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IMPACT OF THE EXECUTIVE ORDERS ON HUMAN RIGHTS IN THE UNITED STATES: STATUS OF THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT

Hearing before the Inter-American Commission on Human Rights
161st Ordinary Period of Sessions
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> The implementation of [President Trump's] executive orders puts migrants and refugees at grave risk of violation of their rights to non-discrimination, personal liberty, due process, judicial protection, special protection for families and children, the right to seek and receive asylum, the principle of *non-refoulement*, the prohibition of cruel, inhuman and degrading treatment, and the right to freedom of movement, among others.
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> - Press Release, IACHR, *IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States* (Feb. 1, 2017)

Under the Safe Third Country Agreement between the United States and Canada[1] ("STCA"), Canada can refuse to hear claims by asylum seekers entering Canada from the United States based on the premise that the United States is a "safe country of asylum" for refugee claimants. However, the United States is not a safe country of asylum for individuals fleeing persecution and violence. On January 25, 2017, President Trump issued two executive orders on immigration and border enforcement, and the Secretary of the Department of Homeland Security ("DHS") issued memoranda implementing the executive orders on February 20, 2017.[2] These executive orders and implementing memoranda place refugees at grave risk of violation of their human rights, the principle of *non-refoulement*, and the prohibition against cruel, inhuman and degrading treatment.

In particular, the executive orders expose asylum seekers to a greatly expanded system of mass incarceration[3] and of expedited removal proceedings without due process,[4] as well as an increase

[1] Agreement between the Government of Canada and the Government of the United States of America: For cooperation in the examination of refugee status claims from nationals of third countries (Dec. 5, 2002), *available at* http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp [hereinafter "STCA"].
[2] The two executive orders on immigration are titled "Enhancing Public Safety in the Interior of the United States" (hereinafter "Interior Enforcement Order") and "Border Security and Immigration Enforcement Improvements" (hereinafter "Border Enforcement Order"). The DHS implementation memoranda are titled "Enforcement of the Immigration Laws to Serve the National Interest" (hereinafter "DHS Memo on Interior Enforcement") and "Implementing the President's Border Security and Immigration Enforcement Improvement Policies" (hereinafter "DHS Memo on Border Enforcement").
[3] Under Section 2(b) of the Border Enforcement Order, individuals may now be detained merely "on suspicion" of violating federal or state law, including laws against unauthorized entry. In addition, Section 11(d) of the Order mandates restrictions on the authority to grant parole (a release from detention), limiting it to cases involving "urgent humanitarian reasons or significant public benefit."

in the number of agents with immigration functions, who may exercise their authority with impunity[5] and in the aggressive prosecution of unauthorized entry.[6] The executive orders also drastically restrict access to asylum by mandating the return of asylum seekers to Mexico pending proceedings[7] and by calling for the construction of a wall on the U.S.-Mexico border.[8]

The orders are inconsistent with international standards for refugee protection, including provisions of the Refugee Convention that prohibit the imposition of penalties for illegal entry[9] and safeguard freedom of movement for refugees.[10] The return of asylum seekers to Mexico also violates the principle of *non-refoulement* under domestic and international law, because of Mexico's well-documented deficiencies in providing asylum protection. Furthermore, if asylum seekers who are not Mexican nationals are turned back to Mexico, they will be at a high risk of being returned to the countries from which they originally fled persecution.[11]

Implementation of these executive orders will also undermine the human rights of asylum seekers. As the Commission has previously noted, the generalized detention of asylum seekers contravenes a number of provisions in the American Declaration of the Rights and Duties of Man ("American Declaration"), including the right to personal liberty and the prohibition of

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[4] Section 11(c) of the Border Enforcement Order directs DHS to expand expedited removal to the furthest extent possible, making individuals throughout the country who entered without proper documentation and cannot prove continuous presence over the past two years subject to expedited removal proceedings. The DHS Memo on Border Enforcement further states that all individuals who are determined by immigration officers to be inadmissible will be removed "without further hearing or review."

[5] Section 8 of the Interior Enforcement Order provides state and local officials, not just trained federal agents, with the authority to apprehend and detain immigrants, functions usually reserved for immigration officers. The DHS Memo on Border Enforcement instructs the Director of Immigration and Customs Enforcement ("ICE") and the Commissioner of Customs and Border Protection ("CBP") "to engage immediately with all willing and qualified law enforcement jurisdictions" for the purpose of entering into enforcement agreements with DHS.

[6] Section 5 of the Interior Enforcement Order calls for criminal prosecution and detention of all persons with immigration violations, including people who enter without inspection.

[7] In section 7 of the Border Enforcement Order, President Trump directs DHS to ensure that individuals entering through a land border "are returned to the territory from which they came pending a formal removal proceeding." It is not clear how this will be implemented, since Mexico has informed the Trump Administration that it will not accept non-Mexican nationals who are turned back from the United States to Mexico. *See* Patrick J. McDonnell, *Mexico rejects U.S. plan to deport Central Americans to Mexico*, L.A. TIMES (Feb. 27, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-mexico-rejects-u-s-plan-to-deport-1487988401-htmlstory.html.

[8] Section 2(a) Border Enforcement Order.

[9] Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, Art. 31.

[10] *Id*. Art. 32(2).

[11] The Washington Office on Latin America released a report in October 2016 documenting Mexico's failure to properly screen migrants who could qualify for protection. *See* Ximena Suárez Enriquez et al., *A Trail of Impunity: Thousands of Migrants in Transit Face Abuses amid Mexico's Crackdown*, WASHINGTON OFFICE ON LATIN AMERICA (Oct. 20, 2016), https://www.wola.org/analysis/a-trail-of-impunity/?utm_source=WOLA+Mailing+List&utm_campaign=193d673dca-9_19_16_Trail_of_Impunity_ENGLISH9_19_2016&utm_medium=email&utm_term=0_54f161a431-193d673dca-133900697#_edn13. Based on current deportation statistics from Mexico, it is likely that many of these asylum seekers will be deported back to the countries they fled, without any meaningful opportunity to apply for asylum there or in the United States prior to deportation. *See* Washington Office on Latin America, *Mexico Now Detains More Central American Migrants than the United States* (June 11, 2015), www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/ (last visited Feb. 22, 2017).

detention for non-fulfillment of civil obligations (Articles I and XXV), the right to due process (Article XXVI), and the protection of family life (Articles V, VI and VII).[12] The Commission has also noted that the executive orders place migrants and refugees at grave risk of violation of their right to non-discrimination and to seek asylum under Article XXVII of the American Declaration.[13]

Although further fact-finding is needed, academics, advocates, lawyers, and journalists across the United States and Canada have started to document the negative impact of the executive orders and implementing memoranda, including the pervasive climate of fear and impunity of immigration enforcement in the aftermath of the election.[14]

Recent reports of heightened immigration enforcement measures include:

- Arrests of over six hundred immigrants in eleven states in a single week in February by Immigration and Customs Enforcement ("ICE") agents,[15] including during routine ICE appointments.[16] DHS Secretary John Kelly stated that about 75 percent of those arrested had criminal convictions.[17] If this is the case, it means that about 170 people did not.
- According to ICE, from the reactivation of the Secure Communities Program via the Interior Enforcement Order[18] on January 25, 2017 through March 10, 2017, more than 3,730 "convicted criminals" were removed through the Secure Communities Program. Given the expansive definition of "criminal" adopted by the administration, it is difficult to know how many of the deportations were based solely on misdemeanors or immigration violations. Further fact-finding is necessary to understand this number.

[12] Press Release, IACHR, *IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States* (Feb. 1, 2017), *available at* http://oas.org/en/iachr/media_center/PReleases/2017/008.asp.
[13] *Id.*
[14] *See, e.g.*, David A. Martin, *How Trump's immigration enforcement push is a serious step backwards: It will feed confrontation, not cooperation, with localities*, NEW YORK DAILY NEWS (Feb. 23, 2017), http://www.nydailynews.com/opinion/trump-immigration-enforcement-push-serious-step-article-1.2980574; Peter L. Markowitz, *Understanding what makes Trump's immigration orders truly chilling*, NEW YORK DAILY NEWS (Feb. 24, 2017), http://www.nydailynews.com/opinion/trump-chilling-immigration-orders-article-1.2981758; Human Rights First, *Asylum Under Threat: Impact of President Trump's Immigration Executive Orders and the Department of Homeland Security's Memoranda on Asylum Seekers* (Feb. 2017), http://www.humanrightsfirst.org/sites/default/files/hrf-asylum-under-threat.pdf; Nick Robins-Early, *Canada Debates Whether the U.S. is still a Safe Place for Refugees*, HUFFINGTON POST (Feb. 15, 2017), http://www.huffingtonpost.com/entry/canada-us-refugee-agreement_us_58a1f8dfe4b03df370d8ebc1.
[15] Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. in One Week*, NEW YORK TIMES (Feb. 12, 2017), https://www.nytimes.com/2017/02/12/nyregion/immigration-arrests-sanctuary-city.html.
[16] *See, e.g.*, Nicholas Kulish, Caitlin Dickerson & Liz Robbins, *Reports of Raids Have Immigrants Bracing for Enforcement Surge*, NEW YORK TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/immigration-raids-enforcement.html; Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her*, NEW YORK TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html.
[17] Camila Domonoske, *75 Percent of Immigration Raid Arrests Were for Criminal Convictions, DHS Says*, NPR (Feb. 13, 2017), https://ww2.kqed.org/news/2017/02/13/75-percent-of-immigration-raid-arrests-were-for-criminal-convictions-dhs-says/.
[18] Section 10 of the Interior Enforcement Order calls for the reinstatement of the Secure Communities program under which the fingerprints of individuals in the custody of a local law enforcement agency were shared with DHS to check against immigration databases for removability. *See* U.S. Immigration and Customs Enforcement, *Secure Communities*, https://www.ice.gov/secure-communities.

- At least two individuals with Deferred Action for Childhood Arrivals ("DACA") were arrested during enforcement operations.[19]
- ICE agents swept up immigrants without any criminal record or prior deportation order in "collateral arrests" when agents came to homes looking for other people.[20]
- Undocumented immigrants were held in detention even after criminal charges were dropped, and more asylum seekers were kept in detention pending adjudication of their claims than before the orders.[21]
- There are reports of abuses committed by U.S. Customs and Border Protection agents in the aftermath of the executive orders, such as the denial of entry of a Canadian church group,[22] the searching of cell phones of U.S. citizens,[23] and arbitrary detention.[24]

In addition, recent reports indicate that the orders are having a significant impact on the U.S.-Canada border:

- DHS Secretary Kelly has acknowledged that the executive orders may be causing more migrants to seek refuge in Canada.[25]
- Numerous journalists have reported on the increased traffic of asylum seekers crossing the U.S. border into Canada on foot, risking their lives in freezing conditions.[26] This is

[19] Dan Levine & Kristina Cooke, *Mexican 'DREAMer' nabbed in immigrant crackdown*, REUTERS (Feb. 15, 2017), http://www.reuters.com/article/us-usa-trump-immigration-arrest-exclusiv-idUSKBN15T307; Katie Mettler, *'This is really unprecedented': ICE detains woman seeking domestic abuse protection at Texas courthouse*, THE WASHINGTON POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.750b1610a662.

[20] *See, e.g.*, Dara Lind, *The first immigration raids of the Trump era, explained*, VOX (Feb. 14, 2017), http://www.vox.com/policy-and-politics/2017/2/14/14596640/immigration-ice-raids; Jeremy Redmon, *Nationwide immigration enforcement operation snares 87 in Georgia*, AJC.COM (Feb. 13, 2017), http://www.myajc.com/news/breaking-news/nationwide-immigration-enforcement-snares-georgia/NUmsHPiQJvV7anhWNA8DSP/. *See also* Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, NEW YORK TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html.

[21] Brian Bennett, *Not just 'bad hombres': Trump is targeting up to 8 million people for deportation*, LA TIMES (Feb. 4, 2017), http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html.

[22] Mahnoor Yawar, *Hamilton church volunteers denied entry to U.S. so they wouldn't 'steal American jobs'*, CBC NEWS (Mar. 13, 2017), http://www.cbc.ca/news/canada/hamilton/hamilton-church-volunteers-denied-entry-to-u-s-so-they-wouldn-t-steal-american-jobs-1.4022969.

[23] Cynthia McFadden, *American citizens: U.S. Border Protection can search your cell phones*, NBC NEWS (Mar. 13, 2017), http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746

[24] Michael D. Shear, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, NEW YORK TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html; Marissa Payne, *Mohammed Ali's son held up at D.C. airport after testifying about first detainment*, WASHINGTON POST (Mar. 10, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/03/10/i-felt-just-like-i-felt-at-my-fathers-funeral-muhammad-alis-son-describes-airport-detainment/?utm_term=.7f99eeff73e6.

[25] Ian Austen, *Trump's immigration orders may be affecting Canada, U.S. official admits*, NEW YORK TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/world/americas/canada-border-migrants-executive-orders-homeland-security-john-kelly.html?ref=todayspaper.

[26] *See, e.g.*, Sunny Dhillon & Sean Fine, *Quebec and Manitoba see influx of asylum seekers crossing U.S. border*, GLOBE AND MAIL (Feb. 12, 2017), http://www.theglobeandmail.com/news/national/quebec-and-manitoba-see-influx-of-asylum-seekers-crossing-us-border/article33995516/; Madison Park & Joe Sutton, *More Refugees flee US for Canada*, CNN (Feb. 20, 2017), http://www.cnn.com/2017/02/20/us/us-refugees-canada/index.html; Catherine

because, while the STCA bars asylum seekers from making refugee claims at the border, it does not preclude them from making a claim in Canada if they manage to make their way past the border.[27]

- Since the start of this year, 1,698 people have reportedly presented themselves at the Canada-U.S. border and asked for refugee protection, up from 728 people during the same time period of 2016.[28] This increase suggests that asylum seekers no longer feel safe in the United States.[29]
- From Feb. 1 to 21, 290 people were intercepted crossing into Quebec, 94 in Manitoba and 51 in British Columbia. These were people who entered outside of an official port of entry and most of the migrants carried identification and a valid U.S. visa.[30]
- Canadian news also recently reported that "[h]undreds of Haitian migrants who travelled to Tijuana, Mexico hoping to cross the U.S. border and be granted asylum say they're now setting their sights on Canada."[31]

Under Section 102(3) of the Immigration and Refugee Protection Act, Canada must continually review the safe third country designation to ensure compliance with the designation criteria, which include a country's human rights record and compliance with the 1951 Refugee Convention and Convention against Torture.[32] Under Article 10(3) of the STCA, either Canada or the United States can suspend application of the agreement for up to three months upon written notice, and the suspension can be renewed for additional periods of up to three months. Given that U.S. asylum policies and practices pursuant to the recent January 25, 2017 executive orders and implementing memoranda do not comply with the criteria for safe third country designation, Canada and the United States have an obligation to suspend application of the STCA.[33]

Porter, Dan Levin & Ian Austen, *Losing Hope in U.S., Migrants Make Icy Crossing to Canada*, NEW YORK TIMES (Feb. 11, 2017), https://www.boston.com/news/national-news/2017/02/11/losing-hope-in-u-s-migrants-make-icy-crossing-to-canada.

[27] *Id.*

[28] Stephanie Levitz, *Number of asylum claimants up but too early to call it a trend, officials say*, NATIONAL NEWSWATCH (Mar. 2, 2017), http://www.nationalnewswatch.com/2017/03/02/number-of-asylum-claimants-up-but-too-early-to-call-it-a-trend-officials-say-2/#.WMvYZaOZOL8.

[29] Rupa Shenoy, *Refugees are freezing to flee the US for Canada*, KERA NEWS (Feb. 17, 2017), http://keranews.org/post/refugees-are-freezing-flee-us-canada ("'Virtually every person who's crossed, from pregnant women in the back of trucks to those sheparding their children to safety, have said to us that the United States is no longer a safe country for them to be in.'").

[30] Nicholas Keung, *Illegal border crossings from U.S. not yet a crisis: federal government*, THE STAR (Mar. 2, 2017), https://www.thestar.com/news/immigration/2017/03/02/illegal-border-crossings-from-us-not-yet-a-crisis-federal-government-says.html.

[31] John Rieti, *Haitian migrants hope to make it to Canada, as Toronto seeks help to deal with refugee influx*, CBC NEWS (Mar. 10, 2017), http://www.cbc.ca/news/canada/toronto/haitian-migrants-canada-1.4018371.

[32] Immigration and Refugee Protection Act, § 102 (Nov. 1, 2001), *available at* http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html.

[33] The Commission has condemned a similar Canadian policy in the past. In April 2011, the Commission ruled that Canada violated its human rights obligations when it returned refugee claimants to the United States under Canada's "direct back" policy without first providing individualized review of their asylum claims. *See John Doe et al. v. Canada*, Merits, IACHR, Report No. 132 (Mar. 23, 2011).

In light of the foregoing, we respectfully request that this Commission:

With respect to the executive orders related to immigration and border security:

- Urge the U.S. government to rescind these executive orders and the related guidance on their implementation as necessary to comply with its domestic and international obligations.
- Urge the U.S. government to temporarily suspend the STCA pursuant to Article 10(3) of the agreement itself, so long as the executive orders remain in force and until further fact-finding on their impact on the rights of asylum seekers is carried out.
- Adopt precautionary measures to prevent irreparable harm resulting from the implementation of these executive orders.
- Request that the U.S. government provide information about asylum seekers crossing the border to Canada and returned from Canada.

With respect to the expanded system of immigration detention:

- Request that the U.S. government provide information regarding the number of immigrants and asylum seekers detained since the implementation of the executive orders.
- Request that the U.S. government provide information regarding the case outcomes in removal proceedings with respect to detained immigrants and asylum seekers.
- Request that the U.S. government grant parole to immigrants and asylum seekers who have been detained solely based on unauthorized entry.
- Request that the U.S. government expand alternatives to detention for immigrants and asylum seekers and consider family detention only as a last resort.

With respect to the expanded expedited removal proceedings without due process:

- Request that the U.S. government take steps to ensure that adults and children in need of protection are referred to asylum officers and given the opportunity to apply for asylum and that border officials do not ignore or discourage individuals from applying for protection.
- Request that the U.S. government reconsider its practice of expedited removal proceedings.
- Request that the U.S. government safeguard the due process rights of immigrants and asylum seekers during the expedited removal process, including, but not limited to, providing appropriate interpretation services, accommodations for disabilities, and access to legal representation.

With respect to the increased number of state and local agents with immigration functions and aggressive prosecution of unauthorized entry:

- Urge the U.S. government to exercise appropriate screening, hiring, and training practices to prevent abuse of authority by federal, state, and local agents.

With respect to the return of refugees to Mexico pending removal proceedings and the construction of a wall on the southern border:

- Urge the U.S. government to conform its screening of immigrants and asylum seekers to international and domestic standards for the protection of refugees and the right to *non-refoulement.*
- Urge the U.S. government to allow domestic civil society organizations and international human rights entities to monitor the screening of refugees at the U.S.-Mexico, as well as the U.S.-Canada border.

With respect to future activities regarding this Hearing and related activities of the Inter-American Commission on Human Rights:

- Convene a hearing on the impact of the executive orders on the STCA at the next Ordinary Session and extend an invitation to representatives of the Canadian government to participate in this hearing.
- Follow up on the problems identified and recommendations issued in its thematic and country reports related to the rights of migrants, as well as in *John Doe et al. v. Canada*, Merits, IACHR, Report No. 132 (Mar. 23, 2011).
- Convene and oversee a joint working group—including other civil society stakeholders and relevant U.S. government agencies—to engage in dialogue regarding this hearing.
- Urge Canada to temporarily suspend the STCA pursuant to Article 10(3) of the agreement itself, so long as the executive orders remain in force and until further fact-finding on their impact on the rights of asylum seekers is carried out.
- Conduct site visits at the U.S.-Canada border to monitor enforcement activities and gather facts related to this issue.
- Issue a final report on the situation of human rights of refugees in the United States, including the information gathered during fact-finding visits, this hearing, and follow-up submissions.
- Request that the U.S. government publish its written responses to any questions unanswered at the March 21 hearing.