

# HARVARD LAW SCHOOL

HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

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The Honourable Ahmed D. Hussen MP  
Minister of Immigration, Refugees and Citizenship  
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## **Re: The Impact of President Trump's Executive Orders on Asylum Seekers**

Dear Prime Minister Trudeau and Minister Hussen:

During his first week in office, President Donald Trump issued three executive orders on immigration: “Enhancing Public Safety in the Interior of the United States” (hereinafter “Interior Enforcement Order”), “Border Security and Immigration Enforcement Improvements” (hereinafter “Border Enforcement Order”), and “Protecting the Nation from Foreign Terrorist Entry into the United States,” (hereinafter “Seven Country Ban”).<sup>1</sup> This letter addresses the effects of these Orders on individuals seeking asylum in the United States, including those who would be returned to the United States from Canada under the Safe Third Country Agreement (STCA).

Based on erroneous assumptions about the criminality and extremist tendency of the immigrant population, President Trump's Executive Orders represent a dramatic restriction of access to asylum and other immigration protections in the United States. They call for a new regime of large-scale detention, expanded expedited removal without due process, deputizing of state and local officials to detain individuals suspected of immigration violations, and aggressive criminal prosecution of unauthorized entry, a means by which many seek access to asylum protection, as recognized in Article 31 of the Refugee Convention.

These policies will curtail asylum seekers' ability to meaningfully pursue their claims, and greatly increase the risk that individuals with viable asylum claims will be deported to countries where they face persecution, in violation of the principle of *non-refoulement*, one of the cornerstones of refugee protection enshrined in the Refugee Convention and the Convention Against Torture, and incorporated into U.S. and Canadian law.

We hope this report is helpful to the Canadian government in responding appropriately, in particular with respect to enforcement and implementation of the STCA.

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<sup>1</sup> The first two orders were signed on January 25, 2017 and the third order was signed on January 27, 2017.

Summarized below are some of the most problematic aspects of the Executive Orders. Attached is a more detailed report, which expands on the effects of these policies.

### **Large-Scale Detention of Refugees Seeking Asylum**

Under President Trump's Border Enforcement Order, all individuals present in the United States without authorization are subject to detention. The order calls for a massive expansion of immigration detention and the construction of new detention centers at the southern border to accommodate a much larger population of detainees. Individuals may now be detained merely "on suspicion" of violating federal or state law, including laws against unauthorized entry.

The Border Enforcement Order also threatens to eliminate parole, which previously allowed vulnerable individuals such as minors, pregnant mothers, and individuals with medical conditions, as well as noncitizens whose detention was "not in the public interest," to be released from detention while their removal proceedings were adjudicated.<sup>2</sup> In addition to exacerbating the risk of retraumatization and other mental health harms, confining refugees to detention centers severely restricts their ability to access counsel with dire consequences for case outcomes, particularly for women and children.<sup>3</sup>

### **Expedited Removal of Refugees Throughout the Country**

"Expedited removal" provides for the immediate removal of an individual upon encounter with an immigration official, without the opportunity to appear before an immigration judge in an administrative hearing. Previously, expedited removal applied to noncitizens who had entered the United States within the past two weeks and who were found without documentation within 100 miles of the southern border.<sup>4</sup> The Border Enforcement Order directs the Department of Homeland Security (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. It is not clear whether there will be any right to appeal the outcome of an expedited removal proceeding.

As a result of this policy, individuals throughout the United States who find themselves in expedited removal proceedings will face immediate deportation. In principle, those in expedited removal proceedings who express fear of return to their home countries will be granted a "credible fear screening" interview to determine whether they can apply for asylum, but detention and arbitrariness in enforcement will severely limit the ability of bona fide claimants to pursue their claims.

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<sup>2</sup> See *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. Immigration and Customs Enforcement, 2 (2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).

<sup>3</sup> See Elizabeth Cassidy & Tiffany Lynch, U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 8 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; see also Peter L. Markowitz *et al.*, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, New York Immigrant Representation Study 20, (2011), [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

<sup>4</sup> 8 C.F.R. § 208.16.

### **Criminalization of Being a Refugee**

The Interior Enforcement Order calls for criminal prosecution and detention of all persons with immigration violations, including people who enter without inspection. Because asylum seekers must physically enter the United States in order to apply for asylum, the Executive Order renders many bona fide asylum seekers unilaterally subject to detention without any assessment of their individual circumstances, effectively ensuring that refugees will be penalized for “illegal entry” in violation of Article 31 of the Refugee Convention.

In addition, 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.”<sup>5</sup>

### **Violations of *Non-Refoulement* (Articles 31 and 33 of the Refugee Convention and the Torture Convention) and the Right to Apply for Asylum**

The provisions of the Border Enforcement Order greatly increase the risk that refugees will be returned to countries where they face persecution. The construction of a wall along the southern border will severely restrict refugees' ability to enter the United States to apply for humanitarian protection. Section 7 of the Order appears to call for asylum seekers arriving via the land border with Mexico or Canada to be returned to those countries while they await their removal proceedings. Though it is not clear exactly how this policy will be implemented, there is a significant likelihood, based on current deportation statistics from Mexico, that asylum seekers who are returned to Mexico will be subsequently deported back to the countries they fled, without any meaningful opportunity to apply for asylum there.<sup>6</sup>

### **The Rule of Law and Arbitrary Enforcement**

The violations of rights contemplated by the three executive orders, the openly Islamophobic and anti-refugee messaging, and the inability to be confident in systematic, predictable, legally compliant enforcement we believe strongly indicate that the United States is not a safe country of asylum.

Sincerely,

/s/

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Director, Harvard Immigration and Refugee Clinical Program

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<sup>5</sup> See National Immigration Forum, *Secure Communities* (Jul. 11, 2011), <http://immigrationforum.org/blog/secure-communities-2/> (last visited Feb. 6, 2017).

<sup>6</sup> See Washington Office on Latin America, *Mexico Now Detains More Central American Migrants than the United States*, Washington Office on Latin America (Jun. 11, 2015), <https://www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/> (last visited Feb. 6, 2017).