October 4, 2017

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

Re: Thematic Hearing Request (Canada)
Human Rights Situation of Asylum Seekers under the Safe Third Country Agreement between Canada and the United States

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

We, the undersigned individuals* and organizations, write to request a thematic hearing regarding the human rights situation of asylum seekers under the Safe Third Country Agreement between Canada and the United States¹ (hereinafter “STCA”) in light of the U.S. government’s recent actions affecting refugee claimants, including the January 25, 2017 executive orders on immigration and border enforcement² and the February 20, 2017 implementing memoranda³ issued by the Secretary of the Department of Homeland Security (hereinafter “DHS”).

Under the STCA, Canada turns back refugee claimants seeking to enter Canada at land border points from the United States, except in limited circumstances,⁴ 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 noted by this Commission, President Donald Trump’s executive orders on immigration place refugees at grave risk of violation of their human

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* Institutional affiliations for identification purposes only.


⁴ Article 4 of the STCA establishes that the agreement does not apply to individuals who qualify for one of four exceptions that consider inter alia the importance of family unity and the best interests of children.
rights and undermine the principle of non-refoulement and the prohibition against cruel, inhuman and degrading treatment.\(^5\)

Despite these challenges, Canada has not reviewed the United States’ designation as a safe third country. Furthermore, Canada generally does not conduct individualized assessments of asylum claims under the STCA, and the STCA limits access to the right to appeal.\(^6\) In this context, the application of the STCA exposes asylum seekers to the risk of indirect refoulement and impacts their right to seek asylum and to due process. We therefore ask that the Commission urge Canada to suspend the STCA. We also ask the Commission to carry out site visits at the U.S.-Canada border to gather facts related to this topic.

The Commission has already condemned a similar Canadian policy in the context of a petition presented by some of the undersigned organizations. 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.\(^7\) A thematic hearing on the STCA at the upcoming sessions would provide an important opportunity to address recent developments in Canadian immigration and refugee policy and reinforce Canada’s regional and international human rights obligations.

To assist the Commission to further understand the situation, Petitioners propose to present information on the operation of the STCA, due process issues that arise for those who present at the Canadian border, and the impact of the executive orders and implementing memoranda on asylum seekers under the STCA.

**Background on the STCA**

The Immigration and Refugee Protection Act of Canada (hereinafter “IRPA”)^8\(^8\) 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”).\(^9\) In 2004, the IRPA designated the United States as a safe third country,\(^10\) and on December 29, 2004, the STCA entered into force.

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\(^6\) As noted above, the STCA does not apply to individuals who qualify for one of the four exceptions set out in Article 4. As outlined further below, the right to appeal to the Refugee Appeal Division does not apply to asylum seekers who enter Canada under one of the STCA exceptions.

\(^7\) See John Doe et al. v. Canada, Merits, IACHR, Report No. 132 (Mar. 23, 2011) [hereinafter “John Doe v Canada”].


Under the STCA, Canada refuses to admit refugee claimants attempting to enter Canada from the United States unless they meet one of four exceptions on the basis that the United States is a “safe country” for asylum. 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 refugee claimant “access to a full and fair refugee status determination procedure.” IRPA also requires that Canada continually review countries designated as safe third countries to ensure compliance with the above-mentioned designation criteria. 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.

Since its introduction, refugee advocates and human rights organizations have opposed the STCA. In 2005, a coalition consisting of the Canadian Council for Refugees, Amnesty International Canada, the Canadian Council of Churches and claimant John Doe filed for judicial review of the STCA before the Federal Court of Canada. The coalition argued that the United States could not be considered a “safe third country” and sought declaratory judgment that the agreement was unlawful under the Canadian Charter of Rights and Freedoms and international human rights and refugee law. In 2007, the Federal Court of Canada held that the United States had failed to comply with its human rights and refugee protection obligations under international law and declared the STCA to be invalid. In 2008, the Federal Court of Appeal overturned the lower court’s decision on procedural grounds, but neither reversed the Federal Court’s findings on the United States’ human rights and refugee protection record nor addressed underlying questions of constitutional law. The Supreme Court of Canada subsequently denied leave to appeal.

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11 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.

12 STCA, supra, preamble.

13 IRPA, supra, § 102(3).

14 STCA, supra, at Art. 10.


19 Canadian Council for Refugees v. Canada, 2008 FCA 229, [2009] 3FCR 136, para. 80, 100 (Can.) In the intervening years, the Supreme Court of Canada has adopted a more liberal standard for evaluating public interest standing. Courts now ask “whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court," rather than whether there was another reasonable and effective way to bring the matter before courts. Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2SCR 524, para. 52 (Can.).

On July 5, 2017, some of the same organizations launched a second legal challenge contesting the validity of the designation of the United States as a safe third country in light of recent developments in U.S. asylum law.\(^{21}\) Under the Trump administration, nearly all of the deficiencies in the U.S. refugee protection system that the Federal Court pointed to continue to pose significant risks to asylum seekers. The current pending litigation makes a hearing even more urgent and important. A hearing and follow-up intervention would play an important role in reinforcing for domestic courts, and other apparatuses of state authority, international standards for refugee protection.

The sections below provide an overview of the impact of the STCA on the human rights of refugee claimants, particularly with respect to their access to asylum and due process.

**Effects of the STCA on Canadian Asylum Process**

(1) Restricted Access to Asylum Under the STCA

The STCA has restricted access to asylum for many people through substantive and procedural deficiencies in its operation. The STCA also has had a chilling effect on refugee claimants as seen in the decrease in refugee claims since the STCA came into effect.

By entering into the STCA, Canada sought “to limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system.”\(^{22}\) Available data indicate that Canada has succeeded in achieving that goal. Under the STCA, the number of claimants found ineligible for asylum between 2005 and 2011 ranged from 301 to 768 applicants per year.\(^{23}\) Refugee claimants who first set foot in the United States and who do not meet any of the STCA’s enumerated exceptions are returned to the United States without individualized review of their asylum claims. In the United States, returned refugee claimants must avail themselves of an asylum regime that, as discussed further below, falls significantly below international standards and fails to ensure adequate protection of refugees.\(^{24}\)

The STCA functions not only to turn refugee claimants away, but also to deter claimants from presenting themselves at the border in the first place. Since the STCA went into effect on December 29, 2004, the number of refugee claims at the U.S.-Canada border has dropped precipitously. Between 1997 and 2004 the number of refugee claims made at the Canadian border averaged just under 10,000 per year.\(^{25}\) In the 12 years since the STCA came into effect,
claims at the border dropped to approximately 5,400 per year.26 The proportion of claims made at the border has also dropped, indicating refugee claimants are choosing other means of attempting to reach Canada. From 1997 and 2004, an average of 31% of all refugee claims in Canada were made at the border.27 In the 12 years since the STCA came into effect, this has dropped to 24% of all claims.28 The impact of the STCA has thus been to erect barriers to authorized entry at land border points. Consequently, refugee claimants have resorted to attempting to enter Canada without authorization, often risking life and limb to cross the U.S.-Canada border on foot. This shift disproportionately affects vulnerable claimants (e.g., women with children, elderly or ill individuals) for whom crossing irregularly often presents a serious challenge.

(2) Inflexible and Inconsistent Application of Exceptions

The STCA has a series of limited exceptions that allow certain refugee claimants from the United States to be heard at the land border. However, as outlined below, these exceptions are narrowly prescribed and applied. In practice, Canadian border officials often apply these exceptions inconsistently and impose insurmountable requirements, further limiting access to asylum even for those who qualify for entry under the STCA’s exceptions.

Under the STCA, refugee claimants traveling from the United States may present a claim if: (1) they have at least one family member in the receiving country who has lawful immigration status other than visitor status or is at least 18-years-old and has a refugee application pending;29 (2) they are unaccompanied minors;30 (3) they are not required to obtain a visa to enter;31 or (4) adjudication of their claim is in the public interest.32 Refugee claimants use the family member exception far more frequently than any other exception.33 Yet, Canadian border officers often impose insurmountable corroboration requirements, including demanding that refugee claimants present original documentation to satisfy the family member exception.34 The emphasis on original documentation presents significant barriers for refugee claimants who may have fled their countries of origin suddenly and unexpectedly or

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27 Arbel & Brenner, supra, at 90.
28 Id.
29 STCA, supra, at Art. 4.2(a)–(b). Eligible family members include a spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews. Id. at Art. 1.1(b).
30 Id. at Art. 1.1(f). (“Unaccompanied minor means an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States.”)
31 Id. at Art. 4.2(c)–(d).
32 Id. at Art. 6.
33 See Arbel & Brenner, supra, at 91; see also Sean Rehaag & Angus Gavin Grant, Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System 16 (Osgoode Legal Studies Research Paper Series, 2015) (“Of the 2,253 claimants benefiting from exceptions to the STCA at land ports of entry in 2013, those with anchor family members were by far the most frequent category (2,215 cases, 98.3%)”) [hereinafter “Rehaag & Grant”].
34 Arbel & Brenner, supra, at 92–93.
otherwise cannot obtain identity documents. In addition, Canadian border officials inconsistently and subjectively evaluate claims under the STCA family member exception, restricting its applicability and thereby limiting its effectiveness in achieving the stated goal of family unity. The Canadian Council for Refugees and Sojourn House have cautioned that Canadian officials’ “unreasonable and inconsistent assessments of family relationships have in some cases undermined the fair application of the family members exception.” In one particularly notable case, a Burundian refugee claimant was twice denied entry to Canada due to baseless suspicion about his identifying documents despite the fact that his sister was a Canadian citizen residing in Canada.

Thus, even refugee claimants who qualify for entry under one of the exceptions enumerated by the STCA and present valid documentation risk being arbitrarily turned back to the United States.

(3) Inability to Appeal to the Refugee Appeal Division

Under Canadian asylum law, refugee claimants may generally appeal to the Refugee Appeal Division (hereinafter “RAD”) to review a first instance decision of the Refugee Protection Division (hereinafter “RPD”) on the merits. The RAD thus serves as an important check on the one-member refugee determination hearings conducted by the RPD. However, Canada’s refugee determination system precludes claimants who enter Canada under one of the STCA’s exceptions from appealing a negative decision to the RAD. This policy arbitrarily restricts the legal rights of Safe Third Country Agreement claimants and weakens the legal protections available to them.

Claimants precluded from RAD appeals must instead file for judicial review before the Federal Court if they wish to challenge a negative first-instance determination. Claimants seeking

35 United Nations High Commissions for Refugees (UNHCR), Identity Documents for Refugees, ¶ 3 U.N. Doc. EC/SCP/33 (July 20, 1984), available at http://www.unhcr.org/excom/EXCOM/3ae68cee4.html (“Due to the circumstances in which they are sometimes forced to leave their home country, refugees are perhaps more likely than other aliens to find themselves without identity documents. Moreover, while other aliens can turn to the authorities of their country of origin for help in obtaining documents, refugees do not have this option and are therefore dependent upon the authorities of their country of refuge or upon UNHCR for assistance in this regard.”).


37 Welcome to Canada, supra, at 25.

38 See generally Cishahayo v. Canada, [2012] FC 1237 (Can.).

39 Citizenship and Immigration Canada, Backgrounder – Overview of Reforms to Canada’s Refugee System (2012), available at http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012002016 (explaining RAD eligibility). In 2013, most claimants denied access to a RAD appeal initially came to Canada through an STCA exception (2,253 claims; 23.1% of claims). Rehaag & Grant, supra, at 14. Other groups who are ineligible to appeal to the RAD include: “claimants who come from a designated country of origin (DCO); claimants whose applications for refugee protection have been declared to have no credible basis (NCB) or to be manifestly unfounded claims (MUC); claimants who are designated foreign nationals (DFN) due to their irregular arrival; claimants who abandon or withdraw their applications; and . . . individuals who were previously recognized in Canada as refugees but who have had their refugee status taken away through cessation or vacation processes.” Rehaag & Grant, supra, at 14.

40 Rehaag & Grant, supra, at 8–10
judicial review face a number of hurdles that those who have access to the RAD do not, including higher barriers to introducing new evidence,\textsuperscript{41} inability to give oral testimony to establish credibility,\textsuperscript{42} and the requirement to first seek leave from the court.\textsuperscript{43} The remedies available to the Federal Court upon hearing a negative first instance determination are also significantly more limited than those of the RAD.\textsuperscript{44} Finally, claimants who do not have access to the RAD may be removed from the country prior to review of an RPD decision, while those who are able to appeal to the RAD typically receive automatic stays on removal pending the appeal.\textsuperscript{45}

The RAD bar thus subjects refugee claimants to a heightened risk of \textit{refoulement} by allowing for their removal with limited opportunity to appeal a first instance refugee determination in contravention of Canada’s international obligations under refugee and human rights law.

(4) Unauthorized and Dangerous Crossings

As a result of the STCA, the number of unauthorized border crossings by refugee claimants has risen in recent years with serious consequences for both refugee claimants and the border regions where these precarious crossings predominantly occur.\textsuperscript{46}

While the number of refugee claimants crossing the border has been rising since at least mid-2016,\textsuperscript{47} available data indicate that the number of unauthorized crossings into Canada has increased significantly since the election of Donald Trump. In 2017, the Royal Canadian Mounted Police (RCMP) intercepted 315 refugee claimants in January, 658 in February, and 877 in March.\textsuperscript{48} In many cases, individuals risked life and limb to cross the border during the harsh winter months. On March 8, 2017, for example, 19 individuals crossed into Manitoba during a blizzard.\textsuperscript{49} On another occasion, two men lost their fingers to frostbite after attempting to make a dangerous overland crossing in Manitoba.\textsuperscript{50} Finally, in May a refugee claimant who may have qualified for entry under the STCA’s family member exception died from exposure while trying to cross the border in northern Minnesota.\textsuperscript{51}

\textsuperscript{41} Id. at 9.
\textsuperscript{42} Id. at 10.
\textsuperscript{43} IRPA, \textit{supra}, § 72. By contrast, those who are eligible to appeal to the RAD are entitled to a substantive decision on their appeal. IRPA, \textit{supra}, § 111(1); Rehaag & Grant, \textit{supra}, at 10.
\textsuperscript{44} While the RAD has broad discretion to uphold or overturn an RPD decision, the Federal Court is typically limited to remanding a negative asylum determination with additional instructions. See Rehaag & Grant, \textit{supra}, at 11.
\textsuperscript{45} IRPA, \textit{supra}, § 49(2)(e); Rehaag & Grant, \textit{supra}, at 11.
\textsuperscript{46} See Michael Ista, \textit{Is Canada Really a Safe Haven?}, THE WALRUS (Sept. 6, 2017), \textit{available at https://thewalrus.ca/how-trumps-america-created-a-new-underground-railroad-into-canada/}.
\textsuperscript{47} See Michael Ista, \textit{Is Canada Really a Safe Haven?}, THE WALRUS (Sept. 6, 2017), \textit{available at https://thewalrus.ca/how-trumps-america-created-a-new-underground-railroad-into-canada/}.
\textsuperscript{48} Contesting the Designation, \textit{supra}, at 13
\textsuperscript{50} Katie Dangerfield & Sean Leslie, \textit{Firefighters rescue 17 asylum seekers, including a baby, from shed in Emerson, Man., GLOBAL NEWS} (Mar. 8, 2017), \textit{available at https://globalnews.ca/news/3295543/19-asylum-seekers-including-children-cross-over-emerson-border-during-winter-storm/}.
\textsuperscript{52} Julien Gignac, \textit{Woman seeking asylum in Canada dies of hypothermia near US border}, THE GUARDIAN (May 13, 2017), \textit{available at https://www.theguardian.com/world/2017/may/31/canada-asylum-seeker-dead-us-border; Karen Pauls, Ghanian grandmother who died in ditch en route to Canada might have been able to enter legally}, CBC, June
The number of unauthorized crossings increased again during the summer, with 3,134 interceptions in July and 5,712 in August. In Quebec alone, between 200 and 250 people per day crossed into Canada during the month of August. In total, the RCMP has intercepted 13,211 refugee claimants in 2017. By comparison, 2,400 refugee claimants crossed irregularly in all of 2016.

In addition to facing serious injury or even death in these hazardous border crossings, refugee claimants who are forced to resort to unauthorized crossings also often place themselves at risk of economic and physical exploitation at the hands of smugglers.

Reports suggest that the increase in unauthorized border crossings may be linked to the enactment of the executive orders in the United States and the climate of fear that they have created. The sections that follow look at the impact of these orders on the rights of asylum seekers.

**Deterioration of U.S. Conditions for Asylum Seekers**

As noted above, on January 25, 2017, President Donald Trump issued two executive orders on immigration: “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”). On February 20, 2017, DHS issued two implementing memoranda that provide guidance on the enforcement and implementation of the two executive orders, titled “Enforcement of Immigration Laws to Serve the National Interest” (hereinafter “DHS Memo on Interior Enforcement”) and “Implementing the senior quotes, supra.
President’s Border Security and Immigration Enforcement Improvement Policies”  
(hereinafter “DHS Memo on Border Enforcement”), respectively.

In the nine months since these two executive orders and their respective implementing memoranda took effect, human rights conditions in the United States for asylum seekers have deteriorated drastically, with serious implications for those returned to the United States under the STCA. Specifically, returned asylum seekers are more likely to face prolonged and indefinite detention; expedited removal proceedings without due process; a more stringent credible fear interview process; increased and aggressive criminal prosecution for immigration-related crimes; and return to Mexico or their home country in violation of the obligation of non-refoulement under the Refugee Convention.

(1) Prolonged, Indefinite, and Mass Detention of Asylum Seekers

The Border Enforcement Order calls for a large-scale expansion of detention capacity at or near the U.S. border with Mexico. In turn, the DHS Memo on Border Enforcement directs Immigration and Customs Enforcement (hereinafter “ICE”) and Customs and Border Protection (hereinafter “CBP”) to expand short-term and long-term detention capabilities. Under the Border Enforcement Order, asylum seekers apprehended “on suspicion of violating Federal or State law,” such as laws prohibiting unauthorized entry into the United States, may be subjected to detention. Additionally, Section 11(d) of the Border Enforcement Order limits parole (a release from detention) to cases involving “urgent humanitarian reasons or significant public benefit,” which DHS has interpreted to mean “sparingly.”

Since the issuance of the Border Enforcement Order on January 25, 2017, ICE has held more asylum seekers and immigrants in detention than in previous fiscal years, with some months seeing an increase of 5,000 individuals held in detention on an average daily basis. In detention facilities where asylum seekers were previously able to obtain parole, pro bono attorneys representing or assisting asylum seekers have seen a drastic decrease in release on parole. In instances in which parole may be granted, high bond amounts are preventing release. Efforts by

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61 DHS Memo on Border Enforcement, supra.
62 Border Enforcement Order, supra, § 5.
63 DHS Memo on Border Enforcement, supra, at 9.
64 Id. § 2(b); Amy Volz & Deborah Anker, The Impact of President Trump’s Executive Orders on Asylum Seekers, 17–05 IMMIGR. BRIEFS 1, 2 (May 2017).
65 DHS Memo on Border Enforcement, supra, at 9.
66 “In April and August of 2017, ICE held a daily average of 40,467 and 38,153 people in immigration detention, respectively. By contrast, in fiscal year 2016, the average daily detention population was 34,376.” Human Rights First, Judge and Jailer: Asylum Seekers Denied Parole in Wake of Trump Executive Order 6 (Sept. 2017), available at https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf.
67 In 2015, parole was only granted to 47% of asylum seekers. Human Rights First, Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers (July 2016), available at http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf.
68 Human Rights First, Judge and Jailer, supra, at 6–9.
69 See Gustavo Solis, Deported over a $2,000 bond: immigration bail bonds have tripled since 1996, USA TODAY (Apr. 18, 2017). “Since taking office in January, the Trump administration has redoubled efforts to round up immigrants with pending criminal charges. At the same time, attorneys say, U.S. Immigration and Customs Enforcement (ICE) is taking a harder line on granting bonds, which, like bail, allow detainees to be released from
the Trump administration to rotate judges to border regions are further aggravating backlogs in dockets, which prolong periods of detention.\textsuperscript{70} Consequently, asylum seekers fleeing horrific past persecution with traumatizing effects are spending months, and sometimes more than a year, in detention.\textsuperscript{71} This has included:

- a torture survivor from Burkina Faso who was detained for over 17 months;\textsuperscript{72}
- an asylum seeker from West Africa targeted for his sexual orientation, who spent 14 months in detention even though he had a U.S. citizen brother;\textsuperscript{73} and
- a human rights lawyer from Venezuela who spent approximately six months in detention.\textsuperscript{74}

The conditions in immigration detention often fall below international standards, with many facilities resembling prisons and lacking access to basic healthcare.\textsuperscript{75} Moreover, immigration detention adversely affects asylum seekers’ ability to retain legal counsel\textsuperscript{76} and adequately prepare for their cases.\textsuperscript{77} In turn, refugees returned to the United States from Canada under the STCA may not only be detained for prolonged periods of time, but may also face a more difficult time in preparing a strong asylum cases due to this detention.\textsuperscript{78}

(2) Expansion of Expedited Removal Proceedings

The Border Enforcement Order calls on DHS to significantly expand the use of expedited removal, a procedure that allows DHS officials to summarily remove individuals from the United States, without a hearing before an Immigration Judge.\textsuperscript{79} While DHS has not yet taken the necessary steps, including providing notice in the Federal Register, to expand expedited

\textsuperscript{70} Meredith Hoffman, \textit{Trump Sent Judges to the Border. Many Had Nothing to Do}, POLITICO MAGAZINE (Sept. 27, 2017).
\textsuperscript{71} Id. at 11.
\textsuperscript{72} Id. at 13.
\textsuperscript{73} Id. at 11–12.
\textsuperscript{74} Id. at 12.
\textsuperscript{77} “Ahmed also said many detainees have a difficult time collecting paperwork and testimony for their cases when they're behind bars. ‘You can't prepare evidence for a good case while you're locked up,’ he said.” Kate Linthicum, \textit{Dozens of asylum-seeking immigrants stop eating to protest detention}, LOS ANGELES TIMES (Dec. 2, 2015).
Additionally, immigration detention has many negative impacts on detained immigrants’ mental and physical health, which further impairs individuals’ ability to focus on preparing a strong legal case for protection. \textit{See generally} Human Rights Watch, \textit{Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention} (2017).
\textsuperscript{78} \textit{See generally} Peter L. Markowitz, et. al, \textit{Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings}, NEW YORK IMMIGRANT REPRESENTATION STUDY (2011).
\textsuperscript{79} Border Enforcement Order, \textit{supra}, §§ 11(c), 2(c).
removal, media reports suggest that DHS will seek to subject individuals to expedited removal if they are arrested anywhere in the United States and cannot prove that they have lived continuously in the U.S. for more than 90 days. In contrast, expedited removal currently only applies to individuals apprehended within 100 miles of the border who cannot prove continuous residence in the U.S. for the 14 days immediately prior to arrest. Another possibility is that expedited removal is expanded to the maximum extent possible under law, making all undocumented individuals who cannot prove continuous residence for two years in the United States subject to expedited removal proceedings. The 90-day expansion could potentially subject at least 40,098 additional individuals to expedited removal proceedings. The two-year expansion could subject another 328,440 individuals to expedited removal proceedings.

Any expansion of expedited removal proceedings would curtail refugees’ due process rights and create a grave risk that bona fide refugees would be returned to their home countries without proper screening. While individuals in expedited removal proceedings who express fears of return to their home countries should be granted a credible fear interview to determine eligibility for asylum, detention, arbitrary enforcement by federal, state and local authorities, and a lack of procedural safeguards severely limit the ability of bona fide refugees to pursue their claims to protection. An expansion of this problematic policy will further increase the risk that asylum seekers, including those returned to the United States under the STCA, are deported to countries where there will face persecution or torture.

(3) More Stringent Credible Fear Interview Process

The Border Enforcement Order directs DHS to ensure that asylum seekers are not “exploiting” the “credible fear” and “reasonable fear” determination process for protection in the United States. The DHS Memo on Border Enforcement thus mandates that asylum officers “determine the credibility of the alien’s statement made in support of his or her claim” and that a positive credible fear finding may only be made “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.”

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80 DHS Memo on Border Enforcement, supra, at 9.
81 Abigail Hauslohner & David Nakamura, In memo, Trump administration weighs expanding the expedited deportation powers of DHS, WASHINGTON POST (July 14, 2017).
83 Id. at 3.
84 Id. at 4.
85 Id.
86 See id. at 2–3.
87 See id. at 3.
89 DHS Memo on Border Enforcement, supra, at 8.
mandates that asylum seekers will be subject to a more stringent credible fear interview process. Changes to the USCIS lesson plans providing asylum officers with training consistent with the DHS Memo on Border Enforcement further support this implication.

Specifically, the new credible fear training materials remove instructions to asylum officers that (1) credible fear interviews are preliminary reviews, not full adjudications; (2) credible fear can still be found even if there is a reasonable doubt as to a person’s credibility; and (3) cultural factors may affect an asylum seeker’s demeanor, which should not be significant in determining eligibility. Furthermore, the new lesson plan place the burden on asylum seekers to tell CBP agents that they have a fear of returning to their home country. Asylum seekers returned from Canada under the STCA will thus be forced to overcome these potentially insurmountable obstacles in order to even access U.S. asylum protection.

(4) Increased Criminal Prosecution of Refugees

The Interior Enforcement Order directs the Department of Justice (hereinafter “DOJ”) to prioritize criminal prosecution of immigration offenses, including entry without authorization. DHS subsequently directed CBP and other agencies to target individuals who enter and reenter into the United States without authorization or who possess unofficial or forged documents. In April and May 2017, the DOJ issued two memoranda directing federal prosecutors to make immigration offenses a higher priority. Since the issuance of these memoranda, prosecution of immigration offenses, especially for unauthorized first time entry into the United States, has dramatically increased.

Immigration prosecutions impede the asylum process since many are deported after completion of a criminal sentence, without an opportunity to express their fears of return to their home countries, given the trauma they have often suffered prior to and during incarceration. The increase in criminal immigration prosecutions infringes on basic due process rights as asylum seekers are forced through summary proceedings, often en masse. These immigration prosecutions have resulted in bona fide refugees serving time in federal prisons, in contravention of U.S. obligations under the Refugee Convention, which prohibits the imposition of penalties on refugees for illegal entry. Examples of bona fide refugees subjected to criminal prosecutions for “illegal entry” include:

90 Volz & Anker, The Impact of President Trump’s Executive Orders on Asylum Seekers, supra note 7, at 12.
91 Id.
92 Interior Enforcement Order, supra, at 8.
93 DHS Memo on Interior Enforcement, supra, at 2.
96 Id. at 5.
- A torture survivor from Eritrea who was criminally convicted of “illegal entry.” After serving his sentence in federal prison, an immigration judge heard his asylum claim and found it so strong that he granted asylum mid-hearing.

- A Honduran transgender woman who was the survivor of rape and sexual violence. After being deported once, convicted for “illegal reentry,” and serving time in federal prison, this refugee was found to qualify for withholding of removal.

Asylum seekers returned to the United States under the STCA are at serious risk of prosecution for illegal entry or reentry into the United States and denial of the opportunity to apply for refugee protection as required under United States, regional, and international law.

(5) Arrest and Return of Refugees to Countries of Origin

The numbers of undocumented immigrants arrested and deported has increased dramatically in 2017 as a result of the immigration executive orders, with potentially dire consequences for asylum seekers returned from Canada under the STCA. ICE made 41,318 arrests between January 22, 2017 through April 2017, a sharp increase from 30,028 arrests during the same time period in 2016. While some of the individuals arrested had criminal convictions, there was a 150% increase in those who were arrested with no criminal record. Arrests have also started taking place in more sensitive locations, including at courthouses, schools and hospitals. In one particular case, a domestic violence survivor seeking a protective order from her abusive boyfriend was arrested at a courthouse in El Paso, Texas. In other cases, parents awaiting brain surgery on their infant or dropping off children to school were arrested.

The decrease in individuals prevailing in immigration court (a 20.7% decrease for the February 1, 2017 to July 31, 2017 period) points to a worrying trend that asylum seekers swept up in raids and arrests will be sent back to their home countries where they may be subject to
persecution or torture. Furthermore, lack of access to counsel infringes on asylum seekers’ due process rights and denies protection to bona fide refugees. Given these new hurdles, the underpinning of the STCA—that refugees returned to the United States from Canada will be given a fair opportunity to claim protection—is not an accurate characterization of the current U.S. immigration system.

(6) Return of Refugees to Mexico

The Border Enforcement Order calls for asylum seekers arriving at the U.S. southern border to await removal proceedings in Mexico. Additionally, since at least the summer of 2016, human rights advocates and the media have reported that border agents have turned away asylum seekers from the United States at the southern border, telling asylum seekers that they cannot apply for asylum in the United States. This practice is so systematic and pervasive that the American Immigration Council, the Center for Constitutional Rights, and Latham & Watkins LLP filed a class action lawsuit on behalf of individuals presenting themselves at the southern border to challenge DHS’s and CBP’s unlawful deprivation of the class’s right to seek asylum. Human rights reports have documented the rampant problems with the asylum system in Mexico, including in many instances, asylum seekers being sent back to their home countries without a hearing on their fears of return to persecution or torture. For refugees returned from Canada to the United States who are subsequently deported due to the many obstacles described above, being forced to await a hearing in Mexico would further exacerbate the traumas they have often suffered. Under these new procedures, bona fide refugees may spend months, if not years, in legal limbo, unable to go home or move forward with protection.

Regional and International Human Rights Obligations

Canada is a party to the 1951 Refugee Convention and its 1967 Protocol as well as the CAT. Article 33 of the Refugee Convention and Article 3 of CAT establish an obligation of non-refoulement.

As a Member State of the Organization of American States (hereinafter “OAS”), Canada has undertaken to respect and ensure the rights of all persons subject to its 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

110 Volz & Anker, The Impact of President Trump’s Executive Orders on Asylum Seekers, supra at 7.
111 Border Enforcement Order, supra, § 2(a).
114 See generally Amnesty International, Facing walls: USA and Mexico's violations of the rights of asylum-seekers, supra. See also Volz & Anker, The Impact of President Trump’s Executive Orders on Asylum Seekers, supra, at 9.
115 See Amnesty International, Facing walls: USA and Mexico's violations of the rights of asylum-seekers, supra, at 36.
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 is also party to other international human rights instruments, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

While the STCA establishes a system of shared responsibility for refugee protection, it does not displace Canada’s international and regional human rights obligations. This Commission has recognized that States have an obligation to ensure the right to seek asylum, not only within its own territory, but also in third countries to which an asylum seeker is removed. In order to preserve this right, a State may not remove an asylum seeker to a third country whose refugee laws contain legal or other bars to seeking asylum. Additionally, the obligation to prevent refoulement obligates a State not only to prevent the removal of a refugee directly to a country of persecution, but also indirectly through a third country (“indirect refoulement” or “chain refoulement”). Therefore, before removing an asylum seeker to a third country, States must conduct an individualized assessment of a refugee claimant’s case, taking into account the third country’s refugee laws, the ability of the claimant to access asylum, and the risk of indirect refoulement.

This Commission has also emphasized the right to due process in asylum claims. This right involves the right to be heard and “all the guarantees which make it possible to arrive at fair decisions.”

In applying these standards, the fact that Canada continues to return asylum seekers to the United States, despite grave deficiencies in U.S. immigration policy, exposes asylum seekers to the risk of indirect refoulement and violates their right to seek asylum. This is aggravated by the fact that Canada does not conduct individualized assessments based on U.S. refugee law of whether an asylum seeker can apply for asylum in the United States, or individualized risk assessments of indirect refoulement.

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116 John Doe v. Canada, supra. See also Haitian Interdiction Case (United States), Merits, IACHR, Report No 51/96, Case No. 10.675, § 163 (March 1997) [hereinafter “Haitian Interdiction Case”].
117 John Doe v. Canada, supra, § 94.
119 John Doe v. Canada, supra, § 94; UNHCR, Background paper No. 2, “The application of the ‘safe third country’ notion and its impact on the management of flows and on the protection of refugees,” (May 2001), available at http://www.refugeelawreader.org/457/Background_paper_no_2.pdf. (“Indirect removal of a refugee from one county to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes refoulement, for which both countries would bear joint responsibility. Therefore, a reliable assessment as to the risk of “chain refoulement” must be undertaken in each individual case, prior to removal to a third country considered to be safe”); IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106 Doc. 40 rev., § 25 (Feb. 28, 2000).
120 John Doe v. Canada, supra, at § 116.
The limited right to appeal and the inconsistent application of STCA exceptions also violate Canada’s due process obligations in the sense that asylum seekers are deprived of access to judicial processes to challenge their forced return to the United States and may face arbitrary decisions. The failure to consider claims on the merits also violates the right to an effective remedy.

Additional research is needed to explore the discriminatory impact that the STCA may have, especially on vulnerable groups. The fact that the STCA only applies to those arriving by land may be arbitrary in that it discriminates against and exposes such people to risk based solely on their method of arrival in Canada. Discrimination also exists with respect to access to RAD appeal, which is not open to refugee claimants who fall under the STCA exceptions.

The designation of the United States as a safe third country also has a discriminatory impact on persons whose claims fall into the areas where the United States is not compliant with the Refugee Convention or CAT. The STCA may also have a disproportionate impact on gender-based claims. For example, advocates in the United States have expressed concern about the risk of refoulement for women fleeing domestic violence, particularly in the current climate. Therefore, women with such claims who are returned to the United States under the STCA may be more severely impacted.

**Recommendations and Requests**

Petitioners believe that this hearing will provide the Commission with valuable information on and analysis of the human rights situation of asylum seekers under the STCA. We also believe that the Commission’s intervention would be a valuable tool in shedding light on the issues surrounding the operation of the STCA and in reinforcing Canada’s international and regional obligations for refugee protection. During the hearing, we will address steps the Commission can take in this regard, including the following:

1. urge Canada to adopt the necessary legislative or administrative changes to ensure due process in refugee protection claims;
2. carry out site visits at the U.S.-Canada border to monitor enforcement activities and gather facts related to this issue;
3. urge Canada to temporarily suspend the STCA until further fact-finding can be carried out;[123]

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122 Molly Redden, *Trump’s rigorous asylum proposals endanger domestic abuse survivors*, THE GUARDIAN (Apr. 10, 2017). (“In 2014, the country’s immigration high court issued a landmark ruling that some women escaping pervasive domestic violence may qualify for asylum in the US. But under a president who rode a wave of anti-immigration sentiment into office, advocates fear these achievements, and the futures of thousands of women are in danger.”).
123 The STCA provides that “[e]ither Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months. Either Party may, with the agreement of the other Party, suspend any part of this Agreement.” STCA, *supra*, at Art. 10.

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4. urge Canada to provide information relating to the impact of the STCA on gender-based and minority group claims, such as disaggregated data on acceptance rates and on applications received before and after the STCA; and
5. request that Canada provide disaggregated information relating to the number of refugee claimants returned to the United States from Canada since the executive orders were issued.

Petitioners respectfully request that the Canadian delegation for the hearing include representation of government agencies with decision-making authority in the context of immigration and refugee policy, including Canada Border Services Agency (CBSA) and Immigration, Refugees and Citizenship Canada (IRCC).

Respectfully submitted*,

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