

*Submitted via Federal eRulemaking Portal*

October 23, 2020

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**RE: Public Comment Opposing Proposed Rule on Procedures for Asylum and Withholding of Removal RIN 1125-AA93; EOIR Docket No. 19-0010; A.G. Order No. 4843-2020**

Dear Ms. Alder Reid:

The Center for Victims of Torture (CVT) respectfully submits this comment in opposition to the Proposed Rule by the Department of Justice (DOJ) on Procedures for Asylum and Withholding of Removal, EOIR Docket No. 19-0010 published on September 23, 2020.

The Proposed Rule does not provide adequate time to comment given the substantial changes it would enact to the procedures for asylum and withholding of removal, and the myriad of serious consequences that could flow from those changes. However, it is clear that the Proposed Rule would undermine due process by taking away asylum seekers' fair opportunity to demonstrate their status as refugees before an immigration judge, and would do so by burdening asylum seekers in ways wholly unrelated to the merits of their claims. In so doing, the Proposed Rule risks survivors of torture—who comprise a shocking percentage of the U.S. refugee and asylum seeking populations—being returned to danger in violation of U.S. legal obligations.

The DOJ should immediately withdraw its current proposal and dedicate its efforts to advancing policies that safeguard individuals fleeing persecution, including torture.

Thank you for the opportunity to submit comments on this Proposed Rule. Please do not hesitate to contact us with any questions or for further information.

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**DETAILED COMMENTS in Opposition to Proposed Rule on Procedures for Asylum and Withholding of Removal RIN 1125-AA93; EOIR Docket No. 19-0010; A.G. Order No. 4843-2020.**

The Center for Victims of Torture (CVT) welcomes the opportunity to comment on the proposed rule titled “Procedures for Asylum and Withholding of Removal,” RIN 1125-AA93; EOIR Docket No. 19-0010; (“Proposed Rule,” or “Rule”).

Founded in 1985 as an independent, non-governmental organization, CVT is the largest organization of its kind in the world. Through programs operating in the U.S., the Middle East, and Africa – involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses – CVT annually rebuilds the lives and restores the hope of nearly 30,000 primary and secondary survivors of torture, other gross human rights violations, and severe war-related trauma. The vast majority of CVT’s clients in the United States are asylum seekers.

CVT also conducts research, training and advocacy, with each of those programs rooted in CVT’s healing services. The organization’s policy advocacy leverages the expertise of five stakeholder groups: survivors, clinicians, human rights lawyers, operational/humanitarian aid providers, and foreign policy experts. CVT helps organize a network of torture treatment programs focused on rebuilding the lives of survivors of torture across the nation. These programs serve primarily asylum seekers, asylees, and refugees.

**I. Background**

On September 23, 2020 the Executive Office for Immigration Review (EOIR) (a component of DOJ) published the Notice of Proposed Rulemaking that is the subject of this comment. Through substantial changes to the procedures for asylum and withholding of removal the Proposed Rule would deny asylum seekers and others facing danger a fair opportunity to present their claims. More specifically, the rule proposes the following regulatory changes:

First, the Proposed Rule would amend the filing deadline for asylum applicants in asylum-and-withholding-only proceedings. In revising 8 CFR 1208.2(c), DOJ would add a 15-day deadline from the date of asylum seekers’ first hearing to file an application for asylum and withholding of removal. The current system allows immigration judges to set these deadlines based on each applicant’s unique situation.

Second, the Proposed Rule would require that asylum seekers re-file incomplete applications with EOIR. Through revisions to 8 CFR 1208.3(c)(3), DOJ would remove the current provision that an asylum seeker’s incomplete asylum application submitted by mail will be deemed complete if the immigration court fails to return the application within 30 days of receipt.

Instead, the Proposed Rule requires immigration courts to reject all incomplete applications and return them to the applicants in a timely fashion. The Rule would also add a maximum of 30 days for the asylum seeker to correct any deficiencies in his or her application, failure of which can lead to the denial of the application.

Third, the Proposed Rule would give guidance to immigration judges as to what types of evidence they are allowed to consider and would allow them to submit evidence. In this Rule the DOJ clarifies what are the “external materials upon which an immigration judge may rely...and proposes to revise the standard for an immigration judge’s consideration of information from non-governmental sources to ensure that only probative and credible evidence is considered.” By revising 8 CFR 1208.12 the DOJ would allow an immigration judge to submit evidence into the record and consider that evidence.

Fourth, the Proposed Rule would limit the duration of an immigration case to 180 days from the date the asylum and/or withholding of removal application was filed. The DOJ argues that Congress intended asylum cases to last 180 days based on INA 208(d)(7) and INA 208(d)(2). To warrant an extension, asylum seekers will have to show “exceptional circumstances,” a burden beyond the “good cause” standard they must meet now.

If the Rule were to take effect as proposed, it would almost certainly lead to the denial of protection for asylum seekers, survivors of torture, and others fleeing persecution for reasons wholly unrelated to the validity of their claim.

## **II. The Proposed Rule is Part of a Larger Scheme to End Asylum**

Through the establishment of policies, agreements, and dubious unilateral changes to well-settled asylum law, it is clear that the Trump administration seeks to prevent individuals from accessing the U.S. asylum process at all, much less actually obtaining asylum. The actions below form the backdrop to the Proposed Rule and include the following:

**Barring asylum on national security and health grounds:** On July 9, 2020 DHS and DOJ proposed a joint rule to bar asylum seekers and others in search of protection from asylum based on the likelihood they might have a disease. This determination would be made by someone lacking medical training and will preclude from protection asylum seekers that fall ill from COVID-19 while awaiting an asylum hearing while in the U.S.

**Proposed rule dismantling asylum:** On June 15, 2020 the DHS and DOJ proposed jointly a rule that gives rise to the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act through the Illegal Immigration Reform and Immigration

Responsibility Act (IIRIRA). It severely limits the number of individuals who will qualify for asylum, which will lead to the removal of survivors of torture and other trauma.

**Blanket ban for asylum seekers at the borders:** On March 19, 2020 the Centers for Disease Control and Prevention (CDC) issued an order allowing the closure of the U.S. borders using COVID-19 as a public health justification. The order allows DHS to remove those seeking protection at the border and between ports of entry without implementing a procedure to determine whether they might qualify for humanitarian protection.

**Changing asylum immigration case law:** The attorney general certified to himself several immigration court cases and decided them in a way that upends longstanding law. In overruling *Matter of A-B-* and *Matter of L-E-A-*, the attorney general made it significantly more difficult for individuals from Central America to win their asylum cases, since they largely rely on these two cases.

**Zero tolerance leading to family separation:** The administration adopted a policy of pursuing criminal charges against *every* individual, including asylum seekers, who crossed the border outside of a port of entry, then forcibly separated children from the parents who were subjected to criminal proceedings. Family separation was a cruel practice that will have long lasting consequences for children, asylum seekers and the United States.<sup>1</sup>

**Asylum ban 1.0:** In November 2018, the president issued a proclamation banning individuals who enter the United States between ports of entry from asylum, currently subject to an injunction.<sup>2</sup>

**Migrant Protection Protocols:** Established in January 2019, this policy forces asylum seekers to wait in dangerous Mexican border cities during the pendency of their cases. Besides placing asylum seekers in danger, it undermines their ability to obtain assistance of counsel, greatly diminishing their ability to win their case.<sup>3</sup>

**Asylum ban 2.0:** In July 2019, the administration disqualified from asylum any individual who transited through a third country before arriving at the United States southern border. This

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<sup>1</sup> See Center for Victims of Torture, *8 Facts about Refugees and Asylum Seekers*, Fact 4, <https://www.cvt.org/AsylumFact4>

<sup>2</sup> See White House, *[Individuals] Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>

<sup>3</sup> See Human Rights First. *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process*, <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>

disqualifies all but Mexican asylum seekers arriving at our southern border from asylum, and the rule is subject to an injunction.<sup>4</sup>

**Agreements with other countries:** The Trump administration has forced some countries that are not safe into entering into “safe third country” agreements—from which people are fleeing violence and persecution that these countries’ governments cannot, or will not, effectively address—including El Salvador, Guatemala, and Honduras.

**Fees for asylum seekers:** The administration has finalized a rule creating fees for asylum applications and initial work authorizations for asylum seekers. Although there has been an injunction on this rule, implementation was scheduled for October 2020, and asylum seekers will have to pay \$50 to submit an asylum application and \$550 for their initial work authorization.

**Work authorization restrictions:** The administration recently finalized a rule that doubles the time an asylum seeker must wait before qualifying for a work permit (from 150 days to 365 days) and imposes additional restrictions on eligibility. Yet another final rule eliminates entirely the time limit previously imposed on USCIS to adjudicate work authorization applications, which implicitly authorizes the agency to delay any such adjudication indefinitely.

### **III. A 30-day Comment Period Does not Give the Public Sufficient Time to Provide Diverse, Evidence-Based Feedback**

Under the Administrative Procedures Act, federal agencies have a duty: “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”<sup>5</sup>

Over the past several months, the Department of Justice, and in some instances the Department of Homeland Security, have been frantically rewriting the rules on which noncitizens and their counsel have relied for decades without giving adequate opportunity for thoughtful comments, or considered review of those comments by the agencies. For this procedural reason alone, we urge the administration to rescind the Proposed Rule. If it wishes to reissue the proposed regulations, it should wait until it has finalized (or withdrawn) overlapping proposed rules that are still pending, and then grant the public at least 60 days to have adequate time to provide comprehensive comments. For example, this Rule does not take into account the final rule on

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<sup>4</sup> See Asylum Eligibility and Procedural Modifications, A Rule by the Homeland Security Department and the Executive Office for Immigration Review on 07/16/2019, <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>

<sup>5</sup> *Capital Area Immigrants’ Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

asylum employment authorization document (EAD), which prohibits asylum seekers from applying for an EAD until 365 days after their asylum application has been pending. 8 CFR § 208.7(a)(ii). The overlap of that rule with the currently Proposed Rule would mean that asylum seekers who file defensive asylum applications would not be authorized to work until after there is a decision on their application, thereby making it much less likely that they could afford counsel for their individual hearing, and interfering with their statutory right to representation. *See* INA § 292. Further, the Rule issued on June 15, 2020 titled “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” 85 Fed. Reg. 36264 (June 15, 2020), proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Without knowing how the agencies may alter that proposed rule based on the 88,933 comments they received,<sup>6</sup> it is impossible to adequately comment on the current Proposed Rule.

The Proposed Rule will have the effect of denying protection to asylum seekers with valid claims, which will lead to the return to danger, torture, and/or death of individuals seeking protection. Despite the catastrophic effect this could have for those seeking asylum, DOJ has given no reason for allowing only 30 days for the public to submit comments on these considerable changes to asylum procedures rather than the customary 60-day comment period. The shortened comment period presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public, including government workers, to work from home and balance childcare and other extraordinary obligations with work activities. The public should be given adequate time to consider these dramatic revisions to existing law to provide thoughtful and well-researched comments.

#### **IV. The Substance of the Proposed Rule Will Curtail Due Process for Asylum Seekers and Result in the Return of Refugees to Danger, Torture, and Death.**

Although we object to the agency’s unfair 30-day deadline for submitting comment on the Proposed Rule, we submit this comment nonetheless because we are compelled to object to policies and practices which would greatly reduce the rights of asylum seekers<sup>7</sup> appearing before EOIR, and would result in the wrongful removal of bona fide asylum seekers to the countries they fled where they would likely face further persecution or even death. Any omission in discussing specific provisions does not mean we agree with them.

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<sup>6</sup> *See* Federal Registrar, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, <https://www.regulations.gov/document?D=EOIR-2020-0003-0001>.

<sup>7</sup> To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal and protection under the Convention Against Torture, it will use the term “asylum seekers” to mean applicants for all of these forms of protection.

**a. The Proposed Rule Does Away with Due Process for the Sake of Speedy Adjudications**

Judges are best positioned to create timelines for each of the asylum requests before them, as they are most familiar with individual cases and their own dockets. This rule imposes a cookie-cutter approach to all asylum cases by dictating how judges should manage their dockets, without considering the realities asylum seekers and survivors of torture are exposed to and with which most immigration judges are familiar.

**i. A 15-day Deadline After a First Immigration Hearing to File an Asylum Application will Result in Refugees Being Returned to Danger**

Proposed 8 CFR § 1208.4(d) would impose a 15-day deadline for asylum seekers to file an asylum application after their first master calendar hearing. Often, asylum applicants first hear they can hire an attorney to help them in their case and are provided with a list of pro-bono resources at their first master calendar hearing. CVT clinicians have explained that their clients often have to wait several weeks before they can schedule an *initial consult* with a legal service provider. Indeed, pro-bono service providers are often unable to provide an initial consult within the proposed time-period, much less to sign a retainer and file an asylum application for a new client within the proposed 15-day timeline. For years immigration judges have allowed asylum seekers additional time, as they understand and recognize the difficulties in obtaining counsel. Immigration judges experience first-hand how critical it is for asylum seekers to have counsel for a fair chance at presenting their case. In fact, data shows that asylum seekers might be 5 times more likely to be successful in their claims when represented by an attorney.<sup>8</sup> The effect of the rule will be that more asylum seekers will represent themselves. *Pro se* representation in a field as complex as immigration law, coupled with the Proposed Rule's unreasonable requirement that an application must essentially be technically perfect, will undoubtedly lead many asylum seekers with valid claims to miss their filing deadline and be returned to the country where they fear persecution and torture.

Unsurprisingly, the administration does not seem to have considered that its June 15, 2020 rule, *see* 85 Fed. Reg. 36264, would place all asylum seekers who have gone through the credible fear process into asylum and withholding-only proceedings, making them subject to the 15-day filing deadline. In 2018, DHS found a credible fear in 74,287 cases it heard.<sup>9</sup> Thus, tens of thousands of asylum seekers would be subject to the new 15-day deadline. Yet the Rule contains no explanation as to how the administration will address the stress this will cause on the need for counsel, or court operations. This is consistent with our concern above regarding the reckless

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<sup>8</sup> See American Immigration Council, *Access to Counsel in Immigration Court* at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

<sup>9</sup> See DHS, *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, [www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview](http://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview).

imposition of rule after rule by this administration without first understanding the effect of the previous ones.

**ii. A 180-day Deadline for Judges to Adjudicate Asylum Cases will Result in Some Asylum Seeker's Inability to Present an Adequate Case**

Through interpretation of sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 the Rule would require immigration judges to complete asylum cases within 180 days after the asylum application is filed, unless the respondent can demonstrate “exceptional circumstances.”

The Rule's 180-day deadline raises serious practical and due process concerns—whether it is applied to all pending cases or prospectively only. Asylum seekers face serious due process concerns if their cases are scheduled too quickly for them to adequately prepare, and equally serious concerns if their cases languish so long that evidence becomes stale and memories fade.<sup>10</sup> If this aspect of the Rule applies to pending cases, the courts would be overwhelmed, and practitioners who have caseloads of, in some instances, hundreds of asylum cases with individual hearing dates scheduled years in advance, would be forced to choose between withdrawing from cases or providing inadequate representation. On the other hand, if EOIR applies the Rule prospectively, EOIR would essentially recreate the “Last In, First Out” policy that the Asylum Offices use. Those who would file asylum cases after the Rule is published would have to go forward on their applications, in many cases before they are ready to do so. At the same time, asylum seekers whose cases have already been languishing in the EOIR backlog would have to wait even longer. For many who want to obtain asylum to bring family who are still in danger in their country of origin, this wait is already devastating. In fact, the healing of many of CVT's clients is hindered by their inability to reunite with their family due to the long waits in the affirmative asylum process.

Although currently immigration judges grant continuances for “good cause” shown regardless of the number of days after the initial application for asylum,<sup>11</sup> the Rule prohibits immigration

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<sup>10</sup> See, Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 20 (June 2019), [www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](http://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf), (“arbitrary prioritizations wreak havoc on case management, giving so-called ‘priority’ cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.”)

<sup>11</sup> The attorney general has already substantially limited the definition of “good cause” for continuing cases in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) while DOJ has imposed performance metrics that give immigration judges a financial incentive to complete cases quickly. See, Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System”* (Apr. 18, 2018), [www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf](http://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf) (“production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.”)



judges from granting a continuance under this threshold if doing so would push the end of the case beyond the 180-day mark. The Proposed Rule would demand that applicants demonstrate that there are “exceptional circumstances” warranting an extension if the request for a continuance would set the case to end beyond 180 days from the filing of the asylum application. Although INA § 208(d)(5)(ii) does not define the term “exceptional circumstances,” EOIR gives examples of qualifying circumstances that would rarely be met – “such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances.” Proposed 8 CFR § 1003.10(b). The asylum application process as it stands is re-traumatizing for applicants as they have to repeatedly recount, explain, defend and try to “prove” their traumatic experiences. The need to show “exceptional circumstances” to obtain additional time might lead survivors to internalize the expectation that only through continued suffering will they receive support, which is likely to cause helplessness and generalized fear.

This Rule would also take away immigration judges’ ability to make decisions about individual cases based on the unique circumstances each asylum seeker experiences. It would prohibit the judge from using his or her discretion to allow additional time to the applicant based on the judge’s knowledge of immigration law and what it takes to provide a fair opportunity for relief. There are many factors that could impact an asylum seeker’s ability to have a meaningful opportunity to present their case within 180 days of filing their asylum application, including lack of funds and opportunity to secure an attorney, lack of evidence from their home country, inability to provide certain facts due to the trauma suffered, or their situation at home. In fact, many of CVT’s clients depend on mental health counseling to manage anxiety and depression symptoms that may otherwise hinder their ability to navigate through the asylum process, and some are waiting to receive critical documentation from abroad.

Amanda McDonald, MSW, LICSW at CVT explains that:

Occasionally clients live with relatives or hosts who prevent them from leaving the house and control their activities. Clients often don’t have access to a computer or free use of a phone and therefore cannot apply for asylum nor can they look for an attorney.

#### **b. Immigration Judges will Cease to be Impartial Parties**

The Proposed Rule would severely limit immigration judges’ ability to consider country conditions evidence submitted by asylum seekers while allowing immigration judges to compile and introduce their own evidence, shifting the role of immigration judges from adjudicators to prosecutors.

The Proposed Rule imposes a bifurcated standard for supporting documentation about country conditions: the immigration judge “may rely” on evidence that comes from U.S. government sources but can only rely on non-governmental sources or foreign government sources “if those

sources are determined by the immigration judge to be credible and probative.” The proposal to direct immigration judges to give considerably more weight to U.S. government documents is especially concerning under the Trump administration given its attempts “to change or suppress intelligence reports that contradicted their immigration policy initiatives on the Mexico-U.S. border and Central American migrants.”<sup>12</sup> Political appointees in the Trump administration “are willing to go to hide facts or outright lie to the American people to support its cruel—and in several ways illegal—immigration policy.”<sup>13</sup> A DHS whistleblower recently filed a report accusing senior DHS officials of asking him to change reports about “corruption, violence, and poor economic conditions” in Guatemala, Honduras, and El Salvador that would “undermine President Donald J. Trump’s (“President Trump”) policy objectives with respect to asylum.”<sup>14</sup> A recent report also found that a “Comparative Analysis of U.S. Department of State Country Reports on Human Rights Practices identified serious omissions of human rights issues and inadequately substantiated reports of improvements.”<sup>15</sup> Non-governmental organizations—whose evidence the immigration judge could only consider after it has been found to be “credible and probative”—have likewise found that the State Department reports are subject to political pressure.<sup>16</sup> Thus, if the Rule were implemented, immigration judges could be required to rely on information that was manufactured to carry out the Trump administration’s immigration policies of keeping immigrants out, regardless of their need for protection. This takes away a fair opportunity for asylum seekers to present real facts on their claim, and undermines our democracy.

By allowing judges to introduce their own evidence into the record, the Proposed Rule would fundamentally alter the role of the judge. The only procedural safeguard the Proposed Rule would provide is that the immigration judge would have to provide “a copy of the evidence . . . to both parties and both parties have had an opportunity to comment on or object to the evidence *prior to the issuance of the immigration judge’s decision.*” [Emphasis added.] Thus, although the asylum seeker and DHS are required by the Immigration Court Procedures Manual to submit evidence at least 15 days before the hearing,<sup>17</sup> the immigration judge would be allowed to submit

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<sup>12</sup> See Just Security, *Whistleblower: DHS Suppressed Reports on Central America and Inflated Risk of Terrorist Border-Crossers*, <https://www.justsecurity.org/72451/whistleblower-dhs-suppressed-reports-on-central-america-and-inflated-risk-of-terrorist-border-crossers/>

<sup>13</sup> *Id.*

<sup>14</sup> See DHS, Office of the Inspector General, Matter of Brian Murphy, (Sep. 8, 2020) [https://intelligence.house.gov/uploadedfiles/murphy\\_wb\\_dhs\\_oig\\_complaint9.8.20.pdf](https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf).

<sup>15</sup> See ARC, *Trump’s State Department Excludes Key Human Rights Issues from its Reports*, [https://asylumresearchcentre.org/wp-content/uploads/2020/10/ARC-Press\\_release\\_USDOS-Comparative-analysis-21-October.pdf](https://asylumresearchcentre.org/wp-content/uploads/2020/10/ARC-Press_release_USDOS-Comparative-analysis-21-October.pdf)

<sup>16</sup> See Amanda Klasing & Elisa Epstein, Human Rights Watch *US Again Cuts Women from State Department’s Human Rights Report*, (Mar. 13, 2019) [www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rightsreports](http://www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rightsreports); Tarah Demant, Amnesty International *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, (May 8, 2018) <https://medium.com/@amnestyusa/a-critiqueof-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca>.

<sup>17</sup> EOIR, Immigration Court Practice Manual, at 36 (Jul. 2, 2020), [www.justice.gov/eoir/page/file/1258536/download](http://www.justice.gov/eoir/page/file/1258536/download).

evidence on the date of the hearing. The regulation fails to consider how a non-English speaker would understand the documents in English, and does not provide a provision allowing for a continuance for the parties to respond to the newly introduced evidence.

The Rule disingenuously likens this proposed change to the immigration judge's existing duty to develop the record. 85 Fed. Reg. 59695. However, the immigration judge's duty to elicit testimony about claims from unrepresented respondents is wholly consistent with the role of a fact-finding adjudicator. The role of the immigration judge is to weigh the facts that the parties put before the court, not to introduce their own facts into the record. Allowing the immigration judge to create their own record in the case would further erode the rights of respondents who appear in immigration court.

**c. The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications for Absurd Technical Reasons**

The Proposed Rule at 8 CFR § 1208.3(c)(3) will lead EOIR to reject and consider bona fide asylum applications abandoned because asylum seekers might leave a box blank on the asylum application form.

Since 2019, USCIS has been rejecting affirmative asylum applications if any box on the Form I-589 is left blank – even boxes that have no legal relevance to the case – or questions that evidently do not apply, such as the name of a child when the applicant has already acknowledged that he or she has no children. The Proposed Rule would now codify this practice and require immigration judges to reject any incomplete application. Once the court rejects the application, the applicant would have 30 days to make the correction, otherwise their application would be considered abandoned.

In a system that does not provide appointed counsel despite the life or death consequences of asylum cases, this change would have a devastating impact on pro se asylum seekers, which will likely increase in number per the analysis provided above regarding the 15-day filing deadline. Depriving asylum seekers of their right to pursue asylum because of reasons completely unrelated to the merit of their claim is wrong and undercuts U.S. obligations pursuant to the Refugee Act of 1980 as it would return refugees to danger. The effects of the Proposed Rule would be especially profound on those in detention and those subjected to the “Migrant Protection Protocols” (MPP) where people are in particularly precarious situations and a lower percentage are represented. If the immigration judge rejects applications on this basis and asylum seekers still do not understand the need to write the word “none” or “n/a” in the empty boxes, they would be unable to seek asylum and will be deported to the country they fled.

## V. The Rule would Undermine U.S. Legal Obligations

The rule abrogates the United States' obligations under the 1951 Convention Relating to the Status of Refugees (the Refugee Convention). The United States, while not a party to the 1951 Refugee Convention itself, did ratify the 1967 Protocol. In ratifying the 1967 Protocol, the United States bound itself to the obligations of the 1951 Refugee Convention as well.<sup>18</sup> Under the Refugee Convention, the expulsion of a refugee shall be only in "pursuance of a decision reached in accordance with due process of law."<sup>19</sup>

As illustrated above, in practice the Proposed Rule would undercut a fair opportunity for asylum seekers to demonstrate they are refugees. By codifying extremely short timelines for the filing of the asylum application and completion of the case, the administration is taking away immigration judges' authority to manage each case as they deem appropriate. Doing so, as explained above, would result in the denial of applications for the inability to meet the 15-day filing deadline, to prepare adequate cases and obtain attorneys within the 180-day deadline to finalize the case. These unrealistic timelines are accompanied by a requirement to fill out every empty slot of an asylum application, a task that is counterintuitive and has no effect on the merits of the claim. This will lead to the rejection and accidental abandonment of asylum applications. As a result of this complete disregard for due process, asylum applications will be denied for reasons unrelated to the merit of asylum seekers' claims and refugees will be returned to danger, death, and torture.

The Refugee Convention also states that "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."<sup>20</sup> [UNHCR has made clear](#) that this is "an essential and non-derogable component of international refugee protection." As this Rule creates hurdles that undermine due process that will lead to the rejection of valid claims for asylum, it would inevitably lead to the return of a significant number of refugees to the country they fled, thus violating the principle of *non-refoulement*.

## VI. Conclusion

The administration must abstain from implementing the Proposed Rule, which will undermine due process and otherwise harm asylum seekers, including the torture survivors among them.

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<sup>18</sup> See UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, Article 1, available at:

<sup>19</sup> See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 32.2, available at: <https://www.refworld.org/docid/3be01b964.html>

<sup>20</sup> See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33.1, available at: <https://www.refworld.org/docid/3be01b964.html>