a complex inquiry that cannot be adequately assessed in a screening interview, particularly given the procedural shortcomings (such as truncated timelines, lack of legal assistance, information about the procedure, translation and interpretation, and time to recover from recent trauma) that often occur in these contexts and carries serious consequences for the individual.[111]

UNHCR has acknowledged that accelerated procedures can benefit both States and asylum-seekers by allowing for the efficient identification of individuals with possible international protection needs.[112] International law requires, however, that certain due process considerations be taken into account in the use of accelerated procedures to minimize the risk of a flawed decision.[113] In UNHCR's experience, it is often challenging for asylum-seekers to obtain representation during 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.

Consideration of Exclusion Before Inclusion

In full proceedings, when exclusion may be assessed, evaluating the inclusion criteria for refugee status must precede consideration of any exclusion criteria.[114] The international legal regime does acknowledge that there are individuals who may meet the positive ('inclusion') criteria for refugee status, but who nonetheless are excluded from international protection. The relevant provisions in the 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee (and is therefore entitled to the rights enumerated in the Convention itself) and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status.[115] Such exclusionary considerations should generally be considered only after an assessment of the 'inclusion' aspects of the person's claim for refugee status, and should be balanced against the need for protection itself.[116]

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[110] ExCom Conclusion No. 30, *supra* note 25, ¶ 97(2)(e); *see also* Global Consultations on Fair and Efficient Asylum Procedures, *supra* note 10, ¶¶ 4-5.
[111] Background Note on Exclusion Clauses, *supra* note 107, ¶ 98. *See generally* GUY S. GOODWIN-GILL, JANE MCADAM & EMMA DUNLOP, THE REFUGEE IN INTERNATIONAL LAW 197 (4th ed. 2021).
[112] *See, e.g.*, UNHCR, FAIR AND FAST: UNHCR DISCUSSION PAPER ON ACCELERATED AND SIMPLIFIED PROCEDURES IN THE EUROPEAN UNION, 5-6 (July 25, 2018) [hereinafter Fair and Fast], https://www.refworld.org/docid/5b589eef4.html.
[113] *Id.* at 13; *see also* UNHCR, STATEMENT ON THE RIGHT TO AN EFFECTIVE REMEDY IN RELATION TO ACCELERATED ASYLUM PROCEDURES, ¶¶ 11-12 (May 21, 2010) [hereinafter Statement on Effective Remedy in Accelerated Procedures], https://www.refworld.org/docid/4bf67fa12.html.
[114] *See* Guidelines on Exclusion Clauses, *supra* note 60, ¶ 31.
[115] Refugee Convention, *supra* note 4, arts. 1D-1F.
[116] *See* Guidelines on Exclusion Clauses, *supra* note 60, ¶ 31 ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."); Background Note on Exclusion Clauses, *supra* note 107, ¶ 99 (explaining that application of the exclusion clauses require both an evaluation of the crime, the applicant's role, and the nature of the persecution feared). *See also* UNHCR, Guidelines on International Protection No. 4: Internal Flight or Relocation Alternative Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees ¶ 36, U.N. Doc. HCR/GIP/03/04 (July 23, 2003) (indicating the inappropriate character of internal flight/relocation examination in admissibility/accelerated procedures). *See generally* Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Feller et al. eds. 2003) (discussing object, function, and procedure for exclusion clauses).

UNHCR recommends that the Government not implement the rule. If it does, however, UNHCR recommends that the Government not apply the rebuttable presumption of ineligibility for asylum during pre-screening procedures and that, in full proceedings, it require adjudicators first to consider inclusion criteria before exclusion criteria.

D. IJ Review of Negative Fear Determinations and Request for Reconsideration by USCIS

The Proposed Rule would require asylum-seekers who receive negative fear determinations to elect affirmatively having an immigration judge review that decision and eliminate the opportunity for asylum-seekers to submit requests to DHS for reconsideration of negative credible fear findings that an immigration judge has reviewed and affirmed to DHS.[117] During credible fear pre-screening, when an asylum officer determines the presumption applies, that the individual cannot rebut it, and that the individual has not established a reasonable possibility of persecution or torture, the asylum officer must provide a written decision and inquire about the individual's desire for immigration judge review.[118] The individual will only be able to access such review, however, if they request it.[119] It appears that individuals who do not or cannot affirmatively elect to undergo immigration judge review will not be given such opportunity and instead have their expedited removal orders executed.[120] Further, in cases where the immigration judge affirms the negative fear determination, asylum-seekers cannot ask USCIS to reconsider its prior decision, though USCIS retains the authority to do at its own discretion.[121]

Under international law, pre-screening procedures must uphold key safeguards to minimize the risk of refoulement, including the rights of an asylum-seeker to receive adequate information and to appeal a negative fear determination.[122] "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."[123] "To be effective, that remedy must provide for a review of the claim by a court or tribunal" [124]—one independent from the authority with responsibility for adjudicating the claim in the first instance[125]—and "the review must examine both facts and law based on up-to-date information."[126] It should be effective in both law and practice.[127]

UNHCR is concerned that, under the new provisions, a greater number of asylum-seekers will be prevented from accessing IJ review of a negative fear determination if the Proposed Rule's requirement that they elect affirmatively to have the decision reviewed by an immigration judge be adopted. Coupled with the heightened standards of proof for screening interviews where the presumption of asylum ineligibility applies and has not been rebutted, as well as rules around how

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[117] *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11751 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).
[118] *Id.*
[119] *Id.*
[120] *See id.* at 11715-16, 11751.
[121] *Id.* at 11751.
[122] *See* UNHCR, IMPROVING ASYLUM PROCEDURES: COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR LAW AND PRACTICE 255 (Mar. 2010), https://www.unhcr.org/4c7b71039.pdf; Statement on Effective Remedy in Accelerated Procedures, *supra* note 113, ¶ 21.
[123] Statement on Effective Remedy in Accelerated Procedures, *supra* note 113, ¶ 23.
[124] *Id.* ¶ 21.
[125] Guide to International Refugee Protection, *supra* note 24, at 127.
[126] Statement on Effective Remedy in Accelerated Procedures, *supra* note 113, ¶ 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.
[127] *Id.* ¶ 23.

adjudicators must decide cases at the pre-screening stage, it is especially important that individuals have access to IJ reviews.

While UNHCR acknowledges the remaining availability of one level of review of negative fear determinations, it is concerned by the elimination of the additional existing recourse available to asylum-seekers to have their claims reconsidered before removal. UNHCR supports the requirement that DHS inform asylum-seekers of the procedure to seek review of a negative fear determination by an immigration judge, as these measures help both empower asylum-seekers and effectively allow for appeal of an adverse pre-screening decision.[128] UNHCR observes that such notices should be given in writing and in a language the asylum-seeker understands.

Despite those limited positive aspects of this piece of the Proposed Rule, 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 pre-screening.[129] For instance, advocates have documented issues with the ability of asylum-seekers "to present evidence or participate meaningfully" in the immigration judge review procedure.[130] As a result, UNHCR is concerned that, without the availability of reconsideration by DHS in some circumstances, such as where an asylum-seeker may have new evidence to present and the rebuttable presumption against asylum eligibility has been hastily, incorrectly, or unfairly applied, the risk of refoulement may rise.

UNHCR recommends that the Government provide all individuals, other than those who decline it affirmatively, with immigration judge review of any negative fear determinations and that the Government refrain from eliminating the ability of asylum-seekers to request reconsideration of negative fear determinations by USCIS. Given the inherent challenges in accurately assessing refugee claims within accelerated procedures, UNHCR underscores the need to ensure that asylum-seekers have their claims properly screened before possible removal. In addition, UNHCR notes that more robust access to legal advice, assistance, and representation as early as possible, including at the credible fear stage, will make the need for requests for reconsideration less acute.

V. Comments on the Characterization of Relevant International Law and Standards in the Proposed Rule

In this section, UNHCR offers reflections on certain characterizations of refugee law standards that are used in the in the justificatory sections of the NPRM. UNHCR presents these observations in the interest of assisting the Government in interpreting refugee law in keeping with the U.S.'s obligations.

[128] In addition, while the availability of IJ review of negative fear determinations is not new under the Proposed Rule, UNHCR is supportive of this review procedure conducted by an authority, EOIR, independent of the first instance adjudicator, USCIS.

[129] *See, e.g.*, Kathryn Shepherd & Royce Bernstein Murray, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* 23-24, AM. IMMIGR. COUNCIL (May 9, 2017), https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers [hereinafter The Perils of Expedited Removal] (describing challenges in the IJ review process that may follow a negative credible fear determination).

[130] *See, e.g.*, *id.*

On the U.S.'s Non-Refoulement Obligations

First, the NPRM specifically asserts that withholding of removal satisfies the U.S.'s international legal obligations related to non-refoulement, as seen in Article 33 of the 1951 Convention.[131] This is inaccurate and must not be used to justify restricting access to asylum for those crossing the southwest border. Receiving statutory withholding of removal under section 241(b)(3) of the INA does not provide the same degree of protection as a grant of asylum in line with INA section 208, or for that matter Article 1 of the 1951 Convention.[132] There are two issues here: first, withholding does not adequately substitute for asylum, as it offers a lesser degree of protection at a higher standard, and second, the U.S.'s non-refoulement obligations cannot be fulfilled by abstracting Article 33 from the rest of the contents of international protection. The non-refoulement obligation underpins the entirety of refugee law and cannot be met by compliance with a single article.

Non-refoulement is a foundational norm of international refugee law. Compliance with that principle is the essential precondition to enjoyment of the other rights owed to refugees under the 1951 Convention and 1967 Protocol and cannot be taken in isolation from that broader framework for refugee protection. Non-refoulement obligations under those instruments are directly associated with asylum, such that purporting to comply, in isolation, with one article (that is, the non-refoulement obligation in Article 33) cannot be understood to represent performance in good faith of the Convention obligations of which that article forms an integral part. Instead, a State is required to provide for determination of refugee status pursuant to the criteria articulated in Article 1. Those found to meet these criteria are entitled to all the rights enumerated in the 1951 Convention, including but not limited to Article 33.

Withholding of removal under the INA does not meet the required provision of rights under the 1951 Convention because it has a higher bar than an asylum determination and is not available to all who would qualify for asylum. As a result, those rightfully considered refugees under international law still do not have access to the protection against refoulement.[133] Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including freedom from arbitrary detention, and pathways to naturalization. Withholding of removal simply cannot be used to replace asylum while asserting that the United States is still meeting its international obligations.

On the Non-Discretionary Nature of Asylum Under International Law

UNHCR notes that the Proposed Rule is premised on the concept that asylum is discretionary.[134] While this is true under U.S. law, it is deeply at odds with international law. The Proposed Rule further justifies this policy change by citing to the previous administration's issuance of rules relying on these provisions of domestic law, in 2000 and 2018, for example.[135] UNHCR observes that, even prior to the Proposed Rule, the U.S. practice of discretionary denial of asylum was at

[131] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11733 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).
[132] *See also, e.g.*, Innovation Law Lab v. Wolf, 951 F.3d 1073, 1081 (9th Cir. 2020) (examining and ultimately rejecting the government's argument that withholding of removal meets the United States's non-refoulement obligations).
[133] *Compare* Huang v. Holder, 744 F.3d 1149, 1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001)), *with* I.N.S v. Cardoza-Fonseca, 480 U.S. 421, 439–40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR Handbook, *supra* note 13, ¶ 42)).
[134] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11733 n.205.
[135] *Id.* at 11735 n.208 ("previous attorneys general and secretaries . . .")

variance with international law, which does not recognize discretion as a factor in providing refugee protection. Under international law, someone who meets the definition articulated in Article 1 of the Convention and Protocol "shall" be considered a refugee. [136] This definition has a declaratory character, that is, "[a person] does not become a refugee because of recognition, but is recognized because [s]he is a refugee."[137] It follows that failure to meet certain technical requirements "does not negate the refugee character of the person."[138]

The right to seek and enjoy asylum, included inter alia in Article 14 of the Universal Declaration on Human Rights, is implemented in part by States' obligations to provide international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol. The United States delivers on this responsibility in part through the status of "asylee" – the outcome of a successful asylum claim. This cannot depend on the discretion of the adjudicator; protection under the 1951 Convention and its 1967 Protocol cannot be contingent on the discretion of refugee authorities.[139]

When an individual is determined to meet the 'inclusion criteria' of the refugee definition contained in Article 1A(2) of the 1951 Convention or the 1967 Protocol, that person should have their refugee status formally recognized through the domestic legal framework of the host country and be provided with a secure and stable status to stay and reside in the country.[140] In other words, once it is established that a person is a refugee, the person "lawfully stays" in the host country within the meaning of the 1951 Convention and should be accorded access to a range of rights allowing the person to integrate.[141] The U.S. discretionary provision, which effectively says that a person may meet the definition of a refugee but nonetheless not be granted asylum in the United States, goes against the object and purpose of the 1951 Convention and its 1967 Protocol by failing to ensure the effective implementation of the right to seek and enjoy asylum.

The international legal regime does acknowledge that there are individuals who may meet the positive ('inclusion') criteria for refugee status, but who nonetheless are excluded from international protection. The relevant provisions in the 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee (and is therefore entitled to the rights

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[136] *See* Refugee Convention, *supra* note 4, art. 1A(2) (providing that "the term 'refugee' *shall* apply to" anyone who meets the definition under Article 1A(2)) (emphasis added).
[137] UNHCR Handbook, *supra* note 13, ¶ 28.
[138] UNHCR, THE INTERNATIONAL PROTECTION OF REFUGEES: INTERPRETING ARTICLE 1 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, ¶ 9 (Apr. 2001), https://www.refworld.org/docid/3b20a3914.html.
[139] *See* Implementation of the 1951 Convention, *supra* note 19, ¶ 16, ("The legislative approach adopted by States to regulate refugee rights can, in itself, negatively influence their realization. In some countries, for example, the issue of refugee protection is approached as one of defining not the rights themselves but rather the powers vested in refugee officials. This means that the protection of refugee rights becomes an exercise of powers and discretions by those officials rather than enforcement of specific rights identified and guaranteed by law. In other cases the realization of refugee rights is left to depend ultimately on an exercise of ministerial discretion.").
[140] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare* Huang v. Holder, 744 F.3d 1149, 1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001))), *with* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439–40 (1987) (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR Handbook, *supra* note 13, ¶ 42)). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification; freedom from arbitrary detention, and pathways to naturalization.
[141] The object and purpose of the 1951 Convention and its 1967 Protocol is to ensure refugees can effectively gain access to international protection and the rights stipulated in the Convention (the importance of which is emphasized in the Protocol via art. I(1)).

enumerated in the Convention itself) – and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status.[142] Such exclusionary considerations should generally be considered only after an assessment of the 'inclusion' aspects of the person's claim for refugee status, and should be balanced against the need for protection itself.[143]

There are three categories of criteria for exclusion, which are commonly referred to as "the exclusion clauses."[144] The first category—exclusion of persons already receiving United Nations protection or assistance[145]—is not relevant to the issues raised by this Proposed Rule. However, the second and third categories—exclusion of persons not considered to be in need of international protection[146] and of persons considered not to be deserving of international protection[147]—provides valuable guidance for the particular provisions at hand.

The Convention sets a high threshold for the exclusion of persons not considered in need of international protection under Article 1E. An individual "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection in another country.[148] Because of the potential serious consequences of excluding an individual with international protection needs, "a strict test" with two core requirements controls whether an asylum-seeker is excludable under Article 1E.[149] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[150] In other words, this ground of exclusion under the 1951 Convention does not apply to individuals who could take up residence in a third country but have not done so. It also does not apply to individuals who merely visited, transited through, or were present in a country for a temporary or short-term stay, or those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[151] The object and purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals.[152]

The Convention also sets a high threshold for the Article 1F exclusion clause to apply. Under this article, a person may only be excluded from refugee status when there are "serious reasons for considering" that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity; (b) he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee; or (c) he or she is guilty of acts contrary to the purposes and principles of the United Nations.[153] The rationale behind Article 1F "is that

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[142] Refugee Convention, *supra* note 4, arts. 1D, 1E, 1F.
[143] *See* Guidelines on Exclusion Clauses, *supra* note 60, ¶ 31 ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."); Background Note on Exclusion Clauses, *supra* note 107, ¶ 99 (explaining that application of the exclusion clauses require both an evaluation of the crime, the applicant's role, and the nature of the persecution feared).
[144] UNHCR Handbook, *supra* note 13, ¶¶ 140-41 *et seq.*
[145] Refugee Convention, *supra* note 4, art. 1D; *see also* UNHCR Handbook, *supra* note 13, ¶ 142.
[146] Refugee Convention, *supra* note 4, art. 1E.
[147] *Id.*, art. 1F.
[148] *Id.*, art. 1E.
[149] Note on Interpretation of Article 1E, *supra* note 62, ¶ 2.
[150] *Id.*, ¶ 6.
[151] *Id.*, ¶¶ 9-10, 13.
[152] *Id.*, ¶ 2.
[153] Refugee Convention, *supra* note 4, art. 1F

certain acts are so grave as to render their perpetrators undeserving of international protection as refugees and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."[154]

The grounds for exclusion – that is, denial of refugee status to a person who would otherwise meet the eligibility criteria for international refugee protection – are enumerated exhaustively in Article 1 of the 1951 Convention. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect.[155] The exclusion clauses in Article 1F of the 1951 Convention, in particular, should not be confused with Article 33(2) of the 1951 Convention,[156] which denies the benefit of non-refoulement protection under Article 33(1) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[157] Article 1F and Article 33(2) are distinct provisions that serve different purposes: Article 1F excludes individuals from the refugee definition, whereas Article 33(2) provides for exceptions to the principle of non-refoulement. Whereas Article 1F aims to preserve the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country and permits, under exceptional circumstances, the withdrawal of protection from refoulement of refugees who pose a serious actual or future danger to the host country or its community.

Accordingly, the fact that the Proposed Rule is justified by reliance on the discretionary portions of U.S. asylum law puts it at odds with fundamental principles of the 1951 Convention and 1967 Protocol. UNHCR is concerned that this creates an onerous exclusion framework deeply at variance with international law.

VI. Best Practices in Regional Responsibility-Sharing and Fair and Efficient Asylum Systems

UNHCR supports U.S. efforts to develop robust regional responsibility-sharing agreements throughout the Americas, in line with the U.S.'s commitment to the goals of the Los Angeles Declaration.[158] Responsibility sharing – or the practice under which countries agree to share responsibilities for responding to refugee protection and mixed flows, including by strengthening support to ease the pressure on front-line states – is a key practice for an effective regional refugee response.[159] UNHCR commends U.S. efforts to expand regional responsibility-sharing: for instance, the NPRM references U.S. efforts to increase refugee processing in the Western Hemisphere; country-specific and other available processes for individuals seeking parole for

[154] Guidelines on Exclusion Clauses, *supra* note 60, ¶ 2.
[155] Background Note on Exclusion Clauses, *supra* note 107, ¶ 7.
[156] UNHCR notes that various bars to asylum in U.S. law echo the language of Article 33(2) of the Convention. *Compare* Refugee Convention, *supra* note 4, art. 33(2), *with* Immigration and Nationality Act § 212(a)(3)(B)(i)(I)-(IV), (VI), (VII), 8 U.S.C. § 1182.
[157] Refugee Convention, *supra* note 4, art. 33(2).
[158] Los Angeles Declaration on Migration and Protection, June 10, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/ [hereinafter Los Angeles Declaration].
[159] UNHCR, EXPERT MEETING ON INTERNATIONAL COOPERATION TO SHARE BURDENS AND RESPONSIBILITIES, SUMMARY CONCLUSIONS, June 28, 2011 [hereinafter Expert Meeting on International Cooperation], https://www.refworld.org/docid/4e9fed232.html; Press Release, UNHCR, UNHCR Warns Against "Exporting" Asylum, Calls for Responsibility Sharing for Refugees, Not Burden Shifting (May 19, 2021), https://www.unhcr.org/en-us/news/press/2021/5/60a2751813/unhcr-warns-against-exporting-asylum-calls-responsibility-sharing-refugees.html; *see also* UNHCR Exec. Comm., Conclusion No. 71 of its Forty-Fourth Session, General Conclusion on International Protection, ¶ (k), U.N. Doc. A/48/12/Add.1, (Oct. 8, 1993), https://www.refworld.org/docid/3ae68c6814.html [hereinafter ExCom Conclusion No. 71]; ExCom Conclusion No. 15, *supra* note 53, ¶ (h).

urgent humanitarian reasons or other reasons of significant public benefit; and opportunities to enter the United States lawfully for the purposes of seasonal employment.[160]

It is imperative that responsibility-sharing agreements effectively *share* and not *shift* burdens between states.[161] UNHCR is concerned that this rule, in its current form, will increase strains on asylum systems in countries to the south, overall reducing asylum space in the region, not enhancing it. The countries through which asylum-seekers will have traveled and transited on their way to the United States should not be left to handle sharp increases in case numbers. This would be contrary to the principles of solidarity, international cooperation and responsibility sharing articulated in the Preamble of the 1951 Convention and reaffirmed in the Global Compact on Refugees, and regional coordination frameworks such the MIRPS, the Quito Process and the Los Angeles Declaration.[162]

Developing a sustainable regional responsibility-sharing collaborative framework is an important goal in line with international legal obligations. Some notions of effective practices in regional responsibility sharing include: 1) supporting and investing in international protection and national asylum systems throughout the Americas; 2) promoting the readmission and reintegration of persons who previously accessed international protection in third countries, through formal agreements that meet minimum requirements under international law; 3) expanding pathways to facilitate safe and orderly access of refugees to the United States; and 4) strengthening humanitarian assistance and integraton support for asylum-seekers and refugees so that they are able to achieve stability in first countries of asylum and do not feel compelled to undertake dangerous onward movements.

While many asylum systems in the Americas have benefited from longstanding efforts to strengthen capacity and resiliency, this does not mean those systems should be left to handle more claims due to measures to restrict access to the United States. Policies implemented in the United States, as part of commendable efforts to build a more fair and efficient U.S. asylum system, must take into consideration the status and capacities of asylum systems in the region. UNHCR observes many such asylum systems are already coping with very high volumes of asylum-seekers (some facing exponential annual growth) and are currently facing overwhelming pressures to meet the critical needs in front of them. Efforts to reform the U.S. system must recognize that any efforts to turn asylum-seekers back to other countries risk undermining previous investments in regional asylum capacities. Several Latin American countries are hosting millions of refugees and it is ultimately in the U.S. interest to continue reinforcing regional capacities to provide safe haven and solutions for refugees as close to home as possible, rather than shifting responsibilities that, in effect, risk toppling existing systems.

As mentioned above, UNHCR is encouraged by U.S. innovations that aim to provide for safer travel and orderly entry (such as new parole programs and the prospects of the CBP One application). However, such innovations must not be paired with policies that deny or curtail access to territorial asylum such as those seen in this Proposed Rule and must be consistent with

[160] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11707 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).
[161] Expert Meeting on International Cooperation, *supra* note 159.; Press Release, UNHCR, *supra* note 159; *see also* ExCom Conclusion No. 71, *supra* note 159, ¶ (k); ExCom Conclusion No. 15, *supra* note 53, ¶ (h).
[162] Refugee Convention, *supra* note 4, Preamble; Global Compact on Refugees, U.N. Doc. A/73/12 (Part II) (Aug. 2, 2018); San Pedro Sula Declaration as a Regional Contribution to the Global Compact on Refugees, pt. 2, ¶ 1 (Oct. 26, 2017), https://www.acnur.org/5b58d75a4.pdf; Declaration of Quito on Human Mobility of Venezuelan Citizens in the Region (Sept. 4, 2018), https://www.cancilleria.gob.ec/wp-content/uploads/2018/09/declaracion_de_quito_en.pdf; Los Angeles Declaration, *supra* note 158.

international human rights standards. Expanding legal pathways such as parole or resettlement, and putting in place appointment systems for orderly processing of third-country nationals at border entry points are helpful to provide safer access for people (including many who may be in need of refugee protection). These initiatives could also to some degree contribute to decongesting asylum systems. Yet, making those mechanisms the near-exclusive means of accessing protection would violate international law by denying access to territorial asylum. UNHCR urges the Government to continue work towards responsibility-sharing mechanisms that seek to expand the overall protection space throughout the region.

With respect to CBP One and other possible digital border technologies to manage entry, UNHCR is ready to support further development of efficient, safe, and protection sensitive entry management systems in consultation with end users (humanitarian stakeholders and asylum-seekers and migrants attempting to use such systems). With continuous technological improvement to facilitate access, as well as by substantially increasing processing capacities at ports, these reforms hold promise in creating viable alternatives to extremely dangerous irregular border crossings.

However, such systems must not be used to designate **exclusive** methods of accessing territory and as a condition for ineligibility for asylum, restricting the right to seek asylum and violating Article 31(1) of the 1951 Convention and the fundamental principle of non-refoulement. Safe and orderly entry mechanisms facilitate access to asylum, but they should not be coupled with measures that are punitive in nature and that create risks of returning asylum-seekers to harm, which are incompatible with international protection responsibilities.

In keeping with standards for transfer of asylum-seekers (see section III.A, *supra*), when crafting policies for an entry management system like CBP One, the United States and Mexico should establish certain parameters for non-Mexicans waiting in Mexico for an appointment or for entry by other means. Such an arrangement should include: granting the person explicit permission to remain lawfully in Mexico while awaiting their appointment; and ensuring relevant standards of protection and treatment under the 1951 Convention and international human rights standards, including non-detention and protection from refoulement.

Such an agreement between the United States and Mexico must take into account safety, security and humanitarian conditions in the locations where asylum-seekers may be forced to wait and ensure that digital border management tools function in line with relevant human rights standards, including as regards confidentiality and data protection.

UNHCR stands ready to consult further with the United States on the opportunities and risks related to the operation of digital entry management systems.

Fair and Efficient Asylum Systems

There are several “building blocks” that, in UNHCR’s observation and in 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.[163] The building blocks in such a system include:[164]

1) **Integrated border processing, reception and registration** that ensures asylum-seekers are identified and documented as early as possible after crossing the border, have access to a range of services responsive to their needs and vulnerabilities, receive basic humanitarian assistance, and have access to information and legal orientation about the asylum process. Such reception arrangements can also reduce overcrowding at ports of entry, minimize delays and inefficiencies, and meet humanitarian needs of vulnerable groups.

2) **Legal information, legal assistance, and legal representation** provided at the earliest possible stage contributes to 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 programs from EOIR) and urges that legal aid form part of border processing as early as possible in the procedures.

3) **Non-adversarial adjudication**, in which adjudicators work with applicants to establish necessary facts and analyze them in accordance with international standards,[165] is, in UNHCR's view, more efficient and more appropriate for asylum-seekers. It allows the asylum-seeker to present their claims for protection as comprehensively as possible and the adjudicator to ascertain information as required, helping reduce delays. UNHCR is encouraged by the U.S. Government's recent adoption of the Asylum Officer Rule (AO Rule) and urges further investment in its implementation, including through exploration of innovative ways to bring it to scale with appropriatelegal assistance and representation.

4) **Differentiated case processing modalities**, which apply clear, objective, and non-discriminatory criteria to channelan applicant's case based on their profile into separate case processing streams.[166] 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 or manifestly unfounded (cases that are clearly fraudulent, abusive, or not related to the criteria for asylum)—can be streamed into accelerated and / or simplified procedures. 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.

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[163] Fair and efficient procedures can benefit both refugees and persons not in need of international protection. *See* IPU/UNHCR Handbook for Parliamentarians No. 27, *supra* note 24, 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*.

[164] *See generally* UNHCR, EFFECTIVE PROCESSING OF ASYLUM APPLICATIONS: PRACTICAL CONSIDERATIONS AND PRACTICES (Mar. 2022), https://www.refworld.org/docid/6241b39b4.html.

[165] Relevant information to be collected includes personal facts and circumstances, country of origin information, and supporting documentation. *See* UNHCR Handbook, *supra* note 13, ¶¶ 196-97, 201 (discussing key principles governing fact-gathering and the need to ascertain "a wide range of circumstances"); UNHCR RSD Procedural Standards Unit 3, *supra* note 40, § 3.2.1 (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); IPU/UNHCR Handbook for Parliamentarians No. 27, *supra* note 24, at 156 (discussing the need for country of origin and other information services to support a fair and efficient asylum system).

[166] *See generally* Aide-Memoire & Glossary of Case Processing Modalities, *supra* note 26.

UNHCR offers these general comments as indicative of the foundational principles and practices in developing fair and efficient asylum systems in line with international norms and standards.[167] UNHCR stands ready to engage further with its U.S. government partners to provide guidance on these general principles, and to present recommendations, including through examination of good practices from UNHCR operations and from other States dealing with similarly complex and challenging settings.

[167] 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), https://www.refworld.org/pdfid/55643c1d4.pdf.