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**OCTOBER REPORT:
IMMIGRATION
DETENTION
IN CANADA**



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1. Huffpost, Child Migrant Detention Is Also A Canadian Problem (2018) available at: https://www.huffpost.com/archive/ca/entry/child-migrant-detention-immigration-border_a_23469145 [accessed 19 November 2021].
2. Socialist Project, End Immigration Detention: An Open Letter (2018) available at: <https://socialistproject.ca/2018/07/end-immigration-detention-open-letter/> [accessed 19 November 2021].

Introduction

Despite Canada being a refugee-welcoming country, recent developments related to the detention of individuals seeking refuge in Canada and the deprivation of their liberty for indefinite periods of time have received criticism from relevant human rights organisations and activists. It is now known that the Canadian government detained a high number of migrants on immigration-related grounds.³ Although the detainees are held for non-criminal purposes, their detainment and confinement in Canadian jails and prisons are criticised for resembling those of criminal convictions.⁴



According to statistics published by the Canadian Border Services Agency (hereinafter CBSA), the number of immigrants detained in Canada has been increasing yearly since 2016, with a peak of 8,825 people in immigration detention between April 2019 and March 2020, including 138 infants and children.⁶ Furthermore, although the COVID-19 pandemic has resulted in the

release of a high number of immigration-related detainees, thus, showing the capability of the Canadian government to find alternatives that do not deprive people of their liberties and securities, such government has not yet responded to the disapproval of its actions by civilians, civil rights activists, and human rights organisations such as Human Rights Watch.⁷ The challenge here lies in the legal framework that allows for the detention of individuals that enter Canada without legal status under such harsh conditions whilst they are waiting for the immigration process to come to an end.

3. Human Rights Watch, I Didn't Feel Like a Human in There: Immigration Detention in Canada and its Impact on Mental Health (2021) available at: <https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental> [accessed 31 October 2021].
4. Human Rights Watch, Canada: Abuse, Discrimination in Immigration Detention: Thousands Held; Systemic Change Needed (2021) available at: <https://www.hrw.org/news/2021/06/17/canada-abuse-discrimination-immigration-detention> [accessed 31 October 2021].
5. CBC News, Death of woman, 50, detained by Canada border agency in Milton, renews calls for more oversight (2017) available at: <https://www.cbc.ca/news/canada/toronto/death-of-woman-50-detained-by-canada-border-agency-in-milton-renews-calls-for-more-oversight-1.4384996> [accessed 19 November 2021].
6. Human Rights Watch, I Didn't Feel Like a Human in There: Immigration Detention in Canada and its Impact on Mental Health (2021) available at: <https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental> [accessed 31 October 2021].
7. Human Rights Watch, Take Action Now (2021) available at: https://view.takeaction.hrw.org/?qs=58a24eb72c00c1304a_b63a9ffd223b118_f2e6c43470259_5462ce085ef_825f3c6f26_4f8e6ed0292e99a11e1923936b27546b117c6253a87299db46df1c6a9e693d7471955d1498c34ae85fce120d53f54 [accessed 31 October 2021].

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The legal framework for refugees and asylum seekers under the international and Canadian legal systems

States are responsible for protecting the rights of their citizens. When a State does not comply with this duty, people are forced to become migrants, refugees, or asylum seekers in order to find protection within a different State. Although the concepts of “migrant”, “refugee”, and “asylum seeker” are all used to describe people who are on the move and/or have left their home countries, these three notions are legally conceptualised in distinct manners.



Migrant is a concept with no internationally accepted legal definition.⁹ According to the Canadian Council for Refugees, a migrant is a person who resides outside their country of origin. In some cases, the use of this term includes people who have long gained the status of Canadian citizens. More commonly, it is used in reference to those who are currently on the move, with temporary status, or no status at all, in the country where they live.¹⁰

A refugee is a person who has left their own country due to the risk of serious human rights violations and persecution.¹¹ These risks become so significant that the affected people are put in a position where they have no other choice but to leave their home country and seek refuge elsewhere. This also happens due to the inability of their own government to grant protection against these dangers. An asylum seeker, on the other hand, is someone who has left their country and is currently seeking protection from persecution and serious human rights violations in a different country. This person is yet to be legally recognised as a refugee and is thus waiting to receive a decision on their asylum claim.¹²

The core of the international protection system lies under the United Nations High Commissioner for Refugees (UNHCR) Refugee Convention of 1951 and its 1967 Protocol,¹³ which has been complemented by other regional treaties and declarations that also refer to the rights of refugees. This system operates as a unit in regards to the Universal Declaration of Human Rights of 1948 and with international humanitarian

8. UNHCR Refugee Agency, Asylum and Migration available at: <https://www.unhcr.org/asylum-and-migration.html> [accessed 19 November 2021].

9. United Nations, Refugees and Migrants: Definitions (2016) available at: <https://refugeesmigrants.un.org/definitions> [accessed 31 October 2021].

10. Canadian Council for Refugees, Refugees and Immigrants: A glossary (2010) available at: <https://ccrweb.ca/en/glossary> [accessed 31 October 2021].

11. Amnesty International, Refugees, Asylum-Seekers and Migrants (2021) available at: <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [accessed 31 October 2021].

12. *ibid.*

13. UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011, available at: <https://www.refworld.org/docid/4ec4a7f02.html> [accessed 31 October 2021].

law.¹⁴ There are certain doctrines and rules under Customary International Law (hereinafter, CIL) that bind all States, including Canada. In this regard, the obligation of non-refoulement under national law, an international human rights law principle that guarantees that no person should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm.¹⁵ This principle is a CIL norm, and in the UNHCR's view, the protection from refoulement has also attained the character of a peremptory norm of international law (*jus cogens*).¹⁶

Additionally, another important pillar of the international protection system for those moving out of their country of origin is the non-penalisation for irregular entry. This protection, enshrined in Article 31 of the 1951 UNHCR Refugee Convention, ensures that refugees and asylum seekers who enter, or are present in a country without authorisation, "should not be subject to penalties, provided they report without delay to the authorities and show good cause for their irregular entry or presence".¹⁷ Thus, it is not a crime to cross a border, without authorisation, to seek asylum.

Under international human rights law, the measures adopted by governments in order to prevent and respond to cases of irregular migration must follow a protection-sensitive entry system. In this sense, it should take into consideration peoples' dignity and respect for their human rights irrespective of their legal status.¹⁸ The principle of non-discrimination also plays an important role when speaking of international refugee law and migration policies. People who migrate must receive this protection on an equal basis, respecting their religion, freedom of expression, cultural beliefs, sexual orientation, or gender identity.¹⁹

Any person in Canada, regardless of their status as a Canadian citizen, a permanent resident, or a "newcomer", has the rights and freedoms contained in the "Charter of Rights and Freedoms".²⁰ This Charter enshrines many protections linked to the CIL non-discrimination principle, such as freedom of religion, thought, expression, the press, and peaceful assembly; the right to participate in political activities and the right to a democratic government; the freedom to move around and live within Canada, and to leave Canada; equality rights; language rights; and, legal rights such as the right to life, liberty, and security.²¹

14. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 31 October 2021].
15. UN Human Rights Office of the High Commissioner, The Principle of non-refoulement under international human rights law (2018), available at: <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [accessed 31 October 2021].
16. UNHCR, UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, para. 16, <http://www.refworld.org/docid/44dc81164.html>. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 21, <http://www.refworld.org/docid/45f17a1a4.html>. UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2008, para. 18, <http://www.unhcr.org/refworld/docid/481ec7d92.html>. See also, EXCOM, Conclusion No. 25 (XXXIII) 1982, para. (b): 'Reaffirming the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law'.
17. UN Human Rights Office of the High Commissioner, A guide to international refugee protection and building state asylum systems (2017) available at: <https://www.unhcr.org/3d4aba564.pdf> [accessed 31 October 2021].
18. 130th IPU Assembly, Resolution on the role of parliaments in protecting the rights of children, in particular unaccompanied migrant children, and in preventing their exploitation in situations of armed conflict (2014).
19. UN Human Rights Office of the High Commissioner, A guide to international refugee protection and building state asylum systems (2017) available at: <https://www.unhcr.org/3d4aba564.pdf> [accessed 31 October 2021].
20. Government of Canada, Guide to the Canadian Charter of Rights and Freedoms (2020) available at: <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> [accessed 31 October 2021].



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Thus, migrants, refugees and asylum seekers have the right to enjoy liberty and security in Canada. However, the reality is that Canadian domestic law allows the State to imprison, in extremely inhumane conditions, those who do not have legal status. A migration and refugee legal framework that allows such consequences does not promote a protection-sensitive entry system or comply with a non-penalisation basis.

The situation analysed in this specific report, one in which many migrants and refugees are/were experiencing imprisonment in inhumane conditions, violates those peoples' human rights on many different levels. The fact that their freedom of movement is completely restricted under immigration-related grounds disregards the right to move freely throughout the national territory and to choose where to live as a basic human right. Furthermore, the conditions in which they are held during the migration proceedings are in no way in compliance with the dignity, respect and non-discriminatory treatment that is required by international human rights law standards, the CIL and the Canadian Charter.

22. Gerami Law PC, The Cost of Canada's Indefinite Immigration Detention Time (2017) available at: <https://geramilaw.com/blog/the-cost-of-canadas-indefinite-immigration-detention-time.html> [accessed 19 November 2021].

The asylum procedure in Canada and the discretion of the Canadian Border Services Agency

It is possible to make an asylum claim in Canada in two ways: the first option is at an official Port of Entry with the CBSA, while the second option is at the office of Immigration, Refugees, and Citizenship Canada (IRCC).²² Both procedures are conducted by Canadian officials who determine if the individual making an asylum claim is eligible to do so. If the individual is found to be eligible, their case will be referred to the Immigration and Refugee Board of Canada, who, in return, will decide if the refugee status should be granted following a hearing at a tribunal.

Worth special exploration is the role of the CBSA as an agency with sweeping “police powers”, which grants them the competence to arrest, put into detention, search and seize individuals as they see fit. However, despite its extensive powers, the CBSA remains to be the only Canadian major law enforcement agency that is not subject to an independent civilian oversight to review its policies or investigate any misconduct. Consequently, the CBSA has a high degree of discretion when it comes to deciding how to treat immigration-related detainees, including where they will be held and who will be incarcerated.

More specifically, the fact that two-thirds of immigration-related detainees were held in immigration holding centres that resemble medium-security prisons between 2016 and 2020, and that almost 2,000 detainees between 2019 and 2020 alone were held in provincial jails alongside criminally accused and convicted individuals demonstrate the level of discretion that the CBSA holds over the detainees and why the procedure is highly discriminatory.²⁴

23. Human Rights Watch, *I Didn't Feel Like a Human in There: Immigration Detention in Canada and its Impact on Mental Health* (2021) available at: <https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental> [accessed 31 October 2021].

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Discriminatory and abusive treatment or not?

Research has shown that although immigration-related detainees have not committed any criminal offence, they are regularly handcuffed, restrained, and held in jails with no contact with the outside world. Furthermore, they are forced to live under these conditions without any fixed date for release. The same problem exists for stateless people.

This situation is particularly problematic as these detainees are fleeing to Canada for asylum purposes, in other words, to flee from the danger, harm, and risk of persecution that exists in their home countries. They cannot apply for asylum prior to their departure, nor can they choose to stay in their home countries. As a result, they have no choice but to be detained as they wait for the immigration process to be finalised. Consequently, immigrant detainees that flee from their home countries in the hope of a better life end up being forced into yet another prison, with no other choice than to accept the discriminatory treatment. Such treatment naturally results in a negative impact on the mental health of the detainees who are already in a vulnerable position with no remedies.

Little is known in terms of the specificities of the treatment these detainees are facing; however, it is established that most detainees are restricted to small spaces with strict regimes whereby they are under constant surveillance. In provincial jails, many detainees are subjected to severe danger and violence. Quite shockingly, immigration-related detainees from communities of color are incarcerated for longer periods in immigration detentions compared to those who are not from communities of colour. These detainees, in particular those who identify as black, are held more commonly in provincial jails than in immigration holding centres, consequently laying out the degree of racially discriminatory treatment that exists in Canada.²⁵

25. Human Rights Watch, *I Didn't Feel Like a Human in There: Immigration Detention in Canada and its Impact on Mental Health* (2021) available at: <https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental> [accessed 31 October 2021].

Conclusion

Canada is well-known for its equal treatment towards non-nationals and its “open-minded” values that make it a popular destination for immigrants and asylum seekers that are fleeing from danger and want to live a better life. However, the reality does not correlate with the unrealistic notion of such a treatment.

Specifically, the treatment of immigration detainees by Canadian authorities has shown that Canada has a long way to go when it comes to creating a safe space for immigrants that flee from their home countries. In light of the information given above, it is clear that the CBSA needs to change the discriminatory treatment towards immigrant detainees and adhere to a higher level of human rights standards as prescribed by both international and Canadian Law.

Accordingly, Canadian authorities need to adjust to a humane and non-discriminatory treatment towards immigrant detainees that are being held in provincial jails under very severe conditions. In this regard, the calls of human rights organisations and instruments such as Amnesty International and Human Rights Watch need to be taken into consideration while also reforming the CBSA system in order for it to be in line with Human Rights Law.

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