Unbalanced Reforms:

Recommendations with respect to Bill C-31

Amnesty International Canada

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Introduction

On February 16, 2012, Bill C-31, the *Protecting Canada's Immigration System Act*, was tabled in the House of Commons. Bill C-31 is an omnibus bill; it incorporates the provisions of the formerly introduced Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, and makes fundamental changes to Canada's current refugee system and the new refugee system that was scheduled to be implemented on June 29, 2012 following the reforms brought by the *Balanced Refugee Reform Act (BRRA)*.

Amnesty International is concerned that Bill C-31, as currently drafted, contravenes provisions in the *Convention relating to the Status of Refugees* ("*Refugee Convention*") and several other binding international human rights treaties to which Canada is a party, and it would likely result, if it were to be implemented in its current form, in serious violations of international refugee law, international human rights law and the Canadian Charter of Rights and Freedoms.

Canada's *Immigration and Refugee Protection Act* (*IRPA*) includes the fulfillment of Canada's international legal obligations with respect to refugees as one of its objectives.[1] Bill C-31 runs counter to this central objective of the Act, and on the contrary increases the likelihood that persons in need of Canada's protection and their family members will experience serious human rights violations, both in Canada and abroad.

What follows are Amnesty International's key concerns regarding Bill C-31. Part I will examine those provisions of the Bill that purport to crack down on the practice of "human smuggling". Part II will focus on the proposal to designate certain countries as "safe" so as to reduce the numbers of refugee claimants originating from those countries. Parts III and IV will outline Amnesty International's concerns with the proposed reforms to shorten the timelines of the refugee determination process and to limit access to Humanitarian and Compassionate applications under s. 25(1) of the *IRPA*. The brief will conclude by providing a summary of recommendations.

I. Anti-Smuggling Provisions

Bill C-31authorizes the Minister of Public Safety to "designate as an irregular arrival the arrival in Canada of a group of persons if he or she (a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility … cannot be conducted in a timely manner; or (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) [*IRPA*'s human smuggling provisions]."[2] The Bill then subjects those who are so designated, including possible survivors of trauma and torture and children as young as 16 years old, to a range of discriminatory sanctions including:

- Mandatory and unreviewable detention for a minimum period of one year;

1 *IRPA*, s. 3(2)(b).
2 Clause 10.

- removal of the right to file an appeal with the Refugee Appeal Division;
- removal of the right to submit an application for permanent residence on Humanitarian and Compassionate grounds under s. 25(1) of the *IRPA* for a period of five years following a negative refugee decision;
- no automatic stay of removal when seeking judicial review; and
- denial of permanent resident status and therefore family reunification for a period of five years following a positive refugee decision.

Amnesty International believes that if passed, these proposed reforms will result in serious human rights violations and will have devastating consequences for refugees and their family members both in Canada and abroad. These violations go to the heart of core international refugee and human rights principles upon which Canadian law is based. Accordingly, Amnesty International calls on the government to withdraw these provisions that penalize refugees in the name of preventing smuggling, and only proceed with law reform dealing with human smuggling in a manner that conforms fully to Canada's international human rights obligations.

A) Arbitrary Detention

Refugee claimants are not criminals. On the contrary, in seeking asylum they are exercising a fundamental human right. Consequently, in the view of the UNHCR, the detention of asylum seekers is "inherently undesirable".[3]

Bill C-31 runs afoul of this central principle of international refugee law by mandating the detention of "designated foreign nationals" for a minimum period of one year without requiring the detention to be individually justified on any of the typical grounds for immigration detention such as preventing flight, facilitating impending removal, protecting the public or national security, ascertaining identity, or completing an ongoing examination in respect of a specific individual.[4]

With respect to reviewing the detention, the proposed legislation provides:

> ... in the case of a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, the Immigration Division must review the reasons for their continued detention on the expiry of 12 months after the day on which that person is taken into detention and may not do so before the expiry of that period.[5] [emphasis added]

During this period, release is only possible where the person's application for protection is allowed or where the Minister decides that there are "exceptional circumstances" warranting an

3 UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Introduction, paragraph 1, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html.
4 Clause 23.
5 Clause 25, proposed additional s. 57.1 to the *IRPA*..

earlier release.[6] There is no definition in the Bill as to what constitutes "exceptional circumstances". If the refugee claimant is not released after twelve months, there will be a review of the detention by the Immigration Division of the Immigration and Refugee Board, but not more than once every six months.[7]

In Amnesty International's view, this proposed policy of indiscriminate, mandatory and unreviewable detention, based solely on an asylum seeker's manner of arrival in Canada, is unjustified and is not supported by any valid purpose served by detention. It constitutes a serious violation of Canada's international and constitutional obligation to not subject individuals to arbitrary detention.

i) Automatic Detention based on manner of arrival

Because of their difficult and desperate circumstances, refugees are often forced to resort to extreme measures both to escape the risk of persecution in their own country, and to enter a country that offers them safe haven. The *Refugee Convention* makes it clear that refugee claimants should not be penalized for the manner in which they try to enter countries of asylum. Article 31 (1) of the *Convention* stipulates that "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

In its "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers" ("Guidelines on Detention"), the UNHCR states that, "Consistent with this Article [31], detention should only be resorted to in cases of necessity. The detention of asylum-seekers who come 'directly' in an irregular manner should, therefore, not be automatic, or unduly prolonged."[8]

Article 2 of the Guidelines on Detention emphasizes the difference between immigrants and refugees in explaining why the illegal entry of a refugee claimant into a country of asylum is not a valid basis for detention. The UNHCR states,

> According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However, the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. <u>This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of</u>

6 Clause 27.
7 Clause 25.
8 UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Introduction, paragraph 3, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html.

movement based on illegal entry or presence. [emphasis added]

How a refugee claimant travels to Canada does not necessarily reflect on the genuineness of the asylum claim, nor is it automatically relevant to the claimant's need for protection. As such, the government's objective to deter large-scale human smuggling operations, however valid as it may be, does not and ought not to justify the automatic detention of asylum seekers who, out of desperation, may have to resort to risky methods of escaping persecution.

Mandatory detention of asylum seekers on the basis of how they arrive or attempt to arrive in a state's territory is arbitrary and contrary to well-established international human rights law. As such, the United Nations Committee against Torture has noted that detention of those irregularly entering a State party's territory should be only used as a measure of last resort and a reasonable time limit for detention should be set. It has, therefore, called for "mandatory detention of those entering irregularly the State's territory" to be abolished, and recommended that non-custodial measures and alternatives to detention be made available to persons in immigration detention.[9]

In February 20112, the UN Committee on the Elimination of Racial Discrimination expressed its concern to Canada that "any migrant and asylum seeker designated as an "irregular arrival" would be subject to mandatory detention for a minimum of one year or until the asylum- seekers' status is established" and recommended in its concluding observations that Canada "repeal the provision on the mandatory detention."[10]

ii) Denial of Prompt Review

The arbitrariness inherent in Bill C-31's policy of indiscriminate mandatory detention is further laid bare by the fact that it is applied in the absence of a case-by-case review of the necessity, proportionality and appropriateness of the detention.

Article 9 of the *International Covenant on Civil and Political Rights* establishes that "[e]veryone has the right to liberty and security of person" and "[n]o one shall be subjected to arbitrary arrest or detention." The same article stipulates that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is now lawful."[11] In its General Comment No. 8, the Human Rights Committee affirmed that Article 9 does not apply only to criminal proceedings, but is applicable to all types of arrest and detention, including cases of "immigration control."[12]

The European Court of Human Rights has found that automatic detention of asylum-seekers constitutes arbitrary detention in violation of the European Convention on Human Rights if detainees are not afforded access to "an effective and speedy remedy for challenging the

9 Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Australia*, 22 May 2008, CAT/C/AUS/CO/3 at para. 11, available at: http://www.unhcr.org/refworld/docid/4885cf7f0.html.
10 Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations: Canada*, 9 March 2012, CERD/CCAN/CO/19-20 at para. 15, available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf.
11 Emphasis added.
12 Office of the High Commissioner for Human Rights, "General Comment No. 8: Right to liberty and security of persons (Art. 9): 06/30/1982" at para.1.

lawfulness of the detention."[13]

In this regard, the UNHCR Guidelines on Detention outline the procedural safeguards applicable to detained claimants, including the right "to have the [detention] decision subjected to automatic independent review", followed by "regular periodic reviews of the necessity for the continuance of detention".[14] No such safeguards are found in Bill C-31.

Bill C-31 deprives designated foreign nationals of the right to have their detention reviewed for one year and thereafter entitles them only to semi-annual reviews. The arbitrary nature of this lengthy denial of review becomes apparent when compared with the entitlement of non-designated foreign nationals to have their detention reviewed within 48 hours after they are taken into detention, followed by a review within seven days and then every 30 days from the previous review.[15]

Under Canadian law, the lack of a prompt review of a person's detention is a significant factor in determining whether that detention is arbitrary. In *Charkaoui*, the Supreme Court of Canada held that, "[t]he lack of review for foreign nationals until 120 days after the reasonableness of the [security] certificate has been judicially reviewed violates the guarantee against arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the right to a prompt review of detention under s. 10 (c) of the *Charter*."[16] Citing provisions in the *IRPA* requiring automatic reviews of detention within 48 hours for permanent residents subject to a security certificate and *Criminal Code* provisions requiring that arrested persons be brought before a judge within 24 hours, or as soon as possible, the Supreme Court noted that "[t]hese provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed."[17]

By this standard, a delay of twelve months before a designated foreign national's detention is reviewed is totally unacceptable. This violation of the guarantee against arbitrary detention is compounded by the provision in Bill C-31 that limits subsequent reviews to no more than once every six months. In the view of Amnesty International, these detention provisions constitute a serious violation of the rights of refugee claimants.

iii) Detention of children

Of particular concern to Amnesty International is that the proposed provisions regarding detention do not distinguish between adult claimants and minors. They require children as young as 16 years old who arrive as part of a designated group to be detained without recourse to an independent detention review for a period of twelve months. They also give the Minister of Public Safety a discretionary power to detain children under the age of 16 or to forcibly separate them from accompanying parents for one year.

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13 *Louled Massoud v* Malta, judgement of 27 July 2010, made final on 27 October 2010, at para. 46, available at: http://www.unhcr.org/refworld/docid/4c6ba1232.html.
14 UNHCR, Guidelines on Detention, Guideline 5 (iii).
15 *IRPA*, Art. 57.
16 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at paragraph 91.
17 *Ibid.*

During a Parliamentary debate on March 15, 2012, both the Minister of Citizenship and Immigration and the Minister of Public Safety confirmed that children of designated parents who are below the age of 16 will either be placed in foster care or informally detained in immigration holding centre with their parents. Minister of Public Safety Vic Toews said:

> [i]n the situations with some of the recent migrant vessels, the children have been placed into foster care in British Columbia. In those types of situations, the system has tried to take care of them … We had long discussions about the line at which one should not have that automatic detention. We have settled on age 16 which I think is a reasonable compromise.[18]

However, it is important to note that the children referred to by the Minister were actually placed in the Burnaby Secure Youth Custody Centre, a detention facility primarily intended for young offenders.

Minister of Citizenship and Immigration Jason Kenney, similarly noted:

> [C]hildren under the age of 16 who were accompanied by parents could be released into the custody of the relevant provincial child welfare agency that would determine whether to place them with a guardian, relatives, or other care. However, if their parents chose to, they could live in the family detention centre, where the conditions are entirely appropriate for families.[19]

Amnesty International does not agree that a locked facility (with fathers separated from mothers and children, security guards and surveillance cameras everywhere, no freedom to circulate even inside the facility and no access to normal schooling) is an environment "entirely appropriate for families." That is why international human rights law establishes that the detention of minors should be exceptional and only when strictly necessary.

These positions contradict the principle affirmed in section 60 of the *IRPA* "that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child". They also violate Canada's obligations under the *Convention on the Rights of the Child* which provides that "[i]n 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" and that "a child shall not be separated from his or her parents against their will."[20] Section 3(3) (f) of the IRPA states that the Immigration and Refugee Protection Act must "be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory."

In its General Comment No. 6, the UN Committee on the Rights of the Child has stated that "generally, in developing policies on unaccompanied or separated children… States should

18 http://openparliament.ca/debates/2012/3/15/vic-toews-1/.
19 http://openparliament.ca/debates/2012/3/15/jason-kenney-10/.
20 Articles 3 and 9.

ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country".[21] Bill C-31 proposes that Canada do the opposite.

The severe limitations that are imposed by the bill on the ability of detained minors to have their detention reviewed also contravenes Article 37 (d) of the *Convention on the Rights of the Child* which states:

> Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent, and impartial authority, and to a prompt decision on any such action.

In the case of unaccompanied or separated children making refugee claims, the Committee on the Rights of the Child has stated that "all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate placement."[22]

B) Denial of Appeals

For years, Amnesty International has maintained that a meaningful appeal on the merits by an independent and impartial body is a necessary element in any fair refugee determination system and that the lack of an appeal constituted a serious shortcoming in the Canadian refugee determination system. Amnesty International, therefore, welcomed the provisions in the 2011 *Balanced Refugee Reform Act (BRRA)* that establish a Refugee Appeal Division (RAD) that would be able to review decisions of the Refugee Protection Division (RPD) on questions of law, fact and mixed law and fact, and accept evidence that was not reasonably available at the time of the RPD hearing. Amnesty International is concerned that this positive development is being now undermined by proposals in Bill C-31 to remove the right of appeal with respect to "designated foreign nationals".

Bill C-31 provides, under Clause 36(1), that "no appeal may be made in respect of a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national."[23]

Amnesty International is concerned that denying claimants a vital safeguard against mistakes that could have devastating consequences, based solely on the manner in which they arrive in Canada, is unequal and unfair treatment, and may lead to the forced return of refugees to face a risk of persecution, in violation of Canada's *non-refoulement* obligations under the *Refugee Convention*.

i. Unequal and Unfair Treatment based on Manner of Arrival

21 Committee on the Rights of the Child, General Comment No. 6 (2005): "Treatment of Unaccompanied and Separated Children Outside their Country of Origin"at para. 62.
22 *Ibid.*
23 Clause 36(1), amendment to s.110 (2)(a) of the *IRPA*.

Amnesty International believes that all persons seeking protection in Canada should be treated equally with respect to something as fundamental as access to justice. This means that *all* failed claimants should have access to an appeal on the merits before the RAD, and not be subject to unfair and unequal treatment based on their method of arrival in Canada. A claimant's method of arrival bears no rational and valid connection to the necessity to correct the mistakes that may occur in the determination of his or her refugee claim. Neither is it relevant to the claimant's need for protection or the genuineness of his or her claim. As noted earlier, this is supported by the *Refugee Convention* which obliges states to refrain from imposing penalties on refugee claimants based on their manner of arrival.[24]

In creating the long awaited and long overdue Refugee Appeal Division, the government of Canada recognized that a meaningful appeal process for rejected refugee claimants is a necessary safeguard against mistakes that could have devastating consequences. This necessity for a meaningful review of a negative decision applies to all claimants regardless of how they arrive in Canada. Denying "designated foreign nationals" access to an appeal is inconsistent with the rationale underlying the RAD, and is contrary to well-established international law, including the *Refugee Convention*, upon which Canadian refugee law is based.

ii. Violation of Canada's *Non-Refoulement* and other International Obligations

Removing the right of appeal with respect to "designated foreign nationals" reintroduces to the Canadian refugee determination system a procedural deficiency which was long recognized as the fundamental flaw of the system by the United Nations High Commissioner for Refugees (UNHCR), Amnesty International, the Canadian Council for Refugees, the Inter-American Commission on Human Rights, and many refugee support organizations.[25]

The UNHCR has consistently maintained that an appeal procedure "[is] a fundamental, necessary part of any refugee status determination process. It allows errors to be corrected, and can also help to ensure consistency in decision-making."[26] Accordingly, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol states:

> The Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain essential guarantees, are the following:

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24 *Refugee Convention*, Art. 31(1).
25 Canadian Council for Refugees, *Refugee Appeal Division Backgrounder* (December 2006), available at: http://ccrweb.ca/RADbackgrounder.pdf; United Nations High Commissioner for Refugees, *Comments on Not Just Numbers: A Canadian Framework for Future Immigration: Report of the Immigration Legislative Review Advisory Group* (March 1998), available at: http://ccrweb.ca/hcrlegr.htm; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (February 2000), available at: http://www.cidh.org/countryrep/Canada2000en/table-of-contents.htm.
26 UNHCR letter to then Minister of Citizenship and Immigration Denis Coderre on non-implementation of the RAD (May 9, 2002), available at: http://ccrweb.ca/unhcrRAD.html.

> …
> (vi) 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 to a different authority, whether administrative or judicial, according to the prevailing system.[27] [emphasis added]

Similarly, the Inter-American Commission on Human Rights, commenting on Canada's refugee determination system, has noted:

> Where the facts of an individual's situation are in dispute, the effective procedural framework should provide for their review. Given that even the best decision-makers may err in passing judgment, and given the potential risk to life which may result from such an error, an appeal on the merits of a negative determination constitutes a necessary element of international protection. [28] [emphasis added]

The *International Covenant on Civil and Political Rights* also makes an explicit reference to rights of appeal in the context of refugee law. Article 13 of the Covenant provides:

> An alien lawfully in the territory of a State Party […] may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by […] the competent authority.

In an authoritative interpretation of Article 13 in April 1987, the Human Rights Committee held that states are obliged to afford aliens facing deportation an opportunity to appeal deportation orders prior to their removal.[29] The Human Rights Committee further referred to the point made in its general comment 15 (27) on the position of aliens under the Covenant that "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one." According to the Committee,

> The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require.[30]

These international standards require the Canadian government to afford all refused refugee claimants the right to an effective appeal on the merits. A claimant's method of arrival does not constitute a legitimate reason for departing from this requirement.

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27 UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992) at paragraph 192, available at: http://www.cidh.org/countryrep/Canada2000en/table-of-contents.html.
28 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (February 2000), paragraph 109, available at: http://www.cidh.oas.org/countryrep/canada2000en/canada.htm.
29 Human Rights Committee, *Hammel v. Madagascar* (3 April 1987) Communication No. 155/1983 at paras. 18.2-19.2.
30 UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986 at para. 13, available at: http://www.unhcr.org/refworld/docid/45139acfc.html.

In the absence of an appeal, judicial review by "leave" from the Federal Court becomes the only available remedy for refused refugee claimants. This remedy does not include the full reconsideration of the claim. The Federal Court only decides whether the decision of the RPD meets the standard of reasonableness which involves paying a high degree of deference to the RPD's decision on issues of fact, credibility and evidence.[31] The Federal Court does not review the merits of the rejected claim and does not reassess the credibility of the claimant. There is no re-examination of the country information the RPD relied upon, no possibility to adduce new evidence, and no personal appearance by the claimant. Accordingly, only less than 1 percent of RPD decisions are overturned by the Federal Court.[32]

Furthermore, a claimant's chances of accessing this inadequate remedy are quite remote as the great majority of refugee claimants are denied leave. Leave is not granted unless the applicant can show, for example, that the decision under review contains an error of law or fact, or that a principle of natural justice or procedural fairness has been breached. Leave is only given in 7.5 percent of cases and the Court does not have to provide a reason when it denies leave.[33]The time limits are also tight and many refused claimants face difficulties in retaining counsel. A recent study has also demonstrated a wide and arbitrary variance in the leave rates of Federal Court judges.[34]

Under the provisions of Bill C-31, a judicial review application is rendered near meaningless as an individual can be deported from Canada even while the leave application is pending unless a stay of removal is sought and granted.[35] Seeking a stay of removal at the Federal Court is problematic because of the costs to litigants and the state, and the fact that the burden to prove that irreparable harm will be caused to an individual is more onerous than proving persecution-thus opening the door to the risk of being deported to a risk of persecution.

As a signatory to the *Refugee Convention*, Canada has an obligation not to return a refugee to persecution. Canada would be in violation of its international obligations if it returns a refugee to persecution following a wrongful rejection of his or her claim. Similarly, the *Convention against Torture*, to which Canada is a party, prohibits Canada from sending a person to a country where there are substantial grounds for believing that he or she would face a risk of torture. These obligations apply with respect to all persons seeking protection regardless of how they arrive in Canada. Bill C-31, by proposing to deny "designated foreign nationals" the right to appeal while at the same time removing the automatic stay of their removal while they await the outcome of their application for judicial review, undermines these fundamental obligations of Canada toward

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31 *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

32 Canadian Council for Refugees, *Protecting Refugees: Where Canada's refugee system falls down* (May 2007), available at: http://ccrweb.ca/files/flaws_0.pdf.

33 Conversation with Paul Davies, Federal Court, Ottawa. See also Sean Rehaag, "The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)" (2012) 8(3) *Osgoode CLPE Research Paper Series*, available at: http://ssrn.com/abstract=2027517

34 Sean Rehaag, "The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)" 2012 *Osgoode CLPE Research Paper No. 9/2012*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027517.

35 Citizenship and Immigration Canada, *Backgrounder – Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration Act* (February 16, 2012), available at: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp.

refugees.

C) Denial of Access to Permanent Resident Status

Bill C-31 further discriminates against and penalizes refugees based on their method of arrival by blocking them from applying for permanent residence status for a period of five years after they are determined to be a Convention Refugee or a protected person.[36]

Amnesty International is deeply concerned about the significant barrier and delay that this proposal creates to the integration of refugees into Canadian society and their eventual application for citizenship. Under the *Refugee Convention*, Canada is obliged to "facilitate the assimilation and naturalization of refugees," and "in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[37] In severely and unjustifiably restricting refugees' integration into society, Bill C-31 violates these international obligations.

The consequences that flow from the denial of access to permanent resident status will cause "designated" refugees and their families an inordinate amount of emotional and psychological harm and suffering, often with irreversible consequences. Below, two of the most severe consequences are discussed.

i. Family Reunification/Family Separation and Impact on Children

Family reunification has long been an important component of Canada's immigration policy. Under the *IRPA*, an individual who is accepted as a refugee or a person in need of protection may apply for permanent residence from within Canada and may include, within the application, family members living in Canada and abroad so that they can join him or her as permanent residents in Canada.

Under Bill C-31, refugees who arrive as part of a designated "human smuggling event" will be deprived, for five years, of the right to apply for permanent residence, and therefore for reunification with their families, including children.

On a purely human level, denying an individual any chance of being promptly reunited with family is a harsh and cruel measure, particularly in the case of a person who has been found to be in need of protection. Prolonged separation strains family relationships and takes a toll on the mental and emotional health of refugees and their families. The effect of delays on children is particularly profound because it means separation from one or both parents. Children may feel that they have been abandoned by their parents, therefore feeling hurt, resentful and demoralized. In the case of refugee families, the damage is compounded because family members abroad may themselves be at risk of persecution, violence, extreme poverty, exploitation and ill-health.

Processing of applications for family reunification (both Family Class sponsorships and family members abroad included in the permanent resident applications of refugees in Canada) is

36 Clause 10, proposed additional s. 20.2 to the Immigration and Refugee Protection Act
37 *Refugee Convention*, Art. 34.

already very slow, especially in certain parts of the world.[38] This problem is chronic. In 1995, the United Nations Committee on the Rights of the Child criticized Canada on this matter and recommended "that every feasible measure be taken to facilitate and speed up the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada."[39] In its subsequent report in October 2003, the Committee noted that its concerns in this regard "have not been adequately addressed" and recommended that Canada "ensure that family reunification is dealt with in an expeditious manner."[40] In proposing Bill C-31, the government has failed to comply with these recommendations and the human rights principles underlying them.

Article 10(1) of the *Convention on the Rights of the Child* recognizes the right of child to be directly cared for by his or her parents and obliges States Parties to deal with "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification […] in a positive, humane and expeditious manner."

On a more general level, international human rights instruments such as the *Universal Declaration of Human Rights* require states to respect and protect family. The *International Covenant on Civil and Political Rights* establishes that "family is the natural and fundamental group unit of society."[41] Article 17 of the *International Covenant on Civil and Political Rights* provides that no one's family and home "shall be subjected to arbitrary or unlawful interference." Similarly, Article 10 of the *International Convention on Economic, Social and Cultural Rights* provides that the "widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

According to the UN Human Rights Committee, interferences with individuals' family and home may be only undertaken in accordance with legislative measures which specify in detail the precise circumstances in which such interferences may be permitted and circumscribe the types of interferences.[42] Furthermore, "interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant" and be a reasonable, necessary and proportionate means to achieving a legitimate aim.[43]

Bill C-31 and the public policy rationales underlying it by no means meet this test of reasonableness and proportionality. The legislation purports to curtail the practice of smuggling non-citizens to Canada which the Government represents as an abuse of the immigration system. However, most of the provisions of the Bill target refugees and their families, who are the victims of smuggling, rather than the smugglers.

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38 For statistics, see Canadian Council for Refugees, "Impacts on children of the Immigration and Refugee Protection Act" (November 2004) at 15-18, available at: http://ccrweb.ca/children.pdf.
39 UN Committee on the Rights of the Child. *Concluding observations of the Committee on the Rights of the Child: Canada*, 20/06/95. CRC/C/15/Add.37at para. 21.
40 UN Committee on the Rights of the Child. Concluding observations: Canada. 27/10/2003. CRC/C/15/Add.215 at para. 46.
41 *Universal Declaration of Human Rights*, Art. 16(3); *International Covenant on Civil and Political Rights*, Art. 23.
42 Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: http://www.unhcr.org/refworld/docid/453883f922.html.
43 *Ibid.*

Measures meant to curtail smuggling must not violate the rights of individuals who turn to them in desperation. Irregular entry into the country is a common and often necessary step for asylum seekers, who may have limited alternative options for reaching safe countries, because of passport and visa restrictions or for other reasons. Anti-smuggling measures should not victimize refugees who have been already victimized two times, first by their persecutors and then by smugglers.

ii. The Right to Travel

In tandem with the inability to reunite with family members in Canada, "designated foreign nationals" who are recognized as refugees or protected persons will be unable to visit their family members in a safe third county for a minimum period of five years because, under the terms of the Bill, they may not obtain travel documents until they receive permanent resident or temporary resident status.[44] The denial of the right to travel not only leads to further family hardship but also may interfere with employment prospects. Employment opportunities may be restricted should they obtain a job in Canada which requires international travel. This is all in contravention of Article 28 of the *Refugee Convention* which obliges contracting states to "issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require."

II. Designated Countries of Origin

Bill C-31 authorizes the Minister of Citizenship and Immigration to designate a country as a "safe" country of origin and then impose severe limitations on the rights of refugee claimants originating from that country. The processing time for these refugee claimants will be reduced from 171 days to 45 days while the processing time for claims from non-designated countries of origin will be reduced from 291 to 216 days.[45] Claimants from DCO's will experience discrimination and unfairness in several respects:

- Refugee claimants from designated countries of origin (DCO) who make an inland claim will have only 30 days to prepare for their refugee hearing from the time they submit a Basis of Claim document and DCO claimants who make a claim at a port-of-entry will have only 45 days for their hearing preparation.[46]

- Refused DCO claimants will be barred from appealing a negative decision to the Refugee Appeal Division, which conducts an independent review of the merits of the decision.[47]

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44 Clause 16, proposed additional s. 31.1 to the *IRPA*.
45 Citizenship and Immigration Canada, *Backgrounder – Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration Act* (February 16, 2012), available at: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp.
46 *Ibid.*
47 *Ibid.*

- Refused DCO claimants' removal from Canada will not be stayed pending judicial review of the decision, [48] meaning that by the time the court might reverse a denial of refugee status, the refugee would already have been deported and possibly even subjected to persecution back home.

Amnesty International is concerned that the establishment of DCO's and the associated restrictions on fairness and appeal rights will inevitably increase the risk of the forced return of some refugees to a risk of persecution, in violation of Canada's *non-refoulement* obligations under the *Refugee Convention*. Some of the most troubling aspects of these proposed changes are highlighted and discussed below.

A) Background

It is clear that one of the driving forces behind Bill C-31 is that the government is seeking a way to ensure that the claims of large numbers of refugee claimants originating from countries that the government considers to be safe countries without serious human rights concerns can be dealt with in an expedited fashion. In general the government considers such claims to be groundless and the claimants to be abusing the refugee determination process. The theory behind the Bill is that if those claims could be dealt with through an accelerated or restricted process such that they are resolved more quickly, other individuals from the country in question would be deterred from travelling to Canada to make similar claims.

This issue is by no means a recent one. For several decades governments have reacted to large influxes of refugees, both from countries that are seen to be obvious sources of refugees and from countries that are not, by imposing restrictions that try to cut off, limit or deter access to Canada by refugee claimants from those countries. Most often that has been done by imposing a visa requirement on nationals of that country who wish to travel to Canada. In July 2009, for instance, the government of Canada imposed visa requirements on nationals of Mexico and the Czech Republic for no other reason than the fact that large numbers of refugee claims were being made by nationals of those countries. In the past there have also been some steps taken within the Immigration and Refugee Board to expedite or streamline processing when large numbers of claims have come forward from countries that officials consider to be countries with few human rights problems.

In March 2010, the government introduced Bill C-11, the *Balanced Refugee Reform Act* ("*BRRA*") and therein proposed to formally adopt a list of designated countries of origin (DCO) for the purpose of expedited processing which involved, among other things, the removal of access to an appeal before the Refugee Appeal Division for those claimants who come from designated countries.

At that time, Amnesty International raised its concerns with the proposal, which it considered to lead to an unfair, discriminatory and politicized refugee determination system. Ultimately, as a result of all of the negotiations and consultations that took place in the months leading up to the final adoption of the *BRRA*, the government agreed to abandon the provisions that were to deny

48 *Ibid.*

DCO-claimants access to the refugee appeal process. It further accepted to make the authority of the Minister to designate countries of origin subject to a positive recommendation from an independent panel of experts, including at least two non-governmental human rights experts. Amnesty International is deeply dismayed that the original provisions in Bill C-11 around appeal and country designation are now being reincarnated in Bill C-31, rejecting the carefully negotiated compromises that were reached in June 2010 to make the refugee reform process both balanced and fair.

B) Criteria for Designation of Countries of Origin

Under Bill C-31, the Minister may designate a country if during a certain period identified by the Minister, the rejection rate or abandonment and withdrawal rate of the refugee claims of the nationals of the country in question is equal to or greater than a threshold percentage set out in a ministerial order.[49] Currently, the backgrounder to the Bill suggests that a rejection rate (which includes abandoned and withdrawn claims) of 75% or higher or an abandonment and withdrawal rate of 60% or higher would trigger a review.[50]

The Minister may also designate a country if the number of refugee claimants from the country in question is lower than a threshold number once again provided for by order of the Minister *and* "the Minister is of the opinion that in the country in question, (i) there is an independent judicial system, (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedom are infringed, and (iii) civil society organizations exist."[51]

Amnesty International is concerned that the criteria established by Bill C-31 for designating countries are unworkable, unreliable, and not in keeping with the realities of human rights abuse in a wide range of countries.

i. The criteria contravene the fundamental principles of refugee determination.

The quantitative thresholds proposed by Bill-31 reflect a group-based approach to assessing the genuineness of the need for protection. This approach is in contravention of the fundamental principle of international refugee protection, highlighted repeatedly by the UNHCR, that refugee claims must be treated not as a group but on the basis of their individual merits.[52]

The question at stake in a refugee hearing is not whether a significant majority or minority of Mexicans, Sudanese, or any other nationality, have a well-founded fear of persecution and thus should be recognized as genuine Convention refugees. The question is rather whether this individual Mexican or this individual Sudanese, given his or her individual background and experiences, has a well-founded fear of persecution. This analysis carries with it a careful

49 Clause 58, proposed additional s. 109.1(2)(a) to the *Balanced Refugee Reform Act*.
50 Citizenship and Immigration Canada, *Backgrounder – Designated Countries of Origin* (February 16, 2012), available at: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16i.asp.
51 Clause 58, proposed additional s. 109.1(2)(b) to the *Balanced Refugee Reform Act*.
52 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 atpara. 43.

assessment of the individual's personal circumstances and state of mind as well as an assessment of the prevailing human rights conditions relevant to his or her situation. Whether or not the acceptance rate of the nationals of the claimant' country meets an arbitrary percentage, defined by the Minister, adds little to this assessment; it neither reflects on the genuineness of the individual asylum claim nor supports a presumption that he or she is less in need of or deserving of access to an appeal than claimants from other counties. It cannot, therefore, constitute a valid justification for reduced procedural protections and discriminatory treatment with respect to something as fundamental as access to an appeal. It may well be, in fact, that given the contested nature of the hearings and contradictory sources of human rights documentation and analysis in claims made by individuals from countries that are likely to be designated, access to an appeal may be of particular importance.

Furthermore, it is important to note that an acceptance rate of 25% for nationals of a designated country means that a large number of persons in the country in question are still in need of protection from persecution, considering that the overall rate of acceptance at the Immigration and Refugee Board is itself generally in the range of 30-40%.[53]

ii. There is no reliable, objective means for drawing up lists of countries that are "safe" and countries that are "not safe" when it comes to human rights protection.

Similarly problematic is Bill C-31's proposed qualitative checklist for designation. Amnesty International has always maintained that there is no reliable and objective means of distinguishing between safe and unsafe countries when it comes to human rights and refugee protection. The fallacy that countries are "safe" for refugee protection purposes simply because they are democratic is borne out by extensive reporting from Amnesty International documenting serious human rights concerns in a range of countries that supposedly recognize basic democratic rights and freedom and have inside them civil society organizations. This is the case for a number of reasons.

First, many human rights violations remain undocumented or poorly documented. They may occur in isolated areas beyond the reach of human rights groups, journalists and others. For cultural reasons victims may be reluctant or even unwilling to report the violations. That may particularly be the case for women and girls, and other groups who face deeply entrenched stereotypes and taboos which dissuade them from speaking out about violence, discrimination and other human rights concerns. For political, economic or other reasons, individuals reporting the violations might not be believed. In fact, it is often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuse in countries.

A second related concern is that patterns of human rights abuse can and do often change quickly. Conditions may, in fact, deteriorate precipitously – more quickly than a process of government designation could accommodate and respond to. The sudden surge in post-election violence and

53 *Database: Refugee acceptance rates by country*, CBC News (September 29, 2010), available at: http://www.cbc.ca/news/canada/story/2010/09/23/f-immigration-board-refugee-acceptance.html.

grave human rights violations in Kenya in January 2008 is just one such example. Bill C-31 does not propose any mechanism for removing a country from a list of designated countries. At a minimum, there should be objective criteria to trigger removal from the list and obligatory review periods.

Third, and most fundamentally, it is impossible to assign a quantifiable measurement to human rights violations, especially when comparing violations of different categories of rights. How to compare violations of the right to torture with violations of the right of access to life-saving health-care? How to compare violations of the right to freedom of expression with violations of the right to non-discriminatory access to education? While assessments of a country's human rights record can clearly be carried out with a goal to gaining a general impression of the situation in a country, it has proven impossible to do so statistically such that countries can be ranked and compared with each other in an objective manner.

Throughout close to fifty years of comprehensive human rights research and reporting, Amnesty International has frequently been asked to list countries in order of their human rights record, or to pronounce on the degree of human rights change in a country from one year to the next. Because it is impossible to do so objectively, Amnesty International has always declined such requests. Amnesty International's Annual Report regularly contains entries documenting human rights violations in countries such as the Democratic Republic of Congo, Iran and Myanmar (Burma) but also contains overviews highlighting serious concerns in countries such as Mexico, the Czech Republic, and others that are expected to be possible candidates for designation under Bill C-31. No comparisons are made among the countries included in the Annual Report because it is not possible to do so. Instead, the facts are left to speak for themselves. For the same reason we urge governments not to adopt provisions in their refugee determination that would involve quantifying and categorizing a country's human rights record.

Notably the UNHCR has highlighted this concern about the difficulty of formulating a list of safe countries of origin, pointing to the "inevitable imprecision of judgments about prevailing human rights situations in countries, as well as the pace at which such situations can evolve."[54]

Finally, because of the lack of a reliable, objective means of measuring a country's human rights record, Amnesty International is very concerned that subjective, politicized factors would enter into the decision to designate a country. For instance, if Canada was interested in negotiating a trade agreement or boosting levels of tourism or investment with the country in question, would it be less likely to be designated? If Canada had an important military or strategic relationship with the country in question, would it be less likely to be designated? Are countries with which Canada has a close relationship more likely to be designated than countries with which Canada's relationship is strained or difficult? Bill C-31 substantially increases such risks of politicization by abandoning the proposal to establish a panel of independent experts who were to advise the Minister on which countries to designate as "safe." Given how difficult, subjective and contentious the process will be, the involvement of an expert panel would have at least helped guard against it becoming politicized.

54 UN High Commissioner for Refugees, Background Note on the Safe Country Concept and Refugee Status, EC/SCP/68, 26 July 1991at para. 5.

iii. Treating individuals differently when it comes to access to justice violates crucial international human rights guarantees with respect to equality and non-discrimination.

Numerous international human rights treaties, binding on Canada, enshrine guarantees of equality and non-discrimination. This is certainly the case when it comes to fundamental rights of access to the courts and equal treatment before the law.

For instance, the *International Covenant on Civil and Political Rights*, in article 2(1), provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[55] [emphasis added]

Article 13 of the Covenant further establishes that "[a]ll persons shall be equal before the courts and tribunals." The designated countries of origin provision in Bill C-31 would run afoul of these two provisions, in that certain groups of individuals would be "unequal" before the Immigration and Refugee Board, for no other reason than their national origin.

A guarantee of equality is also central to the *Refugee Convention*, article 3 of which provides that "[c]ontracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."[56] [emphasis added]

This provision of the *Refugee Convention* specifically refers to refugees and not refugee claimants and it refers to equality with respect to other rights contained in the Convention, which does not include provisions dealing with appeal procedures in refugee determination. However, Amnesty International considers it to establish an important principle of equal treatment, regardless of country of origin, which should be adhered to throughout the refugee determination process.

The UNHCR has cautioned against the use of safe country of origin list noting that "where it serves to block any access to a status determination procedure, or where it results in serious inroads into procedural safeguards, it is to be strongly discouraged.[57]

The designated countries of origin approach is discriminatory and contravenes Canada's international human rights obligation to ensure individuals are treated equally before the law. Amnesty International believes that all persons seeking protection in Canada should be treated equally. That means that *all* failed claimants should have access to an appeal on the merits before the RAD. The same necessity for a meaningful review of a negative decision applies to all claimants, regardless of their country of origin.

55 Article 2(1).
56 Article 3.
57 Ibid., para. 10.

iv. The fact that all substantive matters associated with establishing the safe country thresholds and the actual process for designation is to be by way of a Ministerial order is of great concern.

As noted earlier, the proposed amendment to the *Balanced Refugee Reform Act* which establishes the process for designation is section 109.1. Subsection 109.1(3) provides that the "Minister may, by order, provide for the number, period or percentages referred to in subsection (2)." It is not yet known what approach would be taken to determining these quantitative thresholds. Neither is it known what approach would be taken to evaluating and measuring the level of safety, the state of democracy, the human rights record, and the prevalence of corruption in a country in question. These are not casual considerations. They will determine matters as fundamental as whether or not an individual will be given adequate time to prepare for a fair hearing, an opportunity to lodge an appeal with the Refugee Appeal Division, and an automatic stay of removal pending judicial review of a potentially incorrect or unreasonable decision.

Under the current *Balanced Refugee Reform Act*, the Minister is authorized to detail the safe country thresholds through regulation. At the time of the adoption of this Act, Amnesty International raised concerns about the fact that all substantive matters associated with establishing criteria for the designation of safe countries was left to regulations and not enshrined in the Act. Bill C-31 shields the Minister from accountability even further by leaving the entire process of designation in his or her hands without any requirement on him or her to even detail the decisions through regulations.[58]

For reasons laid out above, Amnesty International is opposed to the use of a designated countries of origin list for the purpose of blocking the access of certain refugee claimants to a fair status determination procedure and an appeal before the Refugee Appeal Division.

III. Unfair Timelines

A) Background and Context

The guiding principle of Canada's refugee determination system, enshrined in *IRPA,* is that the "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted."[59] This principle must guide any proposed changes to the way in which Canada adjudicates refugee claims. Amnesty International agrees that the system is currently too slow, and that refugee claimants wait too long to have their case determined. Slow processing can also encourage abuse. However, speed in itself must not be the only objective of any proposed alterations to the process. The changes must also be fair.

Any acceleration of refugee status determination, that increases the likelihood of genuine refugees receiving a negative decision, risks violating Canada's international obligation not to

58 Regulations demand greater accountability from the Minister as they need the approval of the Cabinet and have to be at least published in draft form in the *Gazette* to give the public time to comment on the proposed changes.
59 *IRPA*, s. 3(2)(a).

send refugees back to places where they risk persecution. Even the most compelling case may be wrongly decided if not fairly and thoroughly considered.[60]

Under the current refugee status determination process, claimants first make their desire to seek refuge known at a port of entry or at a Citizenship and Immigration Canada ("CIC") office. Upon being determined eligible to make a claim, the majority of claimants are issued a Personal Information Form (PIF) which he or she has 28 days to complete. Frequently, it is the issuance of the PIF that causes a claimant to seek and retain legal counsel to assist him or her to complete the document and provide representation before the Immigration and Refugee Board (IRB).

In the PIF, the claimant must detail his or her past work and education history, family members, places of past residence and other biographical details. The most important question requests the details of the individual's refugee claim. This section, referred to as the "narrative", is the claimant's opportunity to fully present all details of his or her story, explaining why he or she cannot return to his or her country of origin.

After submitting the Personal Information Form, the claimant waits for his or her refugee hearing to be scheduled by the IRB. During this period of waiting for a hearing, the claimant and his or her lawyer work together to substantiate the case. The claimant may need medical or psychological assistance as a result of torture or other trauma. Affidavits or letters may be sought from individuals in the home country who witnessed the persecution. Personal documents must be translated and country evidence collected. If insufficient evidence exists to substantiate risk on return, an expert may be sought who can provide a report or oral testimony about the persecution the claimant faces. Finally, the claimant's counsel prepares him or her to testify before the IRB.

Under the *Balanced Refugee Reform Act*, the PIF was to be abolished and refugee claimants were to undergo an initial interview with an employee of the Immigration and Refugee Board fifteen days after their claim was referred to that body. It was not clear whether this interview was going to be substantive (involving questions about the persecution feared and reasons for fleeing to Canada) or information-gathering (an oral version of the background questions from the Personal Information Form). A claimant's full refugee hearing was to take place sixty days after the interview.[61]

At the time, Amnesty International raised concerns about the failure of the legislation to define the purposes or parameters for the interview and recommended that a PIF or an adapted version of the PIF, which provides a written narrative of the basis of the refugee claim, be maintained given that many claimants who are traumatized or afraid of persons in authority would not be able to tell their story so soon after arrival and this could lead to unwarranted credibility conclusions.

60 European Council on Refugees and Exiles. Asylum Procedures, available at: http://www.ecre.org/topics/asylum_in_EU/asylum_procedures.

61 These timelines, both the fifteen and sixty days, were not written into the proposed legislation and they would have appeared in regulations or in the Refugee Protection Division Rules.

Amnesty International also held that for many refugee claimants, sixty days is insufficient time to properly prepare for their refugee hearing and recommended that refugee hearings be scheduled according to when they are ready to proceed and normally within 6 months of referral to the IRB.

Bill C-31 fails to correct these serious problems with the former legislation and exacerbates the concerns by further reducing the timelines for the submission and initial hearing of refugee claims.

B) Proposed Changes and Concerns

Under Bill C-31, the initial interview with an IRB employee will be eliminated and all refugee claimants making a claim at a port of entry (POE) will have to submit a Basis of Claim document to the IRB within 15 days following referral of the claim to the IRB. For inland claims, the Basis of Claim document will have to be submitted to Citizenship and Immigration Canada (CIC) or the Canada Border Services Agency (CBSA) during the eligibility interview. A claimant's full refugee hearing will then take place within 30 days for inland claimants who are nationals of Designated Countries of Origin (DCO), within 45 days for DCO claimants who make their claim at a port of entry and within 60 days for all other claimants. These timelines are not written into the proposed legislation.[62] They will appear in regulations or in the Refugee Protection Division Rules.

i. Fifteen days for Submitting a Basis of Claim Document

Amnesty International is concerned that fifteen days is insufficient time for refugee claimants to adequately draft a Basis of claim document, setting out the details of their claim. At the fifteen day point after having their claim determined eligible – which in many cases will be fifteen days after their arrival in Canada – many claimants will be disoriented and unaware of how to find legal advice. Moreover, reliable and competent counsel may not be available to act for an individual within such a tight timeline.

Amnesty International believes that there may be significant practical challenges in meeting the fifteen-day target. The preparation of a written narrative is time consuming and often only possible with the assistance of an interpreter. The narrative is a critical step in the refugee determination process. It provides claimants with the opportunity to set out in a non-threatening environment a detailed account of the sensitive details of traumatic persecution experienced or feared. Traditionally, it has served not only as the basis of the claim but also as an aid to alert Board Members to the key issues in the case and to help focus their questioning of the claimant.

Amnesty International fears that claimants too traumatized or afraid of persons in authority to tell their story so soon after arrival will be severely disadvantaged by this reduction in the timeline. Claimants will make mistakes or withhold information out of fear, leading to incorrect

62 Citizenship and Immigration Canada, *Backgrounder – Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration Act* (February 16, 2012), available at: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp.

conclusions that they lack credibility. This is particularly the case for survivors of torture and sexual violence and other individuals who have experienced severe trauma and would need time to gain trust in an individual such as their counsel in order to be able to tell their story.

ii. Hearing in Thirty, Forty Five and Sixty Days

The timeframes proposed in Bill C-31 also fail to provide refugee claimants with sufficient time to properly prepare for their refugee hearing. This is particularly so for survivors of gender-based violence[63] or individuals who fled persecution on account of sexual orientation.

The proposed timeframes will make it extremely difficult, if not impossible, for claimants to gather supporting documentation, as obtaining psychiatric reports, expert country condition reports or affidavits from family members abroad are time-consuming processes often beyond the immediate control of the claimant and their counsel. In some cases, the proposed timeline will not allow refugee claimants to develop sufficient rapport with and trust in their legal counsel to tell the entire story of persecution and determine the need to obtain supporting documentation.

It is our view that rushing to a hearing will lead to claimants appearing before the Board unprepared and without the benefit of supporting documentation. Without adequate documentation, the quality of the hearing, and the quality of the decision, diminishes. Under the proposed model, we anticipate that many more requests for adjournments will be made by counsel and claimants because crucial evidence requested has not yet arrived in Canada. The need for inefficient adjournments is avoidable simply by providing claimants and counsel with adequate time to prepare. Wrong decisions made before the claimant is able to testify freely will provoke a greater number of appeals, clogging the system at the back end and leading to needless delays. Amnesty International submits that a better option is to implement more reasonable timelines to ensure a greater number of correct initial decisions.

iii. Appeal in Fifteen Working Days

Amnesty International also has serious concerns regarding the extremely short timeline within which to perfect an appeal – fifteen working days. Currently, refused claimants have forty-five days from the date the decision is received to perfect an application for leave and judicial review in the Federal Court. In our submission, requiring claimants (and their counsel) to review the negative decision, research the applicable law, listen to the recording of the RPD hearing (if applicable) and draft submissions in such a short time-span threatens to render the long-awaited Refugee Appeal Division meaningless.

IV. Humanitarian and Compassionate Applications

Currently, subsection 25(1) of the *IRPA* provides that the Minister of Citizenship and Immigration may grant foreign nationals – including those who are inadmissible to Canada – permanent residence in Canada or an exemption from any applicable provision or obligation under the Act where such actions are justified by humanitarian and compassionate ("H&C") or

63 Human Rights Watch, *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*. At the section entitled "I. Summary" (2010), available at: www.hrw.org/node/88671.

public policy considerations. In doing so, the Minister must take into account the best interests of any child directly affected by the decision.[64]

Neither the Act nor its Regulations define the term "humanitarian and compassionate considerations". However, the term is defined in the *Immigration Manual* as either "unusual and undeserved hardship" or "disproportionate hardship".[65]

The *Manual* instructs immigration officers that applicants "may base their requests for H&C consideration on a wide variety of factors".[66] These include, but are not limited to:

- Factors in their country of origin (this includes <u>but is not limited to</u>**:** economic opportunities or climate in cases of medical conditions);
- Family violence considerations; and
- <u>Any other factor they wish to have considered</u>.[67] [emphasis added]

The amendments to the Act proposed in Bill C-31 would change the H&C process in fundamental ways. Pursuant to Clause 13(3) of the Bill, the Minister would not be allowed to consider a Humanitarian and Compassionate application if the foreign national has made a claim for refugee protection and less than 12 months have passed since that claim was either rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division.[68] Clause 13(1) increases this period to five years for foreign nationals whose arrival is designated as irregular.

A) An Impossible Choice

The H&C provisions of Bill C-31, if enacted, will effectively force foreign nationals to make a choice – to either make a claim for refugee protection ***or*** apply to remain in Canada on humanitarian and compassionate grounds.[69] It is only if failed claimants are still in Canada one year after their claim has been rejected that they will have an opportunity to make an H&C application. If such persons are no longer in Canada at that time, then obviously the "right" to make an application on H&C grounds will be moot.

Amnesty International is concerned that this proposed arrangement will prevent a complete assessment of all relevant circumstances of a foreign national, whose removal from Canada may engage both section 96 and 97 factors relating to persecution and risk to life and H&C factors relating to unusual and undeserved or disproportionate hardship. Take, for example, the case of a young man with mental health problems, who comes from a country where such persons suffer discrimination, harassment, bullying and assaults. Where such an individual has family in Canada, or access to support services that are unavailable in the home country, he will have a difficult decision to make. A claim for protection will allow him to address the conditions in his

64 *IRPA*, s. 25 (1).
65 Citizenship and Immigration Canada, *Immigration Manual*, Chapter IP-5, paragraph 5.6.
66 *Immigration Manual*, Chapter IP-5, paragraph 5.5.
67 *Immigration Manual*, Chapter IP-5, paragraph 5.5.
68 Clause 13(3), proposed amendment to s. 25(1.2) of the Act.
69 Clause 13(3), proposed amendment to s. 25(1.2) of the Act.

country in the context of a full oral hearing but the existence of family members in Canada and/or the support network will be irrelevant to the claim. An H&C claim will allow for an individualized assessment of his particular situation but the risk factors contained in sections 96 and 97 of the *IRPA* will have to be omitted from his application pursuant to the *Balanced Refugee Reform Act.* The difficulties inherent in this situation are compounded by the tight time-lines proposed in Bill C-31 which will effectively compel many foreign nationals to make a challenging choice between two complex immigration assessment processes often involving life-and-death decision making, without the benefit of legal advice. In the view of Amnesty International, this increases the likelihood that persons facing serious harm will be removed from Canada without being afforded with an adequate opportunity to present a complete picture of their situation.

Amnesty International recommends that all refused refugee claimants be given the right to make an H&C application from within Canada so as to ensure that all factors relating to risk *and* hardship are considered while they are here.

B) Mootness and Stay of Removal

However, if individuals are made to choose between a protection claim and an H&C application, then at a minimum the same protections against removal pending final determination should apply to both streams.[70] Currently under the *IRPA Regulations*, the removal of H&C applicants is stayed only following "stage one" approval, until a decision is made to grant or not grant permanent residence to the applicant.[71]

Such prospect of removal before a final determination of a Humanitarian and Compassionate application will place many persons whose circumstances warrant H&C consideration in a highly disadvantaged situation where every course of action could be self-defeating. If they make an H&C application, they will be able to address the humanitarian and compassionate factors that do not fit under sections 96 and 97 of the Act but they risk being removed to face serious harms before a final determination of their application. By contrast, if they make a protection claim, they will benefit from an automatic stay of removal, but will probably lose the opportunity to have their circumstances considered on humanitarian and compassionate grounds following a negative refugee decision as they will be removed in less than 12 months. Amnesty International, therefore, recommends that the Regulations be amended to "even the playing field" and ensure that H&C applicants are not subject to removal pending a decision on "stage one" of their application.

C) Exclusion of Designated Foreign Nationals

Clause 13(1) of Bill C-31 restricts access to humanitarian and compassionate applications by removing the right of foreign nationals whose arrival is designated as an irregular arrival to apply

70 Currently under the *IRPA Regulations*, the removal of H&C applicants is stayed only following "stage one" approval, until a decision is made to grant or not grant permanent residence to the applicant. See *Immigration and Refugee Protection Regulations*, s. 233.
71 *Immigration and Refugee Protection Regulations*, s. 233.

for permanent residence on humanitarian and compassionate grounds "until five years after the day on which a final determination in respect of [their refugee] claim is made" or "in any other case, until five years after the day on which they become a designated foreign national."[72] It further allows the Minister to refuse to consider an H&C application for 12 months after the end of this five year period.[73]These lengthy bars in effect mean that designated foreign nationals are excluded from making permanent resident applications on humanitarian and compassionate considerations unless they are not removed from Canada for five whole years, which is highly unlikely.

Amnesty International has repeatedly underscored in this brief that all persons seeking protection and humanitarian and compassionate treatment in Canada should be treated equally with respect to access to justice. That means that *all* persons whose circumstances warrant H&C consideration should be able to apply for permanent residence on humanitarian and compassionate grounds. The same necessity for a consideration of humanitarian and compassionate circumstances applies to all applicants, regardless of their mode of arrival in Canada or their country of nationality.

D) Best Interests of a Child

Bill C-31 provides an exception from the 12-month bar on H&C applications in respect of a foreign national "whose removal would have an adverse effect on the best interests of a child directly affected."[74] The Bill does not, however, extend this exception to designated foreign nationals. As such, it facilitates the deportation of some children from Canada without adequate consideration of their best interests. Article 3(1) of the *Convention on the Rights of the Child* requires that "[i]n 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." An application for permanent residence on humanitarian and compassionate grounds is the only avenue for explicit consideration of the best interests of the child.

Consistent with Amnesty International's position that there be no separate class of claimants based on mode of arrival or the nationality of the claimant, Amnesty International recommends that all persons whose circumstances warrant H&C considerations, including children, have access to section 25(1) of the *IRPA* which provides for a meaningful consideration of the adverse effects of removal on the best interests of a child directly affected.

Conclusion

Bill C-31 contravenes many of Canada's binding international human rights obligations, including the *Convention relating to the Status of Refugees*, the *International Covenant on Civil and Political Rights*, the *Convention against Torture*, and the *Convention on the Rights of the Child*. Amnesty International is also concerned that the bill will have devastating consequences

72 Clause 13(1), proposed additional s. 25(1.01).
73 Clause 13(1), proposed additional s. 25(1.03)(b).
74 Clause 13(3), proposed additional s. 25(1.21)(b).

for refugees and their families both in Canada and abroad if it is passed in its current form.

Amnesty International rarely calls for proposed legislation to be withdrawn in its entirety. In the case of Bill C-31 however, the human rights violations at issue are so fundamental, numerous and inter-related that Amnesty International is calling for it to be withdrawn and for the government to proceed with law reform dealing with human smuggling and refugee protection in a manner that conforms fully to Canada's international human rights obligations.

If the bill is not withdrawn, at a minimum Amnesty International recommends the following amendments:

1. Repeal the provisions on the mandatory and unreviewable detention of designated foreign nationals for a period of one year.

2. Afford all immigration detainees, including designated foreign nationals, an effective right to challenge, without delay, the lawfulness of their detention.

3. Entitle all refused refugee claimants to a meaningful appeal on the merits by the Refugee Appeal Division, without discrimination as to national origin or method of arrival.

4. Ensure that refugees and protected persons are integrated into Canadian society and reunited with their family members in an expeditious manner by affording them, among other things, the right to apply for permanent residence status immediately after they are granted refugee status.

5. Delete section 109.1 of the *Balanced Refugee Reform Act* and the proposed amendments in Clause 58 of Bill C-31 for the designation of countries of origin.

6. Maintain the existing time-frame for the submission of a written narrative providing the basis of the refugee claim, and schedule refugee hearings according to when they are ready to proceed and normally within 6 months of referral to the IRB.

7. Ensure that the timeline for an appeal to the Refugee Appeal Division are no less than the timelines for making an application for leave to the Federal Court.

8. Allow all refused refugee claimants to make an application for permanent residence on H&C grounds from within Canada without having to wait for one year .

9. Amend the Regulations to protect H&C applicants against removal pending a final decision on "stage one" of their applications.

10. Afford all persons whose circumstances warrant H&C consideration, including children, equal access to an application for permanent residence on humanitarian and compassionate grounds without discrimination as to mode of arrival or country of origin.