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

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

CIS No. 2692-21, DHS Docket No. USCIS 2021-0012, A.G. Order No. 5116-2021

Submitted 19 October 2021

Table of Contents

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits the comments below on the new Proposed Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, proposed by the U.S. Department of Justice and U.S. Department of Homeland Security

(*hereinafter* "the Proposed Rule"). These comments focus on those aspects of the Proposed Rule which are of particular interest to UNHCR and may have a significant impact on asylum-seekers' capacity to obtain protection in the United States in accordance with international standards.

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

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

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

UNHCR presents these comments to provide feedback on which aspects of the Proposed Rule align with international standards for fair and efficient asylum processing, and which raise concerns and, in some cases, diverge from the U.S.'s international legal obligations. The Proposed Rule puts forward revisions to the framework for receiving and processing those who may be in need of international protection, which, UNHCR fully acknowledges, is an area in which revision and transformation is much needed and welcome. There are, indeed, some positive directions in the Proposed Rule, among them, the greater use of non-adversarial processes with the expanded role for USCIS, as well as more favorable standards for pre-screening of asylum claims. However, the Proposed Rule also puts forward some worrying changes which could undermine the framework for refugee protection, among them the risk of increased detention

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

throughout the asylum process, and procedures for lodging claims that may force asylum-seekers to put forward their claims in full soon after arrival without adequate time or legal assistance. UNHCR has set out these concerns in detail below, while also presenting some principles for fair and efficient asylum procedures drawn from transnational examples.

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

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

UNHCR appreciates the decades-long engagement between our agency and the U.S. government on technical aspects of international refugee law and its domestic realization, including asylum adjudication procedures. In this context, UNHCR opens its observations with some overarching comments on the Proposed Rule's alignment with the 1967 Protocol and related guidance. The Proposed Rule puts forward a number of changes that, if implemented, would bring the U.S. closer to the international standards necessary for fair and efficient adjudication of asylum claims. For instance, the proposal for adjudication to take place in the first instance in a non-adversarial setting is very welcome. However, there are other proposals which, if put into practice, might see asylum-seekers placed in a less favorable position, further from international standards necessary to preserve the integrity of the asylum system.

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

Consequently, UNHCR takes this opportunity at the outset to note some key principles for asylum adjudication garnered from UNHCR's seven decades of experience globally. To work well for

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

[8] *See* Exec. Com. of the High Comm'r's Programme, *Conclusions No. 8 (XXVIII) – 1977 on Determination of Refugee Status* (Oct. 12, 1977), *available at* https://www.refworld.org/docid/3ae68c6e4.html [hereinafter ExCom Conclusion No. 8]; ExCom Conclusion No. 15 (XXX) – 1979 on Refugees Without an Asylum Country (Oct. 16, 1979), *available at* https://www.refworld.org/docid/3ae68c960.html; ExCom Conclusion No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (Oct. 20, 1983), *available at* https://www.refworld.org/docid/3ae68c6118.html; ExCom Conclusion No. 58 (XL) – 1989 on the Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection (Oct. 13, 1989), *available at* https://www.refworld.org/docid/3ae68c4380.html. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983; No. 55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74 (XLV) – 1994; No. 81 (XLVIII) – 1997; No. 82 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 93 (LIII) – 2002; No. 103 (LVI) – 2005. *See also Due Process in Procedures*, para. 200. The Executive Committee of the UNHCR Programme is a group of 51 countries that advises UNHCR in the exercise of its protection mandate. The Executive Committee, among other things, issues Executive Committee Conclusions, which are arrived at by consensus among the 51 Member States, including the United States, and which serve under international law as evidence of evolving State practice with respect to refugee protection. *See* UNHCR, "Executive Committee," https://www.unhcr.org/executive-committee.html (last accessed Sep. 14, 2021).

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[9]—they must also be able to access asylum adjudication procedures with certain basic safeguards.[10] 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.[11] These requirements are grounded in international and regional human rights law, including on the fairness of procedures and the right to an effective remedy.[12] Given the serious consequences of an erroneous determination, these protections and guarantees are fundamental at all stages of the procedure.[13] In the asylum context—whether at the border or elsewhere—fairness is premised on 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.[14] UNHCR 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.[15] The interview must be held in a safe, confidential, and suitable environment.[16] 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,[17] and fostering "trust and respect so that the applicant feels comfortable enough to tell his/her story as coherently and completely as possible."[18] UNHCR's Handbook on Criteria and Procedures for Determining Refugee Status,[19] considered to offer authoritative guidance by the U.S. Supreme Court,[20] is not prescriptive

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

[10] UN High Comm'r for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 192 (Apr. 2019) [hereinafter Handbook].

[11] Handbook, ¶¶ 189-192.

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

[13] ExCom Conclusion No. 30.

[14] *See Due Process in Procedures,* ¶ 231. *See generally* UN High Comm'r for Refugees (UNHCR)*, Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determinations Under UNHCR's Mandate* (2020), *available at* https://www.refworld.org/docid/5a2657e44.html.

[15] UN High Comm'r for Refugees (UNHCR), *UNHCR RSD Procedural Standards, Unit 4: Adjudication of Refugee Status Claims,* section 4.3.1 (August 26, 2020), *available at* https://www.refworld.org/docid/5e87075d0.html [hereinafter *RSD Procedural Standards*]. 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. ¶ 232 (Aug 19, 2014), *available at* https://www.refworld.org/cases,IACRTHR,54129c854.html; 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., ¶ 195-6 (May 30, 2018), *available at* https://www.refworld.org/cases,IACRTHR,5c87ec454.html.

[16] UN High Comm'r for Refugees (UNHCR), *UNHCR RSD Procedural Standards*, *Unit 4: Adjudication of Refugee Status Claims*, section 4.3.2 (August 26, 2020), *available at* https://www.refworld.org/docid/5e87075d0.html.

[17] *RSD Procedural Standards*, *Unit 2.7: Legal Representation in UNHCR RSD Procedures*: section 2.7.4, *available at* https://www.refworld.org/docid/5f3114a74.html.

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

[19] *See generally* Handbook.

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

on the characteristics of the first-instance asylum process.[21] Nonetheless, its guidance supports a non-adversarial approach, when noting that given that the asylum applicant who "can provide evidence of all his statement will be the exception rather than the rule (…) the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner," and said examiner is expected to work with the applicant to draw out the full story.[22] In UNHCR's observation, non-adversarial processes 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.

- 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.[23] 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.[24] 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.[25] 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.[26] 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.[27] It may be complemented by information provided by NGOs and legal aid organizations.[28]

- **Legal advice, assistance, and representation** is essential to ensuring that asylum-seekers can navigate the asylum process in full exercise of their rights. Legal advice,

[21] Handbook, ¶¶ 189-192.
[22] Handbook, ¶ 196; *Due Process in Procedures*, ¶¶ 20, 247. On the shared burden of proof of immigration authorities in establishing a risk of serious harm under Article 3 ECHR, see *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, ¶¶ 96-98 (Aug. 23, 2016), *available at* https://www.refworld.org/cases,ECHR,57bc18e34.html.
[23] UN High Comm'r for Refugees (UNHCR), *UNHCR RSD Procedural Standards Unit 2.5: Interpretation in UNHCR RSD Procedures,* section 2.5.1 (Aug. 26, 2020), *available at* 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).
[24] UNHCR, *UNHCR RSD Procedural Standards, Unit 2.5: Interpretation in UNHCR RSD Procedures,* section 2.5.1, *available at* https://www.refworld.org/docid/5f3113ec4.html; *see also Due Process in Procedures,* ¶ 213.
[25] *See Due Process in Procedures*, ¶ 203.
[26] Counseling could also include other advisory functions, on psycho-social or medical issues for instance. UN High Comm'r for Refugees (UNHCR), *Recommandations du HCR relatives au conseil et à la représentation juridique dans la nouvelle procédure d'asile en Suisse* 13 (Mar. 2019), *available at* https://www.refworld.org/docid/5cae4b424.html.
[27] *Due Process in Procedures,* ¶ 171.
[28] Handbook, ¶ 192 (providing that, among other safeguards, asylum applicants should receive the necessary guidance as to the procedure to be followed and the necessary facilities for submitting their cases to the appropriate authorities); *see also* UN High Comm'r for Refugees (UNHCR), *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights*, 51246/17, ¶ 3.2.2., (Feb. 5, 2018), *available at* https://www.refworld.org/docid/5a9d6e414.html (citing ExCom Conclusion No. 8 (XXVIII) 1977, ¶ 53(6); ExCom Conclusion No. 30 (XXXIV) 1983, ¶ 97(2)); *RSD Procedural Standards, Unit 3: Reception and Registration for Mandate RSD,* section 3.1.3 (Aug. 26, 2020), *available at* 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.").

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 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."[29] 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.[30] The serious consequences of erroneous decisions in the asylum context make the provision of legal advice, assistance, and representation all the more important.

The availability of legal advice, 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.[31] 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.[32]

- 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.[33] 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,

[29] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, ¶ 10, CCPR/C/GC/32 (Aug. 23, 2007), *available at* https://www.refworld.org/docid/478b2b2f2.html.

[30] UN High Comm'r for Refugees (UNHCR), *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, at 3 (Sept. 2, 2005), *available at* https://www.refworld.org/docid/432ae9204.html [hereinafter UNHCR, *Fair and Efficient Asylum Procedures*].

[31] *See also* Centre suisse de compétence pour le droits humains, *Evaluation externe de la phase de test relative à la restructuration du domaine de l'asile, protection juridique: conseil et representation juridiques* (Rapport final) (Nov. 17, 2015).

[32] *See* UNHCR, *Fair and Efficient Asylum Procedures,* at 3; *RSD Procedural Standards, Unit 2.7: Legal Representation in UNHCR RSD Procedures* (2016), *available at* https://www.refworld.org/docid/56baf2c84.html (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* UN High Comm'r for Refugees (UNHCR), *UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulation*, 15, COM (2016) 467 (Apr. 2019), *available at* https://www.refworld.org/docid/5cb597a27.html (providing guidance on the right to legal representation, qualifications, appointment and termination of legal representation, and the role and responsibilities of the legal representative).

[33] UN High Comm'r for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement* (Nov. 1997), *available at* https://www.refworld.org/docid/438c6d972.html; UNHCR, *Fair and Efficient Asylum Procedures*, at 4; *see also* UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, ¶ 9, CCPR/C/GC/32 (Aug. 23, 2007), *available at* https://www.refworld.org/docid/478b2b2f2.html
("Administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality o statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find 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,* ¶ 197.

including accelerated procedures. This minimizes the risk of erroneous decisions, and, therefore, that of refoulement.[34]

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.[35] 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.

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

1) **Integrated border processing and reception**, that ensures asylum-seekers are identified, receive basic humanitarian assistance, and have access to legal orientation about the asylum process. Such reception arrangements reduce overcrowding at ports of entry, minimize delays and inefficiencies, efficiently identify those with possible fear of return and claims for international protection, and meet humanitarian needs of vulnerable groups.

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

3) **Non-adversarial adjudication**, in which adjudicators work with applicants to develop necessary factual records and analyze those in accordance with international standards. In UNHCR's experience, non-adversarial adjudication is both more efficient and more appropriate for asylum-seekers.

4) **Triaging and differentiated processing modalities**, which, using clear, objective, and non-discriminatory triaging criteria supported by robust data and country of origin information set against the applicant's particular profile, allow authorities to accelerate processing for manifestly well-founded claims (cases deemed meritorious at the pre-screening stage) as well as claims which appear to be manifestly unfounded (cases that are clearly fraudulent, abusive, or not related to the criteria for asylum). Such processing modalities then permit regular processing for remaining cases, including those which were initially triaged but found to include complex and / or sensitive elements requiring more thorough interviewing and / or assessment.

UNHCR offers these general comments as indicative of the foundational principles and practices in establishing fair and efficient asylum systems and bases the following specific comments on

[34] UN High Comm'r for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement* (Nov. 1997), *available at* https://www.refworld.org/docid/438c6d972.html; *Due Process in Procedures,* ¶ 267.
[35] UNHCR, *Fair and Efficient Asylum Procedures,* at 3.

these principles, among others.[36] In addition to the specific comments below, UNHCR stands ready to engage further with U.S. policymakers on these general principles, including through examination of examples from other States receiving asylum-seekers in similarly complex settings.

III. Observations on Specific Provisions of the Proposed Rule

In this section, UNHCR offers observations and comments on certain aspects of the Proposed Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers. The below analysis mirrors the structure of the discussion in the Proposed Rule for ease of reference, providing in each case discussed an overview of how the proposed change will affect persons seeking international protection, followed by consideration of the relevant international legal standards.

A. Detention and Parole

Grounds for Parole

The Proposed Rule amends existing regulations that govern circumstances for parole from detention of individuals in expedited removal.[37] More specifically, while current regulations permit parole of such asylum-seekers when necessary "to meet a medical emergency" or "for a legitimate law enforcement objective," the Proposed Rule adds a new ground for release.[38] It would allow for parole when "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)."[39] In discussing this intended change, the Proposed Rule highlights that this new provision enables DHS "to prioritize use of its limited detention bed space to detain those noncitizens who pose the greatest threats to national security and public safety, while avoiding unnecessary operational limitations on DHS's authority to place noncitizens into expedited removal."[40] Using this detention framework, DHS could, for example, parole families arriving at the border for processing under expedited removal instead of placing them directly into section 240 proceedings.[41]

While UNHCR welcomes expanded grounds for parole available to individuals in expedited removal, it notes that this is highly unlikely to remedy the long-standing discrepancies between the U.S. approach to detention of asylum-seekers and the clear limitations under international law on the use of detention.[42] In fact, UNHCR is concerned that those discrepancies may widen under the proposed changes because the provisions in the proposed regulation governing new proceedings for asylum-seekers who pass credible fear would appear within section 235 of the Immigration and Nationality Act (INA or "the Act"), as opposed to section 240. Under section 235, as the rule notes, detention is authorized throughout the newly proposed asylum proceeding. UNHCR further observes that detention in section 235 has far more limited options for review of the decision to detain. While the expanded grounds for section 235 parole are certainly a step in the right direction, UNHCR remains concerned that the resulting detention framework is more

[36] Other relevant principles, for example, include ensuring confidentiality. *See generally* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (May 2015), *available at* https://www.refworld.org/pdfid/55643c1d4.pdf.
[37] Proposed Rule at 46,913-14.
[38] Proposed Rule at 46,913.
[39] Proposed Rule at 46,913.
[40] Proposed Rule at 46,913.
[41] Proposed Rule at 46,913.
[42] *See generally* UN High Comm'r for Refugees (UNHCR), *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), https://www.refworld.org/docid/503489533b8.html [hereinafter Detention Guidelines].

restrictive than that seen under section 240. Specifically, vesting this procedure under section 235 leaves UNHCR deeply concerned that asylum-seekers could be arbitrarily detained throughout their proceedings, an outcome that is squarely at odds with international standards.

Bearing in mind that seeking asylum is a lawful act, detention of asylum-seekers should be treated as a measure of last resort.[43] When detention is used, it must not be arbitrary. In order to avoid arbitrariness, the decision to detain must be based on an individual's particular circumstances, and more specifically, detention must be determined to be necessary in the individual's case, reasonable in all the circumstances, proportionate to a legitimate purpose, and prescribed by law.[44] Mandatory detention is always arbitrary because it is not based on an individualized examination of the necessity or lawfulness of detention.[45] Any decision to detain must be subject to independent, periodic review.[46] Furthermore, detention must not be discriminatory.[47] Among other things, this requires that a State has an objective and reasonable basis for distinguishing between non-nationals in this regard, and an individual must always have an opportunity to challenge their detention on these grounds.[48] Finally, in cases where asylum-seekers are detained, they must, as a minimum procedural guarantee, be able to contact and be contacted by UNHCR.[49]

Given the international framework described above, UNHCR's concerns about the detention and parole parameters put forward in the Proposed Rule are numerous, and include the following:

- First, UNHCR is concerned that, despite the parole parameters, many asylum-seekers may nonetheless experience prolonged or indefinite detention during the proposed framework for deciding asylum claims. The grounds for parole, though they would be slightly expanded from the current section 235 parole, remain relatively narrow. Should DHS decline to parole asylum-seekers due to a medical emergency, law enforcement needs, or the unavailability or impracticability of detention, those individuals may remain in custody through the pendency of their proceedings. Likewise, that parole is highly discretionary, and could, in the future, be applied restrictively, leading to widespread detention of asylum-seekers throughout their proceedings.

- Second, UNHCR is concerned that the detention framework still runs afoul of other safeguards against arbitrary detention.[50] For detention not to be arbitrary, it must be based on an individualized assessment of each asylum-seeker's circumstances.[51] Governments' operational concerns, such as availability of bed space in detention, should not guide decisions over detaining people, as those do not account for the particulars of an individual's situation. International law details legitimate purposes for which states may resort to detention, including public order, public health, and national security, the analysis of each of which applies to the individual in question and not to government capacity.[52] Approaching decisions to detain from a presumption of detention and permitting exceptions based on operational considerations, including

[43] Detention Guidelines, ¶ 2.
[44] Detention Guidelines, ¶ 18.
[45] Detention Guidelines, ¶ 20.
[46] Detention Guidelines, ¶¶ 47(iii), 47(iv).
[47] Detention Guidelines, ¶ 43.
[48] Detention Guidelines, ¶ 43.
[49] Detention Guidelines, ¶ 47(vii); *see also* ExCom Conclusion No. 85 (XLIX) - 1998 on International Protection, ¶ (dd) (Oct. 9, 1998), *available at* https://www.refworld.org/docid/3ae68c6e30.html.
[50] *See* Refugee Convention, art. 31(2) (providing a temporal limitation to restrictions on the freedom of movement, including detention, of unlawfully present asylum-seekers).
[51] Detention Guidelines, Guideline 4.
[52] Detention Guidelines, Guideline 4.1.

the availability of bed space, does not fall within the permitted framework under international law.

- Third, for detention not to be arbitrary, the decision to detain must be reviewable by an independent body. In the framework put forward by the Proposed Rule, the decision on parole falls to the detaining authority. UNHCR notes that this is distinct from some applications for review of the decision to detain for those in section 240 proceedings, which are governed at least in part by the immigration courts.

UNHCR has long recognized that detention of asylum-seekers should be an exceptional, rather than routine, occurrence.[53] Under international law, individuals have the right to seek asylum and if they do so, to be treated humanely and with dignity.[54] UNHCR further notes that asylum-seekers in detention often encounter greater obstacles to accessing counsel or support networks and might face other challenges, such as trauma from being held in custody, that bear on the fairness of their proceedings.[55] Accordingly, access to open reception arrangements, along with fair and efficient status determination procedures (discussed at greater length, below), are key pieces of an asylum framework.[56] Within the U.S. context specifically, for example, UNHCR has supported the development of an integrated reception model that, among other benefits, would favor alternatives to detention.

UNHCR has long encouraged the U.S. government to take all necessary steps to bring the U.S. framework for detention of asylum-seekers in line with international law, specifically by incorporating the principles espoused in UNHCR's Detention Guidelines into national law.[57] This includes, among other procedural and substantive guarantees, ensuring that asylum-seekers be able to contact or be contacted by UNHCR, regardless of which DHS entity—CBP or ICE—has custody of them.[58] Similarly, stateless individuals in the United States often face detention throughout their proceedings, which represents an especially compelling hardship.[59] As with others, stateless individuals must be protected from arbitrary detention, and a person's status as stateless should be considered as a factor in detention decisions.[60]

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

Should the Government continue to pursue the placement of the entire first instance asylum decision under section 235 of the INA, as set out in this proposed rule, UNHCR recommends that the parameters for parole be aligned with international law. UNHCR recommends a presumption of release, with an individualized assessment of the decision to detain in every case. Any decision to detain should be premised on a legitimate purpose for detention, namely public order, public

[53] UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees, 2014-2019*, at 5 (2014), *available at* https://www.refworld.org/docid/536b564d4.html [hereinafter Beyond Detention].
[54] Beyond Detention, at 5.
[55] *See, e.g.*, Beyond Detention, at 5.
[56] Beyond Detention, at 5.
[57] *See generally* Detention Guidelines.
[58] Detention Guidelines, ¶ 47(vii).
[59] UNHCR, *Representing Stateless Persons Before U.S. Immigration Authorities: A Legal Practice Resource from the United Nations High Commissioner for Refugees* 34 (Aug. 2017), *available at* https://www.refworld.org/docid/5a15369d4.html %5Baccessed [hereinafter *Representing Stateless Persons*].
[60] *Representing Stateless Persons*, at 34.

health, or national security,[61] and the parole parameters established by this regulation should reflect those purposes. Any decision not to parole must be subject to periodic review.

The Government should, at a minimum, expand this regulation's parole considerations to the fullest extent of domestic law. One step would be to integrate into the present regulation the complete grounds for parole under section 212(d)(5), including "urgent humanitarian reasons" and "significant public benefit." While these grounds do not, in themselves, fully correspond with the absence of legitimate purposes for detention under international law, and while expanding these grounds would not in and of itself cure the risks of arbitrary detention inherent in a parole-only regime, their inclusion would at least bring the proposed framework closer to compliance with international standards. Moreover, ensuring automatic consideration for parole following a credible fear finding and creating a presumption of parole, balanced by any risks of flight, danger to the community or national security, would further protect against arbitrary detention. UNHCR supported, for instance, the parole guidelines issued by ICE in December 2009[62] because they included automatic consideration, a presumption of release, and built-in internal quality assurance mechanisms.

Regardless of the framework for parole ultimately put forward in this regulation, the Government must ensure that those detained have the right to legal counsel.[63] Individuals must be informed of the right to legal counsel; legal counsel must be able to gain admittance to the detention facilities in question (both in person and through other methods such as telephonic communication); communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles, and lawyers must be able to meet with their clients in a private setting.[64]

Lack of Employment Authorization Pursuant to Parole

The Proposed Rule clarifies that parole simply authorizes release from custody and cannot serve as an independent basis for employment authorization.[65] UNHCR is concerned that denying asylum-seekers an opportunity to seek work authorization at an early stage pursuant to their parole status may improperly restrict their right to access the labor market and deprive them of an adequate standard of living, which may indirectly compromise their ability to pursue their applications for protection adequately.[66] "In many instances, asylum-seekers are without means upon arrival," and they may require accommodation and other financial assistance to cover essential living expenses if access to employment is restricted.[67]

UNHCR observes that, as it stands, asylum-seekers in the United States often have to wait until their asylum applications have been pending either 150 or 365 days to apply for a work permit,[68]

[61] Detention Guidelines, ¶ 21.
[62] *See* U.S. Immigration & Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009).
[63] See *infra* section III.B for UNHCR's recommendations on legal advice, assistance, and representation.
[64] Detention Guidelines, ¶¶ 47, 48(iv).
[65] Proposed Rule at 46,913-14.
[66] *See* UN High Comm'r for Refugees (UNHCR), *Decent Work for Refugees: UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees* (July 2021), *available at* https://www.refworld.org/docid/60e5cfd74.html [hereinafter *Decent Work for Refugees*]; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966); UN Committee on Economic, Social and Cultural Rights, *Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights*, para. 3 (Mar. 13, 2017), *available at* https://www.refworld.org/docid/5bbe0bc04.html.
[67] UN High Comm'r for Refugees (UNHCR), *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, ¶ 12, U.N. Doc. EC/GC/01/17 (Sep. 4, 2001).
[68] *See* 8 C.F.R. § 208.7(a)(1)(ii) (2020) (providing that asylum-seekers are eligible to apply for employment authorization once their asylum applications have been pending for 365 days); *CASA de Maryland v. Wolf*, 8:20-cv-02118 (D. Md. Sep. 11, 2020) (order

but they typically must go months longer without permission to work because of the time required to submit an asylum application after arrival and the period during which the Government reviews and decides the application for employment authorization. This reality may leave asylum-seekers, particularly those part of a family with children or other dependents, in a precarious situation while they navigate complex asylum procedures and may be processing significant levels of trauma, as they frequently must go months or longer without an ability to provide for themselves.

Under international human rights law, everyone—including asylum-seekers—has the right to an adequate standard of living, and UNHCR has recognized that respect for these rights and their corresponding standards is essential, particularly in how they may guide reception arrangements.[69] While the 1951 Convention and 1967 Protocol do not expressly set forth detailed standards on all aspects of the reception of asylum seekers, it is generally accepted that "adequate reception conditions are a necessary component of fair and efficient asylum procedures."[70] Access to work for asylum-seekers is clearly linked to the quality of reception conditions, as it may be more challenging to fulfil individuals' basic needs if they are not able to provide for themselves and in the absence of adequate, accessible social protections.[71] Asylum-seekers whose basic needs are not met, which could occur as a result of a lack of access to work, cannot be expected to pursue their applications effectively.[72]

Furthermore, authorizing asylum-seekers to work at an early stage, ideally as soon as practicable upon their reception, offers a variety of benefits, both to asylum-seekers and to host communities.[73] "Allowing asylum-seekers to work during the asylum determination process, or at the very least, to be self-employed, helps to reduce their social and economic exclusion, and can alleviate the loss of skills, low self-esteem and mental health problems that often accompany prolonged periods of idleness."[74] With respect to potential gains by host communities, "[g]ranting asylum-seekers access to the labour market can help to reduce the cost of supporting asylum-seekers, and can benefit the local economy."[75] Thus, there are strong reasons that favor facilitating early access to work for asylum-seekers.

In UNHCR's view, greater parole of asylum-seekers in expedited removal proceedings, as envisioned under this Proposed Rule, presents an opportunity to improve access to work for that population by providing an alternative ground for work authorization eligibility that likely may materialize much more quickly for many, compared to the ground based on status as an asylum-seeker.[76] Instead of affirmatively rejecting this possibility under its provisions, the Proposed Rule instead might provide definitively that paroled asylum-seekers *may* seek employment authorization pursuant to their parole, which potentially could significantly decrease their wait time to obtain a work permit and produce an array of benefits to these individuals and their host communities described in the preceding paragraphs. It is UNHCR's opinion that, although asylum applications may be filed relatively soon upon arrival, per the procedures set forth under other provisions of the Proposed Rule, it remains preferable to provide the option of seeking

granting preliminary injunction) (holding that the 365-day waiting period to apply for employment authorization as set forth at 85 Fed. Reg. 38,626-28 does not apply to members of CASA and ASAP and that those individuals may continue to apply for a work permit 150 days after their asylum applications are complete).

[69] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, 2017*, at 97 (2017), *available at* https://www.unhcr.org/3d4aba564.pdf.

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

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

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

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

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

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

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

employment authorization based on parole since it does not require the 5-month or 1-year waiting period that the other ground does.[77]

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

B. Credible Fear Screening Process

The Proposed Rule reinstates several key aspects of previous screening procedures used in expedited removal that existed prior to changes advanced by the prior administration, which intended to elevate the threshold to access full adjudicatory procedures, and it removes other features of the previous framework.[78] UNHCR observes that the expedited removal process in the United States and its credible fear screening has, since its inception, diverged from international standards for accelerated procedures and that the changes introduced by the Proposed Rule would not fundamentally alter this assessment. Nonetheless, the changes to the credible fear screening process put forward in the Proposed Rule are, on the balance, positive.

Provision of Information and Legal Assistance, Advice, and Representation

UNHCR notes – and welcomes – that the Proposed Rule leaves intact the access to counsel currently available to asylum-seekers and others going through expedited removal proceedings. Even with the simpler screening standards put forward in this rule, the credible fear process can be hard to navigate, especially for those with low levels of literacy, language access issues, or other vulnerabilities. Given that, under the Proposed Rule, the details of the credible fear interview take on additional significance, efforts to make legal assistance as robust as possible will help preserve asylum-seekers' rights and enhance the efficiency of the procedure.

The provision of information and availability of legal advice, assistance, and representation from the very outset of the asylum process is critical to a fair and efficient asylum system and plays a vital part of border processing. UNHCR notes that the U.S. has previously taken innovative and welcome steps with regard to legal assistance, including through the Legal Orientation Program run by EOIR. Similar efforts should be incorporated into this Proposed Rule, acknowledging that now the vast majority of the individual's case will be processed outside of EOIR's purview.

In advance of the credible fear interview, asylum-seekers under the new Proposed Rule should receive information about the asylum process – provided in a manner and language which the

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

[78] *See* Proposed Rule at 46,914. The NPRM expressly solicits comments on changes set forth in this part of the rule, as well as on whether additional changes to provisions of the Global Asylum Rule and Security Bar Rule "are necessary or appropriate to accomplish the objectives outlined in this section." *Id*. at 46,915. UNHCR submitted extensive comments to both the Global Asylum Rule and Security Bar Rule, strongly recommending that neither rule be implemented because their provisions are incompatible with international legal standards and likely could have grave consequences for individuals seeking protection in the United States. *See* UNHCR, Comments of UNHCR on "Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review" (July 15, 2020), *available at* https://www.regulations.gov/comment/EOIR-2020-0003-5471; UNHCR, Comments of UNHCR on "Security Bars and Processing" (Aug. 10, 2020), *available at* https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=60f846854&skip=0&query=comments&coi=USA; UNHCR, Comments of UNHCR on "Security Bars and Processing; Delay of Effective Date" (Apr. 21, 2021), *available at* https://www.regulations.gov/comment/USCIS-2020-0013-5106.

individual understands.[79] This should include information about rights the asylum-seeker has in the asylum process itself, including deadlines and appeals, the interview process, and the right to legal representation. Legal representation itself should be accessible *throughout* the process, at every stage, including during credible fear.

Not only do legal advice, assistance, and representation uphold asylum-seekers' rights, they have been shown to enhance the efficiency of the process by streamlining identification of meritorious cases and reducing the number of appeals.[80] Government funding for legal assistance and representation therefore constitutes an important safeguard and also strengthens the efficiency and integrity of the asylum system. In UNHCR's opinion, it is a best practice for the government to fund legal advice and assistance programs for all asylum-seekers, as well as legal representation, from the very outset of the procedure. However, where government-funded legal aid is not possible, at a minimum it should be assured that non-governmental legal aid providers can provide representation in any part of the procedure and to have access to their clients in any facilities receiving asylum-seekers.

UNHCR recommends that the Government ensure that information, as well as legal advice, assistance, and representation are accessible throughout the asylum process, including prior to and throughout the credible fear interview.[81] The government should fund legal advice and assistance, as well as full representation where possible to facilitate the process, with priority for vulnerable individuals. Specifically:

- UNHCR recommends that the Government ensure that from the moment of encounter, asylum-seekers at the border receive meaningful and accurate information about the procedure for seeking international protection, including the credible fear process; this includes training and equipping border authorities with information and resources. Such information must be made available at government expense. UNHCR further recommends that the Government ensure that NGOs and UNHCR can complement that information, including through direct access to asylum-seekers.

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

- UNHCR recommends that this rule expressly preserve the right to legal representation at the credible fear stage, and at all other stages in the procedure. NGOs, legal aid organizations, and other lawyers must have access to all facilities in which asylum-seekers going through the new procedures are being held, including prior to and during credible fear. Further, UNHCR recommends that the government fund legal representation for as many as possible, prioritizing vulnerable asylum-seekers (including, but not limited to, children, people with disabilities, people with low literacy, and those with language access issues).

Standards for Fear Screenings

[79] *See Due Process in Procedures*, ¶ 203.
[80] UNHCR Discussion Paper, *Practical Recommendations for Fair and Fast U.S. Border Asylum Procedures*; *see also Evaluation externe de la phase de test relative à la restructuration du domaine de l'asile, protection juridique: conseil et representation juridiques* (Rapport final) (Nov. 17, 2015).
[81] See *infra* section III.E, which offers recommendations on appropriate due process and legal representation in appeals procedures.

First, the Proposed Rule would recodify the "significant possibility" standard for fear screenings, to be applied in evaluations of all three types of claims for protection—asylum, withholding of removal, and protection under CAT—thereby undoing the higher "reasonable possibility" standard that the prior administration sought to implement for withholding of removal and CAT claims.[82] Realigning the credible fear standard with its original articulation moves in the direction of realizing its protective intent and helps advance the fundamental protections of the 1951 Convention and its 1967 Protocol. Nevertheless, UNHCR remains concerned that the "significant possibility" standard advanced by the Proposed Rule may preclude access to asylum procedures for people in need of international protection, leading to greater risk of refoulement.

As a preliminary matter, UNHCR notes that the expedited removal framework does not align with the uses of "accelerated procedures" considered appropriate under international standards. Such "accelerated procedures" refer to full merits consideration of an asylum claim conducted on a truncated timeline and incorporate safeguards to ensure fair and efficient claim determination.[83] Claims assessed to be manifestly unfounded—those that are fraudulent, clearly abusive or not related to the criteria for granting refugee status—may be denied protection via accelerated procedures. "Screening" or "profiling", as UNHCR would understand those processes, merely serve (in a non-binding fashion) to identify people in need of international protection and channel them into appropriate procedures. The credible fear screening may seem somewhat akin to an accelerated procedure, but there are important distinctions which render this comparison inapt: the absence of full consideration of the claim; the absence of the full range of procedural safeguards that would accompany full consideration; and an inappropriate standard for rejection which is inconsistent with UNHCR's "manifestly unfounded or clearly abusive" test. As a general matter, UNHCR would recommend that the credible fear procedure not be used without remedying those issues. Nonetheless, if the credible fear procedure is to exist, UNHCR would consider "manifestly unfounded" the most appropriate standard to apply in the credible fear screening. That is, unless a person's claim is assessed to be manifestly unfounded (i.e., clearly unrelated to the criteria for granting asylum, or other protective status, or clearly fraudulent or abusive) at the credible fear interview, they should have access to full proceedings.

Given that the credible fear screening determines access to the U.S. asylum procedure, the standards applied therein must guard against the risk that refugees are returned to places where they face persecution (direct refoulement) or onward removal to an unsafe country (indirect refoulement), which would violate the core principle of non-refoulement that is enshrined in Article 33(1) of the 1951 Convention. Cases that may be "screened out" in this context can only be those determined in a fair procedure to be manifestly unfounded —that is, those claims that are clearly

[82] Proposed Rule at 46,914. *See also* Proposed Rule on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, at 36,268 (June 15, 2020). The "significant possibility" standard requires that an individual demonstrate a "substantial and realistic possibility of success" on the merits of an application for asylum, withholding of removal, or CAT protection; the individual does not have to "show that he or she is more likely than not going to succeed when before an immigration judge." U.S. Citizenship & Immigration Services, *Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations* 14-16 (Feb. 13, 2017). Thus, in the credible fear of torture context, "the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country." *Id*. at 36. The "reasonable possibility" standard, which sets a higher threshold than "significant possibility," is the same as a well-founded fear of persecution in an asylum case. U.S. Citizenship & Immigration Services, *Reasonable Fear of Persecution and Torture Determinations* 11 (Feb. 13, 2017). It requires that an applicant establish a reasonable possibility that he or she would be persecuted or tortured in the country of removal. *Id*. at 10.

[83] *See* UN High Comm'r for Refugees (UNHCR), *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determinations Under UNHCR's Mandate,* at 8 (2020), *available at* https://www.refworld.org/docid/5a2657e44.html.

fraudulent, abusive, or not related to the criteria for granting refugee status.[84] All other claims should proceed for a full determination on the merits. The "significant possibility" standard previously adopted by the United States was already out of step with the international standard,[85] and, although returning to such a standard is a move in the right direction, additional modifications are needed to mitigate the risk of refoulement.

UNHCR recommends that the burden of proof to be re-established in the proposed rule not be implemented. While UNHCR would welcome a move back to "significant possibility" if the alternative were retaining "reasonable possibility," it urges the Government to revise the burden of proof to align with international standards as discussed above. In the absence of such a move, UNHCR proposes that the U.S. government adopt the "manifestly unfounded" framework and procedural safeguards envisioned in UNHCR's guidance and in accordance with international law.

In addition, UNHCR recommends that, similar to identifying manifestly unfounded claims, asylum officers screen for manifestly well-founded claims during the credible fear process. Manifestly well-founded claims could be granted more expeditiously than claims that are complex—whereas complex claims would be assessed under full proceedings, manifestly well-founded claims, for instance, could potentially be adjudicated after a shorter, less involved follow-up interview to the credible fear screening. Not only would such mechanism advance granting protection efficiently to certain asylum-seekers, it likely would also help reduce adding unnecessarily to a large backlog of pending applications.

Non-Application of Mandatory Bars During Pre-Screening

Further, the Proposed Rule amends regulations such that mandatory bars would not apply during the credible fear screening determination.[86] UNHCR welcomes this piece of the proposal affecting an early step in U.S. asylum procedures, as exclusion issues are not appropriately dealt with in accelerated procedures. Implementing mandatory bars during pre-screening could lead to the denial of access to territory and full asylum procedures for some asylum-seekers with valid claims for protection. Especially in view of the potentially serious consequences of an erroneous determination—an asylum-seeker who wrongfully receives a negative fear determination could be returned to a place where they will suffer persecution, violence and even death—UNHCR considers it inappropriate in principle to consider bars to asylum during screening.[87]

---

[84] ExCom Conclusion No. 30, ¶(e). The Executive Committee of UNHCR, during its 34th Session, recognized that it may be useful to derive consensus among States on how to address applications that are considered "clearly abusive" or "manifestly unfounded." UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶¶ 27-28, EC/G/01/12 (May 31, 2001), *available at* https://www.refworld.org/docid/3b36f2fca.html; UNHCR, *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*. 4-5 (July 25, 2018), *available at* https://www.refworld.org/docid/5b589eef4.html. *See also*, Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, 2017*, at 175 (2017), *available at* https://www.unhcr.org/3d4aba564.pdf.

[85] 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 at 21-22, *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487, 19-16773, 2019 WL 5396739 (9th Cir. Oct. 15, 2019) (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).

[86] Proposed Rule at 46,914.

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

Under international standards concerning the identification of international protection needs, as noted above, only 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 accelerated procedure.[88] UNHCR's position is that it is contrary to international law to deprive asylum-seekers of access to a full examination of the substance of their claim based on the summary application of an exclusion ground. Exclusion is a complex inquiry into factual and legal questions involving not only international refugee law, but in many cases international human rights, humanitarian law, and international criminal law. This cannot be adequately assessed in a screening interview, particularly given the procedural shortcomings (such as truncated timelines, lack of legal assistance, information about the procedure, translation and interpretation, and time to recover from recent trauma) that often occur in these contexts.

UNHCR has acknowledged that accelerated procedures can benefit both States and applicants by allowing for the efficient identification of individuals with possible international protection needs.[89] However, international law requires that certain due process considerations be taken into account in the use of accelerated procedures to minimize the risk of a flawed decision.[90] 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.

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

Elimination of DHS Authority to Reconsider Negative Fear Determinations

Finally, the Proposed Rule would eliminate DHS's authority to reconsider negative credible fear findings that an immigration judge has reviewed and affirmed, in an effort to uphold a "streamlined process" after recent "significant delays to the expedited removal process" caused by "growing numbers of meritless reconsideration requests."[91] Instead, after an asylum officer has issued a negative credible fear determination and when DHS inquires about whether an individual would like to seek review by an immigration judge, the Proposed Rule would require DHS to inform asylum-seekers that such review includes an opportunity to be heard and questioned by the judge.[92]

Under international law, asylum-seekers whose claims are examined in accelerated procedures must have access to an effective remedy against a negative decision.[93] "The right to an effective

[88] ExCom Conclusion No. 30, ¶ 97(2)(e); *see also* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶¶ 4-5, EC/GC/01/12 (May 31, 2001), *available at* https://www.refworld.org/docid/3b36f2fca.html.
[89] *See, e.g.*, UNHCR, *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, 5-6 (July 25, 2018), *available at* https://www.refworld.org/docid/5b589eef4.html.
[90] UNHCR, *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, at 13; *see also* UNHCR, *UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures (in the European Context)*, ¶¶ 11-12 (Jan. 1992), *available at* https://www.unhcr.org/en-us/protection/operations/4deccc639/unhcr-statement-right-effective-remedy-relation-accelerated-asylum-procedures.html.
[91] Proposed Rule at 46,915.
[92] Proposed Rule at 46,915.
[93] *See* UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* 255 (Mar. 2010), *available at* https://www.unhcr.org/4c7b71039.pdf; UNHCR, UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures, ¶ 21, *available at* https://www.refworld.org/pdfid/4bf67fa12.pdf.

remedy exists when the individual has an arguable claim," which is a claim "supported by demonstrable facts and not manifestly lacking grounds in law."[94] "To be effective, that remedy must provide for a review of the claim by a court or tribunal"[95]—one independent from the authority with responsibility for adjudicating the claim in the first instance[96]—and "the review must examine both facts and law based on up-to-date information."[97] It should be effective in both law and practice.[98]

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 pathway available to asylum-seekers to have their claims reconsidered before removal. On one hand, UNHCR supports the introduction of a requirement that DHS inform asylum-seekers of the procedure to seek review of a negative fear determination by an immigration judge and to provide immigration judge review to those who do not affirmatively request it, as these measures help both empower asylum-seekers and effectively allow for appeal of an adverse pre-screening decision.[99] 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.[100] For instance, advocates have documented issues with the ability of asylum-seekers "to present evidence or participate meaningfully" in the immigration judge (IJ) review procedure.[101] 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, the risk of refoulement may rise.

UNHCR recommends that the Government refrain from eliminating reconsideration of negative fear determinations by DHS entirely. Rather, given the inherent challenges in accurately assessing refugee claims within accelerated procedures, UNHCR favors modifications to current rules governing reconsideration requests that both enhance efficiency of the credible fear process but also 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.[102]

C. Applications for Asylum

[94] UNHCR, Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures, ¶ 23.
[95] UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures ¶ 21.
[96] Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection*, at 127.
[97] UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures ¶ 21. In previous research, UNHCR has found that permitting full and rigorous scrutiny of negative decisions is key "to safeguard against the risk of denial of applicants' substantive rights to asylum and to refugee status under the 1951 Convention and other forms of protection." *Id*. ¶ 22.
[98] UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures ¶ 23.
[99] 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.
[100] *See, e.g.*, Kathryn Shepherd & Royce Bernstein Murray, American Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* 23-24 (May 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf [hereinafter The Perils of Expedited Removal] (describing challenges in the IJ review process that may follow a negative credible fear determination).
[101] *See, e.g.*, The Perils of Expedited Removal, at 23-24.
[102] See *infra*, section III.B, which outlines UNHCR's recommendations on legal advice, assistance, and representation.

The Proposed Rule establishes a new process for the lodging and adjudication of asylum claims by individuals who pass credible fear screenings in expedited removal.[103] Whereas asylum-seekers found to have credible fear are currently placed into removal proceedings under section 240 of the INA to have their claims considered in full by an immigration judge, the Proposed Rule would have asylum officers in USCIS review these claims in the first instance (please see following section, "Proceedings for Further Consideration").[104] Instead of the asylum-seeker themselves lodging a claim, under the Proposed Rule, "[e]very individual who receives a positive credible fear determination would be considered to have filed an application for asylum at the time the determination [of the fear screening] is served on him or her." In other words, USCIS would prepare and submit applications on behalf of the asylum-seeker based on the elements of the claim disclosed during the credible fear interview. Unlike in current practice, where a Form I-589 serves as the application form, the rule appears to envision "a record of the positive credible fear determination, including copies of the asylum officer's notes, the summary of material facts, and other materials upon which the determination was based" as constituting the application for asylum.[105] The application would be considered filed or received as of the time of service on the asylum-seeker for purposes of the one-year filing deadline and starting the clock for work authorization eligibility.[106]

During the credible fear interview—which can happen within days of arrival—the asylum officer would advise the individual of the consequences of filing a frivolous application, elicit relevant biographical information and facts to evaluate the fear claim, create a summary of material facts, read that back to the individual, and provide an opportunity for the individual to correct any errors.[107] Using this information from the credible fear interview, USCIS would generate the application, which is to include the asylum officer's notes from the screening and the basis for the positive fear determination. The Proposed Rule anticipates that those who pass credible fear screenings "would have an asylum application on file with the Government within days," thereby meeting the one-year deadline and "avoiding the risk of filing delays."[108] The rule does not explicitly provide for access to counsel in this stage of the procedure. A second hearing before a USCIS asylum officer would then be scheduled for full evaluation of the asylum claim.[109] Asylum-seekers "would be allowed to supplement or request modifications or corrections to this application up until 7 days prior to the scheduled asylum hearing before a USCIS asylum officer, or for documents submitted by mail, postmarked no later than 10 days before the scheduled asylum hearing."[110]

Under international standards, procedures for determining refugee status must meet certain basic due process requirements. States are given considerable leeway to establish procedures, so long as they meet those standards and achieve their obligation of non-refoulement, as well as ensure that refugees are identified and can secure international protection.[111] Where possible, asylum-seekers who can complete their applications independently should be allowed to take it away to do so and to return it subsequently to the adjudicatory authority.[112] However, in principle, the notion that the government is an integral player in lodging the asylum application is not incompatible with international standards, so long as key safeguards are in place to protect the

[103] Proposed Rule at 46,915-16.
[104] Proposed Rule at 46,915-16.
[105] Proposed Rule at 46,945.
[106] Proposed Rule at 46,916.
[107] Proposed Rule at 46,916.
[108] Proposed Rule at 49,916.
[109] Proposed Rule at 49,916.
[110] Proposed Rule at 46,916.
[111] Handbook, ¶¶ 189-92.
[112] *See RSD Procedural Standards*, *Unit 3: Reception and Registration for Mandate RSD,* section 3.2.4, *available at* https://www.refworld.org/docid/5e87075b2.html.

asylum-seeker's due process rights. Those key safeguards include the notion that the application should be put together in a timeframe and setting that allow for the vulnerable situations asylum-seekers frequently face, given the importance of the factual information gathered in that initial application.[113] In particular, asylum-seekers should have sufficient time to receive and read information on the asylum procedure in a language they understand, to consider and gather the evidence that may be relevant to their claims, and to complete all sections of the application (including where done with the assistance of a government official).[114] It is crucial that asylum-seekers have access to necessary facilities for submitting their cases, including access to legal advice and qualified legal representatives and competent interpreters who can assist them.[115] (UNHCR notes that both legal assistance and interpretation can be harder to obtain for asylum-seekers in detention.) In any event, individuals should have adequate space, privacy, and time to rest during this process.[116]

In certain respects, the Proposed Rule aligns with international standards on lodging asylum applications. Specifically, the procedure for preparing and filing applications set forth under the rule may aid asylum-seekers in advancing their claims, in part through the provision of some necessary facilities (presumptively interpreters, at least), and also by establishing a mechanism to file applications efficiently. For example, the government facilitating submission of applications on behalf of those without certain language skills or access to critical resources, such as those who do not speak English and may not be able to obtain an interpreter (particularly if they are detained), may help ensure that asylum-seekers who would not have otherwise been able to file an application can pursue their claims. In addition, this will support timely submission in advance of the one-year deadline,[117] enhance earlier processing, and promptly start the clock for work authorization. Further, it is essential for applicants to have the ability to correct or modify their applications prior to full adjudication. These measures—particularly those related to necessary facilities and timely submission of the application—may further access to international protection and lessen the risk of refoulement.

In other ways, however, the Proposed Rule risks diverging from international standards, namely in that Government officials would have responsibility for generating and lodging asylum applications without the necessary safeguards in place to protect asylum-seekers' rights to due process. If the government is to derive the application from the credible fear interview, UNHCR strongly urges that such safeguards be provided from the outset of the expedited removal process, including at least for the credible fear interview. International standards provide for an interplay between adjudicator and asylum-seeker to develop the claim,[118] but this must be executed carefully, and in consideration of these three major concerns:

---

[113] *See RSD Procedural* Standards, *Unit 3: Reception and Registration for Mandate RSD,* section 3.2.4, *available at* https://www.refworld.org/docid/5e87075b2.html; Handbook, ¶ 190.

[114] *See RSD Procedural Standards*, *Unit 3: Reception and Registration for Mandate RSD,* section 3.2.4, *available at* https://www.refworld.org/docid/5e87075b2.html.

[115] *See RSD Procedural Standards*, *Unit 3: Reception and Registration for Mandate RSD,* section 3.2.4, *available at* https://www.refworld.org/docid/5e87075b2.html; Handbook, ¶ 192(iv).

[116] *See RSD Procedural Standards*, *Unit 3: Reception and Registration for Mandate RSD,* section 3.2.4, *available at* https://www.refworld.org/docid/5e87075b2.html; Handbook, ¶ 192(iv).

[117] While recognizing the desire of states to promptly receive claims to maintain a fair and efficient asylum system, UNHCR considers the protection of applications from rejection based solely on timing or other procedural grounds to be "a fundamental safeguard." UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶ 20, EC/GC/01/12 (May 31, 2001) (citing *Jabari v. Turkey*, ECHR, ¶ 40 (July 10, 2000)); ExCom Conclusion No. 15, ¶ (i). Under Article 1 of the 1951 Convention, "failure to meet formal, technical requirements such as time limitations [as to the submission of claims] does not negate the refugee character of [a] person." UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 9 (Apr. 2001), *available at* https://www.refworld.org/docid/3b20a3914.html. Therefore, an asylum-seeker's failure to submit an application within a certain period of time, as well as failure to fulfill other formal requirements, "should not in itself lead to an asylum request being excluded from consideration." UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶ 20, EC/GC/01/12 (May 31, 2001), *available at* https://www.refworld.org/docid/3b36f2fca.html.

[118] *See* Handbook, ¶ 196.

- First, while the rule does provide for input from and approval by the asylum-seeker on that application at a later point, UNHCR is concerned that there is not ample time for the asylum-seeker to prepare his or her case prior to the credible fear interview. The asylum-seeker should be given the assistance, time and facilities needed to prepare his or her case and interview at the earliest opportunity. The initial interview can occur within days of arrival, before asylum-seekers have had time to recover from the trauma of the journey, understand the procedure before them, and assemble evidence. Asylum-seekers have often fled traumatic experiences and undertaken exhausting journeys, and, in many cases, they arrive with limited or no resources that help enable them to present their claims effectively. Starting the asylum application without adequate time to rest or prepare for their interview likely places asylum-seekers, especially those who are unrepresented, at a disadvantage moving forward.

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

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

UNHCR further notes that individuals with specific needs (for instance, those with low levels of literacy, those with language access issues, those with certain disabilities, those who have suffered profound levels of trauma, and children part of a family unit who may have an asylum claim independent of their parents' claims) may need additional time and assistance to complete their applications.[119] There may also be complex cases that require more time than may be available under the proposed framework. These complex cases might, for example, include those involving particular fact patterns (e.g., gang- or gender-based claims) or challenging evidentiary issues that require greater time or resources to address adequately. UNHCR urges there to be flexibility built into the system to accommodate such exigencies.

[119] Other individuals with specific needs may include adolescents, older persons, pregnant women or girls, single parents with minor children, victims (or potential victims) of trafficking, persons with diverse sexual orientation and/or gender identity, persons with physical and mental disabilities, stateless persons, members of ethnic and religious minorities, indigenous peoples, victims/survivors of torture, rape or other serious forms of psychological, physical or sexual abuse, and traumatized persons. Inter-Parliamentary Union & UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, 2017*, at 181 (2017), *available at* https://www.unhcr.org/3d4aba564.pdf.

Under the proposed framework, the consequences of a rushed or inaccurate credible fear interview are significant. Currently in section 240 proceedings, notes from the pre-screening interview are not automatically part of the record unless introduced by the government prosecutor (typically used to impeach the credibility of the applicant). Under the proposed framework, the pre-screening notes could not only be used for impeachment but also as the very basis of the application. The lack of time and legal assistance in this setting is of concern to UNHCR.

Finally, UNHCR is concerned about a conflict of interest that may arise where the adjudicator both prepares *and* decides asylum applications. If, for instance, adjudicators face significant backlogs or certain profiles of claims are viewed unfavorably, it is possible that officials responsible for preparing and lodging applications may feel pressure or incentivized to file fewer claims (e.g., by issuing a greater number of negative fear determinations). Even if no such pressure or incentives exist, the mere appearance of or concern over them could affect the integrity and fairness of the procedure. Putting in place robust protections through checks-and-balances (perhaps with firewalls, where possible) within USCIS may help ameliorate these concerns.

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

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

- Preceding the credible fear interview, sufficient information and guidance about the entire procedure in a language the asylum-seeker understands, provided at government expense, with NGOs able to supplement any government-provided information.[120] This provision of information should include explaining to individuals found to have a credible fear of torture that they may apply for and pursue a claim for asylum in their full proceedings before an asylum officer, as well as any relevant timelines for amending their application;

- Legal counseling available to all, at government expense, through the provision of "know-your-rights" or other such sessions, with individualized counseling made available to those who wish to avail themselves of it;[121]

- Access to qualified legal representatives both prior to the credible fear interview, during, and after (to allow the asylum-seeker to modify the application). The legal representative must have physical and telephonic access to all facilities in which asylum-seekers may be held. It is a best practice for the government to pay for representation for vulnerable asylum-seekers;[122]

- Accommodations and flexible time frames for amending the application, notably for individuals with special needs and / or in complex cases;

[120] See *infra*, section III.B, offering UNHCR's full recommendations on legal advice, assistance, and representation. Confidentiality should also be ensured. *See generally* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (May 2015), *available at* https://www.refworld.org/pdfid/55643c1d4.pdf.
[121] See *infra*, section III.B, offering UNHCR's full recommendations on legal advice, assistance, and representation.
[122] See *infra*, section III.B, offering UNHCR's full recommendations on legal advice, assistance, and representation.

- Robust checks-and-balances (such as measures for quality control and backlog reduction) within USCIS to ensure that conflicts of interest, in appearance or in fact, due to its role in both preparing and deciding applications do not arise, and that it does not result in a disadvantageous position for the applicant.

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

The Proposed Rule introduces new procedures for adjudication of applications for asylum and related protection by individuals found to have credible fear.[123] Under the Proposed Rule, asylum officers in USCIS would review full asylum claims in the first instance during a non-adversarial hearing pursuant to a novel process lodged under section 235 of the Act.[124] Asylum officers would record the hearing, to be transcribed if there is an appeal, and USCIS must provide interpreters instead of relying on applicants to secure their own, as had been the prevailing practice in affirmative asylum interviews (at least prior to the COVID-19 pandemic).[125] While asylum officers already have authority to decide asylum applications, the Proposed Rule would permit them also to adjudicate claims for withholding of removal and protection under CAT for people in this expedited removal proceeding.[126] Unlike in section 240 proceedings, there would not be a chance for asylum-seekers to pursue other complementary forms of protection available under U.S. law.[127] If the officer does not grant asylum to the applicant, the asylum-seeker would be ordered removed but could appeal the decision to an immigration judge and, if necessary, to the Board of Immigration Appeals (BIA or "the Board"), a process discussed more extensively in the next subsection.[128] Further, should an individual fail to appear for their asylum hearing, asylum officers would be able to order them removed.[129]

Under the Proposed Rule, individuals placed in this new proceeding before asylum officers would have a right to representation, at no expense to the Government, by counsel of their choosing who is authorized to engage in such practice.[130] The rule appears to provide for a relatively narrow role of counsel during the hearing compared to that an attorney typically has, in current procedures, when representing an asylum-seeker who is in section 240 proceedings in a merits hearing before an immigration judge. More specifically, the relevant provisions allow, upon completion of the hearing before an asylum officer, an opportunity for counsel (or the applicant) to make a statement or comment on the evidence presented, and counsel "will also have the opportunity to ask follow-up questions."[131] Thus, unlike an asylum merits hearing in immigration court where attorneys may present opening statements, conduct direct examination of the

[123] Proposed Rule at 46,916-19.
[124] Proposed Rule at 46,915-16. In cases where an immigration judge vacates a negative credible fear determination by an asylum officer, provisions within the Proposed Rule would enable the judge to refer the case back to USCIS for an asylum hearing. *Id*. at 46,918.
[125] Proposed Rule at 46,919.
[126] Proposed Rule at 46,919.
[127] Proposed Rule at 46,919. Asylum-seekers may be able—but are not guaranteed an opportunity—to pursue complementary forms of protection. The rule requires them to file a motion to vacate the asylum officer's order of removal demonstrating prima facie eligibility for a form of relief that can't be granted in proceedings under 8 CFR 1003.48. Only one such motion is permitted and must be filed before the IJ decides the application for asylum and related protection. If granted, DHS has discretion to place the applicant in removal proceedings. For further analysis, see *infra* Section III.E ("Access to Complementary Forms of Protection").
[128] Proposed Rule at 46,919; *see infra* Section III.E.
[129] Proposed Rule at 46,919.
[130] Proposed Rule at 46,911, 46,919, 46,942.
[131] Proposed Rule at 46,942.

asylum-seeker and expert and lay witnesses, and offer a closing statement,[132] in the new proceedings, counsel has a limited role in presenting an asylum-seeker's case to the adjudicator.

As noted in the previous section, this proposed process involving a hearing before an asylum officer would supplant the current adjudicatory framework under which asylum-seekers found to have credible fear are placed into removal proceedings under section 240 of the INA to have their claims considered in full by an immigration judge.[133] The Proposed Rule asserts that asylum-seekers with credible fear are not statutorily entitled to section 240 proceedings, and, rather, it underscores that only "further consideration" of their asylum applications is required, which it suggests can be read to give DHS flexibility in determining the precise contours of the process.[134] In its discussion of this change, the Proposed Rule acknowledges that section 240 proceedings "provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings under section 235."[135] It later asserts, however, that the new procedures "would provide protections similar to those provided in section 240 removal proceedings," for instance by giving asylum-seekers the right to be represented at no expense to the Government as exists for those in section 240 proceedings.[136]

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

UNHCR generally welcomes the introduction of a non-adversarial process for the adjudication by USCIS of asylum claims of individuals arriving at the border. UNHCR, along with policy experts and civil society, have long recommended that USCIS, as a specialized and highly qualified first

---

[132] *See* Exec. Office of Immigration Review, Dep't of Justice, *Immigration Court Practice Manual*, ch. 4.16(d) (Nov. 16, 2020) (outlining the conduct of individual hearings before an immigration judge and indicating that parties should be prepared to make an opening statement, raise any objections to the other party's evidence, present witnesses and evidence on all issues, cross-examine opposing witnesses and object to testimony, and make a closing statement).
[133] Proposed Rule at 46,918.
[134] Proposed Rule at 46,917.
[135] Proposed Rule at 46,917.
[136] Proposed Rule at 46,918-19.
[137] Handbook, ¶ 190; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures),* ¶ 20 (May 31, 2001); ExCom Conclusion No. 15, ¶ (i).
[138] *Due Process in Procedures*, ¶ 231.
[139] UNHCR Handbook, ¶ 196.
[140] *RSD Procedural Standards*, *Unit 4: Adjudication of Refugee Status Claims*, section 4.3.2.
[141] *RSD Procedural Standards*, *Unit 2.7: Legal Representation in UNHCR RSD Procedures*, section 2.7.4.
[142] *Due Process in Procedures*, ¶ 234.
[143] Handbook, ¶ 196; *Due Process in Procedures*, ¶¶ 20, 247.

instance authority, be fully entrusted with processing asylum claims at the border, with the possibility of appeal to a court.[144] In light of the need for expertise on refugee and asylum matters, cross-cultural interviewing skills, frequent use of interpreters and the application of a shared burden of proof between adjudicators and asylum-seekers, UNHCR considers the non-adversarial process far better suited to first instance asylum adjudication than adversarial procedures, which are procedurally complex and may not provide an appropriately secure, confidential, and comfortable environment for the disclosure of highly personal, sensitive information. In cases involving especially vulnerable asylum-seekers—such as those who have suffered trauma, have low literacy or educational backgrounds, or are part of a family with a child who is the lead claimant—who may encounter greater challenges to presenting their claims in court, the need for a non-adversarial process is that much greater. Accordingly, UNHCR anticipates that non-adversarial proceedings for asylum-seekers at the border will enhance both the fairness and efficiency of the system and ultimately may help reduce the risk of refoulement.

UNHCR notes with concern, however, that the Proposed Rule will authorize asylum officers to issue removal orders, including in cases where an asylum-seeker fails to appear for their full hearing before USCIS. The rule's new provisions explicitly provide that, in such cases, USCIS is not required to notify applicants that they failed to appear for their interviews before issuing a decision on the application.[145] In UNHCR's view, giving this authority to asylum officers may risk putting asylum-officers in an enforcement-oriented or adversarial role, which could undermine some of the benefits of an otherwise non-adversarial procedure described in the preceding paragraph. Rather, to keep the focus of asylum officers' work on identifying refugees, UNHCR favors a process under which other DHS officers, such as those within ICE, or immigration judges are tasked with issuing removal orders. Furthermore, UNCHR sees it as important to provide applicants who may have missed their hearings inadvertently with notice so that they have an opportunity to remedy the situation, prior to being issued a removal order.

UNHCR supports efforts to move toward non-adversarial hearings before asylum officers on the merits of applications for international protection in the first instance. However, UNHCR recommends that such non-adversarial hearings be implemented in a manner that does not circumscribe asylum-seekers' rights. Specifically, UNHCR urges the Government to consider non-adversarial first-instance asylum hearings in a context that corresponds with international standards on detention and affords asylum-seekers sufficient time and opportunity to recover from trauma, gather information about their case, and have access to legal advice, assistance and representation.[146] Further, UNHCR recommends that, consistent with current practice, asylum officers' role should be limited to adjudication and that they not be authorized to issue removal orders to asylum-seekers.

E. Application Review Proceedings Before the Immigration Judge

Procedural Considerations

The Proposed Rule creates new review proceedings for individuals with a credible fear of persecution or torture not granted asylum or related protections by USCIS.[147] Under the Proposed Rule, when the asylum office declines to grant protection and an asylum-seeker affirmatively requests review of the decision, an immigration judge would conduct a de novo review of USCIS's

[144] *See, e.g.*, Doris Meissner, Migration Policy Inst., *Rethinking the U.S.-Mexico Border Immigration Enforcement System*, at 6 (Oct. 2020).
[145] Proposed Rule, at 46,942.
[146] See *infra*, section B, offering UNHCR's full recommendations on legal advice, assistance, and representation.
[147] Proposed Rule at 46,919-21.

denial of the claims.[148] These "limited review proceedings" under section 235 of the Act would not involve a second, full evidentiary hearing on the application,[149] and, unlike in proceedings under section 240 of the INA, immigration judges could not consider issues related to the asylum-seeker's removability or eligibility for the full range of complementary forms of protection that exist under U.S. law.[150] Instead, the judge determines, after de novo review of the full record of proceedings created by the hearing before USCIS and consideration of any additional testimony or evidence submitted, whether the applicant is eligible for asylum, withholding of removal, or protection under CAT.[151]

In its discussion, the Proposed Rule notes an expectation "that the IJ generally would be able to complete the de novo review solely on the basis of the record before the asylum officer, taking into consideration any arguments raised by the noncitizen, or the noncitizen's counsel, and DHS."[152] Nevertheless, in cases where a factual record may need to be developed further before the IJ, "a party may seek to introduce additional testimony or documentation so long as the party demonstrates to the IJ that the testimony or documentation is not duplicative of the testimony or documentation considered by the asylum officer and that it is necessary to develop the factual record to allow the IJ to issue a reasoned decision in the case."[153] Judges may, "in appropriate cases," require parties to submit prehearing statements or briefs addressing potential additional evidence and why it meets applicable legal standards. In that event, if necessary, "for example in cases involving pro se applicants, IJs will, before proceeding with the case, explain in court the standards for submitting additional testimony and documentation."[154]

Under the proposed provisions, immigration judges could take various decisions in the review proceedings: they would have the authority to review all decisions issued by the asylum officer, upon request by the applicant.[155] In other words, the IJ could review, for example, not only a denial of asylum but also a grant of withholding of removal.[156] The Proposed Rule attempts to justify this, at least in part, where it asserts that DHS may have evidence to present "that indicates that the applicant does not qualify for any of the relief or protection at issue."[157] Depending on the circumstances, the judge may grant asylum to the individual and vacate the asylum officer's removal order, or, if the judge determines the applicant qualifies for withholding of removal or protection under CAT, the judge would grant the appropriate protection but not vacate the asylum

[148] Proposed Rule at 46,919.
[149] Proposed Rule at 46,918. In rejecting an approach involving a second, full evidentiary hearing by an immigration judge, the Proposed Rule explains that the Government found it "unnecessary, duplicative, and inefficient," as it would not add value or procedural protections. *Id*.
[150] Proposed Rule at 46,919. "Complementary protection" refers to protection mechanisms outside of the Refugee Convention. These forms of protection are typically "intended to provide protection for persons who cannot benefit from [the 1951 Convention and its 1967 Protocol] even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country. *See* Ruma Mandal, UNHCR, Dep't of Int'l Prot., *Legal and Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶¶ 4-5, U.N. Doc. PPLA/2005/02 (Jun. 2005). UNHCR acknowledges that the proposed asylum-and-withholding-only proceedings do allow for withholding of removal (CAT), which is one form of complementary protection. However, UNHCR is concerned that other forms of complementary protection, discussed *infra*, would not be included in the new proceedings, thus narrowing the forms of protection available.
[151] Proposed Rule at 46,919. When an asylum-seeker affirmatively requests review by an IJ, DHS would initiate the process and file four items with the immigration court, including (1) a copy of the Notice of Referral to Immigration Judge; (2) a copy of the record of proceedings before the asylum officer; (3) the asylum officer's written decision, including the removal order; and (4) proof that DHS served the previous three items on the asylum-seeker. *Id*. at 46,920.
[152] Proposed Rule at 46,920.
[153] Proposed Rule at 46,920.
[154] Proposed Rule at 46,920.
[155] Proposed Rule at 46,920.
[156] Proposed Rule at 46,920.
[157] Proposed Rule at 46,921.

officer's removal order.[158] Either party can appeal the judge's decision to the BIA, and, if necessary, the asylum-seeker can seek judicial review before a federal circuit court.[159]

Under international law, procedures to adjudicate individuals' claims for protection must uphold key due process safeguards, including those at the border and in accelerated or otherwise shortened procedures.[160] It is generally recognized that fair and efficient asylum procedures are an essential element in the full and inclusive application of the 1951 Convention. This allows States to identify those who qualify (and those who do not) under the refugee definition fairly and efficiently to protect against refoulement and afford international protection to those who need it.[161] In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure. A fair and efficient procedure decreases the overall demands on the reception system, discourages misuse of the asylum system, and avoids protracted periods of uncertainty for the asylum-seeker.

UNHCR's Executive Committee, of which the U.S. has been a member since its establishment in 1955, has recommended that procedures satisfy certain basic requirements, including that: the applicant be given guidance on the procedure itself; the applicant be given the necessary facilities, including a competent interpreter, for submitting his case; and the applicant should have ability to appeal and remain on the territory until a final decision has been made on the claim.[162] In addition, the opportunity to present relevant evidence is critical to procedural fairness, as it affects applicants' ability to establish that they meet the refugee definition set forth under Article 1A(2).[163] UNHCR is concerned that it may be difficult for asylum-seekers to prevail in this limited form of proceeding before an immigration judge, especially placed as it is under section 235 of the INA.

While UNHCR considers the opportunity to appeal a negative decision indispensable under international standards, it is concerned that in the U.S. context, the Proposed Rule's framework for the appeal of an asylum officer's decision to an immigration judge while still under section 235 may lack sufficient procedural safeguards. More specifically, UNHCR is concerned that asylum-seekers may not have an opportunity to be heard in their "de novo review," might face challenges in filing additional evidence, and will not benefit from the full spectrum of guarantees that exist under section 240 proceedings. Asylum-seekers may not have time or resources to assemble relevant evidence, especially from detention, and may not have access to legal assistance and representation that would assist with navigating the complex procedural requirements before the IJ (a process in which DHS would always have an attorney). Further, asylum-seekers should be given the benefit of the doubt, and UNHCR is concerned by the authority of the immigration judge

[158] Proposed Rule at 46,921.
[159] Proposed Rule at 46,921.
[160] Handbook, ¶¶ 189-204.
[161] Article 33(1) of the 1951 Convention codifies the fundamental principle of non-refoulement, which refers to the obligation of States not to expel or return (refouler) a person to territories where his or her life or liberty would be threatened. *See* Nonrefoulement, Black's Law Dictionary 1157 (9th ed. 2009). *See generally* UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, (Jan. 26, 2007), *available at* http://www.unhcr.org/refworld/docid/45f17a1a4.html.
[162] Handbook, ¶ 192; ExCom Conclusion No. 8, ¶ (e) (enumerating basic procedural requirements). *See generally* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (May 31, 2001), *available at* https://www.refworld.org/docid/3b36f2fca.html; UNHCR, *UNHCR Public Statement in Relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'immigration pending before the Court of Justice of the European Union* (May 21, 2010), available at https://www.refworld.org/docid/4bf67fa12.html. *See also* International Covenant on Civil and Political Rights art. 2(3), Dec. 19, 1966 (entered into force Mar. 23, 1976), 999 U.N.T.S. 171 (providing for, *inter alia*, the right to an effective remedy).
[163] *RSD Procedural Standards*, *Unit 7: Appeal of Negative RSD Decisions*, section 7.4.1.

to overturn an underlying grant of protection, including in cases where it possibly is not disputed by DHS.[164]

With respect to new evidentiary burdens, for instance, *pro se* asylum-seekers, especially those in vulnerable situations, may lack the language, technical, or other skills needed to establish, in writing via prehearing statements or briefs, that additional testimony or documentation they wish to submit to the immigration judge is not duplicative of that provided to the asylum officer. Even if a judge is required to explain the standards, it is hard to see how, without counsel and other facilities (such as translators), some asylum-seekers may be able to satisfy this rule. This may be problematic in that it undermines fairness in the asylum procedure and could lead to the exclusion of evidence relevant to the protection claim.

Access to Complementary Forms of Protection

The Proposed Rule creates the possibility that an asylum-seeker could access full removal proceedings, during which they could seek the full range of complementary forms of protection, through a motion to vacate—only one is permitted—filed with the immigration judge before a decision on the application for asylum and related protections.[165] While UNHCR supports this positive opening embedded in the Proposed Rule's provisions on IJ review proceedings, it is concerned that the procedural requirements would in turn limit asylum-seekers' access to available complementary forms of protection. Under U.S. law, victims of crime, human trafficking, and other violence and abuses may be entitled to protections and relief, such as VAWA, U visas, T visas, and Special Immigration Juvenile Status (SIJS). To pursue these complementary forms of protection, an asylum-seeker would have to successfully file a motion with the IJ. Even if that motion is granted, it seems that the asylum-seeker is not then guaranteed access to complementary protection; UNHCR is concerned that the Proposed Rule seems to indicate that DHS retains ultimate discretion on this question. UNHCR observes that this rigorous process to access to all forms of complementary forms of protection that exist under U.S. law—one of which, SIJS, is child-specific—may be especially challenging for pro se, child, and other vulnerable asylum-seekers.

Limiting or denying access to all forms of complementary protection that exist in the U.S. immigration system conflicts with international standards. While it is UNHCR's position that individuals who fulfill the criteria enumerated in Article 1A(2) of the 1951 Convention (or its Protocol) are entitled to be recognized as such and protected under that instrument rather than under complementary protection schemes, complementary protection should be granted to persons in need who fall outside the scope of the 1951 Convention.[166] Therefore, UNHCR has recognized the value of asylum countries offering complementary forms of protection to individuals not formally recognized as refugees but who nonetheless require international

[164] *See* Handbook, ¶ 196 ("[I]f the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.").
[165] Proposed Rule at 46,920. "For the motion to be granted, the applicant would have to show that he or she is prima facie eligible for a form of relief that cannot be granted in proceedings under 8 CFR 1003.48. With the motion granted, DHS would have the discretion to place the applicant in removal proceedings." *Id*.
[166] Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶ 181; *see also* Exec. Comm. Of the High Comm'r's Programme, Standing Comm., *Providing International Protection Including Through Complementary Forms of Protection*, ¶ 26, U.N. Doc. EC/55/SC/CRP.16 (June 2, 2005), *available at* https://www.refworld.org/docid/47fdfb49d.html; UNHCR, *Complementary Forms of Protection*, ¶31 (Apr. 2001), *available at* https://www.refworld.org/docid/3b20a7014.html ("[States] should implement complementary protection in such a way as to ensure the highest degree of stability and certainty possible in the circumstances . . . ."); Nicole Dicker & Joanna Mansfield, UNHCR, *Filling the Protections Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia*, 3, U.N. Doc. Research Paper No. 238 (May 31, 2012) (explaining that complementary protections are based on "international refugee, human rights and humanitarian law" and that its "central feature" is the "international legal obligation of non-refoulement").

protection.[167] Complementary forms of protection, however, are only effective in strengthening the global protection regime if individuals have the chance to apply for them,[168] and those applications are best conducted in the same proceeding as that used for assessing refugee protection needs.[169]

Potential Impact of These Provisions on Particularly Vulnerable Populations

UNHCR observes with particular concern that the Proposed Rule's procedural changes may be disproportionately felt by applicants less well-equipped to navigate complex legal systems. This includes applicants appearing *pro se* in U.S. immigration proceedings, as well as those who have suffered profound trauma, have a low level of literacy, and are not proficient in English. UNHCR observes with concern that representation rates are low for certain categories of asylum-seekers in the U.S., and that being represented correlates with a more than threefold better chance of gaining protection.[170] Yet, while the Proposed Rule makes some allowances for special needs of pro se applicants, such as by requiring immigration judges to explain the process to file additional evidence, its provisions may establish, in some cases, exceptionally high barriers to protection for unrepresented applicants.

UNHCR recommends that the Government revise the provisions on review to ensure that they are implemented in a manner consistent with international standards. In particular:

- UNHCR supports lodging the IJ review procedures under section 240 of the INA, which affords asylum-seekers greater procedural protections and makes less cumbersome the opportunity to pursue complementary forms of protection.

- UNHCR recommends that, should the review procedure stay under section 235, the process for introducing new evidence be made less cumbersome. Noting the grave consequences of erroneous determination, presenting evidence must be made as easy as possible, including in review procedures. This is especially important in recognition of the accelerated timeframe of the first instance decision in the Proposed Rule, during which asylum-seekers very well may not have time to gather information and present their cases as effectively as possible.

---

[167] Exec. Com., *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶ 1. *See also* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶ 48, U.N. Doc. EC/GC/01/12 (May 2001).

[168] Exec. Com., *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶ 25.

[169] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* ¶ 50(e) ("A single procedure to assess the claims of all those seeking refugee status or other complementary protection may, in many cases, represent the clearest and swiftest means of identifying those in need of international protection.").

[170] UNHCR observes that, under the INA, individuals have a right to counsel in immigration court proceedings, but at no expense to the government. 8 U.S.C. § 1362. As a result, in the majority of cases, individuals must pursue their claims for protection or relief *pro se* due to a variety of barriers to representation, including financial and geographic obstacles. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (Dec. 2015). A recent study found that "only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation." *Id*. at 2. Nevertheless, data has consistently shown that those with representation fare far better than those proceeding *pro se*. Individuals in removal proceedings with representation are five-and-a-half times more likely to succeed on their claims than those without counsel. *Id*. While legal assistance generally is highly beneficial to asylum-seekers, UNHCR also notes that individuals who do consult with or retain representation can face challenges due to fraudulent practices, which are often referred to as the "unauthorized practice of immigration law" (UPIL). A long-standing problem, UPIL "results in serious consequences including devastating financial loss and severe immigration ramifications such as deportation." *Avoiding the Unauthorized Practice of Immigration Law*, AM. BAR ASS'N (July 13, 2021), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/avoiding-the-unauthorized-practice-of-immigration-law/; *About Notario Fraud*, AM. BAR ASS'N (Nov. 11, 2020), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/.

- UNHCR recommends that the Government take steps to make access to complementary protection far less cumbersome and easier to navigate for asylum-seekers. At a minimum, the Government should clarify that an IJ decision to allow access to complementary protection amounts to a decision on that matter, and DHS does not retain discretion on that point.

- In addition, the Government might incorporate special protections for *pro se*, child, and other vulnerable applicants who stand at heightened risk of failing to successfully navigate the Proposed Rule's procedural and evidentiary requirements.

- As recommended when commenting on other stages of the newly proposed procedure, UNHCR notes that access to legal advice, assistance, and representation is paramount to ensure robust, fair, and efficient procedures. In addition, UNHCR recommends that all asylum-seekers are provided with adequate legal information and counseling about the section 235 review, meaningful opportunities to apply for complementary protection under section 240, and any other necessary aspects of this appeals process. UNHCR notes that all asylum-seekers must have opportunities to access legal representation throughout and recommends that the Government fund representation for particularly vulnerable asylum-seekers.[171]

F. Severability

UNHCR notes that the Notice of Proposed Rule Making calls for comments on the severability of various provisions of this rule. Specifically, the NPRM notes that the Departments intend for most parts of the rule to continue to operate should any portion of the rule be enjoined or otherwise invalidated by a court, and the Departments seek comment on "whether (and which of) the regulatory provisions proposed herein should be severable from one another."[172]

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

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

[171] See *infra*, section B, offering UNHCR's full recommendations on legal advice, assistance, and representation.
[172] Proposed Rule, 46,921.

IV. Conclusion

UNHCR recognizes the current and complex challenges associated with flows of asylum-seekers amidst mixed migration within the sub-region and the corresponding strains on an asylum system in need of reform and offers its continued support to the U.S. authorities to overcome these challenges and ensure consistency with international law. UNHCR further acknowledges the Government's long-standing commitment to refugees and asylum-seekers and welcomes the decades-long record of consulting with UNHCR on implementation of the 1967 Protocol.

UNHCR recognizes a number of positive initiatives envisaged in this Proposed Rule. For instance, the efforts to find efficiencies such that asylum-seekers can have their claims recognized more expeditiously are welcome. Likewise, the proposal for the first instance asylum claim to be heard in a non-adversarial setting is a move toward a fairer, more efficient system in line with international standards. Nonetheless, UNHCR remains concerned that the Proposed Rule exacerbates several existing discrepancies between U.S. practice and international standards and introduces elements which may create more obstacles to fair and efficient asylum hearings. In particular, UNHCR is concerned that placing this procedure within section 235 will lead to higher prevalence of arbitrary detention of asylum-seekers. Likewise, UNHCR is concerned that at the first instance, asylum-seekers will not have time or assistance in preparing their claims, and that the application, as lodged by the Government, may not accurately reflect the asylum-seeker's situation. As the application proceeds through review, UNHCR is concerned that asylum-seekers, particularly those without access to counsel, will struggle with evidentiary and procedural standards, and with accessing complementary forms of protection for those who need it.

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