



USA: MANDATORY USE OF CBP ONE APPLICATION VIOLATES THE RIGHT TO SEEK ASYLUM

RESEARCH
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The individual's name has been hidden in the cover photograph.

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1. INTRODUCTION

Since March 20, 2020, the Centers for Disease Control and Prevention’s (CDC) Order, “Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists,” known as Title 42, has been in place at the United States’ southern border.¹ The Title 42 public health order allows the US Department of Homeland Security (DHS) to expel asylum-seekers arriving at the border if there is a “serious danger of the introduction of [a communicable] disease into the United States”.²

Title 42 is expected to end on May 11, 2023, in conjunction with the administration of US President Biden ending the national emergency related to the COVID-19 pandemic.³ On February 22, 2023, DHS and the US Department of Justice issued a notice of proposed rulemaking (NPRM) that aims to introduce new migration measures that will begin to apply immediately following the end of Title 42 and which will drastically change the way in which asylum-seekers can access international protection at the US’ southern border.⁴ On April 27, DHS and the US Department of State announced additional measures aimed at stemming regional migration by expanding humanitarian pathways to the United States, while committing to use harsh penalties against individuals who fail to qualify or avail themselves of alternative pathways.⁵

The NPRM applies to asylum-seekers who, after Title 42 ends and in the two-year period after the rule goes into effect, arrive at the southern land border of the United States “without authorization” and traveled through a third country that is a signatory to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.⁶ The NPRM stipulates that the asylum-seeker, or a member of their family with whom they are traveling, will be subject to a “rebuttable presumption” that they are ineligible for asylum unless:⁷

- They were provided authorization to travel to the United States pursuant to a DHS-approved parole process;
- They used the CBP One mobile application (CBP One) to schedule a time and place to present themselves at a port of entry, or they presented at a port of entry without using CBP

¹ Health and Human Services Department, “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 24 March 2020, <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>.

² U.S. Code, Title 42, <https://uscode.house.gov/browse/prelim@title42&edition=prelim>; American Immigration Lawyers Association, “Practice Pointer: Title 42 and Asylum Processing at the Southern Border”, AILA Doc. No. 22102512, 13 January 2023; <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-pointer-title-42-and-asylum-processing>.

³ The White House, Bill Signed: H.J.Res. 7, 10 April 2023, <https://www.whitehouse.gov/briefing-room/legislation/2023/04/10/bill-signed-h-j-res-7/>.

⁴ Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, <https://www.regulations.gov/document/USCIS-2022-0016-0001>.

⁵ Department of Homeland Security, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration, 27 April 2023, <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>.

⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <https://www.refworld.org/docid/3be01b964.html>; UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, <https://www.refworld.org/docid/3ae6b3ae4.html>.

⁷ Unaccompanied children are categorically exempted from the NPRM. There are three grounds for asylum-seekers to overcome the “rebuttable presumption” that they are ineligible for asylum: they faced an acute medical emergency; they faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or they satisfied the definition of “victim of a severe form of trafficking in persons.” Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, <https://www.regulations.gov/document/USCIS-2022-0016-0001>; DHS, Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways”, 21 February 2023, pp. 11723-24, 11750, <https://www.dhs.gov/news/2023/02/21/fact-sheet-notice-proposed-rulemaking-circumvention-lawful-pathways>.

One and established the DHS scheduling system (currently the CBP One app) was not possible for the asylum-seeker to access or use; or,

- They applied for and were denied asylum in a third country en route to the United States.⁸

In accordance with the NPRM, once Title 42 is terminated, asylum-seekers will be required to use the CBP One application to schedule a time to arrive at participating ports of entry along the southern border in order to present their asylum claims, unless they are able to demonstrate “by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle”.⁹ Asylum-seekers who arrive at ports of entry without having previously scheduled an appointment through CBP One and who are unable to prove that it was not possible to access or use the application, will be presumed to be ineligible for asylum.¹⁰

Amnesty International considers that the mandatory use of CBP One as the exclusive manner of entry into the United States to seek international protection violates international human rights law.

2. CBP ONE MOBILE APPLICATION

CBP One is a mobile application launched by U.S. Customs and Border Control (CBP) on October 28, 2020.¹¹ While the application was originally available for specific migration purposes, such as for “land travelers to submit their traveler information in advance prior to their border crossing into the United States [and] air travelers to request an inspection of biological and agriculture products upon their air arrival into the U.S.”, additional uses have been added over time.¹² For example, CBP One was previously used by non-governmental organizations to submit information on behalf of individuals seeking humanitarian exemptions to Title 42 and to verify whether or not individuals were enrolled in the Migrant Protection Protocols (MPP); and is currently used by Ukrainians and Venezuelans granted authority to enter the United States through humanitarian parole programs. Individuals applying for the humanitarian parole programs for Cubans, Haitians, Nicaraguans and Venezuelans must also do so through CBP One.¹³

With regards to asylum-seekers, as of January 18, 2023, individuals seeking international protection in the United States from countries that were subject to Title 42 expulsions were instructed to use CBP One to seek an exemption to Title 42. Asylum-seekers, particularly those from Cuba, Haiti, Nicaragua and Venezuela, were instructed to use CBP One to schedule appointments to present themselves at participating ports of entry to request asylum; however, the use of the application was not mandatory

⁸ Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, <https://www.regulations.gov/document/USCIS-2022-0016-0001>; DHS, Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways”, 21 February 2023, pp. 11723 & 11750, <https://www.dhs.gov/news/2023/02/21/fact-sheet-notice-proposed-rulemaking-circumvention-lawful-pathways>.

⁹ Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, pp. 11720 & 11723, <https://www.regulations.gov/document/USCIS-2022-0016-0001>.

¹⁰ Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, <https://www.regulations.gov/document/USCIS-2022-0016-0001>. According to the NPRM, “Individuals who schedule a time to arrive at a port of entry using CBP One, present themselves at that time, and are processed into the United States, would not be subject to the rebuttable presumption on asylum eligibility created by this proposed rule, whether in an application for asylum or during a credible fear screening.”

¹¹ U.S. Customs and Border Protection, “CBP One™ Mobile Application,” 10 April 2023, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹² U.S. Customs and Border Protection, “CBP One™ Mobile Application,” 10 April 2023, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹³ U.S. Citizenship and Immigration Services (USCIS), “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans,” 22 March 2023, <https://www.uscis.gov/CHNV>.

by policy.¹⁴ However, in practice, use of the CBP One app is the only way for asylum-seekers from some nationalities to seek asylum and there have been numerous reports of individuals waiting prolonged periods of time for CBP One appointments.¹⁵

Starting May 10, 2023, approximately 1,000 new appointments will be made available for 23 hours each day through CBP One.¹⁶ The application is currently only available in English, Spanish and Haitian Creole.¹⁷ Asylum-seekers must be physically located within central or northern Mexico to both request and schedule an appointment via the application. Appointments are being offered at eight ports of entry: Nogales, Brownsville-Matamoros, Eagle Pass-Piedras Negras, Hidalgo-Reynosa, Laredo-Nuevo Laredo, El Paso (Paso del Norte)-Ciudad Juárez, Calexico-Mexicali, and San Ysidro-Tijuana.¹⁸

The NPRM establishes the mandatory use of CBP One in order to be processed at participating ports of entry to seek asylum.¹⁹ The process for requesting appointments through the application is as follows:

For all individuals accessing CBP One on a mobile device and who are located within the CBP-defined proximity to the U.S.-Mexico border, once the individual has entered all biographic information as well as a facial photograph for themselves, spouse and/or children, the user is required to select a desired POE and desired date of arrival, and desired time of arrival. [...]

At the time the user submits information to CBP via the CBP One™ mobile application, the GPS on his or her device is pinged by CBP One. CBP One collects and sends the latitude and longitude coordinates to CBP for analytical purposes (e.g., to determine where the user is submitting the advance arrival information from) and to monitor irregularities (e.g., receiving multiple submissions from the same phone), not to conduct surveillance or track user movement. If a user submits information using a web browser, upon submission CBP will collect the Internet Protocol address from the device to monitor for irregularities (e.g., receiving multiple submissions from the same IP address). CBP is implementing geofencing capabilities to limit use of CBP One™ to users within a defined proximity to the United States border.²⁰

While CBP One allows asylum-seekers to select a desired port of entry and date/time of arrival, “this request does not guarantee that an individual will be processed within a particular time frame; in all cases, CBP will inspect and process undocumented individuals in accordance with the port of entry’s capability to do so”.²¹

¹⁴ U.S. Customs and Border Protection, “CBP One™ Mobile Application”, 10 April 2023, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>; Department of Homeland Security, “Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border”, DHS Reference No. DHS/CBP/PIA-076, 19 January 2023, p. 5, https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.

¹⁵ Twitter, Jack Herrera, 21 March 2023, <https://twitter.com/jherrerr/status/1638214778115047425>.

¹⁶ U.S. Customs and Border Protection, “CBP Makes Changes to CBP One App”, 5 May 2023, <https://www.cbp.gov/newsroom/national-media-release/cbp-makes-changes-cbp-one-app>.

¹⁷ U.S. Customs and Border Protection, “CBP One™ Mobile Application”, 10 April 2023, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹⁸ U.S. Customs and Border Protection, “CBP Makes Changes to CBP One App”, 5 May 2023, <https://www.cbp.gov/newsroom/national-media-release/cbp-makes-changes-cbp-one-app>.

¹⁹ DHS has yet to confirm whether, following the termination of Title 42, appointments through CBP One will be available at all ports of entry along the southern border.

²⁰ Department of Homeland Security, “Privacy Impact Assessment for CBP One™”, DHS Reference No. DHS/CBP/PIA-068, 19 February 2021, p. 19, <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>; Department of Homeland Security, “Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border”, DHS Reference No. DHS/CBP/PIA-076, 19 January 2023, p. 6, https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.

²¹ Department of Homeland Security, “Privacy Impact Assessment for CBP One™”, DHS Reference No. DHS/CBP/PIA-068, 19 February 2021, p. 19, <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>; Department of Homeland Security, “Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border”, DHS Reference No. DHS/CBP/PIA-076, 19 January 2023, p. 8, https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.

3. MANDATORY USE OF CBP ONE TO SEEK ASYLUM VIOLATES THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

All individuals have the universal human right to seek and enjoy asylum from persecution. Under domestic²² and international law,²³ the United States is obligated to provide access to individualized and fair assessments of all requests for protection by asylum-seekers looking for safety at the border, in a way that does not discriminate based on manner of entry or immigration status.²⁴ According to the United Nations High Commissioner for Refugees (UNHCR), “access to a fair and efficient refugee status determination procedure is an essential element in the full and inclusive application of the 1951 Convention and its 1967 Protocol, and indeed a safeguard to protect refugees and asylum-seekers from *refoulement*”.²⁵

Following the termination of Title 42, use of CBP One will be mandatory for asylum-seekers to schedule appointments to be received at ports of entry to present their asylum claims. While Amnesty International recognizes that innovations such as electronic entry management systems could potentially provide for safe transit and more orderly border access, programs like CBP One cannot be used as the exclusive manner of entry into the United States to seek international protection.²⁶

Access to territory is a necessary requirement for realizing the right to seek asylum.²⁷ Once asylum-seekers have been able to access territory, they must also be able to present their claims by accessing refugee status determination procedures that contain certain basic safeguards.²⁸ UNHCR has stated that “while it is left to each State to establish the procedure most appropriate to that State’s constitutional and administrative structure, asylum procedures must be conducted in full respect of due process standards”.²⁹ Further, the way in which the CBP One application works – by forcing asylum-seekers to install it on their mobile devices and then collecting data about their location

²² The U.S. Code safeguards the right to seek asylum in the United States “whether or not at a designated port of arrival”. See: U.S. Code, 8 U.S.C. § 1158 and §1225, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

²³ The United States is State party to the 1967 United Nations Protocol Relating to the Status of Refugees, and is therefore bound to comply, with the obligations deriving from the 1967 Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Congress passed the Refugee Act in 1980 in a sweeping effort to bring the United States’ domestic laws in line with its international obligations and thereby provide additional assurances and protections to asylum-seekers and refugees. See: Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980), <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>; *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 672 (9th Cir. 2021) (“To ... implement the country’s new treaty commitments, Congress passed the Refugee Act of 1980”), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf>.

²⁴ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, pp. 4-5, <https://www.refworld.org/pdfid/6417e6674.pdf>.

²⁵ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, p. 3, <https://www.refworld.org/pdfid/6417e6674.pdf>.

²⁶ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, p. 5, <https://www.refworld.org/pdfid/6417e6674.pdf>.

²⁷ UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights, 51246/17, 5 February 2018, para. 3.1.5, <https://www.refworld.org/docid/5a9d6e414.html>.

²⁸ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/1P/4/ENG/REV.4, February 2019, p. 42, <https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

²⁹ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/1P/4/ENG/REV.4, February 2019, p. 42, <https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

through the application – could be considered as the state’s authorities, via CBP, exercising their jurisdiction or extending their jurisdiction past the physical land border, or at the very least, as a clear exercise of state authority over individuals who are not physically within the boundaries of territory. Consequently, due to this mandatory subjection to state authority, the United States is extending its responsibility to ensure that asylum-seekers are provided with fair and individualized screenings and due process rights with regards to the refugee status determination procedure – a process which is meant to *formally recognize* individuals who are refugees, not to grant status through the procedure.

Additionally, the principle of non-refoulement is a fundamental norm of customary international human rights law, in addition to having specific obligations related to refugees and asylum-seekers in line with refugee law. This principle is applicable wherever a State exercises jurisdiction or where individuals are subject to the effective authority or control of the state, including at the border.³⁰ Denying access to territory for the purpose of refugee status determination may result in a breach of the principle of *non-refoulement*. The mandatory use of CBP One as the exclusive means of accessing protection by conditioning access to asylum on appearing at a port of entry with a prior appointment – or the ability to demonstrate by preponderance of the evidence that it was not possible to access or use the application – violates international law.³¹

UNHCR has also expressed concern that the operation of the presumption of ineligibility established in the NPRM, in conjunction with the exceptions – parole programs, use of CBP One and applying for asylum in third countries during transit – amounts to a penalization of irregular entry in violation of Article 31(1) of the 1951 Refugee Convention.³² The 1951 Convention “recognizes that the seeking of asylum can require refugees to breach immigration rules” and indicates that asylum-seekers should not be subject to specific requirements or suffer penalties or discrimination for this reason.³³ Article 31(1) effectively prohibits discrimination between groups of asylum-seekers based on their manner of entry.³⁴ According to UNHCR, the differential treatment of groups of asylum-seekers, such as those who arrive at ports of entry and those who enter irregularly or who arrive at a port of entry without having secured an appointment through CBP One, is a denial of the latter group’s right to seek asylum.³⁵ Further, making unlawful entry a possible bar to asylum eligibility is a “penalty that carries potentially serious consequences for someone seeking international protection, undermines the right to asylum and risks violations of the principle of *non-refoulement*”.³⁶

³⁰ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, paras. 24, 26, 32-43, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy, March 2010, paras. 4(1)(1)-4(2)(3), <http://www.unhcr.org/refworld/docid/4b97778d2.html>; UNHCR, Note on the Principle of Non-Refoulement, November 1997, part E, <http://www.refworld.org/docid/438c6d972.html>; UNHCR, Executive Committee of the High Commissioner’s Programme, Non-Refoulement No. 6 (XXVIII) - 1977, 12 October 1977, No. 6 (XXVIII), para. C, <https://www.refworld.org/docid/3ae68c43ac.html>.

³¹ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, pp. 13 & 29, <https://www.refworld.org/pdfid/6417e6674.pdf>.

³² UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, p. 13, <https://www.refworld.org/pdfid/6417e6674.pdf>.

³³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <https://www.refworld.org/docid/3be01b964.html>.

³⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <https://www.refworld.org/docid/3be01b964.html>.

³⁵ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, pp. 13-14, <https://www.refworld.org/pdfid/6417e6674.pdf>.

³⁶ UNHCR, “Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): “Circumvention of Lawful Pathways”, CIS No. 2736-22, DHS Docket No. USCIS 2022-0016, A.G. Order No. 5605-2023, 20 March 2023, pp. 13-14, <https://www.refworld.org/pdfid/6417e6674.pdf>.

While the NPRM does include an exemption for individuals who are not able to access or use the application due a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle,³⁷ it is unclear how this will be determined at the border and if border agents will have discretion in these decisions. Further, it is deeply concerning that there are no similar exemptions for populations with circumstantial vulnerabilities such as LGBTI individuals, families with small children, or others such as Black, Brown and Indigenous populations that may face particular risk waiting in Mexico. In this same sense, placing the burden on asylum-seekers to demonstrate that they were unable to access or use the application could preclude those individuals' access to international protection and ultimately result in *refoulement*.

Amnesty International further considers that the use of the CBP One application as the sole means of making an asylum appointment at the southwest border is akin to the previous “metering” policy³⁸ in that asylum-seekers are now once again forced to sign up for appointments at ports-of-entry to access asylum.

4. PRIVACY, DISCRIMINATION AND SURVEILLANCE CONCERNS RELATED TO USE OF CBP ONE APPLICATION BY ASYLUM-SEEKERS

The former United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, has expressed that CBP One's use of facial recognition and GPS technologies, and cloud storage, to collect data on asylum-seekers prior to their entry into the United States raises serious privacy and non-discrimination concerns.³⁹

When using CBP One to request an appointment at a port of entry, asylum-seekers must upload a selfie to the application. According to CBP:

CBP One uses the selfie image for five distinct purposes: (1) to conduct one-to-one (1:1) facial comparison against the passport photograph previously uploaded to the [CBP Advance Travel Authorization (ATA)] mobile application from the eChip; (2) to conduct one-to-many (1:n) vetting against derogatory photographic holdings for law enforcement and national security concerns as part of the ATA vetting process; (3) to generate a new gallery of ATA participants for facial comparison when ATA participants arrive at a port of entry; (4) to conduct 1:n identity verification once the

³⁷ Regulations.gov, Proposed Rule, Circumvention of Lawful Pathways, USCIS-2022-0016-0001, 22 February 2023, <https://www.regulations.gov/document/USCIS-2022-0016-0001>; DHS, Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways”, 21 February 2023, pp. 11720 & 11723, <https://www.dhs.gov/news/2023/02/21/fact-sheet-notice-proposed-rulemaking-circumvention-lawful-pathways>.

³⁸ Under the metering policy, by which tens of thousands of migrants and asylum-seekers were forced to wait in violent border regions in northern Mexico – sometimes for months before they were permitted to request asylum – and without access to adequate accommodations, food, healthcare, legal representation, or physical security from abuses by State and non-State actors. See: Amnesty International, *Americas: Pushback practises and their impact on the human rights of migrants and refugees*, Amnesty International Submission to the United Nations (UN) Special Rapporteur on the human rights of migrants, February 2021, 8 February 2021, AMR 01/3658/2021, <https://www.amnesty.org/en/documents/amr01/3658/2021/en/>; Amnesty International, ‘You Don’t Have Any Rights Here’: *Illegal Pushbacks, Arbitrary Detention, and Ill-treatment of Asylum-Seekers in the United States*, 11 October 2018, AMR 51/9101/2018, p. 11, <https://www.amnesty.org/en/documents/amr51/9101/2018/en/>; Amnesty International, *Facing Walls: USA and Mexico Violations of the Rights of Asylum-seekers*, 15 June 2017, AMR 01/6426/2017, <https://www.amnesty.org/en/documents/amr01/6426/2017/en/>.

³⁹ UNGA, Racial and xenophobic discrimination and the use of digital technologies in border and immigration enforcement, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, A/HRC/48/76, 17 December 2021, para. 47, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4876-racial-and-xenophobic-discrimination-and-use-digital>.

participants arrive at the port of entry; and (5) to conduct 1:n vetting against known derogatory photographs for assistance in CBP's admissibility determination.⁴⁰

Further, prior to an asylum-seeker's arrival at a port of entry, CBP "may use the information submitted by the individual to conduct system checks to identify individuals who may pose a risk to national security, border security or public safety".⁴¹ These checks are identical to the checks conducted by CBP during the primary or, in some cases, secondary inspection process.

From purpose 2 and 5 listed under CBP One's privacy assessment, it is clear that "derogatory photographic holdings" is not a specific categorization, failing to disclose what agencies are the holders of the photographic holders, and under which specific concerns.⁴² It is concerning that the privacy assessment does not clarify what threshold must be met for such a comparison to occur. It neither clarifies whether the people whose photographs are kept within these holdings have consented to having their faces scanned against input facial images of asylum seekers. Similarly, it is entirely unclear whether asylum-seekers have consented to having their faces transferred between various agencies. While law enforcement and national security concerns can be legitimate, the criteria under which possible infringements on the right to privacy can occur must be legitimate, necessary and proportional.

It is also currently unclear from the privacy assessment how 1:n facial recognition functionally assists in CBP's admissibility determination; what are the conditions that dictates that 1:n facial recognition is strictly necessary and proportional to achieving these goals? The privacy assessment also remains unclear about whether ATA participants are simply compared against existing images taken of them upon first arrival, or whether this is compared against larger "derogatory photographic holdings".

Facial recognition technology for identification entails widespread bulk monitoring, collection, storage, analysis or other use of material and collection of sensitive personal data (biometric data). Moreover, facial recognition systems are trained with image recognition algorithms that rely on vast amounts of individuals' faces as input data to improve the system's 'success rate', without the individuals' knowledge or consent, and such an action cannot be 'undone'. Even where input data or training data is deleted, the faces captured by the system have been used to train a facial recognition system, likely without the individual's knowledge or control. Such practices cannot satisfy the requirements of necessity and proportionality under international human rights law and as such violate the right to privacy.

The United States must ensure that it is not engaging in mass surveillance and discriminatory targeted surveillance, which 1:n facial recognition constitutes. As Amnesty International has documented previously, this constitutes a violation of the right to privacy, and the right to equality and non-discrimination in particular.⁴³

The human rights harms of facial recognition technology are not experienced equally and raise well-known discrimination risks. For instance, certain groups may be disproportionately represented in facial image datasets due to discriminatory policing or other practices. Moreover, it is well-established that facial recognition technology systems perform unequally depending on key characteristics including skin color, ethnicity and gender. These discrimination risks have been highlighted by various UN experts,⁴⁴ as well as agencies of the US Government. The US Department of Commerce federal agency the National Institute of Standards and Technology (NIST) measured the effects of race, age

⁴⁰ Department of Homeland Security, "Privacy Impact Assessment for CBP One™", DHS Reference No. DHS/CBP/PIA-068, 19 February 2021, p. 24, <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>.

⁴¹ Department of Homeland Security, "Privacy Impact Assessment for CBP One™", DHS Reference No. DHS/CBP/PIA-068, 19 February 2021, pp. 19-20, <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>.

⁴² Department of Homeland Security, "Privacy Impact Assessment for CBP One™", DHS Reference No. DHS/CBP/PIA-068, 19 February 2021, p. 24, <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>.

⁴³ Amnesty International, Ban the Scan, <https://banthescan.amnesty.org/nyc/>.

⁴⁴ Committee on the Elimination of Racial Discrimination (CERD), Draft General Recommendation No. 36 on preventing and combating racial profiling, 14 May 2019, para. 23, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-36-2020-preventing-and>.

and sex on leading facial recognition technology systems used in the US and found that “the majority of face recognition algorithms exhibit demographic differentials”.⁴⁵ The agency “found empirical evidence for the existence of demographic differentials in face recognition algorithms that [it] evaluated”. Echoing the Gender Shades results, “the NIST study measured higher false positives rates in women, African Americans, and particularly in African American women.”⁴⁶ Such discrepancies mean that certain groups of asylum seekers may be at higher risk of being incorrectly misidentified or matched against “derogatory” photographs and consequently refused the right to asylum.

5. CURRENT FLAWS IN THE FUNCTIONING OF THE CBP ONE APPLICATION

Currently, CBP One is available to asylum-seekers to schedule appointments at participating ports of entry; its use will not become mandatory until Title 42 is terminated on May 11, 2023. Nevertheless, since CBP One’s use beginning in January 2023 as the primary method for asylum-seekers humanitarian exemptions to Title 42 to access ports of entry, Amnesty International and other organizations have received information regarding numerous problems with the application. There are accessibility hurdles given that asylum-seekers must be literate, speak either English, Spanish or Haitian Creole, have access to a cell phone with data or internet service, and have basic knowledge of the new system.⁴⁷

Members of the U.S. Congress, asylum-seekers and civil society organizations have reported numerous difficulties in obtaining appointments through the application including frequent crashes, looping error messages, facial comparison flaws – which has a disproportionate impact on racialized individuals⁴⁸ – the early morning release times of new appointments and slow internet at shelters.⁴⁹ There are also an insufficient number of appointments compared to the number of waiting individuals which has left asylum-seekers stranded at the U.S.-Mexico border. Some asylum-seekers are attempting to secure appointments in other cities which involves security and financial costs.⁵⁰ Further, large family groups are experiencing even more difficulties in making appointments, which has resulted in families separating themselves to improve their chances or deciding to send their children as unaccompanied minors across the border.⁵¹ Most significantly, the lack of sufficient

⁴⁵ U.S. National Institute of Standards and Technology: ‘Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects’, Patrick Grother, Mei Ngan and Kayee Hanaoka, NISTIR 8280, December 2019, <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>.

⁴⁶ Testimony from Dr Charles H. Romine, Director of the National Institute of Standards and Technology, before US Congress Committee on Oversight and Reform, 15 January 2020, <https://www.nist.gov/speech-testimony/facial-recognition-technology-part-iii-ensuring-commercial-transparency-accuracy>.

⁴⁷ Robert Strauss Center for International Security and Law at the University of Texas at Austin, Asylum Processing at the U.S.-Mexico Border: February 2023, p. 2, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>.

⁴⁸ The Guardian, “Facial recognition bias frustrates Black asylum applicants to US, advocates say”, 8 February 2023, <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>

⁴⁹ Robert Strauss Center for International Security and Law at the University of Texas at Austin, Asylum Processing at the U.S.-Mexico Border: February 2023, p. 2, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>; Immigration Impact, “CBP One is riddled with flaws that make the app inaccessible to many asylum seekers”, 28 February 2023, <https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/>; Congress of the United States, House of Representatives, 13 March 2023, https://chuygarcia.house.gov/sites/evo-subsites/chuygarcia.house.gov/files/evo-media-document/cbponeletter_final.pdf; BBC, “At US border, tech issues plague new migrant applications”, 8 March 2023, <https://www.bbc.com/news/world-us-canada-64814095>; The Washington Post, “Desperate migrants seeking asylum face a new hurdle: Technology”, 11 March 2023, <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.

⁵⁰ Robert Strauss Center for International Security and Law at the University of Texas at Austin, Asylum Processing at the U.S.-Mexico Border: February 2023, p. 3, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>; myRGV.com, “Families consider separation to seek asylum as they face limited appointments through CBP app”, 21 February 2023, <https://myrgv.com/local-news/2023/02/21/families-consider-separation-to-seek-asylum-as-they-face-limited-appointments-through-cbp-app>.

⁵¹ Robert Strauss Center for International Security and Law at the University of Texas at Austin, Asylum Processing at the U.S.-Mexico Border: February 2023, p. 3, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>;

appointments means that some asylum-seekers may never be able to make an appointment through the application and thus, under the NPRM, would remain ineligible for asylum in the United States.

Additionally, while one of the stated aims of the NPRM is to avoid migrants and asylum-seekers “waiting in long lines at the border for unknown periods of time in conditions that could put them at risk”,⁵² the insufficient number of appointments available through CBP One is resulting in exactly this, as asylum-seekers find themselves stranded at the border where they face unstable living conditions and security risks.⁵³ Civil society organizations have reported that Black, Brown, LGBTI and Indigenous asylum-seekers experience additional challenges and targeted discrimination in Mexican border towns.⁵⁴ In this same sense, studies have found that the use of other so-called “smart-border” technologies along the U.S.-Mexico border have actually increased asylum-seeker and migrant deaths and pushed migration routes towards more dangerous environments.⁵⁵

6. RECOMMENDATIONS

While Amnesty International welcomes the Biden Administration’s interest in adopting measures to ensure more efficient processing of asylum claims, the mandatory use of the CBP One application as the exclusive manner of entry into the United States to seek international protection violates international human rights law.

Amnesty International urges the Biden Administration to immediately abandon the mandatory use of the CBP One application following the termination of Title 42, and to refrain from requiring the use of facial recognition-enabled technology for asylum seekers.

The USA must immediately cease the deployment of facial recognition technologies for identification (1:n) of asylum-seekers. Further, it must ensure that any rights violations stemming from the use of unnecessary and disproportionate artificial intelligence-driven surveillance tools, such as facial recognition, are investigated and remedied effectively.

Amnesty International calls on the Biden Administration to invest in systems to process asylum-seekers at the border without delay or detention, and to provide them with support to pursue their asylum claims in U.S. communities with access to housing, social services and legal supports.

myRGV.com, “Families consider separation to seek asylum as they face limited appointments through CBP app”, 21 February 2023, <https://myrgv.com/local-news/2023/02/21/families-consider-separation-to-seek-asylum-as-they-face-limited-appointments-through-cbp-app/>; Congress of the United States, House of Representatives, 13 March 2023, https://chuygarcia.house.gov/sites/evo-subsites/chuygarcia.house.gov/files/evo-media-document/cbponeletter_final.pdf.

⁵² Federal Register, Department of Homeland Security & Department of Justice, Circumvention of Lawful Pathways, Docket No: USCIS 2022-0016, p. 33, <https://public-inspection.federalregister.gov/2023-03718.pdf>.

⁵³ Robert Strauss Center for International Security and Law at the University of Texas at Austin, *Asylum Processing at the U.S.-Mexico Border: February 2023*, p. 3, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>; Amnesty International, Amnesty International statement for hearing on “Examining the Human Rights and Legal Implications of DHS’s ‘Remain in Mexico’ Policy”, 18 November 2019, <https://www.amnestyusa.org/wp-content/uploads/2019/11/11.18.2019-Amnesty-International-Statement-for-House-HSC-Border-Security-Subcommittee-Hearing-on-RIM-1.pdf>.

⁵⁴ Robert Strauss Center for International Security and Law at the University of Texas at Austin, *Asylum Processing at the U.S.-Mexico Border: February 2023*, p. 3, <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>.

⁵⁵ UNGA, Racial and xenophobic discrimination and the use of digital technologies in border and immigration enforcement, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, A/HRC/48/76, 17 December 2021, para. 15, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4876-racial-and-xenophobic-discrimination-and-use-digital>.

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