

The Honourable Ahmed Hussen
Minister of Immigration, Refugees and Citizenship
365 Laurier Ave West
Ottawa, Ontario K1P 6A6

January 30, 2017

Dear Minister Hussen,

As the leaders of Amnesty International in both Canada and the United States, we are writing this Open Letter to you with an urgent request that you immediately rescind the designation of the United States under section 101(1)e) of the Immigration and Refugee Protection Act.

This designation, commonly referred to as reflective of the United States being a “safe third country” for the purposes of refugee protection, simply cannot stand in light of deeply troubling developments in the United States over the past week which demonstrate total disregard for a range of binding principles under both international refugee law and international human rights law meant to ensure the safety, dignity and equal treatment of refugee claimants and refugees.

In short, Minister Hussen, in our view it has become rapidly and abundantly clear that amidst rapidly evolving and unpredictable circumstances, numerous Executive Orders issued without notice or consultation by President Trump, considerable confusion and lack of transparency, and an uncertain and developing legal context as court challenges advance, the United States cannot be considered by Canada to be “safe” for the purposes of refugee protection.

The situation has changed very quickly. Some of the decisions have had immediate impact, most notably the indefinite suspension of Syrian refugee resettlement, suspension of the entire refugee admissions program for 120 days and the decision to deny admission to the United State for nationals of Syria, Iran, Iraq, Sudan, Somalia, Libya and Yemen for 90 days. It is unclear as to when the impact of other changes will be felt, such as proceeding with construction of a wall along the US/Mexico border, increased immigration detention and plans to clamp down on “sanctuary cities”. Some issues, such as President Trump’s frequent indications that he believes that torture is effective, linger as ominous indications of what might be to come.

There is every reason to believe that there may be further changes, including through additional Executive Orders. What has become clear is that all of the developments involve dramatic measures that blatantly violate numerous international refugee and human rights legal obligations, including under the 1951 Refugee Convention and its 1967 Protocol, the International Covenant on Civil and Political Rights and the Convention against Torture. Most directly, crucial principles with respect to non-discrimination, *non-refoulement*, arbitrary arrest and imprisonment, fair trials and the rights of children have already been infringed.

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We are strongly of the view that in this context Canada cannot wait to see how things continue to develop in the days and weeks to come. The situation has become so volatile, so entirely unpredictable and marked by such wholesale disregard for international human rights that to allow the designation of the United States to continue for even another day would be utterly untenable.

The “safe third country” regime is premised on the notion that Canada is entitled to rely on another country through which a refugee claimant has travelled to provide a fair hearing and effective protection to that claimant, rather than allowing them to pursue a claim in Canada. At its heart this requires that the Canadian government have confidence that the other country’s record of regard for refugee rights, and human rights more generally, is sufficiently equivalent to Canada’s (and more importantly, in line with international requirements) such that it is legitimate to consider that country to be a partner for the purposes of refugee protection.

Amnesty International has long been concerned about the ‘safe third country’ provision in Canadian law and its application to the United States. We joined with the Canadian Council of Refugees and the Canadian Council for Churches in a 2005 Federal Court application seeking to overturn the designation of the United States as ‘safe’. Notably, in 2007 the Federal Court ruled that the United States’ human rights and refugee protection record at that time did not meet the requirements of Canadian law and overturned the designation on administrative law and Charter grounds. The Federal Court found that the United States’ resort to expedited removals and detention, taken in conjunction with other factors, made the Governor in Council’s designation of the United States as a safe country unreasonable. In particular, the Federal Court highlighted that:

. . . there are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC’s conclusion of U.S. compliance [with international conventions]. These include: the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country.¹

The Federal Court also found that the Safe Third Country Agreement as “currently structured and applied” violated the right to life, liberty and security of the person under s. 7 of the Charter and the right to equality under s. 15 of the Charter.²

¹ *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 FCR 606, para 239.

² *Ibid*, para 337.

The Federal Court's finding was reversed in a Federal Court of Appeal ruling which concluded that as a matter of administrative law, the *actual* compliance of the United States with international treaties was not determinative as long as the Governor in Council considered and was satisfied with the United States' compliance, and that the respondents lacked standing for a Charter challenge.³ The Court of Appeal did not, however, reverse or revisit the Federal Court findings with respect to human rights and refugee protection concerns in the United States, but instead deemed much of the evidence to be irrelevant because it postdated the decision to designate the United States a safe country. The Supreme Court of Canada declined to hear a further appeal.⁴

Minister, what was of sufficient concern to lead a Federal Court judge to conclude that the United States was not 'safe' for refugees in 2007 is exponentially more the case today. Canadian law requires that a country only be designated if it "compl[ies] with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture."⁵ In making that assessment the government is required to consider: (a) whether the United States is a party to the Refugee Convention and to the Convention Against Torture; (b) US policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture; and (c) the US human rights record.⁶ The United States is a party to the Refugee Convention's 1967 Protocol and the Convention against Torture. There are serious concerns with respect to all of the remaining criteria.

The outcry from across the United States, Canada and around the world is, in many respects, the most powerful measure of how deeply offensive President Trump's new measures with respect to refugees are from a human rights perspective. Hundreds of people have been arrested and detained by immigration authorities, for no other reason than their nationality. Untold numbers of others have been refused permission to travel to the United States. Countless others who currently reside in the United States are fearful to leave the country, despite clarification that the ban will not apply to all lawful US permanent residents, worried that they would be banned from returning home.

Reacting to the Executive Order issued on January 27th, Amnesty International USA's Executive Director Margaret Huang expressed grave concern:

The executive order President Donald Trump issued today is cruel, inhumane, and violates international law. The United States has a rich history of helping refugees rebuild their lives safely and with dignity. Our refugee programs should not paint individuals' national origin or religion as suspicious or unwelcome.⁷

³ *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 FCR 136, paras 80 & 100.

⁴ *Canadian Council for Refugees v. Canada*, 2009 CanLII 4204 (SCC), <<http://canlii.ca/t/22d7x>>.

⁵ *Immigration and Refugee Protection Act*, s. 102(1)(a).

⁶ *Immigration and Refugee Protection Act*, s. 102(2).

⁷ Amnesty International, *Executive Action on Refugees is Cruel and Inhumane*, January 27, 2017, <http://amnestyusa.org/news/press-releases/executive-action-on-refugees-is-cruel-and-inhumane>.

None of this is related to any legitimate concern that a particular person poses a true security or other threat to or in the United States. There is no evidence to suggest that refugees or other non-citizens pose more of a risk of committing an act of terrorism than citizens. This ban is entirely due to nationality and religion, which is blatantly discriminatory and arbitrary. It of course bears emphasizing that the seven countries that have been singled out by President Trump are all countries facing widespread and grave human rights crises and that there are undeniable and very serious refugee protection concerns in all seven instances.

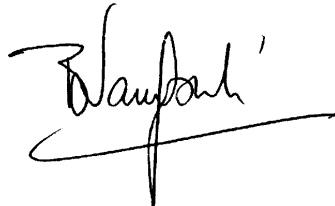
Minister Hussen, this rapid and chilling assault on the rights of refugees by the US government reflects staggering disregard for international law and fundamental precepts of justice. It is vital that Canada act immediately to ensure that refugee claimants in the United States who turn to Canada for protection are able to do so. That requires immediately rescinding the designation of the United States as a 'safe third country'.

We would welcome an opportunity to meet with you on an urgent basis to discuss this further. Arrangements can be made through Alex Neve's Executive Assistants, Aden Seaton/Sarah French, at ea@amnesty.ca or by phone at 613 744 7667 (extension 263).

Sincerely,



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cc. The Right Honourable Justin Trudeau
The Honourable Chrystia Freeland
Parliamentary Secretary Andrew Leslie