

Submission of Comments  
**U.S. DHS and U.S. DOJ Notice of Proposed Rulemaking**  
[88 FR 11704 – “Circumvention of Lawful Pathways”](#)

Following the publication on 23 February 2023 of the above-referenced Notice of Proposed Rulemaking (NPRM), further conditioning eligibility for asylum in the United States (U.S.), and the issuance of a thirty-day comment period, the Danish Refugee Council (DRC), through its country operation in Mexico, respectfully presents this Submission of Comments to inform the Agencies’ analysis of whether the proposed rule appropriately provides a meaningful and realistic opportunity to seek protection. DRC is a leading international organization dedicated to humanitarian response in support of forcibly displaced persons in more than forty countries in the world. In many of these countries, DRC works with the support of and in coordination with the U.S. government to provide an independent, impartial, neutral and humane response rooted in protection. Since 2020, DRC has actively engaged in the humanitarian response to mixed migration flows in Mexico, including along the southern and northern borders.

The information offered by DRC is based on protection monitoring activities conducted in Mexico since 2020. Protection monitoring involves systematically and regularly collecting, verifying, and analyzing information over an extended period of time in order to identify violations of rights and protection risks for populations of concern for the purpose of informing effective responses. From October 2020 through February 2023, DRC conducted household interviews in Tapachula and Ciudad Juarez covering nearly 8,000 individuals.<sup>1</sup> Additionally, qualitative data has been collected in both locations through focus group discussions, direct observations, key informant interviews and a continuous review of primary and secondary sources. An *ad hoc* evaluation was conducted in Matamoros and Reynosa in January 2023.

According to the NPRM, the proposed regulatory change would introduce a rebuttable presumption of asylum ineligibility for persons who do not avail themselves of a lawful, safe and orderly pathway to enter the U.S. and for persons who do not seek asylum or other protection in a country through which they travel. Following this stated rationale, the present Submission offers information on: (1) the availability of regular pathways to enter the U.S.; and (2) the availability of asylum or other protection in Mexico. The Submission offers concluding recommendations for the relevant Agencies.

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<sup>1</sup> An interactive Dashboard of quantitative protection monitoring data is available [here](#).

## **Availability of Regular Pathways to Enter the U.S.**

In proposing that persons who do not avail themselves of regular pathways to enter the U.S. be considered ineligible for asylum, the NPRM assumes the existence of options to enter the U.S. that are lawful, safe and orderly. Specifically, it cites the parole processes introduced between late 2022 and early 2023 for Cuban, Haitian, Nicaraguan and Venezuelan nationals as well as the availability of the CBP One platform for scheduling the arrival of an intending asylum-seeker at the border.

### Parole Processes

The recently established parole processes, while certainly a positive measure for certain eligible nationals, continue to be unavailable for a significant proportion of intending asylum-seekers from Cuba, Haiti, Nicaragua and Venezuela. In particular, the requirements of an unexpired passport valid for international travel and that applicants be able to cover the costs of air travel to the U.S. continue to be prohibitive for many persons of concern. Despite the exception for certain Venezuelan passports, this requirement continues to exclude a significant number of Haitian nationals that have been outside of Haiti for multiple years, as well as Cuban and Nicaraguan nationals who irregularly fled their countries of origin due to persecution. Protection monitoring data confirms that generalized violence is the most commonly cited flight motive for Haitian and Venezuela nationals (82% and 63.0%, respectively), while Cuban and Nicaraguan nationals mostly report fear of persecution (70.0% and 73.0%, respectively). The valid passport requirement of the parole programs has led some persons of concern to consider seeking the renewal or reissuance of their passports with consular authorities of their countries of origin, which is contrary to the spirit of international protection, given that this contact could expose them to a heightened risk of persecution. Similarly, the requirement of entry by air for those processed under these parole programs proves to be an impediment for many persons of concern who lack the economic resources to cover the costs of such travel. Protection monitoring data confirms that, among persons of concern, households have an average income of approximately 1200 MXN, or around 60 USD. Additionally, 20.5% of those monitored by DRC confirmed not having any source of income. This makes it extremely difficult for persons who are otherwise eligible for the parole program to access this pathway for regular entry to the United States. The challenges are particularly acute among larger families that must cover the costs of multiple plane tickets.

The availability of parole is also limited by the fact that individuals who crossed irregularly into Mexico or Panama following the effective dates of the parole programs are automatically ineligible. Given the fact that neither Mexico or Panama has effective procedures for facilitating regular entry into their territories, including for individuals in need of international protection, this criterion interrupts any realistic possibility for seeking protection for a significant proportion of intending asylum-seekers and consolidates the externalization of migration controls. More than 96.1% of protection monitoring respondents confirmed having entered Mexico irregularly. Of these, 77.1% reported subsequently initiating an asylum application with the Mexican Refugee Assistance Commission (COMAR, by its Spanish acronym). This data, together with direct observations carried out at the Ciudad Hidalgo border crossing as well as information from other organizations and media sources, confirms the unavailability of procedures to regularly enter Mexico as an asylum-seeker. In Tapachula, DRC has confirmed that at no point between 2020 and February 2023 did the COMAR have regular presence at the formal land border crossings and that the National Migration Institute (INM, by its Spanish acronym) is generally unwilling to accept asylum requests at the border.

### CBP One

On the other hand, the use of the CBP One platform to schedule the arrival of intending asylum-seekers also suffers from a number of limitations that undermine its usefulness and availability as a regular pathway to enter the U.S. In addition to the numerous technical concerns cited in the NPRM, DRC's field activities confirmed that the repeated updates to the CBP One application and confusion regarding its use, together with the extremely limited number of appointments made available through this system, have prevented many people from effectively seeking protection in the U.S. Considering that the CBP One platform functions as a metering system, enabling certain individuals who are able to navigate its use to be entered onto a virtual waitlist for processing, DRC confirmed that often the most education, tech-savvy and well-resourced persons of concern were able to access this system. Activities in Ciudad Juarez, Matamoros and Reynosa confirmed that a significant majority of persons of concern continue to wait in these border towns for new appointments to be available. This system exposes tens of thousands of persons of concern to unsafe and undignified conditions in Mexico while they wait indefinitely for the opportunity to be processed in the U.S. The existing response efforts by the Mexican authorities have been extremely limited, leaving underfunded civil society and religious organizations to provide an *ad hoc* response that frequently departs from

international humanitarian standards. There are overwhelming needs for safe shelter options as well as services that can guarantee protection from violence, coercion and exploitation. 11.6% of households reported having experienced violence in the place in Mexico where they were monitored. Respondents described facing physical, psychological and sexual violence. Some related accounts of abduction, extortion and other abuses and rights violations at the hands of authorities, criminal groups and other actors. While DRC does not collect quantitative data on these occurrences, many other institutions, agencies, organizations and media outlets have also documented these trends.<sup>2</sup>

CBP One also exposes persons of concern to family separation and to risks associated with irregular transit to different ports of entry. A significant proportion of those monitored by DRC described difficulties attempting to register their entire family unit within the CBP One application. In some cases, this was due to the family unit exceeding the size allowed by the application, and in others, due to user confusion as to how to complete this registration. As a result, only some family members were including in the registration, while others had to register separately. Considering that intending asylum-seekers are more likely to request the first available appointment in order to escape the unsafe conditions in Mexico than to wait months for an appointment to become available in their closest port of entry, numerous families have been forced to separate in order to be present at the designated port of entry on the date of their appointment. Still others were forced to leave some members of the family behind in Mexico so as to not miss the appointment that only a part of the family was able to obtain. This dynamic of scheduling appointments at specific ports of entry has also given rise to an increase in irregular movements of persons of concern within Mexico in an attempt to reach the designated port of entry in time for their appointments. Considering that the vast majority of these individuals lack immigration status in Mexico, they have largely resorted to traveling with traffickers or through informal routes. Mexican authorities recently announced that they would authorize transit within the country for Cuban, Haitian, Nicaraguan and Venezuelan nationals with valid appointments under CBP One.<sup>3</sup> This change, however, does not alter the difficulties faced by other nationalities and the

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<sup>2</sup> For example, see: CNDH. [Informe especial sobre la situación que guarda el tráfico y el secuestro en perjuicio de personas migrantes 2021](#). December 2022; International Rescue Committee. [Rising Gender-Based Violence in Mexico Puts Women on the Move at Higher Risk, IRC Warns](#). 23 November 2022; AP News. [Thriving network of fixers preys on migrants crossing Mexico](#). 28 December 2022.

<sup>3</sup> Gobierno de México. [Autoriza INM paso a migrantes extranjeros que cuenten con cita confirmada por CBP](#). 21 March 2023.

fact that in practice, transportation companies and authorities frequently impede regular internal transit.

### Limitations of Available Pathways

In its activities, DRC has worked with numerous individuals who are otherwise eligible for a regular pathway to the U.S. but who have experienced technical difficulties creating a myUSCIS account or using the CBP One application. The absence of an accessible and an effective mechanism to report and resolve these difficulties have impeded multiple individuals from proceeding with their parole processes. Additionally, protection monitoring activities confirm that these processes have opened up new avenues for fraudulent practices, including exploitation by traffickers representing the ability to successfully obtain appointments through the platform as well as scams by other individuals or groups charging fees in exchange for processing parole applications or completing a CBP One registration.

Given these challenges, it is apparent that the regular pathways to enter the U.S. referenced in the NPRM are not, in practice, available to a significant proportion of intending asylum-seekers. As a result, the presumption of ineligibility for those who do not use these limited pathways is likely to frustrate the possibility of seeking international protection in the U.S.

### **Availability of Asylum or Other Protection in Mexico**

The NPRM cites increased access to protection in the region – including in Mexico – as justification for considering ineligible for asylum in the U.S. persons who do not seek asylum in another country through which they have transited prior to arriving at the U.S. border. Specifically, it references the increased capacity of the COMAR and the support provided by the U.S. government and other actors. However, the demonstrated saturation of the COMAR's services and the conditions that asylum-seekers face in Mexico dramatically undermine access to effective protection in the country.

### Saturation of COMAR

The statistics cited in the NPRM as to the increase in the number of asylum applications presented before the COMAR describe a trend in which the capacity of the COMAR to process applications has been progressively overwhelmed. This has led the agency to adopt *ad hoc* measures<sup>4</sup> in order

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<sup>4</sup> At the time of writing, the COMAR process in Tapachula generally requires asylum-seekers to make an initial approach to one of the multiple COMAR facilities to obtain an

to enable the system to function. Many of these measures undermine procedural safeguards for asylum-seekers and prolong or entirely impede their access to international protection. Since DRC began protection monitoring in 2020, it has tracked the changing practice of receiving and processing asylum applications in the country. In late 2021, based on these findings, DRC published a report on due process in the Mexican asylum process, focusing specifically on the situation in Tapachula, where a significant majority of asylum applications are presented.<sup>5</sup> That report described a number of barriers to effective protection for asylum-seekers, including limitations on access to territory, challenges in presenting an application (wait times to formalize the application, detention, inadmissibility of late-filed applications), difficulties in processing (deadlines and processing times, the opportunity to be heard, appeals) and risks for asylum-seekers. These challenges lead many to abandon the asylum process. Moreover, despite the statistics cited in the NPRM as to the number of lawyers available to provide support in these processes, 90.9% of protection monitoring respondents that had initiated the COMAR process reported that they had not received any sort of legal orientation or case-management assistance in the process.

In addition, the COMAR depends significantly on continued external funding – including from the U.S. government and international agencies – in order to maintain its current functioning. On a number of occasions, COMAR representatives have manifested the insufficient allocation of resources by the Mexican government to cover the costs of its activities.<sup>6</sup> In this context, the idea of increased access to protection in Mexico is questionable.

### Conditions for Asylum-Seekers in Mexico

Additionally, the conditions faced by asylum-seekers who have initiated the process with the COMAR further evidence the barriers to effective protection in Mexico. Currently, there are no government-run reception programs to

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appointment for approximately one year later in order to formalize their asylum application. In that period, the COMAR implements a rescheduling mechanism by which it attempts to move forward appointment dates, disseminating information about current appointments on social media and through local organizations. At the date of the appointment, the asylum-seeker will be allowed to provide initial information as to their claim and will be issued documentation by the COMAR confirming their status as an asylum-seeker, at which point they will become available for certain forms of assistance offered by UN agencies and organizations.

<sup>5</sup> Danish Refugee Council. [Challenges in Refugee Protection and Non-Refoulement in Tapachula, Mexico: A Due Process Analysis](#). 14 December 2021.

<sup>6</sup> For example, see: La Jornada. [Comar ha otorgado 350 mil 223 solicitudes de asilo durante actual gobierno](#). 13 February 2023.

attend to the basic needs of asylum-seekers who are generally not able to find regular work to support themselves during the process. While some are able to find informal work in oftentimes exploitative conditions, among those asylum-seekers DRC monitored in Mexico, 75.6% of households indicated that no one was working. The wait times to register asylum applications means that people must wait months in economically marginalized border areas without their basic needs covered in order to be able to access their entitlements as asylum-seekers. In this period, asylum-seekers are effectively undocumented and particularly vulnerable to different forms of abuse and exploitation, as well as human rights violations. In Tapachula, significant percentages of people are unhoused during this period or reside in informal settlements. Those who are able to rent private housing are generally limited to one room for an entire family unit. More than a third do not have access to potable water and more than 80% have reduced the size of food portions.

Even after asylum-seekers obtain documentation from the COMAR confirming that they have a pending application – a process which may take many months – they are not considered to have lawful immigration status in Mexico. The lack of coordination by INM (the agency with the authority to grant immigration status) with the COMAR means that even registered asylum-seekers are at risk of detention and deportation. Additionally, many remain unable to access the limited formal work opportunities available in these areas. The lack of documents also impedes the possibility of opting for safe and regular transit to other locations in Mexico where asylum-seekers have greater opportunities to find work and cover their basic needs. Freedom of movement is further limited by provisions in Mexican law that obligate asylum-seekers to remain in the state where they initiate their asylum process. This restriction effectively prevents asylum-seekers from moving onwards to locations within Mexico where they might enjoy greater safety and better living conditions. This situation leads many asylum-seekers to undertake risky irregular movements within Mexico, and by doing so, to abandon the COMAR process. This absence of adequate conditions for asylum-seekers in Tapachula thus undermines the capacity of the Mexican asylum system to offer effective protection.

Lastly, security conditions in Mexico prevent many persons in need of international protection from being able to find effective protection in the country. 72.4% of protection monitoring respondents report that generalized violence was one of the factors motivating flight from their country of origin. During field activities, many persons of concern – particularly Honduran, Salvadoran, Guatemalan and Mexican nationals –manifested fear that the individuals or groups that seek to harm them can easily find them within

Mexico. Additionally, a lack of confidence in security forces and justice-sector authorities leads many persons of concern to feel unprotected in the country. 24.5% of respondents reported having suffered a crime in Mexico, of which only 13.6% reported the crime to authorities. Fear of the authorities and fear of reprisals were commonly cited by those who opted not to report. In this context, diverse categories of persons in need of international protection justifiably consider that Mexico is unable to offer them effective protection.

### **Concluding Recommendations**

Based on the foregoing, it is clear that there is an insufficient availability of regular pathways for access to U.S. territory and an insufficient availability of asylum and other forms of protection in Mexico. The cited limitations in the recently created parole programs and the CBP One application are sufficiently serious so as to prevent them from effectively and fairly offering regular pathways for initiating the U.S. asylum process. Additionally, the referenced saturation of the COMAR and the conditions facing asylum-seekers in Mexico undermine effective access to protection in the country. In order to avoid impeding access to asylum in the U.S. and exacerbating protection risks and human rights violations, the U.S. DHS and U.S. DOJ should not adopt the NPRM.

In the event that the Agencies decide to implement the NPRM, the following recommendations should be taken into consideration:

- Guarantee a broad interpretation of existing exceptions and employ a precautionary, protection-centered approach in its application.
- Ensure meaningful and robust bilateral coordination with Mexican authorities and humanitarian organizations in Mexico in order to guarantee adequate reception of persons awaiting access to the U.S. asylum procedure.
- Establish timely and effective mechanisms to receive and address reports of errors in the myUSCIS and CBP One platforms, as well as other complaints of violations of human rights and protection risks that arise as a result of the regulatory change.