

Submission of Comments

**U.S. DHS and U.S. DOJ Notice of Proposed Rulemaking**

*Interim Final Rule – “Securing the Border”*

USCIS Docket No. USCIS 2024-006

Following the Presidential Action announced June 4, 2024, through the ‘[Proclamation on Securing the Border](#)’ and the subsequent publication on June 7, 2024 of the above-referenced [Interim Final Rule](#) (IFR) with request for comments, the Danish Refugee Council (DRC), through its multi-country operation covering Central America and Mexico, respectfully presents this Submission of Comments to highlight the ways in which the proposed rule inhibits meaningful and realistic access to protection for persons of concern in Mexico and Central America.

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 locations, 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 presented by DRC is based on data collected from 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 to date, DRC has conducted household interviews in Tapachula, Reynosa, Matamoros and Ciudad Juarez covering nearly 10,000 individuals.<sup>1</sup> Additionally, qualitative data has been collected in these same locations through focus group discussions, direct observations, key informant interviews and a continuous review of primary and secondary sources. Additionally, a protection needs assessment was conducted with children and adolescents on the move in El Paraiso, Honduras.

Insofar as the above-referenced IFR is premised on promoting the Department of Homeland Security (DHS) and the Department of Justice (DOJ)’s (hereinafter, collectively referred to as ‘the Agencies’) ability to deliver timely decisions and consequences for those irregularly enter the United States, including specifically expedited removal from the U.S., it does not sufficiently address the obligation<sup>2</sup> to deliver timely and effective

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

<sup>2</sup>The preamble to the IFR recognizes the U.S.’s international obligations to refrain from expelling or returning a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

protection for those in need. According to the IFR, the proposed regulatory change establishes that when specific situations are present at the U.S. border with Mexico, additional limitations will be applied to asylum eligibility and safeguards will be reduced in expedited removal procedures so as to enable swift returns of affected people to their countries of origin or, in certain cases, to Mexico. The present Submission offers information on how the IFR would limit meaningful and realistic access to protection against *refoulement* and concludes with recommendations for the Agencies.

### **Additional Challenges for Informed Decision-Making**

The conditions under which the additional limitations on asylum eligibility are to be applied create new challenges for informed decision-making among people of concern who are desperate to access U.S. territory to seek protection. The IFR excludes from eligibility for asylum persons who enter the U.S. without authorization and those who present themselves at a port of entry to the U.S. without authorization to enter, under situations when the numbers of encounters registered by the Agencies purportedly exceeds their capacity to process these individuals. These limitations would thus apply in specific moments and would alternate with other criteria and procedures that would be in place when the Agencies do have appropriate processing capacity.

It is likely to be extremely challenging for persons of concern to know when these additional limitations on asylum eligibility will be in effect. To date, persons of concern have very limited access to official information on access to U.S. territory. 57.7% of Protection Monitoring respondents in the first half of 2024 affirmed that they do not understand the requirements and processes for accessing U.S. territory. At the same time, the application of these limitations is not something that the population of concern will easily be able to discern without access to official information. The total number of encounters across the entire U.S.-Mexico border is not readily apparent to persons of concern who do not have access to information on irregular crossings, particularly given that the U.S. government does not currently publish statistics on encounters. Additionally, even when some individuals might be aware of the dynamics of irregular movements, this awareness is likely to be limited to the specific region of the border where they are located and would very unlikely cover the overall magnitude of encounters. This situation is likely to be particularly acute in regions where the level of encounters is relatively low, such as the Rio Grande Valley, which has not seen the same spike in encounters as that highlighted in the preamble to the IFR which was reported in the San Diego and Tucson sectors. As a result, persons of concern in other parts of the border, including Reynosa and Matamoros, will need to be informed as to when the additional limitations will be in effect.

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be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.

Nearly half of protection monitoring respondents in Reynosa and Matamoros during the first semester of 2024 – 48.3% - confirmed that the main channel through which they receive information on policy changes is word of mouth, while 30.1% receive this information through social media. This dynamic and the difficulty accessing official information renders people of concern more vulnerable to imprecise or misleading information and scams. Furthermore, through activities in Ciudad Juarez, Reynosa and Matamoros, DRC has documented how confusion around changing policies and practices governing access to U.S. territory has fueled the widespread belief there are certain moments when the U.S. border is ‘open’ and others when it is ‘closed’, and that access to U.S. territory requires individuals to remain close to the border and attentive to any information suggesting that the border is ‘open.’ The IFR has already contributed to this dynamic, with people of concern along the northern border expressing their understanding that the new limitations effectively ‘close’ off access to U.S. territory. This, in turn, has led to desperation and fostered the likelihood that the population resorts to imprecise and misleading information provided by human traffickers or on social media.

Given the swiftness with which the limitations established under the IFR can be invoked and applied, they are likely to be experienced as abrupt, without influencing the ability of persons of concern in different parts of the transit route to adapt their decisions. Those who are already at or around Mexico’s northern border when the limitations are applied cannot meaningfully consider any potential alternative pathways. Similarly, a significant proportion of people of concern present in Mexico could be ineligible for certain alternatives. For example, 97.9% respondents during the first semester of 2024 reported having entered Mexico irregularly, which could render them ineligible for certain forms of parole. As a result, persons of concern are unlikely to become aware of when the additional limitations on asylum eligibility would apply with sufficient lead time so as to be able to adapt their decisions. This will thus undermine their ability to make decisions that increase their chances of receiving the protection that they need.

### **Unpredictable and Complex Criteria and Procedures**

Another series of challenges relates to the unpredictability and complexity of the criteria and procedures. Even when people of concern are aware that the additional limitations will apply, they will not have clarity as to the specific criteria that will be used to analyze and evaluate their claims for protection. This is because the standards and procedures foreseen by the IFR are complex and hyper-technical in nature. Intending asylum-seekers who cross into the U.S. irregularly or who present themselves at a port of entry without authorization to enter are faced with the requirement of an affirmative manifestation of fear, the lack of explicit individual advisals, heightened and complicated standards of proof during fear screenings, and the requirement of providing detailed and specific

information. Given that these procedures are complicated to understand, even for trained lawyers and authorities, it is highly unlikely that persons of concern will understand the criteria and standards that they must satisfy in order to be eligible for asylum. This is even more probable the widespread misinformation that abounds with respect to the policies and practices governing access to U.S. territory even without the implementation of the IFR. It is not surprising that 55.9% of all Protection Monitoring respondents since October 2020 manifest that they do not understand the requirements and procedures for accessing U.S. territory. A clear example of the compound complexity of U.S. policy and practice is in the adoption of the restrictions on asylum-eligibility known as the ‘circumventing lawful pathways’ rule, whereafter intending asylum-seekers were faced with a legal framework characterized by a rebuttable presumption, multiple types of procedures for identifying protection needs and different standards of proof.

The unpredictability of criteria and procedures is concerning considering the overwhelming need for protection. Although more general references to violence are among the most commonly cited reasons for departing from their place of origin, during the first semester of 2024, more than half of foreign national Protection Monitoring respondents – 52.0% - and 38.5% of Mexican respondents cited fear of persecution among their flight motives.

### **Challenges in Establishing Exceptions**

Although the IFR provides that certain groups should be exempt from the application of the additional limitations on asylum eligibility, including unaccompanied children, victims of severe forms of trafficking, persons who have an appointment under CBP One or some other processing system and those who are processed based on a discretionary basis, considering the totality of the circumstances, access to the foreseen exceptional treatment requires physical access the U.S. immigration authorities at the ports of entry a functioning appointment system that is accessible to people of concern.

In practice, however, there are numerous factors that impede physical access to U.S. immigration authorities. On the one hand, on the Mexican side of the border, private and other security agents have been observed restricting access to the ports of entry for individuals who do not have a CBP One appointment, without any mechanisms in place to guarantee the possibility of establishing an exception. These practices undermine the exceptions and prevent those who should be exempt from the additional limitations from accessing protection.

This is particularly difficult for unaccompanied and separated children who frequently have limited access to information on immigration policies and practices. DRC’s protection needs assessment conducted in Honduras confirmed that a significant factor

contributing to flight motives and intentions of this group is family reunification, and that many children and adolescents traveling without their parents or guardians have limited access to information. In this context, it is highly unlikely that unaccompanied children would be able to approach the border in order to establish an exception to the asylum limitations.

Similarly, the CBP One appointment system continues to be saturated and fraught with problems that prevent those in need of protection from obtaining an appointment. Only 3.1% of those monitored in Reynosa and Matamoros during the first half of 2024 had obtained an appointment through the application. While technical problems and confusion around the use of the application have diminished, they continue to affect some persons of concern who are illiterate or who have difficulties navigating technology. However, unlike the circumventing lawful pathways rule adopted in May 2023, the IFR does not include an exception for those who are unable to access the CBP One scheduling system as a result of language barriers, illiteracy, significant technical failures or other ongoing and serious obstacles.

Additionally, activities in Reynosa and Matamoros confirmed that many persons of concern are unable to follow-up on the requests for an appointment due to losing their cell phones, forgetting their passwords or having other technical issues that impede them from obtaining an appointment which would exempt them from the additional limitations under the IFR. Still others report having missed their appointment with CBP One as a result of kidnapping or some other form of violence or coercion. 31.6% of respondents in Reynosa and Matamoros who had been assigned an appointment in CBP One reported having missed their appointment as a result of one of these situations.

While the IFR does contemplate other possible situations that would warrant an exception to the additional limitations, there is insufficient clarity as to the procedures through which individuals might seek an exception on these grounds. Furthermore, the IFR refers to imminent or extreme threats that might justify an exception but does not consider survivors of recent and severe forms of violence as potential exceptions, despite the significant need for protection to prevent further harm and to mitigate the effects of the harm suffered. 41.5% of respondents during the first semester reported that someone in their household had experienced violence in Mexico, of which extortion/theft, kidnapping, physical aggression, and sexual and gender-based violence were among the most common forms of violence reported.

### **Reduced Safeguards in Asylum Processing**

Pursuant to the IFR, immigration authorities will no longer provide explicit individual verbal advisals regarding the asylum process or ask specific questions in order to detect

individuals who fear persecution or torture upon return. Instead, advisals will be provided generally, including through signage, and individuals will only be considered to be intending asylum-seekers if they affirmatively manifest a fear of return. This change in practice is likely to prejudice illiterate persons of concern with the intention of seeking asylum. 4.7% of respondents during the first semester of 2024 reported not being able to read in the language that they speak. Additionally, this practice places an undue burden on intending asylum-seekers who are frequently affected by stress and other psycho-emotional symptoms that might alter their ability to make affirmative or otherwise objective manifestations of fear. 89.1% of respondents during the first semester of 2024 reported symptoms of anxiety and 55.0% depression. It is likely that these conditions will negatively influence the ability of people of concern to appropriately manifest their fear, particularly considering the absence of access to counsel or legal advice, thus leading to the failure to identify protection needs and *refoulement*. Indeed, the Agencies recognize in the preamble to the IFR that this manifestation standard could result in failing to detect some individuals in need of protection and appropriately process their claims.

### **Risk of *Refoulement* of Mexican Nationals**

A particularly serious concern around the IFR is the application of the additional limitations on asylum eligibility to Mexican nationals. 18.9% of respondents between Reynosa and Matamoros during the first semester of 2024 were Mexican nationals. Of these, one third cited violence and insecurity as factors influencing their displacement, while 18.5% referred to fear of persecution. Under the IFR, as explicitly recognized in the preamble, Mexican nationals will only be eligible to seek asylum if they obtain a pre-scheduled appointment or are able to establish an exception to the Proclamation or exceptionally compelling circumstances. However, if they are not able to obtain an appointment in CBP One due to the saturation of the system or for other reasons or they are not able to overcome the challenges to establishing an exception, the IFR would effectively deny access to U.S. territory for Mexican nationals in need of protection and force them to remain in the country where their life and freedom is threatened. This would amount to a serious violation of the protection against *refoulement*, particularly considering that for this population group, the lawful, safe and orderly options to access the U.S. for the purpose of requesting protection are scarce and essentially limited to requesting an appointment through the CBP One application without any other specific alternative pathways.

### **Concluding Recommendations**

Based on the foregoing, it is clear that the additional limitations on asylum eligibility and the reduction of safeguards in asylum processing will hinder meaningful and realistic access to protection. The IFR prioritizes imposing penalties for those who seek access to

U.S. territory, including those who credibly seek protection, based on a logic of deterrence, without proportionately addressing the drastic dearth of alternative pathways or the consequences of denying timely and meaningful access to protection. Additionally, the IFR suggests that the responsibility for accessing protection should be borne by persons of concern and not by the authorities who have the duty to refrain from *refoulement*. While a limited number of alternative pathways are available for certain persons of concern of specific nationalities or in other specific situations, making an appointment through CBP One or avoiding the displacement to the U.S. border all together are not effective options for all of those who seek protection.

Taken together, the measures established in the IFR effectively restrict access to territory for those seeking international protection and lead to them being pushed back into Mexico or summarily returned to their countries of origin. While they may be effective in reducing the numbers of asylum-seekers received and processed by U.S. authorities, they simultaneously fuel a dramatic increase in vulnerability and exposure to violence and other forms of abuse and denying access to protection. In order to avoid impeding access to protection in the U.S. and exacerbating protection risks and human rights violations, the Agencies should **rescind** the IFR.

In the event that the Agencies decide to maintain the IFR, the following recommendations should be taken into consideration in order to mitigate the negative impacts:

- Regularly publish data on encounter levels in order for the parameters for activation of the additional limitations on asylum eligibility to be widely and clearly known by persons of concern so as to enable timely and informed decision-making.
- Establish clear and accessible channels for communicating the activation of the additional asylum restrictions to the affected population and interested stakeholders and to stem the spread of misinformation and fraud.
- Exclude from the application of the IFR those individuals encountered at the ports of entry and limit application of any restrictions to those who cross irregularly so as to guarantee access to processing for individuals who should be exempted from the IFR and an appropriate evaluation of the totality of circumstances that would justify an exception.
- Adopt a specific exemption for Mexican nationals in order to guarantee timely access to territory for those Mexicans seeking protection from persecution in their country of origin and avoid *refoulement*.
- Establish clear and transparent procedures and criteria for guaranteeing access to territory for individuals who seek to establish exemption from the additional limitations on asylum eligibility in line with this Submission in order to guarantee a broad interpretation of ‘exceptionally compelling circumstances.’



- Maintain existing practices for providing explicit individualized advisals of asylum procedures and affirmative questioning by immigration authorities to detect fear of persecution or torture prior to effectuating any type of removal of an individual who has not manifested fear of their own accord.
- Exempt from any penalties arising from expedited removal, including restrictions on subsequent admission to the United States, all persons who manifest a credible fear.
- Condition the implementation of any restrictions on eligibility for protection at the border on the actual availability of alternative pathways given the nationality, location and other specific circumstances of each individual.

**Danish Refugee Council – Central America and Mexico**

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