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):

"Security Bars and Processing"

Submitted 10 August 2020

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits for your consideration the comments below on the new Proposed Rule on Security Bars and Processing 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 are of interest to UNHCR and may have a significant impact on the safeguards based on international legal standards available to persons seeking international protection.

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

One of the means by which UNHCR exercises its supervisory responsibility is by providing to States parties its guidance and interpretations of the 1951 Convention, the 1967 Protocol, and other international refugee instruments. This guidance and these interpretations are informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system of international refugee protection.

UNHCR presents these comments today out of concern that the Proposed Rule establishes a new bar to asylum that, if implemented, would diverge sharply from international legal obligations related to refugee protection; creates new substantive and procedural barriers to a fair and efficient review of a claim for protection; and puts at risk individuals who may face persecution or danger in other territories to which they may be removed. UNHCR has a strong interest in ensuring that U.S. asylum law and policy aligns with the international treaty obligations that the United States helped to create and respectfully offers its guidance on these obligations.

[1] G.A. Res. 428(v), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950) [hereinafter UNHCR Statute].
[2] Protocol Relating to the Status of Refugees, art. II, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) [hereinafter Protocol].
[3] Convention Relating to the Status of Refugees, art. 35, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter Refugee Convention]. UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." UNHCR Statute ¶ 8(a).
[4] *See* Protocol.
[5] "The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." Protocol, art. II.

II. Ensuring Access to Asylum and Prevention of Refoulement in the Context of Public Health

UNHCR appreciates the decades-long, positive engagement between our Office and the U.S. government, including on technical aspects of international refugee law and its domestic realization. Further, UNHCR acknowledges the unprecedented challenges States face stemming from the current global pandemic. Nonetheless, UNHCR has serious concerns that the Proposed Rule sets aside fundamental tenets of international refugee law, which as a result would diminish the United States' capacity to fully guarantee the right to seek asylum and find protection against refoulement, in line with its international obligations.[6]

The Proposed Rule seeks to expand U.S. bars to asylum based on "emergency public health concerns."[7] The rule relies on the notion of "communicable disease due to potential international threats from the spread of pandemics" in order to expand the "danger to the security of the United States" bar to asylum that currently exists in U.S. law.[8] While the rule clearly references COVID-19, the rule gives however the Departments of Justice and Homeland Security expansive authority to declare other public health situations and diseases (including treatable diseases) as security threats. The rule identifies "danger to border security and law enforcement personnel"[9] and the "potential economic devastation of a pandemic"[10] as examples of the threats to the security of the United States envisioned by this new bar. This proposed framework, in its entirety, is inconsistent with the refugee protection regime set forth under the 1951 Refugee Convention and its 1967 Protocol, as summarized below and further elaborated in section III of these comments.

Under international law, States have the sovereign power to regulate the entry of non-nationals to their territory, but may not do so in a way that infringes on the right to seek asylum or results in refoulement.[11] This responsibility extends to all persons within the State's jurisdiction, including those at national frontiers.[12] It applies as soon as a person presents themselves at a border claiming to be at risk of persecution or fearing return to his or her country of origin or any other country, including in the context of pre-screening or accelerated procedures.[13] If a person indicates in any way that they may be at risk or have such a fear, or if there is any other reason to suspect that the person may fear return to the country of origin or another place, States must make an independent inquiry as to the person's need for international protection (as opposed to, for example, requiring the person to articulate that need for international protection in some specific manner themselves),[14] and must provide access to relevant information in a language they understand so that the person can make a claim for protection with the competent authority.[15]

UNHCR fully recognizes that States are entitled to take measures to ascertain and manage risks to public health, while continuing to ensure access to asylum and preventing

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[6] Anticipating States' concerns around the COVID-19 pandemic, in March 2020 UNHCR laid out a set of key legal considerations that details relevant international law and proposed measures available for States to act, which enable States to meet their obligations to protect refugees without compromising public health objectives. *See generally* UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protections in the Context of the COVID-10 Response* (Mar. 16, 2020), [hereinafter Key Legal Considerations], https://www.refworld.org/docid/5e7132834.html. Those legal considerations are summarized in this section, alongside UNHCR's concerns that the Proposed Rule does not meet those international standards.
[7] Security Bars and Processing, 85 Fed. Reg. 41,201, 41,201 (proposed July 9, 2020) (to be codified at 8 C.F.R. pt. 208) [hereinafter Proposed Rule].
[8] *Id.*
[9] *Id.* at 41,204.
[10] *Id.* at 41,205.
[11] Key Legal Considerations ¶ 1. Non-refoulement is a central principle of the right to seek asylum; it prohibits any State conduct that leads to the 'return in any manner whatsoever' to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory. *Id.* ¶ 2.
[12] *Id.* ¶ 3.
[13] *See id.* ¶ 3.
[14] *Id.* ¶ 3.
[15] *Id.* ¶ 4.

refoulement.[16] To the extent that such measures entail limitations on the exercise of human rights, they must be non-discriminatory, as well as necessary, proportionate, and reasonable to the aim of protecting public health.[17] Importantly, some rights are subject to only very specific exceptions[18] and do not allow for limitations aimed at broader public policy objectives such as public health, while others may never be limited due to their absolute character.[19] For instance, States might implement appropriate health screening of travellers upon arrival, and/or quarantine for persons who have been identified as suffering from, or have been exposed to, a disease, so long as any limitations on such rights as privacy and freedom of movement do not go beyond what is necessary and proportionate to achieve legitimate public health objectives.[20]

UNHCR notes that, while temporary restrictions on the freedom of movement (such as quarantine) may be appropriate in some circumstances where needed to protect public health, they must be used in accordance with international law. In particular, where such restrictions amount to detention, that detention must not be arbitrary or discriminatory, must be in accordance with and authorized by law in accordance with procedural safeguards, for a limited time period, subject to regular review, and otherwise in line with international standards.[21]

However, imposing a blanket measure with the effect of precluding admission for a particular group of people who may require international protection, without specific evidence of health risk and without measures to protect against refoulement and ensure access to asylum procedures, would be discriminatory and would be inconsistent with international obligations, as it would infringe upon rights that are absolute or subject to only very specific exceptions.[22]

UNHCR has long acknowledged that the U.S. is facing unprecedented challenges associated with new and increased movements of asylum-seekers within the subregion. We recognize that the U.S. asylum system is under significant strain, and we appreciate the ongoing engagement with the Departments of Homeland Security and Justice to explore ways to improve the quality and efficiency of the current system, as well as improve refugee protection throughout the region. However, UNHCR notes with concern that measures taken for public health reasons which impinge upon the right to seek asylum have ripple effects far beyond the State imposing the measures itself.[23] Not only are such measures at variance with international law, they risk sending asylum-seekers into "orbit," searching for a State willing to accept them.[24] This could contribute to further spread of the disease in question.[25] UNHCR very much welcomes the opportunity to continue to engage with the United States on such key issues, and offers, below, these comments on specific aspects of the Proposed Rule in the hopes of constructively advancing such a conversation.

III. Observations on Specific Provisions of the Proposed Rule

In this section, UNHCR offers observations and comments on the Proposed Rule on Security Bars and Processing. 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.

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[16] *Id.* ¶ 5.
[17] *Id.* ¶ 5.
[18] *See, e.g.*, Refugee Convention, art. 33. (prohibiting refoulement under international refugee law).
[19] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter CAT] (prohibiting refoulement under the Convention Against Torture).
[20] *See* Key Legal Considerations, ¶ 5.
[21] *Id.* ¶ 7. Health concerns do not justify systematic use of immigration detention against asylum-seekers or refugees. *Id.*
[22] *Id.* ¶ 6.
[23] *Id.* ¶ 8.
[24] *Id.* ¶ 8.
[25] *Id.* ¶ 8.

A. The "Danger to the Security of the United States" Bar to Eligibility for Asylum and Withholding of Removal

The Proposed Rule establishes a new bar to asylum and withholding of removal based on public health grounds.[26] Citing "significant dangers to the security of the United States posed by the COVID-19 and possible future pandemics, including the economic toll" of those events, the rule purports to clarify that individuals can be barred from asylum and withholding of removal if they "potentially risk bringing in deadly infectious disease to, or facilitating its spread within, the United States."[27] Such a bar to protection is beyond the exclusionary grounds set forth in the 1951 Convention and 1967 Protocol.

Under the Proposed Rule, there are two circumstances under which the bar may be applied: when the disease has triggered an ongoing declaration of a public health emergency under federal law, or when the Secretary of Homeland Security and the Attorney General have jointly determined (in consultation with the Secretary of Health and Human Services) that the disease is of public health significance because it is prevalent or epidemic in another country or region.[28] Neither circumstance corresponds with the framework for exclusion from international protection permitted under international refugee law.

The Proposed Rule appears to be written in blanket terms, asserting that "the bar need not be limited to instances where each individual alien is known to be carrying a disease."[29] Instead, it clearly states that the bar can be applied where "the presence of the disease in the countries through which the alien has travelled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States."[30] As to whether there are "reasonable grounds" for regarding the individual as a danger to the United States, the Proposed Rule explains that meeting this standard requires information that would permit a reasonable person to believe that the individual poses a danger to the security of the United States.[31]

UNHCR is concerned that the new bar to asylum and withholding of removal has the potential to exclude arbitrarily from international protection many individuals who are entitled to such

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[26] Proposed Rule at 41,201-02, 41,214 ("This proposed rule would amend existing DHS and DOJ. . .regulations to clarify that the Departments may consider emergency public health concerns based on communicable disease. . .when making a determination as to whether 'there are reasonable grounds for regarding [an] alien as a danger to the security of the United States" and, thus, ineligible to be granted asylum or the protection of withholding of removal under Immigration and Nationality Act ('INA') sections 208 and 241 and DHS and DOJ regulations.").

[27] *Id.* at 41, 204-05, 41,208.

[28] *Id.* at 41,211-12, 41, 215, 41,217. In determining whether there are "reasonable grounds" for regarding an individual as a danger to the security of the United States, adjudicators may consider whether the individual "exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such disease" or whether the individual or a class of individuals is coming from a country or has embarked at a place where such disease is prevalent or epidemic if:

(i) The disease has triggered an ongoing declaration of a public health emergency under federal law, or

(ii) The Secretary of the Department of Homeland Security and the Attorney General have, in consultation with the Secretary of Health and Human Services, jointly

(A) Determined that because the disease is a communicable disease of public health significance that is prevalent or epidemic in another country or country (or one or more political subdivisions or regions thereof) or place or places, the physical presence in the United States of aliens who are coming from such country or countries (or one or more subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or had embarked at that place or places during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Secretary and Attorney General jointly deem it necessary for the public health that individuals in (A) who are either still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease be regarded as a danger to the security of the United States, including any relevant exceptions as appropriate. *Id.*

[29] *Id.* at 41,210.

[30] *Id.* at 41,210.

[31] *Id.* at 41,210. According to the discussion piece of the Proposed Rule, the information relied upon to reach a determination simply need not be "intrinsically suspect"; it does not have to meet the standards for admissibility of evidence in court proceedings. *Id.*

protection under the 1951 Convention. Further, asylum-seekers may be less willing to disclose any signs or symptoms of illness and refrain from obtaining necessary medical care or testing for fear that they will be barred from seeking protection.[32] UNHCR anticipates that if the Proposed Rule were to be implemented, the U.S. may refoule persons with valid and genuine claims for protection to places where their life or freedom will be threatened, in violation of Article 33(1) of the Convention.[33]

i. International Standards

UNHCR is concerned that the new bar to asylum and withholding of removal goes far beyond the grounds for exclusion set out exhaustively in the 1951 Convention and 1967 Protocol.

Exclusion from international refugee protection

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.[34] In other words, once it is established that a person is a refugee, the person "lawfully stays" in the host country within the meaning of the 1951 Convention and should be accorded access to a range of rights allowing the person to integrate.[35]

The international legal regime does acknowledge that there are individuals who may meet the positive criteria for refugee status, but who nonetheless should be excluded from international protection. The 1951 Convention and 1967 Protocol provide a clear framework for determining who is a refugee (and is therefore entitled to the rights enumerated in the 1951 Convention itself) and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status.[36] Such exclusionary considerations should be balanced against the need for protection itself.[37]

[32] Refugee Convention, art. 24(1)(b) (designating the right of refugees to social security provisions, including for sickness).
[33] 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); 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*, ¶ 5 (Jan. 26, 2007), http://www.unhcr.org/refworld/docid/45f17a1a4.html.
[34] 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 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 42 U.N. Doc HCR/1P/4/ENG/REV.3 (2011))). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized under Article 1A(2), including rights to family reunification, freedom from arbitrary detention, and pathways to naturalization.
[35] 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 art. I(1)).
[36] Refugee Convention, arts. 1D-1F.
[37] *See* UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/05 ¶ 31 (Sep. 4, 2003) ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."); UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1051 Convention Relating to the Status of Refugees*, ¶ 99 (Sept. 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).

There are three categories of criteria for exclusion, which are enumerated exhaustively in the 1951 Convention, and which are commonly referred to as "the exclusion clauses."[38] While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect.[39] The first and second categories—the exclusion of persons already receiving United Nations protection or assistance[40] and of persons not considered to be in need of international protection[41]—are not relevant to the issues raised by this Proposed Rule and as such are not addressed in these comments. However, the third category—exclusion of persons considered not to be deserving of international protection under Article 1F—provides valuable guidance for the proposals put forward in this rule.

Exclusion under Article 1F of the 1951 Convention

The 1951 Convention sets a high threshold for exclusion under Article 1F to apply: a person may only be excluded from refugee status when there are "serious reasons for considering" that (a) he or she has committed a serious 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.[42] The exclusion clauses must therefore always be applied with "great caution" and interpreted in a "restrictive manner" given the potentially serious consequences of erroneous exclusion.[43] 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 to avoid being held legally accountable for their acts."[44]

In contrast, the Proposed Rule justifies a bar to asylum in relation to danger to law enforcement personnel and to the economic health of the United States in the context of the potential transmission of communicable disease.[45] The introduction of a public health bar to asylum cannot be considered as grounds for exclusion from refugee status as it goes beyond and bears no relation to the exhaustive grounds established under Article 1F. The result is the introduction of a public health bar to asylum which would add a ground for exclusion which is neither contemplated by the 1951 Convention nor compatible with the object and purpose of Article 1F.[46]

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[38] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 140-41 *et seq*. U.N. Doc HCR/1P/4/ENG/REV.3 (2011) [hereinafter UNHCR Handbook].
[39] UNHCR, *Background Note on the Application of the Exclusion Clauses*, ¶ 7.
[40] Refugee Convention, art. 1D; *see also* UNHCR Handbook ¶ 142.
[41] Refugee Convention, art. 1E.
[42] Refugee Convention, art. 1F.
[43] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[44] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[45] Proposed Rule at 41,201-02, 41,214 ("This proposed rule would amend existing DHS and DOJ . . . regulations to clarify that the Departments may consider emergency public health concerns based on communicable disease . . . when making a determination as to whether 'there are reasonable grounds for regarding [an] alien as a danger to the security of the United States' and, thus, ineligible to be granted asylum or the protection of withholding of removal under Immigration and Nationality Act ("INA") sections 208 and 241 and DHS and DOJ regulations"); *see also id.* at 41,207-09.
[46] UNHCR acknowledges that the existing bars to asylum in U.S. law already exceed the framework put forward by the Convention, and indeed, the Proposed Rule compounds this error. UNHCR takes note of extensive academic commentary on the origins of the U.S. bars to asylum, which bear some resemblance to Article 1F(b), while also drawing from language in Article 33(2) and independent domestic concerns. For detailed discussions of the legislative history and origins of the U.S. 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 Convention, 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 & Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481, 487, 535-36 (2000) (arguing that changes to immigration law in 1996 established bars to asylum which are only partially compatible with international law articulated in the 1951 Convention and discussing the reliance on Article 33(2) of the Convention); Deborah E. Anker, *Law of Asylum in the United States*, §§ 6.4, 6.16-6.20 (2020) (comparing U.S. bars to Convention provisions).

The exclusion clauses in Article 1F, 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."[47]

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 under the 1951 Convention. While 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 a refugee who poses a serious actual or future danger to the host country or its community. In this context, it is not consistent with the scheme of the 1951 Convention to provide for a new exclusionary bar to asylum and withholding of removal based on the "danger to the security" exception to the principle of non-refoulement under Article 33(2), and thus further expand grounds for exclusion from refugee status beyond those provided for in Article 1F.

In addition to the fundamental concern set out above regarding the new asylum bar's inconsistency with the exhaustive exclusion framework under the 1951 Convention, UNHCR also notes with concern that the understanding of the scope of Article 33(2) that appears to underlie the Proposed Rule is itself at variance with international refugee law. Under the international refugee treaty regime, the exception to protection from refoulement based on the "danger to the security" ground foreseen in Article 33(2) "covers acts of a very serious nature threatening directly or indirectly the government, the integrity or the independence of a State," such as acts of terrorism, espionage, or overthrowing the government by force.[48] The "danger to the security" exception in Article 33(2) "must be interpreted restrictively," "requires an individual assessment," and "must be applied in a manner proportionate to its objective," meaning that, *inter alia*, "refoulement is used as a last possible resort where no other possibilities of alleviating the danger exist."[49]

Not only does the Proposed Rule introduce a ground for exclusion from refugee status that is inconsistent with the 1951 Convention framework, it also fails to require an individual assessment of an asylum-seeker's personal circumstances. Indeed, the blanket nature of the Proposed Rule could lead to whole groups of refugees being barred from asylum.

UNHCR fully acknowledges States' legitimate concerns about managing public health concerns in the context of respecting and fulfilling the right to seek asylum, but considers that dealing with public health concerns through a bar to asylum is an inappropriate mechanism. Specifically, UNHCR has recalled on a number of occasions that a State's legitimate public

[47] Refugee Convention, art. 33(2).
[48] UNHCR, *Factum of the Intervenor, UNHCR Intervention Before the Supreme Court of Canada in the case of Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents)*, SCC No. 27790, ¶¶ 68–73 (Mar. 8, 2001), [hereinafter Suresh Factum], https://www.refworld.org/country,,UNHCR,AMICUS,CAN,,3e71bbe24,0.html; *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*, ¶ 10 (discussing exceptions to the principle of non-refoulement provided for in Article 33(2)); Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement*: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶¶ 170-72 (Cambridge Univ. Press 2003); Atle Grahl-Madsen, UNHCR, *Commentary on the Refugee Convention, Articles 2–11, 13–37*, 139-40 (1997), https://www.unhcr.org/3d4ab5fb9.pdf ("Generally speaking, the notion of 'national security' or 'the security of the country' exception is invoked against acts of a rather serious nature, endangering directly or indirectly the constitution (Government), the territorial integrity, the independence, or the external peace of the country concerned.").
[49] UNHCR, Suresh Factum, *supra* note 48, ¶¶ 74-84; *see also* Lauterpacht & Bethlehem, *supra* note 48, ¶¶ 173-76, 179; UNHCR, *Background Note on the Application of the Exclusion Clauses*, ¶ 10 (explaining that Article 33(2) may be applied in cases of an exceptional threat posed by an individual that "can only be countered by removing the person from the country of asylum").

health concerns, even in the extreme context of a global pandemic, cannot justify the refoulement of persons seeking international protection.[50]

UNHCR also observes that there are measures States can take to respond to public health emergencies while also safeguarding the right to seek asylum and preventing refoulement.[51] For instance, as noted above, States may choose to employ measures such as screening, testing, or quarantine in the process of receiving asylum-seekers and ensuring their right to have their international protection needs assessed fairly and efficiently, taking into account public health considerations (for example, implementing measures allowing for social distancing in the context of the COVID-19 pandemic).[52] Such measures should always be taken in keeping with international law.[53]

UNHCR recommends that the Government strike these provisions creating a new bar to asylum and withholding of removal on public health grounds.

B. Application of the 'Danger to the Security of the United States' Bars to Eligibility for Asylum and Withholding of Removal in the Expedited Removal Process

The Proposed Rule would have asylum pre-screening officers (APSOs) apply the new bar to asylum and to withholding of removal at the credible fear stage of the expedited removal process, in order to "expedite the processing" of individuals in expedited removal proceedings, "including those who potentially have deadly contagious diseases."[54] As a result of this amendment, the Proposed Rule asserts that "potentially lengthy periods of detention" of individuals awaiting the adjudication of their claims could be avoided and that "the inefficient use of government resources" could be minimized.[55] In addition, the discussion on this provision suggests that this procedure is "necessary to reduce health and safety dangers to DHS personnel and to the general public."[56]

The stated justification for this provision is that "[i]t is unnecessary and inefficient to adjudicate claims for relief or protection in 240 proceedings when it can be determined that an alien is subject to a mandatory bar for asylum or statutory withholding, and is ineligible for deferral of removal, at the credible fear screening stage."[57] The Proposed Rule concludes that its

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[50] *See* Key Legal Considerations, pmbl. ("[W]hile States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or *result in refoulement*.") (emphasis added). For example, UNHCR has explained that "[a] person living with HIV and AIDS does not fall within the national security exceptions provided for in Articles 32 and 33(2) of the 1951 Convention." UNHCR, *Note on HIV/AIDS and the Protection of Refugees, IDPs, and Other Persons of Concern* ¶ 26 (April 5, 2006) [*hereinafter* Note on HIV/AIDS]. In other words, applying Article 33(2) solely on the basis of HIV and AIDS would amount to a contravention of the 1951 Convention and/or to the non-refoulement obligation under customary international law. *Id.* ¶ 24. The articles of the Convention referred to here—Article 32, which exceptionally allows for the expulsion of a refugee who is lawfully in the territory on grounds of national security or public order, albeit only to a country where he or she would not be at risk of persecution, and Article 33(2)—"are applicable only to those cases where a person represents a very serious future danger to the security of the country of refuge, and where the *refoulement* or expulsion of the refugee is necessary to eliminate the danger and is used as a mechanism of last resort." *Id.* at ¶ 26, fn. 26 (citing to *Factum of the Intervenor United Nations High Commissioner for Refugees, Suresh v. Minister of Citizenship and Immigration*, SSC No. 27790 (Can.) and UNHCR, *Advisory Opinion Regarding the Scope of the "Danger to the Security of the Country" Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, *Letter to Paul Engelmayer, Esq.* (Jan. 6, 2006) and highlighting that "the *travaux préparatoires* of the 1951 Convention show that the drafters did not intend the *public order exception* provided for in its Article 32 [and thus, expulsion only to a country where the person concerned would not be at risk of persecution] to permit the expulsion of refugees on social grounds, such as indigence, mental or physical illness or disability") (emphasis added).

[51] *See generally* Key Legal Considerations; UNHCR, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic* (April 9, 2020), https://www.refworld.org/docid/5ede06a94.html [hereinafter Practical Recommendations].

[52] Practical Recommendations, ¶¶ 2-4.

[53] Key Legal Considerations, ¶¶ 2-7 (providing, for example, parameters for restricting freedom of movement in accordance with international law).

[54] Proposed Rule at 41,210.

[55] *Id.* at 41,210.

[56] *Id.* at 41,210.

[57] *Id.* at 41,210.

amendments "reasonably balance the various interests at stake," as "[i]t would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a bar receive an opportunity to have the asylum officer's finding reviewed by an IJ."[58]

UNHCR notes with concern that some asylum-seekers with valid claims for protection will likely be denied access to territory and full asylum procedures, through accelerated procedures, having received negative fear determinations on the basis of the new public health bar at the pre-screening stage under this provision of the Proposed Rule. While such persons are precluded from a positive fear determination due to the security bar and may be eligible for deferral of removal under CAT (see below), they will have to affirmatively raise their fear of torture in order to be screened, further reducing their likelihood of having their claims for protection be considered in the course of a full assessment of the substance of the claim. Because of this overly expansive form of pre-screening and consequent denial of access to asylum procedures, some persons in need of international protection will likely be denied such protection and refouled.

i. International Standards

As a general rule, States must establish a procedure to identify refugees, in order to give effect to the obligations under the 1951 Convention and 1967 Protocol. Fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention and 1967 Protocol as they enable a State to identify those who should benefit from international protection, and those who be excluded. In view of the potentially grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the asylum process, including at borders.

International standards for the identification of international protection needs (including through 'screening' or similar processes) 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) may, subject to appropriate procedural safeguards, be 'screened out' in an expedited manner. [59] UNHCR's position is that it is contrary to international law to deprive asylum-seekers of access to a full examination of the substance of their claim based on an exclusionary ground.

Exclusion, as discussed above, is a complex inquiry into factual and legal questions involving not only international refugee law, but in many cases international human rights, humanitarian law and international criminal law. This cannot be completed adequately assessed in a 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, violence and even death—UNHCR considers it inappropriate in principle to consider bars to asylum during screening.[60]

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, in this

[58] *Id.* at 41,213.
[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), [hereinafter ExCom (1983)], https://www.refworld.org/docid/3ae68c630.html. See also UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures). EC/GC/01/12, ¶¶ 4-5 (May 31, 2001).
[60] UNHCR, *Guidelines on International Protection No. 5,* ¶ 31 ("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 . . . .").

context, 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.[61] However, international standards require that certain due process considerations be taken into account in the use of accelerated procedures, to minimize the risk of a flawed decision.[62] In UNHCR's experience, it is often challenging for asylum-seekers to obtain representation during screening, and those without counsel may have received limited or no legal information or might not have a full understanding of their rights or the consequences of failing to exercise them. In this setting, it would be nearly impossible for an asylum-seeker to have sufficient support, or for an adjudicator to have ample time to gather information and evidence, for a proper exclusion determination.

UNHCR acknowledges that States have legitimate public health concerns, and a sovereign right to regulate entry into the country.[63] However, applying a public health bar at the screening stage is an inappropriate response. Not only is the proposed public health bar outside of the Convention's exclusionary grounds, as discussed above, but applying that bar in the context of screening represents a dangerous misapplication of the appropriate framework for accelerated procedures. Asylum-seekers may not be able to articulate clearly and comprehensively why they left, in particular in situations where there is an element of distrust or fear, and therefore for all substantial elements of the claim to be assessed it should be referred to a regular procedure. Consideration of grounds for exclusion involve a complex and substantial analysis that cannot be undertaken in the context of accelerated procedures. A more appropriate response to public health concerns would be to consider testing and quarantining at the initial reception of asylum-seekers.[64]

UNHCR recommends that the Government not enact the proposal to consider a public health bar to asylum during the expedited removal process.

C. Changes to Deferral of Removal under the Convention Against Torture

Having made asylum and withholding of removal unavailable for those to whom the new bar is applied, the Proposed Rule goes on to weaken one of the few remaining forms of protection: deferral of removal under the Convention Against Torture regulations.[65] The rule puts forward two changes for processing deferral cases. First, the rule raises the pre-screening standard for showing the risk of torture in a particular country. Second, for those who meet the pre-screening standard, DHS would now have unreviewable discretion as to whether to place the individual in section 240 proceedings to prove their deferral claim or remove them to a third country prior to that adjudication.

Pre-screening

The Proposed Rule intends to raise the pre-screening standard for individuals who are determined not to be eligible for asylum or withholding of removal but instead seek deferral of removal under CAT, and requires them to raise that claim affirmatively.[66] Individuals seeking

[61] *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.
[62] *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/4decc639/unhcr-statement-right-effective-remedy-relation-accelerated-asylum-procedures.html.
[63] Key Legal Considerations, pmbl.
[64] *Id.*
[65] Under 8 C.F.R. § 208.17, deferral of removal under CAT is available to persons who have been ordered removed, using the standard in 8 C.F.R. § 208.16(c)(3) to assess whether it is more likely than not that an applicant would be tortured in the proposed country of removal. 8 C.F.R. §§ 208.16(c)(3), 208.17. Whereas withholding of removal under CAT (discussed above) is subject to certain bars, deferral of removal under CAT has no bars, in keeping with Article 3 of the Convention Against Torture. It does not necessarily entitle the individual to be released from immigration custody. CAT, art. 3.
[66] Proposed Rule at 41,208, 41,210.

deferral of removal would need "to meet, at the credible fear stage, their ultimate burden to demonstrate eligibility for deferral of removal under the CAT regulations—i.e., that it is more likely than not that they would be tortured in the country of removal."[67] In cases where the individual has not affirmatively established during the credible fear process that he or she is more likely than not to face torture in the country of removal, the person may be expeditiously removed. . . [and] need not be placed into section 240 proceedings.[68]

Third country removal

The Proposed Rule includes amendments to existing regulations that would "enable DHS to exercise its statutorily authorized discretion about how to process individuals subject to expedited removal who are determined to be ineligible for asylum and withholding of removal based on the "danger to the security" bar to protection but who might qualify for deferral of removal.[69] Under the revised provisions, DHS would have the option either to place individuals seeking deferral of removal into section 240 proceedings or to remove the individual to a country where the individual has not affirmatively established that it is more likely than not they would suffer persecution or torture.[70] The Proposed Rule underscores that this discretionary choice by DHS is "unreviewable."[71] This leaves DHS with the capacity to prevent virtually all persons who seek protection from ever having a full adjudication of their claim.

The new provisions require DHS to provide individuals seeking deferral of removal with "the appropriate advisal" and to allow the individual an opportunity to withdraw his or her request for withholding or deferral of removal.[72] If the individual does not withdraw his or her application, DHS may remove the individual to a third country prior to an adjudication of the individual's request for protection if the individual has not affirmatively established that it is more likely than not that the individual would be tortured in that country. In cases where DHS places an individual into section 240 proceedings, "its determination that the alien had established that he or she is more likely than not to be tortured in the prospective country of removal would not be dispositive of any subsequent consideration of an application for protection under the CAT in those proceedings, consistent with an IJ's general authority to review DHS determinations de novo."[73]

The Proposed Rule acknowledges that "these procedures for processing individuals in expedited removal proceedings who are subject to the danger to national security bar differ from expedited removal procedures set forth in the Notice of Proposed Rulemaking, 'Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.'"[74] It further provides that the agencies will "reconcile the procedures set forth in the two proposed rules at the final rulemaking stage" and that they "request comment regarding

[67] *Id.* at 41,210, 41216-18. UNHCR observes that this standard exceeds that set forth under international guidance, which requires only that there exist "substantial grounds for believing that the complainant faces a foreseeable, present, personal and real risk of being subjected to torture in the State to which the complainant would be deported." *See* Committee Against Torture, *General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, CAT/C/GC/4 ¶ 39 (Sep. 4, 2018), https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf.
[68] Proposed Rule at 41,210.
[69] *Id.* at 41,211.
[70] *Id.* at 41,211, 41, 216.
[71] *Id.* at 41,211-12, 41,216. According to the Committee Against Torture, an effective remedy underpins the entire Convention Against Torture. It has explained that it "considers that an effective remedy in the implementation of the principle of 'non-refoulement' should be a recourse able to preclude, in practice the deportation of the complainant where there are substantial grounds for believing that the complainant would personally be in danger of being subjected to torture if deported to another country. The recourse should be a legally-based right and not an ex gratia concession given by the authorities concerned, and should be accessible in practice without obstacles of any nature." Committee Against Torture, *General Comment No. 4*, ¶ 35.
[72] Proposed Rule at 41,212.
[73] *Id.* at 41,212, 41,216-17.
[74] *Id.* at 41,211.

how to best reconcile the procedure set forth in the proposed rules."[75] UNHCR reiterates its willingness to consult on these questions.[76]

UNHCR is concerned that if the provisions on deferral of removal in the Proposed Rule are implemented, it will be significantly harder for persons seeking protection to obtain such a deferral. Requiring applicants to raise fear of torture affirmatively and meet a high standard of proof at pre-screening places undue burden on the applicants. It will likely result in removal of individuals to territories where they face a risk of torture or where they lack access to procedures for determining eligibility for international protection, including asylum and CAT relief. Should individuals be able to overcome these obstacles in pre-screening, they still may not have the opportunity to present their claims for protection at a full hearing. UNHCR is concerned that people seeking protection will be sent to a third country, and will be unable to challenge DHS's decision to send them to that third country instead of placing them in full removal proceedings; the only other option left for them would be to withdraw their application for protection altogether.

i. International Standards

In the U.S. context, deferral of removal under CAT is a form of complementary protection available to those who are not afforded protection as refugees within the U.S. system.[77] While it is UNHCR's position that individuals who fulfill the criteria set out in Article 1A(2) of the 1951 Convention (or its 1967 Protocol) are entitled to be recognized as such and protected under that instrument rather than under complementary protection schemes,[78] 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.[79] Therefore, UNHCR has long recognized the value of asylum countries offering complementary forms of protection to individuals not formally recognized as refugees but who nonetheless require international protection.[80]

Complementary forms of protection are only effective in strengthening the global protection regime if individuals have the chance to apply for them,[81] and those applications are best conducted in the same proceeding as that used for assessing refugee protection needs.[82] UNHCR is concerned that the changes to deferral of removal proposed here will likely lead to larger numbers of persons seeking international protection without any avenues for relief. Given that likelihood, UNHCR observes that access to complementary forms of protection

[75] *Id.* at 41,211.
[76] UNHCR submitted comments on July 15, 2020, in response to the Notice of Proposed Rulemaking entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review." In that submission, UNHCR offered to consult on issues related to expedited removal, as well as on other procedural and substantive questions raised by that Proposed Rule.
[77] *See* Anker, *supra* note 46, § 1.2.
[78] *See* 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 (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 (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 . . . ."); Ruma Mandal, *Legal and Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, U.N. Doc. PPLA/2005/02 ¶¶ 18-19 (2005) (discussing the international legal framework surrounding the operation of complementary protection mechanisms); Nicole Dicker & Joanna Mansfield, UNHCR, *Filling the Protections Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia*, U.N. Doc. Research Paper No. 238, at 3 (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").
[79] 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* Mandal, *supra* note 78, ¶ 19.
[80] *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 (2001).
[81] *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶ 25.
[82] 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.").

directed at meeting CAT obligations, largely precluded by this proposed adjudicatory process, takes on an additional degree of importance. Candidates for deferral of removal should be screened in appropriate ways and should be given access to full considerations of the merits of that claim.

UNHCR recommends that the Government not enact the aspects of the Proposed Rule related to deferral of removal under CAT regulations.

IV. Conclusion

UNHCR recognizes that the United States, like many States around the world, is facing a public health challenge of unprecedented scope and complexity. UNHCR stands with governments around the world and very much welcomes the opportunity to assist States in finding appropriate responses to this public health crisis which uphold the fundamental principles of refugee law.

The Proposed Rule is at variance with these fundamental principles, relying on public health justifications to establish an overly broad exclusion scheme at odds with international law. By establishing a new bar to asylum outside of that permitted by the Convention, applying that bar during screening procedures, and placing a complementary form of protection out of reach of most people, the Proposed Rule is likely to result in the forced return of individuals seeking protection to situations of persecution. In summary, 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 acknowledges that the United States has the sovereign right to control the entrance of non-nationals to its territory, but notes that it may not do so in a way that infringes on the right to seek asylum or results in refoulement.

UNHCR notes that there are reasonable measures for States to take in order to ascertain and manage public health risks in relation to the entry and processing of asylum-seekers and adjudication of their claims. Such measures can include temporary limitations on movement, testing, and screening for disease.[83] In the particular context of the COVID-19 pandemic, UNHCR has issued practical guidance for States on how to address refugee protection concerns while simultaneously protecting public health, including in relation to: ensuring access to territory; registering and documenting asylum-seekers; preventing disease transmission in the context of reception and detention; adapting asylum procedures; and communicating with refugees and asylum seekers to mitigate risks.[84] None of these measures would require changes to the U.S. legal framework but rather could be achieved by adapting reception and processing modalities at the U.S. southwest border to respond to current challenges related to arrival of asylum-seekers within larger migratory movements. UNHCR welcomes the opportunity to discuss these and other measures in detail with the United States Government.

In closing, **UNHCR recommends** that the Government refrain from enacting any part of this Proposed Rule, and instead welcomes consultation about alternative measures to public health threats without limiting the right to seek asylum and safeguarding the principle of non-refoulement.

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[83] *See* Key Legal Considerations, ¶¶ 6-8.

[84] *See* Practical Recommendations. For more detailed guidance on issues related to disease surveillance, individual health screening, infection prevention and control, and case management in collective sites (such as immigration processing facilities); Inter-Agency Standing Committee, *Interim Guidance on Scaling-Up COVID-19 Outbreak in Readiness and Response Operations in Camps and Camp-Like Settings (Jointly Developed by IFRC, IOM, UNHCR, and WHO)* (Mar. 17, 2020), https://interagencystandingcommittee.org/other/interim-guidance-scaling-covid-19-outbreak-readiness-and-response-operations-camps-and-camp.