UNHCR
The UN Refugee Agency

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

"Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"

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I. UNHCR's Role and Supervisory Authority

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits for your consideration the comments below on the new Proposed Rule on Procedures for Asylum and Withholding of Removal as well as Credible and Reasonable Fear Review from 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 if adopted will have a significant impact on the international legal protections to which persons seeking international protection (including asylum-seekers, asylees, and refugees[1]) are entitled.

This submission is offered consistent with UNHCR's supervisory responsibility under its Statute 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 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 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 communicating with States Party its guidance on the 1951 Convention, the 1967 Protocol, and other international and regional refugee instruments. This guidance is informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system of refugee protection.

UNHCR presents these comments today out of concern that the Proposed Rule creates new procedural barriers to a fair and efficient review of a claim for protection; makes fundamental changes to the refugee definition[6] in the United States; and establishes new bars to asylum, in a

[1] UNHCR notes at the outset that the term 'refugee' is used slightly differently in international law as compared to U.S. domestic law, while the term "asylee" is only used in the U.S. domestic law framework. Under international refugee law, a refugee is a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." 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], art. 1A(2). Those who meet the refugee definition set forth in the Convention have the right to enjoy asylum. *See* UN General Assembly, Universal Declaration of Human Rights, art. 14(1), 217 A (III) (Dec. 10, 1948); Executive Committee of the High Commissioner's Programme, *Safeguarding Asylum No. 82 (XLVIII)*, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 17, 1997), ¶¶ (b), (d) (referencing "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights," and describing key aspects of the institution of asylum). Under U.S. statute, the refugee definition itself is very similar: "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). In the United States, however, someone who meets the refugee definition may hold one of two statuses. A person who has their refugee status recognized outside of the United States prior to their admission (usually through resettlement) is considered to have the status of "refugee." *See* 8 U.S.C. § 1157(c)(1). A person who has their refugee status recognized while physically present in the United States is considered to have the status of "asylee." *See id.* §§ 1158(a)(1), (b)(1)(A) (describing the authority to apply for and the conditions for granting asylum). The term "asylee" is not used in international refugee law, since someone who qualifies for asylum is referred to as a "refugee." Where necessary, this Comment will clarify whether these terms are used in the international law context or according to their specific meaning under U.S. law.

[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] 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." Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(b), ¶ 8(a) (Dec. 14, 1950) [hereinafter UNHCR Statute].

[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; *see also* UNHCR, *Note on the Mandate of the High Commissioner for Refugees and His Office* (2013), at 4-7 (describing the High Commissioner's supervisory responsibility in relation to states' compliance with their international obligations towards refugees, asylum-seekers, and others of concern).

[6] UNHCR observes that this Proposed Rule modifies the definition of a refugee as codified at Section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(42)): "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" This definition is based on provisions of the 1951 Convention; specifically, the U.S. definition tracks the language in Article 1A(2) of the 1951 Convention, and the Refugee Act of 1980 was enaged in order to confirm provisions of U.S. law to U.S.

way that diverges sharply from the United States' international legal obligations related to refugee protection. 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 those obligations.

UNHCR notes that these technical comments are submitted as follow-up to our letter of June 26, 2020 to the Attorney General and the Acting Secretary of Homeland Security, in which our initial concerns over this Proposed Rule were raised. Our fundamental observations regarding deviations from basic tenets of international refugee law—including the obligation to protect against refoulement, the right to seek and enjoy asylum, and the principles of due process and fair treatment during the asylum process—are further expounded on below. UNHCR considers that the comment period of only 30 days is insufficient for such extensive changes of enormous consequence for those in need of international protection, and we remain ready to engage in further conversation regarding the wide-ranging changes introduced in the Proposed Rule and covered in UNHCR's comments below.

II. Overall Comments on the Proposed Rule's Incompatibility with the 1951 Convention and 1967 Protocol on the Status of Refugees

UNHCR appreciates that there have been decades of engagement between our agency and the U.S. government, including on technical aspects of international refugee law and its domestic realization. In this context, UNHCR has deep concerns about the Proposed Rule which is incompatable with fundamental tenets of international refugee law and would dramatically diminish the United States' capacity to guarantee protection of refugees from return to situations of serious harm.

As a preliminary matter, UNHCR observes that the Proposed Rule puts forward a vast number of procedural and substantive (definitional) changes that affect almost every aspect of adjudication of protection claims in the United States (affecting asylum seekers and others), while many of the substantive changes will also impact overseas adjudications of refugee status (impacting candidates for refugee admissions). UNHCR is concerned that the extensive changes made in the Proposed Rule move away from the humanitarian, non-discriminatory spirit of the 1980 Refugee Act, which implemented the U.S.'s commitments made through ratifying the 1967 Protocol.[7]

The Proposed Rule, if enacted, would be at variance with at least four basic principles and well-established standards of international refugee law. First, the Proposed Rule makes a great number of substantive changes to the definition of a refugee. For instance, the Proposed Rule takes an overly restrictive approach to core terms such as "political opinion" and "persecution," and further compounds an interpretation of "particular social group" that was already out of step with international law.

Second, the Proposed Rule establishes new and vastly over-reaching exclusionary grounds, including through expanded use of the discretionary clause on asylum in U.S. law, a concept

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obligations under the 1951 Convention and its protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968."). *See also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES (2017), pp. 4-26 (providing a detailed discussion of the links between international law and the definition of 'refugee' in U.S. domestic statute).

[7] Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102 (1980) ("The objectives of this Act . . . are to provide a permanent and systematic procedure for the admission to this country of refugees . . . and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.").

which is already at odds with international standards. UNHCR notes that there is an exhaustive exclusionary framework established in international law. Going beyond that framework raises the specter of erroneous exclusion, which may threaten the life or freedom of concerned refugees and place them at risk of irreparable harm.

Third, the Proposed Rule establishes a series of procedural rules that fall short of due process standards required for a fair and efficient asylum process. For instance, the Proposed Rule alters the preliminary screening that occurs during accelerated removal procedures such that many with valid claims for international protection will be denied. Additionally, the Proposed Rule establishes an asylum-and-withholding-only procedure that precludes access to complementary forms of international protection. The Proposed Rule also puts forward new and punitive standards for frivolous claims and pretermission of incomplete applications, and puts burdens of proof on individuals who are ill-equipped and cannot reasonably be expected to meet them. Taken individually, each of these changes would be divergent from international standards; as a group they serve to create a series of barriers that all but deny outright the right to seek asylum.

Fourth, the Proposed Rule will have particularly harsh impact on vulnerable groups in need of international protection, including unaccompanied children; and those appearing *pro se* in immigration proceedings. This is out of step with international standards that provide for non-adversarial adjudication of claims and favorable treatment for the most vulnerable.

Overall, the Proposed Rule re-orients the U.S. asylum process away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes a set of obstacles which must be overcome by individuals seeking international protection. This approach will make it very difficult for many categories of people seeking protection to find refuge in the United States. International human rights and refugee law—in keeping with the spirit of humanitarianism present in the U.S. at least since the 1980 Refugee Act—is premised on protecting those in need. UNHCR is troubled that many of the proposed changes will have a negative impact on refugees who have committed minor infractions (in the case of discretionary denials), made simple mistakes in applications (in the case of frivolous dismissals or pretermission), and in some cases, seemingly for simply seeking protection in the first place.

UNHCR observes with concern that the Proposed Rule purports to remain in compliance with international obligations because of the continued availability of statutory withholding of removal, a procedure the U.S. has maintained fulfils its international obligations.[8] UNHCR wishes to address this premise at the outset. First, UNHCR notes that compliance with the 1951 Convention and 1967 Protocol is not brought about merely by complying with one article therein (that is, non-refoulement obligations under Article 33). Instead, the U.S. should provide for a determination of eligibility for refugee status pursuant to the criteria in Article 1 (inclusion as well as exclusion).[9] Those in need of international protection are entitled to the rights enumerated in the 1951 Convention, including but not limited to protection under Article 33.[10] Second, UNHCR notes that

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[8] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,289-90 (proposed Jun. 15, 2020) [hereinafter Proposed Rule on Asylum and Withholding] ("[A]n alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal."). *See also, e.g.*, *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020) (examining and ultimately rejecting the government's argument that withholding of removal meets the U.S.'s non-refoulement obligations).

[9] *See* UNHCR's views on discretionary denials for Article 1 analysis, *infra*.

[10] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Refugee Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare Huang v. Holder*, 744 F.3d 1149,

many of the changes in the Proposed Rule, including, for instance, substantive changes to the refugee definition, also affect the adjudication of withholding of removal; the flaws therein impact the withholding procedure too. UNHCR observes that the protection in its weakened form as introduced by the Proposed Rule is not sufficient to protect against violations of the non-refoulement provisions of Article 33.

Ultimately, UNHCR is concerned that the Proposed Rule will lead to the refoulement of large numbers of asylum-seekers of many different nationalities, ethnic backgrounds or religions, and of a very wide range of risk profiles. Non-refoulement, a norm of customary international law, is the cornerstone of the 1951 Convention and its 1967 Protocol. The Proposed Rule, by impeding access to asylum through the introduction of a great number of changes to procedural due process; narrowing the substantive definition of those entitled to protection as an asylee (or qualifying for admissions as a refugee); and vastly expanding the criteria for denying individuals protection, puts forward a regulatory framework at variance with international and U.S. law standards. If enacted, this framework will lead to the refoulement of individuals with international protection needs. This undermines the very fabric of refugee protection, and UNHCR is deeply concerned that the Proposed Rule would lead to a serious deterioration of the protection historically offered by this country.

In light of the Proposed Rule's incompatibility with foundational principles of international refugee law, **UNHCR recommends that the government refrain from adopting the Proposed Rule in its entirety**. Should the government proceed with the Proposed Rule, UNHCR recommends that the rule be carefully reconsidered in order that it might be brought in compliance with international refugee law, including fundamental aspects of the international framework such as non-refoulement, the right to seek and enjoy asylum, and the principles of due process and fair treatment during the asylum process. UNHCR has endeavored to provide specific guidance and recommendations on these principles and others in the ensuing commentary.

UNHCR has long acknowledged the U.S. is facing unprecedented challenges associated with new and increased flows of asylum-seekers within the subregion. We recognize that the U.S. asylum system is under significant strain and is in need of reform, and we appreciate the ongoing engagement with the Departments of Homeland Security and Justice on ways to improve the quality and efficiency of the system and reduce the current backlog. UNHCR stands ready to support the U.S. government to grapple with these complex challenges, with a view to building a more resilient, fair, and efficient domestic asylum system that upholds international standards.

III. Observations on Specific Provisions of the Proposed Rule

In this section, UNHCR offers observations and comments on the Proposed Rule on Asylum and Withholding and Credible and Reasonable Fear Review. The below analysis mirrors the structure of the discussion in the Proposed Rule for ease of reference, providing in each case an overview of how the proposed change will affect persons seeking international protection, followed by a comparison to the relevant international legal standards. UNHCR has endeavored to propose

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1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001))), *with Cardoza-Fonseca*, 480 U.S., 439–40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR Handbook, ¶ 42)). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification; freedom from arbitrary detention, and pathways to naturalization.

recommendations for modifying the Proposed Rule in line with those standards, and would welcome an opportunity to engage further with the Departments of Homeland Security and Justice on the below areas of concern, in line with UNHCR's mandate to provide technical advice on implementing obligations under the 1951 Convention and its 1967 Protocol.[11]

A. Expedited Removal and Screenings in the Credible Fear Process[12]

1. Asylum-and-Withholding-Only Proceedings for Non-citizens who have Established Credible Fear

The Proposed Rule introduces an asylum-and-withholding-only proceeding, a new, stand-alone process within the expedited removal framework for full consideration of an asylum applicant's eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). UNHCR is concerned that this proceeding will narrow the procedural protections available to asylum applicants in a way that is at variance with international standards on fair and efficient asylum procedures.

Under the Proposed Rule, non-citizens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture during screening will now appear before an immigration judge for "asylum-and-withholding-only" proceedings.[13] The Proposed Rule places this proceeding for full determination of a claim for protection under INA § 235, the part of the domestic law that provides for expedited removal, and which allows for prolonged detention.[14] An immigration judge will hold "exclusive jurisdiction" over the merits claim and may only consider the non-citizen's eligibility for asylum, statutory withholding of removal, and withholding or deferral of removal under the CAT regulations.[15]

UNHCR is concerned that this new form of proceeding may curtail options currently available to those seeking international protection. First, this proceeding will preclude non-citizens' opportunities to access some options for complementary forms of protection.[16] (For example,

[11] Refugee Convention, art. 35. 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).

[12] UNHCR is concerned that the provisions in this part of the Proposed Rule will have a particularly harmful impact on persons with international protection needs in light of two operational realities with respect to expedited removal in the United States. First, the administration has expanded the use of expedited removal to the full extent permitted by U.S. domestic law (for those apprehended anywhere throughout the contiguous United States within two years of arriving in the country); this expansion was recently upheld by the U.S. Court of Appeals for the D.C. Circuit. *Make the Road New York v. Wolf*, No. 19-5298, 2020 WL 3421904, at *3 (D.C. Cir. 2020). Second, individuals who receive negative credible fear determinations under INA § 235 are not entitled to challenge those findings in federal court; this has long been the practice and was recently upheld by the Supreme Court in *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, 2020 WL 3454809 (Jun. 25, 2020). Consequently, UNHCR is concerned that the reach of the asylum-only provision could be exceptionally wide, applying to almost all asylum-seekers making claims in the U.S. Further, in light of the *Thuraissigiam* ruling, there seems a very real possibility that even full asylum hearings in an asylum-and-withholding-only proceeding, placed as the Proposed Rule envisions under INA § 235, would not lead to review in federal appeals courts.

[13] Proposed Rule on Asylum and Withholding, p. 36,267. This new category of proceedings is akin to that applied to stowaways and Visa Waiver Program nationalities. *Id.*

[14] *See* Proposed Rule on Asylum and Withholding, p. 36,266; *see also* 8 U.S.C. § 1225(b)(B)(IV) ("[A]ny alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

[15] *Id.*

[16] "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.

under U.S. law, victims of crime, human trafficking, and other violence and abuses may be entitled to protections and forms of relief under other sections of U.S. law, such as VAWA, U visas, T visas, and SIJS.[17]) Second, while the Proposed Rule does allow for appeal to the Board of Immigration Appeals (BIA),[18] the rule does not specify whether there remains a pathway to appeal to the independent federal courts.[19] Additionally, that appeal does not open pathways to complementary forms of protection such as those mentioned above. Finally, UNHCR is concerned that, given the strict new approach to frivolous applications proposed elsewhere in this regulation,[20] and discussed *infra* at Section III.B.1, p. 14, asylum-seekers may feel pressure to waive this appeal.

In UNHCR's opinion, this new procedure may conflict with international standards in three ways.

First, under international law, procedures to adjudicate individuals' claims for protection must uphold key due process safeguards.[21] 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 in order to protect against refoulement.[22] While States have considerable leeway to design procedures for adjudicating refugee status, States must include essential due process guarantees.[23] 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.

The need to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems 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 the 1951 Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions.[24] An applicant for protection is typically in a particularly vulnerable situation, and may experience technical, psychological, and linguistic difficulties in submitting their case to authorities.[25] UNHCR's Executive Committee, of which the U.S. has been

[17] *See, e.g.*, Trafficking Victims Protection Act, 22 U.S.C. § 7105 (2018); Battered Immigrant Woman Act, 8 U.S.C. § 1105a (2018). Individuals in asylum-and-withholding-only proceedings would also presumably be ineligible to apply to adjust status or to seek voluntary departure.

[18] Proposed Rule on Asylum and Withholding, p. 36,267 ("If the immigration judge does not grant the alien asylum . . . the alien will be removed, although the alien may submit an appeal of a denied application . . . ."). In the event that a non-citizen appeals a denial of his or her application to the BIA, the immigration judge's order of removal should be automatically stayed during the adjudication of the appeal. Executive Office for Immigration Review, Dep't of Justice, *Board of Immigration Appeals Practice Manual*, ch. 6.2(b) (Jun. 10, 2020).

[19] *See Thuraissigiam*, No. 19-161, 2020 WL 3454809, *18 (holding that a non-citizen cannot challenge a negative fear determination in federal court).

[20] Proposed Rule on Asylum and Withholding, p. 36,295 (proposing to revise § 208.20 so that a withdrawn application could still be found frivolous unless the applicant wholly disclaims it, withdraws with prejudice and waives their right to appeal).

[21] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 189-204, U.N. Doc. HCR/1P/4/ENG/REV.4 (April 2019) [hereinafter UNHCR Handbook].

[22] 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* Black's Law Dictionary 1157 (9th ed. 2009). *See also* 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), http://www.unhcr.org/refworld/docid/45f17a1a4.html.

[23] UNHCR Handbook, ¶¶ 189-192.

[24] *See* UN General Assembly, Universal Declaration of Human Rights, art. 14(1), 217 A (III) (Dec. 10, 1948); Refugee Convention, Introductory Note (explaining that the Convention is grounded in Article 14 of the Universal Declaration of Human Rights and is the centerpiece of international refugee protection); Executive Committee of the High Commissioner's Programme, *Safeguarding Asylum No. 82 (XLVIII)*, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 17, 1997), ¶¶ (b), (d) (referencing "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights," and describing key aspects of the institution of asylum).

[25] UNHCR Handbook, ¶ 190.

a member since its establishment in 1955, has recommended that procedures satisfy certain basic requirements, including: 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.[26] UNHCR is concerned that this asylum-and-withholding-only proceeding, placed as it is under INA § 235 (expedited removal), may not include the basic procedural requirements described above.

Second, denying access to complementary forms of protection would be in conflict 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,[27] UNHCR acknowledges the varying interpretations of the inclusion criteria have created significant differences in recognition rates for persons in similar circumstances across and even within States.[28] 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 protection.[29] Such forms of protection are only effective in strengthening the global protection regime if individuals have the chance to apply for them,[30] and those applications are best conducted in the same proceeding as that used for assessing refugee protection needs [31] UNHCR is concerned that the narrowing of the U.S. refugee definition in these regulations, which diverges significantly from international law, discussed *infra* at Section III.C.1, p. 23, will lead to larger numbers of persons seeking international protection without relief. In light of that likelihood, UNHCR observes that access to complementary forms of protection, precluded by this proposed adjudicatory process, takes on an additional degree of importance.

Third, UNHCR is concerned that individuals in asylum-and-withholding-only proceedings may be subject to arbitrary detention as a result of this procedure.[32] Non-citizens placed into asylum-and-

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[26] UNHCR Handbook, ¶ 192; UNHCR, *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, No. 8: Determination of Refugee Status (1977), https://www.unhcr.org/en-us/578371524.pdf (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), 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), https://www.refworld.org/docid/4bf67fa12.html. *See also* International Covenant on Civil and Political Rights 999 UNTS 171, Art. 2(3) (Dec. 19, 1966, entered into force Mar. 23, 1976) (providing for, *inter alia*, the right to an effective remedy).

[27] Mandal, s*upra* note 16; *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) (stating that "complementary protection . . . should be granted to persons in need of international protection who fall outside the scope of the 1951 Convention"); UNHCR, *Complementary Forms of Protection*, ¶31 (Apr. 2001), 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").

[28] Exec. Comm. Of the High Commissioner's Programme, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶¶ 7, 25(b), U.N.Doc. EC/50/SC/CRP.18 (9 Jun. 2000); *see also* UNHCR, Dep't of International Protection, *UNHCR Legal and Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶ 19, U.N.Doc. PPLA/2005/02 (Jun. 2005).

[29] *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)*, U.N. Doc. EC/GC/01/12 (May 2001).

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

[31] UNHCR, *Global Consultations on International Protection/Third Track*, ¶ 50 ("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.").

[32] Compare *infra* Section III.A.2, p. 7, *and infra* Section III.A.3, p. 8. UNHCR is concerned that other changes in the Proposed Rules will limit independent review of DHS custody decisions, driving its detention policies further away from international standards.

withholding-only proceedings will not have access to custody redeterminations before an immigration judge, as these new proceedings fall under INA § 235 instead of INA § 240.[33]

Under international law, detention of asylum-seekers should be treated as an option of last resort.[34] 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.[35] Mandatory detention is always arbitrary because it is not based on an individualized examination of the necessity of detention.[36] Any decision to detain must be subject to independent, periodic review.[37] Furthermore, detention must not be discriminatory.[38] 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.[39] The Proposed Rule violates international standards on the detention of asylum-seekers by allowing those seeking international protection to be detained without adequate review during the pendency of "asylum-and-withholding-only" proceedings.[40]

UNHCR recommends that the government refrain from instituting "asylum-and-withholding-only" proceedings and instead continue to use full removal proceedings. (UNHCR stands ready to engage in further conversation about backlog reduction and improving efficiencies in full removal proceedings, in keeping with international standards.) Nonetheless, if the Government wishes to instate "asylum-and-withholding-only" proceedings, it should ensure that such proceedings align with international standards, including by: preserving critical due process protections such as the right to an independent appeal; providing access to complementary forms of protection; and refraining from arbitrary detention, including mandatory detention.

2. Consideration of Precedent When Making Credible Fear Determinations in the "Credible Fear" Process

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[33] Proposed Rule on Asylum and Withholding, 36,266 ("[T]he Departments believe . . . that it is better policy to place aliens with a positive credible fear determination in asylum-and-withholding-only proceedings rather than section 240 proceedings."). Although these individuals would retain the possibility of release by DHS on parole on humanitarian or "significant public benefit" grounds, UNHCR is concerned that individuals will then not be considered as entitled to a custody hearing before an immigration judge to seek release, resulting in their prolonged and arbitrary detention.

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

[35] Detention Guidelines, ¶ 18.

[36] Detention Guidelines, ¶ 20.

[37] Detention Guidelines, ¶¶ 47(iii) and 47(iv).

[38] Detention Guidelines, ¶ 43.

[39] Detention Guidelines, ¶ 43.

[40] UNHCR notes that it has previously engaged the U.S. government with respect to its detention practices in expedited removal and their (lack of) compatibility with international law. More specifically, UNHCR submitted a comment in February 1997 in response to Proposed Rules intended to implement the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), which included provisions on expedited removal. In its comments, UNHCR recommended that (1) the credible fear standard be modified; (2) asylum-seekers not be subject to mandatory detention; (3) at-risk groups not be placed in expedited procedures; (4) meaningful review procedures for expedited removal orders be established; (5) immigration officials receive appropriate training; (6) asylum-seekers be provided information about the expedited removal process; and, (7) asylum-seekers have meaningful access to counsel and interpreters. In addition, UNHCR has previously stated its concern about the use of detention to deter asylum-seekers. *See, e.g.*, Letter from Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States and the Caribbean, to Becky Sharpless, Florida Immigrant Advocacy Center (Apr. 12, 2002) (submitted by FIAC in legal challenge to mandatory detention of Haitian asylum-seekers, Moise v. Bulgur); Letter from Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States and the Caribbean, to John Ashcroft, Attorney General, U.S. Dep't of Justice (Mar. 28, 2003).

The next section of the Proposed Rule requires immigration judges to consider applicable legal precedent when reviewing a negative determination of credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. This includes administrative precedent from the BIA, decisions issued by the Attorney General, decisions of the circuit courts binding where the reviewing immigration judge sits, and decisions of the Supreme Court of the United States.[41] Currently, where there is no law in point in their circuit, adjudicators may to apply the most favorable law from all circuit courts, which has taken disparate positions on key legal issues involved in evaluating an asylum-seeker's eligibility for protection. [42] Consequently, this provision may result in further precluding persons seeking international protection from accessing full asylum procedures.[43]

UNHCR acknowledges that states may wish to include special provisions for dealing expeditiously with those applications which are "so obviously without foundation as not to merit full examination."[44] However, the standard for such procedures must be set cautiously in order to remove the possibility of the "grave consequences" of erroneously excluding those in need of protection.[45] This permits a state to screen out "clearly abusive" or "manifestly unfounded" claims—that is, those that are clearly fraudulent or not related to the criteria for granting refugee status.[46] As discussed below, UNHCR observes that, even prior to this Proposed Rule, the U.S. threshold for credible fear screenings—requiring a "significant possibility" that the applicant can establish eligibility for protection in a full proceeding—was inconsistent with this standard.[47] Now, UNHCR is concerned that relying on less favorable precedent will have the practical effect in some cases of further shifting that threshold away from the international standard. Consequently, this provision may lead to refugees being denied access to fair and efficient status determination procedures, refused protection, and returned to places where their lives and safety are in danger, in violation of Article 33(1) of the 1951 Convention.

UNHCR recommends that the Government continue to permit immigration judges to assess all relevant authorities and give them their due weight when reviewing negative fear determinations. This partially mitigates the risk that such determinations are inconsistent with international law, which requires that adjudicators use cautious thresholds during screening processes.

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[41] Proposed Rule on Asylum and Withholding, p. 36,367.

[42] Case law governing the definition of who qualifies as a "refugee" is not consistent across U.S. circuit courts. For instance, varying definitions of what constitutes a particular social group can result in inconsistent decisions among Circuit Courts. *See, e.g.*, B. Robert Owens, *What is a Social Group in the Eyes of the Law? Knowledge Work in Refugee-Status Determination*, 43 L. AND SOC. INQUIRY 1257 (2018) (summarizing the changing interpretations of a "particular social group" in U.S. Courts).

[43] For instance, immigration judges sitting in border regions may be bound by circuit case law that differs from immigration judges who sit in other areas of the country. After asylum-seekers pass screening and if they are released, many relocate to places all across the country to join their sponsors and pursue their claims in full. Thus, requiring immigration judges to apply the law of the circuit where they sit in reviewing in a negative fear determination may not be representative of the asylum-seeker's likelihood of establishing their eligibility in full proceedings. For a complete analysis on the inconsistencies in asylum and refugee determinations across the United States, see Owens, *What is a Social Group?* (summarizing the changing interpretations of a "particular social group" in U.S. Courts); *and* Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (analyzing the significant disparities in asylum and refugee determinations among U.S. courts).

[44] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].

[45] *Id.*

[46] *Id.*

[47] UNHCR notes that it has previously engaged the U.S. government with respect to its fear screening practices in expedited removal and their (lack of) compatibility with international law. More specifically, UNHCR submitted a comment in February 1997 in response to Proposed Rules intended to implement IIRIRA and the AEDPA, which included provisions on credible fear screenings. In those comments, UNHCR recommended that the credible fear standard be modified to conform with international law on asylum screening. *See supra*, note 37.

3. DHS-Specific Procedures in Expedited Removal and Credible Fear and Their Potential Impact on Detention

The Proposed Rule removes from DOJ regulations provisions related to expedited removal and credible fear that were transferred from the legacy Immigration and Naturalization Service (INS) in 2003. All of the provisions under 8 C.F.R. § 1235 were originally transferred in whole to DOJ on the basis that "nearly all of the provisions of this part affect bond hearings before immigration judges."[48] Now, however, the Proposed Rule seeks to remove certain sections that it suggests do not have relevance to DOJ, while leaving intact other provisions.[49]

UNHCR observes that as originally noted in the 2003 transfer justification, at least one of the sections removed includes reference to custody determination authority, specifically as it relates to parole.[50] As expressed above[51], international human and refugee rights law prohibit the arbitrary detention of asylum-seekers.[52] To the extent that the removal of any of these provisions would eliminate an independent review of DHS custody decisions or subject an asylum-seeker to mandatory detention, elimination of those provisions would run counter to that prohibition.

UNHCR recommends that the Government strike the removal of any provision that would negatively impact access to custody determinations for those who meet the credible fear standard or the reasonable possibility standard for screening.

4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Non-citizens in Expedited Removal Proceedings and Stowaways

The Proposed Rule raises the standard of proof for statutory withholding and torture-related fear determinations from a "significant possibility" of being able to establish eligibility for protection in full proceedings to a "reasonable possibility" that the applicant would be persecuted or tortured.[53] This heightened standard, especially in combination with the changes to the refugee definition contained in other provisions of the Proposed Rule,[54] will reduce access to asylum procedures for people in need of international protection, elevating the risk of refoulement.

Raising the threshold that individuals must meet to have their claims fully considered fails to advance the fundamental protections of the 1951 Convention and its 1967 Protocol. Given the very preliminary nature of screening of asylum and withholding claims, international law requires that the standards applied therein must guard against the risk that refugees are returned to places

[48] Proposed Rule on Asylum and Withholding, p. 36,267; *see also* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9826 (Feb. 28, 2003).
[49] Proposed Rule on Asylum and Withholding, p. 36,267.
[50] *See* 8 C.F.R. § 1235.3(b)(4)(ii)
[51] *See* Detention Guidelines, *supra*, note 34.
[52] *See* Detention Guidelines ¶ 2.
[53] Proposed Rule on Asylum and Withholding, 36,268. 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." *See* 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.
[54] Proposed Rule on Asylum and Withholding, p. 36,280.

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. As explained above, cases that may be screened out in this context can only be manifestly unfounded or clearly abusive claims (that is, those claims that are clearly fraudulent or not related to the criteria for granting refugee status[55]). All other claims should proceed for a full determination on the merits. The significant possibility standard adopted by the United States was already out of step with the international standard, and further elevating the threshold to a reasonable possibility will widen that gap.[56]

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

5. Proposed Amendments to the Credible Fear Screening Process

The Proposed Rule introduces changes related to the criteria for adjudicating fear determinations, as well as to an asylum-seeker's ability to obtain immigration judge review ("IJ review") of a negative fear determination. Asylum Pre-Screening Officers (APSOs) must specifically consider whether an applicant could internally relocate to avoid persecution or torture in their country of origin and must enter negative fear determinations in cases where an applicant appears subject to a mandatory bar to asylum or to statutory withholding, unless the applicant can establish a reasonable possibility of torture.[57] In cases where an APSO makes a negative fear determination, an asylum-seeker must affirmatively elect to undergo IJ review; an asylum-seeker's failure to indicate that they wish to proceed with an IJ review will be treated as declining a request for such review.[58] UNHCR has two primary concerns: first, that persons who merit international protection will be inappropriately screened out by APSOs, and second, there will not be adequate review of those decisions.

International standards on screening indicate that only those claims that are manifestly unfounded or clearly abusive (that is, clearly fraudulent or unrelated to the criteria for granting refugee status) should be screened out. [59] UNHCR's position is that it is contrary to international law to deprive asylum-seekers of access to full procedures based on the possibility of an internal relocation alternative or when the individual may be subject to exclusion; these are, after all, questions intrinsically related to the criteria for granting refugee status.

Looking first at exclusion,[60] UNHCR notes that this inquiry involves complex factual and legal questions involving not only international refugee law, but in many cases international humanitarian law and international criminal law. This cannot be completed adequately in a

[55] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].
[56] 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, 2018 WL 5396739 (C.A.9.) (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).
[57] Proposed Rule on Asylum and Withholding, p. 36,282.
[58] Proposed Rule on Asylum and Withholding, p. 36,298.
[59] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].
[60] UNHCR notes that the mandatory bars to asylum in US law both overlap with grounds for exclusion in the 1951 Convention to some extent and go beyond that framework. For further discussion, *see* Factors for Consideration in Discretionary Determinations, *infra*.

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screening interview, particularly given the procedural shortcomings (such as lack of legal assistance, information about the procedure, translation and interpretation, and time to recover from recent trauma) that often occur in these contexts. Especially in light of the possible serious consequences for the individual—an asylum-seeker who wrongfully receives a negative fear determination could be returned to a place where they will suffer persecution and even death—UNHCR considers it inappropriate in principle to consider bars to asylum in screening.[61]

Turning next to internal relocation, UNHCR notes that this concept also should be addressed only in a full merits hearing, and not during screening. "A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed." [62] Accordingly, because an asylum-seeker has a limited opportunity to present the facts of his or her case, much less gather and present country conditions or other evidence responsive to the possibility and reasonableness of internal relocation, this factor should not affect the outcome of a screening interview.

Even prior to this proposed regulation, UNHCR observed that the U.S. system was already at variance with international law with respect to certain exclusion categories.[63] The 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee and is therefore entitled to the rights enumerated in the Convention itself.[64] The Convention establishes an exhaustive framework for identifying persons who should be excluded from refugee protection, yet U.S. law has evolved in a way that has expanded bars to protection beyond those provided for in the Convention's exhaustive exclusion framework.[65] Accordingly, when the Proposed Rule suggests incorporating those bars into screening procedures, it moves the U.S. regime further away from the framework contemplated under the 1951 Convention and its 1967 Protocol.

Accelerated procedures must uphold key safeguards to minimize the risk of refoulement, including the rights of an asylum-seeker to receive adequate information and to appeal a negative fear determination. 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.[66] However, international standards require certain due process considerations in accelerated procedures to minimize the risk of a flawed decision.[67] The Proposed Rule does not make clear whether asylum-seekers will be informed of the exact actions they need to take to obtain IJ review of a negative fear determination. In UNHCR's experience, it is often challenging

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[61] 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, U.N. Doc. HCR/GIP/03/05 (Sep. 2003) ("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 . . . .").
[62] UNHCR, *Guidelines on International Protection No. 4: Internal Flight or Relocation Alternative*, ¶ 4, U.N. Doc. HCR/GIP/03/04 (Jul. 23, 2003).
[63] UNHCR observes that it has offered observations on this topic to the U.S. government in previous comments on regulatory proposals (*see, e.g.* 1997 comments related to regulatory proposals following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)). *See* note 47, *supra*.
[64] This framework is discussed more extensively *infra* at Section III.C.6, p. 46 of this Comment. In addition, UNHCR previously submitted comments on Proposed Rules issued by U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) in February 2020 that extensively address the exclusion framework under the 1951 Convention and 1967 Protocol (submitted Mar. 3, 2020). This framework includes criteria for identifying persons who, while they would otherwise have the characteristics of refugees, should nonetheless be excluded from refugee status, which appear under Articles 1D-F. 1951 Convention, Article 1D-F. Additionally, refugees who pose security risks are denied the benefit of non-refoulement under Article 33(2). Refugee Convention, art. 33(2).
[65] *See* Refugee Convention, art. 1E, 1F (detailing when persons may be excluded from refugee status).
[66] *See, e.g.*, UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union*, 5-6 (July 25, 2018) https://www.refworld.org/docid/5b589eef4.html.
[67] *Id.* 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), https://www.unhcr.org/en-us/protection/operations/4deccc639/unhcr-statement-right-effective-remedy-relation-accelerated-asylum-procedures.html.

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. Moreover, even with legal representation, it will often be difficult if not impossible to prove the negative (that internal relocation is not possible), in the limited setting and under the time pressures of a pre-screening interview.

As a result, UNHCR is concerned that a greater number of asylum-seekers will be prevented from accessing IJ review of a negative fear determination if the Proposed Rule's new requirement that they affirmatively elect to appeal is adopted. Coupled with the heightened standards of proof for screening interviews and rules around how adjudicators must decide cases at the screening stage, it is especially important that individuals have access to IJ reviews.

UNHCR recommends that the government not implement this provision. Specifically, UNHCR recommends that: the possibility of internal relocation not be included as a factor leading to a negative fear determination; asylum-seekers who appear potentially subject to a bar be provided with access to full asylum procedures for careful consideration of that bar; and that asylum-seekers have access to IJ review of negative fear determinations unless they affirmatively decline that opportunity, having been informed in a language they understand of the consequences of doing so.

B. I-589: Application for Asylum, Withholding of Removal, and CAT Protection

1. Frivolous Applications

i) The Proposed Rule's suggested changes

The Proposed Rule introduces several amendments to the identification and processing of "frivolous" asylum applications. Applicants whose claims are found to be frivolous are precluded from filing any other asylum claim in the future or receiving any form of complementary protection articulated under the Immigration and Nationality Act (they may still file a claim for withholding of removal,[68] but that status, as discussed elsewhere,[69] fails to measure up to the standards in the 1951 Convention). UNHCR notes with concern that this Proposed Rule will have a negative impact on the ability of applicants to obtain a fair and efficient evaluation of their asylum claim and will deter those in need of protection from coming forward now and in the future.

The Proposed Rule broadens the definition of what constitutes a "frivolous" application for asylum. While the current regulatory definition of "frivolous" requires a finding of deliberate fabrication of material elements,[70] the new provision would broaden the definition to apply to asylum applications where the application:

[68] INA § 208(d)(6) ("If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter"); 8 CFR § 1208.20. This statutory provision has been interpreted to mean ineligibility for all immigration benefits listed under the Immigration and Nationality Act (INA). *See* EOIR IJ Benchbook, "Frivolous Finding Standard Language" at 1 ("A finding of submission of a frivolous application shall render the respondent permanently ineligible for any benefit under the Act, aside from withholding of removal…Relief under Article III of the Convention Against Torture is not barred by a frivolous finding because it is not a benefit under the Act). *See also* Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,304 ("1208.20(g): For the purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issue pursued to [CAT]'s implementing legislation"]
[69] *See* Section II, *supra* p. 2.
[70] 8 CFR § 1208.20

- contains a fabricated essential element;
- is premised upon false or fabricated evidence, unless the application would have been granted without the false or fabricated evidence;
- is filed without regard to the merits of the claim; or
- is clearly foreclosed by applicable law.[71]

In addition to modifying the definitional terms used to identify "frivolous" applications, the Proposed Rule also alters the process by which frivolous applications may be identified. Current regulations provide that only immigration judges or the Board of Immigration Appeals (BIA) may issue a finding of a frivolous asylum application.[72] The Proposed Rule, however, will extend this authority to asylum officers adjudicating affirmative asylum applications.[73]

Further, the Proposed Rule seeks to eliminate the existing regulations that require an adjudicator to provide sufficient opportunity to an applicant to account for any discrepancies or implausible aspects before issuing a frivolousness finding,[74] thereby allowing all adjudicators (including asylum officers, immigration judges, and the BIA) to reach a frivolousness finding without providing additional opportunities for the applicant to account for such issues. The proposed regulations suggest that the written warning against frivolous asylum applications found in the Form I-589 should be sufficient notice.[75]

The Proposed Rule makes two further changes. First, the Proposed Rule introduces a definition of "knowingly" filing a frivolous application for asylum, as it pertains to penalization for such an application.[76] Under current law, the term "knowingly" is not defined by current statute or regulations.[77] The Proposed Rule recommends defining "knowingly" as requiring "actual knowledge of the frivolousness or willful blindness" toward it.[78] The new rule further clarifies that "willful blindness" means that the non-citizen "was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise."[79]

Those whose claims are found to be frivolous—both under the expanded definition and according to the current definition—are rendered permanently ineligible for any future immigration benefits, except for statutory withholding of removal or protection under CAT.[80] This includes asylum claims: the individual will not be able to re-file the dismissed claim, or file any future claim

[71] Proposed Rule on Asylum and Withholding, pp. 36,274-75.
[72] INA § 208(d)(6).
[73] Under the new regulations, if an asylum officer refers an asylum application to an immigration judge because of alleged frivolousness, an applicant will not be rendered permanently ineligible for future immigration benefits including asylum, unless the immigration judge or BIA makes a specific finding of frivolousness. Proposed Rule on Asylum and Withholding, p. 36304 (8 C.F.R. 1208.20(b))
[74] These regulations can be found in the existing regulations of 8 CFR § 208.20 or 8 CFR § 1208.20
[75] Proposed Rule on Asylum and Withholding, p. 36,276.
[76] Proposed Rule on Asylum and Withholding, p. 36,273.
[77] INA § 208(d)(6) (providing that a non-citizen "shall be permanently ineligible for any benefits" under immigration law if the Attorney General determines that the non-citizen "knowingly made a frivolous application for asylum and the alien has received notice…of the consequences of knowingly filing a frivolous application.")
[78] Proposed Rule on Asylum and Withholding, p. 36,304.
[79] Proposed Rule on Asylum and Withholding, pp. 36,273-74.
[80] Proposed Rule on Asylum and Withholding, p. 36,277*; see also* Proposed Rule on Asylum and Withholding, p. 36,273 ("Under section 208(d)(6) of the INA, 8 U.S.C. § 1158(d)(6), "[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received […notice], the alien shall be permanently ineligible for any benefits under this chapter.") This statutory provision has been interpreted to mean ineligibility for all immigration benefits listed under the Immigration and Nationality Act (INA) or the "Act." *See* EOIR IJ Benchbook, "Frivolous Finding Standard Language" at 1 ("A finding of submission of a frivolous application shall render the respondent permanently ineligible for any benefit under the Act, aside from withholding of removal…Relief under Article III of the Convention Against Torture is not barred by a frivolous finding because it is not a benefit under the Act.").

(including those on new or different grounds).[81] That individual will also be rendered ineligible for most forms of complementary protection, such as protection under trafficking laws.[82] While the individual will still be eligible for withholding of removal or CAT claims, those are insufficient to meet international standards [see discussion on asylum-and-withholding-only proceedings at p. 6, *supra*].

Finally, the Proposed Rule creates a new mechanism by which applicants could avoid being subject to a frivolousness finding and its associated penalties. An applicant could take the following actions to avoid a frivolousness finding: withdrawing his or her application with prejudice; accepting voluntary departure; withdrawing any other applications for relief; and waiving any rights to file an appeal, motion to reopen, or motion to reconsider.[83]

ii) Impact on Asylum-Seekers and Others Seeking International Protection

UNHCR is concerned that persons seeking international protection will be penalized and denied access to international protection by both the substantive and procedural changes (including the ability for asylum officers to determine "frivolousness" in affirmative claims). This may lead to numerous legitimate claims being prematurely dismissed as frivolous (and therefore more applicants blocked from consideration of their claim now and in the future).

First, UNHCR is concerned that the new and amended definitions of "knowingly" and "frivolous" under the Proposed Rule will block even more people from a meaningful evaluation of their asylum claim than under prior definitions. Under the Proposed Rule, to file a frivolous application "knowingly" requires actual knowledge or "willful blindness toward it." UNHCR anticipates that the "willful blindness" element of this definition could be unfairly applied to asylum-seekers, especially those proceeding *pro se*, who do not necessarily grasp the complexities of the asylum and immigration system in the United States.

In addition, UNHCR is troubled that more claims will be found frivolous under the changed definition that includes applications "clearly foreclosed by applicable law." It is very difficult to ascertain what is "clearly foreclosed by applicable law," particularly in light of the constant evolution of asylum law and its interpretation. This is a serious undertaking for even seasoned lawyers, who have access to legal training, legal research tools, and expertise in the area. Indeed, often government and non-government lawyers—and appellate judges interpreting the INA—do not agree on what is "clearly foreclosed by applicable law." Applicants will almost certainly not be able to understand—prior to adjudication—whether their claim is foreclosed by applicable law (and again, if they fail to grasp this concept, they will be penalized by being prohibited from refiling).

Second, the Proposed Rule's procedural changes will have further adverse impacts on persons seeking international protection. Immigration judges are no longer obliged to provide applicants with notice and opportunity to account for issues of frivolousness; this will also likely result in increased numbers of erroneous findings of frivolousness. This change will have an especially acute impact on *pro se* and child asylum applicants who may not be proficient in English, may be illiterate, may be subject to detention with even more limited resources, or may not understand

[81] Asylum is a benefit listed in INA § 208, and Motions to Reopen and Reconsider are benefits provided in INA §§ 240(c)(6)-(7). Therefore, as benefits under the Act, they will be unavailable to a person subject to the frivolousness bar of INA § 208(d)(6).
[82] The various forms of complementary protection, such as T visas (victims of trafficking), U visas (victims of crime), Temporary Protection Status, and other forms of lawful status are generally established by the INA; therefore, as benefits under the Act, they will be unavailable to a person subject to the INA § 208(d)(6) frivolousness bar.
[83] Proposed Rule on Asylum and Withholding, p. 36,277.

the contours of, for example, applicable law that will influence whether their applications would be considered frivolous.

Third, the new rule disadvantages applicants by limiting forms of protection available to them. UNHCR is concerned that those whose claims are dismissed as frivolous are barred not only from refiling their current asylum claim, but also from any future asylum claims (including those on new grounds). UNHCR notes that withholding of removal will still be available to these individuals, but reiterates its concern that withholding of removal falls short of international standards for protection.[84]

The rule also limits individuals' ability to have access to complementary forms of protection, given that applicants may be strongly incentivized to avoid a threatened frivolousness finding by withdrawing their applications for asylum and any other forms of relief, even though international protection needs may exist.[85] Individuals may be eligible for multiple forms of relief and protection that are complementary to asylum, withholding of removal, and protection under CAT. For example, 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 SIJS. Individuals should not be penalized for pursuing those possibilities when relevant to their situation, especially in light of the challenges that many may face obtaining asylum due to the narrowing of the refugee definition in the Proposed Rule.[86]

Finally, UNHCR is concerned that the provision on withdrawing frivolous applications may push individuals seeking international protection to abandon their claims in order to avoid the strict penalties that would correspond to those applications judged frivolous. Individuals may be intimidated when they receive a warning that their application may be found to be frivolous and inclined to take action to avoid the consequences of a frivolousness finding, even if one would not be warranted under the circumstances. As discussed above, a frivolousness finding triggers permanent ineligibility for benefits under immigration law, including future applications for asylum, with the exception of withholding of removal and protection under CAT; therefore, the incentive to avoid such consequences will likely be high. *Pro se* and child applicants may be disproportionately impacted in this regard.

iii) International standards

International law utilizes a standard of "clearly abusive" or "manifestly unfounded" when it comes to screening out applications that do not merit full adjudication – these concepts were introduced by the Executive Committee in 1983.[87] UNHCR is concerned that the Proposed Rule deviates significantly from this standard. UNHCR notes that the concept of "frivolousness" in U.S. law was

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[84] UNHCR recognizes that an applicant who previously filed a "frivolous" application could still apply for withholding of removal or CAT protection. However, UNHCR notes that these are not sufficient forms of protection to fulfill the U.S.'s obligations under the 1951 Convention and 1967 Protocol. *See* Refugee Convention, art. 1 (articulating criteria for those to be recognized under the Convention and Protocol, and guaranteed the rights therein); *cf id.* art. 33 (providing protection from non-refoulement only, as opposed to guaranteeing the rights in other articles of the Convention). To be in compliance with the 1951 Convention / 1967 Protocol, the state must use an adjudicatory standard in line with Article 1, not Article 33.

[85] *See* Chapter 1 of these comments (addressing the availability and provision of complementary protection to persons of UNHCR's concern); *Providing International Protection Including Through Complementary Forms of Protection*, ¶ 26 (stating that "complementary protection . . . should be granted to persons in need of international protection who fall outside the scope of the 1951 Convention"); *Complementary Forms of Protection*, ¶ 31 (Apr. 2001), 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. . . .").

[86] UNHCR Handbook, ¶ 192

[87] ExCom (1983). These standards are in use in many jurisdictions.

already not in line with the international framework. It is worrying, then, to see the concept further expanded, with very limited safeguards, and UNHCR is concerned that many more people will be erroneously blocked from full consideration of their claims.

The Executive Committee of UNHCR,[88] 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."[89] These concepts are somewhat distinct from the "frivolous" standard articulated in U.S. law, having been generally understood to encompass claims that are "clearly fraudulent" or "not related to the criteria for granting refugee status under the 1951 Convention...nor to any other criteria justifying the granting of asylum."[90] It has been clarified that these terms generally apply to cases involving individuals who *clearly* do not need international protection,[91] and the standard for evaluating whether a claim is clearly abusive or manifestly unfounded should not be too broad.[92] Moreover, UNHCR has explained that false statements, or more broadly, false or falsified 'evidence,' do not in and of themselves make a claim clearly fraudulent or manifestly unfounded, though that is what the Proposed Rule contemplates.[93]

With these substantive definitions in mind, UNHCR urges that procedures for manifestly unfounded or clearly abusive applications include at minimum certain procedural safeguards.[94] While the Executive Committee has recognized "that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure," it has also articulated particular safeguards that should be implemented when assessing whether an application for refugee status is manifestly unfounded or clearly abusive because of "the grave consequences of an erroneous determination."[95] The safeguards include:

i) "a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority to determine refugee status;"

ii) that "the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;" and

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[88] 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. ExCom Conclusion No. 30 refers to manifestly unfounded and / or clearly abusive asylum claims. *See* "Executive Committee" at https://www.unhcr.org/executive-committee.html (last accessed Jul. 15, 2020).

[89] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶¶ 27-28; UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* at 4-5.

[90] ExCom (1983).

[91] *See* ExCom (1983) (recommending that the "manifestly unfounded or abusive character of the application" be established by a competent authority), *and* UNHCR, *The 10-Point Plan in Action, 2016 Update*; *Chapter 6 Differentiated Processes and Procedures*, 175 (Dec. 2016), https://www.refworld.org/docid/584183c74.html (stating that accelerated procedures can be used when there are a large number of claimants "who manifestly have no international protection needs").

[92] *See* ExCom (1983), ¶ d (stating that "clearly abusive" or "manifestly unfounded" claims "are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status" in the Refugee Convention). *See also* UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems*, 177 Handbook for Parliamentarians No. 27 (2017) https://www.refworld.org/docid/5a9d57554.html (outlining situations in which accelerated procedures are not appropriate).

[93] UNHCR, *UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulations – Com (2016) 467*, at 30 (Apr. 2019), https://www.refworld.org/docid/5cb597a27.html; UNHCR, *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determination [RSD] Under UNHCR's Mandate*, at 20 (2020), https://www.refworld.org/docid/5a2657e44.html.

[94] UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 3 European Series 2, p. 397 (Dec. 1992); ExCom (1983).

[95] ExCom (1983).

iii) "an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory."[96]

In such an assessment, should any issue arise that may warrant a full examination of the application, the procedure must accommodate that.

Additionally, UNHCR emphasizes that applicants should receive the benefit of the doubt when presenting their claims notwithstanding that they are unable to substantiate all elements of their case, if they are generally credible, their statements are coherent and plausible, and they are not counter to generally known facts.[97] Applying the notions of abusive, fraudulent, or manifestly unfounded claims to asylum-seekers can be problematic because "not all asylum-seekers have the capacity without assistance to articulate clearly and comprehensively why they left, and certainly not where there is an element of fear or distrust involved, or where other factors are at play."[98] These elements may be particularly present in claims of *pro se* applicants, children, and other vulnerable asylum-seekers, as well as in claims filed by individuals who have consulted certain 'notarios' who make misrepresentations as to their qualifications or other false statements that victimize the immigrant community, or those who retain ineffective counsel.[99]

UNHCR emphasizes that applicants should in any event not be penalized for merely filing applications deemed "frivolous" under a heightened standard. Individuals should certainly not be automatically precluded from filing future asylum applications, nor barred from seeking complementary forms of protection, unless the new asylum application contains no new elements other than those already examined fully in previous proceedings.[100]

In sum, UNHCR is deeply concerned that the expanded definition of "frivolousness" articulated in the new rule takes U.S. law even further away from international standards than what is currently in place. Further, the procedural restrictions imposed by the Proposed Rule will negatively affect asylum-seekers, leading to a far broader application of the concept than would be seen as appropriate under international law.

UNHCR recommends that the Government adopt the "manifestly unfounded / clearly abusive" framework envisioned under international law if it wishes to address "frivolous" applications. Regardless of the definition used, necessary procedural safeguards, as detailed above, should be incorporated into the process. Finally, UNHCR urges that any current or future immigration penalties for filing frivolous applications not be implemented.

2. Pretermission of Legally Insufficient Applications

i) The Proposed Rule's suggested changes

The Proposed Rule creates a new provision that allows immigration judges to pretermit and deny applications for asylum, withholding of removal, or protection under CAT where the applicant has

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[96] ExCom (1983).
[97] UNHCR Handbook, ¶¶ 203-204.
[98] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶ 28.
[99] *See, e.g.*, *About Notario Fraud*, Amer. Bar Ass'n (Jul. 19, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.
[100] UNHCR, *Global Consultations on International Protection/Third Track*, ¶ 50 (stating that a single procedure for adjudicating both refugee protection and complementary forms of protection is the "clearest and swiftest" means for identifying those in need or protection); *see also* discussion at *supra* Section III.B.1.iii, p. 14.

not established a *prima facie* claim for relief or protection under applicable law, without a hearing.[101] Such a provision does not exist under current regulations. Much like the provision on frivolous claims, UNHCR is concerned that this new provision would run afoul of due process requirements and standards for fair and efficient adjudication of asylum claims, including the concepts of "manifestly unfounded" or "clearly abusive," discussed above.[102]

Under the Proposed Rule, the immigration judge's decision to pretermit would be based on the Form I-589 and any supporting evidence (and would not require an interview).[103] The rule further proposes that the Department of Homeland Security (DHS) can move for pretermission of an application through an oral or written motion.[104] In cases where DHS moves for pretermission, the immigration judge must consider any response from the non-citizen to the motion before making a decision.[105] In cases where the immigration judge elects on his or her own authority to pretermit, the immigration judge must provide DHS and the non-citizen with 10 days' notice prior to entering an order and must consider any filings received in response to that notice before making a decision.[106] Whether pretermission is initiated by DHS or an immigration judge, the regulation appears to limit challenges by applicants to written responses;[107] in neither situation would the immigration judge be required to conduct a hearing prior to pretermitting and denying an application.[108]

ii) Impact on Asylum-Seekers and Others of Concern to UNHCR

UNHCR is concerned that this provision will result in the summary dismissal of large numbers of asylum applications, leading to a significant number of asylum-seekers who will never receive a hearing to present their claim. Further, UNHCR is concerned by the short time period that applicants have to respond, in writing, to a motion or notice of pretermission. UNHCR is aware, for example, that it can sometimes take nearly the entire response period of ten days for the mail from DHS or the immigration court to reach detained asylum-seekers. As a result, even if an applicant had the technical resources to challenge such motion or notice, the time to do so may have already passed by the time the applicant is notified.[109] Moreover, UNHCR is concerned that the new regulation does not specify whether or how an applicant can challenge the denial of an application that is pretermitted. For instance, the Proposed Rule does not address whether asylum-seekers can appeal the denial of a pretermitted application or refile the application for re-consideration. Under all scenarios, the lack of due process protections implicated in the proposed pretermission regulatory framework is concerning.

Pretermission of applications, while worrying for all asylum-seekers, will likely have a heavy adverse impact on *pro se* applicants who have to prepare their applications without assistance;

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[101] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[102] *See* discussion on international standards regarding frivolous asylum applications, *supra*, p. 18.
[103] Proposed Rule on Asylum and Withholding, p. 36,277.
[104] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[105] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[106] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[107] Proposed Rule on Asylum and Withholding, p. 36,302.
[108] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[109] UNHCR's concern is based on an understanding that the time to reply to a motion or notice of pretermission would begin to run either at the time that DHS effects service of its motion or when the immigration court mails a notice. Under the Immigration Court Practice Manual, a non-detained individual has 10 days to submit a response to a response to a written motion filed by the opposing party at least 15 days before a hearing (filing deadlines for detained individuals are as specified by the immigration court). Executive Office for Immigration Review, *Immigration Court Practice Manual*, ch. 3.1(b)(i) (July 2, 2020). In addition, UNHCR observes that the 10-day period allowed to respond to an immigration judge's notice of pretermission may begin to run when notice is mailed if the same general principles apply as to other aspects of immigration court practice. *See id.* at ch. 6.2(b) (explaining that, to appeal an immigration judge's decision, the Notice of Appeal must be received by the Board of Immigration Appeals no later than 30 calendar days after the immigration judge renders an oral decision or *mails a written decision*) (emphasis added).

may not speak English; may not be familiar with legal standards and requirements related to these forms of protection; and/or may not understand how to challenge a motion for pretermission by a seasoned government attorney. Similarly, many *pro se* applicants would be ill-equipped to respond were they to receive notice that the immigration judge planned to pretermit and deny their applications. As a result, the Proposed Rule may discriminate against *pro se* applicants who cannot articulate in writing an initial summary of the basis of their claim that an immigration judge finds sufficient, possibly due to their trauma history, age, English proficiency, level of education, lack of familiarity with U.S. law, and/or other factors.

UNHCR further observes that, as with other provisions of the Proposed Rule, there does not appear to be an exception to pretermission for children, and it considers that the application of this rule to such a vulnerable group would be especially damaging to addressing their possible international protection needs.

iii) International Standards

Under international law, States are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[110] However, States should always take note that an asylum applicant is "in a particularly vulnerable situation . . . in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."[111] The framework for examining asylum applications should have "an understanding of an applicant's particular difficulties and needs,"[112] and—despite variance in that framework from state to state—should include essential guarantees and basic requirements.[113] Those requirements include, among others:

- The applicant should receive the necessary guidance as to the procedures to be followed;
- The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his or her case to the authorities;
- If not recognized, the applicant should be given a reasonable time to appeal for a formal reconsideration of the decision.

UNHCR has deep concerns that the provision on pretermission of applications in the Proposed Rule not only fails to comport with these basic requirements but also imposes harsh and disproportionate penalties in a context where applicants themselves are simply not provided with the assistance or opportunity to present their asylum cases effectively. International law suggests that, in appropriate circumstances, incomplete applications may be considered implicitly withdrawn and result in the provisional discontinuation of the application.[114] In some cases, it may be appropriate to consider an application implicitly withdrawn, for example, where the applicant without good cause "failed to respond to requests to provide information essential to his

[110] UNHCR Handbook, ¶ 189.
[111] UNHCR Handbook, ¶ 190.
[112] UNHCR Handbook, ¶ 190.
[113] UNHCR Handbook, ¶ 192.
[114] *See* UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, Council Document 14203/04, Asile 64, of 9 November 2004 (Feb. 10, 2005), at 25-26; European Union: Council of the European Union, Council Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 O.J. (L. 180/60 -180/95), arts. 27, 28(1)(a). Alternatively, incomplete applications could be rejected if the authorities determine that the application is unfounded. *See id.*

or her application."[115] However, this conclusion should be drawn only where the applicant had the necessary facilities to do so. UNHCR has recommend that any such withdrawal should result in a discontinuation of the proceedings, and not in a rejection of the application, such that reopening the application is possible without any time limits.[116] Otherwise, by rejecting an application and not allowing it to be reopened, international protection needs may not be examined.

UNHCR observes that the U.S. system is already at variance with international standards regarding essential guarantees and basic requirements, as it does not provide applicants with access to interpreters, much less a qualified legal representative who could explain the law and asylum process to them. Without access to interpreters or qualified legal representatives, UNHCR considers an interview or hearing on the merits of the claim to be a necessary facility for asylum-seekers to submit their cases. UNHCR does not consider rejection of an application appropriate unless on the one hand, the applicant has received all relevant information to respond to requests for information, including information about the consequences of failing to do so, in a language that they understand, and on the other, the authorities have fully and fairly examined the applicant's claim on its merits.[117] While it is already problematic that asylum-seekers lack access to interpreters and qualified representatives, the Proposed Rule does not address whether applicants would be given information about the possible pretermission of their application in a language they can understand nor does it provide clear authorities to nonetheless review an application for possible international protection needs. Furthermore, UNHCR is concerned about the lack of a pathway for appeal against pretermission decisions.

UNHCR also notes with concern that the failure to require an interview with an asylum-seeker before pretermitting an asylum application is at variance with international standards. It is acknowledged that, under international law, the relevant facts of an individual case are to be furnished in the first place by an individual themselves.[118] However, asylum applicants, in most cases, "will have arrived with the barest necessities and very frequently even without personal documents."[119] Given that the asylum applicant "who can provide evidence of all his statements will be the exception rather than the rule . . . the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."[120] The examiner should work with the applicant to draw out the full story, noting that "very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained."[121] Relying merely on a form, and not progressing to an interview (or multiple interviews) with the asylum applicant, will "normally not be sufficient to enable the examiner to reach a decision."[122] Consequently, the provision on pretermission—which examines the application on paper and precludes, in many cases, an interview—falls far short of the relevant international standards.

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[115] *See* European Union: Council of the European Union, Council Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013, OJ (L. 180/60 -180/95), art. 28(1).

[116] *See* UNHCR*, UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards*, pp. 25-26.

[117] UNHCR, *UNHCR Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast) COM (2011) 319 Final*, 12, 13, 21 (Jan. 2012), https://www.refworld.org/docid/4f3281762.html.

[118] UNHCR Handbook, ¶ 195.

[119] UNHCR Handbook, ¶ 196.

[120] UNHCR Handbook, ¶ 196.

[121] UNHCR Handbook, ¶ 201.

[122] UNHCR Handbook, ¶ 200.

UNHCR observes that the Proposed Rule refers to the use of pretermission where the individual fails to establish a *prima facie* case.[123] Under international standards, the *prima facie* approach[124] to refugee status determination should only be used in an inclusive, protectionary manner. Any decision to deny an asylum application requires an individual assessment of the claim,[125] and that assessment should follow the basic procedural requirements described above. Denying applications summarily that appear insufficient without providing applicants with an opportunity to have a personal interview or the chance to challenge the decision could impinge on their rights to be heard and to appeal, which, as discussed, are regarded as minimum procedural guarantees in asylum adjudication.[126]

UNHCR recommends that the Government strike the provision permitting pretermission of applications for asylum, withholding of removal, and protection under CAT. Instead, as a minimum, the Government should implement a framework for asylum adjudication in keeping with international standards, in which an adjudicator (whether at USCIS or in immigration court) can interview the asylum-seeker, preferably in a non-adversarial manner, to ascertain the full set of facts relevant to the case in question.

C. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal[127]

1. Membership in a Particular Social Group

The Proposed Rule makes significant changes to “particular social group” (PSG) in U.S. adjudication. The Proposed Rule does so by: codification of a heightened standard to define a legally cognizable PSG; the prohibition of ‘circularly-defined’ PSGs; a non-exhaustive list of PSGs that the government, “in general, will not favorably adjudicate;”; and a procedural requirement that increases the burden of proof on asylum-seekers. UNHCR is concerned that this takes the definition of PSG further away from international standards, while also imposing procedural obstacles that will be hard for many asylum-seekers to overcome.

First, the Proposed Rule codifies case law requiring “that a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, *and* (3) socially distinct in the society in question”[128] (emphasis added). The Proposed Rule goes on to say that “the particular social group must have existed independently

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[123] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.

[124] In international refugee law, “[t]he *prima facie* approach consists of the recognition of refugee status on the basis of readily apparent, objective circumstances in the country of origin . . . indicating that individuals fleeing these circumstances are at risk of harm which brings them within the applicable refugee definition, rather than through an individual assessment.” *See* UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* at 8, fn. 26 (citing to UNHCR, *Guidelines on International Protection No. 11*).

[125] *See* UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* p. 8, fn. 26 (indicating that “decisions to reject [under a *prima facie* approach] require an individual assessment”).

[126] UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems* at 156; UNHCR Handbook, ¶192(vi); *see also* UNHCR, *Procedural Standards for RSD Under UNHCR's Mandate*, § 7.1 (Nov. 2003), https://www.refworld.org/docid/42d66dd84.html (outlining the right to appeal, including in situations where there was a breach of procedural fairness that would have limited the applicant's ability to present his or her claim); Committee Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶18(e); *see also* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶¶ 41, 43.

[127] While the analysis in this section is framed in relation to impact on standards applied in domestic asylum adjudications, UNHCR observes with concern that many of the changes articulated in Section C may also impact USCIS overseas adjudications for the purposes of refugee admissions.

[128] Proposed Rule on Asylum and Withholding, p. 36,278 (emphasis added).

of the alleged persecutory acts and cannot be defined exclusively by the alleged harm."[129] Such a requirement takes two distinct approaches to formulating membership of a PSG recognized by international refugee law and requires that an asylum-seeker fulfill both when defining his or her PSG.

Second, the Proposed Rule prohibits purportedly circularly-defined PSGs, noting that a PSG "cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim."[130]

Third, the Proposed Rule narrows the scope of potential PSGs by laying out the following non-exhaustive list of nine circumstances that would generally not be considered sufficient to form the basis of a PSG claim:[131]

1) past or present criminal activity or associations;
2) past or present terrorist activity or association;
3) past or present persecutory activity or association;
4) presence in a country with generalized violence or a high crime rate;
5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups;
6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence;
7) interpersonal disputes of which governmental authorities were unaware or uninvolved;
8) private criminal acts of which governmental authorities were unaware or uninvolved;
9) status as an alien returning from the United States.[132]

Finally, the Proposed Rule introduces a procedural requirement that places a higher burden on the asylum-seeker at the risk of forfeiting her claim if it is not met. "While in proceedings before an immigration judge, the alien must first define the proposed particular social group as part of the asylum application or otherwise in the record. If the alien fails to do so while before an immigration judge, the alien will waive any claim based on a particular social group formulation that was not advanced."[133]

[129] Proposed Rule on Asylum and Withholding, p. 36,278.
[130] Proposed Rule on Asylum and Withholding, p. 36,290.
[131] "The proposed rule would further build on the BIA's standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group." Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,278.
[132] Proposed Rule on Asylum and Withholding, p. 36,279; *see also id.* p. 36,300.
[133] Proposed Rule on Asylum and Withholding, p. 36,279.

As one of the five enumerated grounds in the 1951 Convention, membership in a particular social group is integral to a complete understanding of the refugee definition. UNHCR observes that when the United States incorporated the international law definition of a 'refugee' into domestic law through the 1980 Refugee Act, it explicitly included the concept of "particular social group."[134] The Proposed Rule correctly notes that the term "particular social group" is itself not defined in the 1951 Convention.[135] However, the UNHCR Handbook, which the U.S. Supreme Court regards as authoritative on interpreting the 1951 Convention and 1967 Protocol,[136] expounds on this ground. In addition, UNHCR has developed extensive guidance on its interpretation in accordance with its supervisory responsibility and through UNHCR's adjudicatory experience and observation of state practice as this ground has been invoked with increasing frequency in refugee status determinations.[137] Fundamental to the PSG ground is the instruction that "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[138] While the PSG Guidelines make clear that PSG is not to serve as a "catch all" category,[139] it also states that there is no "closed list" of PSGs.[140]

i) Requirements for Legally Cognizable Particular Social Groups

The Proposed Rule codifies an approach to evaluating the legal cognizability of "particular social groups" that would further cement U.S. practice around this ground outside of international standards.[141] Although "particular social group" is on its face an open-ended term, international jurisprudence and commentary have helped clarify its meaning over time.[142] Based on international legal norms and State practice, UNHCR's PSG Guidelines identify two common approaches to defining a particular social group, and adopt a standard allowing for either approach:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted [the "protected characteristics" approach], **or** who are perceived as a group by society [the "social perception" approach]. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights[143] (emphasis added).

[134] INA § 101(a)(42) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality. . . and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion" (emphasis added)). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) (discussing the legislative history of the 1980 Refugee Act); DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 452-76 (2017), (giving a comprehensive overview of U.S. caselaw on particular social group and providing comparisons to UNHCR standards, including through discussion of the Handbook and the PSG Guidelines).
[135] Proposed Rule on Asylum and Withholding, p. 36,278.
[136] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (following guidelines set forth in the UNHCR Handbook to determine the definition of a "refugee").
[137] *See generally* UNHCR Handbook; UNHCR, *Guidelines on International Protection No. 2: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2020), ¶ 1.
[138] UNHCR, *Guidelines on International Protection No. 2* [hereinafter PSG Guidelines], ¶ 3.
[139] UNHCR, *Guidelines on International Protection No. 2*, ¶ 2.
[140] UNHCR, *Guidelines on International Protection No. 2*, ¶ 3.
[141] Brief for UNHCR as Amicus Curiae, at 23-24; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[142] Brief for UNHCR as Amicus Curiae, at 23-24; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[143] UNHCR, *Guidelines on International Protection No. 2*, ¶ 11.

A particular social group must be identifiable through one of the approaches but need not satisfy both.[144] UNHCR observes that this either-or approach to identifying a particular social group was first delineated in *Matter of Acosta*, which guided U.S. practice on this element for more than twenty years.[145] Eventually, U.S. case law evolved to require that asylum-seekers establish that a particular social group be defined with particularity and be socially distinct, in addition to being comprised of members who share a common, immutable characteristic.[146] As UNHCR has repeatedly noted in amicus briefs, imposing the additional, heightened requirements of particularity and social distinction is contrary to the object and purpose of the 1951 Convention, 1967 Protocol, and PSG Guidelines.[147]

Analyses under these two approaches frequently converge, as groups whose members are targeted based on a common immutable or fundamental characteristic are often perceived as a social group in their societies. However, at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity, such as an occupation or social class. Therefore, it is critical that these approaches be applied distinctly.

UNHCR recommends that the Government strike the codification of these requirements around defining particular social groups from the Proposed Rule and in its place propose adoption of the either-or approach to analyzing particular social groups that conforms with UNHCR guidance.[148] Specifically, UNHCR suggests that the Government reconcile the approaches to minimize gaps in protection: a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted *or* who are perceived as a group by society.[149]

ii) Circularly-Defined Particular Social Groups

The Proposed Rule endeavors to restrict PSGs by requiring that they "must have existed independently of the alleged persecutory acts", citing to *Matter of A-B* for justification.[150] As UNHCR has emphasized, particular social groups must be evaluated on a case-by-case basis,[151] and this provision is at variance with international legal standards on PSGs to the extent that it artificially forecloses a full analysis of a PSG's legal cognizability.

International standards assert that "a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted."[152] However, "persecutory action toward a group may be a relevant factor in determining the visibility

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[144] Gang Guidance, ¶ 35.
[145] 19 I&N Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).
[146] *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008); DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 452-76 (2017).
[147] *See, e.g.*, Brief for UNHCR as Amicus Curiae, at 25; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[148] UNHCR has explained in detail how U.S. law on the interpretation of "particular social group" could be aligned with international standards in some of its recent amicus briefs. *See*, *e.g.*, Brief for UNHCR as Amicus Curiae, at 24-34, *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019); Brief for UNHCR as Amicus Curiae in support for Plaintiffs' Cross-Motion for Summary Judgment, at 13-19, *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Sep. 28, 2018); Brief for UNHCR as Amicus Curiae in Support of Petitioner, at 15-23, *O.L.B.D. v. Barr*, Case No. 18-1816 (1st Cir.) (Mar. 11, 2019).
[149] Under the "protected characteristics" approach, the characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights. *Id.* at ¶ 11.
[150] Proposed Rule on Asylum and Withholding, p. 36,278.
[151] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14. UNHCR, *Guidelines on International Protection No. 2*, ¶ 3.
[152] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14 (emphasis added).

of a group."[153] UNHCR guidance, drawing on a widely cited decision from Australia, explains, "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group."[154]

For instance,[155] persecutory action against victims of trafficking "may be relevant in heightening the visibility of the group without being its defining characteristic."[156] Depending on the context, a society may "view persons who have been trafficked as a cognizable group within that society."[157] In some countries, for example, authorities have targeted individuals who fell victim to trafficking to penalize them for prostitution or "moral crimes."[158] The past trafficking experience would constitute one of the elements defining the group in such cases, rather than the future persecution feared in the form of re-trafficking or other harm, meaning that the group would therefore not be defined solely by its fear of future persecution.[159]

Further, there may be groups in which the persecutory conduct is one factor but not the sole factor in defining the visibility of the group. In cases based on domestic abuse, for example, the inability to leave a relationship may be caused by cultural or religious reasons, rather than solely by the threat of harm from a domestic partner.[160] Women in domestic relationships in Guatemala and El Salvador "endure the twin punishments of violence from male partners who feel 'entitled to physical and emotional power,' and 'widespread impunity for [such] acts of violence' by their cultures."[161] Therefore, it would be improper to conclude, as is done in *Matter of A-B-* and referenced in the Proposed Rule,[162] that fear of persecution is the sole reason that women are unable to leave their relationship.

UNHCR recommends that the Proposed Rule's restrictions around purportedly-circular particular social groups not be enacted. Should these restrictions remain in some form, UNHCR urges that the language be revised to acknowledge the fact that persecution can play a role in determining the visibility of a PSG. Additionally, UNHCR urges that explicit language be strengthened in the rule preserving the ability of adjudicators and courts to continue to evaluate PSG claims on a case-by-case basis beyond the "rare circumstances" envisioned in the current language of the Proposed Rule.

iii) Particular Social Groups That Will Generally Fail in U.S. Adjudicatory Fora

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[153] Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, *Membership of a Particular Social Group, no. 6* (Sep. 6-8, 2001).
[154] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14 (citing McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 264, 142 ALR 331).
[155] UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) f the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (Apr. 7, 2006), ¶ 37; *see also* UNHCR, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, HCR/EG/AFG/18/02 (Aug. 30, 2018), at 86-88 [hereinafter Afghanistan Eligibility Guidelines] (discussing why UNHCR considers that people, such as women, children, or those whose socio-economic circumstances create vulnerabilities to trafficking, may be in need of international refugee protection on the basis of a well-founded fear of persecution for reasons of their membership in a particular social group or other Convention grounds).
[156] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 37.
[157] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 39.
[158] *See* Afghanistan Eligibility Guidelines, p. 88.
[159] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 39.
[160] Brief for UNHCR as Amicus Curiae, at 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[161] Brief for UNHCR as Amicus Curiae, at 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019) (citing UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 17 (Oct. 2015)).
[162] Proposed Rule on Asylum and Withholding, p. 36,281. *See also* Brief for UNHCR as Amicus Curiae, p. 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).

The Proposed Rule puts forward a list of "generally insufficient" PSGs that will, by themselves, not lead to favorable adjudication of a claim for protection. This approach may lead to decisions on protection claims which are inconsistent with international standards, whose concept of a PSG remains open to evolving norms and circumstances. There is no "closed list" of what may constitute a PSG within the meaning of Article 1A(2) of the 1951 Convention.[163] UNHCR guidance on defining PSG indicates that the concept should be read in an evolutionary manner, "open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[164] Therefore, the new regulation's attempt to circumscribe the realm of legally cognizable PSGs is at odds with international law. Instead, the U.S. should adopt standards that can be appropriately responsive to current and future refugee protection needs and international human rights.

The Proposed Rule effectively narrows the range of potential PSGs at the same time it heightens the procedural burden on the asylum-seeker. By providing a non-exhaustive list of "generally insufficient" PSGs, the Proposed Rule limits an adjudicator's ability to evaluate an asylum-seeker's PSGs on a case-by-case basis. Coupled with the rule on pretermission,[165] this list may ultimately preclude many asylum-seekers from having their case heard in a full hearing, as a PSG based on one of the scenarios on this list will be seen as failing to state a *prima facie* case. UNHCR is concerned that this provision not only forecloses PSGs that would likely be recognized under international standards, but also, due to the interplay between it and the proposed changes to pretermission, will impinge on asylum-seekers' right to consideration of their claim.

While these proposed changes will have an impact on many claimants from around the world, they will have particular impact on those in need of protection from Central America and Mexico, especially women. UNHCR's extensive assessments of international protection needs of individuals from Central America and Mexico highlight the nature of persecution commonly experienced by asylum-seekers from those countries, underscoring that these cases often involve claims based on membership of a particular social group.[166] As detailed in recent UNHCR guidelines from 2010, 2016, and 2018, limiting the scope of this ground such that situations involving extortion, attempted recruitment, gang violence, domestic abuse, and other harms no longer form the basis of a PSG claim will leave large numbers of individuals who would otherwise qualify for asylum under international standards without a path to protection.[167]

While the mere notion of a list of "generally insufficient" PSGs is problematic, the exclusion of the PSGs below are particularly out of step with international standards, and therefore merit closer scrutiny:

a. Past or present criminal activity or associations

The Proposed Rule provides that claims based on PSGs defined by past or present criminal activity or associations will generally fail. This provision is in direct conflict with international law and guidance. In UNHCR's view, claims concerning persons with present or past criminal activity

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[163] *Id.*
[164] *Id.*
[165] *See supra* Section III.B.2, p. 16.
[166] *See generally* UNHCR Eligibility Guidelines for El Salvador, Guatemala, and Honduras; UNHCR Guatemala Background Paper; UNHCR Gang Guidance; Children on the Run; Women on the Run.
[167] *See* UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶¶ 36-40 (Mar. 2010), https://www.refworld.org/docid/4bb21fa02.html [hereinafter Gang Guidance]; Eligibility Guidelines for Guatemala, pp. 40-49, 54-55; Eligibility Guidelines for Honduras, pp. 48, 51, 56, 63-64.

or associations, whether voluntary or involuntary, require a careful assessment as to whether the applicant is indeed a member of a particular social group.[168] Voluntary membership in organized gangs normally does not constitute membership of a PSG within the meaning of the 1951 Convention; because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the 1951 Convention to consider such affiliation a protected characteristic.[169]

Nevertheless, in cases involving claims based on past or present criminal activity or associations, it is important to take into account the circumstances under which the applicant became involved in criminal activity.[170] For instance, a person who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime.[171] This applies in particular to young people who may have less capacity or means to resist gang pressures.[172] However, even if the association occurred voluntarily, former gang members, including those who have engaged in or been convicted of criminal activity, may constitute a valid PSG under certain circumstances provided they have denounced affiliation and credibly deserted from it.[173]

UNHCR has explained that gang 'traitors' and former members of gangs may be in need of international protection on account of membership in a particular social group, as well as other grounds.[174] The same guidance provides that family members, dependents, and other members of household of gang members or organized criminal group members, as well as women and girls forced to become gang "wives" or "girlfriends" may also be in need of protection on account of membership in a PSG.[175] For asylum-seekers fleeing these types of circumstances, denial of protection can be a death sentence.[176]

b. Presence in a country with generalized violence or a high crime rate

The Proposed Rule would generally prohibit PSGs defined by presence in a country with generalized violence or a high crime rate.[177] 'Generalized violence' does not have a strict or closed meaning nor is it used in international humanitarian law, and encompasses situations characterized by violence that is indiscriminate and/or sufficiently widespread to affect large groups of persons or entire populations.[178] The concept is understood to include violence perpetrated by both state and non-state actors, including gangs.[179] People fleeing gang violence

[168] Gang Guidance, ¶ 44.
[169] Gang Guidance, ¶ 43.
[170] Gang Guidance, ¶ 44.
[171] Gang Guidance, ¶ 44.
[172] Gang Guidance, ¶ 44.
[173] Gang Guidance, ¶ 44. UNHCR observes that there is a distinction between inclusion and exclusion, and a former gang member could be found to have a well-founded fear based on membership in a PSG but that prior egregious criminal conduct could lead to exclusion.
[174] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, 34, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016) [hereinafter El Salvador Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Guatemala*, 44, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018) [hereinafter Guatemala Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, 50, U.N. Doc. HCR/EG/HND/16/03 (Jul. 2016) [hereinafter Honduras Eligibility Guidelines].
[175] El Salvador Eligibility Guidelines, p. 33-36; Guatemala Eligibility Guidelines p. 43; Honduras Eligibility Guidelines, p. 50.
[176] *See, e.g.*, Kevin Sieff, *When death awaits deported asylum seekers*, WASH. POST (Dec. 26, 2018).
[177] UNHCR notes that, in the absence of a legal definition for "high crime rate," any crime rate could be asserted to be "high" in the context of a particular asylum claim.
[178] UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and / or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, at ¶¶ 71-72, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016).
[179] UNHCR, *Guidelines on International Protection No. 12*, ¶¶ 71-73.

or violence by organized criminal groups may meet the refugee definition under the 1951 Convention.[180] "Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of being victims of gangs. . .Young people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention."[181]

Gangs in Central America are reported to exercise considerable levels of societal control over the population of their territories.[182] In gang-controlled zones, residents are compelled to stay silent and may face a myriad of gang-imposed restrictions.[183] Many gangs also reportedly forbid inhabitants from showing 'disrespect' for the gang, which is subjectively evaluated by gang members and encompasses a multitude of perceived slights and offences, including arguing with a gang member or refusing an extortion demand, resisting a child's recruitment into the gang, or rejecting amorous attention from a gang member.[184] Against this background, and taking into account the limitations on the ability or willingness of State agents to provide protection to civilians, UNHCR considers that some persons perceived by a gang or other organized criminal group as contravening its rules or resisting its authority may be in need of international protection on the grounds of their membership in a particular social group.[185]

c. Recruitment by criminal, terrorist, or persecutory groups

The Proposed Rule generally forecloses PSGs consisting of individuals forcibly recruited by criminal, terrorist, or persecutory groups. This provision is at variance with international law. In UNHCR's view, "[i]ndividuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender or social status. Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty, and lack of parental guidance."[186] Resisting recruitment or otherwise opposing gang or terroristic practices may be considered a characteristic that is fundamental to both a person's conscience and exercise of human rights—that is, at the core of gang or terrorism resistance, is respect for the rule of law.

UNHCR has emphasized that children and youth are at especially high risk of forced recruitment and clearly stated that they may be entitled to international protection on account of membership in a PSG.[187] UNHCR has reported on the serious consequences for children of resisting

[180] UNHCR, *Guidelines on International Protection No. 12*, ¶ 84.
[181] Gang Guidance, ¶¶ 63, 65.
[182] *See* El Salvador Eligibility Guidelines at 9-10; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 16.
[183] *See* El Salvador Eligibility Guidelines at 12; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 18.
[184] *See* El Salvador Eligibility Guidelines at 12; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 18.
[185] UNHCR observes that such a scenario also may merit consideration under the political opinion ground. *See* Political Opinion, *infra.*
[186] Gang Guidance, ¶¶ 36, 37-41 (elaborating on recruitment claims); *see also* UNHCR, Afghanistan Eligibility Guidelines, p. 55 (explaining how and why men and children who suffer forced recruitment by pro-government forces or anti-government elements may be in need of international refugee protection on the basis of a well-founded fear of persecution for reasons of their membership in a particular social group or other Convention grounds); UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia*, HCR/EG/SOM/10/1 (May 5, 2010), p. 16 (describing young Somali males forcibly recruited by Islamist armed opposition groups as a group at risk on the basis of article 1(A) of the 1951 Convention). (UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, HCR/EG/LKA.12/04 (Dec. 21, 2012), p. 35 (explaining that former child soldiers, depending on the details of their claims, may be in need of international refugee protection on account of belonging to a particular social group or other Convention grounds to include careful examination of exclusion considerations in accordance with UNHCR guidance).
[187] *See* Afghanistan Eligibility Guidelines p. 52-55; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia*, HCR/EG/COL/15/01 (Sep. 2015), p. 14 [hereinafter Colombia Eligibility Guidelines]; El Salvador

recruitment, including being punished or killed, making it critical to grant them refugee protection when they meet the criteria under Article 1A(2), which they may on the ground of membership in a particular social group.[188] In particular, separated and displaced children are even more vulnerable to recruitment by armed forces and non-State actors, such as gangs, guerilla forces militias, and terrorist groups.[189] Thus, as international guidance recognizes the cognizability of PSGs involving children so situated, U.S. law should uphold PSGs that are based on recruitment activities.

d. Criminal activity targeting the applicant for financial gain based on perceptions of wealth or affluence

The Proposed Rule generally precludes PSGs defined by circumstances related to criminal activity perpetrated against an applicant for financial gain based on perceptions of wealth or affluence. Such prohibition conflicts with international guidance. UNHCR has addressed extortion by criminal organizations, such as drug trafficking operations and other armed actors, "in areas where they have territorial and social control, as a strategy to ensure control over the population."[190] Similarly, UNHCR has recognized that in the course of exercising exclusive control over their home territories, Central American gangs target "[b]usinesses, (public) transport routes, and even homes in other nearby (and often wealthier) neighbourhoods" for extortion as their main source of revenue.[191] UNHCR has observed that an individual targeted in this manner may be in need of international protection due to their membership in a particular social group "based on the applicant's occupation," where, for example, "disassociation from the profession is not possible or would entail a renunciation of basic human rights."[192] That the persecutor may reap financial gain from the harm inflicted does not undercut the applicant's claim, including the cognizability of their posited PSG.

e. Interpersonal disputes or private criminality

The Proposed Rule would all but foreclose PSGs based on "interpersonal disputes" or "private criminality." This would adversely impact a wide variety of claims advanced by asylum-seekers who arrive from a diverse set of countries and circumstances. For instance, UNHCR has recognized that individuals targeted as part of tribal conflict resolution, including blood feuds, may have international protection needs based on membership in a particular social group.[193] Further,

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Eligibility Guidelines, p. 36; Guatemala Eligibility Guidelines, p. 45; Honduras Eligibility Guidelines, p. 52; UNHCR, International Protection Considerations with Regard to People Fleeing the Republic of Iraq, HCR/PC/IRQ/2019/05_Rev.2 (May 2019), pp. 7, 99-100 [hereinafter Iraq Protection Considerations] (highlighting that children who are survivors of or at risk of forced and underage recruitment may be in need of international refugee protection, depending on the individual circumstances of the case).

[188] *See* Afghanistan Eligibility Guidelines pp. 52-55 (describing forced recruitment of children, as well as men of fighting age, the risks associated with forced recruitment, and the ways in which individuals so targeted may be entitled to refugee protection).

[189] *See, e.g.*, USA for UNHCR, *UNHCR Helps Refugee Children at High Risk of Forced Recruitment* (Mar. 1, 2012), https://www.unrefugees.org/news/refugee-children-at-highest-risk-of-forced-recruitment/; *see also* UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶¶ 19-23, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).

[190] Colombia Eligibility Guidelines pp. 31-33.

[191] El Salvador Eligibility Guidelines p. 11; Guatemala Eligibility Guidelines p. 15; Honduras Eligibility Guidelines p. 16.

[192] Colombia Eligibility Guidelines p. 33; *see also* El Salvador Eligibility Guidelines, p. 31-32 (providing that, "[d]epending on the particular circumstances of the case, UNHCR considers that persons in professions or positions susceptible to extortion, including but not limited to those involved in informal and formal commerce as business owners, their employees and workers, or as street vendors; public transport workers; taxi and *mototaxi* drivers; public sector employees; and certain returnees from abroad may be in need of international protection" on account of their membership in a PSG, among other grounds); Guatemala Eligibility Guidelines p. 41; Honduras Eligibility Guidelines p. 47.

[193] Iraq Protection Considerations pp. 106-08; *see also* Afghanistan Eligibility Guidelines pp. 74-76 (recognizing that individuals who suffer harmful traditional practices, like forced or child marriage, "honour killings," and other forms of sexual and gender-based

events related to domestic abuse or gang violence could also be characterized as involving interpersonal disputes or private criminality.

International legal standards do not require that the persecutor be a State actor. The UNHCR Handbook provides that persecution, while normally related to action by the authorities of a State, "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned."[194] While asylum claims involving non-State actor persecutors tend to be regarded as involving a more nuanced analysis, the complexity of these types of claims should not render them any less relevant nor deserving of international protection.[195]

f. Persons returning from the United States

The Proposed Rule would generally foreclose PSGs consisting of individuals returning from the United States. UNHCR has recognized that persons fitting this profile may be in need of international protection. For example, in some countries, "[t]here are reports of individuals who returned from Western countries having been threatened, tortured or killed . . . on the grounds that they were perceived to have adopted values associated with these countries, or they had become 'foreigners' or that they were spies for or supported a Western country."[196] UNHCR considers that such individuals, potentially including deportees from the United States, may in certain instances be in need of international protection on any number of the Convention grounds, including membership in a particular social group.[197] In addition, returnees to some regions are reported to be "easily identifiable" by actors who may have previously threatened or harmed them or may be targeted for extortion based on the perception of having financial resources.[198] UNHCR guidance also explains how returnees in such circumstances may be in need of international protection due to their membership in a particular social group.[199]

UNHCR recommends that the Government strike this provision entirely in the final version of the Rule. In the alternative, the government should provide explicit authority to adjudicators to evaluate PSG claims on a case-by-case basis. If the government wishes to list particular social groups in order to aid adjudicators in individualized assessments of each claim, it should do so in an inclusionary manner, rather than by making a list of non-cognizable PSGs.

iv) Requiring Applicants to Identify Their Own Particular Social Groups

In addition to generally foreclosing a variety of particular social group formulations, the Proposed Rule creates a new procedural requirement for asylum-seekers pursuing claims based on membership in a particular social group.[200] Under this new provision, applicants presenting their claims before an immigration judge must articulate (or provide a basis for) their own particular

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violence—harms that are typically perpetrated by non-State actors—may be entitled to refugee protection on the ground of their membership in a particular social group). Blood feuds are generally understood to involve "members of one family threatening to kill members of another family in retaliatory acts of vengeance carried out according to an ancient code of honour and behaviour." Iraq Protection Considerations at 106.

[194] UNHCR Handbook, ¶ 65; *see also* UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 20-23; Afghanistan Eligibility Guidelines, p. 76.

[195] Brief for UNHCR as Amicus Curiae, at 16-17; *Gonzales v. Thomas*, 547 U.S. 183 (2007).

[196] Afghanistan Eligibility Guidelines, pp. 46-47.

[197] Afghanistan Eligibility Guidelines, pp. 48-49.

[198] El Salvador Eligibility Guidelines, pp. 28, 30-32.

[199] El Salvador Eligibility Guidelines, pp. 32.

[200] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.

social groups without assistance from the adjudicator.[201] Any particular social groups that the applicant does not advance (or provide a basis for) before the immigration judge will be waived, including on appeal, and those particular social groups could not serve as the basis for potential subsequent motions to reopen or reconsider.[202]

UNHCR is concerned that the Proposed Rule will prevent asylum-seekers from pursuing their claims and lead to the denial of applications made by persons seeking international protection. Under this Proposed Rule, the mere inability of an asylum-seeker to articulate a legally cognizable PSG, even if the individual is a member of such a PSG and has a well-founded fear of being persecuted on such an account, will foreclose pathways to international protection to which he or she is entitled. As with other proposals in the new rule, UNHCR anticipates that this new requirement will adversely affect large numbers of refugees, especially those appearing *pro se* as well as child asylum applicants.[203] UNHCR considers it unlikely that many *pro se* and child applicants are in positions to articulate particular social groups, much less be familiar with this legal concept and its intricate contours.[204]

UNHCR is further concerned that these proposed changes limit opportunities for asylum-seekers to raise new particular social groups on appeal that they may not have had the means or opportunity to present in the first instance before an immigration judge. Appellate review serves as a fundamental safeguard in accessing fair and transparent asylum procedures.[205] That appeal, which must be conducted by an independent body, "must examine both facts and law based on up-to-date information."[206] As at the first instance, the appellate examination of the claim should be non-adversarial, with the adjudicator and the applicant working together to ascertain the facts. Without such a safeguard, the adjudicatory system may fail to identify those in need of international protection.

Requiring applicants to define their own particular social groups, or provide a basis for defining particular social groups, is at variance with basic standards of procedural fairness required under international law. Stated most simply, asylum-seekers are "not required to identify accurately the reason why he or she has a well-founded fear of being persecuted."[207] The Proposed Rule sets forth a framework in which applicants would need to understand the complex concept of a particular social group and define how it applies to them – a difficult task for anyone, let alone an asylum-seeker who might lack understanding of the legal process, might not be fluent in English, and might very well still be traumatized from persecution and flight. The Proposed Rule then would punish them, with serious procedural consequences, for failure. This puts forward a framework that most will simply not be able to meet.

[201] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.
[202] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.
[203] *See, e.g.*, UNHCR Handbook, ¶46 (discussing the reasons why a refugee may not be able to describe elements of the asylum analysis using legal terminology); UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, ¶36 (providing that adjudicators "should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education).
[204] The proposed procedural changes to PSG are striking in light of the high rate of *pro se* asylum applicants. It is objectively unreasonable to expect a *pro se* applicant to be able to define a PSG within the narrow frame that the Proposed Rule still allows and no form of notice of the asylum-seeker's burden to do so is sufficient to rectify such a violation of due process. Even more striking is the stark absence of an exception to this requirement for child asylum applicants, many of whom must also represent themselves in immigration court in the absence of qualified or affordable legal representation. *See* discussion, *infra* Section IV.1 and IV.1, p. 65.
[205] *See, e.g.* 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 2010) https://www.refworld.org/docid/4bf67fa12.html.
[206] *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail.*
[207] UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees*, ¶ 23, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

In order to be considered a refugee, a person must show well-founded fear of persecution on account of one of the five enumerated Convention grounds; it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them.[208] UNHCR considers adjudicators and asylum-seekers to have a shared duty to produce and evaluate facts relevant to refugee status determination,[209] and the burden cannot fall to the claimant alone to identify the grounds of the claim or understand which facts are critical to convey to form the basis of a particular social group.[210] Instead, it is up to the adjudicator in particular to ascertain the reason or reasons for persecution and to decide whether the definition in the 1951 Convention is met with in this respect.[211]

Indeed, in some cases, an adjudicator may need to use "all the means at his [or her] disposal" to develop the evidence most critical to this assessment.[212] International standards recognize the diverse set of technical and psychological reasons that an asylum-seeker may not be able to describe the harm they have suffered, the reasons why, and other elements of the asylum analysis using legal terminology or concepts.[213] For instance, trauma, English proficiency, age, level of education, religious or cultural background, and other factors may limit an individual's ability to articulate their own particular social groups, among other things.

Additionally, many individuals are not able to secure legal assistance until after an immigration judge has decided their applications. For example, detained asylum-seekers are often held in remote locations with few, if any, opportunities to access counsel. Individuals who obtain legal assistance during the appellate stage may be better positioned to present legally cognizable particular social group formulations. In effect, because applicants are often in particularly vulnerable situations, their applications "should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs."[214]

International standards address the need to provide child asylum applicants with special consideration, and it would be particularly egregious to require this highly vulnerable group to define their own particular social groups.[215] UNHCR has published extensive guidance on assessing the international protection needs of children in which it underscores that children may require special assistance in articulating their claims to refugee status.[216] Children may have difficulty articulating their claims due to a range of reasons, including trauma, age, and maturity level, all of which can influence their capacity to even "interpret what they have witnessed or experienced in a manner that is easily understandable to an adult."[217] Therefore, it is highly improbable that many children, especially those without legal representation,[218] can

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[208] UNHCR Handbook, ¶ 66.
[209] UNHCR Handbook, ¶ 196.
[210] Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 693 (Can.) ("A claimant is not required to identify the reasons for the persecution. The examiner must decide whether the Convention definition is met; usually there will be more than one applicable ground.").
[211] UNHCR Handbook, ¶ 67.
[212] UNHCR Handbook, ¶ 196.
[213] UNHCR Handbook, ¶¶ 46, 190; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, ¶¶ 35-36.
[214] UNHCR Handbook, ¶ 190.
[215] As noted above, the new regulations do not explicitly exempt children from this provision (note that the regs do, for example, explicitly exempt unaccompanied children from asylum-and-withholding-only proceedings, which may suggest that if children were intended to be exempt from this provision the regulation would so state). Thus, it appears likely to apply to them.
[216] UNHCR, *Guidelines on International Protection No. 8*, ¶ 2.
[217] UNHCR, *Guidelines on International Protection No. 8*, ¶ 72.
[218] Approximately half of unaccompanied children do not have representation in removal proceedings. Kids in Need of Defense, Improving the Protection and Fair Treatment of Unaccompanied Children 7 (Sep. 2016). The many children who lack attorneys will especially suffer as a result of this provision.

independently identify any or all of the reasons for which they were targeted and identify legally cognizable particular social groups to advance their asylum applications. Whereas the burden of proof is typically shared between adjudicators and applicants in adult claims, adjudicators may need "to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied."[219] In cases where a child cannot fully articulate his or her claim, the adjudicator should make a decision based on all known circumstances, meaning that the adjudicator might have to define the particular social group to which the child belongs if the child suffered persecution on that ground.[220]

UNHCR recommends that the Government strike this provision requiring asylum-seekers to articulate their own particular social groups without the assistance of an adjudicator. UNHCR encourages the Government to rewrite any rule concerning asylum application processing to affirm the adjudicator's duty to explore and identify the reason(s) why an individual has a well-founded fear of persecution, up to and including exploring the elements of particular social groups. UNHCR also encourages the Government to preserve pathways to raise newly articulated PSGs on appeal.

2. Political Opinion

The Proposed Rule sets out to re-define political opinion as "one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control or a state or unit thereof."[221] The Rule would further limit the definition of political opinion by asserting that adjudicators will decline to recognize political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[222] The Proposed Rule also provides two exceedingly narrow but valid circumstances under which applicants will generally be found to establish a valid asylum claim on account of political opinion: forced abortion and involuntary sterilization.[223]

The Proposed Rule would impermissibly narrow the concept of political opinion by crafting a definition that strictly recognizes only those ideas and convictions related to political control of a state. The proposed definition is overly restrictive, limiting current interpretations and future evolution of the concept. It explicitly excludes political opinions defined by "generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior."[224]

As a preliminary matter, UNHCR observes that the Proposed Rule's background section cites to the UNHCR Handbook to support an overly-restrictive reading of 'political opinion'. The Proposed Rule asserts that political opinion should be analyzed in terms of "holding an opinion different from the Government or not tolerated by the relevant government authorities."[225] UNHCR agrees, as does the United States Supreme Court, that its Handbook is a valuable resource in

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[219] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[220] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[221] Proposed Rule on Asylum and Withholding, pp. 36,280, 36,291-92.
[222] Proposed Rule on Asylum and Withholding, pp. 36,280; 36291-92.
[223] Proposed Rule on Asylum and Withholding, pp. 36280; 36,291-92.
[224] Proposed Rule on Asylum and Withholding, pp. 36,280; 36,291-92.
[225] Proposed Rule on Asylum and Withholding, p. 36,279.

understanding international refugee law obligations.[226] UNHCR notes, however, that this single quote, without context, fails to present our full position. A more complete reading of the Handbook and its Guidelines on International Protection, which complement the Handbook, reveals UNHCR's view that political opinion is an expansive concept encompassing a wide range of beliefs and convictions.[227] In subsequent Guidelines on International Protection, UNHCR has clarified that this ground has much broader scope: "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, policy may be engaged."[228] The UNHCR Handbook further clarifies that "[i]n determining whether a political offender can be considering a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; final, also, the nature of the law on which the persecution is based."[229] The Proposed Rule's limiting of the definition of political opinion precludes adjudicators from taking the sum of these factors into account in weighing the validity of an asylum applicant's political opinion claim.

The narrowing of the concept of political opinion forecloses otherwise valid claims based on this ground for a diverse set of asylum-seekers. Limiting implementation of political opinion in this way will, for example, adversely affect asylum-seekers fleeing situations of armed conflict or other violence. International law and UNHCR guidance has clearly recognized that individuals coming from these circumstances may have a well-founded fear of persecution for reasons of political opinion.. "Expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties in situations of armed conflict and violence, or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved may—in the eyes of the persecutor—be considered critical of the political goals of the persecutor.[230] The context and features of the conflict as well as the characteristics of the actor inform whether an opinion is political.[231] For example, "[i]n Colombia, the highly polarized situation and the powerful guerilla groups . . . which at times carry out State-like functions have been relevant factors in finding that an opinion attributed to a victim by a non-State actor is a political one."[232] It is critical to interpret this ground for international protection more broadly than envisioned by the Proposed Rule and to evaluate whether an asylum-seeker is entitled to refugee protection on this ground on a case-by-case basis.[233]

UNHCR guidance recommends that gang-related refugee claims to be analyzed on the basis of the applicant's actual or imputed political opinion vis-à-vis gangs, or the State's policies toward gangs or other segments of society that target gangs.[234] Central American gangs are in some

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[226] *INS v. Cardoza Fonseca*, 480 U.S. 421, 439, fn. 22 (1987) ("It has been widely considered useful in giving content to the obligations that the Protocol establishes.").

[227] *See generally* UNHCR Handbook, at ¶¶ 80-86 (providing overview of political opinion claims). *See also Guidelines on International Protection No. 1*, ¶¶ 32-34; *Guidelines on International Protection No. 8*, ¶¶ 45-47; *Guidelines on International Protection No. 11*, ¶¶ 51-54; Guidelines *on International Protection No. 12*, ¶¶ 37-38.

[228] *Guidelines on International Protection No. 1*, ¶¶ 32. *See also Guidelines on International Protection No. 8*, ¶ 45; *Guidelines on International Protection No. 9*, ¶ 50; Guidelines *on International Protection No. 10*, ¶¶ 10, 51; Gang Guidance, ¶ 45.

[229] UNHCR Handbook, ¶ 86.

[230] UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, HCR/GIP/16/12/ (Dec. 2, 2016), ¶ 37.

[231] Vanessa Holzer, *UNHCR Legal and Protection Policy Research Series: The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, PPLA/2012/05 (Sep. 2012), at 35-36; *see also* UNHCR, *Guidelines on International Protection No. 12*, ¶ 37.

[232] Holzer*, The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, p. 36.

[233] *See* Holzer, *The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, pp. 34-36.

[234] Gang Guidance, ¶¶ 45-51.

areas functionally similar to State actors, and political opinion may manifest in various expressions of anti-gang beliefs and values.[235] Examples include: refusing forced affiliation or taxes-via-extortion; testifying or informing against the gangs; reporting incidents of gang violence to authorities, participating in community-based gang prevention and intervention activities; maintaining neutrality (especially in "hazardous" conditions);[236] or associating with persons or social or religious groups that promote anti-gang values. An individual may also oppose gang activity due to their beliefs in basic human rights, such as the right to security of person, or the rule of law. Such individuals may be viewed as a threat by gangs or as not conforming to their practices, thus becoming targets of intimidation tactics and violence by gangs.[237]

Further, international standards recognize that the concept of political opinion can include non-conformity to gender norms. UNHCR guidance explains that political opinion "may include an opinion as to gender roles," as well as "non-conformist behaviour which leads the persecutor to impute a political opinion to him or her."[238] In some societies, "women continue to face pervasive social, political and economic discrimination due to persistent stereotypes and customary practices that marginalize them," and they often risk threats to their lives and safety where they transgress those norms.[239] "Where non-conformity to traditional roles is perceived as opposing traditional power structures, the risk of persecution may be linked to the ground of . . . political opinion."[240] Thus, "there is not as such an inherently political or inherently non-political activity, but the context of the case should determine its nature."[241] Accordingly, it would be contrary to well-established guidance interpreting this ground to exclude this type of political opinion claim.

The Proposed Rule does make one exception to its otherwise restrictive approach to political opinion, giving favorable treatment to forced abortion and involuntary sterilization claims,.[242] UNHCR acknowledges that these claims are explicitly provided for in the Immigration and Nationality Act.[243] Further, UNHCR notes that forced abortions and sterilizations breach human rights, and despite that these practices may be implemented under a legitimate domestic law, they amount to persecution.[244] Resisting or rejecting these practices may be seen as transgression of religious, social or political norms and as such related to the Convention ground of religion, membership of a particular social group or political opinion, or a combination thereof.[245]

While UNHCR agrees with the notion that forced abortions and forced sterilizations can amount to persecution within the meaning of the 1951 Convention, UNHCR is somewhat concerned with the singling out of these concepts, should other forms of persecution then be dismissed. Persecution was deliberately left undefined by the drafters of the 1951 Convention, to ensure a flexible and evolutionary approach to the term.[246] What amounts to persecution and how the fear of persecution is linked to a Convention grounds depends on the circumstances of each case.[247]

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[235] Gang Guidance, ¶ 12.
[236] See, e.g., *Sangha v. I.N.S.,* 103 F.3d 1482, 1488 (9th Cir. 1997) (finding that an applicant can establish a "political opinion" by showing "political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces" and defining "political neutrality" to include "the absence of any political opinion").
[237] Gang Guidance, ¶ 12.
[238] UNHCR, *Guidelines on International Protection No. 1*, ¶ 32.
[239] Afghanistan Eligibility Guidelines, pp. 76-80.
[240] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea* (Apr. 2009), p. 28.
[241] UNHCR, *Guidelines on International Protection No. 1*, ¶ 32.
[242] Proposed Rule on Asylum and Withholding, pp. 36,280; 36,291-92.
[243] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(B) (2018).
[244] UNHCR, *Guidelines on International Protection No. 1*, ¶ 13.
[245] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 23, 26, 28, 32.
[246] *See* UNHCR Handbook, ¶ 51.
[247] UNHCR Handbook, ¶¶ 52, 66-67.

Consequently, specific references to certain forms of persecution should never result in the dismissal of others. Political opinion is a broad Convention ground and people may be subjected to many forms of persecution for reasons of this ground (or other grounds), including many gender-related forms of persecution.[248] This "carve-out" for forced abortion and forced sterilization must not function in a discriminatory way that unfairly privileges certain types of claims over others; this concern is relevant regardless of the type of "carve-out" established.

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to limit its current use or future evolution, nor should to prioritize one type of claim above others.

3. Persecution

The Proposed Rule radically redefines "persecution" in exceptionally narrow terms that will not be in line with international law. Currently, "persecution" is not defined in U.S. law by statute or regulation, but it is generally considered to include "a threat to life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[249] However, the new regulations envision a much higher threshold for harm to rise to the level of persecution:

> For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive.[250]

In effect, the Proposed Rule constricts the element of persecution by requiring that it be understood as an "extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat." [251] Furthermore, this definition includes a list of harms that will virtually always no longer be considered persecution. More specifically, the Proposed Rule dismisses virtually all harm arising out of civil, criminal, or military strife in a country; treatment that may be regarded as unfair, offensive, unjust, unlawful or unconstitutional; "intermittent harassment"; 'empty' threats; and "non-severe economic harm."[252]

UNHCR is concerned that the Proposed Rule defines "persecution" so narrowly that it all but forecloses the vast majority of claims, including those that would be recognized under the refugee

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[248] See UNHCR, *Guidelines on International Protection No. 12*, ¶¶ 37-39 (enumerating several forms of persecution capable of forming the basis for a valid political opinion claim).
[249] *Matter of Acosta*, 19 I&N Dec. at 222.
[250] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.
[251] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.
[252] The Proposed Rule notes this list is not exhaustive (allowing room for additional factors to be added later).

definition articulated in Article 1A(2) of the 1951 Convention. UNHCR anticipates that this provision, if enacted, would result in the denial of many applications submitted by refugees and their forced return to territories where their lives or freedom will be in danger, in violation of Article 33(1) of the Convention.

Further, UNHCR is troubled that the Proposed Rule fails to account for the sensitivity needed to address children's claims. In cases of child applicants, international law requires consideration of their claims through a child-sensitive lens, as children may experience forms of persecution distinct from adult applicants.[253] "Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child."[254] Factors including age, stage of development, knowledge and memory of conditions in country of origin, and vulnerability must be considered to ensure an appropriate application of the eligibility criteria for refugee status.[255]

i) Harm Constituting "Persecution," Generally

Under the 1951 Convention, refugees have a well-founded fear of persecution on account of one or more of the five enumerated protected grounds.[256] The phrase "well-founded fear of being persecuted" is "the key phrase of the [refugee] definition" under Article 1A(2) of the Convention.[257] Neither the Convention nor its 1967 Protocol define the term "persecution." UNHCR has observed that there is no universally accepted definition of "persecution" and that various attempts to formulate such a definition have been met with little success.[258] Nevertheless, from Article 33 of the Convention, "it may be inferred that a threat to life or freedom" on account of a protected ground "is *always* persecution."[259] Further, UNHCR has recognized that "[o]ther serious violations of human rights—for the same reasons—would also constitute persecution."[260] International law recognizes a variety of harms involving physical, psychological, and sexual violence, such as rape, to generally meet the threshold for persecution.[261] In its Handbook, which, as noted above, has been recognized by the U.S. Supreme Court as offering "significant guidance in construing the Protocol,"[262] UNHCR underscores the need to evaluate whether past or feared harm rises to the level persecution on a case-by-case basis.[263] Accordingly, the Convention and Protocol mandate a broad interpretation of this element that is central to refugee status determination.

The exclusion of a diverse set of harms from the persecution analysis, as contemplated by the Proposed Rule, is not consistent with protection obligations under international refugee law.

[253] UNHCR, *Guidelines on International Protection No. 8,* ¶¶ 3-4, 10-12, 15-36 ("[C]hildren may experience child-specific forms and manifestations of persecution."); *see also* ExCom, Conclusion on Children at Risk, 5 Oct. 2007, No. 107 (LVIII) – 2007, ¶ (b)(x)(viii).
[254] UNHCR, *Guidelines on International Protection No. 8*, ¶ 10 (citing to USCIS Guidelines for Children's Asylum Claims, 10 Dec. 1998).
[255] UNHCR, *Guidelines on International Protection No. 8*, ¶ 4; see also UNHCR, Guidelines on Unaccompanied Children Seeking Asylum, op cit., p. 10.
[256] Refugee Convention, art. 1A(2).
[257] UNHCR Handbook, ¶ 37.
[258] UNHCR Handbook, ¶ 51.
[259] UNHCR Handbook, ¶ 51 (emphasis added).
[260] UNHCR Handbook, ¶ 51.
[261] UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity*, ¶¶ 20-25, U.N. Doc. HCR/GIP/12/01 (Oct. 23, 2012); *see also* UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 9-18 (describing various forms of gender-related violence that may rise to the level of persecution); UNHCR Guidelines on International Protection No. 7: Application of Article 1A(2) to Victims of Trafficking and Persons at Risk of Being Trafficked, ¶¶ 15, 17 (explaining that severe exploitation including abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor, removal of organs, physical beatings, starvation, and the deprivation of medical treatment constitute serious human rights violations that will generally amount to persecution).
[262] *INS v. Cardoza Fonseca*, 480 U.S. 421, 439, fn. 22 (1987) ("It has been widely considered useful in giving content to the obligations that the Protocol establishes.").
[263] *See* UNHCR Handbook, ¶¶ 52-53.

Whether past or feared harm rises to the level of persecution depends on the circumstances of each case, thus making it necessary to assess this element on a case-by-case basis.[264] Such determination may require consideration of an asylum applicant's psychological state, the sociopolitical circumstances in which the harm suffered or feared occurs (such as a prevailing context of insecurity), and the cumulative impact of events or factors which, taken together, may give rise to a well-founded fear of persecution notwithstanding that any one of them may not have sufficed alone. Fear of persecution includes a subjective element that "requires an evaluation of the opinions and feelings of the person concerned."[265] Those opinions and feelings are a lens through which any actual or anticipated measures against the particular asylum-seeker must be viewed.[266] "Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary."[267] In addition, harms that may not independently rise to the level of persecution may if considered cumulatively.[268] UNHCR has explained:

> Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded."[269]

As a result, "it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical, and ethnological context."[270]

In contrast to this framework, the Proposed Rule states that "[p]ersecution *does not encompass*…" a non-exhaustive list of harms that according to its provisions will not be sufficient to satisfy this element.[271] While some of the types of harm referenced in the Proposed Rule as insufficient to constitute persecution independently would in fact be persecution under international law, or may be so in particular instances when considered on a case-by-case basis as mandated under UNHCR guidelines, the regulations do not clarify whether adjudicators are to consider the cumulative effect of the harms that it deems not to be persecution. If that were how this provision is applied—excluding from consideration certain harms and leading adjudicators to neglect consideration of their cumulative effect—such policy would represent a double affront to the concept of "persecution," as well as the humanitarian, protectionary spirit of the 1951 Convention.

ii) Harm Arising Out of Civil, Criminal, or Military Strife

International law recognizes that persecution may occur in situations of civil, criminal, or military strife.[272] UNHCR has emphasized, "In accordance with the ordinary meaning to be given to the

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[264] UNHCR Handbook, ¶ 52.
[265] UNHCR Handbook, ¶ 52.
[266] UNHCR Handbook, ¶ 52.
[267] UNHCR Handbook, ¶ 52.
[268] UNHCR Handbook, ¶ 52.
[269] UNHCR Handbook, ¶ 201.
[270] UNHCR Handbook, ¶ 53.
[271] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300 (emphasis added).
[272] *See* UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 20 (Apr. 2001), https://www.refworld.org/docid/3b20a3914.html (providing that even in conflict situations, persons may be forced to flee persecution on account of a protected ground, and strife and violence are themselves often used as instruments of persecution); *see also* UNHCR, *Legal Considerations on Refugee Protection*

terms and in light of the context as well as the object and purpose of the 1951 Convention, Article 1A(2) applies to persons fleeing situations of armed conflict and violence. In fact, the 1951 Convention definition makes no distinction between refugees fleeing peacetime or 'wartime' persecution. The analysis required under Article 1A(2) focuses on a well-founded fear of being persecuted for one or more of the Convention grounds."[273] In other words, the standard that threats to life or freedom and other serious human rights violations, and that lesser forms of harm cumulatively (or in light of particular individual circumstances), can constitute persecution "should be applied no differently in the context of persons fleeing situations of armed conflict and violence. No higher level of severity or seriousness of the harm is required for the harm to amount to persecution."[274] Moreover, the risk of persecution may exist for individuals as well as entire groups or populations, and "[t]he fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim."[275]

These types of circumstances often generate or advance conditions that put specific or vulnerable individuals at increased risk for persecution. UNHCR guidance has noted, "At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, strengthens, rather than weakens the well-founded nature of the fear of being persecuted of a particular individual."[276] UNHCR has further observed, "States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the civilian population. Opportunities arise for organized crime to exploit the instability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate security for specific or vulnerable groups."[277] So, for instance, persecution can occur in countries where there exists widespread violence by gangs or other organized criminal groups. "Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of becoming victims of gangs."[278] In such context, those individuals who have a well-founded fear of persecution on account of a protected ground would be entitled to protection under the 1951 Convention.[279]

The Proposed Rule stands in conflict with international legal standards governing persecution as they specifically pertain to persecution in the context of civil, criminal, or military strife. The new regulations would exclude "the generalized harm that arises out of civil, criminal, or military strife in a country."[280] While not all individuals who live in countries experiencing civil, criminal, or military strife would meet the refugee definition under Article 1A(2) of the Convention, those who have a well-founded fear of a threat to their lives or freedom on account of a protected ground may be entitled to international protection under that instrument and its 1967 Protocol. As discussed above, it is exceptionally important that each application for protection be assessed on a case-by-case basis. It would never be appropriate to deny an application as failing to establish a well-founded fear of persecution simply because the asylum-seeker came from a country experiencing civil, criminal, or military strife; as underscored in the preceding paragraph, such an asylum-

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for People Fleeing Conflict and Famine Affected Countries, ¶ 2 (Apr. 2017) https://www.refworld.org/docid/5906e0824.html ("Situations of armed conflict and violence may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors").

[273] UNHCR, *Guidelines on International Protection No. 12*, ¶ 10.

[274] UNHCR, *Guidelines on International Protection No. 12*, ¶ 11.

[275] UNHCR, *Guidelines on International Protection No. 12*, ¶ 17.

[276] UNHCR, *Guidelines on International Protection No. 12*, ¶ 17.

[277] UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and / or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 31, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).

[278] Gang Guidance, ¶ 63.

[279] Gang Guidance, ¶ 65.

[280] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.

seeker may be even more vulnerable and at risk of harm constituting persecution. The Proposed Rule, therefore, undermines the protection regime under the Convention and Protocol by excluding a potentially significant category of refugees from relief.

UNHCR recommends that that any definition of persecution included in the rules be brought in line with international standards, as outlined above. At a minimum, the Government should remove the language suggesting that persecution is an "extreme concept" and strike the non-exhaustive list of harms that it does not consider to constitute persecution.

4. Nexus

The Proposed Rule purports to "provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five grounds," and relies on both the REAL ID Act of 2005 and *Matter of A-B-* to enumerate a non-exhaustive list of situations in which an asylum application will generally not result in a favorable outcome.[281] UNHCR is concerned that this will render the U.S. regime even further from international standards.

Under the Proposed Rule, adjudicators, "in general, will not favorably adjudicate" claims based on the following: (1) "personal animus or retribution," (2) "interpersonal animus" involving persecutors who have not targeted or manifested animus against other members of the applicant's asserted PSG, (3) "generalized disapproval of, disagreement with, or opposition to" non-state actors without expressive behavior on the part of the applicant "that is antithetical to the state or a legal unit of the state," (4) "resistance to recruitment or coercion" by a non-state actor, (5) "targeting the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence," (6) "criminal activity," (7) "perceived, past or present, gang affiliation," or (8) "gender."[282] The rationale behind this new provision suggests that, "[w]ithout additional evidence, these circumstances will generally be insufficient to demonstrate persecution on account of a protected ground" and that this new "guidance" will "further the expeditious consideration" of claims for protection.[283] Despite the expansive set of claims captured by this provision, the Proposed Rule "does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination."[284]

This new proposal is wide-ranging and will affect asylum-seekers who have fled countries around the world, though UNHCR notes that it appears many of these provisions disproportionately target the types of asylum claims frequently brought by individuals who were forced to flee the northern Central America countries of El Salvador, Guatemala, and Honduras, which in recent history have produced large numbers of asylum-seekers. Many women and LGBTI claimants will also be disadvantaged, as the Proposed Rule all but directs adjudicators to deny gender-based claims, even though well-established international standards recognize that gender can form the basis of a claim for refugee status.

UNHCR observes that, even before the publication of the Proposed Rule, U.S. law and policy was at variance with international legal standards regarding the interpretation of the refugee definition under Article 1A(2) of the 1951 Convention. The current U.S. legal standard for assessing whether persecution feared is 'for reasons of' a protected ground (often referred to as the 'nexus' in U.S.

[281] Proposed Rule on Asylum and Withholding, pp. 36,381, 36,292.
[282] Proposed Rule on Asylum and Withholding, p. 36,281.
[283] Proposed Rule on Asylum and Withholding, pp. 36,281-82.
[284] Proposed Rule on Asylum and Withholding, p. 36,282.

practice) requires an applicant to establish that the ground upon which his or her asylum claim is based "was or will be at least one central reason" for the persecution suffered.[285] U.S. federal courts are split as to the standard upon which to evaluate nexus,[286] meaning that the likelihood of an asylum seeker to be granted protection currently varies based on jurisdiction. That regional variation notwithstanding, the way that the concept is applied in U.S. practice establishes a higher threshold that an applicant must meet than the standard articulated in international law. While the Proposed Rule purports to standardize the review of nexus, it does so in way that both risks denying protection to potential meritorious, genuine asylum claims and disregards international legal standards, moving the United States further out away from compliance with its international obligations.

Under Article 1A(2) of the 1951 Convention, a refugee is a person outside their country of origin who has a "well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership in a particular social group or political opinion" and is unwilling or unable to avail himself or herself of the protection of that country.[287] UNHCR guidance states that a Convention ground must be *a relevant contributing factor* to the feared persecution but that it need not be shown to be the sole, or dominant cause.[288] Whether there exists a causal link between the harm and a Convention ground "must be assessed in light of the text context, objects, and purposes of the Refugee Convention and Protocol."[289] Accordingly, establishing whether a claim involves a causal link between the persecution feared and a protected ground requires a highly fact-specific inquiry that demands case-by-case adjudication, which is incompatible with the summary rejection of certain types of claims.

The Proposed Rule, as described below, puts forward a set of criteria that will further tighten the concept of "nexus," moving the U.S. further away from the position at international refugee law, according which a person is a refugee so long as the persecution they fear is 'for reasons of' a protected ground, in the sense that ground is a "relevant contributing factor."

i) Nexus in cases involving personal or interpersonal animus

The Proposed Rule attempts to foreclose claims based on personal animus or retribution and interpersonal animus in which the persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group beyond the member who has raised the claim at issue. These exceptionally broad categories will most likely foreclose many claims to refugee status that would be recognized under the 1951 Convention and 1967 Protocol. UNHCR observes that these provisions appear intended to target claims where the persecutor is a "non-State actor," or what the Government has referred to as a "private actor."[290] In particular, the rationale behind the prong concerning "interpersonal animus" appears to focus on claims based on domestic violence, citing *Matter of A-B-*.[291] Such an interpretation of the refugee definition is sharply at odds with international law.

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[285] 8 U.S.C. § 1158(b)(1)(B)(i).
[286] *See, e.g.*, Christian Cameron, *Why Do You Persecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT'L & COMP. L. REV. 233, 234; 247 (2014).
[287] Refugee Convention, art. 1A(2) (emphasis added).
[288] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.
[289] James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. OF INT'L Law 207, ¶ 6 (2002).
[290] *See Matter of A-B-*, 27 I. & N. Dec. 316, 337 (2018).
[291] Proposed Rule on Asylum and Withholding, p. 36, 281.

Under the UNHCR Handbook, which, as previously mentioned, the U.S. Supreme Court regards as authoritative guidance on interpreting the 1951 Convention and 1967 Protocol, persecution can be perpetrated by State and non-State actors.[292] Although persecution frequently relates to action by the authorities of a State, it "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned."[293] While asylum claims involving non-State actor persecutors tend to be regarded as involving a more nuanced analysis, the complexity of these types of claims does not render them any less relevant nor deserving of international protection:[294]

> "In UNHCR's view, the source of the feared harm is of little, if any, relevance to the finding whether persecution has occurred, or is likely to occur. It is axiomatic that the purpose and objective of the 1951 Convention is to ensure the protection of refugees. There certainly is nothing in the text of the Article that suggests the source of the feared harm is in any way determinative of that issue. UNHCR has consistently argued, therefore, that the concerns of well-foundedness of fear, of an actual or potential harm which is serious enough to amount to persecution, for a reason enumerated in the Convention are the most relevant considerations."[295]

Thus, it would be contrary to international law to dismiss claims involving non-State actors without evaluating whether those actors harmed the applicant for reasons of a protected ground.

In addition, international law does not require that all members of a particular social group risk persecution.[296] An applicant for asylum need not demonstrate that all individuals who share the same protected characteristic that they possess are at risk of persecution in order to establish a causal link between the persecution feared by the applicant and an enumerated Convention ground. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, are not known to the persecutors, or cooperate with the persecutor.[297] For instance, "in cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established.[298] The fact that other individuals who belong to the same particular social group are not targeted for harm does not disqualify from refugee status the person who fears persecution for reason of belonging to that group.

Moreover, the existence of personal or interpersonal animus does not necessarily lead a claim to fail for lack of nexus. As explained above, one or more Convention grounds must be a relevant, contributing factor for the persecution, "though it need not be shown to be the sole, or dominant cause."[299] Persecution could, therefore, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link so

[292] UNHCR Handbook, ¶ 65.
[293] UNHCR Handbook, ¶ 65.
[294] Brief for UNHCR as Amicus Curiae, at 16-17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[295] UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19. *See also* Brief for UNHCR as Amicus Curiae, at 16; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[296] *See* UNHCR, *Guidelines on International Protection No. 2*, ¶17 ("An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution").
[297] UNHCR, *Guidelines on International Protection No. 1*, ¶ 21.
[298] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14.
[299] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.

long as the Convention ground(s) were a "relevant, contributing factor." "Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established."[300] Accordingly, personal or interpersonal animus does not necessarily preclude a grant of refugee status.

ii) Nexus in cases involving gang violence and criminal activity

The Proposed Rule names several categories of claims related to violence by gangs and other organized criminal groups as not in general to be favorably adjudicated for lack of nexus. Specifically, these provisions would largely preclude claims based on generalized disapproval of or disagreement with gangs or other criminal groups, resistance to recruitment, targeting of an applicant based on wealth or affluence, criminal activity, and gang affiliation. As explained above, international law does not permit entire classes of claims to be *prima facie* dismissed without performing an individualized assessment to determine whether an asylum-seeker meets the refugee definition. Instead of categorizing claims in such manner as to reject asylum-seekers, the starting point of the analysis should be whether an individual has suffered or fears persecution on account of a protected ground.

Applicants with gang-related claims may meet the refugee definition when they have suffered or fear persecution for reasons of a Convention ground. UNHCR has explained in detailed guidance how applicants with gang-related asylum claims may have suffered or fear persecution that is linked to any of the Convention grounds.[301] UNHCR has observed, "Gang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. . . . Certain social groups may, however, be specifically targeted."[302] In extensive analysis, UNHCR has explained that there are a variety of distinct categories of applicants in gang-related asylum claims who will likely be in need of international protection. In neglecting to take into account this guidance, the Proposed Rule is likely to result in failure to identify many claimants with international protection needs.

UNHCR's guidance has recognized that those who disapprove of or disagree with gangs and other organized criminal groups may be in need of international protection.[303] For instance, gangs often target individuals they perceive as contravening their rules or resisting their authority for reasons of race, religion, political opinion, or membership in a particular social group.[304] In addition, UNHCR has explained that those who resist gang activity may have claims for refugee status on account of various Convention grounds.[305] For example, applicants may have claims based on religion where the applicants' religious beliefs are incompatible with gang lifestyles,[306] based on political opinion if they refused the advances of a gang because they were "politically

[300] UNHCR, *Guidelines on International Protection No. 1*, ¶ 21.
[301] Gang Guidance, ¶¶ 31-42; *see also* El Salvador Eligibility Guidelines, p. 28; Guatemala Eligibility Guidelines, p. 39; Honduras Eligibility Guidelines, p. 44.
[302] Gang Guidance, ¶¶ 10-11.
[303] Gang Guidance, ¶¶ 45-47; *see also* El Salvador Eligibility Guidelines, p. 28; Guatemala Eligibility Guidelines p. 39; Honduras Eligibility Guidelines, p. 44.
[304] *See* El Salvador Eligibility Guidelines, p. 30; Guatemala Eligibility Guidelines, p. 39; Honduras Eligibility Guidelines p. 45.
[305] Gang Guidance ¶¶ 12, 32, 36-41, 48.
[306] Gang Guidance, ¶ 32 ("It could, for example, be the case where the applicant refuses to join a gang because of his/her religious belief or conscience").

or ideologically opposed to the practices of gangs";[307] or claims based on membership in a particular social group where, for example, those "[i]ndividuals who resist forced recruitment into gangs or oppose gang practices . . . share innate or immutable characteristics."[308] Finally, gang deserters and former gang members may fear retaliation for leaving the gang based on a Convention ground.[309] This is not to say, of course, that every individual who opposes gangs is automatically entitled to asylum. The non-citizen has to meet the other parts of the refugee definition. That is one reason why international law requires a case-by-case approach to adjudication of asylum claims.

Beyond the above profiles, international law has recognized that individuals may have international protection needs for reasons of their wealth or affluence (or imputations of the same) as well as being victim of criminal activity. As to the first category related to wealth and affluence, UNHCR guidance provides, "Depending on the particular circumstances of the case, UNHCR considers that persons in professions or positions susceptible to extortion, including but not limited to those involved in informal and formal commerce as business owners, their employees and workers, or as street vendors; public transport workers; taxi and *mototaxi* drivers; public sector employees; and certain returnees from abroad" may have claims to refugee status on account of their membership in a particular social group, among other Convention grounds.[310] That the persecutor may reap financial gain from the harm inflicted does not undercut the applicant's claim, as a Convention ground must be a relevant contributing factor to the harm suffered but that it need not be shown to be the sole, or dominant cause.[311]

Turning to the second category related to criminal activity, as previously discussed, the fact that an asylum-seeker suffered or fears persecution by a non-State actor in no way means that they may for that reason be denied international protection. Rather, the inquiry must center on whether the the applicant fears persecution for reasons of a Convention ground. UNHCR has observed that victims of criminal activity can establish a nexus notably where the criminal actors targeted the applicant because of the applicant's political opinion, some immutable characteristic shared with others in their social group, or another ground. Where, for instance, gang or other criminal violence affects large segments of a society, it is possible for a person to be targeted for reasons of an enumerated ground. UNHCR guidance has underscored that in such circumstances "[y]oung people, in particular, who live in communities with pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention."[312] This is merely one example of many different profiles of victims of criminal activity who may meet the refugee definition.

iii) Nexus in cases involving gender-based claims

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[307] Gang Guidance, ¶ 48 ("Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion").

[308] Gang Guidance, ¶¶ 36-41("Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance").

[309] Gang Guidance, ¶¶ 13-14.

[310] El Salvador Eligibility Guidelines, pp. 31-32; Guatemala Eligibility Guidelines, pp. 40-41; Honduras Eligibility Guidelines, pp. 46-47.

[311] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.

[312] Gang Guidance, ¶¶ 63, 65.

The Proposed Rule provides that gender-based claims will, for the most part, no longer be favorably adjudicated. The rationale behind this specific prong of the new provision on nexus cites to a Tenth Circuit case that had noted, "There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there."[313] UNHCR is deeply concerned with the Proposed Rule's general rejection of gender as a basis for asylum claims, as it will foreclose international protection to many individuals who meet the refugee definition in the 1951 Convention. The change in law envisioned by the Proposed Rule will lead the United States to diverge sharply from well-established guidance according to which claims involving persecution linked to the applicant's gender are fully capable of falling within the refugee definition.

Under UNHCR standards, "[i]t is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme."[314] Although gender is not specifically referenced in the refugee definition set forth under Article 1A(2) of the 1951 Convention, it is widely accepted that gender can influence the type of persecution suffered as well as be a reason for that harm.[315] Accordingly, the UNHCR Handbook emphasizes that "[e]nsuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition," and UNHCR has provided extensive guidance detailing how gender can form the basis of claims on each of the five enumerated grounds in the Convention.[316]

International guidance identifies numerous ways in which an individual may suffer persecution for reasons of their gender.[317] For instance, gender may be a relevant contributing factor to persecution that takes the forms of discrimination,[318] sexual violence,[319] domestic violence,[320] coerced family planning,[321] female genital mutilation,[322] punishment for transgression of social mores,[323] and trafficking,[324] among others. If the well-founded fear of being persecuted in these or other ways is for reasons of a Convention ground—race, religion, nationality, membership of a particular social group, or political opinion—then there exists the connection required by the refugee definition.[325] In cases where a female applicant suffered domestic abuse, for example, nexus would be satisfied if the persecutor harmed the applicant for reasons related to her relationship with the persecutor or status in the relationship, in addition to any other reasons or motives that may exist.[326] Alternatively, in that same profile of case, nexus would be established

[313] Proposed Rule on Asylum and Withholding, p. 36,281 (citing *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005)).
[314] UNHCR, *Guidelines on International Protection No. 1*, ¶ 2
[315] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 1-2.
[316] UNHCR Handbook, ¶ 22; *see generally* UNHCR, *Guidelines on International Protection No. 1*.
[317] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 1-2. *See also* El Salvador Eligibility Guidelines, pp. 38-39; Guatemala Eligibility Guidelines, p. 49; Honduras Eligibility Guidelines, p. 56.
[318] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 14-15.
[319] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[320] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[321] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3. The Proposed Rule recognizes that individuals who have suffered or fear forced abortion or involuntary sterilization "shall be deemed to have been persecuted on account of political opinion" or "shall be deemed to have a well-founded fear of persecution on account of political opinion." Proposed Rule on Asylum and Withholding, p. 36,291. UNHCR observes that, given the gender element that is often present in claims involving forced abortion, the provision redefining "political opinion" is inconsistent with this provision on nexus that will purportedly preclude all gender-based claims.
[322] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[323] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[324] UNHCR, *Guidelines on International Protection No. 1*, ¶ 18.
[325] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20. UNHCR stresses once again that "[t]he claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted." *Id.* ¶ 23.
[326] Brief for UNHCR as Amicus Curiae, at 17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).

if the State's failure to protect the applicant was connected to State biases and discrimination against women, for example, for religious or cultural reasons, engaging the Convention ground of religion and/or political opinion.[327]

The size of a group of people who share a protected characteristic has no bearing on whether it may form the basis of a claim for international protection. In other words, "[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds."[328] "The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument is misconceived, as the other grounds are not bound by this question of size."[329] UNHCR has explained, "Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[330]

UNHCR recommends that the Government strike this provision that all but precludes asylum in cases involving eight different types of claims, as international law requires that applications for international protection not be rejected in the absence of a case-by-case adjudication of their merits. Further, UNHCR recommends that the Government implement a standard for nexus in U.S. law which requires only that a Convention ground be a relevant, contributing factor, not necessarily one central reason, for an applicant's persecution, which will bring the United States into conformity with international legal standards on this issue.

5. Evidence

The Proposed Rule introduces a new provision barring the consideration of evidence related to cultural stereotypes in the adjudication of claims for protection. It dictates, "For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application." The rationale behind this provision is indicated to be that "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim," citing to the former Attorney General's decision in *Matter of A-B-* as support.[331] The parenthetical accompanying the cite to *Matter of A-B-* suggests that, for example, evidence about topics like *machismo* and family violence are not appropriate.[332]

UNHCR is concerned that this provision of the Proposed Rule will severely limit asylum-seekers' ability to submit and have adjudicators consider critical country conditions evidence that bears on

[327] Brief for UNHCR as Amicus Curiae, at 17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[328] UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 18-19.
[329] UNHCR, *Guidelines on International Protection No. 1*, ¶ 31.
[330] UNHCR, *Guidelines on International Protection No. 1*, ¶ 4; *see also* UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 18-19 ("Cases in a number of jurisdictions have recognized 'women' as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria").
[331] Proposed Rule on Asylum and Withholding, p. 36,282.
[332] Proposed Rule on Asylum and Withholding, p. 36,282.

determining whether they are eligible for international protection. While UNHCR observes that no documentary proof is required for states to recognize a refugee claim, information on certain social norms, attitudes, practices, and beliefs may support an applicant's case.[333] For example, information about specific social norms related to masculinity, the expectations of women and girls, and the types of treatment that are tolerated by communities and authorities in a given society may provide key context for evaluating whether a Convention ground is applicable, including whether a posited particular social group is legally cognizable (especially whether it satisfies the social distinction and particularity prongs of that analysis) and connected to the fear of persecution, whether the government in the applicant's country of origin is unwilling or unable to protect them, as well as whether the applicant is eligible for CAT protection.[334] In addition, this type of evidence may corroborate other aspects of applicants' claims, such as the persecution that they suffered or fear. By foreclosing the submission of a potentially wide body of country evidence, the provision will make it exceptionally challenging for asylum-seekers to meet the evidentiary burden required under U.S. law.[335] Moreover, UNHCR is particularly concerned that restricting the submission of evidence related to 'cultural stereotypes' will in fact encourage adjudicators to improperly rely, even if inadvertently, on personal assumptions or speculation about the context and circumstances that an asylum-seeker fled.[336] UNHCR is troubled that this rule will have an heavy negative impact on applicants with gender-based claims, child asylum applicants, and others.

Under international law, states are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[337] Despite variance in the specific frameworks for examining asylum applications that exist from State to State, every framework should include essential guarantees and basic requirements.[338] UNHCR considers denying asylum applicants the opportunity to present relevant evidence to be a breach of procedural fairness, as it constricts applicants' abilities to establish that they meet the refugee definition set forth under Article 1A(2) of the 1951 Convention.[339] Whether claimed cultural or societal norms or patterns which may be understood as stereotypes, specifically, are relevant in refugee status determination depends on the nature and reliability of the information. When such information is reliable, it may be pertinent as evidence in an individual asylum case. In other cases, 'stereotype' evidence may indeed be of limited or no probative value, or simply irrelevant. Accordingly, international standards do not permit the categorical exclusion of certain types of evidence that may be critical to conducting refugee status determination.

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[333] UNHCR Handbook, ¶ 37 ("No documentary proof . . . is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case.").

[334] *See, e.g.*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, Report to the Human Rights Council, A/HRC/31/57 ¶ 10 (Jan. 5, 2016) ("States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity.").

[335] The standard for corroboration in asylum cases under U.S. law has become increasingly difficult for applicants to meet, making their ability to submit country conditions evidence that supports their claim even more critical. Since the passage of the REAL ID Act in 2005, an immigration judge can require an applicant to provide corroborating evidence to sustain his or her burden of proof, even if the immigration judge finds the applicant's testimony credible, persuasive, and specific. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302 (codified at 8 U.S.C. § 1158(b)(1)(ii) (2014)); 8 U.S.C. § 1158(b)(1)(B)(ii) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

[336] *See* UNHCR & European Refugee Fund of the European Comm'n, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 41 (May 2013), https://www.refworld.org/docid/519b1fb54.html.

[337] UNHCR Handbook, ¶ 189.

[338] UNHCR Handbook, ¶ 192.

[339] UNHCR, *Procedural Standards for RSD Under UNHCR's Mandate*, § 7.4.1.

UNHCR recommends that the Government strike this provision from the Proposed Rule, as it is clearly at variance with international standards on procedural fairness in asylum adjudication and will have a significant impact on applicants who submit certain types of claims. Instead, the Government should permit applicants to continue to support their claims with country conditions evidence that provides adjudicators with information that can help them determine whether the applicant is entitled to refugee protection.

6. Internal Relocation

The Proposed Rule creates a presumption that internal relocation would be reasonable in cases involving non-state actors, which it refers to as "private actors," unless the applicant can establish by a preponderance of the evidence that it would be unreasonable to relocate.[340] In addition, the rule identifies individuals or entities that constitute "private actors," including gang members, rogue officials, and family members or neighbors who are not themselves government officials.[341]

UNHCR is concerned that the new presumption that internal relocation is reasonable in non-state actor cases establishes an unfairly high threshold for establishing a protection claim, will ultimately preclude refugees from receiving international protection and could result in *non*-refoulement in violation of Article 33(1) of the 1951 Convention. Further, UNHCR is particularly troubled that this provision appears to apply to child applicants, whose capacity to relocate internally is particularly limited and who have less capacity to meet the burden of proof proposed by these changes.

It is acknowledged that the concept of internal flight or relocation is certainly considered in some countries, in appropriate cases, in the implementation of their refugee protection obligations. It should however not be seen as an independent test in the determination of refugee status, and should not be used as a presumptive bar.[342] UNHCR acknowledges that the question of whether an asylum applicant could internally relocate very well may arise in determining asylum eligibility[343] - and indeed has arisen in U.S. jurisprudence for decades[344] - yet urges that this must be considered as part of the holistic assessment of refugee status.[345]

As a baseline principle, UNHCR notes that the criteria for refugee status are to be interpreted in a liberal and humanitarian spirit, in keeping with the object and purpose of the Convention. [346] International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum.[347] Because asylum is not a last resort, therefore, internal relocation cannot be invoked "in a manner that would undermine important human rights tenets

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[340] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to revise 8 C.F.R. § 208.13(b)(3)(iii) so that internal relocation is presumed reasonable in instances where the persecutor is not the government), *and id.* at 36,294 (proposing to revise 8 C.F.R. § 208.16(b)(3)(iii) so that internal relocation is presumed reasonable where the persecutor is a private actor); *see also id.* at 36,272 (proposing to consider the reasonableness of internal relocation in credible fear screenings), *and id.* p. 36,282 (claiming that "there is no apparent reason" why internal relocation would not be reasonable where the persecutor is a non-government actor).

[341] *See* Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,293 (proposing to revise 8 C.F.R. 208.13(b)(3)(iv) so that "private actors" for the purposes of section iii includes "gang members, rogue officials, family members who are not government officials, or neighbors who are not government officials), *and id.* at 36,294 (proposing to narrow the definition of "private actor" in 8 C.F.R. § 208.16).

[342] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[343] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[344] *See* Proposed Rule on Asylum and Withholding, p. 36,282 (explaining that the current regulations provide a "nonexhaustive list of factors for adjudicators to consider in making internal relocation determinations"), *and id.* at 36,272 (citing *Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015)); *see also, e.g.*, 8 C.F.R. §§ 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B), 208.16(b)(1)(i)(B), 1208.16(b)(1)(i)(B).

[345] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 6-30.

[346] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[347] UNHCR, *Guidelines on International Protection No. 4,* ¶ 4.

underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement."[348]

Internal relocation should be considered as part of the holistic assessment of the asylum claim (as opposed to creating a presumption of denial, as the Proposed Rule sets out to do). In this holistic assessment, the adjudicator should look to both relevance and reasonableness: that is, is relocation practical, safe, and legally accessible (if not, this inquiry is not relevant), and can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship (if not, this inquiry is not reasonable).[349] Where the persecutor is a non-state actor, the adjudicator should look to the capacity for the persecutor to pursue the claimant in other parts of the country, as well as the capacity and willingness of the state to provide effective protection.[350]

UNHCR observes that asylum-seekers may not be able to flee or relocate within their countries of origin when persecuted by non-state actors,[351] and imposing a presumption of such fails to account for the reality of many asylum-seekers. In cases involving non-state agents of persecution, adjudicators must perform a nuanced analysis of whether the persecutor is likely to pursue the claimant to the proposed area of relocation and whether effective, durable State protection from the harm feared exists in that place.[352] With respect to the availability of State protection in the proposed area of relocation, a variety of factors must be considered, including the ability and willingness of the State to provide protection in both the original area of persecution and the proposed area of relocation.[353] Because assessing reasonableness of internal relocation involves a highly fact- and location-specific inquiry, it is not possible to establish a presumption that internal relocation is reasonable in this type of case.

The use of the concept of internal relocation should not create additional burdens for asylum-seekers, as the Proposed Rule would do.[354] Instead, the burden of proving that internal relocation is reasonable should rest on the one who asserts the allegation.[355] Where internal relocation is considered, international law required that a particular area of the applicant's country of origin be identified, and that the applicant then have an opportunity to respond.[356] The Proposed Rule sets the burden with the asylum-seeker, creating a presumption of internal relocation alternatives for non-state actor persecution. Instead, the burden to demonstrate that internal relocation is reasonable should lie with the adjudicator, and to meet that burden, the adjudicator would need to specify a location in the country of origin where the applicant could lead a relatively normal life without facing undue hardship.[357]

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[348] UNHCR, *Guidelines on International Protection No. 4*, ¶ 4.
[349] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 6-31.
[350] UNHCR, *Guidelines on International Protection No. 4,* ¶¶ 15-17.
[351] "UNHCR has long maintained that the 1951 Convention does not confer protection exclusively against persecution by state agents. Rather, persecutory conduct can also be committed by non-state agents." UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, 13 (Feb. 2018) https://www.refworld.org/docid/5a7835f24.html.
[352] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 7(I)(c), 17.
[353] UNHCR, *Guidelines on International Protection No. 4*, ¶ 15; *see also* Gang Guidance, ¶ 53 (outlining the analysis for internal flight in gang-based cases). UNHCR guidance on this issue provides, "As with questions involving State persecution generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas." UNHCR, *Guidelines on International Protection No. 4*, ¶ 15.
[354] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 33-34.
[355] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 33-34; *see also* UNHCR Handbook, ¶196 (discussing burden of proof).
[356] UNHCR, *Guidelines on International Protection No. 4*, ¶ 6.
[357] *See* UNHCR, *Guidelines on International Protection No. 4*, ¶ 7(II)(a) (addressing considerations concerning the "reasonableness" prong of the internal relocation analysis); *see also id*. ¶¶ 18-30 (elaborating on these considerations).

There are special considerations in any analysis of an internal flight or relocation alternative for child applicants, especially unaccompanied children.[358] Given that child asylum applicants are frequently targeted by non-state agents of, such as militarized groups, criminal gangs, and caregivers, this vulnerable group stands to be particularly impacted by the Proposed Rule's provision creating a presumption that internal relocation is reasonable in cases involving non-state actors.[359] Internal relocation may not be practically realistic for children, and poses potentially severe consequences, including violations of fundamental human rights like the right to life, survival, and development.[360] The child's best interests should inform the determination of whether internal relocation is reasonable, as well as whether it is relevant.[361] What is or is not in a child's best interest is a highly fact-specific analysis that often requires an adjudicator to elicit critical information from the child applicant or other witnesses. Due to their trauma history, age, and maturity level, children may have a difficult time articulating their claims, and they are not likely to be able to rebut a presumption of reasonable internal relocation, even where it is not actually reasonable.

In sum, UNHCR is concerned that the Proposed Rule's creation of a presumption of internal relocation for non-state actor persecution is out of step with the object and purpose of the Convention. Substantively, internal relocation should be considered on a case-by-case basis, as part of the holistic analysis of the refugee claim, and should weigh the reasonableness and relevance of the possibility of relocation. The realities of non-state actor persecution make it imperative that such claims be included in such holistic, case-by-case analysis. Procedurally, the burden of proof should not fall to the asylum-seeker, but rather to the adjudicator, who should identify an area of the country that would be reasonable and relevant for relocation, and who should offer the individual the opportunity to rebut that assertion. Finally, the special considerations owed child asylum applicants, particularly unaccompanied children, further confirm that a presumption of internal relocation as applied to this population would be inappropriate.

UNHCR recommends that the Government not implement the new provision creating a presumption of internal relocation in cases involving asylum-seekers who have suffered persecution by non-state actors. Instead, UNHCR recommends that the Government bring its adjudication of internal relocation in line with the international legal principles described above. At the very least, children's claims should be exempted from this section of the Proposed Rule.

7. Factors for Consideration in Discretionary Determinations

i) Changes put forward in the Proposed Rule

UNHCR is concerned that the Proposed Rule mandates that adjudicators consider additional negative factors in determining whether ultimately to grant asylum. This stems from the "discretionary" provision in U.S. law; that the attorney general or homeland security secretary "may" grant asylum if the applicant meets the definition.[362] The Proposed Rule instructs adjudicators working for the attorney general or homeland security secretary to use these

[358] For example, "What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation." UNHCR, *Guidelines on International Protection No. 4*, ¶ 15.
[359] *See* UNHCR, *Guidelines on International Protection No. 8*, ¶ 37.
[360] *See* UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57 ("Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.").
[361] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57.
[362] Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A) (2018).

additional discretionary factors in a wide-reaching and, given the very limited circumstances in which an applicant may overcome them, all but mandatory fashion. By doing so, the Proposed Rule effectively creates new bars to asylum that are beyond the exclusionary grounds proposed in the Convention and Protocol.

The Proposed Rule introduces a series of twelve negative discretionary factors that adjudicators must consider in any asylum application, and which will forcefully influence whether an application for asylum will be granted.[363] First, the provision identifies three "specific but non-exhaustive factors that adjudicators *must* consider" in determining whether to grant asylum.[364] These factors are "significantly adverse" for the purpose of granting asylum (though the Proposed Rule notes that that the adjudicator "should also consider any other relevant facts and circumstances"). They include:

(i) Unlawful entry into the United States unless "made in immediate flight from persecution in a contiguous country";
(ii) Failure to apply for protection in at least one country through which he or she transited before arriving in the United States; and
(iii) Use of fraudulent documents to enter the United States unless the individual arrives directly from his or her country of origin without transiting through any other country.[365]

Next, the provision proposes nine additional adverse factors, "the applicability of which would ordinarily result in the denial of asylum as a matter of discretion." (Adjudicators may "nevertheless favorably exercise discretion in extraordinary circumstances" or extreme and unusual hardships.[366]) These nine factors apply to any applicants who:[367]

(A) Spend more than 14 days in any transit country immediately before arriving in the United States;
(B) Transit through more than one country between their country of origin and the United States;
(C) Have certain criminal histories that will now remain relevant for immigration purposes, despite any reversal, vacatur, expungement, or modification of their conviction or sentence, unless they were found not guilty;
(D) Accrue more than one year of unlawful presence in the United States prior to filing their asylum application;
(E) Fail to timely file required federal, state, and local income tax returns or otherwise fail to satisfy any federal, state, or local tax obligations;
(F) Have had two or more prior asylum applications denied for any reason;
(G) Have withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;
(H) Fail to attend their asylum interviews with DHS; or

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[363] Proposed Rule on Asylum and Withholding, p. 36,283 (proposing three mandatory discretionary factors and nine additional "adverse factors").
[364] Proposed Rule on Asylum and Withholding, p. 36,283 (emphasis added).
[365] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing additions at 8 CFR §§ 208.13(d)(1) and 1208.13(d)(1)).
[366] Proposed Rule on Asylum and Withholding, p. 36,283 (giving examples of extraordinary circumstances "such as those involving national security or foreign policy considerations", and stating that if any of the nine adverse factors are present, the adjudicator can grant asylum if the applicant shows "by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship"). The Proposed Rule cites to previous prior case law on exceptions to discretionary denials.
[367] Proposed Rule on Asylum and Withholding, p. 36,283 (stating that if any of the nine adverse factors are present, the adjudicator can grant asylum if the applicant shows "by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship").

(I) Were subject to a final order of removal and did not file a motion to reopen to seek asylum based on changed country conditions within a year of those changes in country conditions.[368]

The Proposed Rule only permits an applicant to overcome any of the above nine adverse discretionary factors where there exist "extraordinary circumstances" or when the applicant can demonstrate by clear and convincing evidence that denial "would result in exceptional and extremely unusual hardship."[369] The regulation specifically contemplates "extraordinary circumstances" as encompassing "national security or foreign policy considerations." It does not elaborate on what may qualify as "exceptional and extremely unusual hardship" in the asylum context, but rather refers to previous case law.[370] Regardless, this provision of the Proposed Rule concludes by noting that even when an applicant can establish "extraordinary circumstances," those may nevertheless "still be insufficient to warrant a favorable exercise of discretion."[371]

It is UNHCR's understanding that a discretionary denial of asylum has typically been entered *after* the adjudicator has considered other aspects of the asylum claim,[372] and our comments below reflect this understanding. However, UNHCR notes with concern that this panoply of discretionary factors could, in practice, interplay with other aspects of the Proposed Rule such that they deny access to consideration of the substance of the asylum claim altogether. For instance, the Proposed Rule's provisions on frivolous claims[373] indicates that an asylum claim can be dismissed as frivolous (and the applicant rendered unable to reapply) if the application is "clearly foreclosed by applicable law."[374] UNHCR is concerned, in light of other changes suggested in the Proposed Rule, that an applicant who falls into one of these (exceptionally broad) categories for discretionary denial could see their application "foreclosed by applicable law." Likewise, the Proposed Rule contains provisions permitting pretermission of applications that do not establish a *prima facie* claim on paper and / or are "legally deficient,"[375] and UNHCR is concerned that this could be construed to permit the pretermission of claims which trigger one or more of these discretionary factors. Consequently, it seems eminently possible that these provisions could, in combination, preclude consideration of the substance of the asylum claim.

ii) UNHCR's views on discretionary denials

UNHCR is concerned that the expansive new set of negative discretionary factors will effectively function as additional bars to asylum, in a manner far beyond the grounds for exclusion prescribed by Article 1E and Article 1F of the Convention and Protocol. In line with international standards, provisions for the exclusion of those who would otherwise qualify for protection must always be applied with "great caution" and interpreted in a "restrictive manner" in light of the possible serious

[368] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing additions to 8 CFR §§ 208.13(d)(2)(i); 1208.13(d)(2)(i)).
[369] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to revise 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii)).
[370] 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii). "Exceptional and extremely unusual hardship" is a concept in U.S. immigration that historically was relevant to determining eligibility for other relief, including cancellation of removal, but never had a place in the asylum eligibility analysis.
[371] 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii). The provision does not comment on whether exceptional and extremely unusual hardship may sometimes be insufficient to warrant a favorable exercise of discretion.
[372] *See* Proposed Rule on Asylum and Withholding, p. 36,282 ("[A]fter demonstrating statutory and regulatory eligibility" applicants must then demonstrate that the Attorney General or Secretary should "exercise his discretion to grant asylum."); *see also, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018) ("[O]nce an officer has determined that an applicant is eligible for asylum, he or she must then decide whether to favorably exercise discretion . . . .").
[373] *See supra* Section III.B.1, p. 11.
[374] Proposed Rule on Asylum and Withholding, p. 36,295 (proposing to revise 8 C.F.R. § 208.20(c)(4)); *see also id.* p. 36,304 (proposing to revise 8 C.F.R. § 1208.20(c)(4)).
[375] Proposed Rule on Asylum and Withholding, p. 36,277. *See* discussion at *supra* Section III.B.2, p. 16.

consequences of denying protection to an asylum-seeker.[376] Though the Proposed Rule asserts that these adverse discretionary factors "fall short of grounds of mandatory denial," it seems to institute a new set of bars to asylum, as the presence of any one of those factors will lead to denial of protection in all but the rarest of circumstances. The twelve articulated factors, if applied, will contravene fundamental principles guaranteed under the 1951 Convention, including non-discrimination, non-penalization for irregular entry or presence, and non-refoulement. Because the Proposed Rule makes no exception for child asylum-seekers, UNHCR anticipates that many members of this exceptionally vulnerable group will be refouled due to these new provisions that all but bar them from relief and protection.

UNHCR observes that, even prior to the Proposed Rule, the U.S. practice of discretionary denial of asylum was at variance with international law, which does not recognize discretion as a factor in providing refugee protection. Under international law, someone who meets the definition articulated in Article 1 of the Convention and Protocol "shall" be considered a refugee.[377] This definition has a declaratory character, that is, "a person does not become a refugee because of recognition, but is recognised because s/he is a refugee."[378] It follows that failure to meet certain technical requirements "does not negate the refugee character of the person."[379]

Fundamentally, the right to seek and enjoy asylum, included inter alia in Article 14 of the Universal Declaration on Human Rights, is implemented in part by States' obligations to provide international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol. The United States delivers on this responsibility in part through the status of "asylee" – the outcome of a successful asylum claim. This cannot depend on the discretion of the adjudicator; protection under the 1951 Convention and its 1967 Protocol is not contingent on the discretion of refugee authorities.[380]

When an individual is determined to meet the 'inclusion criteria' of the refugee definition contained in Article 1A(2) of the 1951 Convention or the 1967 Protocol, that person should have their refugee status formally recognized through the domestic legal framework of the host country and be provided with a secure and stable status to stay and reside in the country.[381] In other words, once it is established that a person is a refugee, the person "lawfully stays" in the host country within the meaning of the 1951 Convention and should be accorded access to a range of rights allowing

[376] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[377] *See* Refugee Convention, art. 1A(2) (providing that "the term 'refugee' *shall* apply to" anyone who meets the definition under Article 1A(2)) (emphasis added).
[378] UNHCR Handbook, ¶ 28.
[379] UNHCR, *Interpreting Article 1 of the 1951 Convention.*
[380] *See* UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶16, U.N. Doc. EC/SCP/54 (Jul. 1989) ("The legislative approach adopted by States to regulate refugee rights can, in itself, negatively influence their realization. In some countries, for example, the issue of refugee protection is approached as one of defining not the rights themselves but rather the powers vested in refugee officials. This means that the protection of refugee rights becomes an exercise of powers and discretions by those officials rather than enforcement of specific rights identified and guaranteed by law. In other cases the realization of refugee rights is left to depend ultimately on an exercise of ministerial discretion.").
[381] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001))), *with Cardoza-Fonseca*, 480 U.S. at 439–40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting Handbook, ¶ 42)). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification; freedom from arbitrary detention, and pathways to naturalization.

the person to integrate.[382] The U.S. discretionary provision, which effectively says that a person may meet the definition of a refugee but nonetheless not be granted asylum in the United States, goes against the object and purpose of the 1951 Convention and its 1967 Protocol by failing to ensure the effective implementation of the right to seek and enjoy asylum.

The international legal regime does acknowledge that there are individuals who may meet the positive ('inclusion') criteria for refugee status, but who nonetheless are excluded from international protection. The relevant provisions in the 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee (and is therefore entitled to the rights enumerated in the Convention itself) – and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status.[383] Such exclusionary considerations should generally be considered only after an assessment of the 'inclusion' aspects of the person's claim for refugee status, and should be balanced against the need for protection itself.[384]

There are three categories of criteria for exclusion, which are commonly referred to as "the exclusion clauses."[385] The first category—exclusion of persons already receiving United Nations protection or assistance[386]—is not relevant to the issues raised by this Proposed Rule. However, the second and third categories—exclusion of persons not considered to be in need of international protection[387] and of persons considered not to be deserving of international protection[388]—provides valuable guidance for the particular provisions at hand.

The Convention sets a high threshold for the exclusion of persons not considered in need of international protection under Article 1E. Individuals "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection in another country.[389] Because of the potential serious consequences of excluding an individual with international protection needs, "a strict test" with two core requirements controls whether an asylum-seeker is excludable under Article 1E.[390] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[391] In other words, the firm resettlement bar does not apply to individuals who could take up residence in a third country but have not done so. It also does not apply to individuals who merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[392] The object and

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[382] The object and purpose of the 1951 Convention and its 1967 Protocol is to ensure refugees can effectively gain access to international protection and the rights stipulated in the Convention (the importance of which is emphasized in the Protocol via art I(1)).
[383] Refugee Convention, arts. 1D - 1F.
[384] *See* UNHCR, *Guidelines on International Protection*, ¶ 31 ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."), *and* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1051 Convention Relating to the Status of Refugees*, ¶ 99 (Sep. 4, 2003), https://www.refworld.org/docid/3f5857d24.html (explaining that application of the exclusion clauses require both an evaluation of the crime, the applicant's role, and the nature of the persecution feared).
[385] UNHCR Handbook, ¶¶ 140-41 *et seq.*
[386] Refugee Convention, art. 1D; *see also* UNHCR Handbook, ¶ 142.
[387] Refugee Convention, art. 1E.
[388] Refugee Convention, art. 1F.
[389] Refugee Convention, art. 1E.
[390] UNHCR, *Note on the Interpretation of Article 1E of the 1951 Convention*, ¶ 2 (Mar. 2009), https://www.refworld.org/docid/49c3a3d12.html.
[391] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 6.
[392] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.

purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals.[393]

The Convention also sets a high threshold for the Article 1F exclusion clause to apply. Under this article, a person may only be excluded from refugee status when there are "serious reasons for considering" that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity; (b) he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee; or (c) he or she is guilty of acts contrary to the purposes and principles of the United Nations.[394] The rationale behind Article 1F "is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."[395]

The grounds for exclusion – that is, denial of refugee status to a person who would otherwise meet the eligibility criteria for international refugee protection – are enumerated exhaustively in Article 1 of the 1951 Convention. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect.[396] The exclusion clauses in Article 1F of the 1951 Convention, in particular, should not be confused with Article 33(2) of the 1951 Convention, which denies the benefit of non-refoulement protection under Article 33(1) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[397] Article 1F and Article 33(2) are distinct provisions that serve different purposes: Article 1F excludes individuals from the refugee definition, whereas Article 33(2) provides for exceptions to the principle of non-refoulement. Whereas Article 1F aims to preserve the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country and permits, under exceptional circumstances, the withdrawal of protection from refoulement of refugees who pose a serious actual or future danger to the host country or its community.

Accordingly, the Proposed Rule's new set of adverse discretionary factors undermine fundamental principles of the 1951 Convention and 1967 Protocol. The Proposed Rule effectively suggests that they function as additional bars to asylum (that is, grounds for exclusion). UNHCR is concerned they will be nearly impossible for many asylum-seekers to overcome, creating an onerous exclusion framework deeply at variance with international law. Further analysis of these adverse discretionary factors is provided, below.

a. Unlawful entry[398]

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[393] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 2.
[394] Refugee Convention, art. 1F
[395] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[396] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1051 Convention Relating to the Status of Refugees*, ¶ 7.
[397] Refugee Convention, art. 33(2).
[398] UNHCR notes that a separate policy directing that asylum-seekers who cross irregularly be denied asylum is being challenged in federal court. UNHCR filed amicus briefs addressing the asylum proclamation in *O.A. v. Trump*, D.D.C., 1:18-cv-02718 (Dec. 2018); *S.M.S.R. v. Trump*, D.D.C., 1:18-cv-02838 (Dec. 2018); *East Bay Sanctuary Covenant v. Barr*, Ninth Cir., Nos. 19-16487, 19-16773 (Oct. 2019). In addition, UNHCR has previously made public statements regarding the U.S. government's attempts to restrict asylum based on manner of entry. *See* UNHCR Press Release, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (15 July 2019), https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html (noting that such a rule "will endanger vulnerable people in need of international protection from violence or persecution"). UNHCR is concerned

The Proposed Rule directs that those who enter irregularly be denied asylum under the discretionary clause.[399] UNHCR is troubled that this element of the Proposed Rule appears to all but mandate the denial of asylum for applicants who enter the United States irregularly unless the individual fled persecution or torture in a contiguous country. This bar is at variance with three fundamental principles of international law underlying the 1951 Convention and 1967 Protocol, including non-discrimination, non-penalization for irregular entry or presence, and *non-refoulement*.[400] The Proposed Rule discriminates against asylum-seekers from particular countries of origin and penalizes them for their manner of entry into the United States,[401] and increases the risk that those individuals will be returned to a place where their lives or freedom are at risk; all these results contravene international legal standards.

The Convention "recognizes that the seeking of asylum can require refugees to breach immigration rules" and stipulates that refugees should not suffer penalties, or discrimination, for this reason.[402] Article 31(1) of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entry. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence."[403] The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties and encompasses "any administrative sanction or procedural detriment imposed on a person seeking international protection."[404] Disparate treatment of two groups of refugees—those who arrive at ports of entry and those who enter irregularly—is exactly this type of detriment, as is denying the latter group access to rights enumerated in the 1951 Convention. Making unlawful entry a negative discretionary factor in the determination of refugee status, which should not be a discretionary analysis in the first place, is a penalty that carries potentially serious consequences for someone seeking international protection, undermines the right to asylum and risk violations of the principle of non-refoulement.

UNHCR recommends that this element of the Proposed Rule not be enacted.

b. Transit factors[405]

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that this type of measure "excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations." *Id.*

[399] *See* Proposed Rule on Asylum and Withholding, p. 36,293 (proposing that 8 C.F.R. § 208.13(d)(1)(i) list unlawful entry or attempted unlawful entry into the United States as a "significant adverse discretionary factor"), *and id.* at 36,283 (explaining that irregular entry should be considered "significantly adverse for purposes of the discretionary determination").

[400] *See* Refugee Convention, Introductory Note.

[401] The rationale behind this adverse discretionary factor is a fairly clear expression of the U.S. government's intent to penalize asylum-seekers who enter irregularly. It highlights that it is a federal crime to enter the United States outside of a port of entry and discusses the "significant strain" on resources to respond to individuals who enter irregularly to seek asylum. Proposed Rule on Asylum and Withholding, p. 36,283. UNHCR observes that, if this provision is intended to exclude based on such criminal conduct, it would be at variance with the exclusion clause in Article 1F, which describes persons not deserving of international protection as those who have committed certain serious crimes or heinous acts.

[402] Refugee Convention, Introductory Note.

[403] UNHCR notes that the requirement in Article 31(1) for asylum-seekers to have "come directly" – while not the precise topic of this proposed change – may nonetheless be relevant for consideration when crafting a framework in line with international law. For a detailed discussion of the "come directly" term in Article 31(1), *see* Cathryn Costello, UNHCR Legal and Protection Policy Research series, PPLA/2017/01, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, § 4.2 (Jul. 2017) https://www.refworld.org/docid/59ad55c24.html (noting "there is strong support for the view that all refugees are to be regarded as 'coming directly' except those who have found secure asylum elsewhere").

[404] UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas of 'International' Zones at Airports*, ¶8 (Jan. 2019) https://www.refworld.org/docid/5c4730a44.html.

[405] UNHCR filed an amicus brief addressing the transit ban in *O.A. v. Trump*, D.D.C., 1:18-cv-02718 (Dec. 2018); *S.M.S.R. v. Trump*, D.D.C., 1:18-cv-02838 (Dec. 2018); *East Bay Sanctuary Covenant v. Barr*, Ninth Cir., Nos. 19-16487, 19-16773 (Oct. 2019). In

UNHCR is concerned that the three new transit-related adverse discretionary factors—failing to apply for protection in at least one transit country, spending more than 14 days in a transit country, and transiting through more than one country en route to the United States[406]—impinge on the right to seek asylum and the core principle of non-refoulement, and go beyond the exhaustive exclusion framework previsioned in international law. While ensuring refugee protection is the responsibility of the state where the refugees are, UNHCR acknowledges that at the same time, refugees do not have an unfettered right to choose their 'asylum country.'[407] Refugees' intentions ought to be taken into account when considering onward movement, as should connections to the country in which the refugee applies for asylum.[408] Blanket rules requiring refugees to apply in the first country they reach are inappropriate and fail to recognize the need for responsibility-sharing in refugee protection globally.[409]

As discussed above, the Convention does acknowledge that persons who enjoy a secure residency status and rights akin to those of nationals on one country do not need, and may therefore be excluded from, refugee status in another country. Article 1E provides a precise test and sets a high threshold for determining whether exclusion is applicable on such ground: individuals "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection.[410] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[411]

None of the transit-related adverse discretionary factors align with international legal standards:

- **Failure to apply for protection in a transit country:** International law does not require asylum-seekers to apply for protection in the first, or any subsequent, country through which they transit before arriving in the country where they intend to seek asylum.[412] UNHCR emphasizes that the primary responsibility for international protection remains with the state where an asylum claim is lodged.[413] In many cases, asylum-seekers move

addition, UNHCR has previously made public statements regarding the U.S. government's attempts to restrict asylum based on manner of entry. *See* UNHCR Press Release, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (Jul. 15, 2019), https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html (noting that such a rule "will endanger vulnerable people in need of international protection from violence or persecution"). UNHCR is concerned that this type of measure "excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations." *Id.*

[406] *See* Proposed Rule on Asylum and Withholding, p. 36,284, *and id.* p. 36,293 (proposing to include the transit factors at 8 C.F.R. § 208.13(d)(1)(ii), 8 C.F.R. § 208.13(d)(2)(i)(A) and 8 C.F.R. § 208.13(d)(2)(i)(B)).

[407] UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, ¶ 2 (Apr. 2018) [hereinafter Safe Third Country Paper]; *see also* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019); UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, ¶ 1 (May 2013).

[408] Safe Third Country Paper, ¶ 2.

[409] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019).

[410] Refugee Convention, art. 1E.

[411] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 6.

[412] *See* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019) (explaining that while the 1951 Convention does not include the right of refugees to decide in which State they will receive international protection, asylum should not be refused solely because it could have been sought in another country); Exec. Comm., No. 15 (XXX) Refugees Without an Asylum Country (1979), ¶¶ (h)(iii-iv) (noting that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" and that "[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State").

[413] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers*, 6 ¶ 16 (Sep. 2019), https://www.refworld.org/docid/5d8a255d4.html.

onward to seek international protection that is not in fact available in the place to which they have initially fled.[414] The fact that an asylum-seeker has moved onward does not affect his or her right to apply for asylum and be treated in conformity with international refugee and human rights law, including protection from refoulement.[415] Thus, "asylum should not be refused solely on the ground that it could be sought elsewhere."[416]

In addition, this adverse discretionary factor goes far beyond the exclusion clause in Article 1E, which does not apply to individuals who could take residence in a third country but have not done so or merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[417]

- **Spending more than 14 days in a transit country:** This adverse discretionary factor falls outside of the exclusion clause in Article 1E. It requires no inquiry into whether the asylum-seeker took residence in the transit country in question, nor does it require that the asylum-seeker have the rights and obligations equivalent to those of nationals in that country. Therefore, it is clearly at variance with international law.

- **Transiting through more than one country:** As with the other transit-related provisions, this adverse discretionary factor is at odds with international legal standards on exclusion. It does not contemplate whether an asylum-seeker took residence and had certain rights and responsibilities in any transit country, as required under Article 1E to determine whether a person is not considered in need of international protection.

Therefore, directing adjudicators to deny applications where the asylum-seeker did not apply for asylum in a transit country, stayed for a short time in a transit country, or transited through one or more countries will excessively curtail the protection for refugees to which they are entitled under the 1951 Convention and 1967 Protocol.

UNHCR recommends that these elements of the Proposed Rule not be enacted.

c. Fraudulent documents

The Proposed Rule states that an applicant who uses "fraudulent documents" to enter the United States is "inadmissible."[418] UNHCR is concerned that this adverse discretionary factor fails to recognize that some asylum-seekers may be forced to rely on fraudulent documents to escape violence or persecution that they face in a territory, including a territory that may not be the asylum-seeker's country of origin.[419] Similar to the adverse discretionary factor on unlawful entry, this provision contravenes fundamental principles of refugee protection by penalizing asylum-seekers who were forced to breach immigration rules during their flight to seek safety.[420]

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[414] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers*, 2 ¶ 4.
[415] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum*-Seekers, 2 ¶ 11.
[416] Exec. Comm., No. 15 (XXX) Refugees Without an Asylum Country (1979), ¶¶ (h)(iv).
[417] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.
[418] Proposed Rule on Asylum and Withholding, p. 36,283; *see also id.* at 36,293 (proposing to revise 8 C.F.R. § 208.13(d)(1)(iii) so that the use of fraudulent documents is a "significant adverse discretionary factor" for adjudicators).
[419] *See ExCom Conclusion No. 58* (XL) – 1989 UNHCR, ¶ (i).
[420] *See* Refugee Convention, Introductory Note (discussing non-penalization and non-refoulement).

Under Article 31(1) of the Convention, states are prohibited from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence." "Illegal entry" is understood to "include arriving or securing entry through the use of false or falsified documents."[421] This reflects international law's recognition "that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."[422] Penalties imposed beyond the scope of Article 31(1) risk undermining the object and purpose of the Convention, which as discussed above, gives meaning to the right to seek and enjoy asylum. Enacting this provision is likely to lead to the forced return of refugees to territories where they fear threats to their lives and freedom, in violation of Article 33(1) and in a manner that undermines the object and purpose of the Convention.

UNHCR recommends that this element of the Proposed Rule not be enacted.

d. Criminal convictions

The Proposed Rule states that adjudicators must consider any criminal conviction that remains relevant for immigration purposes under U.S. law as a significant adverse factor (including those that have been reversed, vacated, expunged, or modified).[423] More specifically, it directs adjudicators to deny applications filed by individuals who were previously convicted of a "particularly serious crime" but whose convictions or sentences were subsequently reversed, vacated, expunged, or modified, unless the individual was found not guilty.[424] This proposal is inconsistent with the grounds for exclusion based on an applicant's involvement in certain crimes or heinous acts established by Article 1F of the Convention, setting up the possibility of denials of asylum without sufficient levels of case-by-case analysis and rigorous procedural safeguards. This change compounds the pre-existing incompatibilities between the acts listed in Section 208.13(c) and the exhaustive framework for exclusion as well as exceptions to the principle of non-refoulement, as articulated in Articles 1F and 33(2) of the Convention, respectively. [425]

UNHCR is concerned that the Proposed Rule gives adjudicators authority to rely on reversed, vacated, expunged, or modified convictions, unless the individual was found not guilty, to deny

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[421] Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection* (Oct. 2001), ¶ 34, https://www.unhcr.org/3bcfdf164.pdf.

[422] *ExCom Conclusion No. 58* (XL) – 1989 UNHCR, ¶ (i); *see also* UNHCR, UNHCR's Position on Manifestly Unfounded Applications for Asylum (Dec. 1, 1992) ("As to the use of forged or counterfeit documents, it is not the use of such documents which raises the presumption of an abusive application, but the applicant's insistence that the documents are genuine. It should be borne in mind in this regard that asylum-seekers who have been compelled to use forged travel documents will often insist on their genuineness until the time they are admitted into the country and their application examined").

[423] Proposed Rule on Asylum and Withholding, p. 36,284 (proposing that criminal convictions are significant adverse factors and that a conviction remains valid "despite a reversal, vacatur, expungement, or modification" if the change was not based on procedural or substantive defect in the proceedings); *see also id.* p. 36,293 (proposing to revise 8 C.F.R. § 208.13(d)(2)(i)(C) so that convictions that would otherwise be valid "but for the reversal, vacatur, expungement, or modification" indicate a significant adverse factor).

[424] *See* 8 USC § 1158(b)(2)(A)(ii); 8 CFR §§ 208.13(c), 1208.13(c). *Cf.* Off. of Staff Attorneys, Ninth Circuit Court of Appeals, Criminal Issues in Immigration Law D-9-12 (Jan. 2020), http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/D.pdf. A conviction overturned for substantive, non-immigration reasons may not be used as the basis for removability. See, e.g., Nath v. Gonzales, 467 F.3d 1185, 1187-89 (9th Cir. 2006); Poblete Mendoza v. Holder, 606 F.3d 1137, 1141 (9th Cir. 2020). The government bears the burden of proving whether a state court reversed or vacated a prior conviction for reasons other than the merits. Reyes-Torres v. Holder, 645 F.3d 1073, 1077 (9th Cir. 2011). Expunged claims usually still count as convictions for immigration purposes.

[425] UNHCR acknowledges that there is potential overlap between the criminial acts that serve as bars in domestic law (*see*, *e.g.*, INA § 208.13(c)) and the acts that fall within the scope of Article 1F of the Convention. This would need to be determined based on the facts of the case and in light of relevant international standards that inform understanding of the international crimes covered by Article 1F(a), serious non-political crimes (plus geographic and temporal criteria) for Art 1F(b), and the specific criteria of Art 1F(c) (which can encompass acts of terrorism, for instance).

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protection, and that exclusion may be applied in such cases without an individualized assessment of whether the individual concerned has committed a crime, or acts, which justify exclusion from refugee status. Under international standards, the exclusion analysis must be performed on a case-by-case basis, and "rigorous procedural safeguards" are essential to the procedure, as the consequences of exclusion can be grave.[426] In order to satisfy the standard of proof for exclusion, for which the state has the burden, "clear and credible evidence is required."[427] This does not necessarily require that the applicant have been convicted of the criminal offense.[428] However, the reversal, vacatur, expungement, or modification of a conviction or sentence raises serious questions as to whether excluding the applicant from refugee protection would be consistent with international standards. These events could signify that an individual has not incurred individual responsibility for crimes within the scope of an exclusion clause, or that there are circumstances which would mean that applying exclusion to him/her would no longer be consistent with the object and purpose of Article 1F of the Convention.[429] In either case, the possibility that the criteria for exclusion may not be met should be carefully probed in light of all relevant circumstances, and not immediately accepted as sufficient basis for excluding the applicant, as this provision would have adjudicators do. Although the Proposed Rule creates a narrow exception for those found not guilty, UNHCR is troubled that this expansive provision does not reflect the exacting standard for exclusion required under international law and may ultimately result in the exclusion of refugees who were not involved in criminal conduct that would render them undeserving of refugee protection.

The Proposed Rule compounds UNHCR's pre-existing concerns about the discrepancies between Section 208.13(c) and the exclusion framework articulated in the Convention. As has been extensively discussed by legal academics, the U.S. bars to asylum bear some resemblance to Article 1F(b), while also drawing from language in Article 33(2), and also resting on domestic concerns.[430] International law, on the other hand, exhaustively enumerates the grounds for exclusion related to a person's criminal conduct in Article 1F of the Convention. Yet this is not the direct error of the Proposed Rule; the Proposed Rule did not create Section 208.13(c). UNHCR's primary concern with the Proposed Rule itself is that it compounds the problems of Section 208.13(c) by allowing adjudicators to rely on less firm grounds when determining the relevance of the purported conduct that triggers the bar.

In sum, this provision would lead the United States further away from complying with its obligations under the 1951 Convention and 1967 Protocol.

UNHCR recommends that this element of the Proposed Rule not be enacted.

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[426] *See* UNHCR, *Guidelines on International Protection No. 5*, ¶ 31.
[427] UNHCR, *Guidelines on International Protection No. 5*, ¶¶ 34-35.
[428] UNHCR, *Guidelines on International Protection No. 5*, ¶ 35.
[429] *See* UNHCR, *Guidelines on International Protection No. 5*, ¶ 23.
[430] For detailed discussions of the legislative history and origins of the bars to asylum in § 208.13(c), *see, e.g.*, James Sloan, *Application of Article 1F of the 1951 Convention in Canada and the United States*, 12 INT'L J. REF. L. 222, 224 (2000) (LCHR Supplementary Volume) (noting that the United States has not incorporated the exclusion regime established in the 1951 Cconvention, but rather has created its "own exclusion regime based in part on the Convention and in part on its own domestic concerns"); James C. Hathaway and Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481, 487 (2000) (arguing that the Immigration and Nationality Act of 1996 established bars to asylum which are only partially compatible with international law articulated in the 1951 Convention) and 535-536 (discussing the reliance on Article 33(2) of the Convention); ANKER, *supra* note 6, at §§ 6.4 (comparing U.S. bars to Convention provisions) and 6.16-6.20 (providing a detailed discussion of the origin and use of the 'particularly serious crime' bar to asylum and withholding).

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e. Unlawful presence of more than one year before filing

The Proposed Rule states that an applicant's unlawful residence in the United States for one year will act as an adverse factor in the adjudicator's discretionary decision.[431] UNHCR is concerned that this adverse discretionary factor will unduly impact vulnerable asylum-seekers who may not be able to file their applications within a year of arriving in the United States.[432] In addition, UNHCR observes with concern that exercise of this adverse discretionary factor will effectively undermine the exceptions to the "one year bar" that exist under current law.[433]

Under international law, states are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[434] However, procedures for determining refugee status should account for the vulnerabilities that applicants may experience. In some cases, for instance, individuals might have significant challenges submitting an application for asylum to the authorities if they have suffered profound trauma, have limited English proficiency, or do not have access to counsel.[435] Therefore, the framework for examining asylum applications should reflect "an understanding of an applicant's particular difficulties and needs,"[436] and – despite variance in that framework from state to state – should include essential guarantees and basic requirements.[437]

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."[438] 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."[439] 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."[440] Under international standards, regard must be given to concept of refugees *sur place* – that is, people whose refugee claim developed while out of the country – for instance, due to changes of circumstances at home.[441]

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[431] *See* Proposed Rule on Asylum and Withholding, p. 36,284; *see also id.* p. 36,293 (proposing to amend the regulation at 8 C.F.R. § 208.13(d)(2)(i)(D) so that adjudicators should not "favorably exercise discretion" for applicants who "accrued more than one year of unlawful presence").
[432] Under the Immigration and Nationality Act (INA), individuals do not accrue unlawful presence during the period of time in which they have a bona fide asylum application pending. 8 USC § 1182(a)(9)(B)(iii)(II). Accordingly, it appears that this adverse discretionary factor will negatively impact asylum-seekers who do not file their applications within one year of arriving in the United States.
[433] The existing requirement to apply for asylum within one year is subject to exception for "changed circumstances" or "extraordinary circumstances." 8 U.S.C. § 1158(a)(2)(D) ("An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates . . . changed circumstances . . . or extraordinary circumstances.").
[434] UNHCR Handbook ¶ 189.
[435] *See* UNHCR Handbook, ¶ 190 ("It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within . . . an understanding of an applicant's particular difficulties and needs."); UNHCR, Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466 at 9-10 ("Due consideration should be given to any circumstances of the case that may lead to delays in applying for international protection or appropriately substantiating the claim, including trauma due to past experience, feelings of insecurity, or language problems. UNHCR recalls that a late application or substantiation does not preclude the credibility of the applicant's statements").
[436] UNHCR Handbook ¶ 190.
[437] UNHCR Handbook ¶ 192.
[438] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (31 May 2002), ¶ 20 (citing *Jabari v. Turkey*, ECHR, ¶40 (Jul. 10, 2000); Conclusion No. 15 (XXX), 1979, on refugees without an asylum country, ¶ (i) (A/AC.96/572, ¶ 72.2). *See also* discussion on unlawful entry, *supra*, p. 58.
[439] UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 9.
[440] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (May 31, 2002), ¶ 20.
[441] UNHCR Handbook ¶¶ 94-96.

The Proposed Rule appears to overwrite the existing rules on what is considered a timely filing. UNHCR observes that under current U.S. law individuals are not eligible for asylum if they did not file within a year of their arrival into the United States unless they can establish that they qualify for an exception to that deadline, including changed circumstances materially affecting their eligibility or extraordinary circumstances that prevented a delay in submitting the application.[442] Whereas an existing regulation providing examples of what may constitute "extraordinary circumstances" for the purposes of the one-year filing deadline touches upon issues related to the applicant's personal circumstances (e.g., health, legal disability, and counsel, among others), the Proposed Rule's description of "extraordinary circumstances" as they relate to discretion focuses on "national security or foreign policy considerations."[443] This disparity suggests that asylum-seekers who are unable to file their applications within a year face a high burden in demonstrating that they deserve a favorable exercise of discretion.

UNHCR recommends that this element of the Proposed Rule not be enacted.

f. Other adverse discretionary factors

In addition to the individual factors discussed in detail above, the Proposed Rule also considers the following to be adverse factors: failure to file taxes; having two or more previously denied asylum claims; having withdrawn with prejudice a previous claim; failure to attend an interview; and failure to file to reopen a claim within one year. [444] These remaining adverse discretionary factors are incompatible with international law, which, as explained above, does not recognize discretion as part of the refugee status determination.

The international legal framework is structured such that exclusion is an exceptional measure: provisions on the exclusion of those who would otherwise qualify for protection must always be applied with "great caution" and interpreted in a "restrictive manner."[445] This acknowledges the possible serious consequences of a denied claim for someone in need of protection. Many of the adverse discretionary factors such as those discussed in this section are typically not of a serious enough caliber to form part of an exclusionary analysis while others do not justify exclusion for other reasons (for instance, because they do not constitute crimes in the first place, let alone acts contrary to the purposes and principles of the United Nations).[446] Whether an applicant failed to file taxes, had two or more asylum applications denied (especially in light of the new provision on pretermission of 'legally insufficient' asylum applications), missed their asylum interview before the Asylum Office, or may have not filed a motion to reopen to seek asylum based on changed country conditions within a year of the changed circumstances has no meaningful bearing on whether the individual meets the refugee definition under Article 1A(2) of the Convention, nor do these circumstances fall within—or anywhere close to—any of the prudently circumscribed exclusion clauses.

UNHCR recommends that each of these elements be struck from the final rule.

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[442] 8 USC §§ 1158(a)(2)(B), (D); 8 CFR §§ 208.4(a), 1208.4(a).
[443] 8 CFR §§ 208.4(a)(5); 1208.4(a)(5).
[444] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to add adverse discretionary factors at 8 C.F.R. § 208.13(d)(2)(i)(E)-(I)).
[445] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[446] For further discussion, *see* UNHCR, *Guidelines on International Protection No. 5* ¶ 3; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 7 (Sep. 4, 2003), https://www.refworld.org/docid/3f5857d24.html.

With respect to discretionary factors overall, UNHCR recommends that the Government promulgate regulations directing adjudicators to grant asylum every time they encounter an individual who meets the criteria, effectively discontinuing the use of discretion. In the absence of such a change to the use of discretion, UNHCR recommends that the entire list of factors for discretionary denial in the Proposed Rule be struck from the final regulation, effectively removing the adjudicator's mandate to deny on these grounds.

8. Firm Resettlement

The Proposed Rule expands the definition of "firm resettlement" by specifying three circumstances under which an asylum-seeker would be considered firmly resettled.[447] According to the new regulation, an asylum-seeker will be considered firmly resettled (and therefore barred from a grant of asylum) if:

(1) the asylum-seeker "either resided or could have resided in any permanent or non-permanent legal immigration status in a country through which the individual transited prior to arriving in or entering the United States, regardless of whether the individual applied for or was offered such status;"[448]

(2) the asylum-seeker "physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his or her country of nationality or last habitual residence and prior to arrival in or entry into the United States;"[449] or,

(3) the asylum-seeker is a "citizen of a country other than one where he or she alleges a fear of persecution and the asylum-seeker was present in that country prior to arriving in the United States,"[450] or "was a citizen of a country other than the one where the alien alleges a fear of persecution, the asylum-seeker was present in that country prior to arriving in the United States, and the asylum-seeker renounced that citizenship after arriving in the United States."[451]

In addition to identifying the above three circumstances under which an asylum-seeker will be considered firmly resettled, the Proposed Rule creates several additional procedural rules regarding the application of the firm resettlement bar. The Proposed Rule directs that when the evidence of record indicates that the firm resettlement bar may apply, the asylum-seeker will have the burden of proving by a preponderance of the evidence that the bar does not apply.[452] Next, the Proposed Rule specifically allows either DHS or the immigration judge to raise the issue of the application of the firm resettlement bar based on the evidence of record.[453] Finally, the Proposed Rule requires that the firm resettlement bar be imputed from parent to child if the resettlement occurred before the child asylum-seeker turned 18 years old and the child asylum-

[447] *See* Proposed Rule on Asylum and Withholding, p. 36,286.
[448] *Id.*
[449] *Id.*
[450] *Id.*
[451] *Id.*
[452] *See* Proposed Rule on Asylum and Withholding, p. 36,286; *see also id.* p. 36,294 (proposing to revise 8 C.F.R. § 208.15(a)(3)(ii)(B) so that "the alien shall bear the burden of proving the bar does not apply").
[453] *See* Proposed Rule on Asylum and Withholding, p. 36,294 ("Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of the record").

seeker resided with his or her parent at the time of the firm resettlement, except where the child can establish that he or she could not have derived any status from his or her parent.[454]

UNHCR is concerned that these sweeping changes to the interpretation and application of the firm resettlement bar will undoubtedly lead to the exclusion from refugee protection and refoulement of large numbers of refugees. There are only a few, specific bases upon which a person can be excluded from refugee protection under the 1951 Convention.[455] Article 1E is the only one that is potentially relevant to "firm resettlement" and contemplates a specific situation of de facto nationality (which the Proposed Regulation falls far short of).[456] The Convention also provides for consideration of whether a person who is seeking international protection in fact does not require it, because he or she can look to at least one state of nationality for national protection (provided that nationality and protection remain effective in practice).[457] A firm resettlement bar should not apply to individuals who could take residence in a third country but have not done so or merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[458] See p. 54, *supra*, for discussion of the high threshold for the exclusion of persons not considered in need of international protection set by Article 1E of the Convention.

Each of the circumstances that the Proposed Rule identifies as triggering the firm resettlement bar conflicts with the 1951 Convention and its 1967 Protocol, as none of them require that an asylum-seeker both (a) have taken residence in a third country *and* (b) enjoy the same rights and obligations as nationals of that country:

(1) The first circumstance described by the Proposed Rule, which covers individuals who could have but did not take up residence in a third country, fails to align with international legal standards for exclusion, because it does not require that an individual to have actually taken up residence in another country having certain rights and obligations there. The text of Article 1E as well as UNHCR guidance on this issue is abundantly clear—Article 1E does not apply to individuals who could take up residence in a third country but have not done so.[459] Moreover, that piece of the Proposed Rule makes no mention of the rights and obligations that an individual must have in the third country for the bar to apply. Finally, even if a person had taken residence in a third country and enjoyed the rights and obligations equal to nationals of that country, he or she may have a well-founded fear of being persecuted if returned there, and this provision does not provide necessary non-refoulement protections, which would permit an evaluation of an asylum claim against that country.[460] Therefore, this part of the Proposed Rule does not meet the requirements of exclusion under Article 1E.[461]

(2) Next, the second circumstance described by the Proposed Rule, which targets individuals who voluntarily live in a third country for more than a year before arriving in the United States, is at variance with international law because it encompasses individuals who have neither "taken residence" as understood within Article 1E of the 1951 Convention nor have the rights and obligations equivalent to those held by nationals of the country. The phrase

[454] *See* Proposed Rule on Asylum and Withholding, p. 36,294.
[455] Refugee Convention, art. 1D-1F. *See also* UNHCR's views on discretionary denials for Article 1 analysis, *supra*.
[456] Refugee Convention, art. 1E.
[457] Refugee Convention, art. 1E; UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 2, 7.
[458] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.
[459] UNHCR, Note on the Interpretation of Ar ticle 1E of the 1951 Convention, ¶ 9.
[460] *See* UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 4, 17.
[461] *See* discussion on transit factors, *supra*, p. 59.

"has taken residence" signifies that "[t]he person concerned must benefit from a residency status which is secure and hence include the rights accorded to nationals to return to, re-enter, and remain in the country concerned."[462] Further, to be excluded under Article 1E, a person must satisfy the "stringent test" of having the rights and obligations afforded to nationals of the third country in question.[463] This, in fact, means that "it is not enough that he or she merely enjoys better treatment than that provided for by the 1951 Convention."[464] The Proposed Rule does not appear to require that the individual have any rights or obligations in the country in which he or she lived voluntarily. Last, as mentioned in the preceding paragraph, even if the conditions of Article 1E were satisfied, the asylum analysis must provide for non-refoulement considerations where an individual has a well-founded fear of persecution in the third country.[465] Thus, similar to above, this part of the Proposed Rule does not meet the requirements of exclusion under Article 1E.[466]

(3) Last, the third circumstance covered by the Proposed Rule essentially captures two distinct situations—one in which an asylum-seeker holds citizenship in a third country where they have not suffered persecution and was present in that country before arriving in the United States, and another in which an asylum-seeker previously had citizenship in a third country, was present in that country before arriving in the United States, and renounced that citizenship after arriving in the United States.

The first situation would require an assessment of refugee status against both countries of nationality (irrespective of whether the asylum-seeker was present in that country before arriving in the asylum country).[467] Only if the individual can avail himself or herself of the protection of at least one of the countries of which he or she is a national would the individual not qualify for refugee status.[468]

The second situation is at variance with the 1951 Convention because an asylum-seeker may still be entitled to protection as a refugee, notwithstanding that the asylum-seeker has renounced nationality of a country in which they were present before arriving in the United States, if at the time of their application they meet the refugee definition, cannot avail themself of the protection of another country of nationality (in case of multiple nationalities), and do not fall within one of of the Convention exclusion grounds. If a person cannot in practice avail themself of the protection of a third country of which they are a national, or can no longer avail themself of the protection of a country of which the were previously a national, it is immaterial to assessment of refugee status under the Convention that the person has renounced a previously held nationality, whether prior to or after arrival in the United States.

Accordingly, an adjudicator would need to consider whether the applicant who renounced his or her former nationality now has a new nationality, whether he or she is still the

[462] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 10; *see also* ICCPR, art. 12(4) ("No one shall be arbitrarily deprived on the right to enter his own country").
[463] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 12.
[464] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 12.
[465] *See* UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 4, 17.
[466] *See* discussion on transit factors, *supra*, p. 59.
[467] Refugee Convention, art. 1A(2) ("[i]n the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without ay valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national").
[468] *See* UNHCR Handbook, ¶¶ 106-07.

national of yet another country having held multiple nationalities prior to renouncing, or whether the individual has become stateless.

Beyond the problems in the definition of "firm resettlement," the procedural provisions of the Proposed Rule on this topic are also at variance with international law. In particular, international law does not allow exclusion grounds to be imputed from one asylum-seeker to another, including in cases where parents and children file independent applications. UNHCR observes that it is possible, for example, for parents and children to have different statuses as well as rights and obligations in any transit country through which they pass before arriving in their destination country. To be barred under Article 1E, "[t]he person concerned must benefit from a residency status which is secure," and the person must essentially enjoy the same civil, political, economic, social and cultural rights and have generally the same obligations as nationals.[469] While it may be that [all or] none of the applicants involved require refugee protection, it is possible that one will while another will not. Accordingly, the applicability of this bar to asylum to any unique asylum applicant must be determined on a case-by-case basis, including for members of the same family who file their own claims. Excluding an asylum-seeker from protection under the 1951 Convention carries potential serious consequences for the individual, and it is, therefore, critical that Article 1E not be wrongfully applied to an individual who does not personally meet the stringent test it requires.

UNHCR recommends that the Government not implement the Proposed Rule expanding the firm resettlement bar and that it instead use this opportunity to establish a definition of this concept that is compatible with international law.

9. Rogue Officials

i) The Proposed Rule's suggested changes

The Proposed Rule amends the definition of "torture" by addressing the concepts of "public official" and "acquiescence."[470] UNHCR is concerned that this definition deviates from international law and will exclude people in need of protection.

Current regulations provide that, in an application for CAT protection, an applicant must demonstrate that it is more likely than not that he or she will be tortured in the country of removal, with torture being defined, *inter alia*, as harm intentionally inflicted "by a public official."[471] Current regulations do not provide guidance on what constitutes a "public official," though some courts have found that the "public official" definition can be met whether or not the official is acting within the scope of his or her official duties;[472] however, the Board of Immigration Appeals has recently held that an official who is not acting in an official capacity is not covered by the Convention.[473]

The new regulation seeks to codify the recent Board decision, proposing that pain or suffering inflicted by a public official who is *not* acting under color of law (a "rogue official") shall not constitute torture.[474] The guidance given with this proposed regulatory change indicates that the

[469] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 10, 16.
[470] Proposed Rule on Asylum and Withholding, p. 36,286.
[471] 8 CFR 1208.16(c)(2000).
[472] *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) (find that there is no "rogue official" exception to protection under the Convention Against Torture).
[473] *Matter of O-F-A-S*, 27 I & N Dec. 709; 718 (BIA 2019) (holding that an official who is not acting in official capacity, also known as a "rogue official," is not covered by the Convention).
[474] Proposed Rule on Asylum and Withholding, p. 36,294.

assessment of whether a person is acting in an official capacity or as a rogue official include, *inter alia,* whether the person could engage in conduct amounting to torture because of his or her government position or whether he or she could have done so without any connection to the government and whether the person's government connections provided him or her with access to the victim. Additionally, the proposed regulation narrows the definition of "acquiescence" from current regulations by requiring that the public official in question must have awareness of the activity amounting to torture before it occurs and thereafter breach his or her legal responsibility to intervene to prevent it.[475] Specifically, it provides that awareness requires actual knowledge or willful blindness and that, in evaluating "willful blindness," it is not enough for an official to be mistaken, to recklessly disregard the truth, or negligently fail to inquire.

ii) Impact on Asylum-Seekers and Others of Concern to UNHCR

UNHCR is concerned that the new definitions in the Proposed Rule circumscribing what constitutes "torture" will deprive qualifying individuals of international protection.[476] UNHCR observes that the U.S. position has been, even before these regulations, at variance with international law on providing protection against torture since its initial implementation of CAT, as its interpretation of "torture" is narrower than what the term is intended to encompass under Article 1 of the CAT. These rules further limiting the protection available to those facing torture as defined under CAT will drive the United States further out of compliance with its international obligations, and they may ultimately result in the refoulement of individuals to a place where there are substantial grounds for believing they would be subjected to torture in violation of Article 3 of CAT. These changes are especially troubling in light of the amendments to the refugee definition proposed in different sections of the Proposed Rule, which will restrict access to asylum and statutory withholding of removal and render these forms of international protection nearly impossible to obtain.

iii) International standards

Under CAT, "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a specific purpose "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[477] Whether an individual is eligible for CAT protection requires an assessment of whether there are substantial grounds for believing that the applicant would be in danger of being subjected to torture in another territory to which he or she would be forced to return.[478] This involves an evaluation of whether the individual is at risk of torture at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[479] International law governing who constitutes a "public official" for purposes of the "torture" definition does not exempt conduct by individuals who the Proposed Rule refers to as "rogue officials." "It is well established that a state will be responsible for the torturous acts of its officials even if such conduct did not have the specific approval of the authorities."[480] The

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[475] Proposed Rule on Asylum and Withholding, p. 36,294.
[476] *See* CAT, art. 1, ¶ 1 (defining "torture").
[477] Convention Against Torture, art. 1, ¶ 1.
[478] Committee Against Torture, General Comment No. 4, ¶ 5.
[479] Committee Against Torture, General Comment No. 1, ¶ 49(b).
[480] *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:31 (2020) (citing U.N. Comm'n on Hum. Rts., Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), Rep. on Violence Against Women, ¶ 14, U.N. Doc. E/CN.4/1997/47 (1997) ("[A] strict interpretation of human rights law considered that the State is only responsible for its own actions or that of its agents . . . in recent times. . . States are expected to exercise due diligence in preventing, prosecuting and punishing those who perpetrate violence").

Committee Against Torture has emphasized that "the State's obligation to prevent torture also applies to all persons who act, *de jure* or *de facto*, in the name of, in conjunction with, or at the behest of the State party."[481]

The concept of "acquiescence" has been interpreted more broadly under international law than in the Proposed Rule. According to guidance published by the Committee Against Torture, acquiescence exists when public officials "know or *have reasonable grounds to believe* that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish such non-State officials or private actors consistently with the Convention."[482] Similarly, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has explained that "[i]ndifference or inaction by the State provides a form of encouragement and/or de facto permission" for the torturous acts.[483] In other words, international legal standards do not require that public officials be able to intervene or, if they do intervene, to prevent the activity. Rather, it is sufficient that the public officials did nothing. In contrast, the new regulation would find no acquiescence where a public official "was mistaken, recklessly disregarded the truth, or negligently failed to inquire," even though such indifference and inaction would clearly be sufficient under international law. Therefore, the Proposed Rule diverges from international legal standards because it sets a high threshold for applicants to establish acquiescence on the part of the state.

UNHCR recommends that, should the Government implement a new definition of "torture," it make it less restrictive such that it aligns with the definitions in international law.

D. Information Disclosure

The Proposed Rule identifies and broadens the circumstances under which individuals' information may be disclosed without their written consent. Current regulations prohibit the disclosure of protected information pertaining to asylum applications and credible or reasonable fear records to unauthorized third parties. Under the Proposed Rule, however, the Government may now release in certain cases information regarding asylum applications as well as credible or reasonable fear interviews to any U.S. government official or contractor with a need to examine it, including:

- information in an application for asylum, withholding of removal, or CAT protection;
- information supporting that application;
- information about individuals who have filed such an application; and
- information about individuals who have undergone the credible or reasonable fear screening process.[484]

The new regulation provides that this information could be disclosed during an adjudication of the application or any other application under the immigration laws; as part of any state or federal criminal investigation, proceeding, or prosecution; to prevent child abuse; as part of any proceeding arising under immigration laws; or as part of the Government's defense to any legal action related to an individual's immigration or custody status, including petitions for review. In

[481] Committee Against Torture, General Comment No. 2, CAT/C/GC/2, ¶ 7.
[482] Committee Against Torture, General Comment No. 2, CAT/C/GC/2, ¶ 18 (emphasis added).
[483] *See* Juan Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Report on Torture, ¶¶ 11, 55-56 U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).
[484] Proposed Rule on Asylum and Withholding, p. 36,288.

short, the Proposed Rule endeavors to vastly expand the types of information it can disclose and the circumstances under which it may do so.

Under international law, asylum applicants have a right to confidentiality, which must be respected throughout all stages of the adjudicatory process.[485] UNHCR observes that there are some circumstances under which it may be appropriate to disclose data about asylum-seekers, and it has developed thorough guidance governing conditions for such release of information about this vulnerable population. Data protection principles and obligations require that any disclosure be made only when certain conditions are met, including when the disclosure is necessary and proportionate to a specific and legitimate purpose.[486] For instance, disclosure of personal data may be justified to protect national security, combat fraud, and identify those individuals not entitled to international protection.[487] It is never acceptable to disclose information for retaliatory purposes.[488] Sharing in any justified situations must respect data protection principles and international human rights law obligations.[489] When information is released, consent of the concerned individual should typically be required.[490] It is essential that no information about the existence of or included in an asylum application be shared with an asylum-seeker's country of origin, either directly or indirectly, in light of the possible serious consequences to the individual, his or her family, and potentially others.[491]

Further, international standards on conducting refugee status determination caution against disclosure for its impact on evaluating claims. It is necessary for adjudicators to gain the confidence of applicants to facilitate fact gathering and development.[492] "In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."[493] This principle is exceptionally important in cases involving applicants with gender-based claims, survivors of torture and trauma, and children.[494] Applicants fitting these profiles may be especially reluctant to identify the true extent of persecution suffered or feared for a variety of reasons, such as rejection or reprisals from their

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[485] *See* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, pp. 6-17 (May 2015), https://www.refworld.org/pdfid/55643c1d4.pdf. *See e.g.,* UNHCR Handbook, ¶ 200 (discussing the important of confidentiality in refugee status determination); UNHCR *Guidelines on International Protection No. 5*, ¶ 33; *see also* UNHCR, *Guidelines on International Protection No. 1*, ¶ 36(v) (particularly in cases involving gender-based violence, "[t]he claimant should be assured that his/her claim will be treated in the strictest confidence").

[486] *See* UNHCR, Procedural Standards for RSD Under UNHCR's Mandate, § 2.1 (providing that conditions for disclosure include requiring that it serve a legitimate purpose and not jeopardize the security of the individual, their family members or other associates, and observing that the consent of the individual should typically be required); UNHCR, Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information (Mar. 31, 2005), https://www.refworld.org/pdfid/42b9190e4.pdf.

[487] UNHCR, *Guidelines on International Protection No. 5*, ¶ 33; Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, p. 159; *see also* Executive Committee of the High Commissioner's Programme, *Conclusion on Registration of Refugees and Asylum-Seekers No. 91 (LII) – 2001*.

[488] *See* UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, ¶ 14 ("[I]t would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin").

[489] Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27 at 159; *see also* Executive Committee of the High Commissioner's Programme, *Conclusion on Registration of Refugees and Asylum-Seekers No. 91 (LII) – 2001*.

[490] UNHCR, Procedural Standards for RSD Under UNHCR's Mandate, § 2.1.

[491] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (May 31, 2002), ¶ 50(m). UNHCR observes that, "[i]n exceptional circumstance, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed." UNHCR, *Guidelines on International Protection No. 5*, ¶ 33.

[492] UNHCR Handbook, ¶200; *see also* Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27 at 159 (discussing why confidentiality is critical to creating an environment of security and trust conducive to the gathering of information related to an asylum-seeker's claim and explaining that any disclosure of information requires informed consent of the individual concerned).

[493] UNHCR Handbook, ¶ 200.

[494] UNHCR, *Guidelines on International Protection No. 1*, ¶ 35; UNHCR, *Guidelines on International Protection No. 8*, ¶ 70.

family, communities, or persecutors, making it critically important to provide them with "a supportive environment where they can be reassured of the confidentiality of their claim[s]."[495] The failure to account for these realities risks undermining applicants' confidence in an asylum system, which may hinder their abilities to share their accounts.

While recognizing that data sharing may be warranted under some circumstances, such as in efforts to combat fraud, UNHCR is concerned that the expansive opportunities for disclosure under the Proposed Rule may jeopardize asylum-seekers' safety as well as make it more difficult to conduct refugee status determination and deter individuals from exercising their rights. The provision in the Proposed Rule does not reflect these types of limits on data disclosure, instead giving wide latitude to release asylum-seekers' information. For example, disclosure could be especially problematic should that information reach the authorities of asylum-seekers' countries of origin. Such authorities may have persecuted or tortured asylum-seekers and could target them, or their family members or other contacts, for further harm should they learn of the applicants' pending claims. And, disclosure of information could lead to an asylum-seeker becoming a refugee *sur place*.[496]

UNHCR recommends that the Government amend the Proposed Rule to limit the circumstances under which asylum-seekers' information can be disclosed, including by removing the prong of this provision on permitted disclosures that concerns legal actions related to the denial of an application for protection or challenges to custody status, and enhance provisions related to the protection of their personal data and asylum claims. UNHCR advises the Government to remove the prong on disclosures concerning legal actions so that applicants for refugee protection are not deterred from challenging a denial of their claim or their custody status.

IV. Observations on How the Proposed Rule Affects Particularly Vulnerable Groups

A. Children

The Proposed Rule introduces a great number of provisions that will have a severe impact if applied to children in need of protection (including both children in families and unaccompanied children[497]). UNHCR notes that children have specific rights and protection needs, and consequently international standards call for a child-sensitive approach to adjudicating their claims, both with respect to the substantive elements of the refugee definition and to the procedural protections due this vulnerable group.[498]

UNHCR is concerned that the following provisions in the Proposed Rule will – if implemented and applied to children – impede the capacity of those children to find protection in the United States:

[495] UNHCR, *Guidelines on International Protection No. 1*, ¶ 35; *see also Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995) and *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, Mar. 27-29, 2001, Geneva).
[496] *See* UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, ¶ 15 ("In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum-seeker becoming a refugee *sur place*").
[497] UNHCR notes with concern that the Proposed rule does not provide conclusive analysis on how many of its provisions interact with existing pieces of U.S. domestic legislation that protect unaccompanied children, such as the TVPRA. *See* Trafficking Victims Protection Reauthorization Act of 2017, 22 U.S.C. § 7101 (2018). UNHCR urges the U.S. government to resolve any discrepancies between the Proposed rule and extant protections in favor of the unaccompanied child.
[498] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 1-5.

- The introduction of asylum-and-withholding proceedings (that may preclude access to complementary forms of protection for children in families);[499]
- The higher standard of proof for screening for statutory withholding and CAT protection (which may affect children in families);[500]
- The proposed changes on frivolous applications (which may disproportionally apply to children, who cannot be expected to understand whether their claims are "clearly foreclosed by applicable law," and who would then be foreclosed from refiling an asylum claim now or presenting another claim in the future);[501]
- The proposed changes on pretermission (which require a child to be able to state a full claim on paper, without an interview);[502]
- The requirement for the child to state their own particular social group(s) (if not done accurately, this be a ground for pretermission as discussed above, and even if the claim survives pretermission, additional formulations of particular social groups cannot be introduced later in the first instance proceeding or on appeal); [503]
- The substantive changes to the definition of "particular social group", as well as the list of "generally insufficient" particular social groups (including gang recruitment and presence in a country with high crime and/or violence), which will particularly impact children from Central America;[504]
- The narrowed definition of persecution (particularly, the exclusion of harm arising in the context of civil strife, and the lack of special consideration for child applicants);[505]
- The changed definition of "political opinion" as to refer to state opposition only (which will preclude many opinions held by children, such as opposition to FGM or pro-LGBTI rights positions, for example);[506]
- The new approach to internal relocation, which sets a presumption of the availability of internal relocation for non-state actor cases and which does not include an exception for children;[507]
- The applicability of bars triggering discretionary denial to child applicants, including the penalties for unlawful entry; transiting through other countries; using fraudulent documents to enter; and transiting through more than one country;[508]
- The imputation of an adult's firm resettlement status to children, leading to denial of children's claims.[509]

Although the definition of a refugee in the 1951 Convention and 1967 Protocol is not age-specific, it has traditionally been interpreted in light of adult experiences; consequently, child-specific forms of persecution are often overlooked.[510] Both UNHCR and the UN Committee on the Rights of the Child urge that it is imperative to interpret the refugee definition in an age- and gender-sensitive

[499] *See supra* Section III.A.1, p. 4.
[500] *See supra* Section III.A.4, p. 9; UNHCR notes that children accompanied by adults are able to receive independent fear screenings following a negative fear determination for their parent. *See* 8 C.F.R. 208.21(a); *see also Matter of A-K-*, 24 I. & N. Dec. 275 (2007). Under the Proposed Rule, children in this situation would have to meet the higher burden of proof.
[501] *See supra* Section III.B.1, p. 11.
[502] *See supra* Section III.B.2, p. 16.
[503] *See supra* Section III.C.1.iv, p. 28.
[504] *See supra* Section III.C.1, p. 19.
[505] *See supra* Section III.C.3, p. 32.
[506] *See supra* Section III.C.2, p. 30.
[507] *See supra* Section III.C.5, p. 44.
[508] *See supra* Section III.C.6, p. 47.
[509] *See supra* Section III.C.7, p. 59.
[510] UNHCR, *Guidelines on International Protection No. 8*, ¶ 1. "The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as a part of a family unit rather than as individuals with their own rights and interests." *Id.* ¶ 2.

manner, taking into account the specific forms and manifestations of persecution experienced by children.[511] For instance: persecution may manifest differently for children than for adults[512]; children may be subjected to specific forms of persecution influenced by their age, maturity, and vulnerability (and indeed, the fact that the applicant is a child may be a part of the reason for the harm inflicted or feared);[513] and a persecutory act may encompass violations of child-specific rights.[514]

UNHCR notes that certain forms of child-specific persecution are particularly relevant in the context of current refugee flows to the United States.[515] International law recognizes a growing consensus on the ban on recruitment and use of children below the age of 18 in armed conflict;[516] this is a relevant factor in adjudicating some children's claims for protection, especially for children who may have been recruited into non-state armed groups including gangs.[517] Likewise, domestic violence against children – including physical, psychological and sexual violence, while in the care of parents or others – is a very relevant form of harm to consider when adjudicating some children's cases.[518] In child asylum claims, the agent of persecution is frequently a non-state actor; the assessment of whether a state is unable or unwilling to protect the victim should be assessed on a case-by-case basis and should take into account the degree to which state officials are able to respond appropriately to children's needs and complaints.[519]

When it comes to weighing factors that may deny the child protection, international law counsels that adjudicators proceed with deep caution, as the consequences of errors in judgment are particularly high.[520] With regard to internal relocation, for instance, both the relevance of internal relocation as an option and the reasonableness of requiring relocation will be measured differently for a child than for an adult ("what is merely inconvenient for an adult might well constitute undue hardship for a child") and internal relocation of an unaccompanied child to an area with no known relatives is clearly inappropriate.[521] As for the exclusion clauses in Article 1F (see Section III. C. 7. ii., *supra*, p. 54), they should be applied to children only "with great caution" and only if the child has reached the age of criminal responsibility at the time of the excludable act.[522]

In addition to considerations of the substantive elements of a child's claim, UNHCR observes that adjudicators should ensure that children enjoy specific procedural and evidentiary safeguards to ensure due process.[523] These include: children's claims should be processed on a priority

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[511] UNHCR, *Guidelines on International Protection No. 8*, at ¶ 4; *see also* UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* ¶ 74, U.N. Doc. CRC/GC/2005/6 (Sep. 2005).
[512] *See, e.g.* UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 10-12 (noting, among other things, that ill treatment that does not rise to the level of persecution in an adult may nonetheless do so for a child); *id.* ¶¶ 15-17 (noting that children may experience harm differently than adults; that psychological harm may be particularly relevant to consider; and that children are likely to be sensitive to acts that target close relatives).
[513] UNHCR, *Guidelines on International Protection No. 8*, ¶ 18 (citing examples such as forced labor, forced or underage marriage, forced prostitution, and child pornography).
[514] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 13-15 (citing as examples the rights to family unity, protection from traditional practices prejudicial to the health of children, and protection from all forms of physical and mental violence, abuse, neglect, and exploitation).
[515] *See, e.g.*, Children on the Run (UNHCR report, 2015)
[516] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 19-23.
[517] *See generally* UNHCR Gang Guidance.
[518] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 32-33.
[519] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 37-39 (discussing, for example, the notion that police may easily dismiss children and / or may not have the necessary skills to interview and listen to children).
[520] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53- 64.
[521] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57.
[522] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 58-64.
[523] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 65-77.

basis;[524] unaccompanied and separated children should be appointed both an independent, qualified guardian and a legal representative;[525] children should be given the opportunity to express their views and participate meaningfully in the process;[526] the adjudicator should take on greater responsibility to explore the claim fully, not resting the burden of proof with the child;[527] and evidence should be gathered carefully, taking into account children's limited capacity to provide information on country of origin information or the reasons for their persecution.[528]

There appear to be serious incompatibilities between the international standards on children's claims and the elements of the Proposed Rule that may apply to children, which, if applied, will have severe consequences for children seeking protection. This is true both for the substantive elements and the procedural protections as they apply to children. For instance, the proposed changes to the definitions of "persecution," "particular social group," and "political opinion" will all make it harder for children to assert claims and do nothing to take into account the specific persecutory circumstances of children. The effective expansion of bars to asylum – such as discretionary denials and presumption on internal relocation – also do not show regard for the specific needs of children. Likewise, the procedural barriers – including pretermission, dismissal of frivolous claims, and requirement to demonstrate one's own particular social group – indicate a lack of procedural fairness toward children, who require more, not fewer, procedural safeguards in the asylum process.

UNHCR recommends that, should the Government implement the Proposed Rule, it should take great care to account for the special needs of children seeking protection. At a minimum, the government should revise the provisions discussed above with children's needs in mind. The Government should include specific exemptions for children which would address their unique vulnerabilities, such as their age, maturity level, and past trauma. Further, UNHCR urges the Government to enable child asylum-seekers with the facilities they need to have a realistic opportunity to have their claims developed, heard in full, and fairly adjudicated in a non-adversarial setting. This must include providing them with interpreters and access to legal assistance and representation.

B. Applicants without the means to navigate the complex legal system in the United States, including those appearing *pro se* before immigration courts

The Proposed Rule puts forward a great number of procedural changes that are punitive toward applicants, as discussed above, and UNHCR is concerned that these will 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 chance of gaining protection.[529]

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[524] UNHCR, *Guidelines on International Protection No. 8*, ¶ 66.
[525] UNHCR, *Guidelines on International Protection No. 8*, ¶ 69.
[526] UNHCR, *Guidelines on International Protection No. 8*, ¶ 70.
[527] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[528] UNHCR, *Guidelines on International Protection No. 8*, ¶ 74.
[529] 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*. p. 2. While legal

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Yet, despite international standards suggesting that particular care and assistance be given to applicants in vulnerable categories such as these, the Proposed Rule instead seems to establish virtually insurmountable barriers to protection for unrepresented applicants.

The Proposed Rule's provisions prejudice individuals without representation at nearly every stage of the process required to seek international protection—from expedited removal, to asylum application processing, and through adjudication:

- Beginning with expedited removal, the Proposed Rule raises the standards for certain fear screenings and makes it more challenging to obtain review of a negative fear determination. *Pro se* asylum-seekers may not understand which facts of their account they must share to meet the new fear screening thresholds, and those that receive a negative determination might not know that they are required to positively elect to have an immigration judge review their case.

- *Pro se* asylum-seekers who make it into the new asylum-and-withholding-only proceedings established under these regulations face a series of effectively insurmountable challenges to filing their applications and having their claims heard.

- The Proposed Rule allows for asylum-seekers' claims to be pretermitted before receiving a hearing if their application is 'legally insufficient' under applicable law; this standard is incredibly hard for an unrepresented asylum-seeker, especially a person who is not literate and does not speak English, to be able to follow.

- Asylum-seekers face a newly expanded definition of "frivolous" applications that, like pretermission, assumes knowledge of "applicable law." *Pro se* asylum-seekers may not be able to defend themselves if threatened with a finding of frivolousness and consequently suffer harsh penalties such as permanent ineligibility for immigration benefits, including asylum.

- If a *pro se* applicant manages to make it over all of those hurdles, they will face exceptional difficulties establishing their eligibility for international protection under the Proposed Rule's exceptionally narrow definition of a refugee. For instance, a *pro se* applicant may not be aware or understand the contours of particular social groups, and yet the Proposed Rule requires them to articulate their own if their claim is based on this ground or otherwise waive consideration of the particular social group formulations not advanced.[530]

The cumulative effect of the Proposed Rule's provisions on *pro se* asylum-seekers, and especially those with low levels of English proficiency or literacy, is clear: this highly vulnerable group stands virtually no chance at obtaining protection in the United States.

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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." *See Avoiding the Unauthorized Practice of Immigration Law*, AMER. BAR ASS'N (Aug. 1, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/avoiding-the-unauthorized-practice-of-immigration-law/; *About Notario Fraud*, AMER. BAR ASS'N (Jul. 19, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.

[530] UNHCR observes that *pro se* asylum-seekers whose claims are exclusively based on membership in a particular social group are unlikely to make it this far in the process, as their applications will likely have been pretermitted at an earlier stage of adjudication.

Under international law, states have flexibility in establishing appropriate procedures for determining who is entitled to protection.[531] However, states must recognize that an asylum applicant is "in a particularly vulnerable situation . . . in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."[532] The framework for examining asylum applications should have "an understanding of an applicant's particular difficulties and needs,"[533] and, despite variance in that framework from state to state, should include essential guarantees and basic requirements.[534] Among others, these basic requirements include that an applicant be provided with guidance as to procedures that will be followed; the necessary facilities, including the services of a competent interpreter, for submitting their case; and if not recognized as a refugee, a reasonable time to appeal.[535] Further, international legal standards provide that the applicant and adjudicator share the duty to ascertain and evaluate all the relevant facts.[536] In some cases, "it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."[537] The UNHCR Handbook cautions, "[t]he requirement of evidence should . . . not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself," and it explains why an adjudicator may need to conduct multiple interviews or hearings to gather facts before making a determination as to the applicant's refugee status.[538] In sum, because an adjudicator's decision "affects human lives," he or she must act "in a spirit of justice."[539] And yet, in contrast to these standards, the Proposed Rule fails to put forward any safeguards for unrepresented applicants.

UNHCR recommends that the Government revisit the Proposed Rule to take into account the needs of unrepresented asylum-seekers, including those who have suffered profound trauma, those with low levels of literacy, and those who are not proficient in English. UNHCR recommends, as discussed elsewhere, that the Government reconsider punitive procedural provisions such as those on pretermission and frivolous claims. Should these provisions remain, UNHCR recommends that the Government take measures to mitigate their effects on vulnerable groups, including but not limited to those identified here.

Specifically, UNHCR suggests that the Government ensure that all asylum-seekers have access to guidance on the procedures involved in the U.S. system, including during screening procedures (e.g., the precise steps an applicant must take to obtain immigration judge review of a negative fear determinations) and adjudication of their applications. In addition, UNHCR advises the Government to enable asylum-seekers with the facilities they need to have a realistic opportunity to have their claims heard in full. This involves providing applicants with interpreters and access to legal assistance and representation. Further, as noted earlier in this Comment, UNHCR underscores that asylum-seekers should not be detained during the pendency of their proceedings, in part because this practice obstructs their ability to secure representation.[540]

[531] UNHCR Handbook ¶ 189.
[532] UNHCR Handbook ¶ 190.
[533] UNHCR Handbook ¶ 190.
[534] UNHCR Handbook ¶ 192.
[535] UNHCR Handbook ¶ 192.
[536] UNHCR Handbook ¶ 196.
[537] UNHCR Handbook ¶ 196.
[538] UNHCR Handbook ¶ 197.
[539] UNHCR Handbook ¶ 202.
[540] *See* Detention Guidelines, *supra*, note 34.

V. Conclusion and List of Recommendations

UNHCR closes by reiterating our overarching concerns about the breadth of changes in the Proposed Rule and their fundamental incompatibility with international standards. We recognize the challenges associated with increased flows of asylum-seekers within the sub-region, and the corresponding strains on an asylum system in need of reform. Nonetheless, we are deeply concerned that the proposals in this rule breach fundamental tenets of international refugee law binding on the United States. These tenets include *non-refoulement*, the right to seek and enjoy asylum, and the principles of due process and fair treatment in the asylum process. UNHCR is deeply troubled that much of the Proposed Rule seems to run counter to these principles. The Proposed Rule, if enacted, would drastically diminish the United States' capacity to guarantee protection, and lead the United States to step away from a decades-long tradition of humanitarian welcome to asylees and refugees.

UNHCR recommends that the government refrain from implementing the Proposed Rule in its entirety. Should the government proceed, UNHCR recommends that virtually every aspect of the rule be carefully reconsidered in order that the rule might be brought in compliance with international refugee law. The analysis above provides guidance and recommendations on how to approach provisions of the Proposed Rule in line with international standards. In addition to specifying our recommendations at the point of the discussion of each specific provision above, we have provided a unified list of these recommendations below for ease of reference. We close by reiterating our commitment to the decades-long relationship between UNHCR and the U.S. government, and emphasizing that we stand ready to support the U.S. government in building a legal framework for protection that corresponds with international standards, while responding to contemporary challenges that have strained the current domestic asylum system.

List of Recommendations:

A. Expedited Removal and Screenings in the Credible Fear Process

1. Asylum-and-Withholding-Only Proceedings for Non-citizens with Credible Fear

UNHCR recommends that the government refrain from instituting "asylum-and-withholding-only" proceedings and instead continue to use full removal proceedings. (UNHCR stands ready to engage in further conversation about backlog reduction and improving efficiencies in full removal proceedings, in keeping with international standards.) Nonetheless, if the Government wishes to instate "asylum-and-withholding-only" proceedings, it should ensure that such proceedings align with international standards, including by: preserving critical due process protections such as the right to an independent appeal; providing access to complementary forms of protection; and refraining from arbitrary or mandatory detention.

2. Consideration of Precedent When Making Credible Fear Determinations in the "Credible Fear" Process

UNHCR recommends that the Government continue to permit immigration judges to assess all relevant authorities and give them their due weight when reviewing negative fear determinations. This partially mitigates the risk that such determinations are inconsistent with international law, which requires that adjudicators use cautious thresholds during screening processes.

3. DHS-Specific Procedures in Expedited Removal and Credible Fear and Their Potential Impact on Detention

UNHCR recommends that the Government strike the removal of any provision that would negatively impact access to custody determinations for those who meet the credible fear standard or the reasonable possibility standard for screening.

4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Non-Citizens in Expedited Removal Proceedings and Stowaways

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

5. Proposed Amendments to the Credible Fear Screening Process

UNHCR recommends that the government not implement this provision. Specifically, UNHCR recommends that: the possibility of internal relocation not be included as a factor leading to a negative fear determination; asylum-seekers who appear potentially subject to a bar be provided with access to full asylum procedures for careful consideration of that bar; and that asylum-seekers have access to IJ review of negative fear determinations unless they affirmatively decline that opportunity, having been informed in a language they understand of the consequences of doing so.

B. I-589: Application for Asylum, Withholding of Removal, and CAT Protection

1. Frivolous Applications

UNHCR recommends that the Government adopt the "manifestly unfounded / clearly abusive" framework envisioned under international law if it wishes to address "frivolous" applications. Regardless of the definition used, necessary procedural safeguards, as detailed above, should be incorporated into the process. Finally, UNHCR urges that any current or future immigration penalties for filing frivolous applications not be implemented.

2. Pretermission of Legally Insufficient Applications

UNHCR recommends that the Government strike the provision permitting pretermission of applications for asylum, withholding of removal, and protection under CAT. Instead, as a minimum, the Government should implement a framework for asylum adjudication in keeping with international standards, in which an adjudicator (whether at USCIS or in immigration court) can interview the asylum-seeker, preferably in a non-adversarial manner, to ascertain the full set of facts relevant to the case in question.

C. Standards of Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

1. Membership in a Particular Social Group

Regarding requirements for legally cognizable PSGs, UNHCR recommends that the Government strike the codification of these requirements around defining particular social groups from the Proposed Rule and in its place propose adoption of the either-or approach to analyzing particular social groups that conforms with UNHCR guidance. Specifically, UNHCR suggests that the Government reconcile the approaches to minimize gaps in protection: a

particular social group is a group of persons who share a common characteristic other than their risk of being persecuted *or* who are perceived as a group by society.

Regarding purportedly-circular PSGs, UNHCR recommends that the Proposed Rule's restrictions around purportedly-circular particular social groups not be enacted. Should these restrictions remain in some form, UNHCR urges that the language be revised to acknowledge the fact that persecution can play a role in determining the visibility of a PSG. Additionally, UNHCR urges that explicit language be strengthened in the rule preserving the ability of adjudicators and courts to continue to evaluate PSG claims on a case-by-case basis beyond the "rare circumstances" envisioned in the current language of the Proposed Rule.

Regarding the non-exhaustive list of PSGs that will generally fail, UNHCR recommends that the Government strike this provision entirely in the final version of the Rule. In the alternative, the government should-provide explicit authority to adjudicators evaluate PSG claims on a case-by-case basis. If the government wishes to list particular social groups in order to aid adjudicators in individualized assessments of each claim, it should do so in an inclusionary manner, rather than by making a list of non-cognizable PSGs.

Regarding the requirement that applicants define their own PSGs, UNHCR recommends that the Government strike this provision requiring asylum-seekers to articulate their own particular social groups without the assistance of an adjudicator. UNHCR encourages the Government to rewrite any rule concerning asylum application processing to affirm the adjudicator's duty to explore and identify the reason(s) why an individual has a well-founded fear of persecution, up to and including exploring the elements of particular social groups. UNHCR also encourages the Government to preserve pathways to raise newly articulated PSGs on appeal.

2. <u>Political Opinion</u>

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to preclude its current use or future evolution, nor should it prioritize one type of claim above others.

3. <u>Persecution</u>

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to limit its current use or future evolution, nor should to prioritize one type of claim above others.

4. <u>Nexus</u>

UNHCR recommends that the Government strike this provision that all but precludes asylum in cases involving eight different types of claims, as international law requires that applications for international protection not be rejected in the absence of a case-by-case adjudication of their merits. Further, UNHCR recommends that the Government implement a standard for nexus in U.S. law which requires only that a Convention ground be a relevant, contributing factor, not necessarily one central reason, for an applicant's persecution, which will bring the United States into conformity with international legal standards on this issue.

5. Evidence

UNHCR recommends that the Government strike this provision from the Proposed Rule, as it is clearly at variance with international standards on procedural fairness in asylum adjudication and will have a significant impact on applicants who submit certain types of claims. Instead, the Government should permit applicants to continue to support their claims with country conditions evidence that provides adjudicators with information that can help them determine whether the applicant is entitled to refugee protection.

6. Internal Relocation

UNHCR recommends that the Government not implement the new provision creating a presumption of internal relocation in cases involving asylum-seekers who have suffered persecution by non-state actors. Instead, UNHCR recommends that the Government bring its adjudication of internal relocation in line with the international legal principles described above. At the very least, children's claims should be exempted from this section of the Proposed Rule.

7. Factors for Consideration in Discretionary Determinations

With respect to discretionary factors overall, UNHCR recommends that the Government promulgate regulations directing adjudicators to grant asylum every time they encounter an individual who meets the criteria, effectively discontinuing the use of discretion. In the absence of such a change to the use of discretion, UNHCR recommends that the entire list of factors for discretionary denial in the Proposed Rule be struck from the final regulation, effectively removing the adjudicator's mandate to deny on these grounds.

8. Firm Resettlement

UNHCR recommends that the Government not implement the Proposed Rule expanding the firm resettlement bar and that it instead use this opportunity to establish a definition of this concept that is compatible with international law.

9. Rogue Officials

UNHCR recommends that, should the Government implement a new definition of "torture," it make it less restrictive such that it aligns with the definitions in international law.

D. Information Disclosure

UNHCR recommends that the Government amend the Proposed Rule to limit the circumstances under which asylum-seekers' information can be disclosed, including by removing the prong of this provision on permitted disclosures that concerns legal actions related to the denial of an application for protection or challenges to custody status, and enhance provisions related to the protection of their personal data and asylum claims. UNHCR advises the Government to remove the prong on disclosures concerning legal actions so that applicants for refugee protection are not deterred from challenging a denial of their claim or their custody status.

IV. Particularly Vulnerable Groups

Regarding child asylum-seekers, UNHCR recommends that, should the Government implement the Proposed Rule, it should take great care to account for the special needs of

children seeking protection. At a minimum, the government should revise the provisions discussed above with children's needs in mind. The Government should include specific exemptions for children, which would address their unique vulnerabilities, such as their age, maturity level, and past trauma. Further, UNHCR urges the Government to enable child asylum-seekers with the facilities they need to have a realistic opportunity to have their claims developed, heard in full, and fairly adjudicated in a non-adversarial setting. This must include providing them with interpreters and access to legal assistance and representation.

Regarding *pro se* asylum-seekers, UNHCR recommends that the Government revisit the Proposed Rule to take into account the needs of unrepresented asylum-seekers, including those who have suffered profound trauma, those with low levels of literacy, and those who are not proficient in English. UNHCR recommends, as discussed elsewhere, that the Government reconsider punitive procedural provisions such as those on pretermission and frivolous claims. Should these provisions remain, UNHCR recommends that the Government take measures to mitigate their effects on vulnerable groups, including but not limited to those identified here.

Specifically, UNHCR suggests that the Government ensure that all asylum-seekers have access to guidance on the procedures involved in the U.S. system, including during pre-screening procedures (e.g., the precise steps an applicant must take to obtain immigration judge review of a negative fear determinations) and adjudication of their applications. In addition, UNHCR advises the Government to enable asylum-seekers with the facilities they need to have a realistic opportunity to have their claims heard in full. This involves providing applicants with interpreters and access to legal assistance and representation. Further, as noted elsewhere in this Comment, UNHCR underscores that asylum-seekers should not be detained during the pendency of their proceedings, in part because this practice obstructs their ability to secure representation.