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Constellations of Trauma

Conceptualizing the *Best Interests of the Child*
in Canadian Immigration Law

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EXECUTIVE SUMMARY

This report stems from a larger in-house research project conducted in collaboration with *Human Rights Watch*, which focuses on alternatives to detention and systemic racism in immigration adjudication in Canada. Taking a particular interest in the issue of children's rights, this report focuses on the guiding principles of the *United Nations Convention on the Rights of the Child* and explores how practices of child detention in Canada diverge from its legal obligations under the *Convention*.

This research also adopts a critical race lens to examine how the interests of migrants are marginalized and subordinated, resulting in the institutionalization of the "unbelonging" of migrants. The report concludes with a set of recommendations targeted at legal scholars, community organizations, postsecondary institutions, and the federal government, intended to weave empathetic approaches into the Canadian immigration system.

Keywords: Rights of the Child, migration, United Nations, detention, Canada, immigration law, international human rights norms, systemic racism.

INTRODUCTION

Early childhood is a critical period of development, as the emotional and physical health, social skills, and cognitive capacities fostered in these early years are the foundation for healthy and resilient adults.¹ It is in recognition of the particular importance and vulnerability inherent to this stage that world leaders committed to the United Nations *Convention on the Rights of the Child* (CRC), the most widely ratified human rights treaty in history. Article 3(1) of the Convention requires that administrative authorities and legislative bodies take into *primary consideration* the “best interest of the child” in all actions concerning children; by ratifying the *Convention*, states agree to take “all appropriate legislative, administrative, and other measures” to implement it.² The *Immigration and Refugee Protection Act* (IRPA) was also enacted by the Parliament of Canada in 2002, introducing a provision stating that minor children are only to be detained “as a measure of last resort.”³

This report investigates whether, despite being a signatory to the CRC and implementing child welfare provisions in IRPA, the Canadian government’s treatment of asylum-seeking children is in violation of its commitment to their protection; by engaging in practices such as detention and family separation, the government places young children in situations of isolation, fear, and uncertainty, the impact of which may

¹ “The Science of Early Childhood Development (InBrief)”, *Center on the Developing Child* (2007). Retrieved from www.developingchild.harvard.edu.

² UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990.

³ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, Section 60.

endure well beyond childhood. This research applies critical race theory in examining dominant narratives about asylum seekers and how they construct institutional practices that subordinate and marginalize the interests of migrants, before concluding with recommendations targeted at civil society, postsecondary education institutions, and the Canadian government to advance empathetic approaches to immigration law.

ISSUE

Immigration policies hold the power to transform the lives of migrant children, who have already had their feelings of safety and security shaken by displacement and disconnection from the places and people they once recognized as “home.” In addition to the inherent vulnerability of childhood, which is marked by critical psychosocial developmental leaps, migrant children are made doubly susceptible to trauma through the instability and persecution that might characterize the lived experiences that forced them to flee their countries of origin.⁴ Despite these vulnerabilities however, migrant children are routinely held in immigration detention centres in Canada, despite IRPA’s guideline of employing detention only as a last resort for children.⁵

What are the impacts of detention on children, and how can we reconcile this treatment of migrant children with our knowledge of

⁴Rachel Kronick, Cécile Rousseau, and Janet Cleveland, "Refugee children's sandplay narratives in immigration detention in Canada," *European child & adolescent psychiatry* 27, no. 4 (2018), 424.

⁵ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, Section 60.

children's developmental needs? As new parents across the nation pore over books and guides in anticipation of their children's developmental milestones, setting up nurseries with high contrast patterns to promote visual development, or engaging in storytime to nurture their child's vocabulary, an average of 242 migrant children are detained per year, although this number figure does not reflect the number of *de facto* detainees who are held as "guests" of detained parents and therefore remain legally invisible.⁶ Immigration Holding Centres (IHCs) provide scarce opportunities for recreational activities, and detained children are given few opportunities to socialize with other children.⁷ Figures from a Toronto IHC show that, between 2011 and 2015, *de facto* child detainees were held for an average of 36 days; 85% of the children detained during this period were younger than six years old, and nearly two-thirds of them were two years or younger.⁸ In instances where children are spared detention, they are frequently separated from their detained parents, which contravenes the principle of family unity established in Article 9(1) of the CRC.⁹

Studies have found that children in detention face rigid rules and restrictions, constant surveillance, loss of control, and separation from community, culture, and the outside world.¹⁰ Children detainees also

⁶ Hanna Gros and Yolanda Song, "*No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation*," (2016), 9.

⁷ Gros and Song, 5.

⁸ Hanna Gros and Samer Muscati, "*Invisible Citizens: Canadian Children in Immigration Detention*," (2017), 16-18.

⁹ Gros and Song, 5.

¹⁰ Lauren Ashby, "*Constructions of Sympathy: A Media Discourse Analysis of Detained Children and Youth in Canada*," (2020), 52.

have limited opportunities for play, and show minimal interest in recreational activities due to feelings of depression and a lack of trust in others.¹¹ Children in detention are forced to survive and develop in conditions that would be deemed cruel, or even punishable by law, when imposed upon any other child. How is it, then, that this practice is not only *allowed* by the government, but enacted by it? The next section of this report will investigate this issue further by examining its divergence from international norms, as well as the codification of colonialism in immigration law, before discussing opportunities for social and institutional reform.

KEY FINDINGS

Canadian Immigration Law and International Children's Rights Principles

Given the international scope of immigration and the importance of international human rights norms in the interpretation of immigration law, the conceptualization of children's rights in this realm must be guided by the notion advanced by the *Convention* of children's rights as human rights.¹² The CRC outlines a foundational framework in international law that articulates the best interests of the child principle, a threshold concept articulating; 1) the substantive right of a child to have his/her best interests taken into *primary consideration*, 2) an interpretive legal principle, and 3) a rule of procedure guiding the

¹¹ Ibid.

¹²David B. Thronson, "Kids Will Be Kids-Reconsidering Conceptions of Children's Rights Underlying Immigration Law," *Immigration and Nationality Law Review* 23 (2002), 988.

decision-making process of evaluating the potential impact of the decision on the child in question.¹³ As cited earlier, Article 3(1) of the *Convention* requires that administrative authorities and legislative bodies take into *primary consideration* the “best interest of the child” in all actions concerning children; by ratifying the *Convention*, states agree to take “all appropriate legislative, administrative, and other measures” to implement it.¹⁴ Further, Article 9(1) affirms that states must ensure that children are not separated from their parents through state action or inaction, unless it is in the best interests of the child.¹⁵

This case-by-case determination is to be hinged on a non-hierarchical and non-exhaustive list of factors, including the care, protection, and safety of the child, the child’s right to health and education, the child’s views, and a situation of vulnerability, such as belonging to a minority group or being a refugee or asylum-seeker.¹⁶ The United Nations General Assembly, United Nations Working Group on Arbitrary Detention, and the Inter-American Court of Human Rights have all agreed that the migration of a child or their parent is insufficient grounds for the detention of a child. Further, the United Nations High Commissioner for Refugees has stated that children should “in principle not be detained at all,” a principle they've sought to concretize through their *Beyond Detention* program, which presents a

¹³ Thronson, 992.

¹⁴ UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990.

¹⁵ John Tobin, *The UN Convention on the Rights of the Child: A Commentary (Oxford Commentaries on International Law)*, Oxford: Oxford University Press, 2019, 21.

¹⁶ *Ibid.*

global strategy to support governments in bringing an end to the practice of detaining asylum-seekers and refugees.^{17,18}

The Committee on the Rights of the Child found that immigration authorities in Canada failed to apply the best interests of the child principle appropriately or consistently applied in the context of detention. Contrary to the legal responsibilities created by the ratification of the CRC and its requirement of the best interests of the child being accounted for as a primary consideration, the *Canadian Border Services Agency* (CBSA) remarked that the best interests of the child are considered “as one factor, but not a primary factor” in their detention decisions.¹⁹

In the case of detained families, the CBSA currently detains children with their mothers, while fathers are held separately and permitted to have short visits to see their children. This undermining of the family unit also disempowers parents from their roles as “carers, providers, and protectors.”²⁰ This disruption of their ability to parent meaningfully can leave children at increased risk of abuse or exploitation within the detention system.²¹ In some instances, children who are held in IHCs have Canadian citizenship and are not formally detained; however, they are held in these centres as “guests” of their

¹⁷Gros and Song, 38.

¹⁸ UNHCR (United Nations High Commissioner for Refugees), *"Beyond detention: a global strategy to support governments to end the detention of asylum-seekers and refugees."* (2014).

¹⁹ Ibid.

²⁰ Corlett, David. *Captured Childhood*. International Detention Coalition, 2012, 50.

²¹ Ibid, 49.

detained parent, creating a category of legally invisible *de facto* child detainees.²² In 2012, although records indicate that 291 children were officially detained by the CBSA, Canadian children informally held in IHCs as “guests” of their detained parents are not included in this statistical count, making it difficult to generate a figure that accurately reflects the full picture of child detention in Canada.^{23,24}

Critical Race Theory and the Marginalization of the Migrant Child

The gap between acceptable standards for migrant children and children in general in Canada can be understood by challenging the depoliticized celebration of diversity that characterizes the nation’s discourse of multiculturalism.²⁵ By depoliticizing this commitment, enshrined in Section 27 of the *Canadian Charter of Rights and Freedoms*, the struggles of communities of color are relegated to the margins, and mechanisms of institutionalized racism are obscured.^{26,27} Many of these tensions are manifested in the realm of immigration adjudication; as detention disproportionately affects racialized individuals, “it is not possible to fully understand the dynamics of immigration detention without also understanding debates about race, ethnicity and racism

²² Gros and Song, 33.

²³ Stephanie J. Silverman and Petra Molnar, "Everyday injustices: Barriers to access to justice for immigration detainees in Canada," *Refugee Survey Quarterly* 35, no. 1 (2016), 120.

²⁴ *De facto* child detainees are also held in detention “nearly three times longer than those subject to a formal detention order” (Gros and Song, 40).

²⁵ Marina Gomá, "Challenging the Narrative of Canadian Multicultural Benevolence: A Feminist Anti-Racist Critique," *OMNES: The Journal of Multicultural Society* 10, no. 1 (2020), 82.

²⁶ Varun Uberoi, "Multiculturalism and the Canadian charter of rights and freedoms," *Political Studies* 57, no. 4 (2009), 805.

²⁷ *Ibid.*

within and across national boundaries."²⁸ To this end, the research will adopt a critical race theory lens, which posits that society and its institutions are inextricably intertwined with racism and power dynamics that perpetuate the continued marginalization of people of color. The dominant culture of postraciality in the present day, which asserts that racism is a regressive attitude that we have largely left in the past, further complicates this inquiry by limiting what can be identified as racism without controversy.²⁹ In investigating the institutional processes of refugee claims and asylum-seeking, we must first confront the codification of colonialism and racism in legislation and policy. Just as the *Indian Act* supported the construction of a privileged predominantly White population with access to rights and resources that Indigenous peoples were excluded from, immigration laws have historically served as instruments through which nations were constructed to reproduce the legacy of colonization, making the possibility of truly belonging feel evasive for many minoritized migrants, for whom "the past is not only marked by the passage of time, but by loss - the loss of loved ones, of countries, of identities, of selves."^{30,31} Although explicitly racist provisions have been removed from contemporary immigration law, race remains the key technique

²⁸Hindpal Singh Bhui, "The Place of 'Race' in Understanding Immigration Control and the Detention of Foreign Nationals." *Criminology and Criminal Justice* 16, no. 3 (2016), 267..

²⁹Sarah Turnbull, "Immigration Detention and the Racialized Governance of Illegality in the United Kingdom." *Social Justice* 44, no. 1 (147) (2017), 143.

³⁰Jennifer Ma, "The intersection and parallels of Aboriginal peoples' and racialized migrants' experiences of colonialism and child welfare in Canada," *International Social Work* (2020), 5.

³¹Viet Thanh Nguyen, *The Displaced: Refugee Writers on Refugee Lives*, Abrams Press (2018), 22.

through which "access to legal belonging, credential movement and travel, and the protection of the state are distributed."³² This characteristic of the asylum-seeking process imbues it with a certain barbed quality, like a stem so full of thorns that to hold it is to bleed.

This racialization of immigration policy harms the perception and treatment of communities of color by casting them as an "other" whose cultural differences are viewed as a "criterion for exclusion."³³ The carceral migration practice of immigration detention justifies confinement as a suitable punishment for migrants lacking the legal right to enter and/or remain in Canada, giving little weight to the reality that these individuals are fleeing violence or persecution in their countries of origin and have arrived at our borders in the hope of finding protection from the Canadian state.³⁴ Unfortunately, in many instances, migrant families find themselves criminalized and excluded by the same authorities that they believed would grant them safety and security. It is this attitude of suspicion and hostility towards migrants as the "other" that fosters a culture of detaining children in conditions that few would tolerate for their own; due to the particular vulnerability of children, traumas and developmental delays resulting from detention can result in enduring psychosocial problems that can alter the life course of the child detainee.³⁵ Given the formally codified and culturally entrenched nature of these harmful attitudes, moving towards less hostile

³² Turnbull, 145.

³³ Ibid, 146.

³⁴ Ibid.

³⁵ Corlett, 49.

approaches to immigration policy will require both social and institutional reform. The next section proposes some recommendations towards the project of overhauling social and legal cultures to embody a culture of empathy towards migrant children that is better aligned with Canada's legal obligations under the *Convention on the Rights of the Child*.

RECOMMENDATIONS

The recommendations emerging from this research are presented in this section, with the targeted stakeholder of each recommendation indicated in bold lettering.

1. **A renewed and more rigorous commitment to international human rights principles as outlined in the *Convention on the Rights of the Child***

Article 60 of IRPA already dilutes the guidelines of the CRC by requiring that the best interests of the child be taken into account alongside other grounds and criteria, unlike the CRC's requirement that it be a primary consideration. Although the CBSA released the *National Directive for the Detention or Housing of Minors* in November 2017, affirming the best interests of the child as a primary consideration in detention decisions, research conducted by the *Canadian Council for Refugees* (CCR) two years after the directive was issued found that it was not applied consistently.³⁶ The **Canadian federal government** must renew its commitment to the high standard of protection afforded

³⁶ Canadian Council for Refugees, *Immigration detention and children: Rights still ignored, two years later*, November 2019, 2.

to children under the CRC and apply its own more recent directives more consistently. As Canada has long been praised for its humanitarian and compassionate tradition, I urge the government to follow through on this national identity by adhering firmly to viable alternatives to the detention of children and separation of migrant families, a practice whose long-term detrimental impacts on the development and wellbeing of the child far outweigh any administrative concerns.

2. Diversity and representation among decision-makers in law and policy

The most powerful way to eradicate outdated and regressive laws that have historically preserved the interests of elite members of society is to support the incorporation of individuals from diverse cultures, genders, socioeconomic backgrounds, and lived experiences into the profession. To this end, **postsecondary education institutions** must be made more accessible through the removal of financial barriers to legal studies. Mentorship also plays a vital role in the development and trajectory of legal studies and careers; first generation students, who are the first in their families to pursue the study of law, should have access to support through robust mentorship programs to compensate for the informal knowledge networks that might not organically exist within their circles. By encouraging the study of law by students from non-traditional backgrounds, the law is enriched by a diversity of perspectives and encouraged to take a new shape - one in which the threads that have historically constituted the margins of society are knit into the center.

3. Accessible and multilingual awareness campaigns to empower migrants with full knowledge of their rights

In discussing the rights of migrants, it is vital that we also acknowledge their agency in being able to advocate for themselves at critical points in the migratory process. Dense legal documents rife with technical jargon can be difficult to understand even under normal circumstances, so it is especially important to ensure that accessible legal information is readily available for migrants attempting to navigate the asylum-seeking process while advocating for the best interests of their children under precarious circumstances; **legal scholars and research institutions** can play a critical role in this process. Documents outlining key rights and protections in accessible terms should be produced and made available in various languages both online, in print, and in audio. Such a guide may include, but not be limited to, relevant laws, implications of the laws for migrants, instructions on what to do if they are detained or separated from their children, and a list of additional resources.

4. Community organizing and advocacy to build positive and empathetic narratives around migration

In addition to reforming immigration law into compliance with CRC obligations from the top-down by facilitating access to education for aspiring legal scholars from under-represented demographics, there is also an immense capacity for the transformation of social attitudes around migration and child detainees from the bottom-up. If it is

vestigial social attitudes that make us wary of or hostile towards migrants, to the point of seeing the detention of children as a justifiable practice, then social attitudes can also be revitalized by **community advocacy efforts** that encourage replacing fear-based or distrustful mindsets about migration with a culture of empathy. The discourse must shift from hostile rhetoric on opportunism or "otherhood" to a human-centred narrative that recognizes the challenges of fleeing one's homeland, especially when accompanied by young children. Having fled a motherland from which one derives entire generations of culture and history, and having not yet found steady footing in a new host country in which one may finally feel secure and hopeful, migrants are at risk of being left in a twofold limbo. Academic Emma Haddad describes this alienating feeling as a "double displacement" in which the migrant experiences "a physical displacement from the so-called home community and a symbolic and at times violent displacement from agency." In the instance of forced migration, the decision to leave home is often a necessary decision made under circumstances of violence or persecution. Consequently, the migrant "lives between the country of origin and her host country, trapped by division in a no man's land of hope and memory."³⁷

In contrast to the scrutinizing eye and capacity for austere treatment within the existing legal regime around immigration and detention, the efforts of individual Canadians and community organizations in mobilizing to help asylum-seekers feel grounded,

³⁷ Emma Haddad, *The refugee in international society: between sovereigns*, Vol. 106. Cambridge University Press, 2008, 40.

welcome, and at least a little bit “at home” is immensely valuable. After all, as the poet Warsan Shire so simply articulated, “no one leaves home unless home is the mouth of a shark.”³⁸

CONCLUSION

Despite Canada’s well-intentioned commitment to the United Nations *Convention on the Rights of the Child*, the detention of child migrants stands in stark contrast to our identity as a humanitarian and benevolent nation, and contradicts the guidelines established by the CRC. Given the critical developmental phases encompassed by childhood, a firm and immediate end must be brought to the practice of detaining children in austere spaces with little room for meaningful connection to community and minimal opportunity for recreational play with their peers. Alternatives to detention that reject separation of migrant families must be pursued in order to bring Canada’s immigration system into alignment with the guiding principles of the CRC. To follow regressive policies back to their early roots is to unearth a history of colonialism and racism, the long echoes of which still reverberate today. A meaningful reform of Canadian immigration law and practices involves undoing these legacies of othering and marginalization and instilling approaches grounded in humanity and empathy.

³⁸Warsan Shire, *Teaching My Mother How to Give Birth*, London: flipped eye publishing, 2011, 15.

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