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February 28, 2017

President James L. Cavallaro
Commissioner Francisco José Eguiguren Praeli
Commissioner Margaret Macaulay
Executive Secretary Paulo Abrão
Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006

Re: Request for Emergency Hearing on the Safe Third Country Agreement between Canada and the United States at the March 2017 Ordinary Period of Sessions and/or Request to Participate in the Hearing on the Impact of the Executive Orders on Human Rights in the United States on March 21, 2017

Dear Commissioners Cavallaro, Eguiguren, Macaulay and Executive Secretary Abrão:

We, the undersigned organizations and individuals, urge the Inter-American Commission on Human Rights (hereinafter “Commission” or “IACHR”) to convene, at its own initiative, an emergency public hearing at the upcoming 161st Session to discuss the Safe Third Country Agreement¹ (hereinafter “STCA”) between Canada and the United States in light of the U.S. government’s recent and alarming actions affecting refugee claimants, including the January 25, 2017 executive orders on immigration and border enforcement and the February 20, 2017 implementing memoranda issued by the Secretary of the Department of Homeland Security (hereinafter “DHS”).

Under the STCA, Canada refuses to hear claims by asylum seekers entering Canada from the United States on the premise that the United States is a safe third country. However, the United States is not a safe country of asylum for persons fleeing persecution and violence. As previously noted by this Commission, President Donald Trump’s executive orders on immigration create a grave risk of violations of human rights, the principle of *non-refoulement*, and the prohibition against cruel, inhuman and degrading treatment.² We therefore ask that the Commission urge Canada to suspend the STCA.

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

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/departement/laws-policy/safe-third.asp> [hereinafter “STCA”].

² 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 [hereinafter “IACHR Concerns over Executive Orders”].

individualized review of their asylum claims.³ Given the impact of the recent executive orders described further below, there is a substantial likelihood that if Canada turns back refugees to the United States, many of these refugees will be *refouled*. As such, Canada will be in violation of its obligations under Article 33 of the Refugee Convention.

We respectfully submit that an emergency hearing is necessary in light of the urgency of this matter and the Commission's plans to hold its sessions away from headquarters in the remainder of 2017. We ask that the Commission extend an invitation to representatives of the Canadian government to participate in this hearing. We also ask the Commission to carry out site visits at the U.S.-Canada border to gather facts related to this topic.

If an emergency hearing is not possible, we request permission to participate in the upcoming hearing on the Impact of the Executive Orders on Human Rights in the United States, scheduled to take place on March 21, 2017 during the 161st Session of the IACHR.

Detailed below are the relevant provisions of the STCA, as well as the recent executive orders and implementing memoranda, and the impact of recent developments on U.S. compliance with human rights standards relating to the treatment of asylum seekers.

Background on the STCA

The Immigration and Refugee Protection Act of Canada (hereinafter "IRPA")⁴ allows the designation of safe third countries for the purpose of sharing the responsibility for refugee claims. This designation is based on criteria such as a country's human rights record and compliance with the 1951 Refugee Convention and Convention against Torture (hereinafter "CAT").⁵ In 2004, the IRPA designated the United States as a safe third country,⁶ and on December 29, 2004, the STCA entered into force.

Under the STCA, Canada refuses to consider claims to asylum protection by anyone entering Canada from the United States (subject to limited exceptions⁷), on the basis that the United States is a "safe country" for asylum.⁸ However, the STCA does not displace Canada's obligations with respect to refugee protection. Rather, the STCA imposes an obligation on Canada to safeguard for each asylum seeker "access to a full and fair refugee status

³ See *John Doe et al. v. Canada*, Merits, IACHR, Report No. 132 (Mar. 23, 2011).

⁴ Immigration and Refugee Protection Act, § 102 (Nov. 1, 2001), available at <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html> [hereinafter "IRPA"].

⁵ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁶ Regulations Amending the Immigration and Refugee Protection Regulations § 159.3 (Nov. 3, 2004), available at <http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp>.

⁷ Article 4 of the STCA states that the agreement does not apply to individuals who qualify for one of the four exceptions set out in the agreement that consider *inter alia* the importance of family unity and the best interests of children.

⁸ STCA, *supra*, at Art. 4. See also § 101(1)(e) of IRPA, which states that persons claiming refugee protection who come to Canada directly or indirectly from a designated country are not eligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board for a determination of their claim.

determination procedure.”⁹ IRPA also requires that Canada continually review countries designated as safe third countries to ensure compliance with the above-mentioned designation criteria.¹⁰ According to Article 10 of the STCA, Canada can suspend application of the agreement for up to three months upon written notice to the United States, and the suspension can be renewed for additional periods of up to three months.¹¹

As discussed below, U.S. asylum policies and practices under the recent January 25, 2017 executive orders and implementing memoranda do not comply with the criteria for safe third country designation. Canada therefore has an obligation under the IRPA and international law to suspend application of the STCA.

President Donald Trump’s Executive Orders

On January 25, 2017, President Donald Trump issued two executive orders on immigration: “Enhancing Public Safety in the Interior of the United States”¹² (hereinafter “Interior Enforcement Order”) and “Border Security and Immigration Enforcement Improvements”¹³ (hereinafter “Border Enforcement Order”). On February 20, 2017, DHS issued two implementation memos that provide DHS personnel with guidance on the two executive orders: “Enforcement of the Immigration Laws to Serve the National Interest”¹⁴ (hereinafter “DHS Memo on Interior Enforcement”) and “Implementing the President’s Border Security and Immigration Enforcement Improvement Policies”¹⁵ (hereinafter “DHS Memo on Border Enforcement”).

These executive orders significantly undermine human rights and other standards governing the treatment of asylum seekers,¹⁶ including provisions of the Refugee Convention that prohibit the imposition of penalties for illegal entry¹⁷ and limit the imposition of restrictions on freedom of movement.¹⁸ In particular, the orders expose asylum seekers to an expanded system of mass

⁹ STCA, *supra*, preamble.

¹⁰ IRPA, *supra*, § 102(3).

¹¹ STCA, *supra*, at Art. 10.

¹² *Executive Order: Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> [hereinafter “Interior Enforcement Order”].

¹³ *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> [hereinafter “Border Enforcement Order”].

¹⁴ *Enforcement of the Immigration Laws to Serve the National Interest*, Dept. of Homeland Security (Feb. 20, 2017), <https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest> [hereinafter “DHS Memo on Interior Enforcement”].

¹⁵ *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies*, Dept. of Homeland Security (Feb. 20, 2017), <https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies> [hereinafter “DHS Memo on Border Enforcement”].

¹⁶ See 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>; Harvard Immigration and Refugee Clinical Program, *The Impact of President Trump’s Executive Orders on Asylum Seekers* (2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf>.

¹⁷ Refugee Convention, *supra*, Art. 31.

¹⁸ *Id.* at Art. 32(2).

incarceration; expansion of expedited removal proceedings without due process; a heightened credible fear standard; an increase in the number of agents with immigration functions and aggressive prosecution of unauthorized entry. The executive orders also drastically restrict access to asylum by mandating the return of refugees to Mexico pending proceedings in violation of the obligation of *non-refoulement* under the Refugee Convention, and by calling for the construction of a wall on the U.S.-Mexico border.

(1) Large-Scale Detention of Asylum Seekers

The Commission has, in the past, expressed concern about the increased use of immigration detention in the United States, particularly in cases where detention is neither necessary nor appropriate under international norms on the right to personal liberty.¹⁹ The Commission has also expressed particular concern that vulnerable groups, such as asylum seekers, figure prominently among those being held in immigration detention in the United States.²⁰ The IACHR has documented how detention of asylum seekers limits access to counsel, which in turn affects the success of their cases.²¹

The Border Enforcement Order calls for a massive expansion of the existing system of immigration detention, increasing even further the number of refugees subject to detention. Under this order, individuals may now be detained merely “on suspicion” of violating federal or state law, including laws against unauthorized entry.²² The order mandates that offenses with a nexus to the southern border, such as unauthorized entry and reentry into the United States, be priorities for enforcement.²³ The Border Enforcement Order also calls for constructing new detention centers at the southern border to accommodate a much larger population of detainees.²⁴ The DHS Memo on Border Enforcement states that detention is “the most efficient means” for enforcing immigration laws at the border pending a final determination of whether a person ought to be deported or is eligible for protection.²⁵

Additionally, Section 11(d) of the Border Enforcement 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.”²⁶ Guidance set forth in the DHS Memo on Border Enforcement confirms that DHS officials are to use parole “sparingly.”²⁷ This restriction of parole authority will result in the detention of greater numbers of asylum seekers in the United States, worsening a system that granted parole to only 47% of asylum seekers in 2015.²⁸

¹⁹ IACHR, *Report on Immigration in the United States: Detention and Due Process* ¶ 101 (Dec. 30, 2010), available at <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf> [hereinafter “IACHR Report on Immigration”].

²⁰ *Id.* ¶ 104.

²¹ *Id.* ¶ 378.

²² Border Enforcement Order, *supra*, § 2(b).

²³ *Id.* § 13.

²⁴ *Id.* § 5(a).

²⁵ DHS Memo on Border Enforcement, *supra*, at 2.

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (Jul. 2016), available at http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf. The U.S. Government’s fiscal year runs from October 1 through September 30.

(2) Expansion of Expedited Removal Proceedings

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.²⁹ Previously, expedited removal had only been applied to noncitizens who had entered the United States within two weeks of apprehension and who were found without documentation within 100 miles of the southern border.³⁰ 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.”³¹

In principle, individuals in expedited removal proceedings who express fear of return to their home countries will be granted a credible fear interview to determine whether they can apply for asylum. However, detention and arbitrary enforcement by state and local, as well as federal, enforcement officials will likely severely limit the ability of bona fide refugees to pursue their claims to protection. Refugees who are in expedited removal proceedings will face a high risk of being returned to their home countries without proper screening, since as this Commission itself has documented Customs and Border Protection (hereinafter “CBP”) often fails to refer asylum seekers for a credible fear screening.³² The provisions of the Border Enforcement Order will thus curtail asylum seekers’ ability to meaningfully pursue their claims for protection, and greatly increase the risk that individuals with viable asylum claims will be deported to countries where they will face persecution or torture.

Additionally, Section 2(c) of the Border Enforcement Order establishes a policy of expedited determination of apprehended individuals’ legal claims.³³ The DHS Memo on Border Enforcement similarly refers to the “expedited resolution” of asylum claims by immigration courts in detention facilities near the border.³⁴ These provisions will compromise asylum seekers’ due process rights, by limiting their ability to find legal representation and properly prepare and present their claims for protection.

(3) More Stringent Credible Fear Interview Process

The Border Enforcement Order focuses attention on the “credible fear” and “reasonable fear” determination process for refugees seeking protection in the United States,³⁵ requiring DHS to

²⁹ Border Enforcement Order, *supra*, § 11(c) (“Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).”).

³⁰ 8 C.F.R. § 208.16.

³¹ DHS Memo on Border Enforcement, *supra*, at 6.

³² IACHR Report on Immigration, *supra*, ¶ 115.

³³ Border Enforcement Order, *supra*, § 2(c).

³⁴ DHS Memo on Border Enforcement, *supra*, at 9.

³⁵ Border Enforcement Order, *supra*, § 11(b) (“The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.”).

ensure that these processes are not “exploited.”³⁶ The DHS Memo on Border Enforcement directs asylum officers to make a positive credible fear finding “only after the officer has considered all relevant evidence and determined, based on credible evidence, that the alien has a significant possibility of establishing eligibility for asylum.”³⁷ The memo also requires officers to “determine the credibility of the alien’s statement made in support of his or her claim.”³⁸ These requirements may make it even more difficult for asylum seekers with meritorious claims to have their fears of return heard and to obtain protection in the United States.

(4) Criminalization of Refugees

The Interior Enforcement Order calls for criminal prosecution and detention of all persons with immigration violations, including people who enter without inspection.³⁹ These heightened enforcement measures will have dangerous consequences for asylum seekers and refugees who are victims of violence within the United States, as they may be too afraid to seek help from law enforcement, given the increased likelihood of detention and deportation due to “illegal entry.”⁴⁰ As the IACHR itself has noted, these enforcement measures, including construction of more immigration detention centers and emphasis on expedited removals, “represent a policy designed to stigmatize and criminalize migrants or anyone perceived as a migrant.”⁴¹

(5) Increased Cooperation between State and Local Law Enforcement and Immigration Officials without Adequate Oversight or Accountability

The IACHR has previously expressed concern over federal immigration enforcement partnerships with local and state law enforcement, given the failure of Immigration and Customs Enforcement (hereinafter “ICE”) “to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling.”⁴²

The recent executive orders will drastically expand this practice of cooperation between state and local law enforcement and federal immigration enforcement officials. In order to accomplish the large-scale detention contemplated by the executive orders, the Border 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.⁴³ The order revives

³⁶ *Id.* § 11(a). Credible fear determinations are conducted when individuals subject to expedited removal under INA § 235(b) express a fear of return to their home countries. Reasonable fear screenings are conducted when an individual is subject to expedited removal under INA § 241(a)(5) for reinstatement of a prior removal order or INA § 238(b) for removal of individuals who are not Lawful Permanent Residents and who have been convicted of an aggravated felony. These screenings are intended to prevent *refoulement* of individuals who fear persecution or torture.

³⁷ DHS Memo on Border Enforcement, *supra*, at 8.

³⁸ *Id.*

³⁹ Interior Enforcement Order, *supra*, § 5.

⁴⁰ See, e.g., Katie Mettler, ‘This is really unprecedented’: ICE detains woman seeking domestic abuse protection at Texas courthouse, THE WASHINGTON POST (Feb. 16, 2017).

⁴¹ IACHR Concerns over Executive Orders, *supra*.

⁴² IACHR Report on Immigration, *supra*.

⁴³ Interior Enforcement Order, *supra*, § 8.

the Secure Communities program, which was subject to numerous legal challenges,⁴⁴ and permits local law enforcement to deputize police officers to enforce federal immigration laws. The DHS Memo on Border Enforcement instructs the Director of ICE and the Commissioner of CBP “to engage immediately with all willing and qualified law enforcement jurisdictions” for the purpose of entering into enforcement agreements with the DHS.⁴⁵ This heightened cooperation will likely lead to a sharp increase in detention and deportation of asylum seekers in the United States without due process.

(6) Return of Refugees to Mexico

Section 7 of the Border Enforcement Order calls for asylum seekers arriving via the southern border to await removal proceedings in Mexico.⁴⁶ 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.⁴⁷

(7) Construction of a Wall at the Southern Border and More Dangerous Border Crossings

Section 2 of the Border Enforcement Order calls for the construction of a wall on the southern border of the United States.⁴⁸ This provision will likely lead asylum seekers to take more dangerous routes to the United States, resulting in an increased number of deaths among those crossing the border.⁴⁹

Impact of the Executive Orders

Given the risks to the lives of bona fide asylum seekers and refugees outlined above, we respectfully request that the Commission urge Canada to suspend the STCA, at least temporarily, while further fact-finding can be conducted. Academics, advocates, lawyers, and journalists across the United States have started to document the negative impact of the January 25, 2017 executive orders and implementing memoranda,⁵⁰ but further fact-finding is needed.

⁴⁴ Jeh C. Johnson, Dept. of Homeland Security, *Memo re: Secure Communities* (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

⁴⁵ DHS Memo on Border Enforcement, *supra*, at 4.

⁴⁶ Border Enforcement Order, *supra*, § 7 (“Return to Territory. The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.”).

⁴⁷ See Washington Office on Latin America, *Mexico Now Detains More Central American Migrants than the United States* (Jun. 11, 2015), <https://www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/> (last visited Feb. 22, 2017).

⁴⁸ Border Enforcement Order, *supra*, § 2(a).

⁴⁹ See, e.g., Colin Schultz, *Nearly 6,000 Migrants Have Died Along the Mexico-U.S. Border Since 2000*, SMITHSONIAN, Oct. 1, 2014, <http://www.smithsonianmag.com/smart-news/nearly-6000-migrants-have-died-along-mexico-us-border-2000-180952904/#yJjvtOivRWBLEzP2.99>.

⁵⁰ 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; Peter L. Markowitz, *Understanding what makes Trump’s immigration orders truly chilling*, NEW YORK DAILY NEWS, Feb. 24, 2017; 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),

Listed below are some recent reports of enforcement measures since the issuance of President Trump's executive orders on immigration:

- ICE agents arrested over six hundred immigrants in eleven states in a single week in February,⁵¹ including during routine ICE appointments.⁵² DHS Secretary John Kelly stated that about 75 percent of those arrested had criminal convictions.⁵³ If this is the case, it means that about 170 did not.
- At least two individuals with Deferred Action for Childhood Arrivals (“DACA”) were arrested during enforcement operations.⁵⁴
- 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.⁵⁵
- 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.⁵⁶

These enforcement measures reflect a marked expansion of enforcement and detention priorities. At the same time as news outlets reported an increase in immigration enforcement in the United States, journalists also documented an uptick in the number of asylum seekers crossing into Canada. During the weekend of February 10-12, for example, over 40 people crossed over the U.S.-Canada border and claimed refugee status in the Canadian province of Quebec; 21 others did the same in the Canadian province of Manitoba.⁵⁷ The following weekend, 22 more crossed from the United States into Manitoba, risking their lives in freezing conditions.⁵⁸

This sharp increase in the number of asylum seekers crossing from the United States into Canada following President Trump's executive orders suggest that asylum seekers no longer feel safe in

<http://www.humanrightsfirst.org/sites/default/files/hrf-asylum-under-threat.pdf>; Harvard Immigration and Refugee Clinical Program, *The Impact of President Trump's Executive Orders on Asylum Seekers* (2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.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.

⁵¹ Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. in One Week*, NEW YORK TIMES (Feb. 12, 2017).

⁵² See, e.g., Nicholas Kulish, Caitlin Dickerson & Liz Robbins, *Reports of Raids Have Immigrants Bracing for Enforcement Surge*, NEW YORK TIMES (Feb. 10, 2017); Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her*, NEW YORK TIMES (Feb. 8, 2017).

⁵³ Camila Domonoske, *75 Percent Of Immigration Raid Arrests Were For Criminal Convictions, DHS Says*, NPR (Feb. 13, 2017).

⁵⁴ Dan Levine & Kristina Cooke, *Mexican 'DREAMer' nabbed in immigrant crackdown*, REUTERS (Feb. 15, 2017); Katie Mettler, *'This is really unprecedented': ICE detains woman seeking domestic abuse protection at Texas courthouse*, THE WASHINGTON POST (Feb. 16, 2017).

⁵⁵ See, e.g., Dara Lind, *The first immigration raids of the Trump era, explained*, VOX (Feb. 14, 2017); Jeremy Redmon, *Nationwide immigration enforcement operation snares 87 in Georgia*, AJC.COM (Feb. 13, 2017).

⁵⁶ Brian Bennett, *Not just 'bad hombres': Trump is targeting up to 8 million people for deportation*, LA TIMES (Feb. 4, 2017).

⁵⁷ Sunny Dhillon & Sean Fine, *Quebec and Manitoba see influx of asylum seekers crossing U.S. border*, GLOBE AND MAIL (Feb. 12, 2017).

⁵⁸ 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>.

the United States.⁵⁹ A site visit by the IACHR to the U.S.-Canada border would serve a critical role in documenting the effects of the orders and memoranda on restricting the rights of asylum seekers and impeding the proper adjudication of claims for refugee protection.

Regional and International Human Rights Obligations

The January 25, 2017 executive orders do not comply with international norms for human rights and refugee protection. Accordingly, the United States' implementation of these orders, as well as Canada's continued application of the STCA, undermine the following treaty commitments:

(1) The Refugee Convention and CAT

Canada is a party to the Refugee Convention and CAT, and the United States is a party to the 1967 Protocol to the Refugee Convention and CAT. Article 31 of the Refugee Convention limits the imposition of restrictions on freedom of movement and prohibits the penalization of illegal entry or presence.⁶⁰ Article 33 of the Refugee Convention and Article 3 of CAT also establish an obligation of *non-refoulement*.⁶¹

As described above, the January 25 executive orders on immigration prescribe actions, including expansion of detention and expedited removal, which violate Articles 31 and 33 of the Refugee Convention, leading to unsafe conditions for asylum seekers and refugees in the United States.⁶² Indeed, the United Nations High Commissioner for Refugees (hereinafter "UNHCR") has underscored that, under Article 31, detention of asylum seekers should only be resorted to "in cases of necessity" after a full consideration of all possible alternatives.⁶³ In addition, the return of asylum seekers arriving via the land border with Mexico while they await their removal proceedings violates the fundamental obligation of *non-refoulement*.

(2) Regional and International Human Rights Standards

As Member States of the Organization of American States (hereinafter "OAS"), Canada and the United States have undertaken to respect and ensure the rights of all persons subject to their jurisdiction pursuant to the OAS Charter and the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"). The American Declaration recognizes the right to asylum in Article XXVII and sets out a range of other rights that are relevant to refugees, including *inter alia* the right to life, liberty and security of the person (Article I); equality before the law (Article II); family and the protection thereof (Article VI); protection for mothers and children (Article VII); recognition of juridical personality (Article XVII); fair trial (XVIII); and protection from arbitrary arrest (Article XXV). Canada and the United States are also party to other international human rights instruments, including the International Covenant on Civil and

⁵⁹ Rupa Shenoy, *Refugees are freezing to flee the US for Canada*, PRI, Feb. 17, 2017 ("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.").

⁶⁰ Refugee Convention, *supra*, at Art. 31.

⁶¹ *Id.* at Art. 33.

⁶² *Id.* at Art. 31.

⁶³ UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 4* (Feb. 1999), available at <http://www.refworld.org/docid/3c2b3f844.html> (emphasis omitted).

Political Rights (hereinafter “ICCPR”) and the International Convention on the Elimination of All Forms of Racial Discrimination.

The IACHR has already expressed concern about the compatibility of the executive orders with these standards, noting that their implementation

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.⁶⁴

Specifically, the return of asylum seekers to Mexico violates the right to seek asylum under Article XXVII of the American Declaration. The construction of a wall on the southern border and the enhanced credible fear requirements also create challenges for refugee claimants that compromise the exercise of this right.

As the Commission has previously noted, the generalized detention of asylum seekers undermines compliance with a number of provisions in the American Declaration, including the right to personal liberty and the prohibition of detention for non-fulfillment of civil obligations (Articles I and Article XXV),⁶⁵ the right to due process (Article XXVI),⁶⁶ and the protection of family life recognized in Articles V, VI and VII of the American Declaration.⁶⁷

Detention of asylum seekers and restriction of parole under the executive orders also raise concerns with regards to the right to security of the person and the right to humane treatment during detention.⁶⁸ Specifically, the executive orders will result in asylum seekers being detained in deplorable, prison-like conditions without significant procedural protections. Detention of asylum seekers also exacerbates the risk of re-traumatization and other mental health harms. The IACHR has observed that “in cases in which asylum seekers are detained, ‘the longer detention as a preventive measure continues, the greater the resulting burden on the rights of the person deprived of liberty.’”⁶⁹

⁶⁴ IACHR Concerns over Executive Orders, *supra*.

⁶⁵ According to inter-American norms, pre-trial detention can only be used as an exceptional measure in accordance with the principle of necessity and only when less intrusive alternatives have been considered. The necessity of detention must be assessed on a case by case basis. IACHR Report on Immigration, *supra*, ¶ 35. When applied to immigration detention, which is civil in nature, these standards require that immigration policies be “premised on a presumption of liberty – the right of the immigrant to remain at liberty while his or her immigration proceedings are pending – and not on a presumption of detention.” *Id.* ¶ 39. The Inter-American Court of Human Rights has held that laws imposing punitive sanctions for the violation of immigration laws do not have a “legitimate purpose according to the [Inter-American] Convention.” See *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 169 (Nov. 23, 2010). The United Nations Human Rights Committee, for its part, has determined that illegal entry by itself would not justify detention. Human Rights Committee, Communication No. 560/1993, CCPR/C/59/D/560/1993, ¶ 9.4 (Apr. 30, 1997), available at <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.

⁶⁶ IACHR Report on Immigration, *supra*, ¶ 377.

⁶⁷ *Id.* ¶ 50.

⁶⁸ *Id.* ¶¶ 241-48.

⁶⁹ *Id.* ¶ 48.

The criminalization of asylum seekers and the increase in the number of state and local agents deputized with immigration enforcement functions raises serious concerns about the protection of the right to non-discrimination, especially since the lack of ICE oversight has, in the past, led to discriminatory enforcement of immigration law and racial profiling.⁷⁰

For these reasons, we respectfully submit that the United States' enactment and implementation of the executive orders and, in turn, Canada's continued enforcement of the STCA, expose asylum seekers to the risk of serious human rights violations. We request that the Commission urge Canada to suspend the agreement, pending additional fact-finding related to the executive orders and implementing memoranda.

The Commission's Authority to Convene a Hearing

Article 61 of the Rules of Procedure of the Commission allows the Commission to hold hearings "on its own initiative." Article 66 states that, "The Executive Secretariat shall inform the party or parties as to the date, place, and time of the hearing at least one month in advance. However, under exceptional circumstances, that time period may be reduced."

Accordingly, we respectfully request that the Commission consider convening an emergency hearing on the STCA at the 161st Session, and confirm our willingness and ability to participate in such a hearing. We also ask that the Commission extend an invitation to representatives of the Canadian government to participate in this hearing. Additionally, we encourage the Commission to carry out site visits to the U.S.-Canada border to gather facts related to this topic.

If an emergency hearing is not possible, we request permission to participate in the upcoming hearing on the Impact of the Executive Orders on Human Rights in the United States, scheduled to take place on March 21, 2017 during the 161st Session of the IACHR.

Respectfully submitted,*

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⁷⁰ Press Release, IACHR, *IACHR Publishes Report on Immigration in the United States* (Mar. 17, 2011), available at http://www.oas.org/en/iachr/media_center/PReleases/2011/021.asp.

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