United Nations High Commissioner for Refugees

Comments on Bill C-11
"An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger"

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UNHCR Branch Office in Canada
280 Albert Street, Suite 401
Ottawa, Ontario
E-mail: canot@unhcr.ch

UNHCR

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SUMMARY OF COMMENTS

Introduction

- UNHCR welcomes the Government of Canada's initiative to revise its legislation to reflect more clearly Canada's international obligations and national commitment toward refugees and asylum-seekers. **§ 4**
- UNHCR endorses the recognition in C-11 that Canada has specific obligations to refugees, as reflected in the Bill's objectives. **§ 5**
- The Bill responds positively to several long-held UNHCR concerns, in particular, the introduction of an appeal on the merits, and the incorporation in Canadian legislation of Canada's obligations under the 1984 Convention against Torture. **§ 6, 72**
- However, the incorporation of Canada's obligations under the Convention against Torture is incomplete. **§ 92-94**
- The Bill establishes barriers to the refugee determination procedure which may unfairly limit the right to seek asylum. **§ 6, 40-64**
- Bill C-11 is framework legislation. The supporting Regulations will be at least as important as the Bill, in determining the scope and quality of protection available to refugees in Canada. **§ 7-8**

Admission from abroad

- UNHCR commends Canada's commitment to refugee resettlement, urges Canada to maintain this commitment, and supports the unique arrangement whereby refugees can be resettled with private sponsorships. **§ 9-11**
- UNHCR considers resettlement to be a tool of refugee protection. It therefore recommends dropping the requirement that refugees be found likely to establish themselves successfully in Canada, within a prescribed period, to qualify for resettlement. **§ 13**
- UNHCR welcomes the assurance that refugees in need of medical care will not be barred from Canada because of "excessive demand". **§ 14**
- Family unity is a basic right. UNHCR urges that the reunification of refugee families be set out as a distinct objective of Bill C-11.**§ 17**
- UNHCR welcomes measures to ensure the rapid reunification of refugees with their immediate families. **§ 12, 17-20**

Refugees and other protected persons

- The full range of Refugee Convention rights - including issuance of identity and travel documents- should be extended to refugees in Canada upon recognition, and not made dependent on landing. **§ 25-28**
- Measures to put an end to the delayed landing of refugees should be incorporated into Bill C-11. One option would be to land refugees immediately upon recognition, as is done for resettled refugees upon arrival.**§ 30-33**
- UNHCR recommends that the determination of identity done in the course of the refugee determination process be accepted by CIC. **§33**

Exercising the right to seek asylum

- Maintaining open access to asylum procedures is necessary, to respect the basic human right to seek and enjoy asylum from persecution. **§ 37**
- Statutory barriers to the asylum procedure are contrary to the spirit of the Refugee Convention. UNHCR is concerned that certain barriers in C-11 may unfairly limit access to protection. **§ 40-64**
- UNHCR believes that the determination of whether an individual should be excluded from refugee protection should be made by a qualified decision-maker in the course of the refugee status determination procedure, not in a pre-screening phase. **§ 46-47**

The refugee determination procedure

- Canada's refugee determination process is highly regarded. C-11 further strengthens it, by adding an appeal on the merits and incorporating Canada's obligations under the Convention against Torture. **§ 67, 72**
- Consideration should be given to including non-refugee stateless persons in the class of "persons in need of protection." **§ 68**
- Many refugees and asylum-seekers are unable to obtain valid documentation from their countries of origin. This should not be held against them. **§ 69-71**
- Asylum-seekers whose claims were determined abandoned or withdrawn should be able to make an appeal to the Refugee Appeal Division, if they contested in person the abandonment or withdrawal decision. **§ 73**
- The Refugee Appeal Division should receive submissions from appellants, including new evidence, and should be able to call a claimant to appear in person if it cannot make a decision based on the file. **§ 74**
- Persons in need of protection should be told on what basis this finding was made, i.e. the Refugee Convention or the Convention against Torture. **§ 95**
- UNHCR welcomes the role given to it in the procedure. This is a strong example for other countries. **§ 76**

Pre Removal Risk Assessment (PRRA)

- The PRRA is an important safeguard. However, the scope of this safeguard is not entirely adequate. **§ 82-84**
- No artificial time limit should be set for consideration under the PRRA of repeat claims. Rather, the determining factor should be whether there are changed circumstances or new evidence. **§ 84**
- The PRRA officials should be able to refer repeat claims back to the Immigration and Refugee Board, if circumstances warrant. **§ 43, 85**

Removal

- Persons found not to be in need of protection may reasonably be expected to return to their countries of origin. Countries of origin should readmit them. This is necessary to maintain the integrity of the asylum system. **§ 87**

- Under the Refugee Convention, recognized refugees may only be returned to their countries of origin under the limited conditions set out in Article 33(2). Bill C-11 should adhere to those conditions. **§ 88-90**
- The prohibition on return to torture contained in Article 3 of the Convention against Torture is absolute. Bill C-11 should be amended to reflect the non-derogable nature of this prohibition. **§ 92-94**

Detention

- Detention of asylum-seekers should normally be avoided, and should not be used as a deterrent. Alternatives to detention should always be sought. Detention should be for the shortest period possible. **§ 97-99, 105**
- Asylum-seeking children should not be detained. **§ 100-101**
- UNHCR cautions against establishing a detention policy, based on the mode of arrival of a claimant. **§ 103**

Smuggling, trafficking and interdiction

- Many refugees have no choice other than to resort to the services of a smuggler, in order to reach safety. **§ 107**
- UNHCR supports efforts to put an end to human smuggling and trafficking, but such measures should not impede the basic right to seek asylum from persecution. **§ 107-108**
- Appropriate measures should be put in place to protect victims of trafficking, including those who serve as witnesses. **§ 109**
- Overseas interception (interdiction) of undocumented or improperly documented travellers should incorporate safeguards, to make sure this does not result in refoulement. **§ 111-113**

II. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes this opportunity to comment on Bill C-11, "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger."

2. UNHCR has been mandated by the United Nations General Assembly to provide international protection to refugees and to assist governments in solving to refugee problems. Canada is a State Party to the 1951 Convention relating to the Status of Refugees (the "Refugee Convention") and to its 1967 Protocol. As such, Canada has agreed to co-operate with UNHCR in the exercise of its functions, and to facilitate its duty of supervising the application of the provisions of the Refugee Convention.

3. UNHCR has been present in Canada since 1976, and thus has been able to observe Canada's humanitarian tradition in action. One of the great challenges of the 21st century is to make sure that people all over the world are able to live secure lives. Promoting human security continues to be a priority for the Government of Canada and for UNHCR. Until this challenge is met, the international community will need to maintain its commitment to providing asylum to persons in need of protection.

4. UNHCR therefore welcomes the Government of Canada's initiative to revise its immigration legislation to reflect more precisely its international obligations and national commitment with respect to asylum-seekers and refugees. UNHCR especially welcomes the Bill's explicit references to international human rights principles and instruments, including the Refugee Convention and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention against Torture").

5. UNHCR endorses the recognition in the Bill that Canada has specific obligations towards refugees. This is reflected in the distinct objectives set out in the Bill with respect to immigrants and refugees. UNHCR understands and shares the interest of the Government of Canada in ensuring that the resources invested in refugee protection yield both fairness and efficiency, and in keeping abuse to a minimum.

6. The Bill responds positively to a number of long-held UNHCR concerns. These include: (i) the introduction of an appeal on the merits in Canada's refugee status determination system, (ii) the incorporation in this legislation of Canada's obligations under the Convention against Torture[1], and (iii) provisions for persons at risk who, for various reasons, fall outside the refugee definition, but are nonetheless in need of protection. At the same time, UNHCR is troubled by the scope of restrictions on access to the asylum procedure contained in the Bill.

7. Bill C-11 is framework legislation. Numerous provisions in the Bill refer to implementing Regulations which will set out criteria and procedures, and which will shape Canadian refugee policy and practice. These supporting Regulations will be as important as the Bill in determining the scope and quality of protection available to refugees in Canada. UNHCR's comments are therefore preliminary, pending analysis of the Regulations.

8. UNHCR is appreciative of the numerous opportunities it has been given to comment on this proposed legislation. UNHCR looks forward to the opportunity, guided by its responsibilities under Article 35 of the Refugee Convention, to co-operate with the Government on the elaboration of the Regulations. UNHCR urges the Government to undertake the widest possible consultation for these Regulations, given their crucial nature.

III. **ADMISSION FROM ABROAD**

Refugee resettlement

9. UNHCR commends the Government for clearly stating its commitment to refugee resettlement in the Objectives of Bill C-11. Section 2(b) affirms "Canada's commitment to international efforts to provide assistance to those in need of resettlement". Resettlement is an important tool of refugee protection, and Canada's participation in this effort significantly enhances UNHCR's ability to find durable solutions for refugees around the world.

10. Canada operates the world's second largest refugee resettlement program, a concrete manifestation of international burden-sharing. Over the past decade, Canada has resettled more than 140,000 refugees from all continents. For the current year, the government has set a target of 7,300 government-sponsored admissions. Several thousand additional admissions

[1] *See* paragraphs 92-94. UNHCR believes the incorporation of Canada's obligations under the Convention against Torture is incomplete.

of refugees with private sponsorships are expected. UNHCR co-operates closely with Canada on this program.

11. UNHCR applauds Canada for its longstanding commitment to refugee resettlement, and supports the government's efforts to expand resettlement capacity, through the promotion of private sponsorship arrangements. It understands that section 14(2)(c) of the Bill relates to Canada's interest, for policy and planning purposes, in setting resettlement levels. However, UNHCR urges that Canada's program be driven by a shared assessment of resettlement needs. It is, of course, not possible to set pre-determined targets for the protection of refugees who arrive spontaneously in Canada, and there should be no trade-offs between the protection of inland claimants and Canada's overseas resettlement program.

12. Despite the division of Bill C-11 into five parts, including separate parts devoted to immigration to Canada and to refugee protection, UNHCR is concerned that the necessary distinctions are not always made between refugees and other categories of immigrants. The needs of refugees as particularly vulnerable persons are not always given the distinct treatment warranted by their circumstances, in particular those resulting from the absence of national protection by the country of origin. For example, special measures may be necessary to reunite refugee families. UNHCR expects that the accompanying Regulations will therefore set out in detail the manner in which Canada will implement measures already announced in the context of the "Refugee Resettlement Model," in the areas of refugee resettlement and refugee family reunion.

13. UNHCR has consistently encouraged Canada to implement its resettlement programme in a manner which gives priority to a refugee's need for protection through resettlement, and not to focus on the refugee's ability to settle successfully in Canada. The Bill indicates that Regulations will prescribe selection criteria and the weight, if any, to be given to those criteria. Citizenship and Immigration Canada (CIC) has previously stated that the Regulations will extend from 12 months to three to five years the period required for resettled refugees to be able successfully to "establish" themselves in Canada. While this extension is welcome, it would be more appropriate to abolish altogether the requirement that refugees seeking resettlement be found likely to establish themselves successfully in Canada within a specified period. Resettlement is a tool of refugee protection, and as such, should not be linked to the refugee's settlement or integration potential.

14. UNHCR also welcomes the announced intention of CIC to exempt refugees selected abroad from medical inadmissibility criteria relating to "excessive demand," set out in section 38(2)c. It will be important for the Provinces to agree to this, as refugees should not find themselves barred from protection because of a medical condition.

15. Bill C-11 (s.40) establishes a new inadmissible class: those who have misrepresented themselves on an immigration application. This may prove particularly problematic in the resettlement context. Refugees often rely on others to help them complete official application forms. A variety of mistakes may be made, but which do not undermine the applicant's need for protection. Care must be taken that errors or misunderstandings are not seen as "misrepresentation" rendering a refugee (or a family member) inadmissible for resettlement or for family reunification.

16. Similarly, section 42 states that a foreign national is inadmissible if, in certain circumstances, a *non*-accompanying family member is inadmissible. UNHCR urges that steps be taken to ensure that this would not apply to a refugee or person in need of protection.

Reunification of refugee families

17. The reunification of families is set out in section 3(d) of the Bill as an objective with respect to *immigration*. UNHCR would urge that this be also be stated equally explicitly with respect to *refugees*.[2] UNHCR considers the reunification of refugee families to be a priority objective, reflective of the protection which the family enjoys in the international human rights regime.[3]

18. In the News Release issued when Bill C-11 was tabled in Parliament, CIC announced its intention to ensure the processing of refugee families overseas as a unit, including extended family members whenever possible. This is a positive step which, if successfully implemented, could considerably reduce the hardship suffered by separated refugee families.

19. UNHCR also welcomes the announced intention to amend the definition of "dependent" children under the Family Class, by raising the age from under 19 years to under 22. However,

[2] Section 2(f) states, less directly, that one of the objectives of the Act is "to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members."

[3] Article 16(3) of the Universal Declaration of Human Rights reads: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

UNHCR urges special consideration be given in the Regulations to unmarried sons and daughters of refugees even if they are *over* 21 years of age, in exceptional cases. Such consideration would in particular be warranted where the son or daughter is living alone in the country of origin, or in a precarious situation in another country, and reunification with the family in Canada would eliminate this hardship.

20. UNHCR welcomes the announcement that the Regulations will allow dependents of refugees, recognized inland or selected abroad, to be processed for landing as part of the same application, for a period of one year after the principal applicant has acquired permanent residence status. Nonetheless, UNHCR is concerned about dependents of refugees who may only be located or be able to have access to Canadian visa officers overseas *after* the one year limit has passed, and who would then become subject to more restrictive "sponsorship" requirements. UNHCR considers that refugees are entitled to reunification with their immediate families as a matter of right. This should not be made contingent on the refugee's ability to "sponsor" or support family members.[4]

IV. REFUGEES AND OTHER PROTECTED PERSONS

The Refugee Convention and the Convention against Torture

21. Canada acceded to the Refugee Convention and its 1967 Protocol on 4 June 1969. The Convention defines who is a refugee, sets out the rights of recognized refugees, and codifies the fundamental principle of *non-refoulement*. The Convention's refugee definition is found in the current Immigration Act (s. 2(1)) and in Bill C-11 (s. 96). However, the language used in the English version of section 96 ("each of their countries of nationality") does not accord with that of the Refugee Convention, nor with the French version of section 96.

22. Canada ratified the 1984 Convention against Torture in 1987. Article 3 of the Torture Convention prohibits Canada from returning an individual to a country where he or she would be in danger of being subjected to torture. Upon accession, Canada made a declaration pursuant to Article 22, which allows individual complaints from persons in Canada to be brought to the U.N. Committee against Torture.

[4] For more information, see *Note on Family Protection Issues* (EC/49/SC/CRP.14) presented to the UNHCR Standing Committee's 4 June 1999 meeting, available on "www.unhcr.ch/refworld/"

23. While Canada ratified the Convention against Torture many years ago, an express procedure for seeking protection or relief under this Convention was not adopted. Bill C-11 remedies this situation. Section 97 extends protection to persons who would face a substantial danger of torture or of cruel and unusual treatment or punishment in their country of origin. By providing for consolidated decision-making, which assesses the need for protection based on the Convention against Torture as well as the 1951 Convention, Bill C-11 significantly strengthens protection in Canada.

24. As explained in paragraphs 92-95 below, UNHCR urges amendment of C-11 to recognize the *absolute* nature of the prohibition against removal set out in Article 3 of the Convention against Torture. UNHCR also recommends that protection decisions based on this Convention clearly state the grounds on which protection was conferred, to ensure that no individual is removed to torture.

The status of Convention refugees under Bill C-11

25. The full set of rights enumerated in the Refugee Convention are accorded to a refugee in Canada only upon landing (i.e., upon acquisition of permanent residence status), rather than upon recognition as a refugee. The approach of the Government to this problem is best explained in an Operations Memorandum (OM IL-95-02, pertaining to current legislation) which reads in part:

> While the legislation does not make it mandatory for refugees to apply for landing in order to remain in Canada, it nonetheless provides for them to do so as soon as possible after the determination of their claim. Convention refugees who do not become permanent residents in Canada remain without legal status; they are not visitors and cannot be issued Minister's permits except in limited circumstances. They enjoy only limited protection: they have a right not to be returned to the country where they fear persecution, but they do not have the right to return to Canada once they leave. Also, conditional removal orders that were issued against them remain outstanding unless they become landed ... It is therefore important that they initiate the landing process as early as possible after they are determined to be a Convention refugee in order to entitle them to privileges and services that are acquired with full legal status.

26. The drafters of the Refugee Convention intended that refugees should benefit from Convention rights upon *recognition* of their refugee status (unless a State expressly entered a reservation to a particular article). Nonetheless, access to certain Convention rights in Canada

- in particular to a travel document - is contingent upon landing. Bill C-11 does not cure this imperfect situation. UNHCR urges that Bill C-11 be amended, to ensure that Convention rights are respected upon *recognition* of an individual by the Immigration and Refugee Board as a refugee or person in need of protection.

27. Canada did enter a reservation to Articles 23 and 24 of the Refugee Convention, limiting certain rights for refugees to those who are landed.[5] However, this reservation only affects Articles 23 and 24, which pertain to public relief, labour legislation and social security. Canada's obligations under other articles of the Refugee Convention remain unaffected. These obligations include, *inter alia*, the duty to provide refugees with administrative assistance (Article 25), and to issue identity papers (Article 27)[6] and travel documents (Article 28) to refugees.[7] UNHCR urges Canada to comply with these obligations.

28. While section 31(1) of Bill C-11 provides that "a protected person may be provided with a document indicating their status", it is unclear what legal benefit would derive from this "status document", and who would be entitled to it. This appears to fall short of States Parties' unequivocal obligation under Article 27 of the Refugee Convention to issue identity documents to refugees, and under Article 28, to issue travel documents. Many refugee families are scattered throughout the world and refugees should be able to travel and re-establish contact with family in other asylum countries. UNHCR urges that refugees be issued identity and travel documents upon recognition, as required by Articles 27 and 28 of the Refugee Convention.

29. Finally, UNHCR urges Canada to consider removing its reservations to the 1951 Convention.[8] This would be an important gesture, on the occasion of the Convention's 50th anniversary this year, and would accord with the tenor of Bill C-11, the objectives of which include many important principles of refugee protection.

[5] This reservation reads: "Canada interprets the phrase 'lawfully staying' as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be accorded the same treatment with respect to the matters dealt with in Articles 23 and 24 as is accorded visitors generally."
[6] Article 27 of the Refugee Convention states: "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."
[7] Article 28 reads: "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purposes of travel outside their territory …."
[8] UNHCR's Executive Commitee has repeatedly called on States to review their reservations to the 1951 Convention, with a view to withdrawing any such reservations. See Excom Conclusion 79 (XLVII) paragraph (e) and Conclusion 81(XLVII) paragraph (n).

Access to permanent residency ("landing")

30. UNHCR sees continuing benefit for refugees in the right to apply for landing, and would welcome efforts to ensure that all recognized refugees in Canada are able rapidly to become permanent residents, which is a pre-condition for naturalisation. This would be in line with Article 34 of the Refugee Convention, which reads:

> The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.

31. UNHCR applauds CIC's decision, announced in March 2000, to abolish one impediment to the naturalisation process, namely the "right of landing fee" for refugees.

32. UNHCR remains concerned, however, about the many refugees whose landing is delayed for long periods. Such delay not only impedes progress toward naturalisation, it also prevents the reunification of refugee families, a stated objective of Bill C-11, and limits access to post-secondary education. As explained in paragraphs 25 – 28, it also denies refugees access to travel documents and guaranteed re-entry to Canada, although Article 28 of the Refugee Convention requires the Contracting States to issue travel documents to recognized refugees.

33. In many cases, the delay in landing is due to the inability of refugees to provide Citizenship and Immigration Canada (CIC) with "satisfactory identity documents." Since the enactment of amending legislation in 1993, the Immigration Act (s.46.04(8)) has required a refugee applying for landing to present a "valid and subsisting passport or travel document or a satisfactory identity document." UNHCR is encouraged by the fact that this requirement does not appear in Bill C-11. Indeed, a recognized refugee should not be required to obtain documentation from a country where he or she has a well-founded fear of being persecuted. This is why Article 27 of the 1951 Convention provides that Contracting States "shall issue identity papers to any refugee in their territory who does not possess a valid travel document." UNHCR urges CIC to accept the determination of the identity of a refugee by the Immigration and Refugee Board (IRB) as sufficient for the purposes of landing.[9] By analogy with resettled refugees, who are

[9] See a legal opinion commissioned by UNHCR on this subject: Guy S. Goodwin-Gill, "The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without travel or identity documents," available on www.web.net/~ccr.

"landed" upon arrival, inland claimants could be "landed" upon recognition by the IRB. There is no indication that significant numbers of refugees have been recognized in Canada with false identities.

34. The Bill also sets out grounds for inadmissibility which may adversely affect the possibility for a recognized refugee to become a permanent resident, namely, security (s.34), criminality (s. 36(2)), misrepresentation (s. 40), and failure to comply with the Act (s. 41).

35. Inadmissibility because of misrepresentation (s. 40) constitutes a particularly problematic provision when applied to refugees. What may appear to have been “misrepresentation” at the port of entry or at a later interview, may in fact have been a manifestation of anxiety or trauma. Also, asylum-seekers may be counselled by smugglers or “agents” to tell certain stories. And, for cultural reasons, refugees may not always present family members in a manner which conforms to western habits. UNHCR urges that language be inserted in Bill C-11 to take account of these particularities.

36. Failure to comply with the Act (s. 41), as a ground for inadmissibility, also needs to be handled with extreme caution where refugees are concerned. Article 31 of the Refugee Convention exempts refugees from prosecution for illegal entry or presence in the country of asylum provided that certain conditions are met. Section 41 of Bill C-11 should contain a similar exception for refugees.

V. EXERCISING THE RIGHT TO SEEK ASYLUM

Access to the refugee determination procedure

37. Article 14 of the Universal Declaration of Human Rights establishes the right to seek and enjoy asylum from persecution. This right can only be exercised if the asylum-seeker has the opportunity to have his or her claim heard and determined by a competent authority. Asylum-seekers therefore must have access to the territory of countries where protection can be sought, and to the asylum procedure there.

38. UNHCR shares Canada's interest preventing abuse of its asylum procedure by persons who are not in need of international protection. Nonetheless, the myriad of migration controls which many countries, including Canada, have established, also have the effect of making it more difficult for asylum-seekers to seek protection. In many cases, persons in need of

protection have no option other than to resort to the use of false documents and the services of smugglers to bring them to a country where they can ask for asylum.

39. Immigration control measures should not impede the right to seek asylum. UNHCR believes that the most effective way to ensure the integrity of asylum systems is not to erect additional barriers but rather, to process applications fairly and expeditiously. Consistency in decision-making and timely removal of rejected asylum-seekers are of critical importance to the integrity of asylum systems.

Statutory bars to the asylum procedure: the "ineligibility provisions"

40. UNHCR is concerned that Bill C-11 narrows the scope of the right to seek asylum, by establishing statutory barriers to Canada's refugee determination procedure. In UNHCR's view, *automatic* bars to consideration of asylum claims are not in conformity with the Refugee Convention. Comments on the specific statutory devices in Bill C-11 (the inadmissibility and ineligibility provisions contained in ss. 34-37 and s. 101) are set out below.

41. Section 101 contains five grounds which render an asylum application "ineligible" to be referred to the Refugee Protection Division for consideration. A claim is not eligible for referral if:

> (a) refugee protection has already been conferred on, or
>
> (b) refused to the claimant under this Act;
>
> c) a prior claim ... was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;
>
> d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be returned to that country;
>
> (e) the claimant came to Canada directly or indirectly from a prescribed country, other than the country of nationality or former habitual residence; or
>
> (f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. (UNHCR questions the use of the term "international rights", which has no clear meaning.)

Prior claim (s. 101(1) b and c)

42. UNHCR understands the desire of the Canadian government to achieve "closure" in individual asylum determinations, and therefore a person whose claim has previously been refused by the Immigration and Refugee Board will not be eligible to lodge a new claim.

43. However, as is explained in paragraphs 84 – 85 below, circumstances may change which give rise to a new and genuine need for protection. The safeguard provided by the establishment of the Pre-removal Risk Assessment (PRRA) is therefore welcome. UNHCR would recommend, however, that PRRA officers have the discretion to refer particularly complex claims, or those where significant time has elapsed since the first claim, or presenting changed circumstances, back to the Refugee Protection Division for determination.

Protection elsewhere (s. 101(1)d)

44. This provision correctly underlines the importance of ascertaining whether a person who has been recognized as a Convention refugee by a country other than Canada and is able to return to that country. It may also be necessary to ensure that effective protection is available there. In such cases, the officer determining eligibility should assess whether the person has come to Canada due to a fear of persecution at the hands of the previous country of asylum, or because of dangers from which that country was unable to protect him or her.

Exclusion from the scope of refugee protection

45. Section 101(1)f contains the broadest of the "ineligibility" provisions, prohibiting referral to the Refugee Protection Division of persons found inadmissible on grounds set out in ss.34 - 37, namely: security (s.34), human or “international rights” violations (s.35), serious criminality (s.36(1)), and organized criminality (s.37).

46. Indeed, the Refugee Convention (Article 1F) permits State Parties to exclude certain categories of individuals from protection as refugees. The rationale underlying these exclusion provisions is that certain acts are so grave as to render their perpetrators undeserving of protection as refugees, and to safeguard the receiving country from persons who present a danger to the public safety or the security of the country. UNHCR has consistently urged that such determinations be placed *within* the jurisdiction of the authority competent for refugee status determination.

47. Neither the current Immigration Act nor Bill C-11 adopts this approach. Both place determinations of "ineligibility" (exclusion) *outside* the refugee status determination procedure, in the hands of adjudicators or immigration officials. However, because exclusion from refugee status is an extreme sanction, with potentially life-threatening consequences, UNHCR believes that such decisions should be made *within* the asylum procedure, by the authority with expertise and training in refugee law and status determination, in the context of a full consideration of the refugee claim. In the refugee determination hearing, questions regarding the nature and seriousness of the alleged acts, including any mitigating factors, can be fully considered, and balanced against the risk and severity of the persecution feared. This balancing serves to safeguard the legitimate state interest in security and public welfare, while ensuring due consideration of a refugee's need for protection.

48. Under Bill C-11, persons found to be inadmissible/ineligible on grounds of security, violation of human or international rights, or organized criminality may be allowed access to the asylum procedure if they satisfy the Minister that their presence in Canada would not be detrimental to the national interest. No similar exception exists for persons ineligible on grounds of "serious criminality" for convictions in Canada. Persons inadmissible/ineligible because of criminality outside of Canada may have access to the refugee procedure, as long as the Minister does not find them to be a "danger". Paragraphs 52 – 57 below outline how the scope of ineligibility on grounds of serious criminality may affect the rights of asylum-seekers. It is also important to comment on the other ineligibility grounds.

49. **Security grounds** (s. 34) include "members of organisations involved in activities in regard to espionage, acts of subversion and terrorism". While UNHCR has no interest in extending protection to individuals guilty of heinous acts, notes that the term "terrorism" remains undefined, and remains concerned that this provision fails to require an assessment of the individual's specific role or involvement in the acts or organisations which would exclude him or her from the scope of refugee protection.

50. Section 35 establishes inadmissibility on grounds of **human or international rights violations**. As indicated earlier, UNHCR would urge review of the language of s. 101(1) f and s. 35, as the term "international rights" is unclear. This inadmissibility provision extends to senior officials in the service of a government involved in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity and *nationals* (emphasis added) of a

country .... against which Canada has imposed or agreed to impose sanctions... The inclusion of *nationals* of countries against which Canada has imposed sanctions appears to be in error, and is not reflected in the French version. The exclusion of individual on the basis of *nationality* would clearly run counter to Canada's fundamental protection objectives, and be in sharp conflict with Article 1F of the 1951 Convention. UNHCR reiterates its conviction that exclusion must be an individualised determination and not based merely on a person's status or associations. Section 35(2) therefore allows for exceptions to the provisions in 35(1)(b) and (c), where the Minister is satisfied that the individual's presence would not be detrimental to the national interest.

51. Similarly, UNHCR is concerned that section 37(1)a, the provision establishing inadmissibility/ineligibility on grounds of **organized criminality**, is excessively broad. It is unclear what would determine "membership" in an organization engaged in criminal activity. UNHCR reiterates the importance of making individualized determinations based on an applicant's activities, and of avoiding "guilt by association". UNHCR welcomes section 37(2)b which recognizes that refugees may have no choice but to turn to smugglers to reach safety, and that therefore an asylum-seeker who enters Canada with the assistance of a person involved in organized criminal activities, should not be barred from the refugee determination process.

52. Under C-11, all persons found to be inadmissible on grounds of **serious criminality** (s. 36(1)) may *potentially* be denied access to the asylum procedure. Serious criminality refers to any offence punishable under Canadian law by a maximum term of imprisonment of at least ten years. Persons convicted in Canada of such an offence, upon whom a sentence of at least two years is imposed, are *automatically* ineligible to apply for asylum. Persons convicted outside Canada of such an offence are ineligible, regardless of the length of the sentence imposed, if the Minister is of the opinion that the individual is a danger to the public in Canada. UNHCR has several substantive concerns about these provisions, and also notes that the wording of s. 101(2) in the English version is misleading and needs to be clarified.

53. While UNHCR welcomes the inclusion of the "danger to the public" safeguard with respect to convictions *outside* Canada, it recommends that this safeguard also be maintained with respect to convictions *within* Canada (s.36(1)). An asylum-seeker may be encouraged to plead guilty, in exchange for a suspended sentence. Such advice is often based on an

understanding that the individual is *not* a danger to the community. Yet even in such a case, the claimant would still be ineligible, if the suspended sentence exceeded two years.

54. UNHCR recognizes that s. 101(2)b is intended to narrow (as compared to Bill C-31) the scope of grounds for ineligibility because of serious criminality outside of Canada. However, it is unclear where the onus lies: on the claimant to make an application to the Minister for a determination of eligibility, or on the Minister to make a finding of "danger".

55. Also, still with regard to convictions outside Canada, Bill C-11 fails to mirror the wording of Article 1F(b) of the Refugee Convention, which excludes from the benefit of refugee status a person who has committed a "serious *non-political* crime" outside the country of refuge. In the context of determining whether a person has committed a serious non-political crime outside the country of refuge, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* says that a "serious" crime must be a "capital crime or a grave punishable act."

56. The absence of reference in the Bill to the *non-political* nature of the crime leaves open the possibility of excluding an individual who was convicted outside Canada because of his or her political beliefs or activities. Such individuals are likely to be precisely the persons Canada would wish to protect. UNHCR urges that the Regulations include guidance reflecting the requirements of the Refugee Convention.

57. Furthermore, assessing the severity of a conviction outside Canada based on the maximum sentence for a crime, without regard for when the crime was committed or whether the sentence was suspended or not, could mean blocking access to the refugee determination procedure of an individual convicted years or even decades earlier, who served his or her sentence, and where rehabilitation is complete.

Persons ordered extradited (s.105)

58. A related statutory bar to the asylum procedure is found in ss.105 and 112. These automatically exclude from the refugee determination *and* pre-removal risk-assessment procedures those persons ordered surrendered under the *Extradition Act*. The order of surrender is deemed to be a rejection of a claim for protection on the basis of Article 1F(b) of the Refugee Convention. UNHCR considers this an inappropriate application of Article 1F(b),

as it precludes full consideration and weighing of all elements bearing upon both inclusion and exclusion, including mitigating circumstances.

Arrival via a third country (101(1)e and 102)

59. Bill C-11 provides that an asylum-seeker coming directly or indirectly from a “prescribed” country (other than his country of nationality or habitual residence) may be barred from access to the refugee determination procedure. While a similar provision exists in the current law, no such “safe third countries” have (to date) been prescribed.

60. States may legitimately establish co-operative mechanisms designed to allocate or share responsibility for examining asylum claims, provided that the procedures incorporate necessary safeguards. UNHCR's principal concern is that refugees receive the protection they need, and that responsibility-sharing agreements do not lead directly or indirectly to *refoulement.*

61. States should bear in mind that an asylum-seeker may have good reason to leave a potential country of asylum. Such reasons must be assessed on a case-by-case basis, and could include risks in that country, or family or other ties elsewhere. The UNHCR Executive Committee has counselled that "the intention of asylum-seekers as regards the country in which they wish to request asylum should as far as possible be taken into account."[10]

62. The widespread misuse of the notion of a ‘safe third country’ is of concern to UNHCR. Due to the inappropriate application of this notion in some countries, asylum-seekers have been removed to territories where their safety cannot be ensured. This practice is clearly contrary to basic protection principles, and may result in violation of the principle of *non-refoulement.*

63. The UNHCR Executive Committee has affirmed that no asylum-seeker should be returned to a third country for determination of his or her claim without sufficient guarantees, in each individual case, that the person will be re-admitted to that country; will enjoy effective protection there against *refoulement;* will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards.[11]

[10] *See* Executive Committee Conclusion No. 15 (XXX), "Refugees without an asylum country."
[11] *See* Executive Committee Conclusion No. 58 (XL), "Problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection."

64. An *individual* analysis must be done to establish whether the asylum-seeker may be sent to a third country. The question of whether a country is 'safe' is not a generic one, which can be answered for any asylum-seeker in any circumstances.

Procedure for assessing "inadmissibility" (s.44)

65. Section 44 establishes the procedure for determining inadmissibility. UNHCR believes that, notwithstanding the express provision that an examination take place, such a determination requires an opportunity to be heard, as an essential element of procedural fairness. The denial of this opportunity to any asylum-seeker prior to issuance of a removal order would be a serious breach of due process.

66. However, under C-11, persons believed to be inadmissible on grounds of security, human rights violations, serious criminality and organized criminality may be referred to an adjudicator for an admissibility hearing or may be the subject of an immediate removal order, *without a hearing*, "in accordance with the Regulations" (s.44). UNHCR urges that in *all* cases, a hearing before an adjudicator take place.

VI. THE REFUGEE DETERMINATION PROCESS

The basis for protection in Canada

67. UNHCR welcomes the provision in Bill C-11 for consolidated decision-making by the Refugee Protection Division. The Division will assess the individual's need for protection on the basis of the Refugee Convention and the Convention against Torture. Placing this consolidated determination in the hands of the Refugee Protection Division, with its specialised knowledge of countries of origin and experience in determining individual claims, is a positive step, and will further strengthen Canada's procedure, already among the most highly regarded.

68. In defining the class of "persons in need of protection" pursuant to s. 97(1), UNHCR would urge the inclusion of non-refugee stateless persons. UNHCR has a special role as intermediary to resolve cases of statelessness.[12] UNHCR does not believe that there are significant numbers of stateless persons in Canada, and note is taken that the Bill's definition of "foreign national" includes stateless persons. Nonetheless, UNHCR would encourage the Government to establish a legal status for non-refugee stateless persons. Their need for a secure status

[12] UNHCR has been entrusted by the U.N. General Assembly with the functions foreseen under Article 11 of the 1961 Convention on the Reduction of Statelessness (see Resolutions 3274 (XXIX) and 31/36).

could be assessed within the framework of the consolidated decision-making provided for in sections 95-98. This approach would be consistent with the spirit of the 1954 Convention relating to the Status of Stateless Persons, to which UNHCR urges Canada to accede. Alternately, UNHCR would recommend an explicit reference to stateless persons in the Regulations pertaining to section 25 ("humanitarian and compassionate considerations").

69. In any determination of an individual's need for protection, an assessment of credibility will be important. Section 106 requires the Refugee Protection Division to consider whether the asylum-seeker possess "acceptable documentation establishing identity," or whether he or she has provided a "reasonable explanation" for the lack of documentation, or has taken "reasonable steps to obtain the documentation."

70. An asylum-seeker has the duty to be truthful with the authorities of the country of asylum and to co-operate in the assessment of his or her claim. This includes a responsibility to provide information to the authorities and to co-operate in efforts to establish identity, including providing identity documents *when possible.* UNHCR acknowledges that the deliberate destruction of documents by asylum-seekers is a serious problem. However, measures to deal with undocumented asylum-seekers and refugees must also take into account the very real obstacles such persons may face, to obtain proper identification documents.

71. Many refugees and asylum-seekers are unable to obtain valid documents, precisely because they have a well-founded fear of being persecuted by the authorities who would issue such documents. It is therefore important that asylum-seekers not be compelled to approach the authorities of their country of origin for such documentation. Bringing their whereabouts or application for refugee status to the attention of the authorities of the country of origin could have serious consequences for family members and associates left behind. Failure to seek or obtain documents under these circumstances should not result in a finding that the claimant is not credible. Similarly, criminality and security checks of persons seeking protection should be undertaken in such a way as to avoid alerting the authorities of a country where the claimant fears persecution to his or her status as an asylum-seeker in Canada.

The appeal procedure (ss. 110-111)

72. UNHCR welcomes the introduction in Bill C-11 of the right to a (paper) appeal on the merits of a refugee determination decision. An appeal on the merits of a negative first instance decision is a fundamental feature of a credible refugee status determination system. The decision to introduce an appeal on the merits is a clear recognition of the fact that refugee determination is indeed "one of the most difficult judicial or quasi-judicial events existing in Canada."[13] The introduction of an appeal will strengthen the Canadian system and will reflect best practices internationally.

73. Section 110(2) provides that a refugee claim which has been determined withdrawn or abandoned may not be appealed. UNHCR recommends that the right to appeal extend to claimants whose applications were determined abandoned, but who contested this decision in person. Access to an appeal in such cases is particularly important, as the refugee determination procedure remains a complex legal process, and increasing numbers of asylum-seekers are not represented by legal counsel.

74. Section 110(3) provides that the Refugee Appeal Division "may" accept submissions from an asylum-seeker. UNHCR urges that the Refugee Appeal Division accept all submissions from appellants, including those containing new information. The Appeal Division should also be able to call the claimant to appear in person, if a decision cannot be made based on the file.

75. UNHCR has concerns about the Minister's right to appeal against *positive* first instance decisions, particularly in the light of experience with this practice in other countries. Appeals of positive first instance decisions may add considerably to the workload of the new Refugee Appeal Division and create great uncertainty for newly recognized refugees. If this option is retained, it should be used judiciously.

UNHCR's role

76. UNHCR welcomes the roles set out in sections 110(3) and 166(e) for the organisation: the right to present submissions to the Refugee Appeal Division, and to attend and observe any proceedings concerning asylum-seekers and refugees. This expression of willingness to co-operate with the agency entrusted with supervision of the Refugee Convention sets a strong

[13] per La Forest, J., in *Chan v Canada* (MEI) [1995] 3 S.C.R. 593 at 619 (SCC).

example for other systems to emulate. UNHCR presumes that although s. 110(3) provides that the Refugee Appeal Division *may* accept written submissions from UNHCR, such submissions would in practice not be refused. Similarly, UNHCR would expect to be able to continue to enjoy the rights associated with its observer status, namely to have access to evidence and reasons for decisions (subject to the limitation in s. 166(f)).

Suspension of consideration of a claim

77. Sections 103 and 104 set out conditions under which the Refugee Protection Division and Refugee Appeal Division's consideration of an asylum application must be suspended or terminated. Consideration of a claim is to be suspended if the claim has been referred to the Immigration Division for a determination of inadmissibility, or if the officer considers it necessary to wait for the decision of a court with respect to a claimant charged with a criminal offence of a certain gravity.

78. UNHCR understands the considerations, which could lead to the suspension of a claim. However, in the interest of avoiding a new category of "claimants in limbo," UNHCR urges that such suspensions be exceptional and of short duration. UNHCR notes that criminal convictions require proof beyond a reasonable doubt and may lead to lengthy appeal procedures, thus a final decision may not be forthcoming for months or years.

Non-disclosure of evidence

79. Sections 76 to 81 set out the circumstances in which a person may be declared inadmissible based on security or criminal intelligence information, which is not disclosed to him or her. UNHCR understands that there may be occasions when a State has security interests to protect, and disclosure of information could harm those interests. However, UNHCR also believes that there are procedural guarantees which can be employed to protect the right of an asylum-seeker or refugee to a full and fair hearing, while also protecting confidential material.

80. For instance, section 78 sets out the procedure according to which undisclosed information may be presented to a Federal Court judge to serve as proof of inadmissibility on grounds of security, violation of human or international rights, serious criminality or organized criminality. The judge is required to provide a summary of the undisclosed information, which will reasonably inform the person concerned of the nature of the allegations.

81. However, sections 86 and 87 do not guarantee that a summary of the information will be provided to the person concerned, when undisclosed information is presented as evidence before the Immigration and Refugee Board or in Federal Court proceedings. UNHCR recommends that sections 86 and 87 be amended to ensure that a summary is *always* provided.

VII. PRE-REMOVAL RISK ASSESSMENT

82. Sections 112-114 provide that persons who are the subject of enforceable removal orders may apply to the Minister for a pre-removal risk assessment (PRRA). UNHCR welcomes this remedy, but is concerned about its narrow scope. UNHCR understands that a pre-removal risk assessment will not be available to four categories of persons (s. 112(2)):

- Foreign nationals removable pursuant to an extradition order ;
- Foreign nationals removable to a "safe third country";
- Foreign nationals who did not leave Canada after their removal order became effective and a minimum period of time (to be prescribed) has not yet passed ;
- Foreign nationals who left Canada after their removal order became effective and who return to Canada before a period of six months has elapsed.

83. UNHCR understands that it is the intent of Bill C-11 to allow access to the PRRA for persons who are found ineligible to make a refugee claim. However, UNHCR would urge that a clear provision in this respect be included in the Bill.

84. UNHCR believes that the establishment of arbitrary time limits for access to the PRRA may limit its effectiveness. A person who is outside his or her country of origin may become a refugee *sur place*, when circumstances change in the country of origin, or as a result of the claimant's activities outside the country of origin. Serious changes in circumstances may occur *at any time*. Rejected asylum-seekers and other categories of persons facing removal may be affected by such changes. UNHCR therefore recommends that the time limits set in s. 112(2)c and d be removed, and replaced by a reference to "changed circumstances or new evidence", as the factors which would trigger a pre-removal risk assessment.

85. As indicated in paragraph 43 above, UNHCR recommends that PRRA officers have the discretion to refer particularly complex cases back to the Immigration and Refugee Board for a

new hearing. In UNHCR's view, this could be warranted in cases where many years have passed and/or where circumstances have changed significantly since the individual's first claim was determined. UNHCR welcomes the provision under s.113(b) that a hearing may be held in the context of the PRRA. This will be particularly important in those cases where claims were never referred to the Immigration and Refugee Board, and where therefore no hearing on the merits of the claim was ever held.

86. Where access to the refugee determination procedure is denied, and claims referred to the PRRA for determination, there is the risk of creating a two-tier system, in which the protection risks of one class of asylum-seekers are assessed by the Immigration and Refugee Board, while those of another are assessed by CIC officials. This could affect both the efficiency of the system and consistency of decision-making.

VII. REMOVAL

The Refugee Convention: exceptions to the principle of *non-refoulement*

87. Persons not in need of international protection may legitimately be expected to return to their countries of origin. The UNHCR Executive Committee has recognized that return of persons not in need of protection is fundamental to preserve the integrity of the asylum institution. The right of everyone to return to his or her country of origin is fully recognized in international law, and all countries should readmit their citizens. Returns must, however, be undertaken in a humane manner and in full respect for the human rights and dignity of those being repatriated.[14]

88. The cornerstone of international refugee protection is the principle of *non-refoulement*, contained in Article 33(1) of the Refugee Convention, which reads:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[14] *See* Conclusions 79 (XLVII) para (u) and 81 (XLVII) para (s), and Notes entitled: "Return of Persons not in need of International Protection" (EC/47/SC/CRP.28 of 30 May 1997) and "Composite Flows and the relationship to refugee outflows, including persons not in need of international protection, as well as facilitation of return in its global dimension" (EC/48/SC/CRP.29 of 22 May 1998).

The only exception to this principle is set out in Article 33 (2), which permits States to deny this protection to a refugee:

> whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, by having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

89. Three basic elements must be kept in mind regarding the interpretation of Article 33. First, the principle of *non-refoulement* applies to a person who may be a refugee, regardless of whether the determination of refugee status ("recognition" or "conferral") has been made. Second, Article 33(2) constitutes an exception to an important protection principle and must therefore be interpreted and implemented in a restrictive manner.[15] Finally, given the serious consequences of removal for the person concerned, such a decision should involve a careful weighing of the danger to the security of the community (or gravity of the crime) and the persecution feared. In the case of criminality, the facts of the crime and the actual punishment ordered by a competent court will be most relevant.

90. Accordingly, section 115(2) of the Bill requires the Minister to express the opinion that a Convention refugee who would lose this protection on grounds of serious criminality poses “a danger to the public in Canada”, before that person may be returned to the country of feared persecution. A refugee found to be inadmissible on grounds of security, violation of human rights or international rights or organized criminality, will not benefit from continued protection if the Minister is of the opinion, on the basis of the nature and severity of acts committed or danger to the security of Canada, that it would be contrary to the national interest for the individual to remain in Canada. The wording "contrary to national interest" is considerably broader than the wording of Article 33(2) of the Refugee Convention, which refers to "danger to the security" or "danger to the community” of the asylum country. UNHCR recommends amendment of s. 115(2)b, to mirror the language of Article 33(2).

91. The legislation is silent on the procedures which will apply to the removal provisions. These are to be set out in the Regulations**.** UNHCR recommends that these procedures ensure that Convention refugees facing removal are sufficiently informed of the facts on which a "danger opinion" by the Minister has been based, in order to know the case against them, and have the

[15] See UNHCR Executive Committee Conclusion No.7 (XXVII) on expulsion.

opportunity to respond to the allegations, pursuant to principles of due process and natural justice.

The prohibition on removal under the Convention against Torture

92. For persons protected under the Convention against Torture, the *non-refoulement* provision in Article 3 applies:

> No State Party shall 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.
>
> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

This provision differs from Article 33 of the Refugee Convention in two key respects. Most importantly, *it is not subject to derogation*. Canada is, therefore, prohibited from returning any individual who faces torture in his or her home country, regardless of crimes he or she may have committed or the danger he or she may present. Secondly, an individual who invokes Article 3 of the Convention against Torture does not need to demonstrate that he or she faces torture for one of the five grounds set out in the refugee definition.

93. In 1996, Canada joined in the consensus on the following language in the 1996 Conclusion of UNHCR's Executive Committee. The Committee reaffirmed:

> ... the fundamental principle of *non-refoulement*, which prohibits the expulsion and return of … persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture.[16]

94. UNHCR notes with concern that Bill C-11 (s.115) does not respect the non-derogable nature of the prohibition against the return of an individual to a situation where there are substantial grounds for believing that he or she would be in danger of torture. Consistent with Canada's obligations as a State Party to the Convention against Torture, UNHCR urges that it be amended accordingly.

[16] Conclusion No.79 (XLVII) para (j).

95. UNHCR also recommends that the Immigration and Refugee Board be required, when it confers protection based on a finding of a risk of torture, to include a clear statement to this effect in its decision pertaining to that case.

Designation of countries to which safe return is not possible

96. Under section 44(3) of the former version of this Bill (C-31), the Minister could temporarily stay the removal of foreign nationals to designated countries. This reflected the situation under the current Immigration Act, which allows the Minister to stay removals to countries when the level of civil violence or other situation (for instance, the aftermath of a natural disaster) is such that safe return cannot be contemplated. This provision does not appear in C-11. Section 50(e) of C-11 provides simply that a removal order is stayed "for the duration of a stay imposed by the Minister." UNHCR would recommend an explicit reference in this context to civil strife and the aftermath of natural disasters.

IX. DETENTION OF ASYLUM-SEEKERS

97. The right to liberty is a fundamental human right set out in universal and regional human rights instruments.[17] The detention of asylum-seekers is therefore inherently undesirable, and should normally be avoided.[18]

98. Refugees and asylum-seekers are in a different situation than other foreigners. Circumstances often compel refugees to enter a country illegally in order to escape persecution. Article 31 of the Refugee Convention prohibits the punishment of refugees for illegal entry or presence under specified circumstances. Where asylum-seekers have not committed crimes, their detention raises significant concern. This concern is heightened in the case of unaccompanied women, children, and persons with special medical or psychological needs, and when detention results in separation of families. Detention should not be imposed as part of a policy to deter future asylum-seekers or to discourage those who have commenced asylum procedures from pursuing them.

[17] *See inter alia*: The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the American Convention on Human Rights 'Pact of San Jose'.
[18] *See* "Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice," UNHCR Executive Committee, 15th meeting, (EC/49/SC/CRP.13 of 4 June 1999).

99. Where exceptional circumstances warrant restrictions on freedom of movement, UNHCR recommends that alternatives to detention always be sought first, such as reporting and residency requirements, identification of a guarantor, release on bail and residence in reception centres where it is permitted to leave and return during stipulated times.

100. Special efforts need to be made to avoid the detention of children. UNHCR welcomes the inclusion of the guiding principle in s.60 that detention of minors be only a measure of last resort. This is in line with Article 37 of the Convention on the Rights of the Child, which states that the detention of minors should be used "only as a measure of last resort and for the shortest appropriate period of time," and that the best interests of the child must be a primary consideration in all actions taken by States concerning children.

101. Under no circumstances should children be detained together with adults, unless these adults are their relatives or guardians, and children should never be placed with common criminals. To make sure that the needs of unaccompanied asylum-seeking children are identified and safeguarded, UNHCR urges States to ensure the appointment of a guardian with clear responsibility for looking after the interests of these children. This is especially important where children are detained.

102. Sections 55 and 56 set out grounds for detention of foreign persons, including asylum-seekers. These are:

- pending completion of an examination for an inadmissibility hearing;
- reasonable grounds to suspect the foreigner is inadmissible on grounds of security or for violating human rights;
- reasonable grounds to believe the person is inadmissible *and* a danger to the public or unlikely to appear for future proceedings;
- failure to establish identity.

103. UNHCR notes with concern that the grounds for detention in C-11 go beyond those set out in Executive Committee Conclusion 44 (XXXVII), which does not include the ground "unlikely to appear." Moreover, CIC has indicated that the Regulations will specify that the "unlikely to appear" provision includes claimants arriving as part of a criminally organized smuggling or trafficking operation. UNHCR would caution against establishing a policy of

detention based solely on the *mode of arrival* of an asylum-seeker. Many asylum-seekers are forced to resort to the services of smugglers in order to reach safety.

104. The Bill provides for the detention of persons who do not establish their identity "for the purpose of any procedure under this Act." UNHCR understands that the Regulations will focus on whether or not the individual has co-operated in establishing his or her identity. In making such a determination, it is important to be aware of the special circumstances of asylum-seekers, especially those who may have suffered persecution or trauma at the hands of authorities and whose behaviour in the presence of authorities may wrongly be perceived as unco-operative. The concept of "refusal to co-operate" must involve elements of wilfulness and intention to deceive, and should not extend to individuals who, in good faith, are unable to secure evidence or documentation sought by the Canadian authorities. Additionally, while s.58 gives the Immigration Division the competence to order the release of detainees, subsection 58(1)d removes this competence from the Immigration Division if the Minister is of the opinion that the individual's identity has not been established and that the individual has not "reasonably co-operated with the Minister … for the purpose of establishing their identity…." UNHCR recommends amending s.58(1)d, to leave this determination within the jurisdiction of the Immigration Division.

105. Detention should be for the shortest period possible, and there should be a periodic review of the grounds for detention. The current Act requires an initial detention review within 48 hours, a second in the seven days which follow, and subsequent reviews every 30 days. UNHCR notes that section 57(1) of the Bill calls for an initial review within 48 hours or "without delay afterward." Subsequent reviews are conditional on the first review taking place. UNHCR recommends that section 57(1) specify a mandatory time limit for the first detention review, in order to ensure that detainees' substantive and procedural rights are assured.

106. With respect to section 83(2), which relates to detention reviews for permanent residents (who may also be refugees), UNHCR considers the six-month review period excessively long, and recommends a review after no more than three months.

X. SMUGGLING, TRAFFICKING AND INTERDICTION

107. Part 3 of Bill C-11 is devoted to enforcement matters, including efforts to combat human smuggling and trafficking. UNHCR shares the concern of the Government of Canada about the

practice of human trafficking, as well as its concern that migrant smuggling may lead to abuse of asylum procedures. It is, however, imperative that measures to combat trafficking and smuggling do not impede the basic right to seek asylum from persecution. While many persons being smuggled or trafficked are migrants in search of better opportunities for themselves and their families, others are refugees who had no option but to resort to the services of smugglers, in order to reach safety. In other words, smuggled and trafficked persons may also be persons in need of international protection.

108. In December 2000, Canada signed the U.N. Convention against Transnational Organized Crime (CTOC) and its two Protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Both Protocols recognize that smuggled and trafficked persons may also be refugees, and therefore include a saving clause, designed to safeguard the rights of asylum-seekers and refugees under the Refugee Convention, in particular the right to protection against *refoulement*.

109. The CTOC and its Protocols also contain a variety of provisions to ensure that smuggled and trafficked migrants, especially women and chidren, are not further victimized, and suggest appropriate protection measures for smuggled and trafficked persons who give testimony in criminal proceedings concerning offences covered by the CTOC. Article 25 of that Convention requires State Parties to "take appropriate measures within its means to provide assistance and protection to victims of offences ... in particular in cases of threat of retaliation or intimidation," and both Protocols provide for complementary measures. Article 16 of the Smuggling Protocol calls for "protection and assistance measures." Articles 6 and 7 of the Trafficking Protocol appeal to States to protect the privacy and identity of victims of trafficking, and to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently in appropriate cases." As these new international instruments are incorporated into Canadian legislation, UNHCR urges attention to these important provisions.

110. Bill C-11 expands the offences, and increases the penalties, related to organising entry into Canada or to the use of false documents (ss.117-129). UNHCR welcomes the fact that persons found to be refugees are exempt from punishment for such offences (s.133). However,

UNHCR is concerned that the Bill may unfairly punish an individual who applied for asylum in good faith, or who assisted a refugee, perhaps even a family member, to flee persecution and reach safety in Canada. Similarly, transportation companies should not be fined for bringing an improperly documented person to Canada, if that person is subsequently found to be a refugee.

111. In the past, the Government announced its intention to reinforce its interception efforts, by stationing more migration control officers overseas to prevent undocumented persons from coming to Canada. International law and international refugee law in particular provide important parameters for States undertaking interception as a means to combat irregular migration.

112. The fundamental principle of *non-refoulement* reflects the commitment of the international community to ensure that persons in need of international protection are able to exercise their right to seek and enjoy asylum from persecution. This principle does not imply any geographical limitation. In UNHCR's understanding, the obligation of States to respect the principle of *non-refoulement* extends to all government agents acting in an official capacity, within or outside their national territory.

113. Interception, and other enforcement measures, must take into account the fundamental difference between refugees, as persons entitled to international protection, and other migrants, who may resort to the protection of their country of origin. Intercepted persons who present a claim for refugee status should enjoy protection until their status has been determined. For those found to be refugees, intercepting States, in co-operation with concerned agencies, should undertake efforts to identify a durable solution including, where appropriate, resettlement.