Center for Gender & Refugee Studies

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Submission to the Special Rapporteur on the Human Rights of Migrants

Input for the Report on the Phenomenon of Missing Migrants – Human Rights Analysis

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The Center for Gender & Refugee Studies (CGRS) is grateful for the opportunity to contribute this input to inform your report on issues relating to the phenomenon of missing migrants, which will be presented at the Human Rights Council's 59th session.[1]

This submission draws upon the following resources which provide analyses and information relevant to the call for input. Copies of these resources are included in the Annex.

- CGRS, *"Manifesting" Fear At the Border: Lessons from Title 42 Expulsions* (Jan. 30, 2024);
- CGRS, University of California College of the Law, San Francisco's Haiti Justice Partnership, Haitian Bridge Alliance, and the École Supérieure Catholique de Droit de Jérémie, *Making a Mockery of Asylum: The Proposed Asylum Ban, Relying on the CBP One App for Access to Ports of Entry, Will Separate Families and Deny Protection* (Mar. 27, 2023);
- CGRS, *Comment in Response to DHS and DOJ Request for Comments: Securing the Border, 89 FR 81156* (Nov. 05, 2024).

[1] Special Rapporteur on the human rights of migrants, *Call for input - Report on the phenomenon of missing migrants – human rights analysis*, The Office of the High Commissioner for Human Rights (accessed on Nov. 5, 2024). **Questions № 3** seeks to explore the root causes, as well as major contributing factors leading to migrants going missing or disappearing throughout their migration journeys. **And № 4** seeks to identify "the obstacles in existing national, regional, and international legal and policy frameworks as well as in operational environment of humanitarian actions that may raise or create the risk of migrants going missing and/or disappear[.]"

Restrictive asylum policies impose cumbersome requirements that prevent asylum seekers from requesting protection while also heightening their risks of kidnappings and disappearances and suffering other types of harm. Drawing on the United States' draconian border policies and enforcement practices, this submission demonstrates how such practices expose asylum seekers and migrants to danger at the U.S.-Mexico border. Part I highlights current asylum policies and border practices that preclude individuals from seeking safety. Part II examines the consequences of these flawed policies, including family separations and increased kidnappings by cartels. Part III presents recommendations to address these issues.

I. EXISTING RESTRICTIVE ASYLUM POLICIES AT THE U.S.–MEXICO BORDER AS MAJOR CONTRIBUTING FACTORS OF MIGRANTS' DISAPPEARANCES

In recent years, U.S. asylum and border policies have been in flux, marked by significant restrictions on access to asylum under the Trump administration. Under the Biden administration, some of these policies were terminated, modified or replaced, yet there continue to exist significant barriers to accessing asylum at the U.S. southern border. Civil society organizations, including CGRS, have challenged these restrictive policies in courts with mixed results (see our Litigation page for more information).

Currently, the Biden administration has in place two major policies that curtail access to asylum at the border. These policies leave individuals stranded and exposed to dangers in Mexico or at risk of being returned to the very dangers from which they fled.

First, starting on May 11, 2023, the U.S. government implemented a new rule entitled Circumvention of Lawful Pathways, 88 FR 11704 . This rule bans eligibility for asylum for those who cross the U.S. southern border without authorization unless they: 1) applied for and were denied protection in a transit country; 2) availed themselves of a limited number of migration pathways to enter the United States; or 3) pre-scheduled an appointment through a smartphone app called CBP One to present themselves at the border. Simultaneously, the government reinforced existing limitations on the ability to walk up to border points of entry to request asylum by requiring, save for limited exceptions, the use of CBP One to schedule an appointment in advance.

Second, starting on June 2024, the Biden administration implemented a set of "emergency" measures under the Securing the Border framework. These measures are triggered when

the number of border encounters exceeds a specified threshold. When in effect, access to asylum is limited by: 1) rendering individuals who cross the border between ports of entry ineligible for asylum, save for limited exceptions; 2) imposing a "shout test," which requires apprehended individuals to affirmatively "manifest fear" of return to be considered for a credible fear interview, shifting this responsibility to them at a time of extreme vulnerability; and 3) applying a heightened screening standard during credible fear interviews, requiring individuals to demonstrate a "reasonable probability" of persecution or torture, a stricter threshold than the previous standard. Those who fail to overcome these procedural barriers face expedited removal to their home or a third country.

While these policies are framed as measures to improve management at the border, they in fact expose asylum seekers to significant dangers, including the risk of disappearances and kidnappings.

II. RESTRICTIVE BORDER POLICIES EXACERBATE THE RISK OF KIDNAPPINGS, DISAPPEARANCES, AND OTHER FORMS OF HARM

The effects of these restrictive border policies are broad-ranging. This submission focuses specifically on the impact of requiring the use of the CBP One app to approach the border to seek asylum and the "shout test" requirement imposed under the Securing the Border framework.

A. CBP One

Since the requirement to schedule an appointment through CBP One to approach the border and seek asylum was implemented, the app has been marred by various issues. These include technical glitches, limited language access, and failure to recognize the facial features of Black and other individuals with dark skin—precluding many from being able to request protection. Additionally, the use of the app assumes access to smartphones and reliable Wi-Fi or cell service, creating unnecessary and sometimes insurmountable barriers for individuals fleeing persecution.

Families seeking asylum face specific challenges. CBP One requires users to upload photographs of all members of the family group under a single profile, but the limited availability of appointment slots forces families to act quickly. Individuals often struggle to capture photos of everyone and upload them in time. Even parents who have taken additional measures, such as waking their young children up in the middle of the night to take the required pictures, have reported not being able to do it fast enough to secure a slot.

Our Report, *Making a Mockery of Asylum,* documents how "the app prevented families from adding their family members under one profile. Parents could add their information, but the app would freeze or shut down after they did so, preventing them from adding their children and progressing further in the appointment process." As a result, some families resorted to creating separate profiles for different members, which tragically led to instances of family separation.

This occurred because, to cross the border together, all family members must be included under a single profile. Families who created separate profiles arrived for their appointments only to be told by officers that they could not be processed together. The *Making a Mockery of Asylum* report records that "[o]fficers consistently told parents that they had the 'option' of leaving their children behind, sending their children across the border unaccompanied, or attempting to get another appointment together."

In response, families had to make a heartbreaking decision to separate in desperation without knowing if they would be able to reunite. At least 18 out of 157 families interviewed stated that their families had to separate because of the CBP One app as our *Making a Mockery of Asylum* report documents. Families that stayed in Mexico considered sending their children ahead unaccompanied to remove them from dangerous border conditions.

Due to cartel violence, it is very risky for asylum seekers to remain stranded in Mexico, a fate faced by many waiting for a CBP One appointment. In 2021 alone,[2] over 6,000 migrants were violently attacked, and the homicide rate amounted to 28 per 100,000 people. The following examples demonstrate the acute risks of disappearance or kidnappings faced by individuals while trying to schedule a CBP One appointment:

- One woman was desperately trying to schedule an appointment for her two-year-old daughter and father-in-law after cartels disappeared her husband and mother-in-law.
- A family awaiting reunification with their loved ones in the U.S. went into hiding after a cartel kidnapped them in southern Mexico, where the mother was repeatedly assaulted and faced ongoing threats.
- A Honduran mother and her thirteen-year-old son received menacing calls following an attempted kidnapping.
- A Mexican woman whose son was abducted by cartels faced threats to her own life.

[2] Albinson Linares, *'We live in fear': Over 6,000 migrants in Mexico have been violently attacked*, NBC News (Aug. 26, 2021), https://www.nbcnews.com/news/latino/-live-fear-6000-migrants-mexico-violently-attacked-rcna1783.

- A Salvadoran woman feared staying in Mexico and being found by the cartel who threatened to kidnap her son.
- A Cuban family missed their scheduled CBP One appointment after being kidnapped in Mexico and held for a month.
- A Honduran family was kidnapped in Tapachula and later extorted by the police.

B. Manifesting fear, or the "shout test" requirement

As noted earlier, while the Securing the Border policy is in effect, individuals apprehended after crossing the border between ports of entry must affirmatively manifest a fear, either verbally or non-verbally, of returning to their home countries. Known as the "shout test," this requirement replaces the standard practice of CBP officers asking individuals about their fears to access credible fear proceedings.

The "shout test" places an unreasonable burden on individuals seeking asylum. It is subjective and disregards language barriers, trauma, and other factors that hinder communication, resulting in many valid asylum claims being ignored. This measure was first implemented under the Title 42 expulsions policy, where its effects on asylum seekers were widely documented. CGRS, together with its partners, interviewed at least 97 families that were expelled to border cities, revealing serious failures to protect asylum seekers. As our *"Manifesting" Fear At the Border* report documents, among the interviewed, more than half (51 families) stated that they had verbally expressed a fear of returning, while almost three-quarters (73 families) indicated they had shown a fear through non-verbal means.

Despite these expressions of fear, not a single family was referred for a fear screening, a requirement under CBP guidance. Instead, CBP officers dismissed, verbally abused, and sometimes completely ignored their attempts to communicate, telling them to "shut up" or asserting they had "no right" to an interview.

The "shout test", along with the disregard for procedural protections shown by CBP officers, has put vulnerable asylum seekers at even greater risk by returning them to conditions where they face kidnappings, violence, and death threats. For example, as detailed in our report, in one case, a Honduran mother and her child, having survived a 22-day kidnapping in Mexico, were expelled back without a fear screening despite their clear vulnerability.

III. RECOMMENDATIONS

The alarming situation of asylum seekers at the U.S.-Mexico border, as detailed in this submission and the related resources, exemplifies how restrictive border policies intensify the dangers asylum seekers and migrants face, particularly the risk of kidnappings. With the return of the Trump administration, we anticipate the likely reinstatement of more draconian border policies, which will exacerbate the humanitarian crisis at the border and result in tragic consequences, including family separations and migrant disappearances.

In light of these trends, this submission urges the Special Rapporteur on the human rights of migrants to consider including in his report the following recommendations for States to address the conditions that exacerbate dangers for asylum seekers, including kidnappings:

1. Lift restrictive policies that limit access to asylum and refrain from implementing measures aimed at deterring migration, as they exacerbate risks for asylum seekers and undermine their right to seek protection.

2. Eliminate procedural barriers such as app-based systems and "shout tests" that disproportionately hinder access to protection. Where technology is used as a tool to facilitate access, ensure it is optional and designed to address issues of discrimination, accessibility, and equity.

3. Ensure that border policies prioritize family unity and provide adequate safeguards against the dangers faced by migrants stranded at borders, including cartel violence and extortion.

4. Establish transparent oversight and accountability mechanisms for border enforcement practices to prevent abuse, protect vulnerable individuals, and ensure compliance with international human rights standards.