CENTER FOR
Gender & Refugee
STUDIES

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July 15, 2020

Via Federal e-Rulemaking Portal
http://www.regulations.gov

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

RE: Request for Comments: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (June 15, 2020); EOIR Docket No. 18-0002, A.G. Order No. 4714-2020, RIN 1125-AA94, OMB Control Number 1615-0067

Dear Ms. Reid:

Karen Musalo, Blaine Bookey, and Kate Jastram submit this comment on behalf of the Center for Gender & Refugee Studies (CGRS) in response to EOIR Docket No. 18-0002, RIN 1125-AA94, *Request for Comments: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (June 15, 2020)* (hereinafter, Proposed Rule or Rule). Due to the length of the Rule and therefore the length of our comment, we include this outline to guide your review. We have also attached for your reference our CVs and a number of the documents we cite.

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I. INTRODUCTION

The present comment relates to the Joint Notice of Proposed Rulemaking by the Department of Justice (DOJ) and the Department of Homeland Security (DHS). The Rule would amend several regulations relevant to applications for asylum, withholding of removal under INA 241(b)(3), and protection under the Convention Against Torture (CAT or the Convention). The amendments would have an impact on expedited removal screenings, asylum office interviews, and adjudications in full removal proceedings. The proposed changes are both procedural and substantive in nature and touch on near every single existing standard for consideration of these claims, upending processes and standards that have been in place for many years if not decades.

As experts in asylum law, we focus our comment particularly on the Rule's compliance with the international legal obligations of the United States. Due to the time constraints outlined below, we are not able to comment on every troubling aspect of the Rule. Our failure to comment on any particular element of the Rule should not be interpreted as our support for it. To the contrary, for the reasons set forth below, CGRS urges DOJ and DHS to abandon the Rule. It is our expert opinion that the Rule will lead to refugees who are fleeing a range of abhorrent persecution that has long been recognized as meriting protection being returned to extremely violent countries where they could be abused, sexually assaulted, or otherwise harmed, tortured, or killed.

II. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Karen Musalo[1] following her groundbreaking legal victory in *Matter of Kasinga*[2] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[3] produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with immigrant, refugee, LGBTQ, children's, and women's rights networks.[4] Since our

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[1] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California Hastings College of the Law. Professor Musalo's CV is attached along with those of Professor Bookey and Professor Jastram.

[2] 21 I. & N. Dec. 357 (B.I.A. 1996).

[3] *See, e.g.*, *Innovation Law Lab v. Nielsen*, No.3:19-cv-00807-RS (N.D. Cal.)*, prelim. inj. stayed pending petition for cert., Wolf v. Innovation Law Lab*, -- S.Ct.--, 2020 WL 1161432 (Mar. 11, 2020) (Mem.); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr*, 344 F. Supp. 3d 96 (D.D.C. Dec. 18, 2018) (gov't appealed), No. 195013 (D.C. Cir. Jan. 30, 2019)); *U.T. v. Barr,* 1:20-cv-00116-EGS (D.D.C.); and *Matter of A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

[4] *See, e.g.*, our Immigrant Women Too campaign.

founding, we have also engaged in international human rights work with a strong emphasis on El Salvador, Guatemala, Honduras, Mexico, and Haiti to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect their citizens.[5]

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate asylum claims of those fleeing persecution, with particular expertise on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law. It is in furtherance of our mission that we submit this comment.

III. THE AGENCIES DID NOT PROVIDE SUFFICIENT TIME TO COMMENT ON THE PROPOSED RULE

We begin by requesting the full 60-day period for public comment on the Rule. We joined over 500 other organizations on June 18, 2020 in requesting a minimum of 60 days to provide a comment, and incorporate that letter into this comment.[6] We also support the reasoning of a similar request dated June 22, 2020 by the Chairman of the House Committee on the Judiciary and the Chair of its Subcommittee on Immigration and Citizenship, and incorporate that letter into this comment.[7]

In addition to the letters referenced above, we make the additional observations in support of our request for the full 60-day period for public comment. First, since we signed the letter of June 18th, the COVID-19 pandemic has accelerated in the United States. Plans for reopening have been delayed by our host institution, the University of California Hastings College of the Law,[8] the City and County of San Francisco,[9] and the State of California.[10] Our campus remains partially closed and our staff is required to continue to telework. Many of us have family responsibilities which exacerbate the difficulties of working full-time from our homes.

Finally, we note that the federal holiday during the brief time allowed for public comment further reduced the number of work days in the comment period. All of these factors have impeded our ability to analyze more thoroughly the lengthy and complex Rule, research all potentially relevant international and domestic law sources, and provide fully responsive

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[5] *See, e.g.*, Karen Musalo, *El Salvador--A Peace Worse Than War: Violence, Gender and a Failed Legal Response,* 30 YALE J. LAW & FEMINISM 3 (2018); Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 Hastings Race & Poverty L.J. 265 (2013).

[6] Request to Provide a Minimum of 60 Days for Public Comment, June 18, 2020, signed by the Center for Gender & Refugee Studies and 501 Other Organizations, June 18, 2020.

[7] Request for 60-Day Comment Period for DHS and DOJ Joint Notice of Proposed Rulemaking, signed by Representative Jerrold Nadler and Representative Zoe Lofgren, June 22, 2020.

[8] *See* UC Hastings Law, Guide for Returning to the Workplace, July 1, 2020.

[9] *See* Reopening San Francisco.

[10] *See* California Department of Public Health COVID-19 Updates.

comments. If the comment period is extended, we reserve the right to expand our analysis and to resubmit a more complete comment with additional supporting documentation.

IV. THE PROPOSED RULE ABUSES THE RULEMAKING PROCESS

The Proposed Rule is a major one that would upend well-settled processes and long-established legal interpretations for adjudicating claims for protection. The Departments have not justified with evidence a curtailed comment period or the designation of the rule as not "major" or "significant." 85 Fed. Reg. 36264, 36289 (June 15, 2020) (hereinafter Rule).

Additionally, the rushed timing and sheer scope of this Rule is an abuse of the administrative rulemaking process. Many elements of the Rule would codify erroneous decisions made during this administration by the Board of Immigration Appeals and the Attorneys General, as well as unlawful executive branch orders, proclamations, and other policies. Most if not all of these decisions and policies are currently being challenged in the courts by CGRS and other advocates. Many of the decisions and policies have been vacated or otherwise enjoined,[11] or have been the subject of other limiting or negative treatment by the courts.[12]

Bypassing the litigation process as well as the normal rulemaking process, the administration seeks to codify its erroneous legal decisions and policies just over 100 days before a presidential election which numerous polls indicate the incumbent is likely to lose. The administration's haste to put this regulation in place is revealed by the unjustifiably short period provided for public comment, and the agglomeration of dozens of substantive and procedural changes to the asylum system.

V. THE PROPOSED RULE FAILS TO ENSURE COMPLIANCE WITH U.S. INTERNATIONAL LEGAL OBLIGATIONS TOWARDS ASYLUM SEEKERS

A. The Relevant International Legal Obligations

The relevant international legal obligations with which the United States must comply are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) [13] and the

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[11] *See, e.g., East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (upholding injunction against rule barring asylum for individuals who enter between ports of entry); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (vacating rule barring asylum for individuals who enter between port of entry); *East Bay Sanctuary Covenant v. Barr*, --- F.3d ----, 2020 WL 3637585 (9th Cir. 2020) (upholding injunction against rule barring asylum to individuals who have transited through a third country en route to the United States as inconsistent with the relevant statutes and arbitrary and capricious as counter to evidence before the agencies); *Capital Area Immigrants' Rights Coal. v. Trump*, --- F.Supp.3d ----, 2020 WL 3542481 (D.D.C. June 30, 2020) (vacating third country transit rule for the agencies' failure to follow notice and comment procedures).

[12] *See, e.g., De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (finding the Attorney General's decision in *Matter of A-B-* should not be interpreted to categorically preclude claims involving domestic violence survivors and that the decision rests on arbitrary reasoning); *Juan Antonio v. Barr,* 959 F.3d 778, 790 n.3 (6th Cir. 2020) (finding persuasive ruling of other court that *Matter of A-B-* is arbitrary, capricious and contrary to law).

[13] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

1984 CAT.[14] The United States acceded to the Refugee Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees.[15] The United States ratified CAT in 1994 with no relevant reservations, declarations, or understandings. These treaties have been implemented in domestic law in the Refugee Act of 1980 and the Foreign Affairs Reform and Restructuring Act of 1998, and accompanying regulations, respectively.

Under the Refugee Protocol, the United States is prohibited from returning persons to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[16] The corresponding provision in U.S. law incorporates the treaty obligation, stating that the Attorney General "may not remove" a person to a country if the Attorney General determines that the person's "life or freedom would be threatened in that country because of the [person's] race, religion, nationality, membership in a particular social group, or political opinion."[17] Additionally, U.S. law incorporates nearly verbatim the definition of a refugee found in the Refugee Protocol, and provides that a person meeting that definition may in the exercise of discretion be granted asylum.[18]

Under CAT, the United States shall not "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."[19] The corresponding regulation again incorporates the treaty obligation, providing that a person will be eligible for protection under CAT if he or she establishes "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[20]

By becoming a state party to these treaties, we have undertaken to carry out their terms in good faith.[21] Furthermore, the Supreme Court has explicitly recognized that in enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformance with international law.[22]

In relevant part, these treaties require the United States to achieve a specified result – the *non-refoulement* of the persons protected. This, in turn, requires the United States to be able to identify the persons who fall within the protected classes described in the treaties, persons who fear return to persecution or torture.

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[14] 1465 U.N.T.S. 85 (entry into force 26 June 1987).
[15] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[16] 1951 Convention Relating to the Status of Refugees, art. 33, binding on the United States by means of U.S. accession to the Refugee Protocol, art. 1.
[17] 8 U.S.C. 1231 (b)(3)(4).
[18] 8 U.S.C. 1158 (b)(1)(A).
[19] CAT, art. 3.
[20] 8 C.F.R. 208.16 (c) (2).
[21] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).
[22] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).

Guidance on the procedures and criteria by which the United States may identify the beneficiaries of these treaty protections are found in Conclusions of the United Nations High Commissioner for Refugees (UNHCR) Executive Committee, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection,*[23] and other UNHCR guidelines. They are also found in interpretive guidance from the United Nations Committee Against Torture.

We therefore analyze this Rule from the perspective of whether the proposed changes to established procedures and to accepted interpretations of the refugee definition and CAT protection will provide adequate safeguards against *refoulement.*

B. UNHCR's Expressed Concerns

In that regard, it is instructive to note that UNHCR has expressed concern about the Rule, calling it "a departure from humanitarian policies and procedures long championed by the United States and rooted in international law."[24] The High Commissioner, Mr. Filippo Grandi, stated that "the changes contained in the pending regulation, combined with separate restrictions enacted in recent years, would mean that many people fleeing persecution would be unable to request, or obtain, asylum in the United States."[25]

UNHCR goes on to say that it remains ready "to offer the technical assistance we have acquired around the world to support the United States in finding solutions to the challenges it faces today in maintaining an asylum system that is safe, fair and humane."[26] We urge the Departments to respond favorably to this offer of assistance by engaging in consultations with UNHCR before finalizing the Rule. These consultations should also include experts such as CGRS and others with deep knowledge and long experience in asylum law. If the Departments choose not to engage in such expert consultations, we request an explanation of why not.

C. The Procedural Changes at the Screening and Merits Stages Pose an Unacceptable Risk of *Refoulement*

Our comment begins with the Rule's changes to procedures. As an overarching observation, we note the repeated emphasis throughout the Rule on efficiency, at the expense of minimum procedural safeguards which are critical in reducing the risk of *refoulement.* Most of the

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[23] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at https://www.refworld.org/docid/5cb474b27.html [accessed 13 July 2020] (hereinafter *Handbook*).

[24] Statement by UNHCR Filippo Grandi on U.S. asylum changes, 9 July 2020, available at https://www.unhcr.org/news/press/2020/7/5f0746bf4/statement-un-high-commissioner-refugees-filippo-grandi-asylum-changes.html.

[25] Id.

[26] Id.

changes proposed are justified on the grounds that they will allow for more rapid adjudication of claims. While an efficient asylum process is beneficial to both asylum seekers and the government, it must also be fair. UNHCR has advised that "fair and efficient procedures are an essential element in the full and inclusive application of the Convention."[27]

1. **The new credible fear standards would weed out deserving claims and decrease not increase efficiency**

Section II.A of the Rule makes a number of changes to the credible fear process which increase the risk that the United States will mistakenly return a person deserving of protection to persecution or torture. It cannot be emphasized enough that the initial screening done during expedited removal is intended to be overly inclusive precisely to avoid *refoulement*, since it is the only inquiry that the government will make into the applicant's claim of fear before removal. Because the credible fear screening process lacks many of the procedural safeguards associated with a full merits hearing in immigration court, Congress intended for the screening standard to be more generous. It is inherent in the nature of a preliminary screening process that some people who are found to have a credible fear will not be able to establish that they meet the standards for asylum, withholding, or protection under CAT. This is not a flaw in the credible fear screening process, rather an indication that is it working precisely as intended.[28]

Request for Empirical Evidence: Because the Rule appears to assume that the credible fear screen-in rate is too high, we request data for the period from 2010 to date on the rate of positive versus negative credible fear findings by asylum officers, the rate of negative determinations reversed versus those upheld by immigration judges upon review, and the final outcome of those cases in immigration court. We request that these figures be disaggregated by gender, age, nationality, place and manner of entry into the United States, and the legal bases on which the claim was approved or denied. We further request all information relevant to the question of what the Departments assess to be the correct or optimal screen-in rate at the credible fear stage, and what factors are used to make such a determination. With regard to the latter, we request information on whether human rights reports issued by the Department of State, the U.S. Commission on International Religious Freedom, UNHCR, or other organizations (and if so which ones) were used to inform any assessment of the correct or optimal screen-in rate.

[27] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at https://www.refworld.org/docid/3b36f2fca.html [accessed 14 July 2020], para. 5.

[28] *See generally*, United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, 2005, available at https://www.uscirf.gov/reports-briefs/special-reports/uscirfs-expedited-removal-study. *See also* Karen Musalo, *Expedited Removal*, 28 *Hum. Rts.* 12 (2001), available at https://repository.uchastings.edu/faculty_scholarship/567.

a. **Elevating the screening standard for withholding and CAT**

As noted above, the expedited removal protection screening standard is intended to be generous. Heightening the standard in this manner defeats Congressional intent in crafting the expedited removal process. The Rule states that the Departments "do not believe that this change would implicate reliance interests." Rule 36271. However, the three reasons cited in support of this curious formulation are not relevant. First, the Rule notes that the ultimate eligibility standard remains the same. But as we point out above, the purpose of a credible fear screening is to be over-inclusive. Simply because the screening standard that will be used in a merits hearing is unchanged does not address the increased risk of *refoulement* created by ratcheting up the preliminary standard.

Second, the Rule states that "it is exceedingly unlikely" that applicants seek withholding or CAT protection "based on the applicable standard of proof." This is a disingenuous argument which deliberately misstates asylum seekers' actual "reliance interest." They have an interest, and indeed a right, not to be returned to persecution or torture. The obligation to ensure that does not happen rests with the government. Raising the screening standard makes it more likely that the government will err, and that *refoulement* will occur.

Finally, the Rule asserts that the change would provide numerous benefits, again stressing efficiency. As we note throughout this comment, asylum procedures must be both fair and efficient. Heightening the preliminary screening standard, along with all the other changes proposed that would front-load the credible fear process, including consideration of eligibility bars and internal relocation, eliminates fairness entirely.

Worse still, the Departments undermine their own efficiency argument by acknowledging that in some cases, asylum officers would need to spend additional time eliciting more detailed testimony to see if the higher burden was met. Rule 36271. Indeed, the officers will in fact be required to spend the additional time in each case given changes set forth in the Rule. The Rule establishes a bifurcated screening process (Rule 36270) that will require the officers to employ two different standards of proof in the same brief interview while also requiring careful assessment of internal relocation factors and eligibility bars (see below). The result will be that the credible fear interview will mutate from its current initial, generous-standard, screening process to a mini-merits hearing complete with layered standards of proof and analysis of all potential inclusion and exclusion elements of the claim. Given the lack of time on the part of asylum officers, and the lack of legal advice and other resources on the part of applicants, this is a recipe for *refoulement*.

The Rule asserts that the long use of the reasonable fear standard in screening for CAT protection evidences that it is consistent with *non-refoulement* obligations (Rule 36270), yet fails to acknowledge the vastly different environment in which the standard would now be used. As noted above, it would be merely one component in a complicated matrix of legal requirements and restrictions that asylum officers would be expected to apply correctly in each and every credible fear interview. The cumulative impact of additional legal elements to

consider and a higher standard of proof to apply tips the balance sharply toward the risk of erroneous decision-making. Similarly, review by an immigration judge, which is also time-limited, will be an insufficient mechanism to catch the errors made by asylum officers.

b. Disallowing consideration of the most favorable precedent

With respect to review by an immigration judge, the Rule will add language to specify that in reviewing a negative credible fear determination, an immigration judge must apply decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits. Rule 36267. Requiring immigration judges to consider only precedent where they sit and not the precedent most favorable to the applicant only compounds the impermissible heightening of the standard and will result in *refoulement.*[29]

c. Requiring asylum officers to consider the availability of internal relocation alternatives and bars to asylum in threshold screenings

The Rule proposes to include consideration of internal relocation in credible fear screenings. Rule 36272. Separately, the Rule makes substantial and problematic changes to the internal relocation factors (Rule 36282), which we analyze below. In addition, the Rule would require screenings to include consideration of the bars to asylum and statutory withholding eligibility. Rule 36272.

The Rule states that "from an administrative standpoint, it is pointless and inefficient" to adjudicate claims fully when it is determined at the screening stage that the applicant is subject to one or more bars, and asserts that Rule reasonably balances the various interests at stake. Rule 36272. However, this represents a serious underestimation of the asylum seeker's interest in not being erroneously returned to persecution or torture at such an early and expedited screening stage.

Precisely because the stakes are so high for the applicant, UNHCR advises that any consideration of factors that would exclude a person from refugee status not be investigated, even in a full merits hearing, until after the determination of whether she meets the refugee definition.[30] True administrative efficiency is served by not looking at bars or internal relocation until the agency has found that the applicant is indeed a refugee. If the applicant does not meet the refugee definition, there is no need to decide if she is barred for some reason. UNHCR specifically warns that exclusion decisions should not be dealt with in accelerated procedures such as expedited removal, so that a full factual and legal assessment of the case can be made.[31]

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[29] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 137–38 (D.D.C. 2018).

[30] Handbook para 31. UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at https://www.refworld.org/docid/3f5857684.html [accessed 11 July 2020], para. 31.

[31] 2003 Exclusion Guidelines, para. 31. *See also* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at

For similar reasons, UNHCR notes that the issue of internal relocation raises a number of complex questions that in most cases will require in-depth examination, and stresses that it is not appropriate to consider such issues in deciding whether an applicant will receive a full hearing on the merits.[32]

Furthermore, the supposed balancing of interests suggested by the Rule is illusory, as it assumes that an adequate inquiry will be made into potential bars. Asylum officers do not have sufficient time in the limited span of a credible fear interview to engage in complex fact-finding and sophisticated legal analysis. Even if an adequate amount of time were available, the applicant will not be in a position to understand the significance of questions related to internal relocation and the many eligibility bars, or to explain her situation fully. The Rule distorts the purpose of a preliminary screening beyond all recognition and attempts to subvert the procedures set out by Congress.

Request for Empirical Evidence: To the extent that the Rule assumes greater efficiency will result from these changes, we request data for the period from 2010 to date on the number of claims referred by asylum offices after interviews on the merits and denied in immigration court as a result of application of the bars or a finding that internal relocation was safe and reasonable. We further request that these figures be disaggregated by gender, age, nationality, place and manner of entry into the United States, and whether the applicant initially went through the credible fear screening process or not.

2. The new I-589 filing requirements would deny asylum seekers their day in Court and subject them to harsh consequences

Section II.B of the Rule makes two major changes to current procedures at the asylum office and in the immigration courts, which again disproportionately favor efficiency at the expense of the risk of *refoulement*.

a. Pretermitting claims without a full evidentiary hearing

Under the proposed Rule, an immigration judge could pretermit and deny asylum, statutory withholding, and CAT protection if she concludes that the application (including any supporting evidence the applicant may have been able to marshal so early in the proceedings) does not

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https://www.refworld.org/docid/3f5857d24.html [accessed 11 July 2020], para. 99. For additional analysis of procedural issues, see Geoff Gilbert, Cambridge University Press, *Current Issues in the Application of the Exclusion Clauses*, June 2003, available at https://www.refworld.org/docid/470a33ba0.html [accessed 11 July 2020].

[32] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at https://www.refworld.org/docid/3f2791a44.html [accessed 12 July 2020], para. 36; *see also* UN High Commissioner for Refugees (UNHCR), *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 397, available at https://www.refworld.org/docid/3ae6b31d83.html [accessed 11 July 2020], 2. (iii).

establish a *prima facie* case. Rule 36277. Here again, the Departments err too far on the side of efficiency over fairness thus increasing the risk that applicants are returned to persecution or torture. For this reason, UNHCR has identified "a complete personal interview by a fully qualified official" as one of three necessary procedural safeguards before any final determination is made on a claim.[33] Depriving immigration judges of the opportunity of hearing the applicant's testimony, with competent interpretation if needed, poses too great a risk that they will erroneously determine that an applicant does not meet the required legal standards.

This is particularly true because applicants are not provided with attorneys at the government's expense, and many, including many children, must navigate the complicated U.S. immigration system by themselves. The application form and its instructions are lengthy, provided only in English, and must be filled out in English. Applicants may mistakenly rely on inexpert advice from community members or untrustworthy websites about how to fill out the form, or may use free online services to translate their own declaration and other documents, which may not produce an accurate rendering into English. Moreover, the questions are fairly broad and do not adequately define legal terms such as "particular social group" or explicitly state the legal standards under which the answers will be judged.

There is an international consensus adopted by governments on UNHCR's Executive Committee, of which the United States is a member, that basic requirements for asylum adjudication include the applicant receiving necessary guidance as to the procedure, and being given the necessary facilities, including the services of a competent interpreter, for submitting her case to the authorities.[34] In the U.S. immigration court system, the only time the applicant receives any guidance or interpretive assistance at all is when she appears in court. In the absence of appointed counsel, immigration court hearings play a vital role in ensuring that asylum seekers receive at least basic information in a language they understand. Allowing for pretermission of claims without such a hearing thus falls afoul of international standards and sharply increases the risk that the judge will make the wrong decision.

The safeguard proposed, that the applicant would have ten days to respond to a notice of pretermission, is insufficient to guard against *refoulement* and belies the claimed benefit of efficiency. Most applicants receiving such notice would not be able to find an attorney to help them cure the defects of their application, and indeed may not understand what the defects are. If the notice of pretermission is detailed enough to provide adequate information about what is needed to reach the *prima facie* threshold, then the asserted efficiency benefits will not materialize. It would be far faster and easier to have the person come to court and answer questions than to have the immigration judge provide a written explanation of what is lacking in the case, and then engage in an analysis of the sufficiency of the applicant's response.

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[33] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at https://www.refworld.org/docid/3b36f2fca.html [accessed 14 July 2020], para. 32. See also, Handbook, para. 199.

[34] UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, HCR/IP/3/Eng/REV. 2017, available at https://www.refworld.org/docid/5a2ead6b4.html [accessed 11 July 2020] (e).

There is an another important way in which the Rule fails to improve efficiency while protecting against *refoulement*. We note that elsewhere the Rule lists nine particular social groups that generally will not be adjudicated favorably, but cautions that in "rare circumstances" they might be. Rule 36279. Similarly, the Rule lists eight situations where, in general, nexus to a protected ground will not be found but acknowledges that in "rare circumstances" with "additional evidence" such facts could be the basis for finding nexus. Rule 36281-82. The Rule also proposes twelve new discretionary factors (discussed below), nine of which will ordinarily preclude a grant of asylum but which might be overcome by a showing of extraordinary circumstances such as national security or foreign policy considerations, or "exceptional and extremely unusual hardship." Rule 36283-84. These sweeping almost-prohibitions, with their extremely limited exceptions, provide a strong argument for *never* allowing pretermission. An immigration judge cannot be expected to assess correctly on the basis of a written application whether an exception applies to one of these stringent new standards on social group, nexus, discretion, or other elements of the definition.

b. **Expanding the definition of frivolous claims**

It is agreed that fraudulent asylum applications place a burden both on the government and on *bona fide* applicants who must wait even longer for their claims to be heard. However, the proposed Rule expands the notion of frivolousness far beyond a reasonable attempt to deter fraud, and poses too great a risk that an unsuspecting asylum seeker will be unfairly penalized. While the term frivolous is not defined in the statute, the existing regulation provides that a material element must be deliberately fabricated, and the applicant must have sufficient opportunity to account for discrepancies or implausible aspects of the claim.

Under the Rule, the definition is expanded to include applications that are patently without merit or prohibited by applicable law. Rule 36276. However, U.S. asylum law is well-known for its complexity, can differ between jurisdictions, and is subject to change with each new administrative rule, or decision from the Board of Immigration Appeals or Attorney General, or opinion from the courts of appeals. Given the many sources of law and the ever-developing nature of decisional and regulatory law, it is both unfair and unreasonable to expect that asylum seekers can know whether their application is without merit or even whether it is prohibited by law.

This overly expansive redefinition of frivolousness is even more problematic because there will no longer be a requirement to give the applicant an opportunity to address discrepancies or implausible aspects of her application. UNHCR counsels that it is the adjudicator's responsibility to clarify any apparent inconsistencies and resolve any contradictions.[35] It is a fundamental element of due process that a person should be allowed to address any perceived discrepancies before they are used not only to deny her claim but also to impose a harsh penalty.

[35] Handbook, para. 199.

D. The Substantive Changes to the Refugee Definition and Other Legal Terms Will Undoubtedly Result in the Return of *Bona Fide* Refugees to Persecution or Torture

Section II.C of the Rule makes extensive changes to numerous terms in the refugee definition as well as key concepts in CAT protection. As noted above, U.S. law includes nearly verbatim the refugee definition and the definition of torture from international law. Given the intent of Congress to bring the United States into compliance with international law, we request that the Departments assess all relevant guidance from UNHCR and the United Nations Committee Against Torture with respect to each and every one of the terms in the proposed Rule, and provide their legal reasoning as to the consistency or not of the proposed Rule with international guidance.

We endeavor to point out as many sources as possible in this comment for reference purposes, but due to limited time, are not able to include them all, nor are we able to make more than preliminary comments on each definitional change. To assist the Departments in understanding U.S. treaty obligations more fully, we reiterate our request that the government engage in consultations with UNHCR, CGRS, and other experts before finalizing the Rule. If such consultations do not occur, we request an explanation of why not.

1. The changes to the definition of "particular social group" discriminate against certain claims that have long been recognized and confuse the analysis

a. General observations

The Rule begins by codifying additional elements that will be required to establish a particular social group beyond the basic understanding of a common immutable characteristic as set forth in *Matter of Acosta,* 19 I&N Dec. 211 (B.I.A. 1985). The first two of these are that the group must be defined with particularity and be socially distinct in the society in question. Rule 36278.

The Rule goes on to add that the group must have existed independently of the persecutory acts and cannot be defined exclusively by the harm. Rule 36278. Footnote 28 points out that there is confusion regarding these two phrases and purports to clarify that both of these standards must be met, yet does not explain how the concepts are similar or different, and what elements would be considered necessary to meet each standard. Furthermore, the so-called "circularity principle" is intended to address issues of nexus. By mandating that this inquiry is included in the social group standard, the Rule impermissibly conflates these elements and goes against the plain language of the statute and the treaty. Moreover, adding such requirements to the social group definition is contrary to the views of UNHCR (described below).

Thus, the Rule codifies five separate tests that a social group must meet to be cognizable. As noted above, the final two tests relate to nexus, and not to social group.

The four factors that are additional to the *Acosta* test of immutability depart dramatically from UNHCR's guidelines on particular social group, and will make it nearly impossible for claims based on this ground to succeed. UNHCR's guidelines explain that a social group is established by meeting one of two alternate tests: immutability or social perception.[36] Further entrenching the Board of Immigration Appeals' erroneous and restrictive analysis into regulation takes the United States even further away from UNHCR's approach. Before finalizing the Rule, the Departments should explain their rationale for departing from UNHCR's guidelines.

b. Nine bases categorically rejected as a general matter

The Rule lists nine "nonexhaustive bases that would generally be insufficient" to establish a particular social group (for clarity, we retain the numbering in the supplementary information; they are not numbered in the proposed regulation):

(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) Attempted recruitment of the applicant by criminal, terrorist or persecutory groups;
(6) 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; or
(9) Status as an "alien" returning from the United States. Rule at 36279.

At the outset, we note that this list and similar lists in other sections of the Rule undermine the requirement that claims to asylum should be adjudicated individually. The only exception to the requirement of a case-by-case analysis is in situations where for practical reasons due to large numbers, it is not possible to carry out an individual determination for each person. In such cases, authorities may therefore engage in group determination, whereby each member of the group is regarded *prima facie* as a refugee (i.e., a categorical application in favor of the applicant, not to her detriment).[37]

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[36] 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*, 7 May 2002, HCR/GIP/02/02, available at https://www.refworld.org/docid/3d36f23f4.html [accessed 11 July 2020], para. 11. *See also*, Handbook, paras. 77-79. For further discussion, see T. Alexander Aleinikoff, Cambridge University Press, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group'*, June 2003, available at https://www.refworld.org/docid/470a33b30.html [accessed 12 July 2020]. *See also* UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at https://www.refworld.org/docid/50348afc2.html [accessed 15 July 2020].

[37] See UNHCR, *Guidelines on International Protection No. 11 : Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, available at https://www.refworld.org/docid/555c335a4.html [accessed 15 July 2020]; *see also*, Handbook, para. 44.

In addition to the Rule's failure to provide for either protection or efficiency and clarity with respect to social group, we offer the following preliminary observations on certain of the disfavored social groups on the list.

The first three "bases"

The first three "bases" on the list are past or present criminal, terrorist, or persecutory activity or association. Rule 36279. We stress that it is important to take into account the circumstances surrounding such activity or association. In particular, an applicant may have been under duress. Furthermore, children who lack the requisite maturity and mental capacity would and should not normally be considered to have voluntarily engaged in the activity or association.[38] Assessment of these factors argues against their inclusion on the list of generally disfavored social groups.

The fourth "basis"

The fourth "basis" on the list, presence in a country with generalized violence or a high crime rate (Rule 36279), should be read in connection with UNHCR's guidelines on claims for refugee status related to situations of armed conflict and violence, which also apply in situations of generalized or indiscriminate violence.[39] In contrast to the proposed Rule, and as U.S. courts have recognized, UNHCR advises that the elements of the refugee definition should be applied no differently in the context of armed conflict or violence. In particular, the guidelines explain that "no higher level of severity or seriousness of the harm is required … nor is it relevant or appropriate to assess whether applicants would be treated any worse than what may ordinarily be 'expected' in situations of armed conflict and violence."[40] There is no reason or need to treat applicants from a country experiencing generalized violence or a high crime rate differently from other applicants. Indeed, doing so is discrimination based on country of origin in violation of article 3 of the Refugee Convention.

We strongly object to the Rule citing *Matter of A-B-* as support for the fourth "basis," as doing so displays a profound misunderstanding of the facts of her case. Rule 36279. Although we are counsel for Ms. A.B., due to the limited time available to prepare this comment, we note only that the conditions in El Salvador actually support her underlying claim for asylum. Indeed, in many countries like El Salvador that are experiencing high rates of violence, women – because of gender roles and expectations – are particularly vulnerable to targeted violence both

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[38] *See, e.g.*, UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], para. 44.
[39] 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*, 2 December 2016, HCR/GIP/16/12, available at https://www.refworld.org/docid/583595ff4.html [accessed 12 July 2020], para. 5.
[40] Id. para. 12.

because the government's resources are spread thin attempting to keep order and because internal relocation options are severely limited.[41]

The fifth "basis"

The fifth "basis" on the list, the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups (Rule 36279), should be read in connection with UNHCR's guidance on claims relating to victims of organized gangs, which includes consideration of individuals at risk of, or who refuse, recruitment.[42] With respect to the particular social group analysis of such claims, UNHCR advises that those who resist forced recruitment may share immutable characteristics such as age, gender and social status.[43] Resistance may also be considered a characteristic fundamental to one's conscience and the exercise of human rights.[44] In addition, gang resisters are often perceived as a group by their society.[45] The lesson of UNHCR's guidance on claims made by victims of gangs is that they can and should be analyzed under normal refugee law principles. There is no justification for singling them out as generally undeserving of protection.

The seventh and eighth "bases"

The seventh and eighth "bases" on the list are what the Rule characterizes as "interpersonal" disputes and "private" criminal acts of which governmental authorities were unaware or uninvolved. There are several troubling aspects to these "bases." First, they appear to conflate questions of persecution with social group analysis, since lack of involvement by the state may be a form of persecution. In that regard, UNHCR advises:

> Significant to gender-based claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harms. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context.[46]

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[41] Karen Musalo, *El Salvador--A Peace Worse Than War: Violence, Gender and a Failed Legal Response*, 30 YALE J. LAW & FEMINISM 3 (2018).

[42] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], para. 12.a.

[43] Id, para. 36.

[44] Id. para. 38.

[45] Id. para. 41.

[46] 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*, 7 May 2002, HCR/GIP/02/01, available at https://www.refworld.org/docid/3d36f1c64.html [accessed 14 July 2020], para. 15.

The proposed "bases" also create confusion about the role of the agent(s) of persecution, particularly since there may be very different reasons accounting for the authorities' unawareness as opposed to their noninvolvement. As UNHCR clarifies:

> There is scope within the refugee definition to recognise both State and non-State actors of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.[47]

These "bases" that purport to define a social group may also implicate nexus. We note that UNHCR has made it very clear that gender-based claims can be recognized where the harm comes from a private actor and the government is unable or unwilling to help. UNHCR explains in its gender guidelines that:

> 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, whether or not the absence of State protection is Convention related. 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.[48]

Additionally, guidance may be found in UNHCR's position on claims based on membership in a family or clan engaged in a blood feud.[49] In it, UNHCR explains that one reason for the authorities' inability or unwillingness to provide protection could be their view that such disputes are a family matter that should be resolved by the family rather than by law enforcement agencies.[50]

On a final note, we again object strongly to the Rule citing *Matter of A-B-* as support for the eighth "basis" as it displays yet another failure to grasp the facts of her case while illustrating the confusion created by the Rule. Rule 36279. As noted above, although we are counsel for Ms. A.B., due to the limited time available to prepare this comment, we point out only that the authorities in El Salvador were not unaware of certain persecutory actions taken by her husband though they may have been unaware of every single instance of his abuse. Whether they could be considered to have been uninvolved depends on the meaning of the term. They were certainly not effectively involved so as to meaningfully control the persecution. Indeed,

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[47] Id. para. 19.
[48] Id. para. 21.
[49] UNHCR, *UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 March 2006, available at https://www.refworld.org/docid/44201a574.html [accessed 12 July 2020].
[50] Id. para. 15.

her persecutor's brother was a police officer and he exploited this relationship to intimidate and further his persecution. Our point is that the government's inability or unwillingness to provide protection is a question of fact that is not appropriate for inclusion as an element in a list of social groups that generally will not be approved.

The ninth "basis"

Finally, the ninth "basis" refers to status as an "alien" returning from the United States. This is another example of the Rule's confusing terminology, since the person would be returning to her own country and would therefore not be an "alien" in the country where she fears harm. Unless, of course, the Departments are suggesting that she might have U.S. citizenship imputed to her and therefore could be considered an "alien" in her country of origin, in which case her fear of persecution would more likely rest on grounds of imputed nationality, or actual or imputed political opinion, and not on social group.

c. Duty placed on asylum seekers to define the group

As a procedural matter, the Rule states that the applicant must define her social group in her application or otherwise on the record, or waive it, including in any motion to reopen or to reconsider. Rule 36291. At the same time, the adjudicator may consider the "substance" of the alleged group rather than the specific form of the delineation. Rule 36291. This position is exactly opposite to that recommended by UNHCR, which is that it is the adjudicator's duty to ascertain the reason for the persecution and not the applicant's duty to analyze her own case to such an extent as to identify the reason in detail.[51] UNHCR has clearly stated that the applicant "is not required to identify accurately the reason why he or she has a well-founded fear."[52] Inconsistency with such a basic precept indicates that the proposed Rule errs on the side of efficiency at the cost of *refoulement.*

In sum, it appears that the Departments' desire to tightly limit social group claims is at odds with its stated goals of clarity and efficiency. With five tests that every proffered social group must meet, and a list of nine social groups that will generally not be favorably looked upon but might be allowed in rare circumstances, the Rule all but ensures that endless litigation will ensue to clarify the meaning of all the tests and terms, including the exception for rare circumstances. In addition to the harm suffered by applicants who will be erroneously returned to persecution or torture under this impermissibly restrictive view of social group, the government will be forced to expend resources needlessly to litigate these questions.

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[51] Handbook, paras. 66-67.

[52] UN High Commissioner for Refugees (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*, 7 May 2002, HCR/GIP/02/01, available at https://www.refworld.org/docid/3d36f1c64.html [accessed 12 July 2020], para. 23.

d. Proposal: A better approach to particular social group that the Departments should consider

As an example of an approach to social group definition that is both much simpler and consistent with UNHCR guidelines, the Departments should consider the formulation in the Refugee Protection Act of 2019 which reads in relevant part:

(iii) the term 'particular social group' means, without any additional requirement not listed below, any group whose members –

(I) Share –
(aa) a characteristic that is immutable or fundamental to identity, conscience, or the exercise of human rights; or
(bb) a past experience or voluntary association that, due to its historical nature, cannot be changed; or

(II) Are perceived as a group by society.[53]

Before finalizing the Rule, we request that the Departments explain why the proposed Rule meets the twin goals of protecting refugees in accordance with international guidance while promoting efficiency and clarity more effectively than the definition in the Refugee Protection Act of 2019.

Request for Empirical Evidence: In order to assist in this analysis, we request the Departments to provide statistics and other information from 2010 to date on the number of claims filed based at least in part on social group, whether they were approved or denied and at what level, and what social groups precisely were proffered and either accepted or rejected, and on what grounds. We further request that these figures be disaggregated by gender, age, nationality, and place and manner of entry into the United States.

2. The changes to the definition of "political opinion" erroneously restrict its intended meaning

The Rule references what it asserts is "the general understanding that a political opinion is intended to advance or further a discrete cause related to political control of a state" in order to significantly limit the definition of the term. Rule 36280. As a result, political opinion would be defined only as an "ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." Rule 36291. However, only one case is cited in support of the asserted "general understanding," and there is no justification given for limiting the term so narrowly. Even if political opinion were correctly limited to anti-government opinion, which as we explain below is not the correct reading, the Rule's formulation implies that any disagreement with one's government short of working to have the authorities thrown from power would not be grounds for protection. An applicant might

[53] Refugee Protection Act of 2019, S.2936, H.R.5210 https://www.congress.gov/bill/116th-congress/senate-bill/2936 Title I, Subtitle A, Sec. 101(C).

generally support her government while actively opposing its stance on one or more issues; it is not clear from the Rule if that applicant would be considered to have a political opinion for the purposes of the refugee definition.

Further muddying the proposed new definition, the Rule cites the UNHCR Handbook to bolster the agencies' position. Rule 36279. However, UNHCR's analysis of political opinion in no way supports the notion that the term is limited to the political control of a state. To the contrary, the Handbook refers simply to an applicant having opinions which are not tolerated by the authorities.[54] Furthermore, the Rule fails to engage with abundant, subsequent, and detailed UNHCR guidance that speaks directly to the expansive scope of the political opinion ground. UNHCR has repeatedly explained that "[i]n UNHCR's view, the notion of political opinion needs to be understood in a broad sense to encompass 'any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.'"[55] In its analysis of gender-related persecution, UNHCR specifically refers to the applicant holding certain political opinions that are "different from those of the Government *or parts of society*," which may include an opinion as to gender roles.[56]

The Rule goes on to say that the Departments generally will not favorably adjudicate political opinion claims "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, and 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." Rule 36291. Such a rule is directly contrary to UNHCR's guidance on fear-of-gang cases, which correctly points out that, especially in Central America, criminal activity may implicate agents of the State and therefore opposition to criminal acts may be analogous with opposition to State authorities.[57]

This unwieldy definition of political opinion is another example of the Rule's "lose-lose" approach, where it impermissibly limits protection while also failing to provide clarity or promote efficiency. It is also an additional example of the common practice in this Rule of providing lists of categories of claims that "generally" should not be approved. As noted above, not one claim that falls under any of these "generally" disfavored categories is appropriate for pretermission, since an immigration judge would need to determine if the applicant actually had one of the few cases in the "generally" disfavored category that should be approved.

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[54] Handbook, para. 80.
[55] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], para. 45.
[56] 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*, 7 May 2002, HCR/GIP/02/01, available at https://www.refworld.org/docid/3d36f1c64.html [accessed 12 July 2020], para. 32 (emphasis added).
[57] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], para. 47.

Request for Empirical Evidence: In order to better assess this proposed change to the definition of political opinion, we request the Departments to provide statistics and other information from 2010 to date on the number of claims filed based at least in part on political opinion, whether they were approved or denied and at what level, and what types and expressions of political opinion precisely were claimed and either accepted or rejected, and on what grounds. We further request that these figures be disaggregated by gender, age, nationality, and place and manner of entry into the United States.

3. The changes to the definition of "persecution" impermissibly reject certain harms that, at a minimum, would cumulatively suffice

The Rule imposes a drastic narrowing of the notion of persecution from that set forth in *Matter of Acosta,* redefining it as an "extreme concept of severe legal harm" that would *not* include the following (for clarity, we retain the numbering in the supplementary information; they are not numbered in the proposed regulation):

(1) Every instance of harm that arises generally out of civil, criminal, or military strife;
(2) Any and all treatment that the United States regards as unfair, offensive, unjust or even unlawful or unconstitutional;
(3) Intermittent harassment including brief detentions;
(4) Repeated threats with no action taken to carry out the threats;
(5) Non-severe economic harm or property damage; or
(6) Government laws or policies that are infrequently enforced unless applied to the applicant personally.

Rule 36280-81.

The first category appears to relate not to persecution but rather to nexus and is thus another confusing example of the Rule's undermining its stated goal of providing clarity and efficiency. As noted above, refugee claims can indeed arise from situations of armed conflict and violence.[58]

More troubling, the third and fourth categories fail to explain their departure from the long-established principle that persecution can be cumulative. As explained in UNHCR's *Handbook*, an applicant may have been subjected to various measures not in themselves amounting to persecution, such as discrimination in different forms, in some cases combined with other adverse factors such as general insecurity in the country. In direct contrast to the Departments' approach here, UNHCR states that "it is not possible to lay down a general rule as to what

[58] 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*, 2 December 2016, HCR/GIP/16/12, available at https://www.refworld.org/docid/583595ff4.html [accessed 12 July 2020].

cumulative reasons can give rise to a valid claim."[59] Rather, it depends on "all the circumstances, including the particular geographical, historical and ethnological context."[60]

UNHCR's emphasis on examining all the circumstances relevant to persecution underscores our concern that this section of the Rule could be read as imposing a series of categorical rules that exclude an applicant from protection. Unlike other sections of the Rule listing items that *generally* will not be favorably adjudicated, this section states that the Rule will "better clarify what *does and does not* constitute persecution." A few lines later, the Rule states "persecution *would not* include" the list given. Rule 36280 (emphasis added). This approach does not appear to square with the long-established rule that asylum claims must be determined on a case-by-case basis.

The proposed redefinition of persecution also fails to acknowledge that children experience harm and fear quite differently than adults. The failure to ensure a child-sensitive analysis of the refugee definition or to ensure that procedures take full account of the vulnerability of children is a shocking defect that runs throughout the Rule. Due to the limited time available for comment, analyzing these flaws is outside the scope of the present comment, but we urge the Departments to study UNHCR guidelines on children's asylum claims and take into account the views of experts.[61]

4. The changes to the "nexus" element conflate the analysis with other elements of the refugee definition and discriminate against certain categories of claims

a. Eight "situations" categorically rejected as a general matter

The Rule lists eight "nonexhaustive situations" in which the Departments, in general, will not favorably adjudicate claims:

(1) Personal animus or retribution;
(2) Interpersonal animus in which the persecutor has not targeted, or manifested an animus against, other members of a particular social group in addition to the applicant;
(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;
(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

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[59] Handbook, para. 53.
[60] Id.
[61] 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*, 22 December 2009, HCR/GIP/09/08, available at https://www.refworld.org/docid/4b2f4f6d2.html [accessed 15 July 2020].

(5) Targeting 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. Rule at 36292.

Again, the Rule fails to meet its goal of providing clearer guidance and expediting claims, while at the same time, many refugees with valid claims would be unjustly denied under this section.

Conflation of nexus with other elements of the refugee definition will lead to extreme confusion and inefficiency

The Rule introduces greater confusion rather than clarity by mandating that the nexus analysis take account of many factors which correctly fall under other elements of the definition. For example, the first two "situations" of personal or interpersonal animus are similar, but not identical, to the seventh and eighth social groups that the Rule says generally will not be approved.[62]

In addition, the third "situation" of opposition to gangs is similar but not identical to the Rule's new limitation on political opinion claims, and is subject to the objections noted above.[63] The fourth "situation" of resisting gang recruitment is similar but not identical to the fifth social group that the Rule states will generally not be approved. It is also contrary to UNHCR guidance, which explores relevant considerations for gang-related cases under each of the five protected grounds.[64]

Moreover, the fifth "situation" of crimes targeted at wealthy persons is substantially similar to the sixth social group that the Rule says will generally not be approved. The seventh situation of perceived gang affiliation is similar but not identical to the first and possibly third social groups that the Rule says will generally not be approved. Finally, the eighth "situation" of gender is relevant to an analysis of social group and the other protected grounds, as well as the type of persecution feared or suffered.

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[62] UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 March 2006, available at https://www.refworld.org/docid/44201a574.html [accessed 12 July 2020], paras. 11-15. *See also*, UN High Commissioner for Refugees (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*, 7 May 2002, HCR/GIP/02/01, available at https://www.refworld.org/docid/3d36f1c64.html [accessed 12 July 2020], para. 21.

[63] See UN High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], paras. 45-51.

[64] UN High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at https://www.refworld.org/docid/4bb21fa02.html [accessed 12 July 2020], paras. 29-51.

It is entirely unclear what relationship the Rule intends to create between these similar but different formulations of various protected grounds, and the "on account of" requirement. It appears that adjudicators will need to focus on the differences between these formulations in order to make findings as to the protected ground and to nexus. This will work against timeliness and efficiency, particularly since the Rule acknowledges that in "rare circumstances," such facts could be the basis for finding nexus. Rule 36282.

The second "situation"

In addition to the comments above, we have a specific objection to the second "situation" which states that nexus to a protected ground will not generally be found in situations where there is interpersonal animus in which the persecutor has not targeted, or manifested an animus against, other members of a particular social group in addition to the applicant. To support this proposal, the Departments cite *Matter of A-B-.* Rule 36281.

However, this approach is exactly contrary to the position taken by UNHCR, which correctly notes that the question of targeting other members of the social group is not relevant in assessing nexus. UNHCR explains that:

> [W]hether or not the persecutors target female domestic partners of *other* men is irrelevant. The persecutor abuses his wife or partner specifically because she is *his* subordinate domestic partner and he can, with the approval of society (be it tacit or overt), exercise authority over her. That he does not abuse women over whom he does not perceive himself to have the same authority and control does not suggest that the abuse is not on account of the victim's status as his subordinate domestic partner. *Cf. Matter of S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000) (Islamic father persecuted daughter on account of her liberal beliefs, even though there was no evidence that he would persecute liberal daughters of other fathers). This point was made well in *Matter of R-A-*, where an analogy was drawn to a slave owner who beats his own slave but has neither the inclination nor the opportunity to beat his neighbor's slave. It would still be reasonable under such circumstances to conclude that the beating was on account of the victim's status as a slave. *See* DHS *R-A-* Brief at 34.[65]

The eighth "situation"

With respect to the eighth listed "situation," it is entirely incorrect to say that gender is a "circumstance" that will generally be insufficient to demonstrate persecution on account of a protected ground. Rule 36282-82. To the contrary, with specific reference to gender-based claims, UNHCR advises that:

[65] Br. of UNHCR, *Grace v. Whitaker*, No. 1:18-cv-018530EGS, Doc. 84 (D.D.C. Oct. 3, 2018).

> 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, whether or not the absence of State protection is Convention related. 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.[66]

The same guidelines quoted above also emphasize the importance of a gender-sensitive interpretation of each of the Convention grounds, and provide a blueprint for such analysis.[67]

b. Proposal: a better approach to nexus for the Departments to consider

As an example of an approach to nexus that is both much simpler and consistent with UNHCR guidelines, the Departments should consider the formulation in the Refugee Protection Act of 2019 which reads in relevant part:

> (D) (i) The burden of proof shall be on the applicant to establish that the applicant is a refugee.
> (ii) To establish that the applicant is a refugee, persecution –
> (I) shall be on account of race, religion, nationality, membership in a particular social group, or political opinion; and
> (II) may be established be demonstrating that –
> (aa) a protected ground is at least one reason for the applicant's persecution or fear of persecution;
> (bb) the persecution or feared persecution would not have occurred or would not occur in the future but for a protected ground; or
> (cc) the persecution or feared persecution had or will have the effect of harming the person because of a protected ground.
>
> (E) Where past or feared persecution by a nonstate actor is unrelated to a protected asylum ground, the causal nexus link is established if the state's failure to protect the asylum applicant from the nonstate actor is account of a protected asylum ground.[68]

Before finalizing the Rule, we request that the Departments explain whether and if so how the proposed Rule meets the twin goals of protecting refugees in accordance with international

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[66] 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*, 7 May 2002, HCR/GIP/02/01, available at https://www.refworld.org/docid/3d36f1c64.html [accessed 12 July 2020] para. 21.

[67] Id. paras. 22-34.

[68] Refugee Protection Act of 2019, S.2936, H.R.5210 https://www.congress.gov/bill/116th-congress/senate-bill/2936 Title I, Subtitle A, Sec. 101.

guidance while promoting efficiency and clarity more effectively than the nexus definition in the Refugee Protection Act of 2019.

Request for Empirical Evidence: In order to assist in this analysis we request the Departments to provide statistics and other information from 2010 to date on the number of claims denied on the basis of failure to establish nexus and why, including what protected grounds were asserted and what elements were taken into account in cases where nexus was not found. We further request that these figures be disaggregated by gender, age, nationality, and place and manner of entry into the United States.

c. Relevance of evidence of "pernicious cultural stereotypes" to the analysis

Finally, the Departments aver that "pernicious cultural stereotypes" have no place in the adjudication of applications for asylum or withholding, regardless of the basis of claim. Rule 36282. Therefore, the Rule will bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality and gender, to extent those stereotypes were offered in support of an applicant's claim to show that a persecutor conformed to cultural stereotype. Rule 36292.

However, by inventing a bar for a certain type of undefined evidence, the Rule creates confusion where none previously existed. This works against the goal of efficiency, and would certainly lead to *refoulement* if implemented by adjudicators. Every refugee story is at heart a negative statement about the applicant's country of origin – either the government persecuted the applicant, or was unable or unwilling to protect her.

The adjudicator is given no guidance on how to determine the line between on the one hand, required country conditions information that accurately portrays the conditions facilitating persecution in the applicant's country of origin, and is therefore vital for her to meet her burden of proof, and on the other hand, barred evidence that promotes a stereotype. There is no guidance on what "promoting" a stereotypes means, or even what the definition of "stereotype" is. It is not clear if the Rule intends to bar evidence relating to any cultural stereotype, or only "pernicious" ones. If the latter, the term "pernicious" is not defined.

The Rule is also in tension with the Supreme Court's holding in *INS v. Elias-Zacarias*, which states that since the statute makes motive critical, the applicant "must provide *some* evidence of it, direct or circumstantial."[69] Such circumstantial evidence may well include societal norms.

Clarity on the crucial question of what evidence would be allowed under this Rule is critical, given the emphasis on corroboration even of credible testimony.[70] Precisely because applicants

[69] *INS v. Elias-Zacarias,* 502 U.S. 478, 483 (1992) (emphasis in original).
[70] 8 U.S.C. 1158(b)(1)(B)(ii).

are seeking international protection, they have no choice but to submit evidence that inevitably casts their country of origin in a less than flattering light.

For example, the 2019 *State Department Country Reports on Human Rights Practices in Burma* advises that "extreme repression of and discrimination against the minority Rohingya population, who are predominantly Muslim, continued in Rakhine State."[71] Similarly, the United States Commission on International Religious Freedom (USCIRF) reports that the ongoing violence in Burma is fueled by hate speech and incitement to violence spread on social media, and specifies in particular the behavior and threats of Buddhist nationalist groups.[72] It is unclear if these U.S. government sources would be barred under the Rule as promoting a cultural stereotype of Buddhists in Myanmar being anti-Muslim extremists.

Indeed, the International Religious Freedom Act (IRFA) defines countries of particular concern as countries where the government engages in or tolerates particularly severe violations of religious freedom.[73] USCIRF's most recent report recommends fourteen countries to be designated as being of particular concern.[74] Many if not most of these countries might also be subject to stereotypes of their religion. The adjudicator has no yardstick by which to measure whether the Rule bars introduction of such findings from USCIRF, for example.[75]

It should also be noted that Title V of IRFA requires that adjudicators consult the Department of State annual report on religious freedom as well as other country conditions reports when analyzing asylum claims based on religion. Again, the Rule provides no guidance as to how to implement the bar against evidence promoting cultural stereotypes when dealing with basic country conditions information which may well be highly critical of a particular government or society.

Finally, it must be noted that claims based on social group require extensive documentation in order to meet the requirements of particularity and social distinction, which by definition require assessment of the place of the proffered social group in the context of the applicant's society. If applicants are barred from submitting country conditions evidence that could be interpreted as promoting a cultural stereotype, then adjudicators will make erroneous decisions based on lack of knowledge.

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[71] U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Burma, available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/burma/.
[72] USCIRF, Annual Report 2020, available at https://www.uscirf.gov/sites/default/files/USCIRF%202020%20Annual%20Report_Final_42920.pdf, p. 12.
[73] Id. at 2.
[74] Id. at 3.
[75] *See also* UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, available at https://www.refworld.org/docid/4090f9794.html [accessed 15 July 2020] (advising at para. 27 d) that "decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life, and other factors.").

5. The changes to the "internal relocation" analysis confuse more than clarify and incorrectly heighten the burden for applicants

In proposing what it calls "a more streamlined presentation" of the most relevant factors the Rule proposes to do away with nearly all of the content of current internal relocation analysis. Rule 36282. The Rule does mention consideration of the totality of the "relevant" circumstances but then lists only the size of the country; the geographic locus of persecution; the size, reach and numerosity of the persecutor, and the applicant's "demonstrated ability to relocate to the United States in order to apply for asylum." Rule 36293. In relation to shifting the burden of proof, the Rule also explains that private actors shall not be considered to be government or government-sponsored absent evidence that the government sponsored the persecution. Rule 36293.

The Rule's approach to internal relocation is contrary to that counselled by UNHCR, which focuses on a number of specific inquiries regarding the safety of the area of relocation and the reasonableness of expecting the applicant to live there.[76] With regard to safety, relevant questions include whether the area of relocation is practically, safely, and legally accessible to the applicant, and whether she would be exposed to a risk of persecution or other serious harm upon relocation.[77] With regard to reasonableness, UNHCR advises that it is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival.[78]

The Rule criticizes the current regulations as providing little practical guidance (Rule 36282), yet the short list it offers in replacement fails to provide clarity and indeed raises far more questions than it answers. This is even more concerning due to the Rule's proposal that internal relocation be considered in credible fear interviews.

For example, the Rule mentions the size of the country, without specifying how to analyze that factor. Is there a specific number of square miles of territory below which the Departments find that a country would be too small to support a finding of internal relocation? If so, listing those countries would help adjudicators. If not, what other factors relating to size should adjudicators consider? Possibilities might be density of population, concentration of certain ethnic or religious groups in certain areas, ease of travel around the country, degree of interconnectedness in terms of communications and the overall economy, whether certain areas are affected by armed conflict and/or are under the effective control of non-state actors, and so on, but none of these is clearly related to the size of the country.

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[76] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at https://www.refworld.org/docid/3f2791a44.html [accessed 12 July 2020], para. 7.
[77] Id. paras. 9-21.
[78] Id. paras. 24-30.

Similarly, the Rule mentions the geographic locus of persecution. Most people are persecuted in the community where they live. Does the Rule imply that persecution in only one location somehow makes internal relocation possible? If so, how many different locations in one country would a person need to be persecuted in to show she has no internal relocation alternative? It is unclear what guidance adjudicators should glean from looking at the geographic locus factor.

With respect to the factor of the size, reach and numerosity of the persecutor, the Rule again fails to explain the significance of these particular elements. Curiously lacking from this list is the persecutor's degree of motivation. One single highly motivated persecutor, such as an abusive partner, could make it impossible for the applicant to live anywhere at all in the country. Or a numerically small group such as an extremist political faction could have a malign influence in a country far exceeding their actual number. With respect to the "reach" of the persecutor, the Departments should be aware that in many countries, residents are required to register their information, including their current address, with the authorities. Persecutors are often able to gain access that information and track down their victims. The importance of "numerosity" and how it is different from "size" is unclear and does not serve the goal of providing guidance to adjudicators.

Finally, consideration of the applicant's ability to relocate to the United States is simply irrelevant. The refugee only has to cross the border of her country once. It may take great courage to do so, and it may take connections and a large amount of money to pay a smuggler for help. But these have nothing to do with whether the applicant would be able to live safely and reasonably in another part of her country. Inclusion of this factor is immaterial at best, and will lead to confusion on the part of adjudicators.

As a final observation, we note that the Rule's statement that private actors shall not be considered to be government or government-sponsored absent evidence that the government sponsored the persecution is tautological. It is unclear how adjudicators are supposed to assess "sponsorship" and indeed what sponsorship even means in this context.

Before finalizing the Rule, we request that the Departments explain why the proposed Rule meets the twin goals of protecting refugees in accordance with international guidance while promoting efficiency and clarity more effectively than UNHCR's internal relocation guidelines.

Request for Empirical Evidence: In order to assist in this analysis we request the Departments to provide statistics and other information from 2010 to date on the number of claims denied on the basis of finding an internal relocation alternative, including what elements were taken into account in each case. We further request that these figures be disaggregated by gender, age, nationality, and place and manner of entry into the United States.

6. The changes to the discretionary factors are vague, require consideration of factors that are already part of the analysis or should have no bearing on whether asylum is granted, and will lead to erroneous denials

Here the Rule proposes to supersede *Matter of Pula* and replace it with a list of three significantly adverse factors and nine adverse factors to be considered before granting asylum in the exercise of discretion. We begin by recalling that the discretionary determination comes only after a finding that the applicant meets the refugee definition. Therefore, any use of extraneous factors to deny asylum should be very sparing indeed, which is precisely the approach that has worked successfully since the 1987 decision in *Matter of Pula*. We note that asylum is the only form of protection available in the United States which allows for family unity (through derivative status) and family reunification.[79] It is also the only protection status that allows the beneficiary to work toward obtaining citizenship in the United States. We point out that article 34 of the Refugee Convention requires that states shall as far as possible facilitate the assimilation and naturalization of refugees. There should thus be a very high burden on the Departments to justify these adverse factors which will prevent nearly every applicant from receiving a favorable exercise of discretion.

The Departments fail to identify any problems that have arisen from reliance on *Matter of Pula* and merely assert their belief that is it appropriate to establish criteria for the exercise of discretion. Rule 36283. Overall, it is clear that that the criteria reflect a desire to use denial of asylum as a deterrent, which is an impermissible goal. Some of the factors listed are in direct violation of international and U.S. law.

Significantly adverse factors

The Rule proposes three specific but non-exhaustive factors that must be considered as significantly adverse (numbered for clarity as they appear in the supplementary information):

(1) Unlawful entry or attempted unlawful entry unless in immediate flight from persecution or torture in a contiguous country;
(2) Failure to seek protection in at least one country through which the applicant transited; and
(3) Use of fraudulent documents to enter the United States unless the applicant arrived directly without transiting through any other country. Rule 36283.

The Rule states that if one of these significantly adverse factors applies, the adjudicator should consider any other relevant facts and circumstances. This vague formulation does not cure the initial defect of characterizing them as significantly adverse.

[79] The importance of family unity is reflected in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Sec. B., reprinted in the UNHCR Handbook. *See also*, Kate Jastram and Kathleen Newland, Cambridge University Press, *Family Unity and Refugee Protection*, June 2003, available at https://www.refworld.org/docid/470a33be0.html [accessed 15 July 2020].

With respect to the first and third factors, we note that (in addition to directly contravening INA 208) article 31 of the Refugee Convention prohibits states from penalizing refugees for their illegal entry or presence. While article 31 does have some limitations, the proposed Rule goes far beyond their scope. Due to the brief period allowed for public comment, we are not able to present fully the international and domestic law sources relevant to a complete consideration of these factors. We request that the Departments read the study prepared by Professor Guy S. Goodwin-Gill and explain how the proposed factors are consistent with the requirements of article 31.[80]

Other factors that generally result in denial

The Rule goes on to list nine adverse factors, which must be considered and ordinarily will result in denial of asylum in the exercise of discretion (numbered for clarity as they appear in the supplementary information):

(1) More than fourteen days in another country that permits applications for protection;
(2) Subject to limited exceptions, transit through more than one country prior to arrival in the United States;
(3) Criminal convictions even if reversed, vacated, expunged or modified;
(4) Unlawful presence of more than one year's cumulative duration prior to filing;
(5) Failure to file taxes or fulfill related obligations;
(6) Having had two or more prior asylum applications denied;
(7) Having withdrawn with prejudice or abandoned an asylum application;
(8) Subject to limited exceptions, failing to attend an asylum interview; and
(9) Filing motion to reopen based on changed country conditions more than one year after the change. Rule 36283-85.

Our preliminary observations on these factors are as follows. We again object that due to the brief period of time allowed for public comment, we are not able to present the full range of arguments that we would otherwise make, nor are we able to cite to and append all relevant international law sources for the Departments' reference.

With respect to the first and second adverse factors, the Rule states that they are supported by existing law surrounding firm resettlement and applicants who can be removed to a safe third country. Rule 36284. This assertion is incorrect. Spending more than fourteen days in another country en route to the United States would not trigger the firm resettlement bar, much less would simple transit. Nor can applicants be removed to a third country unless it is safe, and they would have access to a full and fair procedure. Additionally, the Departments have

[80] Guy S. Goodwin-Gill, Cambridge University Press, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, available at https://www.refworld.org/docid/470a33b10.html [accessed 13 July 2020].

apparently failed to take into account UNHCR's views on "irregular movement"[81] and on transfer to third countries.[82]

The third factor on criminal convictions is inconsistent with UNHCR's exclusion guidelines, which instruct that the exclusion clauses must be applied with great caution and always be interpreted in a restrictive manner.[83]

The fourth factor of timely filing conflicts with current statutory exceptions to the one-year filing requirement.

The fifth factor casts too wide a net, as many asylum seekers do not have social security or individual taxpayer identification numbers that allow them to file taxes. Many do not have employment authorization for long periods of time, which will become even longer as a result of a recently promulgated rule. It is thus not relevant for the Rule to point out that most individuals in the United States are required to file taxes (Rule 36284) since most such individuals have employment authorization and social security numbers. Additionally, it is not clear what "related obligations" means, so adjudicators would not have sufficient guidance to apply this factor correctly and consistently.

The sixth through ninth factors relate to minor procedural errors and omissions. They are insufficiently serious to justify depriving an applicant who meets the refugee definition from the benefits of that status.

Indeed, all of the nine adverse factors are either addressed in existing law in a different manner, or are too minor to serve as the basis for denying asylum to an applicant who is otherwise eligible because she meets the refugee definition and is not barred.

Nor is it a satisfactory to provide that asylum may be granted if there are extraordinary circumstances such as national security or foreign policy considerations, or if the applicant can produce clear and convincing evidence that denial would result in exceptional and extremely unusual hardship. Rule 36283-84. Family separation is *per se* exceptional and extremely unusual hardship for a person who meets the refugee definition. The Rule creates in effect a new

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[81] UN High Commissioner for Refugees (UNHCR), *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers* , September 2019, available at https://www.refworld.org/docid/5d8a255d4.html [accessed 11 July 2020].

[82] UN High Commissioner for Refugees (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*, April 2018, available at https://www.refworld.org/docid/5acb33ad4.html [accessed 11 July 2020].

[83] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at https://www.refworld.org/docid/3f5857684.html [accessed 13 July 2020], para. 2. *See also* UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at https://www.refworld.org/docid/3f5857d24.html [accessed 13 July 2020].

standard for asylum, that of exceptional and extremely unusual hardship, in violation of the statute and the treaty.

This additional hurdle of needing to overcome an adverse discretionary factor imposes an impermissibly high burden on the applicant who is only required to establish that she has a well-founded fear of persecution. It also undermines the Departments' efficiency argument, since adjudicators will now have to make a separate discretionary determination analyzing the three significantly adverse factors, and the nine adverse factors, and then analyzing all the elements which might support a finding of exceptional and extremely unusual hardship.

7. The changes to the definition of "firm resettlement" impermissibly expand the circumstances under which presence in a third country before arriving in the United States will bar asylum

The Rule proposes three circumstances under which an applicant will be considered firmly resettled:

(1) The applicant resided or could have resided in any permanent legal status or any non-permanent but potentially indefinitely renewable status (but not tourist status) in a transit country, regardless of whether the applicant applied for or was offered such status;
(2) The applicant resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after leaving her country before arriving in the United States; or
(3) The applicant is a citizen of another country (not the persecuting country) and was present in that country before arriving in the United States, or under those facts, she renounced that citizenship prior to or after arriving in the United States. Rule 36286.

We again object that due to the brief period of time allowed for public comment, we are not able to present the full range of arguments that we would otherwise make, nor are we able to cite to and append all relevant international law sources for the Departments' reference. But our preliminary observation is that the firm resettlement provisions of domestic law are based on article 1.C of the Refugee Convention and must be consistent with it.[84] UNHCR advises that these clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively and no other reasons may be adduced by way of analogy to justify withholding or withdrawing refugee status.[85] The Rule cannot be squared with international law and does not account for the common scenario where asylum seekers are in danger or their fundamental human rights are otherwise restricted in the countries they travel through.

[84] *See also* Handbook, paras. 97-107, 111-134.
[85] Handbook, para. 116.

8. The changes to the state involvement elements of protection under CAT flout international standards

With respect to protection under CAT, we reiterate our objection that due to the insufficient period of time allowed for public comment, a full analysis of the Committee's jurisprudence is outside the scope of this comment. The Rule violates international law and impermissibly restricts the scope of Convention relief in two fundamental respects: (1) it creates an exception to state accountability for what it characterizes as "rogue officials;" and (2) redefines the acquiescence standard in cases involving non-state actors as requiring actual awareness of the alleged torture and a reckless disregard for the further or negligent failure to inquire as to the activity constituting torture would not be sufficient to attribute to the state.

First, we note that the Rule makes a major change to the treaty definition that is entirely invalid and beyond the power of the Departments to enact. Article 1 of CAT describes the relevant actor as "a public official or other person acting in an official capacity." The Rule purports to modify the treaty by adding text to the regulation so that it reads "a public official *acting in an official capacity* or other person acting in an official capacity." Rule 36303, emphasis added.

The Rule makes clear that with this proposed change, a "rogue official" cannot inflict torture for the purposes of protection under CAT. Rule 36287. However, it is an *ultra vires* act for the Departments to purport to limit our treaty obligation in this manner. The Senate made three reservations, two declarations, and four extensive understandings to CAT as part of the treaty ratification process.[86] Many of these concerned various terms and concepts in article 1, but none of them reflects or supports the Rule's addition of this limiting language in any way. The Departments are attempting to rewrite the Senate's advice and consent role, and introduce an entirely unwarranted new condition on U.S. participation in the treaty.

Even if the Departments had the power under U.S. law to make such a significant change to the treaty language, which they do not, it would not affect our international obligation not to return people to a risk of torture. It is a fundamental rule of international law that a party may not invoke the provisions of its own domestic law as justification for its failure to perform a treaty.[87]

As noted, the language interpreted in the Rule comes directly from article 1 of the treaty. Therefore, the Departments should defer to the views of the United Nations Committee Against Torture, the body of independent experts established by the treaty to monitor its implementation by state parties. We urge the Departments to seek technical assistance from the Office of the United Nations High Commissioner for Human Rights in order to better understand U.S. obligations under this treaty before finalizing the Rule. These consultations

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[86] *See* Resolution of Ratification: Senate Consideration of Treaty Document 100-20, Oct. 27, 1990, available at https://www.congress.gov/treaty-document/100th-congress/20/resolution-text#:~:text=The%20Convention%20against%20Torture%20and,States%20on%20April%2018%2C%201988.

[87] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980), art. 27.

should also include experts such as CGRS and others with deep knowledge and long experience of protection against return to torture. If the Departments choose not to engage in such expert consultations, we request an explanation of why not.

The CAT Committee takes a more expansive and protective view of the scope of state obligations under the Convention both as to when acts can be directly attributed to the state (as above), as well as when they can be indirectly attributed. The Committee's definition of acquiescence does not require actual awareness as imposed by the Rule. For example, the Committee's General Comment No. 2 provides as follows:

> The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, 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, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.[88]

The Departments should address these discrepancies before finalizing the Rule and provide their legal analysis of the sufficiency of the proposed approach under international law. This is particularly important because without a correct analysis of the issues of "rogue officials" and "acquiescence," claims involving gender may not be properly assessed. The Committee specifically notes that it has applied the above principle to states' "failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking."[89]

The Rule's proposals to narrow CAT protection are inconsistent with the Committee's position that states "must ensure that their laws are *in practice* applied to all persons regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status" or any other status or adverse distinction.[90]

The Rule also fails to undertake a gender-informed analysis of CAT protection. In contrast, the Committee emphasizes that "gender is a key factor." The Committee points out that:

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[88] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at https://www.refworld.org/docid/47ac78ce2.html [accessed 14 July 2020], para. 18.
[89] Id.
[90] Id. para. 21 (emphasis added).

> Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.[91]

VI. CONCLUSION

In conclusion, we wish to emphasize that this comment was prepared with an insufficient amount of time, and does not reflect the full scope of our objections to the Rule, nor the breadth of legal authority which supports complete repudiation of the Rule.

We urge the Departments to withdraw this Rule in its entirety. We also urge the Departments to provide the empirical evidence we have requested and explain how their analysis of that evidence should inform any future proposals to change asylum law and procedures. The single most objectionable aspect of the Rule is its disregard for U.S. obligations under international law. In order to remedy this profound flaw, we cannot recommend strongly enough that the Departments engage in consultations with UNHCR, the United Nations Office of the High Commissioner for Human Rights, CGRS, and other experts in order to make use of expertise that is apparently lacking in the government.

Thank you for the opportunity to submit comments on the proposed Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu or 415-636-8454.

Sincerely,

Kate Jastram
Director of Policy & Advocacy

Karen Musalo
Director

Blaine Bookey
Legal Director

[91] Id. para. 22.