

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations*

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26 June 2018

The Right Honourable Justin Trudeau, PC,  
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Dear Prime Minister and Minister,

**Re: Systematic US violation of international human rights of refugee children and families:  
Revoke the Canada-US “Safe Third Country” Agreement**

We are writing on behalf of Lawyers’ Rights Watch Canada (LRWC), a Canadian organization of lawyers and other human rights defenders who conduct research, education and advocacy on implementation of international standards for human rights, the rule of law and access to justice around the world. LRWC has Special Consultative status with the United Nations (UN) Economic and Social Council (ECOSOC).

LRWC joins many organizations in urging Canada to revoke the “Safe Third Country” agreement with the United States (US) which agreement is currently under review by your government. The Safe Third Country agreement allows Canada to reject asylum seekers entering from the States on the grounds that they should have applied for asylum in the US. Since Canada considers the US to be a “safe country,” it is almost impossible for persons in the US to make successful refugee claims in Canada. The Safe Third Country agreement allows Canada to return refugees to the US, even when the US authorities then return them to the dangers of the countries they left.

LRWC is gravely concerned about serious human rights violations against migrant children entering the US, including serious international crimes against them and lack of access to justice. The UN Human Rights Council has been expressing concern about violations of migrant

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children's human rights around the world for several years, including children entering the US.<sup>1</sup> The US Office of Refugee Resettlement (ORR) reported in April 2018 that ORR attempted to track 7,635 unaccompanied migrant children who were apprehended and placed with sponsors after entering the USA. ORR tracking conducted between October and December 2017 resulted in a finding that 1,475 of such children were unaccounted for.<sup>2</sup> US officials have stated that number of children unaccounted for may be up to 6,000 for the 2017 year.<sup>3</sup> The ORR claims that it is not legally responsible for the children once a sponsor is found for them, that 50% of the children are placed with parents, 40% with other relatives, and 10% with unrelated persons. The ORR also asserts that the children are not really missing because their sponsors do not answer the telephone when the ORR calls. An immigration advocacy worker explains that families often include those without proper paperwork so people are afraid to answer the telephone because they fear of USA Immigration and Customs Enforcement (ICE) who are reportedly "terrorizing" them.<sup>4</sup>

Faults of the old system were extended to encompass more children by US President Donald J. Trump's new "zero tolerance policy" by which children have been stripped from their parents' care. There are now reportedly more than 2,000 children in US custody without their families including very young children.<sup>5</sup> On 18 June 2018, the UN High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, condemned the Trump administration's policy of separating young children from their parents. If the parents are thought to have entered the country illegally, the children and parents are incarcerated in separate detention centers. Prime Minister Trudeau and UK Prime Minister Theresa May have both acknowledged the US policy as "wrong." In response to international and domestic outrage against this cruelty, on 20 June 2018 the US President rescinded by executive order the policy of separating children from their parents for detention. Instead, children will be detained with their families. In many cases, there is no paperwork enabling the return to their parents of the children already removed and no one seems sure when or even whether they will be reunited.

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<sup>1</sup> UN Human Rights Council, Global issue of unaccompanied migrant children and adolescents and human rights: Progress report of the Human Rights Council, Advisory Committee, A/HRC/33/5316 August 2016, available at:[https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A\\_HRC\\_33\\_53\\_E.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_53_E.docx).

<sup>2</sup> Statement of Steven Wagner, Acting Assistant Secretary, Administration for Children and Families, US Department of Health and Human Services, before the Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, United States Senate, 26 April 2018, available at: <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf>.

<sup>3</sup> "Exclusive: US officials likely lost track of nearly 6,000 unaccompanied migrant kids," Franco Ordoñez & Anita Kumar, McClatchy, June 19, 2018, available at <https://www.mcclatchydc.com/news/politics-government/white-house/article213430099.html>.

*Ibid.*

<sup>5</sup> Maria Sacchetti, Kevin Sieff, Marc Fisher, Separated immigrant children are all over the US now, far from parents who don't know where they are, Washington Post, [https://www.washingtonpost.com/politics/separated-immigrant-children-are-all-over-the-us-now-far-from-parents-who-dont-know-where-they-are/2018/06/24/c9bc5ba6-7568-11e8-805c-4b67019fcfe4\\_story.html](https://www.washingtonpost.com/politics/separated-immigrant-children-are-all-over-the-us-now-far-from-parents-who-dont-know-where-they-are/2018/06/24/c9bc5ba6-7568-11e8-805c-4b67019fcfe4_story.html).

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The Safe Third Party agreement has become a clear hazard to refugees running for their lives. The agreement works in opposition to UN treaties and other international law clearly intended to save their lives or freedom.

### **Violation of International Refugee Law**

Both Canada and the US have ratified the 1967 *Protocol relating to the Status of Refugees* (Protocol)<sup>6</sup> by which they undertake to apply the terms of the 1951 *Convention Relating to the Status of Refugees* (Refugee Convention).<sup>7</sup> Article 31 of the Refugee Convention provides that:

The Contracting States *shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence* (emphasis added).

The clear meaning of Article 31 is that the US must not criminally charge refugees and asylum seekers with improper entry or presence in the US as long as they present themselves immediately to authorities and account for their actions. The US has refused to put in place laws or policies to confirm the internationally binding principles of the Refugee Convention and Protocol. Instead, the US unlawfully thwarts the application of Article 31 of the Refugee Convention by blocking refugees from entry at regular crossings and criminalize their irregular entries under US Code §1325<sup>8</sup> in what has been described as a “Catch 22” situation.

### **Violation of the Convention on the Rights of the Child**

The separation of children from their parents also violates the *Convention on the Rights of the Child* (CRC)<sup>9</sup> signed by the US in 1977. While the US has not ratified the CRC, the *Vienna Convention on the Law of Treaties*<sup>10</sup> obligates State signatories of treaties to refrain from acts that defeat the purpose of the treaty. The purpose of the CRC is to ensure the best interests of children including their survival, protection and development, and, specifically, their right to not to be separated from their parents against their will without a court determination that separation is in the best interests of the child. Canada has ratified the CRC and has an obligation to all

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<sup>6</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>. The US acceded to the Protocol in 1968, see <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. For explanation of the relationship between the Refugee Convention and the Protocol, see the Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR), *Convention and Protocol Relating to the Status of Refugees*, Geneva: UNHCR, 2010, available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

<sup>7</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

<sup>8</sup> 8 USC Sec. 1325, available at: <https://www.justice.gov/usam/criminal-resource-manual-1911-8-usc-1325-unlawful-entry-failure-depart-fleeing-immigration>.

<sup>9</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>10</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 18, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

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children present in Canada, including those seeking refugee status, to ensure that the children's rights are protected in accordance with the CRC.

### **Torture and ill-treatment of children and parents**

The unplanned separation of children from their parents exposes young children to unnecessary trauma that is likely to affect deleteriously their long term neurological and psychological and social development.<sup>11</sup> Such separations also cause severe mental suffering<sup>12</sup> to children and their parents in violation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),<sup>13</sup> ratified by the US in 1994. US officials have intentionally inflicted severe psychological suffering on children and their parents for the purpose of punishing asylum seekers. This meets the definition of torture in Article 1 which describes torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Canada and the US have an obligation under Article 2 of the CAT to prevent and prosecute acts of torture in accordance with the CAT. We emphasise Article 2.1, which provides that no exceptional circumstances whatsoever may be invoked as a justification of torture, and torture cannot be legally justified by orders from superior officers or public authorities. Further, Canada and the US must not "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>14</sup> Canada is guilty of refoulement if it invokes the "Safe Third Party" agreement to send children or their parents to any country, including the US, where they may be subjected to physical or mental torture.

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<sup>11</sup> Victor Carrion, MD., interviewed in "5 Questions: How border separations can traumatize children." Stanford Medicine News Center, 21 June 2018, available at: <https://med.stanford.edu/news/all-news/2018/06/5-questions-how-border-separations-can-traumatize-children.html>.

<sup>12</sup> See, e.g. the descriptions of parents' reactions by public defender Erik Hanshaw in "Families will no longer be separated at the border. But where are my clients' kids?" *Washington Post*, 20 June 2018, available at: [https://www.washingtonpost.com/outlook/families-will-no-longer-be-separated-at-the-border-but-where-are-my-clients-kids/2018/06/20/9d9e59a0-74b6-11e8-805c-4b67019fcfe4\\_story.html?utm\\_term=.e2bd486b3e34](https://www.washingtonpost.com/outlook/families-will-no-longer-be-separated-at-the-border-but-where-are-my-clients-kids/2018/06/20/9d9e59a0-74b6-11e8-805c-4b67019fcfe4_story.html?utm_term=.e2bd486b3e34). Also see Eli Rosenberg, "'Gut-wrenching' recording captures sounds of crying children separated from parents at the border." *Pro Publica*, 19 June 2018, available at: [https://www.washingtonpost.com/news/post-nation/wp/2018/06/18/a-secret-recording-captures-the-sounds-of-crying-children-separated-from-parents-at-the-border/?utm\\_term=.148fd0ad96f2](https://www.washingtonpost.com/news/post-nation/wp/2018/06/18/a-secret-recording-captures-the-sounds-of-crying-children-separated-from-parents-at-the-border/?utm_term=.148fd0ad96f2).

<sup>13</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>.

<sup>14</sup> *Ibid*, article 4.

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## **The international crime of enforced disappearance: Children held in undisclosed locations**

LRWC is gravely concerned about reports that officials have failed to provide information to parents, their lawyers or the courts about the location of a number of the migrant children unlawfully separated from their parents at the border. A public defender in Texas reported on 20 June that US officials cross-examined in court hearings have testified that they do not know the location some children.<sup>15</sup> In one case, the judge is reported to have said “If someone at the jail takes your wallet, they give you a receipt. They take your kids, and you get nothing? Not even a slip of paper?”<sup>16</sup> In many cases, officials have taken children into custody but failed to promptly disclose the children’s whereabouts, kept the children in incommunicado detention, denied them contact with their relatives, and placed them outside the protection of the law with no access to judicial oversight or any other remedies.

This situation describes the international crime of enforced disappearance,<sup>17</sup> which violates multiple rights<sup>18</sup> protected by the *International Covenant on Civil and Political rights* (ICCPR),<sup>19</sup> including rights to survival, liberty, freedom from torture and ill-treatment, the integrity of family life, protection of the law, and access to judicial oversight and remedies.<sup>20</sup> Victims of enforced disappearance include the disappeared children<sup>21</sup> as well as their relatives who are subjected to unremitting anguish and uncertainty about the fate or condition of their disappeared loved ones.<sup>22</sup> The crime of enforced disappearance is continuous until the disappeared person is released or the circumstances of the disappearance are established including disclosure of the whereabouts of the disappeared.<sup>23</sup>

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<sup>15</sup> Erik Hanshew, "Families will no longer be separated at the border. But where are my clients' kids?" Washington Post, 20 June 2018, available at: [https://www.washingtonpost.com/outlook/families-will-no-longer-be-separated-at-the-border-but-where-are-my-clients-kids/2018/06/20/9d9e59a0-74b6-11e8-805c-4b67019fcfe4\\_story.html](https://www.washingtonpost.com/outlook/families-will-no-longer-be-separated-at-the-border-but-where-are-my-clients-kids/2018/06/20/9d9e59a0-74b6-11e8-805c-4b67019fcfe4_story.html). Also see Sacchetti et al, *supra* note 5.

<sup>16</sup> Hanshew, *Ibid*.

<sup>17</sup> *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Article 1, available at: <http://www.un.org/documents/ga/res/47/a47r133.htm>

<sup>18</sup> United Nations Commission on Human Rights, “Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission Resolution 2001/46,” E/CN.4/2002/71, 36.

<sup>19</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>20</sup> Jeremy Sarkin, “Why the Prohibition of Enforced Disappearance Has Attained *Jus Cogens* Status in International Law.” *Nordic Journal of International Law* 81(4) (2012): 537-584 at 538-39.

<sup>21</sup> *Declaration on the Protection of all Persons from Enforced Disappearance*, UN General Assembly resolution 47/133, A/RES/47/133, 18 December 1992, available at: <http://www.un.org/documents/ga/res/47/a47r133.htm>, describes disappeared persons as those who have been

arrested, detained, or abducted against their will or otherwise deprived of liberty by government officials, or by organized groups or private individuals acting on behalf of, or with the direct or indirect support, consent, or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or by a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

<sup>22</sup> *Ibid*, Article 1.

<sup>23</sup> Working Group on Enforced or Involuntary Disappearances (WGEID), *General Comment on Enforced Disappearance as a Continuous Crime, Report of the Working Group on Enforced or Involuntary Disappearances, Re: Systematic US violation of international human rights of refugee children and families: Revoke the Canada-US “Safe Third Country” Agreement*

By definition, the crime of enforced disappearance involves government officials, at least by acquiescence through lack of appropriate action to prevent or terminate the disappearances.<sup>24</sup>

The US is a party to the ICCPR, as is Canada. At customary international law, duties of States Parties to the ICCPR to investigate and remedy enforced disappearances have been confirmed by the UN Human Rights Committee.<sup>25</sup> There must be no support, consent or acquiescence by any State.<sup>26</sup>

Canada's continued application of the Safe Third Country agreement puts Canada at risk of supporting all of these serious violations of international human rights law against migrant and refugee children and their families. Given the gravity and urgency of the situation of asylum seeking children and their families entering the US at this time, we urge that the agreement be ended immediately.

We look forward to your urgent reply.

Yours sincerely,



J.B. Gerald  
Member  
Lawyers' Rights Watch Canada



Catherine Morris, BA, JD, LL.M.  
Research Director and UN Liaison Director  
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2010, A/HRC/16/48, at p 23, available at:

[http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances\\_en.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf)

<sup>24</sup> *Ibid.*, at 1.

<sup>25</sup> UN Human Rights Committee, General Comment No. 31, para 8, *supra* note 33. Investigations are to be undertaken according to *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution* (Minnesota Protocol), available at:

<http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf>.

<sup>26</sup> *Declaration on the Protection of all Persons from Enforced Disappearance*, *supra* note 15.

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