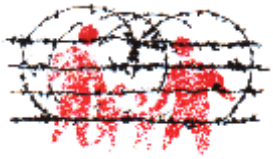

CANADIAN COUNCIL FOR REFUGEES

BILL C-11 BRIEF
25 March 2001

TABLE OF CONTENTS

1. SUMMARY

Introduction

— The heavy enforcement emphasis with which Bill C-11 was presented promotes negative stereotypes about refugees and immigrants and caters to xenophobia and racism within Canadian society.

— Bill C-11 is a framework legislation that leaves many of the key rules to regulations. This is a concern since it gives wide powers to change the rules without any parliamentary oversight.

— Bill C-11 tends to give more discretionary powers to immigration officers and reduce individual protections. The CCR calls for the opposite.

— A separate *Refugee Protection* part to the bill is welcome. The CCR would like however to see it cover more of the refugee programs, notably the refugee resettlement program and applications for permanent residence by refugees (currently dealt with in the bill under Part 1, *Immigration to Canada*).

— The use of the term "foreign national" for all non-citizens, including permanent residents, promotes a view of non-Canadians as "aliens" and undermines the status of permanent residents as members of Canadian society.

Human rights obligations

— Bill C-11 makes more reference than the current *Immigration Act* to Canada's human rights obligations (for example, by protecting people from return to torture, as guaranteed by Article 3 of the Convention Against Torture, and by referring to the best interests of the child). However, the bill is not consistent in ensuring that its provisions meet human rights obligations. The CCR urges the incorporation of relevant international human rights instruments.

Refugee resettlement

— The bill should be amended to exclude the possibility of setting quotas or numerical limits on refugee categories.

— The inclusion in Bill C-11 of an exemption from inadmissibility for resettled refugees on the basis of excessive medical demand is welcome.

— The proposal to reduce the impact of the "successful establishment" criterion is positive, but is incomplete. The CCR recommends that the successful establishment criterion be completely eliminated.

— The bill provides for no review mechanism for refused applicants for refugee resettlement and imposes a leave requirement on applications to the Federal Court for judicial review. The CCR

recommends that refugee applicants overseas have access to the Refugee Appeal Division of the Immigration and Refugee Board.

Refugee Determination in Canada

- The bill increases the bars to access to the refugee determination system, notably by denying any second claims as well as claims where there are issues of criminality or security. The CCR recommends that all claimants be granted access to the Immigration and Refugee Board and that any issues of eligibility be addressed there. Only eligibility issues that are consistent with the *Convention relating to the Status of Refugees* should be retained. Second claims should be addressed through the introduction of a re-opening mechanism.

- The CCR welcomes consolidation of decision-making at the Immigration and Refugee Board (risk review is moved from Citizenship and Immigration Canada where it is currently done). Also positive is the inclusion of protection for people at risk of torture, as required under the *Convention against Torture*. However, the Convention prohibits the return of anyone to torture, while the bill makes some exceptions. The definition of risk review is also restrictive in excluding risks faced generally in the country of origin. As well as amending these points, the CCR recommends including a provision to protect stateless persons.

- Under Bill C-11, most refugee hearings will be before a single board member, with no possibility of oral hearing at appeal. This means that a refugee will be heard by only one person. This reinforces longstanding concerns of the CCR with respect to the appointment process of board members. A transparent, professional and accountable selection process is urgently required.

- The CCR welcomes the introduction of an appeal for refugee claimants. The lack of an appeal on the merits is one of the fundamental flaws of the current refugee determination system. The CCR however calls for the appeal to be strengthened by allowing oral hearings where credibility is at issue, by allowing new evidence to be introduced, by clarifying the independence and hierarchical superiority of the Refugee Appeal Division and by allowing appeals from claimants whose claim has been declared abandoned.

- The introduction into the bill of a Pre-removal Risk Assessment is a welcome acknowledgment of the need to review potential risks faced by people about to be removed. However, the categories of people who will have access are restricted (and due to some drafting problems, unclear). Access should be expanded to cover anyone who might be at risk. In the interests of both fairness and efficiency, the Pre-removal Risk Assessment should be conducted by the Immigration and Refugee Board, not Citizenship and Immigration Canada.

- The bill provides for suspension of the removal of persons found to be at risk but where there are issues of criminality or security, they are to be left in limbo. People who have committed crimes against humanity should be prosecuted in Canada. Other people should be allowed to

apply for permanent residence (some of them may be people who have been convicted in a sham trial of crimes they did not commit).

— The bill provides for *refoulement* to torture or persecution in ways that are not consistent with international human rights obligations. The prohibition on return to torture is absolute. *Refoulement* of refugees is only allowed in cases where the refugee presents a danger to the public, not in cases where it is considered contrary to the national interest. These provisions should be corrected to comply with international instruments.

— Specific provisions need to be included to prohibit *refoulement* to countries or parts of a country where a person is at risk, in cases where the person is not found to be in need of protection because of dual or multiple nationalities or because of the existence of an internal flight alternative.

Detention

— The CCR is firmly opposed to the proposed expansions in powers of detention, which permit detention on the basis of administrative convenience and suspicion, broader powers of detention on the basis of identity, increased scope for detention without warrant, and link between mode of arrival and likelihood of detention. The CCR recommends that the only grounds for detention be danger to the public and flight risk.

Applications for permanent residence by refugees

— Permanent residence applications made by refugees should be addressed under Part 2, Refugee Protection

— People accepted by the Immigration and Refugee Board or in the PRRA as refugees or persons in need of protection should be granted permanent residence automatically, by operation of law.

Family reunification

— The CCR welcomes various proposals for facilitating family reunification, but regrets that they are not incorporated into the bill. Family unity is a right and should be protected as such in the bill. In particular, spouses and children of recognized refugees in Canada should have the right to travel to Canada for processing here. Economic status (e.g. receipt of social assistance) should never be a bar to family reunification.

— The bill increases powers for collecting on debts associated with a sponsorship undertaking. There needs to be some mechanism for reviewing humanitarian circumstances before proceeding against sponsors.

— The length of spousal sponsorships is to be reduced from 10 years to 3 years, a very positive move. This should be extended to cover fiancé-e-s and children.

Inadmissibility and permanent residence

- The bill expands the categories of inadmissibility, introducing some new categories that throw a very wide net (e.g. engaging in organized crime and misrepresentation). The CCR calls on the contrary for the current inadmissibility categories to be narrowed.

- The current provisions for removing people on the basis of alleged security risk are unfair, both in terms of the broad definitions used and the lack of procedural protections for the individuals. Bill C-11 continues to refer to "terrorism" without defining it and to "being a member of an organization" without requiring that the individual constitute a security risk.

- Permanent residents accused of security issues lose access to the Security Intelligence Review Committee (SIRC). The CCR calls for the definition to be narrowed, access to SIRC to be granted to permanent residents and others, and the inclusion of a right of appeal from a Federal Court decision on a security certificate. The provisions calling for mandatory detention of non-permanent residents should be deleted.

- The CCR recommends that some kind of "returning resident's permit" be re-instated so that permanent residents going abroad can be assured in advance that their situation meets the requirements of the law and that they will not lose their status.

- All permanent residents should have a right to an oral hearing before the Immigration Appeal Division. This includes people who are inadmissible on the basis of criminality, security, serious human rights violations and organized crime. These categories are very broad and include people who have been convicted of no crime. Even in cases where they have committed a crime, humanitarian circumstances need to be considered (e.g. if the person has lived since infancy in Canada).

- Powers of immigration officers to examine non-citizens, including permanent residents, are extended to within Canada (instead of being limited to the border, as is currently the case). The CCR opposes this change, which treats all non-Canadians as if they are constantly at our borders, instead of members of Canadian society.

Interdiction

- The government has announced its intention of increasing interdiction measures, i.e. measures designed to prevent improperly documented travellers from reaching Canada. The CCR is deeply concerned about the impact of these measures on refugees, who often have no choice but to use illegal means of travel in fleeing persecution. The CCR calls for the bill to circumscribe the activities of immigration officers involved in interdiction overseas and to include the obligation to protect refugees.

- Carrier sanctions (i.e. fines on transporters, such as airlines and shipping agencies) should not be imposed when persons brought into Canada are subsequently determined to be refugees,

since organizations should not be penalized for enabling refugees to flee persecution. There should be no carrier sanctions for bringing stowaways into Canada, since they provide an incentive for throwing stowaways overboard.

- Bill C-11 exempts from penalties for illegal entry people who are subsequently found to be refugees. While this is welcome, it does not go far enough: it does not cover people who are interdicted overseas and as a result not recognized as refugees; nor does it cover people who, motivated by humanitarian concerns, assisted refugees to enter Canada.

- The CCR is very concerned at the significant increases in scope of offences and penalties associated with enforcement of the Act. They treat offences against the border as exceptionally serious crimes, which in the view of the CCR, is not at all justified. It is important to note that while most white people have the luxury of travelling wherever they want legally, many members of racialized minorities do not. The escalation of the offences and penalties, which in itself sends the message that Canada is threatened by foreigners, will have particular impact on these communities.

- The problem of human trafficking (the holding in bondage of human beings) is addressed in the bill through increased penalties for traffickers. The CCR is however concerned that there are no provisions to protect the rights of those trafficked.

- The CCR emphasizes the importance of approaching the bill with gender and anti-racist analyses. While from these points of view there are some positive aspects in the proposals, there are also many points of concern.

2. INTRODUCTION

2.1 Negative discourse and preoccupation with abuse

In announcing both Bill C-11 and its predecessor Bill C-31, the Minister of Citizenship and Immigration, the Honourable Elinor Caplan, has portrayed the bill as "tough" and emphasized measures countering criminals and abusers. The Canadian Council for Refugees is deeply concerned that this focus – both in discourse and proposed changes – stereotypes refugees and immigrants in highly negative terms. This is divisive and caters to the xenophobic and racist constituency within Canadian society.

2.2 Framework legislation

The bill is a piece of framework legislation, meaning that only the main overall rules are included, and most of the details are left to Regulations. The bill is much shorter than the current Act and is simpler and easier to read. However, because many of the important rules are in the Regulations, the Act by itself gives little idea of the real processes refugees and immigrants will go through. Furthermore, putting things in the Regulations opens the door to the government changing the rules, without parliamentary scrutiny, based on its convenience, public annoyance, displeasure at a court's decision on individual rights, etc.

The Canadian Council for Refugees is also concerned that the bill does not reflect a balanced view of what immigration and refugee protection are about. There is much in the bill about detaining people, removing people, punishing people and keeping people out, but remarkably little about the core function of admitting people. For example, the bill mentions that one of its objectives is family reunification, creates a family class (S. 12 (2)) and establishes the right to sponsor a family member (S. 13 (1)) but that is virtually all it has to say about this pillar of immigration. Similarly, the refugee resettlement program is established in the bill, but virtually all the rules that will actually guide the program are to be left to Regulations and policy. In the view of the CCR, the Act should articulate the government's commitment to fundamental resettlement principles. The bill should clearly exempt refugees from inadmissibility on grounds of establishment criteria; it should exclude refugees from any form of quotas or numerical limits; it should entrench the right of private sponsors to name refugees they want to sponsor and the right of refugees to apply for resettlement.

2.3 Increase in discretionary powers and reduced protection of individual rights

The Canadian Council for Refugees is concerned at a general tendency in the bill to increase the powers of immigration officers and to reduce protection of individual rights. An example of this tendency is the expansion in the powers of detention. Under the bill, new categories of people become detainable. Refugees, immigrants and the Canadian public are asked to trust that immigration officers will not abuse their power and will only detain when the facts warrant it. Similarly, with the expansion of some of the inadmissibility categories, we are reassured that relevant circumstances will be taken into consideration before action is taken against an individual. The CCR is completely opposed to this approach: when rights are at stake, the discretionary powers of officials must be as narrowly circumscribed as possible and individuals must be granted protections against arbitrary decisions. It is important to note also that granting increased discretionary powers to immigration officers opens the door to abuses targeting racialized minorities. There are already frequent complaints about perceived bias or racism by immigration officers and no independent complaints mechanism to investigate such complaints.

2.4 Distinct Refugee Protection Part

The new bill is to be called the **Immigration and Refugee Protection Act**, and has separate objectives for refugees, and a distinct part on *Refugee Protection*. The CCR welcomes this recognition that refugees, as people forced to flee, are fundamentally different from immigrants. However, the distinction is not fully respected within the bill: refugee resettlement is covered (insofar as it is covered at all) under Part 1, *Immigration to Canada*. In addition, many of the rules affecting refugee claimants (for example, the provisions relating to applying for permanent residence or those relating to detention) are found in Part 1, where the specific realities of refugees are not taken into account.

2. 5 Use of "foreign national"

The use of the term "foreign national" in the bill is highly problematic. It emphasizes the foreignness of the non-Canadians, rather than their common humanity. Particularly disturbing is the fact that the term groups together all categories of non-Canadians, including permanent residents. Although Bill C-11, unlike C-31, includes a definition of "permanent resident" and uses this term at various points in the bill, "foreign national" is often still used for all non-Canadians. The bill thus classifies permanent residents as foreigners, on a par with others who have no status at all. In the view of the CCR, this terminological use undermines one of the proposed objectives of the Act, namely the promotion of the successful integration of permanent residents into Canada (S. 3(1)(e)). The categorization of permanent residents as "foreign nationals" appears furthermore to go deeper than a mere terminological approach, significant though that is. A number of the changes found in the bill do in fact strip permanent residents of some of the rights they currently enjoy, treating them more like "foreigners" and less like the accepted members of Canadian society that they are in fact.

Recommendation 1 Amend the bill to remove reference to "foreign nationals."

3. HUMAN RIGHTS OBLIGATIONS

As a signatory to international human rights instruments, Canada has obligations to respect the human rights of non-citizens. Under the *Canadian Charter of Rights and Freedoms*, Canadian laws must respect certain fundamental rights principles.

The new *Immigration and Refugee Protection Act* needs to meet the standards set out in relevant international instruments as well as those of the Charter.

Unfortunately, despite some references, the bill does not incorporate the relevant instruments.[1]

3.1 Objectives and application

Section 3 (3) (d) of the bill states that the Act is to be construed and applied in a manner that "ensures that any person seeking admission to Canada is subject to standards, policies and procedures consistent with the *Canadian Charter of Rights and Freedoms.*"

This formulation is preferable to the current Act which refers only to the equality component of the Charter (S. 3(f) "to ensure that any person who seeks admission to Canada ... is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*").

However, the bill still limits the Charter application to "any person seeking admission." This excludes people undergoing removal or otherwise affected by the provisions of the bill. Surely all standards, policies and procedures to which people are subjected under the Act must be consistent with the Canadian Charter of Rights and Freedoms?

Recommendation 2 Section 3 (3) (d) be amended to read "any person <u>affected by the provisions of this Act</u> is subject to standards, policies and procedures consistent with the *Canadian Charter of Rights and Freedoms.*"

While Section 3 does refer to the Charter, it makes no explicit reference to Canada's international human rights obligations. Section 3 (3) (a) states that the Act is to be construed and applied in a manner that "furthers the domestic and international interests of Canada." Since Canada's international interests include promoting respect for human rights, we can read into this provision an implied

[1] Notably the 1951 Convention relating to the Status of the Refugees (which has relevant provisions affecting rights of Convention refugees), the Convention on the Rights of the Child, the Convention Against Torture, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

reference to international human rights obligations. This is however by no means as strong as would be a direct reference to the need to comply with these obligations.

Recommendation 3 A further provision be added to Section 3 (3) to state that the Act is to be construed and applied in a manner that "complies with international human rights instruments to which Canada is signatory."

Under the Objectives with respect to refugees, the bill (at S. 3(2)(b)) refers to Canada's international legal obligations with respect to refugees. This is a welcome reference to international human rights instruments. However, one may question why legal obligations are restricted to those with respect to refugees. Canada also has international legal obligations towards non-citizens who are not refugees (for example, towards anyone at risk of torture or extrajudicial execution and towards children).

Recommendation 4 Add the words "and others at risk of human rights violations" after "with respect to refugees" in S. 3(2)(b).

The bill also includes an objective, with respect to both immigration and refugees, "to promote international justice and security" by denying access to Canada to serious criminals and security risks (S. 3(1)(i) and S. 3(2)(h)). While the commitment to international justice is welcome, the means proposed to achieve it (denying access to Canadian territory) is too limited. International justice is not necessarily in all cases promoted by denying access to Canadian territory to criminals. If the alternative to giving a person access to Canadian territory is their return to a fundamentally unjust system and/or risk of torture, it will be more just to allow the person entry. Justice can also require more of Canada than simply closing the door on people who have committed crimes against humanity. Our obligations under the Convention against Torture, for example, include obligations to prosecute torturers. We note that Spain recently attempted to promote international justice by seeking to bring Augusto Pinochet into their country in order to bring him to justice. The formulation in the bill entrenches the government's too narrow strategy for dealing with war criminals: deport them, do not attempt to prosecute them.

Recommendation 5 Amend S. 3(1)(i) and S. 3(2)(h) to read "to promote international justice, respect for human rights and security." [i.e. add "respect for human rights" and delete "by denying access to Canadian territory to foreign nationals who are criminals and security risk"].

3.2 Convention against Torture

The *Convention against Torture*, to which Canada is a signatory[2], is a particularly important human rights instrument for immigration matters, since it contains a prohibition against return to torture.[3] Currently, the *Immigration Act* contains no provisions specifically addressing Canada's obligation not to send anyone to torture. Furthermore, the Canadian government has shown itself reluctant to comply with its obligations, in policy and in practice.[4] The Canadian government position has attracted international criticism, including from the UN Human Rights Committee[5] and from the UN Committee against Torture. In its *Concluding Observations* following its examination of Canada in November 2000, the latter committee included among its subjects of concern: "The position of the State party in arguments before courts, and in policies and practices that, when a person is considered a serious criminal or security risk, the person can be returned to another state even where there are substantial

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[2] Canada signed the *Convention against Torture* in 1985 and ratified it in 1987.

[3] Article 3 of the Convention states: 1. 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. 2. 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.

[4] For example, in December 1997, Canada deported Tejinder Singh to India, despite a request by the UN Committee against Torture that deportation be stayed so that it could look into his case. He was alleging that he would be at risk of torture. He was arrested on arrival in Delhi. The Federal Court of Appeal recently took the position that Article 3 of the Convention Against Torture does not establish a non-derogable right to *non-refoulement* to a risk of tortue (*Manickavasagam Suresh c. Canada (Minister of Citizenship and Immigration and the Attorney General of Canada)*, A-415-99, 18 January 2000). This decision is on appeal to the Supreme Court of Canada, which will hear the case in May 2001.

[5] In April 1999, the UN Human Rights Committee stated, in its *Concluding observations* following its examination of Canada's compliance with the International Covenant on Civil and Political Rights:

> The committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee ... recommends that Canada revise this policy in order to ... meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk. (Para. 13)

grounds for believing that the individual would be subjected to torture, an action which would not be in conformity with the absolute character of the provisions of Article 3(1) of the Convention."[6]

Unlike the current *Immigration Act*, Bill C-11 makes specific reference to the *Convention Against Torture*. Section 97(1)(a) of the bill provides for the protection of people who are at risk of torture as defined in Article 1 of the *Convention Against Torture*.

This is a most welcome step in the right direction. However, the bill does not fully respect Article 3 of the Convention, which prohibits sending anyone back to torture. Under the bill, the prohibition against sending a person to torture does not apply to people who are inadmissible on grounds of serious criminality or security (S. 115(2)). Bill C-11 thus provides for persons to be removed to a country where there are substantial grounds for believing that they would be in danger of being subjected to torture, in violation of Canada's obligations under the Convention Against Torture and disregarding the clear recent recommendation of the UN Committee Against Torture.

Recommendation 6 Incorporate Article 3 of the *Convention against Torture* into the bill.

3.3 Convention on the Rights of the Child

The *Convention on the Rights of the Child* addresses the particular rights of children. Article 3 of the Convention articulates the key obligation that states make the best interests of the child a primary consideration in all decisions taken concerning them.[7] The current *Immigration Act* however makes no reference to this obligation, nor to the Convention.[8]

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[6] *Concluding observations and recommendations of the Committee against Torture: Canada*, 22 November 2000. The Committee recommended that Canada: "Comply fully with article 3(1) of the Convention prohibiting return of a person to another state where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious criminal or security risk."

[7] "... in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 3.1 (underline added).

[8] In 1995, Canada was examined by the UN Committee on the Rights of the Child. In its *Concluding observations*, under *Principal subjects of concern*, the Committee stated at Paragraph 13:

> The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. Nevertheless, the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugees' or immigrants' children. It is particularly worried by the resort by immigration officials

Although Bill C-11 fails to mention the Convention on the Rights of the Child, it does make a step in the right direction by referring at various points to the need to take account of the best interests of any child directly affected.[9] The bill also declares that minor children are only to be detained as a last resort (S. 60).

Unfortunately, the references to the best interests of the child are limited in two important regards. Firstly, the bill only speaks of *taking into account* the best interests of the child, while the *Convention on the Rights of the Child* sets the higher standard of making the child's best interest a *primary consideration*. Secondly, the bill directs that the child's best interests be considered only in certain decisions, whereas according to the Convention, *all* decisions taken concerning children should be subject to the best interests rule.

Recommendation 7 Amend the bill to include specific reference to the *Convention on the Rights of the Child* and a clear direction that all decisions taken under the Act concerning children must make their best interests a primary consideration.

The bill also states that children do not need an authorization to study at pre-school, primary or secondary level (S. 30(2)). The student authorization exemption brings some improvement over a current problem with the interpretation of the *Immigration Act*, which leads to some children being denied their basic right to education. However, the fact that there is an exception to the rule for the children of temporary permit holders means that Canada will not be complying with its obligations under the Convention to assure basic rights in a non-discriminatory manner. Furthermore, because there is an exception, school boards will ask to see proof of status, leading to possible confusions and delays and the potential of parents not sending their children to school out of fears for the consequences.

Recommendation 8 Amend the bill to remove any exceptions to the rule that minor children do not need an authorization to study at pre-school, primary or secondary level.

The *Convention on the Rights of the Child* contains a number of other articles that need to be considered in immigration and refugee proceedings. Article 10.1 states that "... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt

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> to measures of deprivation of liberty of children for security or other related purposes and by the insufficient measures aimed at family reunification with a view to ensure that it is dealt [with] in a positive, humane and expeditious manner. The Committee specifically regrets the delays in dealing with the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada as well as cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order.

[9] Sections 25(1) (humanitarian and compassionate considerations); 28(2)(c) (loss of permanent residence due to absence from Canada); 67(1)(c) (appeals at the Immigration Appeal Division).

with by States Parties in a positive, humane and expeditious manner" (underlining added). The bill however does nothing to address the current problem with long delays in family reunification, which particularly affect refugees who are often forced to separate from the families while fleeing persecution.

Recommendation 9 Include in the bill measures to authorize the early admission to Canada of spouses and children of refugees, permanent residents or Canadian citizens, and the parents of minor refugees, permanent residents or Canadian citizens.

3.4 Statelessness

The problem of statelessness, which many people once thought was a local and temporary problem belonging to the aftermath of World War Two, has sadly been growing in recent years. A small percentage of the world's stateless people come to Canada. While some can find protection as refugees, others do not. They may spend months or years in detention or in limbo, or be bounced between countries, none of which are prepared to take responsibility for ensuring that their basic rights, including the right to a nationality,[10] are respected.

Example of impact
Serguei was born in the Ukraine and grew up in Estonia. In 1994 he made a refugee claim in Canada, arguing that he faced persecution as a perceived Russian in Estonia. The Immigration and Refugee Board rejected his claim but noted that he was stateless. In May 1997, he was deported to Moscow, but the Russian authorities did not recognize him as a citizen and denied him entry. He was sent back to Montreal where he was detained. The Ukrainian and Estonian authorities also refused him travel documents. After months in detention in Montreal, he was released but had no work permit. He became increasingly depressed with his situation and asked CIC to remove him to Estonia, saying he would talk his way in at the airport. He was deported in March 1998 to Estonia, where he was imprisoned for four months, and released only following the intervention of the UNHCR. He remains stateless.

Canada is a signatory to the 1961 *Convention on the Reduction of Statelessness*, but has not signed the 1954 *Convention on the Status of Stateless Persons*, which offers stateless persons parallel protections to those offered Convention refugees. The Canadian Council for Refugees urges the Canadian government to sign the 1954 Convention, both with a view to the protecting the rights of stateless persons in Canada and so that Canada can play a leadership role in finding worldwide solutions to the problems of statelessness.

[10] Article 15 of the *Universal Declaration of Human Rights:* "Everyone has the right to a nationality."

In the meantime, Bill C-11 should address the needs of stateless persons in Canada by offering them the protections outlined in the 1954 Convention.

Recommendation 10 Amend Bill C-11 to include protections for stateless persons on the lines of the *Convention on the Status of Stateless Persons*.

3.5 Inter-American Commission on Human Rights

As a member of the Organization of American States (OAS)[11], Canada undertakes to respect and ensure the fundamental rights of all persons subject to its jurisdiction and commits itself to the *American Declaration of the Rights and the Duties of Man*.[12] Through the Inter-American Commission on Human Rights, the OAS monitors the human rights situation in member states. In February 2000, the Inter-American Commission on Human Rights released its *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system*. This report reviews Canada's refugee determination system in the light of Canada's human rights obligations and makes a series of recommendations.

Bill C-11's inclusion of an appeal on the merits in the refugee determination system and the consolidation of risk review at the Immigration and Refugee Board (IRB) respond to two of the recommendations. However, there are many other recommendations to which the bill does not respond at all, or where it in fact aggravates the current situation. For example, the report calls for the substantive determination of eligibility to be placed within the competence of the IRB. The bill, on the other hand, actually increases the categories of people who will be declared ineligible and therefore prevented from being heard by the IRB. The report also includes recommendations on re-opening provisions, expediting family reunification, preventing long-term detention, adding safeguards in the security certificate procedure and not separating families through removals.[13]

Recommendation 11 Review the bill in the light of the February 2000 report of the Inter-American Commission on Human Rights on Canada's refugee determination system.

3.6 Human rights bodies

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[11] Canada joined the OAS in 1990.

[12] Unlike most member states of the OAS, Canada is not a party to the *American Convention on Human Rights*. The CCR urges the Canadian government to ratify that treaty.

[13] The particular concerns in these areas are detailed below.

In view of the importance of ensuring Canada's compliance with international human rights obligations, the government should seek an opinion on the bill from relevant international human rights bodies, notably the UN Committee against Torture, the UN Human Rights Committee and the Inter-American Commission on Human Rights.

Recommendation 12 Seek an opinion on the bill from relevant international human rights bodies, notably the UN Committee against Torture, the UN Human Rights Committee and the Inter-American Commission on Human Rights.

4. REFUGEE RESETTLEMENT

Each year thousands of refugees are able to find protection and start a new life in Canada through the Refugee Resettlement Program.[14] Thousands of Canadians have been enriched through their volunteer experiences with the program, working to welcome refugees into Canadian communities.

Despite the importance of the program's impact on human lives, it often seems to receive little attention. This is certainly true of the bill: there are few references to resettlement in Bill C-11. Unlike refugee determination in Canada, the definitions and processes relating to refugee resettlement will appear only in the Regulations.

While refugee resettlement is mentioned in Part 2 of the bill (Refugee Protection), Section 99(2) immediately refers claims for refugee protection made outside Canada to Part 1 of the bill (*Immigration to Canada*). Thus resettlement is treated not as a matter of refugee protection, but rather as an immigration program. For the Canadian Council for Refugees, this is the wrong approach: refugees, whether in Canada or elsewhere, need to be treated according to their need for protection and for a durable solution, not according to criteria devised for immigrants. The same rationale that led to Refugee Protection being identified as a separate part of the Act calls for refugee resettlement to be included in this part.

Recommendation 13 All matters relevant to refugees or persons in need of protection, including the resettlement program should be dealt with under Part 2, *Refugee Protection*, and not referred to Part 1, *Immigration to Canada* (S. 99(2)).

We welcome the reference to resettlement in the bill's Objectives with respect to refugees. Section 3(2)(b) articulates the Act's objective to "affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement."

4.1 Quotas

The bill provides for Regulations establishing numerical limits or quotas for numbers of applications processed or approved and the numbers of visas issued in a year (S. 14(2)(c)). These quotas could apply to refugees resettled, as well as to refugees in Canada, family class or independent immigrants.[15]

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[14] Since 1979, over 386,000 refugees have come to Canada through the resettlement program, representing more than 10% of total immigration. Resettled refugees are selected at visa posts abroad and come to Canada either as government-assisted refugees or sponsored by private groups (or a combination of the two).

[15] The current *Immigration Act* has a similar but not identical provision: 114(1)(b) provides for regulations "prescribing classes of immigrants in respect of which the number of immigrants who may

Quotas should never be applied to refugees. Refugees are people fleeing human rights abuses, not categories of immigrants that can be planned and managed. The government must always maintain the flexibility necessary to respond to refugee crises. The emergency evacuation in 1999 of Kosovar refugees to Canada is a good example of an unforeseeable situation that calls for urgent action. The CCR would like to see Canada respond as quickly and as generously in more such situations. Having quotas would stand in the way of this.

With respect to refugee resettlement, the CCR is also very concerned to preserve the principle of additionality. By this we mean that the voluntary contribution of private sponsors should always add to, and never be a substitute for, the resettlement efforts undertaken by the government on behalf of Canada. If limits were put on the total number of refugees to be resettled in a given year, this would mean that the more refugees the private sector sponsored, the fewer refugees the government would resettle.

The CCR is also committed to the principle that no limit should be set on the generosity of Canadians. Private sponsors make a serious undertaking when they sponsor a refugee, promising to supply the refugee's needs for a year after arrival. They make these contributions because of their commitment to helping offer protection and a new home to someone forced to flee persecution.

The bill also makes possible the imposition of a single quota for all categories of refugees (whether resettled from abroad or recognized in Canada). The CCR has been deeply concerned at recent decisions by some governments to reduce their commitment to resettlement because of increased arrivals by refugee claimants.[16] The CCR is firmly opposed to any playing off of one category of refugees against another.

Recommendation 14 Add to 14(2)(c) text to exclude 12 (3) (Convention refugees and protected persons) from this provision [providing for regulations on "the number of applications that may be processed or approved in a year, the number of visas and other documents that may be issued in a year, and the measures to be taken when that number is exceeded" i.e. quotas].

be issued visas or granted landing in any calendar year shall be subject to numerical limitation."

[16] Australia made such an announcement in February 2000.

4.2 Consultations

Bill C-11, like the current *Immigration Act*, requires or promotes consultation with provinces on various matters relating to immigration plans and programs (S. 10). There is a well-established tradition that interested non-governmental organizations are also consulted on resettlement levels, although at times this step has been omitted. Given the CCR's interest in openness, transparency, democracy and accountability in refugee affairs, and the important role played by non-governmental organizations in the refugee resettlement process, it would be helpful to require public consultation on resettlement plans in Bill C-11.

Recommendation 15 Include a requirement for public consultation in the development of plans for refugee resettlement.

4.3 Excessive medical demand

Currently, refugees selected abroad are inadmissible if it is considered that they will cause excessive demands on Canada's health or social services. This means that some refugees with particular health problems are denied resettlement, even though the refugees with medical needs are often among the most vulnerable.

Under Bill C-11, refugees will be exempt from inadmissibility on the basis of excessive medical demand (38(2)(b)).[17]

4.4 Ability to successfully establish

The Minister has announced her intention of focusing refugee resettlement selection more on protection objectives and less on whether the refugees are likely to establish themselves quickly in Canada.

Currently, refugees resettled must satisfy visa officers not only that they meet the refugee or humanitarian designated class definition, but also that they will be able to successfully establish in Canada. The period within which they are expected to establish themselves is one year. This leads to refugees with a compelling need for resettlement being refused simply because they are believed not to be likely to settle in the same time as immigrants. There is a strong gender and class bias in the successful establishment criterion, since visa officers are directed to take into account level of education, knowledge of English/French, professional experience and qualifications, all of which women and people of lower socio-economic classes are less likely to score well at.

[17] The US already admits refugees irrespective of potential medical demand.

The Minister announced that visa officers evaluating the potential for successful establishment will consider social and economic factors and that the period during which refugees will be expected to successfully establish is to be extended to 3 - 5 years. This proposal is a welcome step in the right direction.

However, the Canadian Council for Refugees continues to call on the government to eliminate altogether the successful establishment criterion, which has no justifiable function in a humanitarian program. Canada should follow the example of other resettlement countries (for example, the United States) and select refugees on the basis of their need for resettlement, and not on their potential as immigrants.

Recommendation 17 Eliminate the successful establishment criterion for resettled refugees and persons in need of protection.

4.5 Appeal/judicial review

Currently applicants overseas for resettlement in Canada have no right of appeal from a negative decision by a visa officer (just as refugee claimants in Canada currently have no right of appeal). On the other hand, refugees overseas have automatic access to judicial review at the Federal Court, while refugee claimants in Canada must first apply for leave (i.e. permission to argue the case).

In the name of consistency, Bill C-11 imposes a leave requirement on all applications for judicial review (Section72), including refugee applicants overseas. Even now, without the leave requirement, few refugees overseas are able to bring their case to the Federal Court, because of all the practical difficulties. The new leave requirement will make it even more difficult for refugees overseas to get any kind of review of the case.

The rationale for limiting access to the Federal Court is consistency. The Canadian Council for Refugees notes that to achieve consistency between the overseas and in-Canada systems, an appeal needs to be offered overseas, since Bill C-11 introduces an appeal for refugee claimants in Canada.

Any system makes errors. The consequences for refugees overseas of a negative decision by a visa officer can be devastating for their lives. In the interests of fairness, refugees seeking resettlement need an appeal.

The bill creates a new Refugee Appeal Division at the Immigration and Refugee Board and provides for appeals on the merits from refugee protection decisions made in Canada. The jurisdiction of this division could be extended to include appeals from refugee protection decisions made by visa officers overseas. This would not only provide greater fairness to applicants overseas, but also improve consistency in decision-making on refugee protection in Canada and overseas, by having the same appeal body. We note that the Immigration and Refugee Board already provides a forum for appeals

on some decisions by visa officers in the Immigration Appeal Division, so that the proposed extension of the IRB's jurisdiction is by no means unprecedented.

Recommendation 18 Amend S. 110 (Appeal to Refugee Appeal Division) to allow appeals to the Refugee Appeal Division from decisions overseas to reject applications for refugee protection.

If this recommendation is not accepted, the CCR emphasizes the importance of exempting refugee applicants overseas from the leave requirement for judicial review. Currently, there are relatively few applications to the Federal Court by refugees overseas, but CCR members report that, of those that are made, a fairly high percentage are successful. This argues for the need for an accessible review mechanism.

Recommendation 19 If refugees refused overseas are not given access to the Refugee Appeal Division, at a minimum exempt them from the leave requirement for applications for judicial review to the Federal Court.

5. REFUGEE DETERMINATION IN CANADA

5.1 Access to the refugee determination system

As a signatory of the 1951 Convention relating to the Status of Refugees, Canada has a legal obligation not to 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" (Article 33).

In order to comply with this obligation, Canada must, before removal, be sure that a person being removed is not a refugee. The refugee determination system exists to identify who is a Convention refugee and who is not.

However, some people who claim to be refugees and at risk of persecution are denied access to the refugee claim process (i.e. their claims are found ineligible). Because they are never given a chance to be heard on their refugee claim and to be granted refugee status, they risk *refoulement*, or forced return to persecution, and Canada risks violating its international obligation to protect refugees from *refoulement*.

The Canadian Council for Refugees has urged the government to refer all claims immediately to the Immigration and Refugee Board for determination and address any appropriate eligibility issues there.[18]

The Inter-American Commission on Human Rights in its *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system* (February 2000) raised concerns about restrictions on access to the system, particularly with regard to the right of the claimant to be heard. At Paragraph 173, the Commission recommends that Canada: "Place the substantive determination of eligibility to enter the determination process within the competence of the CRDD [Convention Refugee Determination Division, of the IRB]."

Unfortunately, Bill C-11, rather than reducing restrictions on access to the Immigration and Refugee Board, actually enlarges the categories of people whose claims will be found ineligible (i.e. will not be referred for a hearing to the Immigration and Refugee Board).

Recommendation 20 Amend the bill so that all refugee claims are eligible. Any relevant eligibility issues should be addressed by the Immigration and Refugee Board in the context of the refugee hearing.

[18] Since the vast majority of refugee claims are in any case found to be eligible, this recommendation would have minimal impact on the overall functioning of the refugee determination system.

5.1.1 Second claims

Under the bill, anyone who has ever before made a refugee claim in Canada will be ineligible to make a new claim. (S. 101(1)(a), (b) and (c)).[19] This covers people whose first claim was refused, abandoned, withdrawn, accepted and found ineligible. No matter how many years have passed and no matter how much the person's situation has changed or the circumstances in the country of origin have changed, the person will not be heard by the Immigration and Refugee Board. This is an extremely significant change that is inconsistent with Canada's obligations not to send refugees back to persecution.

Examples of potential impact:

- A woman comes to Canada fleeing persecution because of her political activities in defence of women's rights. Two months after she makes a claim, she hears that there has been a shift in the government in her home country and persecution of political activists has decreased. In addition her father is terminally ill and wishes to see her before he dies. She withdraws her claim and returns to her country. A few months later, there is another shift in government policies and a renewed campaign of political persecution. She flees back to Canada, only to find that her claim is ineligible, that she cannot be heard and that she faces immediate forced return to her country of origin.

- A six-year old boy makes a claim as part of his family's refugee claim. He and the other members of his family are found not to be refugees and they return to their home country. Thirty years later, the boy has grown up and become active in a political party that starts to be violently persecuted. He arrives in Canada and makes a refugee claim. His claim is not eligible to be heard because of the rejection thirty years earlier on what was basically his parents' refugee claim.

- A young gay man comes to Canada, seeking protection. He has been harassed, imprisoned and tortured in his home country because of his sexual orientation. However, having lived in a culture of acute homophobia, he dare not mention that he is gay. The Immigration and Refugee Board finds his story incoherent and rejects his claim. He leaves Canada and returns after three months. Now he has received support and advice from an NGO and is ready to tell the full story of his persecution. However, under Bill C-11, he won't get the chance and will face immediate deportation.

[19] Under the current Act, a claim is ineligible if a person has been outside Canada for less than 90 days after having a claim refused, declared abandoned or found ineligible. The current Act does not deny access to claimants who previously withdrew their claim.

There are many reasons why people who are refugees in need of protection may make second claims. These include poor representation during the first claim, errors made in the first decision, changes in circumstance in the home country and personal changes relating to the claimant. Evidence that is not available at the time of the first determination may confirm the basis of the claim. Survivors of torture may have been unable in the first claim to adequately explain their experience of persecution due to the effects of the trauma they have undergone. Often families' claims are heard together and not all members of the family are heard in full. This is particularly the case with women, whose claim is frequently subsumed under their husbands. It may become clear only later that the woman had important grounds for claiming refugee status on her own behalf. Anecdotal evidence suggests that a high percentage of those currently making a second claim are women (and a high percentage are accepted).

It is difficult to understand the rationale for excluding access to the refugee determination system of people who previously withdrew a claim. Such people have never been heard and have complied with the requirements of the Canadian *Immigration Act*. There are many possible reasons relating to personal circumstances or country conditions why a person may withdraw but subsequently need Canada's protection from *refoulement*.

Those who have previously abandoned a claim may also be at risk of persecution (and may have compelling reasons for the earlier abandonment). Claims are sometimes declared abandoned as a result of incompetent or unscrupulous representation, or as a result of claimants being disoriented or traumatized.

The only recourse offered under the bill is a *Pre-removal Risk Assessment* (PRRA) and this is open only to claimants who have been outside Canada for at least six months since their first claim. This means that for claimants who return within less than six months there is no mechanism at all for looking at new evidence, although there may be radical changes in the country of origin (for example, a coup d'état) or in the personal circumstances of the claimant (for example, her family may have been denounced as state enemies).

For claimants who return to Canada after more than six months, the *Pre-removal Risk Assessment* offers some mechanism of review. Procedurally, however, this mechanism is significantly inferior to the protections offered by a refugee determination by the Immigration and Refugee Board: applicants have no right to an oral hearing[20] or to an appeal, and the decision is made by immigration officials, rather than the Immigration and Refugee Board, an independent quasi-judicial tribunal with expertise in refugee determination.

[20] S. 113(b) states the general rule that PRRA decisions will be made without a hearing. Exceptions are provided for in cases where the Minister is of the opinion that one is required. It is not known in which types of cases the government intends to hold hearings.

The Inter-American Commission on Human Rights in its recent report urged that a re-opening provision be introduced. At paragraph 173 it recommends that Canada take measures to: "Amend the determination process before the CRDD to enable it to be reopened to consider newly available material facts or evidence deemed to meet a reasonable threshold of relevance, thereby providing an important safeguard in identifying genuine refugees and ensuring their right to non-return under Article XXVII of the American Declaration, and the minimum procedural guarantees necessary to ensure the efficacy of that right."

The concern addressed here by the Inter-American Commission would apply equally to claimants still in Canada after a negative decision and to those who have left and returned to Canada within a year. A re-opening mechanism would be one way to distinguish between second claims by people who do in fact have a valid claim to refugee status and repeat claims that are simply abusive.

The UN High Commissioner for Refugees has also recommended a re-opening mechanism: "... the criteria for access to refugee status determination procedures should be sufficiently flexible to allow for the reopening of a claim when more recent events or new information gives it greater validity, such as in the case of a refugee *sur place*. Assessing the potential impact of subsequent developments or new facts requires expertise in refugee law. For this reason, UNHCR would recommend that previously rejected asylum-seekers who seek to reopen their claim based upon new facts be referred to the agency charged with responsibility for refugee status determination."[21]

Recommendation 21 Introduce into the bill a provision for re-opening refugee claims previously refused, for the consideration of newly available evidence.

The Supreme Court of Canada ruled in its 1985 *Singh* decision that fundamental justice requires an oral hearing when issues of credibility are at stake. Claimants making a second claim often bring new evidence in which credibility is an issue, yet they will have no right to an oral hearing. In the case of persons who previously withdrew or abandoned a claim, the lack of consistency with *Singh* requirements is particularly blatant: they have never had an oral hearing.

Bill C-11 does provide in S. 113(b) for the possibility of a hearing, when the Minister considers it necessary, based on prescribed factors. It is not clear who will be able to benefit from this provision, and in any case applicants will not have the protections of the IRB's independent decision-makers, expertise and policies and guidelines developed specifically for refugee claimants. It also appears highly inefficient to create two parallel hearing processes to apply the same refugee protection definitions.

Recommendation 22 Amend the bill so that those who have not previously had a hearing (e.g. those who withdrew or abandoned their claim) have their claims referred to the

[21] Comments on *Not Just Numbers: A Canadian Framework for Future Immigration, Report of the Immigration Legislative Review Advisory Group,* March 1998.

Immigration and Refugee Board, so that they have access to an oral hearing, as called for by the *Canadian Charter of Rights and Freedoms.*

5.1.2. Serious criminality, organized criminality, security, violating human rights

Under Bill C-11, refugee claims will be ineligible if the claimants have been (a) convicted in Canada of a crime punishable by a maximum of at least 10 years imprisonment, and for which a sentence of 2 years was imposed; or (b) convicted outside Canada of a crime that would in Canada be punishable by a maximum of at least 10 years and the Minister is of the opinion that the person is a danger to the public. Also ineligible are claims determined inadmissible on grounds of security, violating human rights or organized criminality.

Currently, claimants are ineligible on grounds of criminality only if the Minister issues a "danger to the public" certificate. Claimants inadmissible on security grounds are ineligible if the Minister is of the opinion that it is contrary to the public interest to have the claim determined.

The current restriction is out of line with international standards. Both the Inter-American Commission on Human Rights and the United Nations High Commissioner for Refugees have expressed their concerns that the Canadian bars on access to the refugee determination system are not consistent with human rights obligations.[22] The allegations of criminality should be considered in the context of a refugee hearing, where the crimes committed can be weighed against the threat of persecution.

[22] The Inter-American Commission on Human Rights raises particular concerns about ineligibility on the basis of criminality and/or national security. "While the right to be heard in presenting a claim does not necessarily presuppose the application of the same procedural guarantees that would apply, for example, in a a criminal court case, it does require that the person concerned by accorded the minimum guarantees necessary to effectively state his or her claim. In this regard ... the determination that there are reasonable grounds to presume that a person presents a danger to national security or public order may require the resolution of extremely complex questions of fact and law" (para. 60). The UNHCR in its *Comments on Not Just Numbers: A Canadian Framework for Future Immigration*, March 1998, recommended treating eligibility issues in the context of the refugee definition, and narrowing some eligibility criteria that are inconsistent with internationally accepted doctrine on exclusion. "For example, the present *Immigration Act* provides that persons who were senior officials in the service of a government that has engaged in terrorism, systematic or gross human rights violations, war crimes or crimes against humanity are ineligible for refugee status determination. UNHCR would agree that senior officials of repressive regimes may indeed be excludable, either because of their own actions or due to complicity in acts committed by others. Exclusion, however, must be an individualised determination and not based solely upon status or "guilt by association." UNHCR has similar concerns about the provisions rendering members of terrorist organisations ineligible for status determination, as membership *per se* in such an organisation should not be a decisive or sufficient cause for excluding a person from refugee status. Moreover, UNHCR would note the absence of any international consensus on the definition of terrorism or criteria for designating terrorist organisations. While fully supporting Canada's efforts to identify and exclude war criminals and other individuals who are undeserving of international protection, UNHCR considers that the concept of individual responsibility should be reflected in legislative provisions governing exclusion."

Last November the UN Committee against Torture raised among its subjects of concern the use of the danger to the public opinion "without interview or transparency" as a mechanism for denying access to the refugee determination procedure.[23]

The CCR appreciates that Bill C-11 brings an improvement over C-31 which excluded people convicted of crimes outside Canada , without reference to potentially trumped up convictions. However, the re-instatement of exclusion based on the danger to the public opinion, given the clear statement by the UN Committee against Torture against it, is completely unacceptable.

It is also important to note that while claimants who have been convicted in Canada must have been sentenced to at least two years imprisonment before they are ineligible, there is no minimum sentence requirement for those convicted outside Canada. The person may not have committed a serious crime at all and may not have been imprisoned, but the proposed ineligibility category takes account not of individual offence, but only of what the maximum sentence could be, if committed in Canada. Note that being convicted in another country of using a document to enter the country illegally would make a person criminally ineligible.[24]

The category of inadmissibility on the basis of organized criminality is new and under C-11 leads also to ineligibility. A person need not have been convicted of any crime, or even to have committed any crime, to be inadmissible on this basis. Yet on the basis of meeting the "organized criminality" definition, and without any opinion from the Minister that the person represents a danger to the public, a person is denied the right to make a refugee claim.

People who represent no danger to security will also be barred from making a refugee claim on the basis of security inadmissibility, which includes people deemed to be members of an organization that is believed to have engaged in terrorism. The category includes people who only joined an organization after it had renounced violent actions. For example, members of the ANC are inadmissible on security grounds.

The Refugee Convention clearly identifies the categories of people not entitled to refugee protection on the basis of criminality.[25] In the interests of conforming to international standards and ensuring that

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[23] *Concluding observations and recommendations of the Committee against Torture: Canada*, 22 November 2000, Paragraph 5 (f).

[24] S. 123(1)(b) of the bill establishes a maximum penalty of 14 years imprisonment for the offence of using a travel document to enter the country in contravention of the Act.

[25] The Convention does not apply where there are serious reasons for considering that the person has: (a) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) been guilty of acts contrary to the purposes and principles of the United Nations. (Art. 1 F)

refugees are protected, the Convention definitions should be respected and the issues of criminality addressed at the refugee hearing, as recommended by the UNHCR.

Recommendation 23 Amend the bill to refer all claims to the Immigration and Refugee Board, including claims involving allegations of criminality, security or human rights violations. These allegations should be considered in the context of the refugee claim determination and with reference to the exclusion clauses in the *Refugee Convention*.

5.1.3. Where a person has been recognized as a Convention Refugee in another country

Bill C-11, like the current Act, excludes from the claim process refugees who have been granted refugee status in another country to which they can be returned. This provision is reasonable when a person does have full status and protection in another country. It however causes injustices in certain cases where the claimant is in fact being persecuted in the country of first refuge. There is also always the risk that immigration officers will make mistakes about the person's status and entitlements in the country in question (in one case, for example, a person was turned away at the border on the basis that she had UNHCR status in a country of temporary refuge: in fact, she had no entitlements as far as the country was concerned).

Claimants found ineligible because they have refugee status in another country are given no opportunity to present their case. This denial of access is inconsistent with the principle of *non-refoulement* articulated in Section 115(1) of the bill. This section states that no refugee, whether recognized in Canada or by another country, is to be returned to persecution. Yet the system established in Bill C-11 provides no mechanism for determining whether a person recognized as a refugee by another country will be at risk of persecution.

> *Example of impact of the provision:*
> Sophie and her family fled persecution in their country of origin and found refuge in a neighbouring African country. However, because the two countries had close links, their persecutors were able to follow them and continued to threaten their lives. So they fled again, this time to Canada. Because they already had refugee status in another country, they were found ineligible to make a claim, and had no opportunity to argue that they were not safe in that other country. Under Bill C-11, they would also be turned away without a hearing.

Recommendation 24 Amend the bill to refer all claims to the Immigration and Refugee Board, including claims of persons who have received refugee status in another country. The Immigration and Refugee Board should consider the question of whether the person already has meaningful protection elsewhere.

To deal with cases where a person is at risk in one or more countries but can safely be returned to another, there need to be provisions to prohibit *refoulement* to countries. A similar need exists with respect to people who are found not to be refugees because of the existence of an internal flight alternative. Such people are left without any protection and may be returned by Canada to the part of the country in which they are in fact at risk.

Recommendation 25 Introduce into the bill provisions to prohibit *refoulement* to countries or parts of country where a person is a risk, in cases where the person is not found to be in need of protection because of dual or multiple nationalities or status in another country, or the existence of an internal flight alternative.

5.1.4 Where a person is subject to a removal order

Section 99(3) of Bill C-11 denies access to the refugee determination system to anyone who is subject to a removal order. The same restriction exists in the current *Immigration Act* (S. 44(1)).

This measure is presumably intended to prevent abuse of the refugee determination system by persons seeking to delay their removal by making a refugee claim. However, it also has the effect of excluding refugees from protection. This may result when there are changes in circumstances after a removal order is issued (for example, a coup d'état in the country of origin). Problems also arise when immigration officers at the port of entry do not understand that a person is trying to make a refugee claim. In 1999, the Canadian Council for Refugees drew attention to a number of cases among the Chinese who arrived by boat, where removal orders had been made despite the clear assertion by the persons that they wished to make a refugee claim. Citizenship and Immigration Canada admitted that errors had been made and withdrew the removal orders to allow the refugee claims. Here, for some at least, the problem was solved, but CCR members are aware of other, less high profile cases, where people fearing persecution never had an opportunity to tell their story.

Under Bill C-11, it appears that persons subject to a removal order will not even have access to the Pre-Removal Risk Assessment, unless they are still in Canada after the prescribed period has passed (S. 112(2)(c)). This means that people who may be refugees will never get a chance to explain their fear of persecution.

Example of impact of provision
T., a refugee from Zaire, arrived in Canada and was questioned at the airport. He did not say he wanted to claim refugee status because he believed he would be immediately sent back to Zaire (this happens in some European countries, and had in fact happened to his sister). A removal order was made against him and he was detained, pending deportation. It was then too late to make a refugee claim. He was only saved from deportation because Canada declared a moratorium on removals to Zaire. Eventually (after 5 months) T. was released from detention. Three years later he was still living in limbo.

Recommendation 26 Amend S. 99(3) by deleting the words "who is not subject to a removal order" so that claims from persons subject to a removal order can be referred to the Immigration and Refugee Board.

5.2 Grounds for protection

Bill C-11 combines what are currently two separate decisions (refugee determination and risk review), providing a single decision at the Immigration and Refugee Board (IRB).

For each claim for "refugee protection", the IRB will decide whether the person is:

– A **Convention Refugee** (same as in current Act), or

– A person in need of protection, meaning:

i) a person at **risk of torture** in their home country (as defined in the Convention Against Torture)

ii) a person whose life would be at risk or who risks **cruel and unusual treatment or punishment**, but only if the person was unwilling or unable to seek state protection, there is no internal flight alternative, the risk is not related to internationally acceptable and lawful sanctions, and the risk is not related to the availability of medical care.

iii) a **member of a class** of persons established by Regulations to be in need of protection.

The exclusion clauses of the Refugee Convention (Section E or F) apply to both Convention Refugees and persons in need of protection. (Section E excludes people who are firmly resettled; Section F excludes war criminals, those who have committed a serious non-political crime outside the country of refuge and anyone guilty of acts contrary to the purposes and principles of the United Nations).

The same definitions as above apply to decisions made in the Pre-removal Risk Assessment.

5.2.1 Consolidation of decision-making

The Canadian Council for Refugees welcomes the consolidation of decision-making (on refugee status and other risk assessments) at the Immigration and Refugee Board. This is a move that the CCR has recommended. Assessments of the risk of torture or other serious human rights violations require the same procedural guarantees as determination of refugee status, and the same expertise on human rights situations in the country of origin. The Immigration and Refugee Board, as an independent, quasi-judicial administrative tribunal with well-developed research and documentation, is far better placed than Citizenship and Immigration Canada (CIC) to make decisions on all protection issues. The consolidation also makes sense from the point of view of efficiency: rather than recreating the expertise and the procedures, and starting from the beginning again with the claimant's case at CIC, the Board can simply add the risk review to the refugee status determination.

The same arguments of fairness and efficiency also suggest that the Pre-Removal Risk Assessment should be conducted by the Immigration and Refugee Board. However, Bill C-11 assigns this task to CIC (see below, page 39). This goes counter to one of the recommendations from the UN Committee against Torture, which in its November 2000 report on Canada encouraged Canada "to ensure that the proposed new legislation permits in-depth examination by an independent entity of claims, including those from persons already assessed as security risks."[26]

The CCR notes the importance of ensuring that all refugees are granted Convention refugee status, in the interests of strengthening the international refugee protection régime and international refugee jurisprudence, and to ensure maximum protection of individual refugees in Canada.

Recommendation 27 Include in the bill a requirement that the Refugee Protection Division, in considering claims, first consider whether the claimant is a Convention refugee and, in the affirmative, identify the person as such.

5.2.2 Convention against Torture

The specific reference to the Convention against Torture (CAT) is new and important. However, as argued above (see page 11), Bill C-11 does not fully comply with the CAT. Article 3 of the CAT prohibits the removal of *any one* to torture, no matter what they may have done in the past or be likely to do in the future. The absoluteness of the rule reflects the international community's obligation to refuse any complicity with torturers.

Unlike the Refugee Convention, the CAT *non-refoulement* provision thus has no exclusion clauses and no exceptions. Section 98 of the bill, however, applies the Refugee Convention exclusion clauses

[26] *Concluding observations and recommendations of the Committee against Torture: Canada*, 22 November 2000, Paragraph 6 (b)

(Section E and F) to both the Convention refugee definition and to persons in need of protection (which includes persons found at risk of torture).

Recommendation 28 Amend Section 98 to add (at the end of the section) the words "unless that person has been found to be a person at risk of torture as defined in the Convention against Torture."

While Article 3 of the Convention Against Torture prohibits the removal of anyone to torture, this does not mean that persons who have committed crimes against humanity should be allowed to pursue their lives in freedom in Canada. On the contrary, Canada has obligations to prosecute those who have committed crimes against humanity. The same Convention against Torture, in Article 5, obliges Canada to prosecute any torturers in Canada if they cannot be extradited.

Recommendation 29 Ensure that those in Canada who have committed acts of torture be prosecuted in Canada where they cannot be extradited to another country to be brought to justice.

5.2.3 Risk to life and risk of cruel and unusual treatment

The CCR welcomes the inclusion in the category "persons in need of protection" of persons who face risks to their life or of cruel and unusual treatment (S. 97(1)(b)). This offers a means to protect persons who face very serious human rights violations in their home country, but who for one reason or another do not meet the Convention Refugee definition.

However, Bill C-11, like the current post claims risk review (Post-Determination Refugee Claimants in Canada Class or PDRCC), incorporates a number of restrictions that limit the effectiveness of the provision for ensuring protection of persons at risk. Of particular concern is subsection (ii) which requires that the risk be faced in every part of the country and that it not be faced generally by other individuals from or in that country. Experience with this restriction in the PDRCC process has shown that it makes it difficult for people to find protection when they face a very serious risk in the context of widespread human rights violations in their home country. Perversely, the more massive the rights abuses, the more difficult it can be to be accepted, since applicants must show that they are more at risk than their neighbours back at home – hard to do when almost everyone is at risk. S. 97(1) already states that the applicant must be "personally" at risk, thus limiting the provision to persons who themselves are at risk. It should therefore be unnecessary to introduce the reference to the risk not being faced generally by other individuals. What is relevant is whether the individual risks serious violations of his or her basic rights, not how many other people may be similarly at risk.

The reference to the risk applying in every part of the country is also problematic, in that it may not be possible for the person to reach or live in parts of the country where they might hypothetically be safe. This is often true where the country is at war and crossing combat lines is impossible. In some cases,

too, women, young people and members of a certain ethnic or religious group will not be able to live safely in some parts of the country.

Recommendation 30 Amend Section 97(1)(b) [definition of risk], by deleting subsection (ii) "the risk would be faced by the foreign national in every part of that country and is not faced generally by other individuals in or from that country."

5.2.4 Statelessness

As mentioned above (page 14), there are some stateless persons in Canada who do not meet the Convention refugee definition and find themselves in limbo, in detention or in orbit. Canada should take measures to ensure protection of their rights, by including a provision relating to statelessness under "persons in need of protection."

5.3 Hearing before the Immigration and Refugee Board

5.3.1 Appointments to the Immigration and Refugee Board

Under Bill C-11, refugee decisions are to be made by single member panels (S. 163), rather than two-member panels as is currently the case.[27] While the bill introduces the possibility of appeal, there is to be no oral hearing before the Refugee Appeal Division. This means that generally speaking only a single decision-maker will actually hear the refugee claimant.

With so much depending on the individual decision-maker, the quality of the decision-makers, already a matter of grave concern, is more critical than ever. Yet, according to the bill, appointments will continue to be political and there will still be no transparent, professional and accountable selection procedure.

The Canadian Council for Refugees supports the report on the subject prepared by François Crépeau and France Houle, *Compétence et Indépendance*, dated 6 March 1998 and updated in October 2000 as *The Security of Refugees and the Abilities of IRB Members*. This report contains seven key recommendations on the IRB appointments process.

Recommendation 31 Introduce into the bill provisions to ensure a transparent, professional and accountable selection procedure for members of the Immigration and Refugee Board, on the lines of the Crépeau/Houle recommendations.

[27] The bill also provides for three-member panels, but it is anticipated that these will be exceptional.

5.3.2 Claimants without identity documents

Section 106 of the bill requires the Refugee Protection Division to take into account, in determining credibility, whether the claimant has "acceptable documentation" or a reasonable explanation for the lack of ID. This provision is either completely redundant or hurtful to refugees.

The Immigration and Refugee Board, in making a refugee determination, must take into account all relevant information. This includes elements relevant to the identity and the credibility of the claimant. The IRB already calls on claimants to provide identity documents, and if none are available, subjects the claimant to close questioning about the lack of documents and the person's identity.

If Section 106 means that the IRB must continue to do what it is already doing, it is redundant. If, however, it means something more – that the Board must take a harder line on requiring identity documents – the provision will hurt refugees who in many cases cannot produce identity documents, because there is no functioning state to issue them, because as a victim of persecution they are denied them or because as refugees fleeing persecution they do not have the luxury of stopping to apply for documents. The wording "acceptable documentation" also suggests a fixed standard against which documentation will be evaluated, something is completely inappropriate given the complexity and variety of refugees' situations.[28]

Recommendation 32 Delete Section 106 [requiring the IRB to take into account lack of documentation in evaluating credibility].

5.3.3 Hearing by videoconference

S. 164 provides for hearings before the Immigration and Refugee Board, including refugee hearings, to be heard by means of videoconference. The CCR considers the use of video-conferencing for refugee hearings to be a denial of due process to refugee claimants, because credibility cannot be effectively evaluated through this technology and because of the difficulty claimants often have in testifying in front of a camera. For the same reasons, the use of videoconference in detention reviews similarly compromises the rights of detainees to a fair hearing.

Recommendation 33 Amend S. 164 to prohibit the use of videoconferencing for hearings before the Refugee Protection Division and for detention reviews and amend S. 170(b) to require that a hearing before the Refugee Protection Division be held in the presence of the person concerned.

5.3.4 Cessation of refugee status

[28] Insisting on identity documents is short-sighted and inappropriately imposes a Canadian standard. It ignores the fact that in many parts of the world, identity is not generally established through documentation.

Section 108 of the bill addresses cessation of refugee status (cf. S 69.2 (1) of the current Act). The Refugee Convention provides for the cessation of refugee status under Article 1 (C). This applies to persons who have been granted refugee status, but who no longer need the protection of that status.[29] Section 108, however, confuses the grounds for cessation with reasons for rejecting a refugee claim. Refugee determination addresses the future risk of persecution of the claimant. Cessation deals with situations where a need for protection that was previously recognized no longer exists. These two must not be confused.

Recommendation 34 Amend S. 108 [cessation] to conform to the *Refugee Convention*, applying the grounds for cessation to applications by the Minister for cessation, and not making them grounds for rejection.

5.3.5 Vacation of refugee status

Bill C-11, like the current *Immigration Act*, provides for applications by the Minister to the Immigration and Refugee Board for vacation of refugee status, on the basis of misrepresentation or fraud (109). However, while currently the Minister must first apply for leave, under the Bill there is no leave provision.

Going through a vacation hearing is a traumatic and expensive undertaking for a refugee. There is no good reason for subjecting refugees to this unless there are strong grounds for thinking that the application might be successful. The current leave provision serves as this safety mechanism. The CCR is not aware of any reasons why the leave requirement should be suppressed. Given that the bill introduces new leave requirements for applicants (including refugee applicants refused overseas), it seems inconsistent for the government to be relieving itself of a leave requirement that offers some protection to refugees from ill-founded applications for vacation of status.

Recommendation 35 Re-insert the leave requirement for applications for vacation of refugee status.

In the case of refugee protection conferred through the PRRA, Bill C-11, unlike Bill C-31, has a separate vacation process. S. 114(3) gives the Minister the power to vacate a decision without any of the procedural safeguards in the IRB vacation process. The standard for vacating is very low ("the Minister is of the opinion that") making it immune to meaningful judicial review. Unlike the vacation

[29] Article C of the Convention lists the following grounds for cessation: i) the refugee has voluntarily re-availed herself of her country's protection; ii) the refugee has voluntarily re-acquired his nationality; iii) the refugee has acquired a new nationality, and enjoys that country's protection; iv) the refugee has voluntarily re-established herself in her country; v) the circumstances that made him a refugee have ceased to exist (unless there are compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality). [This is a summary, not the full text of Article C of the Convention.]

process at the IRB, there is no reference to not vacating if there was sufficient other evidence available at the time on the basis of which refugee protection could have been determined (109(2)). Under C-31 positive PRRA decisions would have been vacated at IRB.

Recommendation 36 Delete S. 114(3) and provide for vacation procedures for PRRA decisions at the IRB.

5.4 Appeal

The Canadian Council for Refugees welcomes the introduction in Bill C-11 of an appeal on the merits (S. 110-111). The bill thus addresses one of the fundamental flaws in the current refugee determination system. The lack of an appeal mechanism has recently been criticized by the Inter-American Commission on Human Rights in a report on Canada's refugee system.[30] The United Nations High Commissioner for Refugees has also emphasized the need for a right of appeal, a need that is only the greater in the context of consolidated decision-making.[31]

The proposed appeal, however, offers very limited protections to refugee claimants, since it is on paper only, generally before a single member. A significant percentage of negative refugee decisions are based on credibility, yet it is extremely difficult to challenge through written submissions a finding that a person is not credible. Written procedures are also extremely problematic for claimants who do not have a lawyer to represent them – as is frequently the case because of inadequate legal aid coverage.

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[30] The IACHR report states, at Paragraph 174: "With respect to access to administrative and judicial review mechanisms, the Commission recommends that the State take further action designed to ensure that:

> Refused refugee claimants have access to a merits-based review of the decision taken by the CRDD, whether through administrative or judicial channels..."

[31] From March 12, 1999 UNHCR comments on the white paper: ."... given the potentially grave consequences of an erroneous negative decision and the fact that all three determinations will be made by the same decision-making body, at the same time, it is UNHCR's view that the consolidation of the decision-making process should be made contingent on the establishment of an effective appeal on the merits. UNHCR has long promoted the need for an appeal on the merits of a negative refugee determination, or any other decision that may result in the loss of refugee status and possible *refoulement.* UNHCR's EXCOM has termed this right of appeal "a basic requirement" in refugee status determination procedures. EXCOM Conclusion No 8 states "if the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or different authority, whether administrative or judicial, according to the prevailing system." An effective right of appeal is consistent with due process and constitutes a fundamentally important component of the international protection regime."

Recommendation 37 Amend S. 110 (3) [Appeal to Refugee Appeal Division] to allow oral hearings, where credibility is at issue.

The bill provides no guarantees of the independence of the Refugee Appeal Division and of the superior expertise of its members in the field of refugee determination. If the appeal is to function as an effective mechanism for correcting errors, the Refugee Appeal Division must be clearly a separate and higher tribunal (as is the case in other tribunals).

Recommendation 38 Clarify the independence and hierarchical superiority of the Refugee Appeal Division in the bill.

The bill foresees a paper review based on the file of the initial hearing and written submissions. It does not specifically allow for new evidence. Yet, as CCR members know well, part of the reason for wrong negative decisions is often that not all the evidence was available at the hearing (for example, because a traumatized survivor of torture or of sexual violence was unable to testify fully, or because a case was inadequately presented and relevant supporting information not submitted).

Recommendation 39 Clarify in the bill that new evidence can be introduced in the refugee appeal.

The bill gives equal access to appeal to the refugee claimant and the Minister. The stakes are, however, not equal: for the claimant it is potentially a matter of life and death; for the Minister, the interests are very much less significant. Quite apart from the appeal, the Minister has ample opportunity to protect the integrity of the system through interventions in hearings and appeals, through judicial reviews and through applications for vacation of refugee status. Where individual rights are not at stake, it is not advisable to be adding an extra step in the process.

Recommendation 40 Amend 110(1) to allow refugee claimants only (in Canada and overseas), and not the Minister, access to the Refugee Appeal Division.

The bill denies the right of appeal to those whose claim has been declared abandoned. This may make sense in cases where claimants really have no interest in pursuing their claims. However, abandonment cases are by no means always straightforward and uncontested. CCR members are aware of increasing numbers of cases where claims are declared abandoned, as a result of misunderstanding or illness or through the fault of counsel. Refugees are frequently traumatized by their experiences and are disadvantaged by their newness in Canada, their lack of knowledge of English and French, among other barriers. All of these factors mean that there is sometimes a need for a second look at cases declared abandoned.

Recommendation 41 Allow appeals from claimants whose claim has been declared abandoned.

As mentioned above, the CCR also recommends a re-opening provision at the Refugee Protection Division (Recommendation 21, page 25). This measure would offer another solution to refugees, who for one reason or another, have not been recognized as such.

5.5 Pre-removal Risk Assessment (PRRA)

The bill introduces new provisions for assessing the risks faced by people who for one reason or another are denied access to a refugee hearing before the Immigration and Refugee Board (IRB). The risk assessment will apply the same definition as the IRB (Convention refugee and persons in need of protection) but will be conducted by Citizenship and Immigration Canada.

Provisions in Bill C-11 relating to access to PRRA have changed significantly since Bill C-31, which did not give access to some refugees intended to have access. Unfortunately, C-11 is still very unclear about who will have access to the PRRA and the provisions appear in fact to deny access to most people who would need this recourse.

As argued above, the Canadian Council for Refugees believes that justice, the Canadian Charter and our international human rights obligations require that refugee claimants have access to the refugee determination process. We therefore cannot support the availability of a Pre-removal Risk Assessment as a substitute to an oral hearing before the Immigration and Refugee Board.

In addition to this fundamental concern, the PRRA proposals are problematic in a number of ways.

People who have previously made a claim and return to Canada within less than six months are denied access to the Pre-removal Risk Assessment. This rule is intended to prevent abusive repeat claims.[32] However, it will also have the effect of denying some refugees an opportunity to be heard, leading to their *refoulement* to persecution. At any time, conditions in the country of origin or in the claimant's personal circumstances may change significantly, making the person at risk of persecution. Any arbitrary time bars exclude some people at risk.

Recommendation 42 Delete the six month bar on second-time claimants presenting evidence.

The bill denies access to the refugee determination process to people who are inadmissible on grounds of serious criminality, security, human rights violations or organized criminality. Although this is not clear from the bill, it is presumably intended that they should instead have access to a Pre-removal Risk

[32] Providing for a possibility of re-opening at the Refugee Protection Division (as proposed above, Recommendation 21, page 25) would address potential abuse at the same time as ensuring that refugees had a right to be heard.

Assessment.[33] While it is good to see any recognition of the need to assess the possibility that these people may face serious human rights abuses, the proposed Pre-removal Risk Assessment is ill-equipped to do this job. Claims where there are allegations of criminality or security issues are among the most complex and contentious. These are the claims where there is the most need of an independent decision-maker, expertise, an oral hearing and procedural guarantees.

The risk assessment will be evaluating exactly the same risks that the Immigration and Refugee Board evaluates in the refugee hearing. In some cases there will be oral hearings, requiring additional structures, policies and practices. Yet the bill gives this job not to the IRB, but to Citizenship and Immigration Canada (CIC), which will have to set up its own structures, training programs, documentation centres, etc. This is neither efficient, nor likely to lead to good decision-making.

A further reason against having CIC do the risk assessment is that the pressures to remove a person speedily may influence the thoroughness of the immigration officer's evaluation of the risks[34]. Will an immigration officer, whose colleagues in the removal office are keen to arrange immediate deportation of a person, feel free to take the time necessary to carefully investigate the person's submissions about risk? In the CCR's view, there is a conflict of interests here, which constitutes a reason for having the risk decision-maker independent of CIC.

The situation of people excluded from refugee protection by the IRB on the basis of Article 1F is peculiar. The IRB can only grant or refuse refugee protection, it cannot grant a stay for people undeserving of refugee protection but nevertheless at risk of, for example, torture. At the PRRA, on the other hand, there is the possibility of a stay for people rejected on the basis of Article 1F of the Refugee Convention. However, as C-11 is currently drafted, it does not appear that such people will have access to the PRRA unless they manage to avoid removal for the prescribed period (S. 112(2)(c)). Therefore a claimant may have a hearing before the IRB and be excluded on the basis of IF. The IRB may be convinced that the person is at risk of torture but it cannot grant a stay. The person may then be removed from Canada before they are entitled to a PRRA. Even if they do get access to the PRRA, they are unlikely to have an oral hearing: so the body that heard all the evidence cannot offer the remedy of the stay, and the body that has to decide on the stay is unlikely to have the opportunity to hear directly all the evidence.

Recommendation 43 Have the Pre-removal Risk Assessment conducted by the Immigration and Refugee Board.

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[33] According to S. 112(2)(c), it seems that these categories would only be eligible for a PRRA after the prescribed period (probably three months) has expired.

[34] According to S. 49(2)(b), a person found ineligible to make a refugee claim is removable 7 days after the claim is so determined. There may be a further stay planned in the Regulations, to delay removal until after the Pre-removal Risk Assessment has been completed.

The provisions in the bill relating to the Pre-removal Risk Assessment go some way towards recognizing the prohibition in the Convention Against Torture (CAT) against sending anyone to torture. However, the provisions make clear that the government does not intend to comply with the absolute prohibition in the CAT, since they propose to balance risks to Canada against risks to the person (including risks of torture). The balancing provisions in S. 113(d) are mirrored in the *non-refoulement* provisions of Section 115, which provide exceptions to *non-refoulement* in cases of danger to the public or where it would be contrary to the national interest. This is inconsistent with the absolute prohibition on return to torture in the Convention Against Torture.

Recommendation 44 Amend S. 115(2) to include an absolute prohibition on *refoulement* of persons to risk of torture (consistent with the Convention Against Torture), by excluding persons at risk of torture from the exceptions to the *non-refoulement* rule.

The Refugee Convention does include an exception to the principle of *non-refoulement* established in Article 33. This reads: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." States are urged to apply this exception in a restrictive manner, given the very serious consequences to the individual.

The exception in S. 115(2)(b) refers to the "national interest" and inadmissibility on the grounds of security, violating human rights or organized criminality. By allowing consideration of "national interest" this subsection throws a broader net than the Refugee Convention tests of "danger to the security" or "constituting a danger to the community." Furthermore, the inadmissibility categories of organized criminality and violating human rights are not consistent with the Refugee Convention in that they do not require a conviction. It is contrary to our international obligations to extend in this way the categories of Convention refugees who may be refouled.

Recommendation 45 Amend the S. 115(2) exceptions to the *non-refoulement* principle to make them consistent with the Refugee Convention.

In the case of a person ineligible for refugee determination on the basis of safe third country, the Minister can, according to S. 115(3), send the person back to the safe third country, or to another country if the person's refugee claim was rejected in the safe third country.

This is an important and disturbing change from the current Act, which says that if a person cannot be removed to the safe third country, the claim is to be referred to the CRDD (S. 46.03). The bill is proposing that Canada accept the determination of another country. The bill proposes no mechanism at all for hearing from a person whose refugee claim was rejected in another country before potentially sending them back to the country of alleged persecution, even though considerable time might have passed and important changes of circumstance developed. Given the different interpretations of the refugee definition by different countries, the negative decision of the other country does not necessarily

reflect Canadian standards. For example, many countries do not recognize as refugees women fleeing gender-based persecution. A woman with such a claim, rejected in a "safe third country", could be removed directly to the country of persecution, without any opportunity to present to Canadian authorities her claim of gender-based persecution.

Recommendation 46 Amend S. 115(3) to delete "or if the country from which the foreign national came to Canada has rejected their claim for refugee protection", so that persons rejected as refugees in a safe third country cannot be removed by Canada to their country of alleged persecution, without any right to be heard on their claim.

People found to be at risk in the Pre-removal Risk Assessment but inadmissible on grounds of serious criminality, security, human rights violations or organized criminality (or rejected refugee status on Section F exclusion grounds) can only be given a stay of removal (rather than refugee protection and the chance to apply for permanent residence). This makes sense in cases of people, for example, who have committed serious human rights violations (and such people should not only not be given permanent resident status, but should be prosecuted in Canada for their crimes).

However, as currently drafted the categories of people affected by these provisions are very broad and include people who have committed no crime and represent no danger to Canadian security. They may include people who were wrongly convicted abroad in sham judicial processes of crimes that they never committed. They may also include people who have been associated with an organization viewed as terrorist, although they themselves have never been involved in any terrorist activities.

People in these categories will not be considered against the Convention refugee definition, only against the Convention against Torture and risk to life or risk of cruel and unusual treatment or punishment (113(d)). Because the categories are much broader than the groups that the Refugee Convention itself excludes, it is wrong to deny these people access under the refugee definition.

Furthermore, in terms of remedies, unless people who are found to need protection from *refoulement* have the possibility of gaining full refugee protection and becoming permanent residents, a new class of refugees in limbo will be created.

Recommendation 47 Amend the bill so that everyone considered under the PRRA is considered against the refugee definition and limit the provisions denying full refugee protection to people who have actually committed very serious crimes and/or represent a danger to the security of Canada.

6. DETENTION

The right to liberty is a fundamental human right, yet one that often seems to be given little weight in relation to immigration detention. In many ways people accused of a crime find their right to liberty better protected than those subject to the *Immigration Act*. The Canadian Council for Refugees has long been concerned that current powers of immigration detention are too broad, leading to arbitrary and long-term detention. The implication of these broad powers is that non-Canadians' right to liberty is not treated as a fundamental right. Given that the majority of those detained are generally members of racialized minorities, there is also a possible racist element in the minimizing of the importance of non-Canadians' right to liberty.

Detention of refugee claimants is particularly unacceptable. Many refugees have been wrongfully imprisoned and/or tortured as part of their persecution and suffer enormous hardship when detained in the country they thought would offer them protection and liberty. Being detained is also a very serious disadvantage when it comes to preparing a refugee claim (limited access to a lawyer, to documentation and to advice and support, and impacts on psychological preparation). It is possible that the fact of being detained may also influence negatively those making the refugee determination, since detainees carry with them associations of criminality and illegitimacy. More broadly, the detention of refugee claimants feeds into popular prejudices against refugees, encouraging Canadians to see refugees as dangerous people, rather than people in danger.

Unfortunately, Bill C-11, rather than narrowing the provisions for detention, actually broadens them in a number of ways.

The bill (Section 55(3)) gives immigration officers new powers to detain at the port of entry on the basis of administrative convenience (for example, to complete an examination) or because they have "reasonable grounds to suspect" inadmissibility on grounds of security or human rights violations.

The Canadian Council for Refugees considers it completely unacceptable to deprive someone of their liberty on the basis of *convenience* or *suspicion*. The tests of danger to the public and "unlikely to appear" already cover all situations in which detention is necessary. The new provisions constitute a serious threat to the fundamental right of liberty.

Recommendation 48 Delete Section 55(3) (which provides for new grounds of detention of administrative convenience and suspicion).

The bill expands the provisions for detention without warrant (Section 55(2)). Currently, there are limited circumstances in which people inside Canada can be arrested without warrant. Under the bill, immigration officers will be able to arrest and detain, without warrant, people who are inadmissible, even when they are not about to be removed. Again, this is an unwarranted extension in the powers of immigration officers, undermining non-Canadians' right to liberty.

Recommendation 49 Amend S. 55(2) to restrict the powers of detention without warrant to situations where the officer has reasonable grounds to believe the person is a danger to the public.

The bill expands provisions for detaining people on the basis of identity. Any document requirement hurts refugees who are often forced to flee without identity documents, because it is their very identity that puts them at risk of persecution.

Currently, people can only be detained on identity grounds at the port of entry. Under the bill, people can be detained if they fail to establish their identity for any procedure under the Act (Section 55 (2)(b)). This suggests that refugee claimants could be detained if they fail to establish their identity at their refugee hearing before the Immigration and Refugee Board.

Once someone is detained on ID grounds, the bill suggests that they may be detained for weeks or months. The bill says (S. 58 (1)(d)) that a person can be held in detention so long as the Minister is of the opinion that identification has not been satisfactorily established and an adjudicator is satisfied that (1) the detained person has not been reasonably cooperative or (2) that the Minister is making reasonable inquiries to establish the persons identity. Bill C-11 worsens the situation for detainees compared to Bill C-31, because it is no longer left to the adjudicator to decide whether identity has been satisfactorily established or whether it can be. There is to be no independent oversight of immigration officer's decision that the person's identity has not been established.

Since it can often take refugees weeks or even months to get identity documents, there is a real danger that refugees and others affected by this provision will be forced to wait in detention for long periods before they either obtain identity documents. It is important to note that it is in general much more difficult for refugees to obtain their papers while they are locked up in detention, especially since they must often be very cautious in how they seek them, because of the risk of endangering themselves, family members or others.

Paragraph 58 (1) (d) is particularly disturbing to see in the bill, since it outlines factors that should not properly be in framework legislation, but rather in regulations. It thus gives great weight to considerations that will be particularly prejudicial to refugees.

The CCR does not consider lack of identity documents to be in itself a rational ground for detention. There will be occasions when doubt about the identity of the person combined with other elements will lead to concerns that the person will not appear or represents a danger to the public. However, that does not require a separate ground for detention relating to identity.

Recommendation 50 Amend the bill to delete identity as a ground for detention.

Recommendation 51 In the alternative, at least limit the circumstances in which persons can be detained on grounds of identity, move S. 58 (1)(d) to the regulations and

restrict detention on the basis of identity to short-term detention and amend S.58(1)(d) to give the Immigration Division jurisdiction to decide if a detained person's identification has been or may be established.

The government has announced that it plans to make arriving through criminally organized smuggling operations a factor towards concluding that the person would not appear. The Canadian Council for Refugees is completely opposed to this proposal. People who arrive using smugglers are not in fact necessarily less likely to present themselves. Many refugees have no choice but to use smugglers in order to escape prosecution. It is a serious mistake to confuse the mode of arrival with the intentions of the person. Each individual case must be evaluated individually.

Recommendation 52 Omit any reference in regulations to arrival through criminally organized smuggling operations constituting a factor towards concluding that the person would not appear.

The Canadian Council for Refugees is pleased to see reference in the bill to special considerations for the detention of minors and the principle that minor children are to be detained only as a last resort. However, for this to be effective it will be necessary to ensure that alternatives are available so that detention is indeed a last resort.

We also note the absence of any reference in this context to the Convention on the Rights of the Child and in particular the principle that the best interests of the child be a primary consideration.[35]

Recommendation 53 Include in the bill a direction that the best interests of the child be a primary consideration in any detention decision affecting a minor.

Canada also has obligations to protect family unity and the right of children to be with their parents. In some cases, children who are Canadian citizens are found in immigration detention because their parents are detained and the alternative would be separation of children from their parents. Unless absolutely necessary, families should not be asked to choose between detaining their children and separating children from parents.

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[35] In 1995, Canada was examined by the UN Committee on the Rights of the Child. In its *Concluding observations*, under *Principal subjects of concern*, the Committee stated at Paragraph 13:

> The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. Nevertheless, the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugees or immigrants children. It is particularly worried by the resort by immigration officials to measures of deprivation of liberty of children for security or other related purposes...

Recommendation 54 Include in the bill a direction that the right to family unity be taken into account in decisions relating to detention.

Also of serious concern are the provisions for mandatory detention of non-permanent residents under the security certificate process. These are dealt with below (page 54).

7. APPLICATIONS FOR PERMANENT RESIDENCE BY REFUGEES

Section 99 of Bill C-11 addresses applications for permanent residence from refugees, either overseas (S. 99(2)) or in Canada (S. 99(4)). In both cases, the permanent resident application process is dealt with under Part 1 of the bill, *Immigration to Canada*. There refugees are subject to the same rules as immigrants, with any specific rules for refugees to be dealt with in the Regulations.

Refugee protection means more than protecting refugees from *refoulement* to a country where they fear persecution: it means ensuring the protection of all their basic rights. This is made clear in the fundamental refugee protection instrument, the 1951 Convention relating to the status of refugees, which outlines a series of rights which states must grant to refugees.[36]

Refugees in Canada traditionally have access to most of these rights through acquiring permanent residence. This approach has the advantage of promoting the speedy integration of refugees by offering them a permanent status with the possibility of applying for Canadian citizenship relatively soon, should they so choose.

In recent years, however, thousands of refugees in Canada have been denied permanent resident status or forced to wait years before they can acquire it. The three principal barriers to permanent residence are identity documents[37], security issues[38] and fees.[39] Deprived of permanent residence, refugees

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[36] These include the right to practise their religion, property rights, right of association, access to courts, access to employment (including self-employment and professions), right to housing, right to education, right to public relief, labour protection and social security, freedom of movement, access to identity and travel documents and access to naturalization.

[37] Since 1993 Convention refugees applying for permanent residence are required by the *Immigration Act* to provide "satisfactory" identity documents. Thousands of refugees have been left in limbo because of this requirement. The largest number of refugees affected are from Somalia and Afghanistan, countries which because of the breakdown in government structures are unable to provide their citizens with identity documents. Refugees from other countries have also been affected, either because they cannot get identity documents, or because applying for them might put family members at risk.

[38] The security net catches many refugees who do not represent any security threat, but are nevertheless inadmissible because they are or were members of an organization considered to have engaged in terrorism. See below, page 53.

[39] Since 1994, Convention refugees recognized in Canada have been required to pay $500 per adult and $100 per child in processing fees for their permanent residence application. For five years (February 1995 to February 2000) refugees also had to pay the Right of Landing Fee ($975 per adult).

cannot reunite with their families (even their spouse and young children) and do not enjoy all the rights guaranteed them under the *Refugee Convention*.[40]

The Canadian Council for Refugees is disappointed that the government has not addressed through Bill C-11 and the accompanying announcement the very grave human suffering being endured by thousands of refugees living in limbo. As the government itself has acknowledged, many of those affected are women, children and youth (groups that tend to have access to further identity documents).

The CCR urges that the bill provide for the automatic grant of permanent residence to all those found to be Convention refugees or persons in need of protection. This would be a simple and effective way of ensuring that refugees enjoy their rights and of promoting speedy integration and rapid family reunification. The vast majority of refugees are sooner or later granted permanent residence status. In the cases of those not eligible for permanent residence, CIC would be able to proceed to remove the status.

Currently the majority of refugees have to wait in limbo, separated from their families, because of the tiny minority that is not eligible. Under the CCR proposal, the majority would have the immediate benefits of permanent residence status, and the onus would be on CIC to identify the minority who are not entitled to that status.

Recommendation 55 Amend the bill to grant automatic permanent residence status to all protected persons. CIC would continue to be able to move to take away permanent residence status in the few cases where the persons are not entitled.

Part 2, *Refugee Protection*, should outline the requirements of applications for permanent residence by Convention refugees and should by every means possible facilitate the speedy acquisition of permanent residence by all Convention refugees.

Recommendation 56 Introduce into Part 2, *Refugee Protection*, provisions dealing with the acquisition of permanent residence by refugees and persons in need of protection, without any identity document or fee requirements, and introducing a fair process, with timelimits, for any security concerns.

As noted above (page 41), persons who are identified through the Pre-Removal Risk Assessment as requiring protection must also have the right to apply for permanent residence status, unless they have committed serious human rights violations.

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[40] In an opinion prepared for the UNHCR in May 2000, Professor of International Refugee Law Guy Goodwin-Gill concluded that Canada's treatment of refugees without identity or travel documents was not compatible with obligations under the 1951 *Convention relating to the Status of Refugees*.

S. 31(1) states that protected persons may be provided with a document indicating their status. It is understood that this document would allow people to apply for a travel document. If our recommendation regarding automatic grants of permanent residence is accepted, this status document will be of lesser importance, although it would still be necessary for protected persons who lost their permanent residence. In any case, a status document that is given only on a discretionary basis will be of limited value since protected persons may face the same obstacles to getting the document as they face in their application for permanent residence. All people who are determined by the Board to be a Convention refugee or a person in need of protection are, according to the bill, "protected persons" (S. 95(2)). If a document is provided indicating that status, logic requires that all protected persons receive one.

Recommendation 57 Amend S. 31(1) to read "a protected person shall be provided with a document indicating status."

8. FAMILY REUNIFICATION

The International Covenant on Civil and Political Rights states at Article 23.1: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Canada, as a signatory to this Covenant, has an obligation to protect the family, including through the promotion of family reunification.

Canada also has particular obligations for family reunification under the Convention on the Rights of the Child. Article 10.1 states that "... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."

The UN Committee on the Rights of the Child in 1995 expressed its concern over Canada's "insufficient measures aimed at family reunification with a view to ensure that it is dealt [with] in a positive, humane and expeditious manner. The Committee specifically regrets the delays in dealing with the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada as well as cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order." (Para. 13)

Policies promoting family reunification are also essential for the integration of newcomers. Being reunited with family members is one of the key elements permitting refugees and immigrants to feel at home in Canada.

Bill C-11 itself has relatively little to say about family reunification, since most of the relevant provisions are left to the Regulations.

The bill simplifies procedures for the government to collect on money owed in relation to a sponsorship undertaking (S. 145-147). Thus if a person sponsors a family member who receives social assistance while under sponsorship, the sponsor can become liable for the amount and can have her or his wages garnisheed.

There are many reasons why sponsored family members may receive social assistance. In some cases the sponsor has failed to live up to his or her obligations. But in other cases the sponsor is not at fault: there may have been illness or loss of employment. In some cases, the sponsor may have been subjected to physical or psychological abuse by the sponsored person. The system for collecting on debts needs to be sensitive to the wide range of possible extenuating factors.

Recommendation 58 Include in the bill some mechanism for determining whether there are humanitarian reasons for not collecting on debts associated with a sponsorship undertaking [S. 145].

Among the announcements for regulatory changes, the Canadian Council for Refugees welcomes the proposal to grant spouses and children of refugees already landed in Canada a one year window of opportunity to be processed as part of the permanent resident's application. This will promote family reunification and mean that family members will not need to be sponsored under the family class or demonstrate their own refugee claim, if they apply within one year of their family member's arrival.

The government also proposes to create an in-Canada landing class for sponsored spouses and partners. This will also promote speedy family reunification, allowing families to be together in Canada while awaiting immigration processing. However, where the spouses cannot travel to Canada because they need a visa (as is the case for many refugees, and for many members of racialized communities), this measure cannot be taken advantage of.

Refugees applying for family reunification routinely wait months or years before children and parents are reunited. The delays are extremely painful for the families, separated not by their own choice, but by forced flight. Often the delays are dangerous too, since family members (more often than not the wife and children) are themselves the victims of persecution.

The CCR urges that spouses and children of recognized refugees in Canada be given the right to travel to Canada for processing here.

Recommendation 59 Amend the bill to give spouses, common law and same sex partners, and dependants of recognized refugees in Canada the right to travel to Canada for processing here.

The CCR welcomes the government's proposal to treat same sex and common law partners the same as married couples. How this is operationalized will be important. The CCR will be anxious to ensure that regulations are sensitive to the realities of refugees, including that partners made be forcibly

separated by events and that in some countries gay men and lesbians are persecuted, affecting the ways their relationships are lived. Thus a requirement of cohabitation is not appropriate.

The proposal to reduce the length of the sponsorship requirement from 10 years to 3 years for spouses and same sex/common law partners is welcome. It represents a very positive step towards ensuring newcomers' access to rights and services and towards reducing the relationship of dependency created by sponsorship, with all the associated dangers of conjugal violence. For the same reasons, the reduction should also apply to sponsorships of fiancé-e-s and children.

Recommendation 60 Reduce the length of sponsorship for fiancé-e-s and children.

The increase in the maximum age of dependent children from 18 to 21 is welcome. The current cut-off causes great hardship for some refugees, whose families are torn apart. In the case of young adult daughters, the need for the increase is particularly strong, since in many societies it is completely unacceptable and dangerous for young single women to live on their own.

The Canadian Council for Refugees is very disturbed by the government proposal to prevent people on social assistance from sponsoring family members, including spouses and minor children. (Currently, spouse and children are the only family members that can be sponsored by a person on social assistance). The proposed bar represents a denial of the rights of family unity on the basis of economic status.

Recommendation 61 Entrench in the bill the right of all Canadian citizens, permanent residents and Convention refugees to family reunification, without discrimination on the basis of economic status.

9. INADMISSIBILITY AND LOSS OF PERMANENT RESIDENCE

Bill C-11 makes a number of changes to the categories of inadmissibility. People found inadmissible may be denied permanent residence, denied access to the refugee determination system or lose their permanent resident status. Given the important consequences, inadmissibility categories should be as narrow as possible.

The Canadian Council for Refugees has concerns about a number of the current inadmissibility categories, which are defined so broadly that they catch in their net people who should not be excluded. Unfortunately, Bill C-11, rather than addressing these concerns, actually broadens still further the inadmissibility categories.

9.1 Organized criminality

The bill creates a new inadmissible category for transnational organized crime (S. 37(1)(b)). This category is defined in an extremely vague manner through reference to "activities such as people smuggling, trafficking in persons or money laundering." No criminal conviction is required, only "engaging in activities."

The bill clarifies that entering Canada with the assistance of people smugglers does not lead to inadmissibility on the basis of membership in a criminal organization (S. 37 (2)(b)), but it does not apply this exemption to the category of transnational organized crime. The category could also catch people who help family members get to Canada using smugglers.

The CCR is very concerned about the use of immigration processes to address issues of criminality. If crimes have been committed, they should be prosecuted and the defendants be fairly tried as justice requires. Making alleged criminal activity, without any conviction, a ground for inadmissibility amounts to punishing non-Canadians for accusations against which they never have a full opportunity to defend themselves. The consequences of being found inadmissible under this provision can be extremely serious: a refugee claimant is denied access to the refugee determination process; a permanent resident is deportable without appeal to the Immigration Appeal Division.

Recommendation 62 Delete the new inadmissibility category for transnational organized crime (S. 37(1)(b)).

9.2 Misrepresentation

The bill creates a new category of inadmissibility for misrepresentation (S. 40), valid for 2 years from the time the person is removed. It includes direct and indirect misrepresentation, persons sponsored by a person who made the misrepresentation (if the Minister chooses) and persons whose refugee protection is vacated for misrepresentation.

Current experience with "misrepresentation" shows that it is a highly problematic concept. Cultural differences, language barriers and bad advice can all lead to what appears to be a misrepresentation. For refugees, who often flee to Canada in desperate circumstances and with no opportunity to learn how the Canadian system works, the dangers of unintended misrepresentation are particularly great.[41]

> *Example of potential impact*
> Sara immigrated to Canada with her second husband, who forced her to leave behind her children from her first marriage, making no reference to them on their immigration application forms. After two years in Canada, conjugal violence led to the dissolution of the marriage. When she tries to be reunited with her children, she will be accused of misrepresentation and face removal from Canada. Bill C-11 offers no mechanism for considering the circumstances, including the context of an abusive relationship, that led to her misrepresentation.

Recommendation 63 Delete the new category of inadmissibility for misrepresentation (S. 40). At a minimum include a provision for humanitarian considerations to be taken into account, particularly in cases involving vulnerable groups such as refugees.

Refugees whose refugee status is vacated are in a particularly vulnerable situation, because they lose their permanent residence without having any right to appeal to the Immigration Appeal Division (S. 46(1)(d)). This means that there will be no opportunity to present any humanitarian considerations. In the case of a person who received protection under the PRRA, the person loses permanent residence without even a hearing on the vacation of refugee protection (S. 114(3), see above, page 35). Whereas a business immigrant found guilty of misrepresentation has access to an appeal before the IAD and consideration of humanitarian factors, a protected person whose status is vacated has no such access. While the CCR does not condone misrepresentation, it is important to take account of the fact that refugee claimants are often in highly vulnerable situations, subject to exploitation, bad advice and pressures to protect family members and others. Before a permanent resident is stripped of status, there needs to be some forum to consider all the circumstances of the case.

Recommendation 64 Amend the bill to grant access to the Immigration Appeal Division to permanent residents whose refugee protection status is vacated.

9.3 Human rights violations

[41] It is not clear from the bill how misrepresentation is to be determined. S. 44 provides for inadmissibility to be determined either by an immigration officer or by an adjudicator, depending on the Regulations. The question of how inadmissibility is to be determined (both for misrepresentation and other categories of inadmissibility) is an important question that should not be left to the Regulations.

The bill adds a new inadmissibility category consisting of representatives of governments against which Canada has imposed sanctions (S. 35(1)(c)). "Representative" is a broad term that could cover even a person with a relatively unimportant civil service position. Any provision which assigns guilt based on association, rather than personal responsibility, is extremely problematic.

Recommendation 65 Define "representative of governments" (S. 35(1)(c)) more narrowly to limit it to persons with direct responsibility for human rights abuses.

9.4 Security risks

Under Bill C-11, the highly problematic category of inadmissibility on the grounds of membership in a "terrorist" organization is maintained. Neither membership nor "terrorism" are defined. As a result, people who are simply active supporters of a political organization, without themselves being in any way involved in any violent activities, are caught in the net.[42] People who are acknowledged by the Canadian Security Intelligence Service to represent no security risk are nevertheless found to meet the very broad definition.

Section 34 draws up a whole list of activities that are covered by the security inadmissibility category, including "being a danger to the security of Canada" and "engaging in acts of violence that would or might endanger the lives or safety of Canada." Even without the category mentioning terrorism (S. 34 (1) (c)) and membership in organizations (S. 34 (1)(f)), the list of security inadmissibilities would still cover anyone who posed a security threat. Given the lack of any international or national consensus on the meaning of "terrorism" and the problematic aspect of penalizing people for their association, rather than their personal responsibility, the CCR urges the deletion of these two paragraphs.

Recommendation 66 Delete S. 34 (1) (c) ["engaging in terrorism"] and S. 34 (1)(f) ["being a member of an organization..."]

9.5 Security certificates

In Bill C-11, the certificate process for deciding that someone is a security risk or inadmissible on other grounds, already extremely secretive and unfair in the current Act, offers people even fewer rights (Sections 76 - 85). As under the current Act, there is a complex process, involving a certificate signed by two Ministers and review by a Federal Court judge. There is no flowchart to assist with understanding. The range of people potentially subject to the certificate proceedings is enormous

[42] S. 34(1)(f) refers to membership in "an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts..." The use of the range of tenses means that a person is inadmissible for security reasons for being a member of an organization that, in the past, engaged in "terrorism", even though the person might not have joined until after the organization renounced violent action. The bill does offer an improvement over the current Act (19(1)(f)(iii)) in that it does not refer to past membership.

(anyone inadmissible on grounds of security, violating human or international rights, serious or organized criminality: categories that include people who have committed no crime and who represent no security threat). People who have been convicted abroad on the basis of trumped up charges can be targetted. The bill provides no criteria to limit the circumstances in which the certificate process may be used. The person concerned is not entitled to know all of the information based on which the determination is made. A single judge makes the decision whether to uphold the certificate. The decision may not be appealed or judicially reviewed. Once the security certificate has been upheld by a judge, the person is removable and no further applications can be made under the Act.

Currently, permanent residents facing security proceedings have access to the Security Intelligence Review Committee, which carefully examines the basis of the security opinion and provides an important check on the authority of CSIS, the agency responsible for providing security related advice to the Minister and the Solicitor General. Under Bill C-11, permanent residents will no longer have access to SIRC but instead, along with all other non-Canadians, will enjoy only a minimal right of review by a single judge of the Federal Court. Justice requires rather that access to the Committee be opened up to persons other than permanent residents against whom a security opinion is made.

Recommendation 67 Re-instate/grant access to the Security Intelligence Review Committee for permanent residents and non-permanent residents found to be inadmissible on security grounds.

At S. 78, Bill C-11 states in subsection (c) that the Federal Court judge "shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." The reference to proceedings being informal is new and disturbing. A permanent resident being accused of representing a security risk needs to have the benefit of all the protections that formal proceedings can offer.

Recommendation 68 Delete S. 78 (c) [judge to deal with matters informally and expeditiously].

S. 80(3) denies the right of appeal or further judicial review from a decision by the Federal Court judge (this is also the case in the current Act). Given the highly contentious and complex nature of decisions in security cases, an appeal is very much needed to ensure that people are treated justly.

Recommendation 69 Accord the right of appeal from a decision by the Federal Court on a security certificate.

S. 82(2) imposes mandatory detention on non-permanent residents named in a certificate. While people named in a certificate may represent a danger to Canada, it is wrong to assume that this is the case. The certificate process is geared to the protection of information, not towards people who are necessarily dangerous. Yet the bill does not allow for any consideration at all of whether detention is justified until the person has been in detention for at least four months. A person might even apparently

be granted a stay of removal under the PRRA and still be forced to wait four months before the judge could even review whether the person poses a danger.

Recommendation 70 Delete S. 82(2) imposing mandatory detention on non-permanent residents named in a certificate.

9.5 Loss of permanent residence on the basis of physical residence

Under Bill C-11, permanent residents will need to be in Canada for two years out of each five year period, otherwise they lose their status (S. 28(2)). This is not a very demanding physical residency requirement and thus recognizes that there are many reasons why permanent residents may need to spend time outside Canada, while still intending to live in Canada.

The CCR is however concerned that there may be occasions when permanent residents find themselves outside Canada for more than three years in a five year period. In particular, family obligations, for example, when a parent is sick and needs long-term care, may place demands on permanent residents who have no intention of leaving Canada permanently. Bill C-11 provides for humanitarian considerations and the best interests of any child affected to be considered before a final decision is taken to remove permanent residence (S. 28(2)(c)). However, this forces people to risk their future status, not knowing whether an immigration officer will give humanitarian considerations. People would be able to plan their lives better if they had the option of applying for some kind of "returning resident's permit" which would allow people to know in advance whether they would be able to keep their status in Canada. This might save a few people the expense and inconvenience of leaving sick relatives in order to return to Canada for a few months simply to meet the residency requirements. It would also help people to know in advance whether CIC will agree that any of the available exeptions to the physical residence rule apply to their situation (for example, being outside Canada employed on a full-time basis by a Canadian business counts as physical residence (S. 28(2)(a)(iii)), but this is a criterion which may be open to interpretation).

Recommendation 71 Provide for some kind of "returning resident's permit" to allow people who must be overseas for more than three years to apply in advance for humanitarian consideration.

9.6 Appeals to the Immigration Appeal Division

According to Bill C-11, no appeals to the Immigration and Refugee Board can be made by permanent residents found inadmissible on the grounds of security, violating human rights, serious criminality or organized crime (S. 64).

Serious criminality is defined here as a crime punished in Canada by a sentence of at least two years . This replaces the current highly problematic bar on appeals in criminality cases where a danger to the public certificate is issued, a process that has attracted charges of racism. The two year imprisonment

rule is less arbitrary than the danger to the public process, but inflexible in the face of cases where, for example, a person has been in Canada since infancy and represents no danger to the public. Since studies have shown that there is systemic racism in Canada's justice system, there is reason for concern that a fixed sentence criterion will also discriminate against members of racialized minorities, who tend to be sentenced to longer terms of imprisonment.

With respect to organized criminality, the bill does not require a two year sentence or even a conviction, just "engaging... in activities such as people smuggling." Thus a permanent resident could be deported without an appeal based simply on allegations of, for example, minimal involvement with smugglers to help a family member escape persecution.

The inadmissibility categories which lead to denials of right of appeal to the Immigration Appeal Division cover a wide range of activities, some of them very serious, some not at all. It is only fair to allow applicants access to the IAD so that these distinctions can be made on a case by case basis.

In the view of the Canadian Council for Refugees, the status of permanent residence should not be lost without access to a quasi-judicial process.

Recommendation 72 Remove the bars on access to the Immigration Appeal Division to people found inadmissible on the grounds of security, violating human rights, serious criminality or organized crime.

9.7 Examination by immigration officers

The current *Immigration Act* provides for the examination by an immigration officer of every person seeking to enter Canada (S. 12). Bill C-11 expands the powers of immigration officers to provide for the examination of non-Canadians, including permanent residents, not only on entering Canada, but at any time within Canada (S. 15). This change means that the border is brought into Canadian society: all members of society who are not citizens are treated as if they are eternally at the border, subject to examination at any time by immigration officers. Such a power would be open to abuse and goes directly counter to the bill's objective of promoting the integration of newcomers to Canadian society.

Recommendation 73 Restrict immigration officers' authority under S. 15 to the authority to examine persons seeking to enter Canada (i.e. delete reference to authority to examine persons inside Canada).

9.8 Right of permanent residents to enter Canada

Section 4 of the current *Immigration Act* establishes the principle that Canadian citizens and permanent residents have the right to come into Canada except where it is established that the

permanent resident is inadmissible. This formulation groups together citizens and permanent residents as members of our society, and articulates the right of permanent residents to be considered as such until the opposite has been established.

Bill C-11, on the other hand, separates citizens and permanent residents, and gives only the former (along with registered Indians under the *Indian Act*) the right to enter Canada (S. 19(1)). Permanent residents are not recognized as members of Canadian society with the same fundamental right. Instead their right to enter is conditional upon them satisfying an immigration officer that they have permanent residence status and meet the requirements of the Act (S. 19(2)). Thus a new onus is put on permanent residents each time they enter Canada to establish that they are permanent residents, and if the immigration officer has doubts, the person will be refused admission and will have to argue the point from outside Canada (potentially separating the permanent resident from family, home, employment, studies, business, etc).

Recommendation 74 Amend S. 19 to assert the right of permanent residents to enter Canada unless their loss of status has been established.

10. INTERDICTION

Bill C-11 and the April 2000 government announcement accompanying Bill C-31 tell us of government plans to reinforce measures already in place to prevent "improperly documented travellers" from getting to Canada. These measures have a particular impact on refugees, who generally cannot get visas and often cannot even travel on their own passport. Refugees often have no choice but to use false papers or smugglers in order to escape persecution.[43] Yet interdiction efforts are applied blindly, blocking refugees and non-refugees equally.[44]

Carrier sanctions turn airline staff into immigration enforcement officials overseas, checking and re-checking travellers' documents and preventing them from getting aboard if they suspect that their

[43] The Refugee Convention recognizes this fact. Article 31 reads: "(1) 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 in the sense of Article 1, 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."

[44] The Vatican has recently spoken out about this trend: "Persecution and violence do not allow their victims the luxury of getting passports and visas before a forced departure. Some have little choice but to use traffickers and arrive irregularly in safe countries. This should question any equation of migrants or refugees with criminals. The rhetoric of "zero tolerance" for illegally entering a country means the destruction of the already fragile international asylum regime and betrays the ignorance of its proponents." *The Solidarity of the Church with Migrants and Itinerant People*, Rome 2000.

documents are not genuine. Refugees turned away often end up being jailed or forced back to their country of origin.[45]

Example of impact
L. arrived in Canada and made a refugee claim. A couple of months later her husband also escaped from their country of origin. On his way to Canada to rejoin his wife (who had recently given birth) he was interdicted, i.e. stopped from getting on the plane to Canada, in London, England. He was given no indication that he could make a refugee claim in England and was immediately deported back to his country of origin.

According to the April 2000 announcement, the government proposes to increase overseas interdiction by stationing more immigration control officers abroad. Interdicted refugees are at risk of being immediately sent back to the country of origin or put into jail in the country in which they are interdicted. Interdiction activities therefore engage Canada's obligations not to "*refoule*" refugees (i.e. forcibly return refugees to persecution). As stated recently by the UN High Commissioner for Refugees:

> The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law.[46]

Although the Act limits the enforcement activities that immigration officers can undertake in Canada, the whole area of overseas interdiction activities is left untouched by the bill. Giving a legislated framework to interdiction would be one way of addressing the impact of these activities on refugees.

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[45] The United Nations High Commissioner for Refugees discusses the impact of interdiction in a recent paper *Interception of Asylum-seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17, 9 June 2000. "Immigration control measures, although aimed principally at combating irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum ... [T]he exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, may result in the *refoulement* of refugees" [Para. 18].

[46] Para. 23, *Interception of Asylum-seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17, 9 June 2000

Recommendation 75 Include in the bill rules about the enforcement activities that can be undertaken by immigration officers overseas and include the obligation to ensure that, in any interdiction activities, refugees are protected, including from *refoulement*.

10.1 Carrier sanctions

Bill C-11, like the current *Immigration Act*, requires transportation companies to bring only properly documented travellers into Canada (S. 148(1)). Penalties are imposed on carriers that bring in improperly documented persons. No exception is made for refugees. The law is thus asking transportation companies to cooperate in barring access to refugees fleeing persecution, even though this may mean that the refugees are sent back to persecution.

Recommendation 76 Exempt carriers from sanctions when they bring into Canada persons who are subsequently determined to be refugees.

The particular impact of carrier sanctions on stowaways on ships needs consideration. The tragic case of the Romanians on the *Maersk Dubai* who were allegedly thrown overboard must alert us to the possibility that sanctions may cost some stowaways their lives.

Recommendation 77 Exempt carriers from sanctions when they bring stowaways into Canada.

10.2 Offences related to illegal entry

The bill expands the offences related to organizing entry into Canada or using false documents and increases the penalties for these offences (S. 117-123).[47]

The CCR has serious concerns about the dramatic increases in scope of offences and penalties. While the CCR respects the Canadian government's right to control its borders, we do not support treating contraventions of the Act as extremely serious crimes (with penalties of up to 5 years, up to 14 years and even up to life imprisonment for some offences). The powers of search and seizure (including intercepting mail) provided for under Bill C-11 (and under the current *Immigration Act*) similarly trample on the rights that are integral to a democratic society.

[47] It is interesting to note that the only category of offences where the scope is narrowed and the penalties are not increased is the category of offences committed by immigration officers (S. 129). Thus the penalties for an immigration officer who makes or uses a false document are significantly lower than those for a non-immigration officer who does the same thing (S. 123 (1)).

The Canadian borders are not sacred. Yet the bill treats even trivial offences against the border as matters requiring extreme measures and the suspension of normal protections against state interference in people's private lives.

It is important to consider these sanctions from a global perspective. Citizens of countries of the North, for the most part white, are generally speaking able to travel freely around the world, while citizens of other countries, mostly people of colour, face a whole range of barriers to travel. The penalties and intrusive measures in the bill are effectively directed at members of racialized groups, to whom legal means of entry are often denied. The whole approach reinforces extremely dangerous xenophobic prejudices that see newcomers as a potential threat, against whom all possible measures must be taken.

Recommendation 78 Narrow the scope of offences and reduce the penalties associated with contravention of the act and strengthen protections of civil liberties.

The bill exempts from some of the offences relating to illegal entry persons who are found to be refugees (S. 133). However, this exemption fails to cover refugees who are interdicted on their way to Canada and therefore cannot claim refugee status here. There are already cases where persons are interdicted on their way to Canada: when their spouse in Canada subsequently tries to sponsor them, they are declared inadmissible on the grounds of the crime of travelling on a false document. Under the bill, the problem is likely to worsen, because of the increase in both the scope of the offences and the penalties.

Example of impact
Mrs. K, a survivor of torture, fled Iran and came to Canada with her four children. She was found to be a Convention Refugee and applied for permanent resident status for herself, her four children and for her husband overseas, Mr. S, himself a victim of torture. There were long delays in the processing of the permanent residence application and eventually, after years of family separation, and aware of the difficult circumstances of his wife and children in Canada, Mr S tried to come to Canada with false documents. He was interdicted in the UK where the authorities detained him for 12 weeks. He was eventually released and granted refugee status there.

Meanwhile, Mrs. K received a letter from a Canadian visa officer in the UK stating that Mr. S was "inadmissible" to Canada on account of his conviction in the UK for the offence of trying to reach Canada with false documents.

Source: Inter-Church Committee for Refugees.

In December 2000 Canada signed UN Protocol against the Smuggling of Migrants.[48] Article 5 of this Protocol states that "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object" of the acts of smuggling that states are urged to criminalize. While this does not prevent states from penalizing persons who have been smuggled, it does suggest an international consensus that criminalization efforts should be directed at smugglers, and not at the those who are being smuggled. Those caught entering or attempting to enter illegally are already penalized by the prospect of deportation, as well as the indignity of their situation. It is not necessary to make them also liable to other penalties (up to two years' imprisonment under S. 125, or up to 14 years' imprisonment for the use of a false document (S. 123)).

Recommendation 79 Focus offences on smugglers and not those who are smuggled.

The S. 133 exemption is also problematic in that it does not apply to others, including family members, who help refugees to escape. Someone who organizes the entry of a group of 10 or more refugees fleeing persecution is liable to life imprisonment (S. 117 (3)).

The bill says that the courts are to consider offences committed for profit as an aggravating factor: this implies that even when the motive is not for profit, it is still an offence. Thus people whose only motive was compassion for someone fleeing persecution would be punishable and could face extremely serious penalties.

Recommendation 80 Exempt from offences related to illegal entry people acting on humanitarian motives.

S. is a young Afghan woman, who was living in Pakistan with her mother. S. had been a medical student in Afghanistan and was continuing her education in Pakistan, a fact which brought her to the attention of Afghan and other extremists there, exposing her to violence. Through the intervention of family members living in Canada, S. and her mother were sponsored as refugees.

The Canadian visa officer, however, refused the application on the basis that the two women would not "successfully establish" themselves in Canada.

Responding to the increasingly desperate situation in Pakistan, family members in Canada lent S. and her mother their papers so that they could escape (the only solution they could see to the solution). They arrived in Canada and were recognized as Convention Refugees.

Under Bill C-11, the family members in Canada are liable to up to 10 years imprisonment, although their only motive was to help family members escape persecution.

[48] *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*.

10.3 Protocol on trafficking in persons

Along with the protocol on migrant smuggling, Canada has signed a protocol on trafficking in persons.[49] The bill reflects some aspects of this protocol: for example, the bill adds a new inadmissibility category (S. 37(1)(b)) for engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering (see above, page 51). But while the bill includes enforcement measures inspired by the draft protocol, we do not see reflected in the bill the provisions in the protocol aimed at protecting victims of trafficking. Articles 6 and 7 address "Assistance to and protection of victims of trafficking in persons" and "Status of victims of trafficking in receiving States" as part of the protocol's purpose of protecting the victims of trafficking, particularly women and children. Currently (and under Bill C-11), there is nothing in place to protect victims of traffickers. If, for example, authorities discover a group of women and minors, kept in confinement and forced into prostitution by traffickers, they are liable, if they have no legal status in Canada, simply to be detained and removed, without any consideration for the way in which they have been abused.

Recommendation 81 Include measures in the bill to identify victims of trafficking and offer them particular protection, in the light of their status.

[49] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.*

11. GENDER ANALYSIS

This brief has included a number of comments throughout about the possible differential impacts of various aspects of the government's proposals. In the interests of highlighting this analysis, the following points are gathered together.

- The Minister government has announced its proposals to **bar from family sponsorship people who are on social assistance**. Since women, more often than men, are single parents (and must rely on social assistance), they are likely to be disproportionately affected by this provision. In many cases, reuniting the family leads to the family being able to get off social assistance.

- The proposal to **reduce the length of spousal sponsorship** from ten years to three years will have a positive impact on sponsored women, by reducing their financial dependence on their husband. The sponsorship relationship reinforces the patriarchal model and makes sponsored women more vulnerable to abuse.

- The proposal to increase the **maximum age of dependent children** from 18 to 21 will help to address a particular problem faced by families with young adult daughters. In many societies it is completely unacceptable and dangerous for young single women to live on their own.

- The elimination of any possibility of making a **second refugee claim** will hurt women who never had an opportunity in the first claim to explain their persecution because the spouse was the principal applicant. Current experience shows that some women who have strong grounds of their own for claiming refugee status are not heard in their first claim made with their husband, because they are not asked, or because they are intimidated or traumatized.

- The bill includes the possibility for refugee claimants in Canada to be recognized as "persons in need of protection" if there is a risk to their life of a risk of cruel and unusual treatment or punishment. The bill requires that this risk apply in every part of the country. This "**internal flight alternative**" may be particularly problematic for women, who often are not able to live safely in some parts of the country, for social, economic and cultural reasons.

- The proposals for regulations include a commitment to shift the balance in resettlement decisions away from "**successful establishment**" and towards protection concerns. This is positive since potential for "successful establishment" is evaluated using criteria that are unfavourable to women (e.g. education, professional experience and training). However, maintaining the "successful establishment" fails to address the underlying problem of the gender bias in this test.

- The bill fails to address a range of current problems that hurt women in particular. The requirement for refugees to produce **identity documents** for landing has a particularly negative

impact on women and children, who tend to have been issued fewer documents than men. Similarly, demands for **DNA testing** to establish family identity delays family reunification (with the women more often than not waiting in precarious situations overseas). The costs of DNA testing are particularly burdensome to single mothers. In general, delays in family reunification cause serious hardship to both men and women separated from their spouses, and to separated parents and children. While the proposal to facilitate processing of spouses in Canada is welcome, this does not address the problems faced by many refugee families, where those overseas cannot travel immediately to Canada because nationals of their country require visas.

– Increased measures of **interdiction** have a differential impact on women in that the more barriers are set up, the more expensive the prices of the smugglers, and the less women can afford the price of escape from persecution. In addition, although the bill aims to get tough on **traffickers**, whose victims are often women, it does nothing to protect the rights of the victims of trafficking.

12. ANTI-RACIST ANALYSIS

Just as it is important to analyse the bill from the point of view of differential impacts on women and men, it is also necessary to consider the differential impacts on racialized minorities and whether proposals combat or promote racism and xenophobia.

Again, the following are points referred to in the text, gathered together here to give an overview.

- The **negative discourse** with which the bill was presented promotes negative stereotypes about refugees and immigrants as people who abuse the system, commit crimes and represent a threat to Canada. This approach caters to the racist and xenophobic element in Canadian society.

- The use of the term "**foreign nationals**" emphasizes the foreignness of the non-Canadians, including permanent residents, whose rights and treatments are under discussion, rather than their common humanity. The impact of this alienating term is likely to be particularly heavy on members of racialized minorities, since white newcomers are already more readily accepted as Canadians than racialized minorities (even those who are born in Canada).

- Granting increased **discretionary powers** to immigration officers opens the door to abuses targeting racialized minorities. There are already frequent complaints about perceived bias or racism by immigration officers and no independent complaints mechanism to investigate such complaints.

- While the right to liberty is a fundamental right, the government gives itself very **broad powers to detain** under the *Immigration Act* (and ever broader under Bill C-11). The implication is that non-Canadians' right to liberty is of lesser concern. Given that the majority of those detained are generally members of racialized minorities, there is also a possible racist element in the minimizing of the importance of non-Canadians' right to liberty.

- The government has announced its intention of regularizing processing for **landing in Canada of sponsored spouses/partners**, a positive move that will facilitate family reunification. However, this measure will particularly benefit those who can travel to Canada without needing a visa (mostly white). Citizens of most of the countries of African and Asia need a visa to travel to Canada and therefore often cannot take advantage of this measure by itself.

- The proposed elimination of the danger to the public certificate process for denying permanent residents' access to the Immigration Appeal Division on the basis of **criminality** is positive in that it was an administrative process that has attracted charges of racism. Establishing a two-year sentence as a bar is more neutral. On the other hand, studies have shown that there is systemic racism in Canada's justice system. There is therefore reason for concern that a fixed

sentence criterion will also discriminate against members of racialized minorities, who tend to be sentenced to longer terms of imprisonment.

— The dramatic increases in the scope of **offences against the act** and in the penalties for contravening the act are extremely problematic from the point of view of an anti-racist analysis. The bill treats even trivial offences against the border as matters requiring extreme measures and the suspension of normal protections against state interference in people's private lives. People of colour face a whole range of barriers to travel, while white people generally can travel legally wherever they want. The penalties and intrusive measures in the bill are effectively directed at members of racialized groups, to whom legal means of entry are often denied. The escalation of offences and penalties reinforces dangerous xenophobic prejudices that see newcomers as a potential threat, against whom all possible measures must be taken.

— Demands for **identity documents** hurt in particular people from the least developed countries, i.e. people of colour, since most of those countries do not have the culture of documentation found in the North. The bill not only fails to address the current problem faced by thousands of refugees who cannot land because of ID, it reinforces identity documents as a barrier by directing decision-makers to take account of lack of identity documents as a factor in evaluating a refugee claimant's credibility.

— The new category of inadmissibility on the basis of **misrepresentation** may have a particularly adverse effect on people from the South, since accusations of misrepresentation are sometimes based on cultural misunderstandings.

13. RECOMMENDATIONS

Recommendation 1	Amend the bill to remove reference to "foreign nationals."
Recommendation 2	Section 3 (3) (d) be amended to read "any person affected by the provisions of this Act is subject to standards, policies and procedures consistent with the *Canadian Charter of Rights and Freedoms.*"
Recommendation 3	A further provision be added to Section 3 (3) to state that the Act is to be construed and applied in a manner that "complies with international human rights instruments to which Canada is signatory."
Recommendation 4	Add the words "and others at risk of human rights violations" after "with respect to refugees" in S. 3(2)(b).
Recommendation 5	Amend S. 3(1)(i) and S. 3(2)(h) to read "to promote international justice, respect for human rights and security." [i.e. add "respect for human rights" and delete "by denying access to Canadian territory to foreign nationals who are criminals and security risk"].
Recommendation 6	Incorporate Article 3 of the *Convention against Torture* into the bill.
Recommendation 7	Amend the bill to include specific reference to the *Convention on the Rights of the Child* and a clear direction that all decisions taken under the Act concerning children must make their best interests a primary consideration.
Recommendation 8	Amend the bill to remove any exceptions to the rule that minor children do not need an authorization to study at pre-school, primary or secondary level.
Recommendation 9	Include in the bill measures to authorize the early admission to Canada of spouses and children of refugees, permanent residents or Canadian citizens, and the parents of minor refugees, permanent residents or Canadian citizens.
Recommendation 10	Amend Bill C-11 to include protections for stateless persons on the lines of the *Convention on the Status of Stateless Persons*.
Recommendation 11	Review the bill in the light of the February 2000 report of the Inter-American Commission on Human Rights on Canada's refugee determination system.
Recommendation 12	Seek an opinion on the bill from relevant international human rights bodies, notably the UN Committee against Torture, the UN Human Rights Committee

and the Inter-American Commission on Human Rights.

Recommendation 13 All matters relevant to refugees or persons in need of protection, including the resettlement program should be dealt with under Part 2, *Refugee Protection*, and not referred to Part 1, *Immigration to Canada* (S. 99(2)).

Recommendation 14 Add to 14(2)(c) text to exclude 12 (3) (Convention refugees and protected persons) from this provision [providing for regulations on "the number of applications that may be processed or approved in a year, the number of visas and other documents that may be issued in a year, and the measures to be taken when that number is exceeded" i.e. quotas].

Recommendation 15 Include a requirement for public consultation in the development of plans for refugee resettlement.

Recommendation 17 Eliminate the successful establishment criterion for resettled refugees and persons in need of protection.

Recommendation 18 Amend S. 110 (Appeal to Refugee Appeal Division) to allow appeals to the Refugee Appeal Division from decisions overseas to reject applications for refugee protection.

Recommendation 19 If refugees refused overseas are not given access to the Refugee Appeal Division, at a minimum exempt them from the leave requirement for applications for judicial review to the Federal Court.

Recommendation 20 Amend the bill so that all refugee claims are eligible. Any relevant eligibility issues should be addressed by the Immigration and Refugee Board in the context of the refugee hearing.

Recommendation 21 Introduce into the bill a provision for re-opening refugee claims previously refused, for the consideration of newly available evidence.

Recommendation 22 Amend the bill so that those who have not previously had a hearing (e.g. those who withdrew or abandoned their claim) have their claims referred to the Immigration and Refugee Board, so that they have access to an oral hearing, as called for by the *Canadian Charter of Rights and Freedoms.*

Recommendation 23 Amend the bill to refer all claims to the Immigration and Refugee Board, including claims involving allegations of criminality, security or human rights violations. These allegations should be considered in the context of the refugee claim determination and with reference to the exclusion clauses in the *Refugee*

Convention.

Recommendation 24 Amend the bill to refer all claims to the Immigration and Refugee Board, including claims of persons who have received refugee status in another country. The Immigration and Refugee Board should consider the question of whether the person already has meaningful protection elsewhere.

Recommendation 25 Introduce into the bill provisions to prohibit *refoulement* to countries or parts of country where a person is a risk, in cases where the person is not found to be in need of protection because of dual or multiple nationalities or status in another country, or the existence of an internal flight alternative.

Recommendation 26 Amend S. 99(3) by deleting the words "who is not subject to a removal order" so that claims from persons subject to a removal order can be referred to the Immigration and Refugee Board.

Recommendation 27 Include in the bill a requirement that the Refugee Protection Division, in considering claims, first consider whether the claimant is a Convention refugee and, in the affirmative, identify the person as such.

Recommendation 28 Amend Section 98 to add (at the end of the section) the words "unless that person has been found to be a person at risk of torture as defined in the Convention against Torture."

Recommendation 29 Ensure that those in Canada who have committed acts of torture be prosecuted in Canada where they cannot be extradited to another country to be brought to justice.

Recommendation 30 Amend Section 97(1)(b) [definition of risk], by deleting subsection (ii) "the risk would be faced by the foreign national in every part of that country and is not faced generally by other individuals in or from that country."

Recommendation 31 Introduce into the bill provisions to ensure a transparent, professional and accountable selection procedure for members of the Immigration and Refugee Board, on the lines of the Crépeau/Houle recommendations.

Recommendation 32 Delete Section 106 [requiring the IRB to take into account lack of documentation in evaluating credibility].

Recommendation 33 Amend S. 164 to prohibit the use of videoconferencing for hearings before the Refugee Protection Division and for detention reviews and amend S. 170(b) to require that a hearing before the Refugee Protection Division be held in the presence of the person concerned.

Recommendation 34 Amend S. 108 [cessation] to conform to the *Refugee Convention*, applying the grounds for cessation to applications by the Minister for cessation, and not making them grounds for rejection.

Recommendation 35 Re-insert the leave requirement for applications for vacation of refugee status.

Recommendation 36 Delete S. 114(3) and provide for vacation procedures for PRRA decisions at the IRB.

Recommendation 37 Amend S. 110 (3) [Appeal to Refugee Appeal Division] to allow oral hearings, where credibility is at issue.

Recommendation 38 Clarify the independence and hierarchical superiority of the Refugee Appeal Division in the bill.

Recommendation 39 Clarify in the bill that new evidence can be introduced in the refugee appeal.

Recommendation 40 Amend 110(1) to allow refugee claimants only (in Canada and overseas), and not the Minister, access to the Refugee Appeal Division.

Recommendation 41 Allow appeals from claimants whose claim has been declared abandoned.

Recommendation 42 Delete the six month bar on second-time claimants presenting evidence.

Recommendation 43 Have the Pre-removal Risk Assessment conducted by the Immigration and Refugee Board.

Recommendation 44 Amend S. 115(2) to include an absolute prohibition on *refoulement* of persons to risk of torture (consistent with the Convention Against Torture), by excluding persons at risk of torture from the exceptions to the *non-refoulement* rule.

Recommendation 45 Amend the S. 115(2) exceptions to the *non-refoulement* principle to make them consistent with the Refugee Convention.

Recommendation 46 Amend S. 115(3) to delete "or if the country from which the foreign national came to Canada has rejected their claim for refugee protection", so that persons rejected as refugees in a safe third country cannot be removed by Canada to their country of alleged persecution, without any right to be heard on their claim.

Recommendation 47 Amend the bill so that everyone considered under the PRRA is considered against the refugee definition and limit the provisions denying full refugee

protection to people who have actually committed very serious crimes and/or represent a danger to the security of Canada.

Recommendation 48 Delete Section 55(3) (which provides for new grounds of detention of administrative convenience and suspicion).

Recommendation 49 Amend S. 55(2) to restrict the powers of detention without warrant to situations where the officer has reasonable grounds to believe the person is a danger to the public.

Recommendation 50 Amend the bill to delete identity as a ground for detention.

Recommendation 51 In the alternative, at least limit the circumstances in which persons can be detained on grounds of identity, move S. 58 (1)(d) to the regulations and restrict detention on the basis of identity to short-term detention and amend S.58(1)(d) to give the Immigration Division jurisdiction to decide if a detained person's identification has been or may be established.

Recommendation 52 Omit any reference in regulations to arrival through criminally organized smuggling operations constituting a factor towards concluding that the person would not appear.

Recommendation 53 Include in the bill a direction that the best interests of the child be a primary consideration in any detention decision affecting a minor.

Recommendation 54 Include in the bill a direction that the right to family unity be taken into account in decisions relating to detention.

Recommendation 55 Amend the bill to grant automatic permanent residence status to all protected persons. CIC would continue to be able to move to take away permanent residence status in the few cases where the persons are not entitled.

Recommendation 56 Introduce into Part 2, *Refugee Protection*, provisions dealing with the acquisition of permanent residence by refugees and persons in need of protection, without any identity document or fee requirements, and introducing a fair process, with timelimits, for any security concerns.

Recommendation 57 Amend S. 31(1) to read "a protected person shall be provided with a document indicating status."

Recommendation 58 Include in the bill some mechanism for determining whether there are humanitarian reasons for not collecting on debts associated with a sponsorship

undertaking [S. 145].

Recommendation 59 Amend the bill to give spouses, common law and same sex partners, and dependants of recognized refugees in Canada the right to travel to Canada for processing here.

Recommendation 60 Reduce the length of sponsorship for fiancé-e-s and children.

Recommendation 61 Entrench in the bill the right of all Canadian citizens, permanent residents and Convention refugees to family reunification, without discrimination on the basis of economic status.

Recommendation 62 Delete the new inadmissibility category for transnational organized crime (S. 37(1)(b)).

Recommendation 63 Delete the new category of inadmissibility for misrepresentation (S. 40). At a minimum include a provision for humanitarian considerations to be taken into account, particularly in cases involving vulnerable groups such as refugees.

Recommendation 64 Amend the bill to grant access to the Immigration Appeal Division to permanent residents whose refugee protection status is vacated.

Recommendation 65 Define "representative of governments" (S. 35(1)(c)) more narrowly to limit it to persons with direct responsibility for human rights abuses.

Recommendation 66 Delete S. 34 (1) (c) ["engaging in terrorism"] and S. 34 (1)(f) ["being a member of an organization..."]

Recommendation 67 Re-instate/grant access to the Security Intelligence Review Committee for permanent residents and non-permanent residents found to be inadmissible on security grounds.

Recommendation 68 Delete S. 78 (c) [judge to deal with matters informally and expeditiously].

Recommendation 69 Accord the right of appeal from a decision by the Federal Court on a security certificate.

Recommendation 70 Delete S. 82(2) imposing mandatory detention on non-permanent residents named in a certificate.

Recommendation 71 Provide for some kind of "returning resident's permit" to allow people who must be overseas for more than three years to apply in advance for humanitarian consideration.

Recommendation 72	Remove the bars on access to the Immigration Appeal Division to people found inadmissible on the grounds of security, violating human rights, serious criminality or organized crime.
Recommendation 73	Restrict immigration officers' authority under S. 15 to the authority to examine persons seeking to enter Canada (i.e. delete reference to authority to examine persons inside Canada).
Recommendation 74	Amend S. 19 to assert the right of permanent residents to enter Canada unless their loss of status has been established.
Recommendation 75	Include in the bill rules about the enforcement activities that can be undertaken by immigration officers overseas and include the obligation to ensure that, in any interdiction activities, refugees are protected, including from *refoulement*.
Recommendation 76	Exempt carriers from sanctions when they bring into Canada persons who are subsequently determined to be refugees.
Recommendation 77	Exempt carriers from sanctions when they bring stowaways into Canada.
Recommendation 78	Narrow the scope of offences and reduce the penalties associated with contravention of the act and strengthen protections of civil liberties.
Recommendation 79	Focus offences on smugglers and not those who are smuggled.
Recommendation 80	Exempt from offences related to illegal entry people acting on humanitarian motives.
Recommendation 81	Include measures in the bill to identify victims of trafficking and offer them particular protection, in the light of their status.

14. CROSS-REFERENCE OF SECTIONS OF BILL C-11 TO BRIEF

Section	*Recommendation*	*Page number*
Throughout	1	8
3(1)(i) and 3(2)(h)	5	10
3(2)(b)	4	10
3(3)(d)	2	9
3(3)	3	9-10
10	15	19
12(2)	59	49
12(2)	61	50
14(2)(c)	14	18
15	73	56
19	74	57
28	71	55
30(2)	8	13
31(1)	57	48
34(1)(c) and (f)	66	53
35(1)(c)	65	53
37(1)(b)	62	51
40	63	51-52
46(1)(d)	64	52

Section	*Recommendation*	*Page number*
55(2)	49	42-43
55(2)(b)	50	43
55(3)	48	42
58(1)(d)	51	43-44
60	53	44
60	54	45
64(1)	72	54-55
72(1)	19	21
77	67	53-54
78(c)	68	54
80(3)	69	54
82(2)	70	54-55
97	10	15
97(1)(b)	30	32-33
98	28	31-32
99(2)	13	17
99(3)	26	29-30
99(4)	55	47
99(4)	56	47
100-101	20	22
101	22	25

Section	*Recommendation*	*Page number*
101	23	28
101	24	28-29
106	32	34
107	21	23-25
107	27	31
108	34	35
109	35	35
110	18	20-21
110(1)	40	37
110(1)	41	37
110(3)	37	36-37
112(1)	43	39
112(2)(d)	42	38
112-113	47	41
114(3)	36	35-36
115	6	11-12
115	25	29
115(2)	44	40
115(2)	45	40
115(3)	46	40-41
117-133	78, 79, 80	59-61

Section	*Recommendation*	*Page number*
145	58	49
148	76	59
148	77	59
153	31	33
159	39	37
164	33	34
New provision	7	12-13
New provision	9	13-14
New provision	75	57-59
New provision	81	62