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January 8, 2019

Re: 83 FR 55934, EOIR Docket No. 18-0501, Entitled “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims”

Dear Ms. Alder Reid:

The Center for Victims of Torture (CVT) welcomes the opportunity to comment on the Interim Final Rule referenced above (“the Rule”), which was promulgated on November 9th by the Department of Justice (DOJ) and the Department of Homeland Security (DHS).

Founded in 1985 as an independent non-governmental organization, CVT is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest 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 of nearly 25,000 primary and secondary survivors, including children. 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.

I. Background

On the same day that DOJ and DHS promulgated the Rule, the President signed a “Proclamation Addressing Mass Migration Through the Southern Border of the United States” (“the Proclamation”). Taken together, the Rule and Proclamation (“Asylum Ban”) prohibit anyone who crosses the southern border irregularly from obtaining asylum.

More specifically, the Rule changes asylum law in three ways: First, it makes refugees ineligible for asylum if they are subject to the Proclamation and enter the United States in violation of its terms. Second, it denies those refugees even the opportunity to show a “credible fear” of persecution if returned to their home country, leaving them eligible to apply only for two less robust and more-difficult-to-obtain forms of relief: withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (“Withholding”), or withholding or deferral of removal under the Convention Against Torture (“CAT protection”). Third, it provides that an immigration judge is to review whether the Proclamation in fact applies in each case, and if so whether the refugee has satisfied the threshold requirement to apply for Withholding or CAT protection.

For its part, the Proclamation purports to suspend the entry of individuals who crossed the United States' southern border without receiving inspection at a designated port of entry.

In sum, the Asylum Ban eliminates the mere possibility of asylum for countless trauma victims, even in cases where they have a credible fear of persecution if returned to their home country and even where government policies and practices—like illegal turn-backs¹ and “metering”²—obstruct their ability to access ports of entry.

II. The Asylum Ban Is Unlawful

The Rule, which was implemented immediately without prior notice or opportunity for comment, runs afoul of a number of U.S. legal obligations. They include:

- The guarantee—which brings the United States into compliance with the United Nations Convention Relating to the Status of Refugees, to which the United States is party³—that every person in or who arrives in the United States has the opportunity to seek asylum, regardless of manner of entry.⁴
- The federal immigration law requirements that: 1) individuals who would otherwise be subjected to expedited removal upon apprehension at or near the border must be referred for a “credible fear interview” upon expressing any fear of return to their country of origin, and subsequently referred to immigration court proceedings to seek asylum if a credible fear is established;⁵ and 2) changes to the limitations and conditions placed on asylum seekers be made by regulation (not by presidential proclamation).⁶
- The federal anti-trafficking law requirement that migrant children arriving alone in the United States be permitted to present their asylum claim in a non-adversarial proceeding.⁷
- The federal administrative law requirement that promulgation of a new federal rule must be preceded by public notice and a meaningful opportunity for comment.⁸

¹ Refugee Blockade: The Trump Administration’s Obstruction of Asylum Claims at the Border at 3-8, Human Rights First, December 2018 (hereinafter “Refugee Blockade”), available at https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf.

² Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, Office of the Inspector General, U.S. Department of Homeland Security, September 27, 2018, available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

³ The United States acceded to the Refugee Convention via its 1967 United Nations Protocol Relating to the Status of Refugees. Its obligations are incorporated into domestic law in the Refugee Act of 1980. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

⁴ 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival ... irrespective of such alien’s status, may apply for asylum in accordance with this section...”)).

⁵ 8 U.S.C. § 1225.

⁶ 8 U.S.C. § 1158(b)(2)(C).

⁷ 8 U.S.C. § 1158(b)(3)(C).

⁸ 5 U.S.C. §§ 553(b), (c), and (d).

III. The Asylum Ban Punishes, And Will Cause Significant Harm To, Torture Survivors And Survivors Of Other Forms Of Serious Trauma

1. The Asylum Ban targets highly traumatized populations

According to the Department of Health and Human Services Office of Refugee Resettlement, research indicates that 44% of refugees, asylees, and asylum seekers now living in the United States are torture survivors.⁹ Many others among these populations, children included, have experienced different forms of trauma.

Trauma survivors present complex health needs. As CVT's Director of Client Services, Dr. Andrea Northwood, explained recently in a sworn affidavit on behalf of detained asylum seekers:

It is well established in the scientific literature that traumatized persons carry forward vulnerability from their traumatic experiences; research across types of trauma and cultures has consistently shown a significant correlation between the degree of vulnerability/impact and the chronicity or severity of trauma exposure. This vulnerability operates on both a psychological and physiological level. To cite one of the foremost experts on the effects of trauma on the brain and body:

“We have learned that trauma is not just an event that took place sometime in the past; it is also the imprint left by that experience on mind, brain, and body.... Trauma results in a fundamental reorganization of the way mind and brain manage perceptions. It changes not only how we think and what we think about, but also our very capacity to think.... Under normal conditions people react to a threat with a temporary increase in their stress hormones. As soon as the threat is over, the hormones dissipate and the body returns to normal. The stress hormones of traumatized people, in contrast, take much longer to return to baseline and spike quickly and disproportionately in response to mildly stressful stimuli,” [(van der Kolk, B. (2014). *The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma*. New York: Penguin Books, p. 21, p. 46)].

Post-traumatic Stress Disorder and Major Depressive Disorder are the two most common psychiatric disorders among CVT's asylum-seeking clientele who have survived life-threatening traumas and are enduring catastrophic losses of family, culture, career, and all property and material possessions in exile. These two disorders often co-occur (a majority of our clients are diagnosed with both), and are present even in the absence of [prison-like conditions typical of U.S. immigration detention facilities].

Post-traumatic Stress Disorder (PTSD) results in ongoing emotional suffering in the form of debilitating nightmares, flashbacks and other forms of re-experiencing the trauma as if it were happening again in the present; avoidance behaviors;

⁹ Office of Refugee Resettlement, Services to Survivors of Torture Program, <https://www.acf.hhs.gov/orr/programs/survivors-of-torture> (“Research studies indicate a 44% prevalence of torture among refugees, asylees, and asylum seekers now living in the U.S.”).

negative changes to one's thoughts and mood; and various manifestations of increased physiological arousal that make it difficult to do things such as concentrate, sleep, and feel safe.

Major Depressive Disorder results in ongoing emotional suffering in the form of (a) depressed or sad mood, and/or (b) loss of interest in life and daily activities, combined with some combination of the following additional symptoms: diminished ability to think or concentrate or make decisions, loss of appetite or over-eating (resulting in significant weight loss or gain), insomnia or hypersomnia, fatigue and loss of energy, feelings of worthlessness or excessive guilt, restlessness or feeling slowed down (to a degree observable to others) and recurrent thoughts of death or killing oneself.¹⁰

For the reasons described below, the Asylum Ban compounds these harms.

2. From a healing perspective, Withholding and CAT Protection are not sufficient substitutes for asylum-eligible torture and trauma survivors

As a threshold matter, the Asylum Ban puts severely traumatized, otherwise asylum-eligible individuals—including torture survivors—at heightened risk of deportation to persecution. That is because both Withholding and CAT Protection require refugees to show that it is more likely than not—i.e., greater than a 50% chance—that they will be persecuted on one of the protected grounds (Withholding)¹¹ or tortured (CAT Protection) if returned to their country. Asylum, by contrast, requires a “well-founded” fear, which the Supreme Court has said can be as little as a 10% chance of persecution.¹²

But even for refugees granted Withholding or CAT Protection, as compared to asylum both forms of relief are limited in ways that can delay, impede, or sometimes prevent survivors from stabilizing and healing. For example:

Family separation

As colleagues at Human Rights First have explained:

One of the most damaging consequences of extending only withholding of removal or CAT protection to refugees is the potential for permanent family separation. Because these limited forms of relief apply only to the applicant, refugees cannot include spouses and children under their applications. As a result,

¹⁰ The Center for Victims of Torture, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children at 3-4, DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, November 6, 2018, available at https://www.cvt.org/sites/default/files/attachments/u101/downloads/cvt_comments-flores_proposed_rulemaking-final.pdf.

¹¹ The protected grounds for Withholding are persecution on account of race, religion, nationality, political opinion or group membership.

¹² *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

an immigration judge may grant protection to a refugee parent but order a child deported. Similarly, these refugees cannot petition to bring their children and spouses to safety in the United States as refugees granted asylum or resettled from other countries can. A refugee's children and spouse may be left stranded in dangerous or even life-threatening situations abroad. These refugees cannot even visit family abroad since neither withholding nor CAT protection entitles a refugee to a travel document.¹³

Many of the serious negative health consequences associated with family separation have been well documented.¹⁴ One less commonly acknowledged consequence, which affects many CVT clients and families who were forced to leave loved ones behind when they fled their home countries, is “ambiguous loss:” the uncertainty of not knowing whether family members are dead or alive, absent or present.¹⁵

This process is characterized by a complete absence of information on one's ultimate fate and national identity, often with perceived life-or-death consequences for endangered family members abroad....

...

[The family] must live for years with the unanswered questions of whether they will live or die, whether they will ever see each other again, whether the family or parts of it will reunite, and whether they will be able to gain or rebuild new national and cultural identities.¹⁶

Several of CVT's clients have described the anguish associated with family separation, which is often made worse by uncertainty surrounding their own status in the United States.

Mary: “I can't concentrate. I am depressed and exhausted. How can I stay in this situation? It's hard to keep living a life interrupted like this. What is my life for, here without my kids? For so long I experience it like a punishment. I want to ask immigration if I deserve this punishment, but I have no power, they have the power so I must be quiet and wait.”

Adam: “It is painful, stressful. I have been denied in every way. I have had suicidal thoughts at times, living a life without my family, not knowing how long that will be. At the same time, I

¹³ Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk, Human Rights First, November 2018, available at https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf.

¹⁴ See, e.g., Letter to DHS Secretary Kirstjen Nielsen and Attorney General Jeff Sessions from medical and mental health professionals and researchers working in the United States, June 2018, available at <https://secure.phr.org/secure/family-separation-sign-letter>; See also Statement from Ana María López, MD, MPH, FACP, President, American College of Physicians, available at <https://www.acponline.org/acp-newsroom/acp-objects-to-separation-of-children-from-their-parents-at-border>.

¹⁵ Andrea K. Northwood and Damir S. Utrzan, Broken Promised and Lost Dreams: Navigating Asylum in the United States at 5, *Journal of Marital and Family Therapy* (2016) (citing Boss, 2004; p. 554).

¹⁶ *Id.* at 5, 6.

continue to worry for the safety of my family back home. No guarantee for their safety. My absence puts them at risk. I can't plan for my future.”

John: “This has been a disaster on me. A disaster on my family, my wife and kids. My family suffers because of my absence. My family suffers because of pressure on them and the threat that might come to them from the government. The separation is so difficult and painful for us.”

The Asylum Ban will condemn survivors like Mary, Adam, and John to a permanent state of ambiguous loss—with all of the pain and suffering that entails—and in so doing jeopardize their recovery.

Limited and uncertain legal status, plus increased risk of detention

Unlike asylees, refugees granted Withholding or CAT Protection cannot apply for lawful permanent residency, and so have no path to eventual citizenship.

[They] are left in long-term legal limbo. In fact, the immigration judge enters an order of removal but simultaneously freezes the deportation by granting withholding of removal or CAT protection. While the refugee cannot be returned to the country where the immigration judge has found he or she is more likely than not to be persecuted or tortured, the refugee has not been granted any immigration status. The government sometimes continues to detain these refugees and can try to remove them to another country.¹⁷

Limited and uncertain legal status further complicates an already challenging but near-universal early goal of treatment for torture and trauma survivors: restoring a sense of safety. As Dr. Northwood has explained, without effective rehabilitation many torture victims “are unable to achieve the subjective sense of safety and calm that healthy people take for granted due to the dysregulation of their nervous system under chronic threat.”¹⁸

Absent that sense of safety and stability, many survivors struggle to heal, to reconstruct their social connections, to improve their socioeconomic situation, and to focus on building a future in the United States.

To the extent that the Asylum Ban would subject refugees to immigration detention beyond that which they would have suffered otherwise, and in a system that has proven to be dangerous and unaccountable,¹⁹ it is both harmful and cruel. As CVT explained in our comments on DHS’s Notice of Proposed Rulemaking on the Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children (DHS Docket Number ICEB-2018- 0002),

¹⁷ Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk, Human Rights First, November 2018, available at https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf.

¹⁸ Brief for the Center for Victims of Torture as Amicus Curiae at 11, *Al Bihani et al. v. Trump*, 09-cv-00745-RCL (D.C. Dist. Ct., January 24, 2018) (hereinafter “CVT Guantanamo Amicus Brief”), <https://www.cvt.org/sites/default/files/Final%20Amicus%20Brief-4.Jan%202018.pdf>.

¹⁹ ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, Office of the Inspector General, U.S. Department of Homeland Security, June 26, 2018, available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

“[m]ultiple studies evaluating the detention of asylum seekers in various industrialized countries have demonstrated that detention—particularly when indefinite in nature—exacerbates trauma survivors’ severe mental health symptoms, and can be independently traumatic.”²⁰ An October 2018 literature review conducted by Physicians for Human Rights (PHR) corroborates, and expands upon, those conclusions:

The data ... demonstrates that detention negatively impacts mental health outcomes for refugee children, adolescents, and adults. The marginalizing and restricting environment re-traumatizes asylum seekers, an already vulnerable population with a significant pre-history of trauma, instead of providing them with the safety that they need. The experience of detention is associated with increased rates of psychological and developmental disorders among refugees, which include PTSD, major depressive disorders, attachment disorders, separation anxiety, episodes of self-harm, and attempted and completed suicides.²¹

Other studies have shown similar negative impacts even when detention was relatively brief (approximately 30 days).²² These findings are consistent with CVT’s clinical experience. According to Dr. Northwood:

One of the features of PTSD is that its re-experiencing symptoms (nightmares, flashbacks, feeling the same terror one felt during a previous trauma, etc.) are often triggered by exposure to reminders of that trauma. Immigration detention facilities are replete with these reminders: uniformed guards, institutional settings, guns, limited control or movement, shackles, wearing a prison-like uniform, being threatened with forced removal (routinely regarded as a death sentence for CVT asylum-seeking clients), being under the control of a government authority – these are all common features of traumatic events that persons who are fleeing political persecution and human rights violations have already experienced. In my experience, trauma survivors in institutional settings such as locked hospital wards or prisons experience significant exacerbation of their PTSD re-experiencing and hyper-arousal symptoms in the presence of these triggers, with accompanying heightened distress and emotional dysregulation.

It has been my consistent clinical observation in treating asylum seekers that symptoms of Major Depression and PTSD increase substantially in environments of deprivation and boredom.... Sitting around all day with nothing to do is described as a major stressor (at best) and even a cause of insanity (“going crazy”) by our asylum-seeking trauma survivors, as they use “keeping busy” and

²⁰ The Center for Victims of Torture & The Torture Abolition and Survivor Support Coalition, *Tortured & Detained –Survivor Stories of U.S. Immigration Detention* (2013) at 13 & n.26, available at https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf.

²¹ *The Impact of Immigration Detention on Migrant Mental Health* at 5, PHR Issue Brief, October 2018, https://s3.amazonaws.com/PHR_other/factsheets/PHR_Asylum_Issue_Brief_Immigration_Detention_Impact_on_Mental_Health.pdf; see also *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* at 10, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003, <https://phr.org/wp-content/uploads/2003/06/persecution-to-prison-US-2003.pdf>.

²² Cleveland, J., Rousseau, C., *Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada* at 58, *The Canadian Journal of Psychiatry*, 409-416 (2013).

meaningful activity to distract themselves from involuntary, disturbing traumatic memories as well as profound sadness and loss. One of the first priorities of rehabilitation at CVT is to rebuild meaningful activity into the lives of asylum seekers who have applied for asylum but are not yet eligible for a work permit. This is because this change alone produces a reduction in emotional distress and calms people down.²³

Barriers to education and work:

Refugees granted only Withholding or CAT Protection do not qualify for federal-government student loans and must regularly renew their work authorization.²⁴ Coupled with a lack of permanent legal status, these individuals often face difficulties obtaining stable employment.²⁵

Studies have demonstrated that “unemployment and underemployment are very detrimental to mental health, namely with regard to depression and distress.”²⁶ Indeed, for many of CVT’s clients—doctors, lawyers, businesspeople, engineers, and others who have suffered unimaginable loss—stable and fulfilling employment is a foundational step in healing and rebuilding their lives.

IV. Conclusion

For the reasons described above, the Asylum Ban is unlawful and imposes needless, substantial harm on a population replete with trauma survivors. We urge you to rescind the Rule.

Sincerely,

/s/ Scott Roehm
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²³ The Center for Victims of Torture, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children at 7, DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, November 6, 2018, available at https://www.cvt.org/sites/default/files/attachments/u101/downloads/cvt_comments-flores_proposed_rulemaking-final.pdf.

²⁴ Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk, Human Rights First, November 2018, available at https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf.

²⁵ *Id.*

²⁶ Michel Perreault, El Hadj Toure, Nicole Perreault, Jean Caron, Employment Status and Mental Health: Mediating Roles of Social Support and Coping Strategies, *Psychiatric Quarterly*, August 27, 2016.