



UNHCR Submission on Bill C-31

*Protecting Canada's Immigration System Act*

May 2012

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## Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on Bill C-31, An Act to amend the Immigration and Refugee Protection Act ("IRPA"), the Balanced Refugee Reform Act ("BRRRA"), the Marine Transportation Security Act and the Department of Citizenship and Immigration Act – *Protecting Canada's Immigration System Act*. Bill C-31 impacts on Canada's international obligations in relation to asylum-seekers and refugees under the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention") and its 1967 Protocol ("the 1967 Protocol"), to which Canada is a party, and raises issues relating to the implementation of those instruments.
2. Bill C-31 introduces several measures that will have a significant impact on Canadian asylum procedures. Of particular interest to UNHCR are those provisions relating to eligibility and access to asylum procedures, the creation of separate categories of asylum-seekers and differential treatment arising therefrom: mandatory detention without review for up to 12 months, and family separation for a minimum of 5 years for some asylum-seekers. UNHCR is pleased to see that the Refugee Appeal Division (RAD) has been maintained and that it will start its work. At the same time, the Office is concerned with the restricted access to an appeal for many categories of claimants as well as indications that removals will have a non-suspensive effect pending judicial review. Furthermore, UNHCR welcomes the setting in place of more efficient time limits on filing claims and on hearings, to meet the goal of improving the efficiency of the refugee status determination process, although UNHCR notes that these measures need to be balanced with fairness in the asylum procedure.
3. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees. As set forth in its Statute, UNHCR fulfills its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."<sup>1</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention". The same commitment is included in Article II of the 1967 Protocol.
4. UNHCR hopes that the comments and recommendations hereby submitted will provide a valuable contribution to the elaboration of refugee legislation in compliance with international standards and practice, which will fully correspond to Canada's long standing international leading role in refugee protection.

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<sup>1</sup> Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V), 14 December 1950, at 8(a).

## 1. Designation of groups of foreign nationals as irregular arrivals

5. Under section 20.1 (1) of Bill C-31, the Minister may, by order and having regard to the public interest, designate a group of persons as “irregular arrivals” on the basis of: a.) his opinion that examinations of the persons in the group cannot, particularly for the purpose of establishing identity or determining inadmissibility, be conducted in a timely manner; or b.) because he 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) [human smuggling or trafficking] for profit, or for benefit of, at the direction of or in association with a criminal organization or terrorist group.
6. UNHCR understands and shares the concerns of the Government of Canada as of many other States to combat people smuggling. Criminal and organized smuggling of migrants on a large scale, may lead to the misuse of national asylum or immigration procedures. However, given an increasing number of obstacles to access safety, asylum-seekers are often compelled to resort to smugglers to reach a safe place in which to claim asylum. The proposed designation of irregular arrivals may lead to an unwarranted penalization of those in need of international protection, in effect “blaming the victims” of the smugglers or traffickers for having sought to escape persecution.<sup>2</sup>
7. With regard to the grounds for designation as an “irregular arrival”, Bill C-31 will create two classes of asylum-seekers and refugees in Canada based on the above noted designation provision under section 20.1 (1), and of particular concern is the designation for operational reasons. The main legal consequences of such a designation as far as asylum-seekers and refugees are concerned include the following:
  - mandatory detention with a review of the reasons for detention not before 12 months and then only every 6 months for persons over the age of 16,
  - no access to appeal before the RAD against a decision of the Refugee Protection Division rejecting the claim for refugee protection of a designated foreign national,
  - inadmissibility to apply for permanent residency and denial of family and other rights during a 5 year minimum period, and

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<sup>2</sup> It is worth mentioning in this context that Article 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (“Smuggling Protocol”), supplementing the United Nations Convention against Transnational Organized Crime provides that each State party shall take, consistent with its international obligations, all appropriate measures to preserve and protect the rights of persons who have been the object of smuggling. Further, Articles 6 and 7 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Trafficking Protocol”) also provide for the non-penalization for irregular entry and assistance and protection to victims of trafficking. Both instruments are to be read in accordance with obligations under international refugee law, including the 1951 Convention and the 1967 Protocol, see Article 19 of the Smuggling Protocol and Article 14, Trafficking Protocol. Canada is a party to these instruments, having ratified both the Smuggling Protocol and Trafficking Protocol on 13 May 2002.

- reduced ability to enjoy rights as other refugees granted status in Canada including continuing reporting requirements upon obtaining refugee status, inability to obtain Convention travel documents for 5 years, and possible negative impact on the application for permanent residency for retroactive designation.

### **1.1 Differentiated treatment of asylum-seekers who are designated foreign nationals**

8. This designation is also problematic from a non-discrimination point of view. UNHCR does not believe that the stated grounds for the designation as irregular arrival provide for a legitimate justification for a substantially differentiated treatment of refugees and asylum-seekers with respect to detention, access to an appeal or access to permanent residency in conjunction with the right to a travel document for refugees. The legislation may therefore be at variance with human rights based non-discrimination guarantees (e.g. Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and potentially also Article 3 of the 1951 Convention).

**Recommendation No. 1:** UNHCR recommends against the differential treatment of refugees and asylum-seekers where it infringes on established rights of refugees.

### **1.2 Mandatory detention without review for 12 months**

9. Section 55 (3.1) of Bill C-31 provides for the mandatory detention of all designated foreign nationals over the age of 16, and section 56 (2) states that a designated foreign national must be detained until a final determination is made to allow the claim for refugee protection or application for protection, until the Immigration Division or the Minister orders their release. Under the Bill, the discretion of officers to negotiate release is curtailed. Pursuant to section 57.1 (1) the Immigration Division must review the reasons for the continued detention of a designated foreign national 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. Following that, reviews can only take place every six months thereafter.
10. UNHCR's long-standing position has been that the detention of asylum-seekers is inherently undesirable. In exercising their fundamental right to seek asylum, asylum-seekers are often forced to arrive at, or enter a territory illegally. 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, not least because of the urgency of their flight or their inability to approach the authorities.<sup>3</sup> Article 31(1) of the 1951 Convention takes this situation into account and prohibits

<sup>3</sup> See UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>, Guideline 2, page 3.

penalties being imposed on refugees on account of their illegal entry or presence. Article 31(2) further provides that Contracting States shall not apply to the movements of refugees and asylum-seekers restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country. In line with international human rights law, determining what is necessary must be assessed in each individual case.

11. International law clearly provides that no one shall be subjected to arbitrary or unlawful detention.<sup>4</sup> The United Nations Human Rights Committee has noted that for detention to be lawful, it must pursue a legitimate governmental objective that is determined to be necessary, reasonable in all the circumstances and proportionate in *each individual case*; and that detention can only be justified where other less invasive or coercive measures have been considered.<sup>5</sup> Detention must also be subject to periodic and judicial review (see, specifically, Article 9(4) of the ICCPR). In particular, the UN Human Rights Committee has stated that mandatory and non-reviewable detention is unlawful as a matter of international law.<sup>6</sup>
12. Practically, detention has been shown to cause psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional and psychological consequences. Detention can exacerbate the suffering and trauma that asylum-seekers may already have undergone prior to or during flight to seek protection. These consequences of detention can be even more severe for vulnerable asylum-seekers such as children, pregnant women, the elderly, victims of torture or trauma and persons with physical and/or mental disabilities.
13. There is no empirical evidence that detention deters irregular migration, or discourages persons from seeking asylum.<sup>7</sup> Detention can also create increased difficulties for later integration in the host country for those persons found to be in need of protection. The human rights consequences as well as the social and economic costs of administrative detention would compel the further exploration of and investment in alternatives to detention, with which Canada has had good experiences.<sup>8</sup>

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<sup>4</sup> Article 9, International Covenant on Civil and Political Rights (ICCPR).

<sup>5</sup> *C v. Australia*, HRC, Comm. 900/1999, 13 November 2002, at para. 8.2.

<sup>6</sup> *A v. Australia*, HRC, Comm. No. 560/1993, 30 April 1997, at para. 9.4 and 9.5 and *C v. Australia*, HRC, Comm. 900/1999, 13 November 2002, at para. 8.3 concluding on violations of Article 9 (4) ICCPR, see Executive Committee Conclusion No. 44 (XXXVII), *Detention of Refugees and Asylum-Seekers*, (1986), para. (e).

<sup>7</sup> See A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, UNHCR, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>. UN High Commissioner for Refugees, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.

<sup>8</sup> See A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, UNHCR, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>, which discusses the Toronto Bail Program.

14. With regard to the age limit in section 57, UNHCR recalls that under general principles of international law, and as articulated in the *Convention on the Rights of the Child* (CRC), a child includes all individuals under the age of 18.<sup>9</sup> The CRC affirms that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily,” and that they should have prompt access to legal service and assistance and the right to challenge the legality of such deprivation of liberty before an appropriate authority.<sup>10</sup> As UNHCR’s Executive Committee has concluded, since detention “can affect the physical and mental well-being of children and heighten their vulnerability, States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child.”<sup>11</sup>
15. In UNHCR’s view, the relevant provisions of Bill C-31, as currently drafted, would be at variance with several international standards. The grounds for designation and the group character of designation as irregular arrivals are too general to ensure that detention is justified on the basis of necessity, reasonableness in all the circumstances and proportionate in each individual case. Sections 55 to 57 establish detention as a rule whereas it should be the exception and a measure of last resort. Moreover, the lack of access to review for 12 months and subsequently only every 6 months would fall outside procedural guarantees set down in Article 9(4) of the ICCPR and would be unprecedented in Canada.
16. For the above reasons, UNHCR strongly recommends that the Government refrains from introducing a mandatory detention regime for irregular arrivals in relation to refugees and asylum-seekers. At a minimum, UNHCR recommends to afford those detained with the full procedural rights due to them under international law, including timely detention reviews. UNHCR further recommends that alternatives to detention be utilized wherever appropriate, building on the positive best practices already in place in Canada.<sup>12</sup> Particular care should be provided in relation to vulnerable individuals including children, pregnant women, the elderly, victims of torture or trauma and persons with physical and/or mental disabilities

**Recommendation No. 2:** UNHCR strongly recommends that the Government refrains from introducing a mandatory detention regime for irregular arrivals in relation to refugees and asylum-seekers. At a minimum, UNHCR recommends to afford those detained with the full procedural rights due to them under international law, including timely detention reviews.

**Recommendation No. 3:** UNHCR recommends that alternatives to detention be explored and implemented where appropriate building on the positive best practices

<sup>9</sup> Article 1 of the Convention on the Rights of the Child (CRC).

<sup>10</sup> Article 37 CRC.

<sup>11</sup> Executive Committee Conclusion No. 107 (LVIII), *Children at Risk*, (2007), para. (b) (xi).

<sup>12</sup> See A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, UNHCR, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

already in place and especially in respect of children, pregnant women, the elderly, victims of torture or trauma and persons with physical and/or mental disabilities.

**Recommendation No. 4:** UNHCR recommends that the definition of child in Bill C-31 conforms to the definition under the Convention on the Rights of the Child and that Article 37 of the CRC is fully complied with.

### ***1.3 Detention for inadmissibility on grounds of serious criminality, criminality or organized criminality<sup>13</sup>***

17. Bill C-31 introduces a modified paragraph 55 (3) (b) of IRPA, with broader grounds for detention, according to which “a permanent resident or a foreign national may, on entry into Canada, be detained if an officer (...) (b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.” Moreover, under paragraph 58 (1) (c), the Immigration Division would be obliged to continue detention where it finds that the Minister is taking “necessary steps to inquire” into a reasonable suspicion of grounds for inadmissibility.
18. As far as asylum-seekers are concerned, this new provision may be interpreted and applied in a way that could lead to arbitrary detention. While national security and public order are legitimate grounds for detention, UNHCR stresses the requirements of necessity and proportionality under international law. Detention must be a measure of last resort and should only be applied when it has been shown that less coercive or intrusive measures are insufficient. In this context, alternatives to detention are part of any assessment of the necessity and proportionality of detention.<sup>14</sup>
19. Also, situations of criminality (serious, organized, or otherwise) should be handled within the criminal law context by a public prosecutor, with the appropriate procedural safeguards within criminal law.
20. Further to this, UNHCR warns against restricting the grounds for release by justifying continued detention where “necessary steps” are being taken by the Minister “to inquire into a reasonable suspicion” of inadmissibility. Investigative detention should be limited by periodic review of the evidence adduced to justify the immigration reasons for detention, not solely efforts to adduce such evidence. Asylum-seekers should not be detained for any longer than necessary and where there are no longer justifiable grounds for detaining the given individual(s), they

<sup>13</sup> These provisions apply not only to Designated Foreign Nationals but also to asylum-seekers who fall within the categories mentioned in the above heading.

<sup>14</sup> UN High Commissioner for Refugees, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.



should be released.

#### ***1.4 Reporting requirements of a designated foreign national despite granting of Convention refugee status***

21. Under section 98.1 (1) of Bill C-31, designated foreign nationals on whom refugee protection is conferred must report to an officer in accordance with the regulations. The purpose, modalities and time frame for these reporting requirements are not clear from the Bill.
22. UNHCR notes that other Convention refugees in Canada are not subject to reporting requirements and would advise against setting up a two-tiered system of recognized refugees. The Office is concerned that such requirements may be punitive in character and inconsistent with Article 31 of the 1951 Convention. Further, any limits on the freedom of movement of refugees would need to satisfy Article 26 of the 1951 Convention as well as the necessity and proportionality requirements of corresponding human rights instruments.<sup>15</sup> UNHCR recommends that this differential treatment be avoided and that Convention refugees not be subject to on-going reporting requirements.

**Recommendation No. 5:** UNHCR recommends that designated foreign nationals, especially those designated for operational reasons, who are recognized as refugees under the 1951 Convention be treated like other recognized refugees and that they not be subject to continuing reporting requirements except where necessary and proportionate in an individual case. All recognized refugees shall benefit from the rights accruing under the Convention and corresponding human rights instruments.

#### ***1.5 Five year bar on regularizing status and implications for family unity***

23. Under Bill C-31 designated foreign nationals recognized as refugees are barred from applying for permanent residence or, temporary residence or making humanitarian and compassionate applications, for five years from the date of acceptance by the Immigration and Refugee Board (IRB). This time frame also applies to sponsoring family members thereby delaying local integration in Canadian society and reunification with their families for at least 5 years.
24. Article 34 of the 1951 Convention requires states to “...as far as possible facilitate the assimilation and naturalization of refugees”. The bar on regularizing status is likely to delay access to naturalization procedures. This is not in the spirit of the 1951 Convention and its ultimate goal of providing durable solutions to refugees.

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<sup>15</sup> Article 12 (1) ICCPR, and Article 22 of the American Convention of Human Rights (ACHR).

25. The principle of family unity is enshrined in international law as the natural and fundamental unit of society and entitled to protection by society and the State.<sup>16</sup> UNHCR's Executive Committee has underlined on several occasions the need for the unity of the refugee's family to be protected. In particular, when the principal applicant is recognized as a refugee, other members of the family unit should normally also be recognized as refugees, family unity issues should be treated as a matter of priority,<sup>17</sup> and family reunification should be facilitated in the State where a refugee is a lawful resident provided that there is no other country where the family could live together.<sup>18</sup> In UNHCR's view, the effect of designation may have disproportionate consequences resulting in a lengthy delay or denial of family unification for recognized refugees.

**Recommendation No.6:** UNHCR recommends that, in the spirit of the 1951 Convention, the five year bar to regularization of status be removed.

**Recommendation No. 7:** UNHCR recommends that the principle of family unity be fully respected and applied consistently throughout the refugee procedure and that recognized refugees under the 1951 Convention be entitled to apply for family reunification in a timely manner.

### ***1.6 Restriction on issuing Convention Travel Documents***

26. New section 31.1 of Bill C-31 provides that, for the purposes of Article 28 of the 1951 Convention, a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary residence permit under section 24. This new section could lead to the situation in which designated foreign nationals would not be able to obtain a Convention Travel Document for 5 years without adequate justification.
27. The new section 31.1 is at variance with Article 28 of the 1951 Convention, which provides that "Contracting States shall 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...." Although the term "lawfully staying" has no universally consistent meaning, it is UNHCR's view that "stay" means a permitted regularized stay of some duration – including either permanent or temporary residence, while "lawful" normally is to be

<sup>16</sup> Article 23 ICCPR, Article 9 CRC and Article 17 ACHR; See also Recommendation B of the Final Act of the Diplomatic Conference that adopted the 1951 Convention.

<sup>17</sup> See Executive Committee Conclusion No. 88 (XLX), *Protection of the Refugee's Family*, (1999), para. (b) (iii) and (iv); and Executive Committee Conclusion No. 24 (XXXII), *Family Reunification*, (1981), para. 2 and 5.

<sup>18</sup> Executive Committee of the High Commissioner's Programme, Standing Committee, Family Protection Issues, EC/49/SC/CRP.14, 4 June 1999, at para. 13, available at: <http://www.unhcr.org/refworld/docid/4ae9aca00.html>

assessed against prevailing national laws and regulations.<sup>19</sup> A judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited. Formally recognized refugees whose status in the country has been permitted by the granting State should be considered to be “lawfully staying” in their host country, and consequently, be entitled to benefit from the right to Convention Travel Documents per Article 28 of the 1951 Convention, unless there are compelling reasons of national security or public order to deny a Convention Travel Document in the individual case.<sup>20</sup>

**Recommendation No.8:** UNHCR recommends deleting Section 31.1 of Bill C-31 or alternatively, bringing it in line with the wording and meaning of Article 28 of the 1951 Convention.

## 2. Designated country of origin (DCO)

28. Under amendment 58, Bill C-31 would modify the BRRA (s. 109.1) with regard to the criteria of designating countries of origin by the Minister. Asylum applicants from designated countries may be faced with the following legal consequences:

- Different time limits to provide documents, in particular the Basis of Claim document and/or for the scheduling of a hearing (among others), to be determined in the Regulations (refer to amendment 59 of Bill C-31 to s.111.1 (2) of IRPA),<sup>21</sup>
- Lack of access to the RAD if their claim is rejected (refer to amendment 36 of Bill C-31 to s. 110(2) of IRPA),
- Denial of a statutory stay of removal (refer to amendment 21 of Bill C-31 to s. 49 (2)(c) of IRPA).<sup>22</sup>

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<sup>19</sup> UN High Commissioner for Refugees, “Lawfully Staying – A Note on Interpretation”, available at: <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>.

<sup>20</sup> R. da Costa, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, June 2006, UNHCR, POLAS/2006/02, at page 18. This interpretation is supported by wide State practice, see e.g. Article 25 of Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need international protection and the content of the protection granted, 19 May 2004 and accepted by most leading jurists: J. Vedsted-Hansen, Article 28/Schedule in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para. 63 et. seq., G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, (3<sup>rd</sup> ed.), Ch. 10, 1.3.3, p. 525; J. Hathaway, *The Rights of Refugees under International Law*, Ch. 6.6 International travel.

<sup>21</sup> The government has indicated shorter timelines for DCO claimants to have a hearing, see: Citizenship and Immigration Canada, *Background — Summary of Changes to Canada’s Refugee System in the Protecting Canada’s Immigration System Act*, op. cit.

<sup>22</sup> There have been indications that this provision will be supplemented by a change to the Regulations, such that persons from DCO, those designated as DFN, those who fall under an exception to the Safe Third Country Agreement, and those whose claims are found to be manifestly unfounded or to have no credible basis, will not benefit from a statutory stay of removal. It should be noted, however, that said individuals will still be able to apply for a judicial stay of removal, pursuant to the Federal Court’s common law jurisdiction. See: Julie Bechard and Sandra Elgersma, *Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act*,

29. The triggers for a review of DCO are based on rejection rates, withdrawal and abandonment rates or a qualitative checklist for countries with few refugee claims. Thresholds and quantitative triggers are to be established by Ministerial Order. This is in contrast to the previous proposed amendments in the BRRA which called for designations pursuant to the approval of an expert panel. Further, the proposed amendments do not provide a procedure for removing a country from the list.
30. With regard to the legal consequences, shortened time limits will be discussed below under section 4 and access to an appeal under section 5. This section will focus on the concept of DCO, the selection criteria and the review process.
31. UNHCR does not oppose the introduction of a “designated” or “safe country of origin” list as long as this is used as a procedural tool to prioritize or accelerate the examination of applications in carefully circumscribed situations. The designation of a country as a safe country of origin cannot establish an absolute guarantee of safety for nationals of that country; it can only take into account the general civil, legal and political circumstances in a country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned.<sup>23</sup> It may be that despite general conditions of safety in the country of origin, for some individuals, members of particular groups or relating to some forms of persecution, the country remains unsafe.
32. Furthermore, while the concept of DCO can work as an effective decision-making tool, it is important that the general assessment of certain countries of origin as safe is based on reliable, objective and up-to-date information from a range of sources. The assessment needs to take account not only of international instruments ratified or existing legal frameworks, but also the actual degree of respect for human rights and the rule of law evidenced in the country’s human rights record as a whole, including compliance with human rights instruments and its openness to independent national or international organizations for the purpose of monitoring human rights.<sup>24</sup> Also, with regard to the procedure for adding or removing countries from any list of safe countries of origin, this needs to be transparent, open to challenge in a court of law, and reviewable in light of changing circumstances in countries of origin. One way of achieving transparency and quality could be by ensuring that the designation is done by a panel of experts.

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*the Balanced Refugee Reform Act, the Marine Transportation Act and the Department of Citizenship and Immigration Act*, 16 April 2012, at pgs. 3 and 7.

<sup>23</sup> See UNHCR’s Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, at page 41 (Comment on Article 30), available at: <http://www.unhcr.org/refworld/docid/42492b302.html>. See also Executive Committee Conclusion No. 87 (L), *General Conclusion on International Protection*, (1999), para. (j): “(...) notions such as “safe country of origin”, (...) should be applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*.”

<sup>24</sup> UN High Commissioner for Refugees, *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection, EC/GC/01/12, 31 May 2001, at para. 39, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

**Recommendation No. 9:** UNHCR recommends that designation of a country as a DCO be based on objective, reliable and up-to-date information and be decided by a panel of experts. The designation also needs to be challengeable in a court of law and reviewable in light of changing circumstances in the country of origin.

### 3. Ineligibility based on criminality grounds

33. Section 101 (2) (a) and (b) of IRPA provides that “a claim is not ineligible by reason of serious criminality under paragraph (1) (f) unless (a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years and for which a sentence of at least two years was imposed; or (b) in the case of inadmissibility by reason of a conviction outside Canada, the Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least ten years.”
34. Bill C-31 lowers the threshold for “serious criminality” by removing the requirement that a sentence of at least two years is imposed under paragraph (a), and deleting the requirement for a Minister’s opinion that a person constitutes a danger to the public under paragraph (b). This amendment must be analyzed together with the recently passed criminal omnibus bill (*The Safe Streets and Communities Act*),<sup>25</sup> which introduced several more provisions meeting the “serious criminality threshold” as well as the limited opportunity to assess the mitigating factors in the individuals’ particular circumstances.
35. It is a long established principle that fair and efficient procedures for the determination of refugee status need to be in place, in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.<sup>26</sup> In UNHCR’s view, asylum applications should not be considered inadmissible unless the individual concerned has already found effective protection in another country (“first country of asylum”), or if responsibility for assessing the particular asylum application in substance is assumed by a third country, where the asylum-seeker will be protected from *refoulement* and will be able to seek and enjoy asylum in accordance with accepted international standards (a “safe third country”).<sup>27</sup> UNHCR has already expressed concerns over exclusion

<sup>25</sup> Bill C-10 , “An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and Consequential Amendments to Another Act” was adopted in Parliament on 12 March 2012.

<sup>26</sup> Executive Committee Conclusion No. 71 (XLIV), *General Conclusion on International Protection*, (1993), at para. (i) and Executive Committee Conclusion No. 74 (XLV), *General Conclusion on International Protection*, (1994), para. (i); and UN High Commissioner for Refugees, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

<sup>27</sup> See UN High Commissioner for Refugees, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, at para. 8, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>. See also UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on procedures in

being examined under the heading of “ineligibility”, or admissibility to the refugee proceedings – the considerations set out in UNHCR’s submission to the House of Commons Standing Committee on Citizenship and Immigration of 5 March 2001, which set out the Office’s comments with the introduction of IRPA, remain valid.<sup>28</sup>

36. Likewise, UNHCR has previously expressed its views about the provisions in section 101 (2) (a) and (b) of IRPA.<sup>29</sup> With regard to the new section 101 (2) (a) concerning convictions in Canada, UNHCR notes that in cases of convictions for crimes committed within Canada, exclusion from international refugee status would be justified only if the acts in question fall within the scope of Article 1F(a) (as a crime against peace, war crime, or crime against humanity, as defined in the relevant international instruments) or Article 1F(c) (as acts contrary to the purposes and principles of the United Nations).<sup>30</sup> Where such convictions are handed down in relation to crimes committed outside Canada, this may give rise to exclusion under any of the three exclusion clauses under Article 1F – Article 1F(b) may be applicable, depending on the gravity (“serious”) and nature (“non-political”) of the crimes in question. By eliminating the requirement that a sentence of at least two years has actually been imposed (thus instituting a lower test for serious criminality), the broader meaning of the term “serious criminality” in Bill C-31 combined with the recently passed Bill C-10 (*The Safe Streets and Communities Act*) will lead to the ineligibility of persons actually in need of international protection that would not meet the criteria of exclusion under Article 1 F (b) of the 1951 Convention. The mandatory nature of section 101 (2) combined with expedited removal orders under new subsection 48(2) of Bill C-31 increases the risk of *refoulement*.
37. With regard to new section 101 (2) (b) concerning convictions outside Canada, UNHCR notes that such convictions may form the basis for exclusion under Article 1F of the 1951 Convention – this assessment should, however, be made as part of the procedure to determine the merits of the claim rather than at the admissibility stage. In terms of the scope of section 101 (2) (b), UNHCR’s statement about the

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Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), available at: <http://www.unhcr.org/refworld/pdfid/42492b302.pdf>.

<sup>28</sup> See UNHCR Canada, Comments on Bill C-11, Submission to the House of Commons Standing Committee on Citizenship and Immigration, 5 March 2001, page 15 et seq., available at <http://www.parl.gc.ca/Content/HOC/Committee/403/CIMM/WebDoc/Office%20of%20the%20United%20Nations%20High%20Commissioner%20E.pdf>; See also Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para. 31 and the accompanying Background Note, as well as the Lisbon Expert Roundtable: Global Consultations on International Protection, 3-4 May 2001, EC/GC/01/2Track/1, para. 15, online at: <http://www.unhcr.org/3b38938a4.pdf>.

<sup>29</sup> See UNHCR Canada, Comments on Bill C-11, Submission to the House of Commons Standing Committee on Citizenship and Immigration, 5 March 2001, page 18 et seq., available at: <http://www.parl.gc.ca/Content/HOC/Committee/403/CIMM/WebDoc/Office%20of%20the%20United%20Nations%20High%20Commissioner%20E.pdf>.

<sup>30</sup> In contrast to Article 1F(a) and (c), the exclusion clause in Article 1F(b) contains geographic and temporal criteria and may be applied only to a person with regard to whom there are serious reasons for considering that he or she “has committed a serious non-political crime outside the country of refuge, prior to admission to that country as a refugee”.



possibility of ineligibility attaching to crimes which do not fall within the scope of Article 1F are similar to those outlined above with regard to section 101 (2) (a). Moreover, the elimination of the requirement that a person concerned constitute a “danger to the public” will broaden the scope of this ineligibility provision, expanding it not only beyond the criteria which justify exclusion under Article 1F but also beyond the conditions under which the 1951 Convention permits exceptions to the principle of *non-refoulement*, in Article 33(2).<sup>31</sup> In this context, UNHCR notes that Article 33(2) of the 1951 Convention deals with the treatment of refugees and defines the exceptional circumstances in which they could be refouled; it was not conceived as a provision determining admissibility into refugee status determination procedures, nor as an exclusion clause.<sup>32</sup>

**Recommendation No. 10:** UNHCR recommends that the proposed amendments to sections 101 (2) (a) and (b) of IRPA avoid expanding ineligibility grounds further in ways that are not consistent with the 1951 Convention.

#### 4. Shortened time limits under the new asylum process

38. One of the stated goals for refugee reform is the creation of a more efficient process with less delay. Under amendment 56 of Bill C-31 (which amends section 100 of IRPA), the first step in lodging a refugee claim under the new system, will be the submission of a “Basis of Claim” (BOC) document (the exact contents of which have yet to be determined). The time limits for the BOC’s submission and for the scheduling of a hearing will be set out in the Regulations (as stated in the amendments under Bill C-31 to subsections 100 and 111.1).<sup>33</sup> However, based on the public background document comparing the current system with new proposals,<sup>34</sup> the timeframe to submit the BOC could be as short as 15 days for those declaring refugee status at a port of entry, while inland claimants will be required to bring their BOC with them to the eligibility interview.
39. Further, the government has indicated that the timeframe for a first level hearing before the Refugee Protection Division (RPD) will be 30 days for inland claimants of DCO (60 days under BRRA), 45 days for port of entry DCO claimants, and 60 days for all non-DCO claimants (90 days under BRRA).<sup>35</sup> Amendment 59 of Bill C-31 (to

<sup>31</sup> See UNHCR in *N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States*, Respondent Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, available at: <http://www.unhcr.org/refworld/type,AMICUS,USA,48622dd72,0.htm>

<sup>32</sup> See, for example, UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, available at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

<sup>33</sup> In that respect, UNHCR’s comments are subject to change in light of future regulations/ IRB rules.

<sup>34</sup> Citizenship and Immigration Canada, *Backgrounders — Summary of Changes to Canada’s Refugee System in the Protecting Canada’s Immigration System Act*, accessed 15 March 2012, online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2012/2012-02-16f.asp>>.

<sup>35</sup> Ibid.

section 111.1 of IRPA), sets out that the Regulations may allow for different time limits for claimants from DCO. If the given individual is eligible for an appeal to the RAD, they will have 15 working days to file an appeal with an anticipated timeline of 90 days to a written decision.<sup>36</sup>

40. For several years, UNHCR has observed efforts by States to speed up the decision making process using different procedural measures. One of them is the introduction of time limits for applications.<sup>37</sup> As part of the efficiency criterion, UNHCR supports efforts by Government authorities to decide applications for asylum in a timely manner. However, States need to balance efficiency with the fairness of the procedure. Overly restrictive timeframes in the context of a sophisticated asylum process can lead to increased rates of abandonment of claims and a rise in the number of unrepresented claimants. Asylum claimants do not ordinarily have the knowledge or training to navigate the legal system (especially in light of their vulnerabilities and probable language barriers). Even where a claimant retains counsel, enough time needs to be allowed for applicants to apply for legal aid, and/or find, retain and instruct counsel. Without adequate opportunity to retain counsel, the IRB may see a rise in the number of unrepresented claimants who are unprepared and ill-equipped to present their claims. Such individuals may also be more prone to missing deadlines, which can lead to an increase in declarations of abandonment.<sup>38</sup> The consequences of abandonment are in effect a final negative decision as there is no right to an appeal or access to a pre removal risk assessment for one year after the negative decision.

**Recommendation No. 11:** In setting and enforcing time limits for BOC submissions and hearings, UNHCR recommends that the government balance the need for efficiency with the fairness of the asylum procedure.

**Recommendation No. 12:** In addition to the new time limits, UNHCR urges the Government to allocate appropriate resources towards creating, maintaining or supplementing legal services for asylum-seekers.

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<sup>36</sup> Ibid.

<sup>37</sup> The automatic and mechanical application of time limits for submitting claims has been found to be at variance with international protection principles, see *Jabari v. Turkey*, European Court of Human Rights, 10 July 2000, para. 40; see also Executive Committee Conclusion No. 15 (XXX), *Refugees Without an Asylum Country*, (1979), para. (i) (A/AC.96/572, para. 72.2).

<sup>38</sup> For example, under the current IRB Rules, where a Personal Information Form is not provided within the prescribed timeframe, a claim can be pronounced abandoned. If the rules are maintained in this form, and if the timelines are compressed as envisioned, then it seems likely that the number of abandonments may rise. Individuals deemed to have abandoned their claim would be barred from accessing the RAD (s.110(1.1)(b)), and not have access to a PRRA (s.112(2) and (2.1)). Further, the Board's jurisdiction to reopen refugee cases has been removed (s.170.2), and statutory stays of removal where a decision is appealed to the Federal Court, have been removed. Further, under s.48(2), removals will be enforced more quickly (going from enforcement "as soon as is reasonably practicable" to enforcement "as soon as possible"). Thus, an unrepresented claimant who misses a particular deadline or scheduled appearance within the new compressed timelines, would be denied an opportunity to have the merits of their claim decided, and be left with few recourses, before removal is enforced.



## 5. Refugee Appeal Division (RAD)

41. UNHCR welcomes the implementation of the Refugee Appeal Division (RAD) under Bill C-31.<sup>39</sup> UNHCR's position remains that an appeal on the merits be made available to all asylum-seekers whose claims are rejected at first instance.
42. Bill C-31 maintains the RAD initially outlined in IRPA, but introduces several new provisions that preclude access to an appeal for specific categories of asylum claimants whose claims are rejected at first instance under sections 110 (1) and (2). The following categories of asylum-seekers rejected by the RPD will not have access to an appeal:
- applicants designated as "irregular arrivals" (designated foreign nationals): (designation can be made due to absence of operational capacity or for reasonable grounds to suspect involvement/association with smuggling, criminal or terrorist group or activity),
  - applicants from Designated Country of Origin,
  - applicants who came to Canada under an exception to the Safe Third Country Agreement,
  - persons rejected by the RPD for "no credible basis" for the claim,
  - persons rejected by the RPD for having manifestly unfounded claims (the criteria for these assessment likely to be outlined in the Regulation),
  - persons whose claims are determined to be withdrawn or abandoned, and
  - persons whose claims are vacated or determined that protection ceased upon application by the Minister to the RPD.
43. An appeal stage is a standard feature of any refugee status determination procedure.<sup>40</sup> In most countries which institute individualized procedures, claimants have the right to an appeal before an independent and impartial tribunal or body.<sup>41</sup>
44. Such an appeal instance should have the jurisdiction to review questions both of fact and law. It should be able to accept and assess new evidence, and to recognize refugees independently. In practice, the combination of specialist

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<sup>39</sup> It is noted under amendment 55 to section 275 of IRPA that the implementation of the RAD will come into force on a date to be fixed by order of the Governor in Council as already provided in IRPA.

<sup>40</sup> Executive Committee: "[r]eiterates the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection are identified and granted such protection." Executive Committee Conclusion No. 74 (XLV), *General Conclusion on International Protection*, (1994), at (i), <http://www.unhcr.org/41b041534.html>.

<sup>41</sup> For instance, UNHCR welcomed the EU wide standard that applicants for asylum have the right to an effective remedy before a court or tribunal, see Article 39 of Council Directive 2005/85/EC of 1 December 2005 and UNHCR's Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, at page 52 (Comment on Article 38), available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

expertise with quasi-judicial independence has proven particularly beneficial for the quality of decision-making.

45. UNHCR is seriously concerned that the RAD will not be available to all claimants regardless of the nature of their claim. The right to appeal is a fundamental requirement of a fair and efficient asylum procedure, to which no exception should be made.<sup>42</sup> At the core of the 1951 Convention lies the principle of *non-refoulement*, whereby those with protection needs cannot be returned to a place where they will be at risk of persecution or serious human rights violations including loss of life. The purpose of a second review through an appeals mechanism is to ensure that errors of fact or law at the first instance decision making can be corrected, to avoid injustice and to ensure respect for the principle of *non-refoulement*.
46. In addition to restricted access to appeal, amendment 21 of Bill C-31, which changes s.49(2)(c) of IRPA appears to limit the ability of individuals to seek effective remedies before removal is enforced. UNHCR is particularly attentive to the fact that, if removal proceedings are not suspended for cases seeking judicial review to the Federal Court, this may lead to cases of *refoulement*.

**Recommendation No. 13:** UNHCR recommends that all asylum-seekers have access to an appeal on the merits to the RAD.

**Recommendation No. 14:** UNHCR recommends that a stay of removal pending judicial review to the Federal Court be maintained as in the current asylum process.

## 6. Humanitarian and Compassionate Applications (H&C)

47. Under new subsection 25(1.2) (c) “the Minister may not examine the request if (c) subject to subsection (1.21), less than 12 months have passed since the foreign national’s last claim for refugee protection was rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned.” New paragraph (1.21) provides that this one year ban from making an H&C application “does not apply in respect of a foreign national (a) who, in case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, their country of former habitual residence, to provide adequate health or medical care; or (b) whose removal would have an adverse effect on the best interests of a child directly affected.”
48. While claims for asylum and/or protection deal with an assessment of risk,<sup>43</sup> H&C applications deal with an assessment of hardship with the explicit legislative directive not to “consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need

<sup>42</sup> See Executive Committee Conclusion No. 8 (XXVIII), *Determination of Refugee Status*, (1977), para. (e) (vi).

<sup>43</sup> Or more specifically, an assessment of risk of persecution under section 96 and an assessment of risk of torture and cruel and unusual treatment or punishment under section 97.

of protection under subsection 97(1).”<sup>44</sup>

49. In light of the proposals to restrict procedural guarantees in relation to time limits and limited access to the RAD, the one year bar on application for rejected asylum claimants may make it more difficult if not impossible to benefit from such complementary mechanisms. The bar against making an H&C application for one year after the refugee procedure may result in such individuals being deported before a proper analysis can be made of their eligibility for complementary protection.

**Recommendation No. 15:** UNHCR recommends that the H&C procedure be maintained to address situations where complementary forms of protection are needed.

### ***6.1 Five year prohibition on Humanitarian & Compassionate Applications for designated foreign nationals***

50. Under section 25 (1.01-1.03), designated foreign nationals are generally barred from making an H&C application for 5 years from the date of an application’s decision or from the date of designation.

51. UNHCR recommends that in the spirit of guarding against the distinctions between certain categories of asylum-seekers, this 5 year bar should be removed.

**Recommendation No. 16:** UNHCR recommends the removal of the 5 years bar for Designated Foreign Nationals to file a Humanitarian and Compassionate application from the date of decision or the date of designation.

## **7. Pre-Removal Risk Assessments (PRRA)**

52. Amendments 38 and 60 in Bill C-31, which introduce changes to section 112(2) of IRPA, institute a one year bar on accessing a PRRA after a negative determination in an application for protection. Further, the possibility of subsequent applications

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<sup>44</sup> IRPA s.25(1.3). Canada has noted that “[t]he purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada’s humanitarian tradition. Use of this discretion should not be seen as conflicting with other parts of the *Act* or *Regulations* but rather as a complementary provision enhancing the attainment of the objectives of the Act.” Among the objectives noted in Canada’s *Immigration and Refugee Protection Act*, are: “to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution” and “to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of all human beings.” See: Inland Processing (IP) Manual 5, *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*, at 8, online at <<http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>>, and IRPA, s.3(2)(c) and e, online at: <<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/page-7.html#docCont>>. See also: Overseas Processing (OP) 4, Processing of Applications under Section 25 of the IRPA, at 3, online at: <<http://www.cic.gc.ca/english/resources/manuals/op/op04-eng.pdf>>.

will be prohibited unless 12 months have passed from the previous negative PRRA decision. Timelines have also accelerated for filing a PRRA application and supporting evidence to 15 working days (to be set out in the Regulations).

53. UNHCR notes that effective return policies and practices are essential to maintain the integrity of refugee status determination procedures and that it is appropriate for States to remove those determined not to be in need of protection where they have had access to fair and efficient procedures, and where there is a finding that they are not in need of or deserving of protection.
54. At the same time, PRRA are an important safeguard against the deportation of persons in need of international protection. Similar to the submission of H&C applications, such mechanisms can ensure protection where individuals in need of and deserving of protection are not recognized through regular processing channels. In particular, given the many categories of asylum-seekers who will not have access to an appeal under the RAD, and/or a statutory stay of removal, the availability of a PRRA is all the more important to maintain as a safeguard against return to threats of torture or inhuman or degrading treatment under international human rights instruments.<sup>45</sup>

**Recommendation No. 17:** UNHCR recommends that the PRRA be maintained to address situations where complementary forms of protection are needed.

## 8. Re-opening of a refugee claim

55. Currently, section 55 of the IRB Rules allows an application to reopen a claim which was decided or abandoned, “if it is established that there was a failure to observe a principle of natural justice.”<sup>46</sup> Bill C-31 removes the ability of the RPD to reopen hearings for refugee protection or applications for cessation or vacation, including situations where natural justice was not observed, if the RAD or the Federal Court have already made a ruling (under s. 170.2). The Bill also bars the RAD from re-opening hearings, including in situations where natural justice was not observed, if the Federal Court has already made a ruling (in s.171.1).
56. UNHCR maintains that claims for protection should be reopened where new evidence comes to light, including in situations where there has been a breach of natural justice, to allow for the claim to be re-examined in its entirety.<sup>47</sup> The PRRA may not be an appropriate mechanism to deal with all situations of new evidence, given the restricted and discretionary availability of hearings. Further, if new

<sup>45</sup> See, Article 3 of the United Nations Convention against Torture (CAT), and Article 7, ICCPR.

<sup>46</sup> Natural justice requires that every person is given the opportunity to make his or her case, especially when a person fears for his or her life (right to be heard). See: *Israel Mendoza Garcia v. MCI*, 2011 FC 924.

<sup>47</sup> Under Canadian Law as it currently stands (pre-C31), new facts can be submitted to trigger a reopening of a hearing, however, it is not enough simply to have new facts. There must be a lack of natural justice. See for example: *Estefanía Lopez Diaz*, 2010 FC 131.

evidence should come to light after one has had a PRRA, mechanisms should be made available to examine such new evidence. Similarly, the RAD may not be a sufficient mechanism to deal with new evidence given the restricted access to hearings, the limited examination of oral evidence (at a hearing), and the possibility that new evidence could come to light after one has had the appeal heard. Finally, judicial review before the Federal Court is by definition, a forum which does not examine new evidence.

**Recommendation No. 18:** UNHCR recommends that the jurisdiction of the RPD and the RAD, to reopen claims based on new evidence be affirmed under Canadian law, and that the restrictions envisaged in C-31 be removed.

## **9. Cessation of refugee status without due regard for safeguards with respect to continued need for protection**

57. Bill C-31 amends sections 40(1)(c) and 46.1(d) of IRPA with the effect that a person whose refugee or protected person claim has "ceased" will be inadmissible for permanent residency status or have their permanent residency status revoked and thus, could be subsequently removed from Canada. The section does not differentiate between inland asylum applicants and resettled refugees, and can be applied to both. Individuals who have had their status revoked owing to cessation are barred from appealing to the RAD, and the Bill does not make provisions for an appeal against an exemption decision.
58. In recognition of the need to respect a basic degree of stability for refugees and the internationally shared objective of ensuring durable solutions for refugees, not least reflected in Article 34 of the 1951 Convention, the cessation clauses are rarely invoked. Moreover, where they are invoked per Article 1 C (5) or (6) of the 1951 Convention in light of the "fundamental, stable and durable character of the changes" in the country of origin,<sup>48</sup> refugees are entitled to apply for an exemption to that cessation decision on the grounds of a continuing need for international protection or owing to compelling reasons arising out of past persecution. While this remains available as per existing legislation, the barring of an appeal in the proposed Bill (proposed restrictions on appeal of subsection 110 (2) (e)) against a negative exemption decision would conflict with principles of procedural fairness and due process of law.<sup>49</sup> UNHCR would like to stress the fundamental importance of ensuring appeal safeguards in line with international standards.

59. Exemption procedures can be costly and time-consuming and as a policy

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<sup>48</sup> Executive Committee Conclusion No. 69 (XLIII), available at: <http://www.unhcr.org/refworld/docid/3ae68c431c.html> ; see also UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status*, 7 May 2002, para. 19-22, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>.

<sup>49</sup> UN High Commissioner for Refugees, *Guidelines on Exemption Procedures in Respect of Cessation Declarations*, December 2011, available at: <http://www.unhcr.org/refworld/docid/4eef5c3a2.html>.

consideration, cessation ought to be avoided for refugees having acquired permanent residency or other stable status.<sup>50</sup> Likewise, UNHCR's Executive Committee has stressed that the application of the cessation clauses to long-staying residents may interfere with their acquired rights to family, social or economic life.<sup>51</sup> The automatic ban or withdrawal of permanent residency could have significant consequences on the status and rights of refugees in Canada.

60. The proposed amendments will result in a state of uncertainty for many refugees, including for resettled refugees and thus will undermine the durable nature of the resettlement solution.

**Recommendation No. 19:** In light of the need to ensure basic stability for refugees and to meet the objective of providing durable solutions, UNHCR recommends that cessation should not automatically bar access to or revoke permanent resident status.

**Recommendation No. 20:** UNHCR recommends that adequate appeal procedures against negative exemption decisions be put in place in line with principles of procedural fairness and due process of law.

## 10. Disclosure of information

61. Section 150.1(1)(b) of the proposed amendments to IRPA and s.5.1 of the proposed amendment to the *Citizenship and Immigration Act* (CIA), authorize the Regulations to set out the terms for any matter related to ss.5 and 5.1 of the CIA and s.13 of the *Canada Border Services Agency Act*, which relate to agreements on the collection, use and disclosure of biometric information to foreign governments and/or international organizations.
62. In the context of refugees and asylum-seekers who allege persecution perpetrated by authorities in their country of origin or habitual residence, the new provision may allow the transmission of biometric and other information to countries of origin or habitual residence (either directly or through a third party).
63. Principles governing the right to privacy are applicable to refugees and asylum-seekers, and other foreigners, as they are to nationals. The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution either by the authorities of the country of origin or by others from whom the authorities do not protect and whose

<sup>50</sup> See Executive Committee Conclusion No. 69 (XLIII) and UNHCR, *Note on Suspension of "General Cessation" Declarations in respect of particular persons or groups based on acquired rights to family unity*, December 2011, available at: <http://www.unhcr.org/refworld/docid/4eef5a1b2.html>.

<sup>51</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status*, 7 May 2002, para. 19-22, and ExCom Conclusion No. 69 (XLIII), *Cessation of Status*, 1992, at (e), see also: UN High Commissioner for Refugees, *Guidelines on Exemption Procedures in Respect of Cessation Declarations*, December 2011.

situation can be jeopardized if protection of information is not ensured. It would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final rejection of the asylum claim.<sup>52</sup>

64. UNHCR recommends therefore that changes to the aforementioned Acts (or any subsequently proposed Regulations) should provide for the particular situation of asylum-seekers and refugees and exclude the transmission of information to countries of alleged persecution.

**Recommendation No. 21:** UNHCR recommends that appropriate safeguards be introduced in the text of C-31 to ensure that any personal data including biometric information of refugee claimants gathered during the asylum process are not shared with authorities of their state or country of origin or former habitual residence.

## 11. UNHCR's role

65. Currently, under section 166(e) of the Act, UNHCR is entitled to observe the proceedings before the IRB of those who fall within its mandate. The Executive Committee has noted the value of UNHCR being given a meaningful role in refugee status determination procedures.<sup>53</sup>
66. Under section 110(3) of the proposed amendments, UNHCR has an opportunity to provide written submissions to the RAD where the matter is before a three member panel. When this will be the case may be elaborated in the Regulations or IRB Rules.
67. UNHCR welcomes the opportunity to intervene at the RAD but notes restrictions on its ability to do so. The sitting of a three member panel is at the discretion of the Chairperson where he or she "is of the opinion that a panel of three members should be constituted."<sup>54</sup> In the current system, the IRB notes that "[i]n order to maintain the efficiency of the RPD's process, relatively few cases [are] heard by

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<sup>52</sup> UN High Commissioner for Refugees, *Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005, available at: <http://www.unhcr.org/refworld/docid/42b9190e4.html>.

<sup>53</sup> The Executive Committee has "[n]oted with satisfaction the participation in various forms of UNHCR in procedures for determining refugee status in a large number of countries and recognized the value of UNHCR thus being given a meaningful role in such procedures." Executive Committee Conclusion No. 28 (XXXIII), *Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Determination Procedures*, (1981), at para e, online at: <http://www.unhcr.org/41b041534.html>.

<sup>54</sup> Section 163 of IRPA states that "[m]atters before a Division shall be conducted before a single member unless, except for matters before the Immigration Division, the Chairperson is of the opinion that a panel of three members should be constituted."

three-member panels.”<sup>55</sup> As part of its supervisory responsibility as set out in paragraph 8 of the UNHCR’s Statute read in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol, UNHCR has always exercised its right to intervene in asylum proceedings with care and has intervened in a limited number of cases raising important matters of fact or law. Therefore UNHCR is concerned that it will have a limited opportunity to intervene in specific cases which raise important matters of fact or law, as it is likely that few cases will be heard in panels of three.

**Recommendation No. 22:** UNHCR recommends rewording the amendment to reflect UNHCR’s authority to intervene on all cases, in accordance with the role assigned to it under the 1951 Convention and its Statute.

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<sup>55</sup> Moreover, it was stated that: “[t]he majority of assignments [are] for training purposes.” IRB, “Designation of Three Member Panels,” dated 23 January 2003, online at: <http://www.irb.gc.ca/Eng/brdcom/references/pol/pol/Pages/3mempanel.aspx>.



## **UNHCR Recommendations:**

### **1. Designation of groups of foreign nationals as irregular arrivals**

**Recommendation No. 1:** UNHCR recommends against the differential treatment of refugees and asylum-seekers where it infringes on established rights of refugees.

**Recommendation No. 2:** UNHCR strongly recommends that the Government refrains from introducing a mandatory detention regime for irregular arrivals in relation to refugees and asylum-seekers. At a minimum, UNHCR recommends to afford those detained with the full procedural rights due to them under international law, including timely detention reviews.

**Recommendation No. 3:** UNHCR recommends that alternatives to detention be explored and implemented where appropriate building on the positive best practices already in place and especially in respect of children, pregnant women, the elderly, victims of torture or trauma and persons with physical and/or mental disabilities.

**Recommendation No. 4:** UNHCR recommends that the definition of child in Bill C-31 conforms to the definition under the Convention on the Rights of the Child and that Article 37 of the CRC is fully complied with.

**Recommendation No. 5:** UNHCR recommends that designated foreign nationals, especially those designated for operational reasons, who are recognized as refugees under the 1951 Convention be treated like other recognized refugees and that they not be subject to continuing reporting requirements except where necessary and proportionate in an individual case. All recognized refugees shall benefit from the rights accruing under the Convention and corresponding human rights instruments.

**Recommendation No. 6:** UNHCR recommends that, in the spirit of the 1951 Convention, the five year bar to regularization of status be removed.

**Recommendation No. 7:** UNHCR recommends that the principle of family unity be fully respected and applied consistently throughout the refugee procedure and that recognized refugees under the 1951 Convention be entitled to apply for family reunification in a timely manner.

**Recommendation No. 8:** UNHCR recommends deleting Section 31.1 of Bill C-31 or alternatively, bringing it in line with the wording and meaning of Article 28 of the 1951 Convention.

## **2. Designated country of origin (DCO)**

**Recommendation No. 9:** UNHCR recommends that designation of a country as a DCO be based on objective, reliable and up-to-date information and be decided by a panel of experts. The designation also needs to be challengeable in a court of law and reviewable in light of changing circumstances in the country of origin.

## **3. Ineligibility based on criminality grounds**

**Recommendation No. 10:** UNHCR recommends that the proposed amendments to sections 101 (2) (a) and (b) of IRPA avoid expanding ineligibility grounds further in ways that are not consistent with the 1951 Convention.

## **4. Shortened time limits under the new asylum process**

**Recommendation No. 11:** In setting and enforcing time limits for BOC submissions and hearings, UNHCR recommends that the government balance the need for efficiency with the fairness of the asylum procedure.

**Recommendation No. 12:** In addition to the new time limits, UNHCR urges the Government to allocate appropriate resources towards creating, maintaining or supplementing legal services for asylum-seekers.

## **5. Refugee Appeal Division (RAD)**

**Recommendation No. 13:** UNHCR recommends that all asylum-seekers have access to an appeal on the merits to the RAD.

**Recommendation No. 14:** UNHCR recommends that a stay of removal pending judicial review to the Federal Court be maintained as in the current asylum process.

## **6. Humanitarian and Compassionate Applications (H&Cs)**

**Recommendation No. 15:** UNHCR recommends that the H&C procedure be maintained to address situations where complementary forms of protection are needed

**Recommendation No. 16:** UNHCR recommends the removal of the 5 years bar for Designated Foreign Nationals to file a Humanitarian and Compassionate application from the date of decision or the date of designation.

## **7. Pre-Removal Risk Assessments (PRRAs)**

**Recommendation No. 17:** UNHCR recommends that the PRRA be maintained to address situations where complementary forms of protection are needed.

## **8. Re-opening of a refugee claim**

**Recommendation No. 18:** UNHCR recommends that the jurisdiction of the RPD and the RAD, to reopen claims based on new evidence be affirmed under Canadian law, and that the restrictions envisaged in C-31 be removed.

## **9. Cessation of refugee status without due regard for safeguards with respect to continued need for protection**

**Recommendation No. 19:** In light of the need to ensure basic stability for refugees and to meet the objective of providing durable solutions, UNHCR recommends that cessation should not automatically bar access to or revoke permanent resident status.

**Recommendation No. 20:** UNHCR recommends that adequate appeal procedures against negative exemption decisions be put in place in line with principles of procedural fairness and due process of law.

## **10. Disclosure of information**

**Recommendation No. 21:** UNHCR recommends that appropriate safeguards be introduced in the text of C-31 to ensure that any personal data including biometric information of refugee claimants gathered during the asylum process are not shared with authorities of their state or country of origin or former habitual residence.

## **11. UNHCR's role**

**Recommendation No. 22:** UNHCR recommends rewording the amendment to reflect UNHCR's authority to intervene on all cases, in accordance with the role assigned to it under the 1951 Convention and its Statute.