

CENTER FOR
Gender & Refugee
STUDIES

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October 22, 2020

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

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RE: *Request for Comments: Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59692 (September 23, 2020), EOIR Docket No. 19-0010, A.G. Order No. 4843-2020, RIN 1125-AA93

Dear Ms. Reid:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to EOIR Docket No. 19-0010, *Request for Comments: Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59692 (September 23, 2020) (hereinafter, Proposed Rule or Rule). We include a table of contents to guide your review.

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I. INTRODUCTION

The present comment relates to the Notice of Proposed Rulemaking by the Department of Justice (DOJ) regarding procedures of the Executive Office for Immigration Review (EOIR). The Rule would require that in many cases, a full asylum application and supporting documents must be filed within 15 days after the first master calendar hearing, and codify a recent instruction requiring rejection of the asylum application form if even just one totally irrelevant or inapplicable box is not filled in. The Rule would also allow immigration judges to submit their own evidence into the record, and to reject evidence from sources other than the U.S. government.

As experts in asylum law, we focus our comment particularly on the Rule’s compliance with the international legal obligations of the United States to ensure that refugees are not returned to persecution or torture. Due to the time constraints outlined below, we are not able to comment fully 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 the Department to abandon the Rule.

It is our expert opinion that the Rule's unwarranted and unrealistic changes to asylum application filing deadlines and procedures, and to evidentiary rules, will lead to refugees who are fleeing a range of abhorrent persecution that has long been recognized as meriting protection being needlessly returned to 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 Musalo¹ 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 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 refugee, immigrant, LGBTQ, women's, and children's rights networks.⁴ Since our founding, we have engaged in international human rights work with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico 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 or torture, 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.

¹ Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California Hastings College of the Law.

² 21 I&N Dec. 357 (B.I.A. 1996).

³ See, e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) cert. granted sub nom. *Wolf v. Innovation Law Lab*, No. 19-1212 (Oct. 19, 2020); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr*, 965 F.3d 833 (D.C. Cir. 2020), reh'g requested (Appellants' Pet. for Reh'g en banc, No. 18-59177 (Aug. 31, 2020)); *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, and the [2021 Immigration Action Plan](#).

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).

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

Although this comment is timely filed, we begin by requesting the full 60-day period for public comment on the Rule. On October 8, we joined 85 other organizations urgently requesting a minimum 60-day comment period.⁶ We incorporate the arguments made in that letter into this comment.

In addition to the arguments made in the October 8 letter, we make the following observations in support of our request for the full 60-day period for public comment. Since the Rule was published on September 23, 2020, the COVID-19 pandemic has continued to accelerate in the United States. Plans for reopening have been delayed by our host institution, the University of California Hastings College of the Law,⁷ as well as by the City and County of San Francisco,⁸ and the State of California.⁹ 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. Public elementary and secondary schools in our area are not open for in-person instruction, so parents on our staff are responsible for making alternate arrangements to care for their children and to support their distance learning.

In addition, this comment period falls within peak wildfire season in California, which has had a negative impact on our ability to prepare our comment in three ways. First, we have been severely impacted by smoke from catastrophic fires, leading to many days of extremely poor air quality. The unhealthy air quality has affected staff members with pre-existing respiratory issues, as well as parents on our staff whose children cannot go outside for home-schooling or play, or who have childcare cancellations.

Second, the risk of fire remains high. Two of our staff members have had to evacuate their homes during this comment period and all staff, like all local residents, must be ready to flee at a moment's notice. Third, the extreme fire danger means that our staff members are also subject to Public Safety Power Shutoffs by our utility, Pacific Gas & Electric, as well as unpredictable rolling power outages.

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.

These factors have impeded our ability to analyze the Rule more thoroughly, research all potentially relevant international and domestic law sources, and provide fully responsive 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.

⁶ [Nearly 90 Organizations Join to Urge the Justice Department to Provide a 60-Day Comment Period to Respond to EOIR's Proposed Changes to Asylum and Withholding of Removal Procedures](#), Oct. 8, 2020.

⁷ See UC Hastings Law, [COVID-19 Community Updates](#).

⁸ See [Reopening San Francisco](#).

⁹ See [California Department of Public Health COVID-19 Updates](#).

IV. THE PROPOSED RULE ABUSES THE RULEMAKING PROCESS AND UNDERMINES THE PURPOSE OF THE ADMINISTRATIVE PROCEDURE ACT

Bypassing the normal rulemaking process, the administration seeks to codify far-reaching, erroneous, and harmful policies less than two weeks before a presidential election which nearly all 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 grouping into one Rule of several major changes to EOIR procedures. Most notably, this Rule shortens the filing period for asylum applications to an unrealistic 15 days; makes the failure to fill in every single box on the application form, even those that do not apply, grounds for rejecting the application as a matter of federal regulation; imposes an unprecedented fee for an asylum application; and completely violates normal evidentiary procedures by allowing judges to submit their own evidence into the record, while empowering them to reject evidence from non-U.S. government sources. Each one of these fundamental changes would justify a separate proposed Rule with a minimum of a 60-day comment period.

We also note, and object to, the sheer volume of administrative rulemaking propounded by the administration with respect to the asylum system. During the brief 30-day comment period for the present Rule, at least two other proposed Rules with grave consequences for asylum seekers have had overlapping, equally brief, periods during which we have had to prepare our comments.¹⁰ The effect of such rapid-fire rulemaking is to severely inhibit the public's ability to analyze and provide comment, thus undermining the purpose of the Administrative Procedure Act. We also question whether the Departments are carefully preparing and considering their proposed rules, given the speed at which they are being published.

Furthermore, even though their subject matter often overlaps, these cascading proposed Rules rarely cross-reference one another, their final form has not yet been determined, and their cumulative effect is unknown. So many proposed Rules await finalization that it is impossible to know the contours of the regulatory scheme on which we are commenting. In piecemeal fashion, the Department of Homeland Security and the Department of Justice, as well as the Centers for Disease Control and Prevention, have proposed hundreds of changes to the definition of well-settled legal terms and to long-established procedures at all stages of asylum processing.

Previous proposed changes, like the ones in this Rule, are nearly always asserted to promote efficiency, yet are so convoluted and poorly written as to complicate matters and create unnecessary confusion instead. The Departments' focus on efficiency also comes without sufficient regard to fairness and the procedural protections which must be part of any adjudication system. This Rule, like its predecessors, and the ones newly issued during this comment period, will create new obstacles to protection and

¹⁰ *Request for Comments: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52491 (August 26, 2020); *Request for Comments: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services*, 85 Fed. Reg. 56338 (September 11, 2020).

impose additional burdens on asylum seekers, thus ensuring that refugees are mistakenly returned to persecution or torture.

V. U.S. INTERNATIONAL LEGAL OBLIGATIONS TOWARDS ASYLUM SEEKERS

The relevant international legal obligations regarding the principle of *non-refoulement* with which the United States must comply are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol)¹¹ and the 1984 Convention Against Torture (CAT).¹² 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.¹³ 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.¹⁴ 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.”¹⁵

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.”¹⁶ 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.”¹⁶

By becoming a State Party to these treaties, we have undertaken to carry out their terms in good faith.¹⁷ Furthermore, the U.S. 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.¹⁸ The Rule itself acknowledges that the Refugee Act amended the Immigration and Nationality Act “to implement the obligations of the United States under the 1967 Protocol.” Rule 59693.

¹¹ 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

¹² 1465 U.N.T.S. 85 (entry into force 26 June 1987).

¹³ 189 U.N.T.S. 137 (entry into force 22 April 1954).

¹⁴ 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. 33(1).

¹⁵ 8 U.S.C. § 1231(b)(3)(A).

¹⁶ 8 C.F.R. § 208.16(c)(2).

¹⁷ Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).

¹⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987).

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. Any obstacles to this process of identification, such as those contained in this proposed Rule, make it more difficult for the United States to meet its obligation of *non-refoulement*.

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*,¹⁹ and other UNHCR guidelines, as well as authoritative interpretations by the United Nations Committee Against Torture. Given the Rule’s erroneous assertion of compliance with U.S. international legal obligations, Rule 59694, we ask that the Department consult with UNHCR, CGRS and other asylum law experts before finalizing this Rule.

VI. THE RULE IMPOSES ADDITIONAL BARRIERS TO PROTECTION AND CREATES UNNECESSARY AND UNJUST BURDENS FOR ASYLUM SEEKERS THAT WILL LEAD TO REFOULEMENT

A. Requiring The Asylum Application To Be Filed Within 15 Days Is Unrealistic, Unfair, and All But Eliminates the Ability to Request Protection

The Rule requires that Form I-589 and supporting documentation be filed within 15 days when the applicant is in an asylum-and-withholding-of-removal-only proceeding (hereinafter, asylum-only proceeding). Rule 59699. Such a requirement might meet the asserted benefit of promoting speedy resolution of cases, but would be at an unacceptable cost to due process and pose an undue risk of *refoulement*. The Department appears to misunderstand or seriously underestimate the complexity of asylum law, in at least three different ways.

First, since the applicant is by definition in an asylum-only proceeding, the Rule blithely states that “there is no reason not to expect the [applicant] to be prepared to state his or her claim as quickly as possible.” Rule 59694. To the contrary, there is every reason to expect that an applicant would not be able to state their claim within two weeks of their master calendar hearing. Even without the deluge of proposed changes to the refugee definition noted above, U.S. asylum law is extremely complicated.²⁰

¹⁹ 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 19 October 2020] (hereinafter *Handbook*).

²⁰ Casebooks and treatises are written on asylum law, e.g., Musalo, Moore, Boswell, and Daher, *Refugee Law and Policy: A Comparative and International Approach* (2018) (the lead author is the CGRS director, other authors include a CGRS staff attorney and a CGRS advisory board member) . The United States Court of Appeals for the Ninth Circuit maintains an [Immigration Outline](#) to assist attorneys in analyzing petitions for review. The [Asylum, Withholding of Removal, and Convention Against Torture section](#) is nearly 200 pages long in the January 2020 version.

Nearly every single word in the refugee definition, and in the definition of torture, and in the statutory bars has been litigated in multiple circuits and can be interpreted in various ways. These interpretations vary from jurisdiction to jurisdiction and can change with new courts of appeals opinions. Furthermore, under this administration even long-established precedents are being reversed by new Attorney General decisions.²¹ Seemingly simple concepts such as “political opinion” are now subject to revision.²² Less straightforward elements such as “particular social group” are extremely difficult even for experienced asylum attorneys to craft effectively, and are also in process of being re-written. June 15 Rule 36278ff. It is ludicrous to expect an attorney, much less a *pro se* applicant, to file a legally sufficient asylum application, much less obtain supporting documentation, within a two week period.

Second, as further evidence of the Department’s misunderstanding of the procedures it intends to change, the Rule twice refers to asylum-only proceedings as “streamlined.” Rule 59694. However, such proceedings are streamlined only in the sense that other potential forms of relief will not be considered. They are most emphatically not intended to be streamlined in the sense that the consideration of a claim for protection may be truncated. Therefore, the supposed streamlined nature of an asylum-only proceeding in no way supports the proposal to require the full application and supporting documentation to be filed within 15 days. To the extent that the Department may be proposing that the asylum adjudication is indeed to be streamlined by cutting it short, it is yet another attempt by the administration to rewrite the law by executive fiat.

Third, the Rule notes in passing that applicants in asylum-only proceedings are “often also detained.” Rule 59693. This appears to be offered as a justification for the new 15-day filing requirement without any seemingly awareness that detention of an applicant is actually an argument for a longer and more flexible filing schedule. It is well-known and widely documented that applicants in detention have a great deal of difficulty in obtaining counsel. Under the Rule, not only would the time available to find an attorney shrink to almost nothing, many attorneys will be extremely reluctant to take on a detained case, or any asylum-only case, when the filing deadline is so brief. Moreover, the conditions of detention impede, rather than enhance, the ability of asylum seekers to be able to heal from their past trauma and recount traumatic experiences in a coherent and linear manner.

In another example of the harmful intersecting of recently proposed Rules, we note that the June 15 Rule expands the definition of a frivolous claim. June 15 Rule 36276. Being forced to hurriedly submit an asylum application without assistance in understanding the law will undoubtedly cause many applicants to unfairly be penalized for a “frivolous” claim.

Even if all applicants had appointed counsel at government expense, the 15-day requirement is unrealistic. But in reality, because applicants are not provided with attorneys at the government’s

²¹ See, e.g., *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); and *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020).

²² *Request for Comments: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264, 36280 (June 15, 2020) (hereinafter June 15 Rule).

expense, many, including many children, must navigate the complicated U.S. immigration system by themselves. The [application form and its instructions](#) are lengthy (currently 26 pages), provided only in English, and must be filled out in English. Applicants may mistakenly rely on inexpert advice from fellow detainees, 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. Combined with another provision in the Rule that all boxes must be filled in (see below) even if the applicant is unsure of the meaning of the question, or the question does not apply, the Rule is needlessly creating multiple traps for an applicant to be considered ineligible for protection, or deemed not credible.

The Rule’s failure to take into account these realities shows that the Department’s emphasis on speed comes at the cost of fairness. Nor are the proposed Rule’s defects cured by providing that an immigration judge may extend the time limit for filing applications, or that the applicant may seek to supplement the application later, Rule 59699. Immigration judges are under extreme pressure to complete cases, which this Rule mandates must be done within 180 days. Rule 59699. The immigration judge has every incentive not to allow additional time, or supplementation of the application or documentation.

Furthermore, in another example of various different proposed Rules creating greater harm than the sum of their parts, the rigid timelines set out in this Rule must be read against the June 15 Rule requiring applicants to define their particular social group in their application or on the record, or waive it. June 15 Rule 36291. At every step of the way, the administration seeks to complicate asylum law while shortening the time for adjudication. This will lead to mistaken cases of *refoulement* as well as needless appeals to the Board of Immigration Appeals and the federal courts, which are extremely expensive for applicants and for the government.

B. The Rigid Requirement To Fill In All Boxes On Form I-589 Is Arbitrary, Promotes Inefficiency, and Places Needless Obstacles In The Path Of Asylum Seekers

The Rule deems an asylum application incomplete if it does not include a response to each of the questions contained in the form. Rule 59699. Any incomplete application will be returned and must be corrected within 30 days. This provision codifies recent practice by U.S. Citizenship and Immigration Services with respect to affirmatively filed applications. So, for example, on page 2 of Form I-589 the applicant must check one box if they have children or another box if they do not have children. There are then 21 separate questions with regard to each child, with spaces for four children. Even when an applicant does not have children, and has correctly checked the box that they have no children, the Rule appears to require that some response be entered in each of the 84 inapplicable boxes relating to children. Anecdotal evidence from practitioners indicates that USCIS has rejected as incomplete forms where, for example, applicants with three children have left blank the spaces on the form for a fourth child. Additionally, practitioners have reported that USCIS’s requirement to leave no blank spaces is

inconsistently applied; sometimes an I-589 with “NA” in a box is returned with instructions to enter “Not Applicable” and vice versa.

We object strongly to this part of the Rule for three reasons. First, it is arbitrary to the point of stupidity. The Department has identified no problem arising from inapplicable boxes being left blank on the form. In the absence of any documented problem being addressed, consider that each newly filed I-589 will need to be checked to ensure that all boxes are filled in. If this is done by a government official or contractor, processing times will increase. If done by some kind of optical scanner, the chances are even greater that mistakes will be made. The “incomplete” form then must be mailed back to the applicant, at the government’s expense. When the corrected form is returned, a government official or contractor will have to calculate whether the correction is timely filed, and once again, check to make sure every box, *including those which by definition are not applicable*, is filled in. The Rule therefore fails to meet the asserted goal of efficiency, while placing unnecessary burdens on asylum applicants.

Second, the capricious nature of this instruction which the Department now intends to codify into binding federal regulation is demonstrated by how easily one could imagine the Rule being the reverse. The government could, with equal lack of logic, decree that no box should be filled in that does not apply and then return applications that say “Not Applicable” in one or more boxes to be corrected. One can readily imagine dire warnings in the I-589 instructions not to mark any box unless the applicant has specific and responsive information to put in the box.

Third, the safeguard proposed, that the applicant would have 30 days to respond to a notice of incompleteness, is insufficient to guard against *refoulement* and again belies the claimed benefit of efficiency. Most applicants receiving such notice would not be able to find an attorney to help them cure the incomplete aspects of their application, and indeed may not understand what the incomplete defects are.

This Rule requiring all boxes to be filled in must also be read in light of a previous proposal to pretermit hearings where an application fails to state a *prima facie* case. June 15 Rule 36277. It is entirely predictable that an applicant will submit the I-589 and fail to fill in a box because it does not apply to them. As noted above, the entire lengthy form must be reviewed and if incomplete, returned to the applicant with 30 days to correct the problem. The applicant then resubmits the I-589, only for the immigration judge to review it and determine that it fails to establish a *prima facie* claim. The applicant is then given notice of the second failure, this time with only ten days to respond.

Again, 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 – including whether a box was mistakenly left blank due to oversight, or a sincere belief that it was not applicable since there was no

information to put in the box – than to have multiple reviews on paper which could well end in the applicant being denied the opportunity even to speak to the immigration judge before their case is denied.

Rather than promoting the Department’s stated goal of efficiency, this Rule simply gives the Department another arbitrary reason to deny an application, which will result in the erroneous return of refugees to persecution or torture.

VII. THE DEPARTMENT’S CLAIM THAT REASONABLE FILING DEADLINES DO NOT VIOLATE INTERNATIONAL TREATY OBLIGATIONS IS ERRONEOUS ON ITS FACE

As a final comment on both the 15-day filing requirement, and the 30-day limit for re-filing an incomplete application, we note and object to the Department’s erroneous assertion that “reasonable filing deadlines do not violate the immigration laws or any international treaty obligations.” Rule 59694. First, for the reasons given above, these extremely short filing deadlines are not reasonable, particularly since, as the Department acknowledges, applicants are “often” detained. Rule 59693.

Second, as explained in Part V above, the international treaty obligations in question are *non-refoulement* to persecution and to torture. The United States is obligated to have sufficiently robust, fair procedures to allow for the identification of those to whom this protection must be extended. Contrary to the Department’s assertion, UNHCR has specifically addressed the issue of time limits for applications and their incompatibility with international standards. As UNHCR advises:

[A]n asylum-seeker’s failure to submit a request within a certain time limit or the non-fulfilment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect its credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles.²³

We ask that the Department specify whether it has reviewed UNHCR’s guidance on this point, and if not, why not.

VIII. CHANGES TO EVIDENTIARY RULES WILL MAKE ASYLUM HEARINGS FUNDAMENTALLY UNFAIR AND RESULT IN ERRORS BY IMMIGRATION JUDGES LEADING TO *REFOULEMENT*

The Department proposes alarming changes to evidentiary rules by imposing a heightened standard for the consideration of evidence from sources other than the U.S. government, and by allowing

²³ UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 20, available at: <https://www.refworld.org/docid/3b36f2fca.html> [accessed 18 October 2020].

immigration judges to submit their own evidence into the record. Rule 59699. Each of these changes will impede the judge's ability to assess the applicant's claim accurately, and will taint the record on appeal.

First, the Rule states that immigration judges "may rely" on material from any U.S. government source. There is no caveat that such information must be complete, accurate, or up-to-date. It appears that anything written on government letterhead or retrieved from a government file will be deemed reliable, despite a long history of well-documented errors in such records as they pertain to individuals.²⁴ Additionally, U.S. government sources may not have any information at all that is relevant to an applicant's claim. A government source frequently used in asylum adjudication is the State Department *Country Reports on Human Rights Practices*. Even at their best, these publications cannot comprehensively report on every human rights violation or situation in every country in the world. Furthermore, under this administration, the State Department *Country Reports* have been selectively edited to de-emphasize certain human rights violations, especially those affecting women and LGBTQ individuals.²⁵

The Rule goes on to state that immigration judges may rely on all other sources, described as "foreign government and nongovernmental sources," only "if those sources are determined by the judge to be credible and probative." This limitation will have a profoundly negative impact on asylum seekers' ability to corroborate their claims. It is critical that applicants be able to submit evidence from non-U.S. government sources. Newly developing human rights situations may be documented only by local press reports, for example. Little-known conflicts may be covered only by diaspora nongovernmental organizations. The proposed Rule equates any non-U.S. government source as potentially non-credible or non-probative, even though this category includes well-established, highly respected resources such as UNHCR's [RefWorld](#), and [ecoi.net](#), a joint partnership between UNHCR and the Austrian Red Cross, that UNHCR has endorsed as "the main global platform for country of origin information."²⁶

The Department fails to identify what problem is being solved by bifurcating sources of evidence to the detriment of any information that is not from a U.S. government file. Immigration judges are already empowered to assess the probative weight and value of evidence proffered. But immigration courts are not bound by the Federal Rules of Evidence precisely because applicants may well need to rely on a variety of corroborative materials.²⁷ Under this Rule, immigration judges will not even have to admit

²⁴ United States Commission on International Religious Freedom, [Report on Asylum Seekers in Expedited Removal](#) (2005).

²⁵ Asylum Research Centre, [Comparative analysis of the U.S. Department of State's human rights reports](#), Oct. 21, 2020; CLINIC, [Department of State Country Report on Human Rights Practices: Honduras: Comparison Chart: 2016 and 2019](#), Oct. 20, 2020; Oxfam, [Sins of Omission: Women's and LGBTI rights reporting under the Trump administration](#), Nov. 1, 2018.

²⁶ [UNHCR and Austrian Red Cross Partnership](#).

²⁷ See, e.g., *Haile v. Holder*, 658 F.3d 1122, 1128 (9th Cir. 2011) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." (quotation marks and citation omitted)); *Matter of D-R-*, 25 I. & N. Dec. 445, 458 (BIA 2011) ("It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings and that Immigration Judges have broad discretion to admit and consider relevant and probative evidence.").

such evidence into the record, thus handicapping review by the Board of Immigration Appeals and the federal courts of appeals.

The second change to evidentiary practices, allowing immigration judges to submit their own evidence, is potentially even more damaging since it undermines their role as neutral decision-makers. The Rule appears to justify this change by citing the immigration judge's responsibility to develop the record. Rule 59695. However, this would imply that the immigration judge should submit only evidence which would help the applicant, since there is already a government attorney in the adversarial proceeding whose job it is to submit evidence that may cast doubt on the claim. While in principle an immigration judge could submit evidence that would bolster the applicant's claim, as a practical matter, immigration judges do not have time to research potentially helpful corroboration for each applicant. At best, this Rule will lead to inconsistent results reflecting the preferences of the immigration judges, or their superiors. Immigration judges may well be given packets of general evidence for each country or type of claim by their superiors and told to enter it into the record. This will again taint and distort the record on appeal, to the almost certain detriment of the applicant.

Finally, we note again that this Rule must be harmonized with a previously proposed Rule. The June 15 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. June 15 Rule 36292.

As we noted in our comment on the June 15 Rule, it is unclear how the immigration judge should determine the line between accurate country conditions information and inadmissible evidence that promotes a stereotype. The June 15 Rule lacks any guidance on what "promoting" a stereotype means, or even what the definition of "stereotype" is. It is not clear if the June 15 Rule intends to bar evidence relating to any cultural stereotype, or only "pernicious" ones. If the latter, the term "pernicious" is not defined.

This self-inflicted problem that the government proposes in the June 15 Rule exists for government sources referenced in the instant Rule, as well as all other sources. 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."²⁸ 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.²⁹ It is unclear if these U.S. government sources would be barred under the June 15 Rule as

²⁸ 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/>.

²⁹ USCIRF, *Annual Report 2020*, available at https://www.uscifr.gov/sites/default/files/USCIRF%202020%20Annual%20Report_Final_42920.pdf, p. 12.

promoting a cultural stereotype of Buddhists in Myanmar being anti-Muslim extremists, or if the immigration judge “may rely” on them based on the instant Rule simply because they are U.S. government sources. Similarly, what if the evidence that the immigration judge wishes to introduce into the record under the instant Rule promotes a cultural stereotype under June 15 Rule? The Department provides no reasoned explanation to disturb the well-settled principle on admission of evidence in immigration court that is probative and relevant.

The lack of justification for the evidentiary changes in the instant Rule, combined with the extremely unclear implications of cultural stereotype inadmissibility under the June 15 Rule, reveals that the Department cannot truly be seeking efficiency or an accurate outcome in immigration court proceedings. Without a clearly defined problem that is being addressed, these overlapping proposed changes to rules on evidence place an unwarranted and unfair burden on applicants, and greatly increase the risk of immigration judges mistakenly ordering an applicant be returned to persecution or torture.

IX. 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 Department to withdraw this Rule in its entirety. In order to remedy the profound flaws in this Rule, we strongly recommend that EOIR engage in consultations with UNHCR, CGRS, and other practitioners and scholars knowledgeable in asylum law, 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

Kate Jastram
Director of Policy & Advocacy