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Proposed Rule Will Destroy U.S. Protections for Asylum Seekers

Re: Comment on 85 FR 36264 [RIN 1125-AA94; EOIR Docket No. 18-0002; OMB Control Number 1615-0067] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Dear Ms. Reid,

I am writing on behalf of Physicians for Human Rights (PHR) to express our strong objections to the proposed Rule 85 FR 36264 [RIN 1125-AA94; EOIR Docket No. 18-0002; OMB Control Number 1615-0067] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.

PHR is an international non-governmental organization that for more than 30 years has used science and the uniquely credible voices of medical professionals to document and call attention to severe human rights violations around the world.

In this Public Comment, PHR argues that the proposed Rule will have a deeply harmful impact on asylum seekers seeking protection at U.S. borders. The Rule will dismantle most of the remaining U.S. asylum system and foreclose the possibility of relief for many groups who are protected under domestic and international law.

PHR coordinates an Asylum Network of experts who provide more than 700 pro bono forensic evaluations annually for asylum seekers and applicants for other forms of humanitarian relief. PHR has provided thousands of such evaluations over the past 30 years, through the contributions of now more than 1,700 trained health professionals nationwide. PHR experts conduct forensic evaluations according to the principles in the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the “Istanbul Protocol,” the global standard for documenting torture.



A research study confirmed that approximately 90 percent of PHR clients are granted asylum.¹ Therefore, we have extensive experience and insight as an organization regarding the types of cases and profiles of applicants who have historically been recognized as asylees in the U.S. immigration system. The proposed Rule will drastically impact PHR clients and eliminate asylum protections for many clients presenting with medical documentation of trauma, violence, and torture.

1. The proposed changes to asylum procedures will have a disproportionately negative impact on asylum seekers with high levels of trauma, often the very applicants with the strongest claims.

These proposed changes fail to account for the impact of trauma on the asylum seeker, thereby creating unrealistic constraints that effectively preclude the right to seek asylum for even the strongest cases.

Short filing deadline

PHR is gravely concerned that the proposed Rule all but eliminates due process, as it creates unduly high evidentiary standards and unlawfully penalizes individuals who do not file within one year of arrival or who cross between ports of entry. Although PHR clients have historically demonstrated an extremely high grant rate – up to 89.7 percent of PHR clients are granted asylum² – these procedural hurdles will severely affect the ability of even applicants with strong claims to meaningfully access the asylum process. These barriers will also create inefficiencies in the immigration system and waste government resources.

Many PHR clients file for asylum late, sometimes after more than one year residing in the United States, due to trauma which can make completing everyday tasks a challenge, or because they simply had never heard about the right to seek asylum and relevant legal processes. PHR has long advocated for eliminating the one-year bar, because it is an arbitrary, ineffective, and unnecessary roadblock to the already-complicated asylum process.³

Many PHR clients, who are physically and emotionally traumatized, cannot immediately produce a coherent, comprehensive, linear account to explain their fear of return within hours of their interception by border officers, or to border or asylum officers of the opposite sex, whom they have never met before. PHR clients may have difficulty recounting their experiences right away due to trauma, mental health conditions, fear of officials, stigma about being an abuse survivor, or shame related to their protected

¹ S. L. Lustig, S. Kureshi, K. L. Delucchi, et al, “Asylum grant rates following medical evaluations of maltreatment among political asylum applicants in the United States,” *Journal of Immigrant and Minority Health*, 2008;10:7–15.

² Ibid.

³ <https://phr.org/wp-content/uploads/2020/07/The-One-Year-Bar-to-Asylum.pdf>.



characteristic. Some clients struggle to recount their trauma because they are sobbing or weeping as they remember these traumatic experiences, making it difficult to understand them. Common symptoms of Post-Traumatic Stress Disorder (PTSD) – which many of our clients suffer from – include hyper-vigilance, avoidance behavior, memory loss, and non-linear narratives, but these symptoms, which are actually evidence of trauma, may translate into a negative credibility assessment if the adjudicator is not well informed about typical trauma presentation.⁴ Furthermore, the adversarial nature of immigration proceedings may exacerbate these symptoms.⁵ Moreover, the format and environmental circumstances of the asylum-seeking process further heighten these difficulties.

PHR clients have been greatly assisted in the process of producing a coherent and linear account through access to therapy and to forensic asylum evaluations, as well as legal counsel, in order to navigate the complex U.S. asylum system. Having a short filing deadline makes it difficult to access any of these services, particularly for those who need pro bono services.

Changes to the Credible Fear Interview

All PHR clients were able to access the asylum system due to the credible fear standard assessing a “significant” rather than “reasonable” risk, so that a client with a legitimate need for asylum protection who faced challenges to recount their full story had time to recover in safety in the United States, which allowed them the chance to fully develop their case and gather supporting evidence. By raising the standard of proof, the proposed change from “significant possibility” to “reasonable possibility” (the latter being a higher standard) in the credible fear interview would have deprived many PHR clients from obtaining asylum.

Filing for Multiple Forms of Protection

Most PHR clients apply for multiple forms of protection – asylum, Special Immigrant Juvenile Status (SIJS), T-visa, U-visa, Violence Against Women Act (VAWA), withholding of removal, Convention Against Torture (CAT) withholding – at the same time, as many of them have suffered multiple forms of harm from multiple persecutors in their country of origin, in transit, in crossing the border, and even in the United States.⁶ Not allowing asylum seekers to file for multiple forms of relief will deprive them of the most appropriate form of protection for PHR clients.

⁴ B. McVane, “PTSD in asylum-seekers: Manifestations and relevance to the asylum process,” *Psychiatry Res*, 2020;284:112698, doi:10.1016/j.psychres.2019.112698.

⁵ Ibid.

⁶ See PHR report “There is No One Here To Protect You,” section: Findings, Children Suffered Multidimensional, Recurrent, and Sustained Trauma, https://phr.org/our-work/resources/there-is-no-one-here-to-protect-you/#phr_toc_3.



Internal Relocation in the Country of Origin

Many PHR clients report relocating internally in their home country multiple times in order to hide from their abusers.⁷ If they were in hiding, it would also be extremely difficult for them to provide any evidence that they did indeed relocate, as clients report that they delete their social media accounts, do not take photos, and seek to conceal their whereabouts in order to avoid their persecutors.⁸ Furthermore, internal relocation also requires the ability and resources to travel to and live elsewhere in order to seek safety, and many clients do not have the means to leave their jobs, families, and friends, and yet find secure shelter in other geographic areas.⁹ Requiring proof of internal relocation in country of origin is unreasonable and will expose vulnerable individuals to serious risks.

Restrictions Based on Transit Route

Many PHR clients have crossed the border between ports of entry, due to the administration blocking people from entering at ports of entry and due to the “metering” policy, which has required people to wait for weeks or months, often in dangerous and precarious conditions, before being admitted to the United States. In other cases, the asylum seeker was fleeing for their life and made the decision to cross without waiting at the port. Limits on periods of time in transit will also deny protection to the people who have exhausted every possible remedy during their journey and suffered harm and threats of harm in transit to the United States. PHR has documented cases where asylum seekers from other countries experienced severe harm in Guatemala, Honduras, and Mexico in transit to the United States.¹⁰ Restricting access to asylum based on transit route and manner of entry is a violation of international refugee law and U.S. asylum law, and flies in the face of medical evidence of severe harm suffered by populations on the move in the region.

2. The proposed Rule severely restricts the definition of persecution and all but bars claims related to domestic violence, gang violence, sexual orientation, and gender identity. It also bars persecution claims based on death threats unless there were already attempts to carry out the threats.

⁷ See PHR report “You Will Never See Your Child Again,” section: Findings, Families Fled Physical Violence and Death Threats from Gangs, https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/#phr_toc_4.

⁸ Ibid.

⁹ Ibid.

¹⁰ See PHR report “If I went back, I would not survive”: Asylum Seekers Fleeing Violence in Mexico and Central America,” https://phr.org/our-work/resources/asylum-seekers-fleeing-violence-in-mexico-and-central-america/#phr_toc_1.



Most PHR asylum clients would be all but barred from obtaining asylum under the proposed Rule, despite the severity of the harm that they have survived and the physical and mental health consequences. The Rule's removal of protections based on domestic violence, gang violence, sexual orientation, and gender identity flouts U.S. legal obligations to these groups under international refugee law.¹¹

A majority of PHR clients have obtained asylum on account of membership in a particular social group related to resisting gang recruitment, domestic violence, intimate partner violence, being targeted as someone who returned to the United States or had relatives in the United States, gender identity, sexual orientation, and political opinion related to resistance to prevailing socio-political realities such as the dominance of gangs and chauvinism, racism, and homophobia.

PHR has conducted multiple studies documenting and detailing the harms inflicted on many individuals who belong to these groups; harms that have led to acute and long-term physical and mental health consequences.

In 2020, PHR conducted a mixed-methods retrospective study analyzing 135 medical affidavits from successful asylum cases for persons specifically fleeing domestic violence and/or persecution by organized gangs.¹² The study found that asylum applicants experienced a range of trauma, often repeatedly over the course of years, before fleeing to the United States – trauma that continuing after they fled. Trauma histories were supported by scars and other physical sequelae of violence, and nearly two-thirds (64.4 percent) of applicants met diagnostic criteria for mental illness.

A PHR review of the asylum evaluations of 183 children found that 60 percent were fleeing gang violence.

PHR's June 2019 report "[There is No One Here to Protect You](#)" analyzed more than 180 physical and psychological evaluations of children seeking asylum in the United States. A majority of children and adolescents assessed were victims of violence at the hands of gang members (60 percent) or forced conscription into gangs (24 percent). Gang

¹¹ United Nations High Commissioner for Refugees (UNHCR), "Guidance Note on Refugee Claims Relating to Victims of Organized Gangs," March 2010, <https://www.refworld.org/pdfile/4bb21fa02.pdf>; UNHCR, "Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," October 23, 2012, <https://www.refworld.org/docid/50348afc2.html>; UNHCR, "Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees," December 22, 2009, <https://www.unhcr.org/50ae46309.pdf>; UNHCR, "Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," May 7, 2002, <https://www.unhcr.org/3d58ddef4.pdf>.

¹² Eleanor Emery, Mehar Maju, Jamie Ko, Kathryn Hampton, Hajar Habbach, Kate Coursey, and Adam Richards, "Traumatic Experiences, Physical and Mental Health Sequelae, and Resilience Amongst Persons Granted Asylum in the U.S. on the Basis of Domestic Violence or Persecution by Organized Gangs," Accepted Oral Presentation, North American Refugee Health Conference, September 17-29, 2020.



members perpetrated repeated physical assaults and beatings, sometimes aggravated assault with weapons including sticks, belts, bats, knives, machetes, and firearms, resulting in serious injuries.

Additionally, children often witnessed brutal acts of violence against their own families or members of their communities. Witnessing violence is a traumatic event which results in serious negative mental health outcomes for children.¹³ Gangs often used shocking tactics to incite fear, or as a warning to those attempting to resist. Children reported that the gangs forced them to choose between joining the gang and being murdered. If children did join the gang, the coercion continued with the demands of the gang. Children reported gang members kidnapping them, holding them hostage, or enslaving them. The geographical reach of the gangs extended to private homes and community spaces, giving the feeling that nowhere was safe. Gangs also used social media to make threats and assert their sphere of influence.

Much of the violence perpetrated by gang members was sexual in nature, ranging from coercion to become the “girlfriend” of a gang member, to subjecting children to brutal group assaults. Children reported sexual violence committed by family members. These acts of sexual abuse and assault, especially when experienced at such a young age, lead to lasting trauma, often manifested as feelings of dissociation, impaired psychological development and self-image, and social isolation.

A PHR report documenting the cases of 18 asylum seekers waiting in Tijuana, Mexico found that more than half were fleeing gang violence, and at least one was targeted based on gender identity.

In PHR’s October 2019 report [“If I went back, I would not survive.”](#) PHR documented the cases of 18 asylum seekers fleeing violence in Mexico and Central America. PHR documented 10 cases that involved gang violence. They were all consistent with the United Nations High Commissioner for Refugees definition of who gangs target and how this violence forces people to flee:¹⁴ forcible youth recruitment into gangs; extortion of small business owners and other specific groups unable or unwilling to pay protection money or provide certain goods and services; threats or killings of witnesses to crimes, or those who have reported crimes; and gender-based violence against women and girls, among other groups.¹⁵

¹³ Kitzmann et. al., “Child Witness to Domestic Violence: A Meta-Analytic Review,” *Journal of Consulting and Clinical Psychology*, 71.2 (2003); H. M. Zinzow, K. J. Ruggiero, R. F. Hanson, D. W. Smith, B. E. Saunders, and D. G. Kilpatrick, “Witnessed community and parental violence in relation to substance use and delinquency in a national sample of adolescents,” *J Trauma Stress* (2009);22(6):525–533. doi:10.1002/jts.20469.

¹⁴ Please note that these categories are not mutually exclusive.

¹⁵ “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs,” UNHCR, March 2010, <https://www.refworld.org/pdfid/4bb21fa02.pdf>.



All of the evaluated asylum seekers provided credible accounts and corroborating evidence that they fled persecution that resulted in significant trauma. Several of these asylum seekers endured multiple forms of persecution and trauma, reflecting the compounding violence in several countries that drives so many from this region to seek asylum.

- 16-year-old Adriana¹⁶ lost a pregnancy when her boyfriend, who was connected to local gangs in El Salvador, beat her. He told Adriana's mother that "blood would flow" if they tried to denounce the gang to the police.
- Jorge, 60, was attacked by gang members in Honduras, who broke his clavicle with a baseball bat after he tried to rescue his nephews from recruitment into the gang. A PHR medical expert found that Jorge screens positive for PTSD and moderate depression.
- Javier, Rosa, and their three children fled El Salvador after gang members beat Javier when he missed a monthly payment of protection money to the gang. Javier reported symptoms of PTSD, severe depression, and anxiety.
- Sergio, Romina, and their two sons fled from Honduras to Guatemala after an attack by members of organized crime. Their eight-year-old son Antonio was attacked by two men with a machete. His attackers missed killing him by just a few centimeters when they hurled the weapon at the boy as he rode on the back of a motorcycle with his parents. Sergio told PHR that, after two months in Guatemala, he was again found by the very men they had fled, so his family then went to the U.S.-Mexico border to seek protection in the United States. Sergio did not undergo a full clinical evaluation, but Romina screened positive for major depression and PTSD. Antonio screened positive for PTSD and anxiety.

The cases demonstrated that gangs have a "high level of organized determination as to who should be killed, when and where,"¹⁷ and these are not "random criminal acts."¹⁸ Moreover, PHR's research found that in six of the 10 cases related to gang violence, the asylum seekers tried to find a safe haven in their own country or another country before fleeing to the United States, but continued to face insecurity given the gangs' stronghold.

PHR documented five cases involving the forcible recruitment of youth to gangs. Women also became targets within the context of forcible recruitment. Two out of the 10 asylum seekers who faced threats and/or violence from gangs or cartels reported that extortion in the form of demands for protection money was the reason they fled their countries. Estimates suggest that gangs in El Salvador and Honduras collect more than

¹⁶ All names changed for security reasons.

¹⁷ "UN Expert Urges El Salvador Step Up Measures to Halt Murders, Vicious Cycle of Impunity," OHCHR, last modified February 6, 2018, accessed July 15, 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22635&LangID=E>.

¹⁸ Ibid.



\$300 million each year,¹⁹ demonstrating the widespread nature of this practice in both countries.²⁰ PHR also documented cases in which witnesses to crimes were targeted by gangs and other forms of organized crime, such as cartels or paramilitary forces.

Additionally, one asylum seeker whose case PHR documented was targeted based on gender identity.

- Juana, a 27-year-old-transgender woman from El Salvador, faced widespread discrimination and persecution. Her family no longer spoke to her, and she could not get a job. Police officers often harassed her, and she was sexually assaulted by two officers. When she threatened to report the incident, they replied “We hope you do. Then it will be worse for you next time,” demonstrating the lack of accountability of state security forces in El Salvador. Juana screened positive for PTSD, which is seen at high rates among transgender asylum seekers, as well as the broader transgender community.

A PHR report analyzing the cases of 17 asylum-seeking adults and nine children found that 14 out of 17 adults had been targeted by gangs or cartels, and six families were subject to domestic violence. Death threats were the most common type of persecution experienced, with 15 out of the 17 adults interviewed receiving death threats in their country of origin.

In PHR’s February 2020 report [“You Will Never See Your Child Again.”](#) PHR reviewed the psychological evaluations of 26 asylum-seekers – 17 parents and nine children – who had been separated by the U.S. government in 2018. In their descriptions of their pre-migration trauma, most of the families reported being targeted by gangs or cartels, with 14 out of the 17 adults reporting such targeting. Six families were subjected to domestic violence (two by intimate partners and four by other family members), but four of those six were also victims of gang violence, reinforcing the dominance of persecution by gangs.

All parents reported to PHR clinicians that they experienced symptoms related to their pre-migration trauma when they arrived at the border. Symptoms which began in their home country, and that they reported continued in the United States, included nightmares, insomnia, intrusive flashbacks, pervasive anxiety, and impairment in carrying out daily activities.

Many of the families suffered physical assault (eight), or their friends or relatives were killed (nine). Families also reported to PHR clinicians that they were subjected to

¹⁹ "Life Under Gang Rule in El Salvador," International Crisis Group (ICG), last modified November 26, 2018, accessed July 15, 2019, <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador>.

²⁰ Central American and Mexico Gang Assessment,” USAID Bureau for Latin America and the Caribbean Office of Regional Sustainable Development, April 2006, accessed July 22, 2019, https://pdf.usaid.gov/pdf_docs/PNADG834.pdf.



extortion (six), sexual assault (five), and robbery (five), as well as two kidnappings and a poisoning case. All but one of the adults reported being subjected to multiple forms of persecution.

Almost all individuals reported being targeted based on their personal characteristics and past experiences. The two main trends were having a family member who was a gang target (11) and resisting gang coercion (eight): five adults resisted gang extortion or robbery, one refused to be a “girlfriend”/sex slave of a gang member, and two resisted gang/cartel recruitment. Other reasons for being targeted included: being a farmer or business owner (three), single mother living alone (three), people with relatives working in the United States (three), woman unable to leave a relationship (two), sexual violence survivor (two), member of a minority religion (two), and having an indigenous background (two). Their accounts indicated that the incidents were not random acts of generalized violence in society but rather were specific and targeted to each individual based on traits which the individual could not, or should not be expected to, change.

Under the proposed Rule, asylum-seekers like these PHR clients could see their claims denied, in clear violation of U.S. obligations under international refugee law.²¹

3. The Rule restricts the definition of “public official” in the context of torture.

PHR clients from Colombia, Ecuador, El Salvador, Guatemala, Guinea-Bissau, Honduras, Jamaica, Mexico, Senegal, and Sudan have obtained protection under the UN Convention Against Torture (CAT).

Such individuals would be severely disadvantaged and face a high risk of *refoulement* if the administration moved forward with the proposed change to the definition of torture, since governments rarely acknowledge that they have sanctioned or conducted torture and may seek to evade responsibility by blaming “rogue” officials. Furthermore, in a number of successful CAT applications among PHR clients, the torturer was a non-state actor.

Twenty-four (24) PHR clients have obtained protection under the CAT within the past 10 years. Clients had an average age of 30 years, ranging from age 19 to age 50; eight were women and 16 men. Seventeen (17) of the clients came from the Northern Triangle

²¹ UNHCR, “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs,” March 2010, <https://www.refworld.org/pdfid/4bb21fa02.pdf>; UNHCR, “Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,” October 23, 2012, <https://www.refworld.org/docid/50348afc2.html>; UNHCR, “Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,” December 22, 2009, <https://www.unhcr.org/50ae46309.pdf>; UNHCR, “Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,” May 7, 2002, <https://www.unhcr.org/3d58ddef4.pdf>.



and Mexico, while the remaining seven clients came from Colombia, Ecuador, Guinea-Bissau, Jamaica, Senegal, and Sudan.

- A client was repeatedly attacked and ultimately nearly killed by his half-brothers because their father provided him money to open a business. After years of attacks, including being gashed by a rock thrown at his head, in 2013, his half-brothers threw scalding water over him, causing serious burns over his face, neck, and chest.
- A client was tortured during a coup d'etat in 2009. The client stated that his tongue was cut, and he was burned all over his body with a cigarette. He was beaten with a chair leg and cut with a letter opener. He had tongue surgery and received approximately 24 stitches in his tongue.
- A client's brother was physically and emotionally abusive to her since she was 12 years old, including threatening her multiple times with a machete and telling her he would kill her. The client reported PTSD symptoms.
- A client had a long scar on his arm from being severely beaten by police officers after witnessing them beating another man. While they were beating him, he fell on the ground and cut his arm on rocks. The next thing he remembered was waking up covered in blood.

Conclusion

For more than 30 years, volunteer health professionals in PHR's Asylum Network have provided evaluations to thousands of survivors of torture and ill-treatment who seek refuge and an opportunity to recover in the United States from the trauma and injury they have endured. Our organization and clinicians are deeply familiar with the serious harms many asylum seekers have fled and the strong evidentiary basis for their claims to remain in the United States.

By denying due process and narrowing the definitions of persecution and torture, this Rule violates the right to seek asylum and U.S. obligations under international treaties and domestic law. The proposed changes in U.S. regulations will return many asylum seekers to grave harm or death in their home countries.

We urge you to rescind this dangerous Rule immediately and restore protections for individual fleeing persecution.

Sincerely,

Donna McKay
Executive Director
Physicians for Human Rights