

# Violating international law through onerous procedural law

## The proposed U.S. asylum regulations

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On June 15, 2020, the United States Department of Homeland Security, U.S. Citizenship and Immigration Services, and the Department of Justice Executive Office for Immigration Review issued [proposed regulations](#) that would drastically change procedures for applying for asylum and for so-called “withholding of removal.” Most importantly, the proposed regulations would require individuals with a credible fear of persecution to have their claims for asylum or withholding of removal adjudicated by an immigration judge in abbreviated proceedings, rather than in fuller and fairer proceedings under section 240 of the Immigration and Nationality Act (“INA”), as provided by the current regulations. They make many other adverse changes to asylum-seeking procedures as well that drastically increase the burden on applicants. These far-reaching changes would violate the United States’ international legal obligations. The proposed regulations should accordingly be withdrawn.

### **A violation of the right to seek asylum**

The many procedural changes contained in the proposed regulations effectively undercut the exercise of the right to seek and enjoy asylum. They make applying for asylum so onerous that many deserving individuals will be denied relief and sent back to countries where they are likely to face persecution – the very harm that the U.S.’s [Refugee Act of 1980](#) seeks to prevent. The proposed changes would be especially injurious to very vulnerable groups, such as girls and women fleeing situations involving intolerable gender-based violence.

These adverse impacts of the proposed regulations are especially concerning because the right to seek and enjoy asylum is a fundamental human right protected by U.S. statutory law (in the [Refugee Act of 1980](#)), treaty law that binds the U.S., and customary international law that also binds the U.S. It is also a right supported by fundamental ethical principles expressed in international law and supported by the sacred texts of the world’s great religious traditions.

The right to seek and enjoy asylum is recognized in the [Universal Declaration of Human Rights](#), adopted by the United Nations General Assembly in 1948, with the full support of the U.S. Government. Indeed, U.S. First Lady Eleanor Roosevelt chaired the U.N. Commission on Human Rights that drafted this historic document. Article 14, paragraph 1 of the Universal Declaration declares: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

In 1951, the United Nations adopted the [Convention Relating to the Status of Refugees](#) (“1951 Refugee Convention”) with the aim of protecting and providing refuge and asylum to those who had fled the horrors of the Holocaust and other atrocities of World War II and ensuing post-war conflicts. It defined the term “refugee” as including any person who “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” [1951 Refugee Convention](#), art. I(A)(2). (The enumerated grounds of persecution in this definition are often referred to as “the five protected grounds.”)

The protections of the 1951 Refugee Convention were extended to all victims of persecution on one of the five protected grounds, without regard to the 1 January 1951 cutoff, in the [1967 Protocol Relating to the Status of Refugees](#) (“1967 Protocol”). While the U.S. did not ratify the 1951 Refugee Convention, it did ratify the 1967 Protocol in 1968, effectively assuming most of the obligations of the 1951 Refugee Convention and applying them to all persons meeting the definition of “refugee” in the 1951 Refugee Convention without any date restriction. See [1967 Protocol](#), art. 1, para. 1.

### **The obligation of non-refoulement**

Among the many obligations that the U.S. effectively undertook pursuant to both treaties was the obligation of “non-refoulement,” which is especially relevant to asylum-seekers. In particular, Article 33, paragraph 1 of the [1951 Refugee Convention](#) provides: “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 of a particular social group or political opinion.”

The U.S. has solemnly assumed, in accordance with the treaty ratification procedures specified in the U.S. Constitution, these obligations towards refugees and asylum-seekers. As treaty obligations, it is required under customary international law to fulfill them in “good faith,” as exemplified by Article 26 of the [Vienna Convention on the Law of Treaties](#).

Furthermore, there is compelling evidence that the obligation of non-refoulement is now a norm of customary international law binding on all states, including the U.S., as recognized by the U.N. High Commissioner for Refugees in an [advisory opinion](#). A strong case can also be made that the right to seek asylum as provided in Article 14 of the Universal Declaration and to “fair and efficient asylum procedures” (in the words of the same [advisory opinion](#)) is also a universally binding norm of customary international law. Elsewhere on this blog I have elaborated on [the importance of customary international law in protecting human rights](#).

It is clear that Congress adopted the Refugee Act of 1980 in large part to fulfill its obligations under the 1967 Protocol and 1951 Refugee Convention in good faith. See [INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 \(1987\)](#). Furthermore, U.S. law provides that interpretations of federal statutes should be favored that fulfill the U.S.'s treaty and customary international law obligations, as expressed by the Supreme Court in [Murray v. Charming Betsy, 6 U.S. 64, 118 \(1804\)](#).

### **The ethical principle of equal respect for the rights of human beings**

All of the solemn treaty obligations the U.S. has undertaken in relation to refugees and asylum-seekers and relevant norms of customary international law are supported by a fundamental ethical principle, announced in the [Universal Declaration of Human Rights](#), of universal and equal respect for the rights of every human being, regardless of her or his country of origin. The U.S.'s international legal obligations should be interpreted in light of this fundamental ethical principle.

As I have demonstrated in my [scholarly works](#), the sacred texts of many of the world's great religious traditions confirm this principle as well as an associated fundamental ethical principle that we must do whatever we reasonably can to rescue the vulnerable and oppressed, including those from a different country, and provide them with a haven from persecution. This ethical obligation not only falls on individuals, but also on states. For example, the Hebrew Scriptures emphasize in the most emphatic tone that we must not turn away from helping those who are fleeing persecution:

“If you refrained from rescuing those taken off to death, / Those condemned to slaughter — / If you say, ‘We knew nothing of it,’ / Surely He who fathoms hearts will discern [the truth], / He who watches over your life will know it, / And He will pay each man as he deserves.” (Proverbs 24:11-12).

### **Conclusion**

Given the U.S.'s clear legal obligations under the above treaties, customary international law, and the 1980 Refugee Act, properly interpreted in light of their humanitarian purposes and fundamental ethical principles, the changes in the proposed regulations are deeply problematic. Together they severely undermine the effective enjoyment of the right to seek asylum that the U.S. has agreed to grant based on its treaty commitments and its own national law.

To highlight just a few major problems with the proposed regulations, the limitation on section 240 proceedings would severely undermine asylum-seekers' ability adequately to present their cases and receive a full and fair hearing on their claims. As the explanation in the [proposed regulations](#) itself admits, “Section 240 proceedings are often more detailed and provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings under section 235 of the Act.” This is precisely why it is important to preserve these benefits of section 240 proceedings.

Many other proposed changes impair asylum-seekers' ability to show they have a well-founded fear of persecution on one of the five protected grounds. For example, the [proposed regulations](#) would explicitly list persecution based on "gender" as a type of persecution that would not be favorably adjudicated. However, [as pointed by the Tahirih Justice Center](#), case law has clearly established that women who are victims of gender-based violence warrant classification as a "particular social group" and the protection of the 1980 Refugee Act. This legal precedent is certainly supported by the U.S.'s treaty obligations interpreted in light of fundamental ethical principles, as emphasized above. For all these reasons the proposed regulations should be withdrawn.

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