Center for Gender & Refugee Studies

January 25, 2022

Via Federal eRulemaking Portal https://www.regulations.gov

Carrie Anderson
Director of Policy for the Family Reunification Task Force
U.S. Department of Homeland Security

Re: *Request for Public Input: Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families*, 86 Fed. Reg. 70512 (December 10, 2021)

Docket No. DHS-2021-0051

Dear Ms. Anderson:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to DHS Docket No. DHS-2021-0051, *Request for Public Input: Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families*, 86 Fed. Reg. 70512 (December 10, 2021).

We include the following outline to guide your review.

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INTRODUCTION

We appreciate this opportunity to provide input to the Task Force to assist in its drafting of recommendations to the President.[1] We note with interest that it is the policy of this Administration to respect and value the integrity of families seeking to enter the United States,[2] as it is indeed the obligation of the United States under

[1] *Establishment of Interagency Task Force on the Reunification of Families*, Executive Order 14011, Feb. 2, 2021, Sec. 4 (c)(iii), 86 Fed. Reg. 8273, 8274.

[2] Executive Order 14011, Sec. 1.

international law to do so.[3] We also note that the Administration condemns the human tragedy that occurred when U.S. immigration laws were used to intentionally separate children from their parents or legal guardians, including through the use of the Zero-Tolerance policy,[4] as it correctly indicates that our legislative framework and not just executive branch policies must be amended in order to prevent family separation. We join the Administration, along with affected families, advocates, and concerned Americans, in denouncing the Zero-Tolerance policy.

We strongly urge the Administration to settle the claims of those who suffered under the policy. However, the present comment focuses on other methods of preventing the separation of families seeking asylum in the future.

EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES (CGRS)

CGRS was founded in 1999 by Professor Karen Musalo[5] following her groundbreaking legal victory in *Matter of Kasinga*[6] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender, childhood,[7] family unity,[8] and other bases for protection, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions.

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[3] Annex 1 to the Convention Relating to the Status of Refugees, Excerpt from the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, IV B, 189 U.N.T.S. 37. *See also,* Frances Nicholson, "The Right to Family Reunification," in *The Oxford Handbook of International Refugee Law* (Costello, Foster, McAdam, eds.) (2021).

[4] Executive Order 14011, Sec. 1.

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

[6] 21 I&N Dec. 357 (BIA 1996).

[7] Center for Gender & Refugee Studies and KIND, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014).

[8] Kate Jastram, *The Kids before Khadr: Haitian Refugee Children on Guantanamo*, 11 Santa Clara J. Int'l L. 81 (2012); Kate Jastram, "Family Unity," in *Migration and International Legal Norms* (Aleinikoff and Chetail, eds.) (2003); and Kate Jastram and Kathleen Newland, "Family Unity and Refugee Protection," in *Refugee Protection in International Law* (Feller, Turk, Nicholson, eds.) (2003).

We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[9] 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, children's, and women's rights networks.[10] Since our founding, we have also 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, including children[11]—namely, violence and persecution committed with impunity when governments fail to protect their citizens.[12]

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

CONCERNS AND RECOMMENDATIONS

As a note on terminology, we use the term family reunification when immediate family members are physically separated, with one or more in the United States and one or more in another country. We use family unity to refer to situations where family members are physically together but require corresponding legal status in order to remain together. We will also use family unity as the general term for both situations unless a specific meaning is clear from the context.

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[9] *See, e.g.*, *Huisha-Huisha v. Mayorkas*, --- F.Supp.3d ----, 2021 WL 4206688 (D.D.C. Sept. 16, 2021); *Pangea Legal Servs. v. DHS*, No. 20-cv-09253, 2021 WL 75756 (N.D.Cal. Jan. 8, 2021) (*preliminarily enjoining the Global Asylum rule*); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated as moot and remanded* No.3:19-cv-00807-RS (N.D. Cal.); *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 2, 2018); *U.T. v. Barr,* 1:20-cv-00116-EGS (D.D.C.); *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021); and *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021).

[10] *See, e.g.,* the Welcome With Dignity campaign.

[11] *See* Center for Gender & Refugee Studies et al., *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015);

[12] *See, e.g.*, Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. (2021); Center for Gender & Refugee Studies, Haitian Bridge Alliance, and IMUMI, *A Journey of Hope: Haitian Women's Migration to Tapachula, Mexico* (2021).

While we understand that the Zero-Tolerance policy is a primary concern of the Task Force, we also appreciate the opportunity provided to address other issues. This is an important recognition that far too many policies are still in place under the current administration that lead to families being separated. We address several of the most damaging in turn, grouped in the following categories: Access to territory; failure to fully provide for family unity in asylum or in withholding; impermissible bars to asylum; backlogs and other procedural flaws.

ACCESS TO TERRITORY

I. Title 42

As co-counsel in *Huisha-Huisha*[13] and *P.J.E.S.*[14], which challenge the application of Title 42 expulsion procedures to families and children respectively, we are acutely aware of the devastating impact this policy has on parents/guardians and children who – until they reach the U.S. border – are traveling together. They are then faced with the agonizing choice between staying together in perilous conditions in Mexico or sending children ahead alone to attempt to enter without inspection. Both options are extremely dangerous and highly traumatizing. There are also reports that families who attempt to enter together are then separated by U.S. government officials, for example, when couples are not legally married, or when grandparents are entering with grandchildren.[15]

There is extensive documentation of the prevalence in northern Mexico of rape, kidnapping, murder, and other serious crimes specifically targeting asylum seekers, along with the absence of basic social services such as housing, food, medical care, and education.[16] Use of Title 42 to render asylum law void violates domestic law as well as our treaty obligations and is a moral stain on the country.

Recommendation: The Task Force should strongly condemn this policy and urge its immediate end. Public health officials have repeatedly called attention to the pretextual nature of Title 42, and have recommended measures by which the

[13] *Huisha-Huisha v. Mayorkas*, --- F.Supp.3d ----, 2021 WL 4206688 (D.D.C. Sept. 16, 2021).
[14] *P.J.E.S. v. Wolf*, 502 F.Supp.3d 492 (D.D.C. 2020).
[15] Physicians for Human Rights, *Neither Safety nor Health: How Title 42 Expulsions Harm Health and Violate Rights,* July 28, 2021.
[16] *See, e.g.,* Human Right First, *"Illegal and Inhumane": Biden Administration Continues Embrace of Trump Title 42 Policy as Attacks on People Seeking Refuge Mount*, Oct. 21, 2021.

United States can safely process asylum seekers while not risking the health of government officials, border communities, or people seeking asylum.[17]

II. Remain in Mexico 2.0

We are aware that the Administration's attempts to end this policy have so far been thwarted by the courts. Nevertheless, we are appalled by the Administration's choice to extend the policy's reach to a wider group of nationalities, particularly when the government's own explanation of the decision to terminate MPP correctly identifies the many harms flowing from it and acknowledges the importance of maintaining family unity.[18] As co-counsel, we successfully challenged the initial iteration of Remain in Mexico in *Innovation Law Lab.*[19] We have submitted *amicus* briefs in *Texas v. Biden*.[20]

Remain in Mexico's impact on families is similar in many ways to Title 42 in that parents/guardians and children face grave dangers in Mexico, with limited or nonexistent social services and almost no access to legal counsel.[21] Even though placement in the Remain in Mexico program might appear to a desperate asylum seeker to be preferable to expulsion under Title 42, experience has shown that it is nearly impossible to successfully present an asylum claim in U.S. immigration court while trapped in Mexico.[22] The apparent access to procedures is illusory. As with Title 42, parents/guardians face an impossible choice between staying together in Mexico or sending children on alone so that they might at least escape the untenable conditions in Mexico.

Recommendation: The Task Force should recommend whatever actions are necessary to end the program. In the meantime, the expansion to new nationalities should be ended, and exceptions should be applied broadly to ensure that no one

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[17] Columbia University Mailman School of Public Health, *Epidemiologists and Public Health Experts Reiterate Urgent Call to End Title 42*, Jan. 14, 2022.
[18] Department of Homeland Security, *Explanation of the Decision to Terminate the Migrant Protection Protocols,* Oct. 29, 2021, p. 8, n. 30.
[19] *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated as moot and remanded* No.3:19-cv-00807-RS (N.D. Cal.).
[20] *Texas v. Bide*n, 20 F.4th 928 (5th Cir. 2021).
[21] Human Rights First, *Inhumane Again: Remain in Mexico Rollout Confirms Endemic Flaws of Unfixable Policy*, Dec. 16, 2021.
[22] American Immigration Council, *The "Migrant Protection Protocols,"* Jan. 7, 2022.

is returned to danger. Asylum seekers already in the program should be given appointed counsel and should not be on any kind of expedited docket.

III. Metering

In *Al Otro Lado,*[23] a case we have just joined, plaintiffs successfully challenged the policies and practices of turnbacks and "metering" and now await the court's ruling on remedies. Turnbacks and metering also resulted in family separation as people had to wait for months and even years to be allowed to approach ports of entry to request asylum. Waiting in Mexico exposed families to the same dangers as those faced by families expelled under Title 42 or subjected to Remain in Mexico.

Recommendation: We urge the Task Force to recommend that the government cease turning back or otherwise denying access to inspection and/or asylum processing to noncitizens who are in the process of arriving in the United States at ports of entry and rescind all current versions of guidance regarding metering and performance-based queue management. In addition, the Task Force should recommend that the government promptly identify all metered noncitizens who were improperly determined to be ineligible for asylum based on the third-country transit rule and reopen or reconsider any past decisions resulting from those determinations.

FAILURE TO PROVIDE FULLY FOR FAMILY UNITY IN ASYLUM; FAILURE TO PROVIDE FOR ANY FAMILY UNITY WHATSOEVER IN WITHHOLDING OF REMOVAL

I. U.S. law makes no provision for a child asylee to extend derivative status to a parent

While U.S. law correctly allows a parent or spouse who is granted asylum to extend derivative status to immediate family members, a child granted asylum does not have the same benefit. This can lead not only to family separation but also to *refoulement*, for example, where a child is at risk of harm such as female genital mutilation, or forced recruitment into a gang. Since recognizing the child's claim to asylum will not allow his or her parents derivative status, parents must instead make much more complex legal arguments that they are the ones with a well-founded fear. Presenting and adjudicating such convoluted claims is a waste of

[23] *Al Otro Lado v Mayorkas,* Case 3:17-cv-02366-BAS-KSC (S.D.Cal.Sept. 2, 2021).

resources for all concerned, and could easily and efficiently be addressed by allowing the child to be the primary applicant for the family.

Recommendation: The Task Force should recommend that a minor child asylee may extend derivative status to his or her parents and siblings.[24]

II. U.S. law fails to provide for family unity at all for beneficiaries of withholding

The illogical and legally incorrect structure of U.S. asylum law results in the applicants who meet the most stringent standard for protection -- withholding of removal -- receiving the fewest benefits, including notably, that of family unity/reunification.[25]

The problem arises because the United States is to our knowledge the only State Party to the Refugee Convention/Protocol that differentiates between a person who meets the refugee definition – who under U.S. law is eligible for asylum only as a matter of discretion – and a person who must be protected from *refoulement* (mandatory withholding of removal). Other States Party, the Office of the United Nations High Commissioner for Refugees, and international law experts agree that the Refugee Convention/Protocol requires the protection of *non-refoulement* for all who meet the refugee definition.[26] The unique U.S. law bifurcation between asylum and withholding of removal leads to the nonsensical result that a refugee as defined under international law is not necessarily protected from *refoulement* by the United States unless they also meet the more stringent standard required for withholding.

As explained below, U.S. law additionally imposes numerous bars to asylum, thus leading to the *refoulement* of people who would otherwise qualify for asylum but cannot meet the withholding standard. This also results in unnecessary and unjustified family separation even for those who do qualify for withholding.

Recommendation: The Task Force should recommend statutory changes to ensure that the same benefits given to asylees are provided to those who receive withholding of removal. While Congressional action is required to bring our

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[24] The Refugee Protection Act of 2019, Sec. 112, contained this provision.
[25] Compare 8 C.F.R. Sec. 1208.16(e) (withholding) with 8 U.S.C. Sec. 1158 (b)(3) (asylum).
[26] *See, e.g.,* Sir Elihu Lauterpacht QC and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*," in *Refugee Protection in International Law* (Feller, Turk, Nicholson, eds.) (2003).

domestic law more fully in line with our treaty obligations, the administration should lead by sending such legislation to Congress.

IMPERMISSIBLE BARS TO ASYLUM

An individual might be eligible only for withholding and not for asylum solely due to application of the one-year filing deadline or another impermissible bar to asylum. As noted above, our statutory framework is deficient with respect to the lack of family unity benefits afforded to beneficiaries of withholding as compared to asylees. This problem has been exacerbated over the years as both the executive branch and Congress have imposed an increasing number of bars to asylum. Most of these bars go far beyond the specifically enumerated grounds of exclusion in the Refugee Protocol. People in need of protection who run afoul of one of the many bars must then attempt to meet the higher withholding standard. We note three particularly problematic bars to asylum below, each one of which must be addressed to prevent family separation in the future.

I. The reinstatement bar

The bifurcation between asylum and withholding of removal leads to pernicious results including for individuals subject to reinstatement of removal, who are not eligible for asylum under current regulations. They might have been erroneously removed due to a flawed expedited removal process or might face new threats on return to their home country that did not exist at the time of their first entry. However, when they attempt to seek protection on return to the United States, even if successful, are denied the opportunity to reunify with family. As noted in an *amicus* brief we filed,

> Juan, Tania and Emely are separated from their children solely because of their prior (erroneously issued) removal orders that DHS reinstated. The children are in hiding due to ongoing risks of harm related to their parents' reasons for fleeing to the United States. The reinstatement bar to *bona fide* refugees has a devastating humanitarian impact, tearing many people from their families and causing untold detrimental impacts on their emotional and psychological well-being, as well as the security of their loved ones.[27]

The reinstatement bar is also extremely inefficient. In cases where a parent and child are in proceedings together, for example, if the parent is subject to

[27] Amicus brief of Center for Gender & Refugee Studies and the National Immigrant Justice Center in support of petitioner in *R.S.F. v. Sessions*, Court of Appeals for the Ninth Circuit, No. 17-70533, Aug. 28, 2017.

reinstatement, the child will have to file an independent application for asylum and both claims will need to be presented and adjudicated.

Recommendation: The Task Force should recommend that the relevant agencies rescind the reinstatement regulation which misinterprets the statute and has no basis in the Refugee Protocol.[28] They should also recommend that DHS exercise its discretion not to reinstate removal, in particular in cases where individuals did not have a meaningful opportunity to apply for asylum in the first instance.

II. One-year filing deadline

Enactment of the one-year asylum filing deadline in 1996 was opposed by UNCHR, scholars, advocacy organizations, and some members of Congress as contrary to U.S. obligations under the Refugee Protocol.[29] The Protocol does not allow for any time limit on asylum applications whatsoever. Asylum seekers who do not fit within one of the two narrow exceptions to the filing deadline are barred from asylum, and may apply only for withholding of removal, a status which entrenches family separation due to the need for every single family member, including each child, to qualify separately.

As with the reinstatement bar, implementation of the one-year filing deadline is extremely inefficient. Adjudicators must waste time inquiring as to the reasons for the delay and whether the applicant meets one of the statutory exceptions before they can even begin to consider the merits of the asylum claim.

Recommendation: The Task Force should recommend that Congress repeal the one-year filing deadline.[30]

III. Particularly serious crime

The Refugee Protocol allows States not to recognize as refugees people who commit certain crimes or bad acts, and even to *refoule* a recognized refugee who "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community."[31] However, the crime-related bars to

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[28] The Refugee Protection Act of 2019, Sec. 112, contained a provision addressing the defects of reinstatement of removal.

[29] Karen Musalo and Marcelle Rice, "The Implementation of the One-Year Bar to Asylum," 31 *Hastings Int'l & Comp. L. Rev.* 393 (2008).

[30] The Refugee Protection Act of 2019, Sec. 103, contained a provision eliminating time limits on asylum applications.

[31] Refugee Convention, art. 33(2).

asylum under U.S. law are vastly more expansive than the enumerated, and limited, crime-related grounds of exclusion in international law.

We note especially that the definition of a "particularly serious crime" under U.S. law has ballooned far beyond its textual basis in the Convention/Protocol to include a wide array of minor, non-violent crimes, including misdemeanors. Again, those barred from asylum for these trivial reasons must meet the higher standard for withholding of removal. Even if they are granted withholding, they cannot extend derivative status to their family members.

Recommendation: Given the degree to which criminal law has become entwined with immigration law, and the resulting statutory bars to asylum which violate our obligations under the Refugee Protocol, the Task Force should recommend an expert commission, including UNHCR, to study crime-related bars to asylum under U.S. law with a mandate to bring such bars into alignment with the grounds of exclusion provided in the Protocol.

BACKLOGS AND OTHER PROCEDURAL CONCERNS

I. Backlogs

Backlogs at the Asylum Office and in the Executive Office for Immigration Review impose long-term *de facto* family separation by delaying adjudication which might allow for reunification. The delays are frequently due to factors that are no fault of the individuals, including turnover at the immigration courts, double-booking, and court closures due to weather or other reasons such as COVID exposure.

One example is the case of our client "Marisol," who fled Guatemala after suffering decades of extreme gender-based violence at the hands of her husband, including rape, beatings, and threats of violence and death. She has been in removal proceedings since 2014. In 2018, an immigration judge denied Marisol asylum, holding that her claim could not succeed in light of *Matter of A-B-*[32] ("*A-B- I*"), which Attorney General Sessions issued just weeks before her individual merits hearing. The BIA affirmed in a single-member, two-page decision devoid of analysis.

Marisol petitioned for review before the Court of Appeals for the Ninth Circuit. After briefing was completed before the Ninth Circuit, the government sought remand for the BIA to "fully explain" its analysis. The BIA in turn remanded her case back to

[32] 27 I&N Dec. 316 (A.G. 2018).

the immigration judge. *A-B- I* has since been vacated by Attorney General Garland and is no longer a valid authority on which to base denial.

In November 2021, CGRS submitted a request to DHS to exercise its prosecutorial discretion to stipulate to a grant of asylum on the existing, comprehensive record and the vacatur of *A-B- I*. However, the Office of Chief Counsel indicated that it cannot consider such requests until a few weeks before the individual hearing, which was recently rescheduled from June 2022 to February 2024—nearly ten years after Marisol was placed in removal proceedings. In the meantime, three of Marisol's children remain in Guatemala, where they fear emotional and physical abuse from their father, Marisol's husband, and suffer neglect and draconian control by his parents, their caretakers. Marisol's children's educational opportunities are limited, and they have suffered the pain of many years of separation from their mother. Their safety and well-being hinges on Marisol's ability to remain in the United States and have them join her once she is granted asylum.

Once an asylee gains status, backlogs in I-730 processing times stretch this time period even further, not only jeopardizing family ties but often exposing family members still in the home country to danger. The case of our client "Rochelle" highlights this phenomenon. Rochelle was finally granted asylum in December 2019, over two years ago. This final result was itself the result of unlawful delay. Rochelle successfully appealed the immigration judge's initial denial from 2017. However, Rochelle remains separated from her son who is living in hiding in Haiti. Rochelle's persecutors have threatened her son and conditions in Haiti have worsened significantly in recent years due to political instability and natural disasters. He has no family to care for him and is extremely vulnerable as a result. Rochelle filed an I-730 for her son just weeks after receiving her grant of asylum, but it may be many more months before they can be reunited. The persistent separation has caused Rochelle extreme mental distress and exacerbated her own recurring trauma from the abuse she experienced.

Recommendation: The Task Force should recommend that both the Asylum Office and the Executive Office for Immigration Review be fully resourced in order to work through their backlogs promptly. In addition, USCIS should surge resources to and prioritize I-730 petitions and CAM applications, and/or offer parole for family members of people waiting in the backlog.

II. Prosecutorial discretion

As described above in the example of our client Marisol, one factor contributing to immigration court backlogs is the failure of ICE attorneys to exercise prosecutorial discretion where the record supports relief. If DHS would stipulate to grants of protection in these cases, it would not only clear the docket but would also allow for more prompt reunification with family members. Additional guidance to ICE attorneys for narrowing issues to be litigated would lead to more timely completion of hearings and also aid in reducing the backlog.

Recommendation: The Task Force should recommend that DHS issue new guidance to ICE attorneys encouraging them follow its priorities memo and, for example, affirmatively review all cases to see where it could stipulate to grants, rather than waiting until the last minute before the merits hearing.

CONCLUSION

Family unity is an integral part of refugee protection. We urge the Task Force to review all aspects of U.S. asylum law and policy that deliberately or inadvertently lead to family separation, and to make recommendations that will put families at the center of protection.[33] We urge the Task Force to consult with the Office of the United Nations High Commissioner for Refugees, with the Center for Gender & Refugee Studies, and with other experts and affected communities and to recommend further actions in areas, such as legislative amendments, that are beyond their direct remit.

Thank you for the opportunity to provide this input. If you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu.

Sincerely,

Kate Jastram

Kate Jastram
Director of Policy & Advocacy

[33] See "The United States Should Respect Family Unity and the Best Interests of the Child," in Center for Gender & Refugee Studies, *Asylum Priorities for the Next Presidential Term* (2020).