

## **Comments of the United Nations High Commissioner for Refugees on Proposed Rule from the Executive Office for Immigration Review (U.S. Department of Justice): “Procedures for Asylum and Bars to Asylum Eligibility”**

UNHCR submits for your consideration the comments below on the new Proposed Rule from the Executive Office for Immigration Review, “Procedures for Asylum and Bars to Asylum Eligibility” (*hereinafter* “Proposed Rule on Bars”).<sup>1</sup>

These comments have been prepared by the United Nations High Commissioner for Refugees (UNHCR) and focus on those aspects of the Proposed Rule on Bars which may have a significant impact on the international legal protections available under US treaty obligations to refugees, asylum-seekers, and others of concern to UNHCR.

This submission is offered consistent with UNHCR’s supervisory responsibility under the 1967 United Nations Protocol Relating to the Status of Refugees (the “1967 Protocol”)<sup>2</sup> and the 1951 United Nations Convention Relating to the Status of Refugees (the “1951 Convention”).<sup>3</sup> The United States is a signatory and State Party to the 1967 Protocol, and therefore has agreed to cooperate with UNHCR to facilitate our duty of supervising the application of the provisions of the Protocol, and, as incorporated therein, the 1951 Convention. One of the means by which UNHCR exercises its supervisory responsibility is by communicating with States Party its guidance and interpretations of the 1951 Convention, the 1967 Protocol, and other international 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 on Bars restricts asylum in a way that is at variance with international legal obligations related to refugee protection. UNHCR has a strong interest in ensuring that United States asylum law and policy remains consistent with the international treaty obligations that the United States helped to create, and respectfully offers its guidance on those obligations.

### **Analysis**

#### **1. Bars to Asylum Beyond the 1951 Convention Framework**

The Proposed Rule on Bars suggests seven new bars to eligibility for asylum. These bars would apply to asylum-seekers who are convicted of:

- 1) A felony under state or federal law;
- 2) An offense under the U.S. domestic laws on smuggling or harboring non-citizens;
- 3) An offense under INA Section 1326 (illegal re-entry);
- 4) A federal, state, tribal, or local crime involving “criminal street gang activity;”
- 5) Certain offences concerning driving while intoxicated;

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<sup>1</sup> EOIR Docket No. 18–0002; A.G. Order No. 4592–2019; issued December 19, 2019.

<sup>2</sup> Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, at Art II.

<sup>3</sup> July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, at 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).

- 6) A federal, state, tribal, or local domestic violence offence (this category also includes a bar to asylum for those “who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted”); and
- 7) Certain misdemeanors under federal or state law for offenses related to false identification, unlawful receipt of public benefits, or possession of small amounts of drugs or drug-related paraphernalia.

The 1967 Protocol and 1951 Convention lay out a clear framework for determining who is a refugee and is therefore entitled to the rights enumerated in the Convention itself. That framework includes criteria for identifying persons who, while they would otherwise have the characteristics of refugees, should nonetheless be excluded from refugee status.<sup>4</sup> This framework divides into three categories, commonly known as “the exclusion clauses.”<sup>5</sup> The first two categories – exclusion for persons already receiving United Nations protection or assistance,<sup>6</sup> and for persons not considered to be in need of international protection<sup>7</sup> – are not particularly germane to the issues discussed in this proposed rule. However, the third exclusion category – for persons considered not to be deserving of international protection – provides valuable guidance for the issue at hand.

The Convention sets a high threshold when defining persons considered not considered to be deserving of international protection. Article 1(F) states that persons may be excluded from refugee status where there are “serious reasons for considering that:

“(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

“(b) he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee;

“(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”<sup>8</sup>

In addition, Article 33(2) of the 1951 Convention denies the benefit of *non-refoulement* 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.”<sup>9</sup> Article 1F is to be distinguished from Article 33(2) of the 1951 Convention, which provides for the exceptions to the principle of *non-refoulement*. These are distinct provisions serving different purposes. Article 1F forms part of the refugee definition in the 1951 Convention, and exhaustively enumerates the grounds for exclusion from refugee status based on criminal acts committed by the applicant. Unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection. While Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country. The application of Article 33(2) affects the treatment afforded to refugees, rather than their recognition as refugees under the 1951 Convention. It permits, under exceptional circumstances, the withdrawal of protection from *refoulement* of refugees who pose a danger to the host country. A decision to exclude an applicant based on a finding that s/he

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<sup>4</sup> 1951 Convention, Article 1(D)-(F).

<sup>5</sup> UNHCR Handbook, paras. 140-141 *et seq.*

<sup>6</sup> 1951 Convention, Article 1(D). Such protection or assistance was given by the former United Nations Korean Reconstruction Agency and is currently given by the United Nations Relief and Works Agency for Palestine Refugees in the Near East. *See* UNHCR Handbook, para. 142.

<sup>7</sup> “This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.” 1951 Convention, Article 1(E).

<sup>8</sup> 1951 Convention, Article 1(F).

<sup>9</sup> 1951 Convention, Article 33(2).

constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.

UNHCR is concerned that the seven new bars proposed in this Rule go far beyond the exclusion framework established by the Convention. UNHCR's general position is that, given the stark consequences of exclusion for the person concerned, the exclusion clauses in the Convention must be narrowly construed.<sup>10</sup> At the same time, the exclusion clauses are exhaustively enumerated in Article 1F, and while these clauses are subject to interpretation, they cannot be amended or modified<sup>11</sup> in the absence of an agreement by the contracting Parties. As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1F should always be interpreted in a restrictive<sup>12</sup> manner and applied with utmost caution<sup>13</sup>, and in the light of the overriding humanitarian character of the 1951 Convention.

The Proposed Rule on Bars would exclude asylum-seekers who have committed crimes significantly less severe than those contemplated by the drafters of the Convention.<sup>14</sup> Because the proposed bars are overly broad, UNHCR is concerned that they risk the exclusion of legitimate refugees.

The Proposed Rule on Bars contemplate offenses committed in the United States after entering the country.<sup>15</sup> Consequently, the language in Article 33(2) – which covers “particularly serious crimes” in the country of refuge – is most relevant. UNHCR observes that in 1997 we offered comments (similar to those we offer today) on proposed rules entitled “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; and Asylum Procedures.” Those comments, which spoke to proposed rules promulgated in line with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), examined discrepancies between the language of “particularly serious crime” in Article 33(2) and the notion of “aggravated felonies” in U.S. law, urging caution.

Neither the Convention nor the Handbook defines “particularly serious crime,” as articulated in Article 33(2). However, the Handbook does offer some guidance in determining whether a crime is a “serious” non-political crime for purposes of the Article 1(F) exclusion clause regarding a person who “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” A “serious” crime must be “a capital crime or a grave punishable act,” and “[m]inor offences punishable by moderate sentences are not grounds for exclusion” under Article 1(F).<sup>16</sup> A “particularly serious crime” is an even more restrictive category.

The Proposed Rule on Bars looks to exclude individuals who have convicted relatively minor crimes, including misdemeanor crimes not serious enough to be considered felonies under U.S. law. This is at variance with the serious nature of the crimes contemplated in the Convention's framework. Additionally, the particular proposed bar excluding asylum-seekers who have “engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted,” raises additional

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<sup>10</sup> UNHCR Handbook, para. 149.

<sup>11</sup> See UNHCR, *Background Note on Exclusion*, at para. 7. As a general principle of international law, a treaty can only be modified or revised by agreement between the contracting Parties. This principle is set forth in Article 39 of the *1969 Vienna Convention on the Law of Treaties*, which stipulates that: “[...] a treaty may be amended by agreement between the Parties”. Similarly, no reservations to Article 1 of the 1951 Convention are permitted by virtue of Article 42 of the 1951 Convention. For further guidance on the law of treaties, see Ian Brownlie, *Principles of International Law*, sixth Edition, Oxford University Press, 2003, at pages 581-584.

<sup>12</sup> See UNHCR Handbook, para. 149.

<sup>13</sup> See Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are generally accepted as being declaratory of international law. In particular, under Article 31, a treaty shall be interpreted “in good faith in accordance with the ordinary meaning given to the terms [...] in their context and in the light of its object and purpose”. The object of the 1951 Convention, as stated in its Preamble, is to endeavour to ensure that refugees have the widest possible exercise of fundamental rights and freedoms.

<sup>14</sup> UNHCR Handbook, paras. 147-149.

<sup>15</sup> Proposed Rule on Bars, p. 19.

<sup>16</sup> UNHCR Handbook, para. 155.

concerns. Article 33(2) only permits the removal of the protection against *refoulement* if there is a final conviction.

Moreover, in determining the refugee status of persons who have been convicted of a crime within the country of refuge, the adjudicator first must assess whether the person fulfills the criterion of having a "well-founded fear of persecution" as specified in Article 1(A)(2) of the Convention and Article I of the Protocol. It is only after the person has been considered to satisfy the above "well-founded fear of persecution" criterion that the possible applicability of any exclusion clauses should be examined.<sup>17</sup> At that point, a balancing test is appropriate, to weigh the nature of the offence against the severity of the feared persecution.<sup>18</sup> UNHCR is concerned that these new bars are to be automatically applied, leaving no room for such a balancing test.

**UNHCR recommends** that none of these bars be implemented, and that the Proposed Rule on Bars be rewritten to correspond with the exclusion framework articulated in the Convention.

## 2. Penalization for Irregular Entry

The Proposed Rule on Bars includes, as mentioned above, a new bar to asylum eligibility those convicted of illegal re-entry. This presumably affects at least two groups of asylum-seekers: First, this could affect those who re-enter irregularly in order to seek asylum, if they were first convicted on the re-entry charge. Second, this would affect those who have been convicted of illegal re-entry in the past, prior to developing a fear of persecution. If they were to present at a port of entry to seek asylum, even many years later, this bar could be effectuated against that person.

Article 31 of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entrance. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties, but includes "any administrative sanction or procedural detriment imposed on a person seeking international protection."<sup>19</sup> Disparate treatment between two groups of refugees – those who arrive at ports of entry and those who enter irregularly – is such a detriment, as is denying the latter group access to rights articulated in the Convention.

**UNHCR recommends** that the bar to asylum for those with illegal re-entry convictions be struck.

## 3. Compatibility with International Treaty Observations

The text of the Proposed Rule on Bars observes that the new framework "is consistent with U.S. obligations under the 1967 Protocol," which incorporates Articles 2-34 of the 1951 Convention.<sup>20</sup> Specifically, the Proposed Rule asserts that the new bars to asylum are compatible with the prohibition on *refoulement*, because the new bars affect the individual's eligibility for asylum, but do not affect eligibility for withholding of removal and CAT protection.

The framework for recognition (and exclusion) of refugees does not make such a distinction. Instead, an individual recognized as deserving of asylum under Article 1 is correspondingly entitled to protection from *refoulement* through Article 33. Withholding of removal, which may have its merits in other instances, is not to be seen as a substitute for asylum. Additionally, withholding of removal fails

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<sup>17</sup> UNHCR Handbook, para. 176.

<sup>18</sup> Handbook, paras. 154, 156, and 157.

<sup>19</sup> UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas of 'international' zones at airports* (Jan. 17, 2019), para. 8, <https://www.refworld.org/docid/5c4730a44.html>.

<sup>20</sup> Specifically, Section D of the Proposed Rule on Bars discusses United States laws implementing international treaty obligations.

to secure numerous rights to which Convention refugees are entitled, including freedom from detention, family reunification, and pathways to naturalization.

- UNHCR, Multi-Country Office Washington, February 2020