



Amnesty International

Response to the Report of the
Legislative Advisory Group

March 1998

The Canadian Section of Amnesty International welcomes the opportunity to respond to the Report of the Legislative Advisory Group. We echo the concerns about the limited and hurried nature of these hearings, which we know have been communicated to the Minister by many invitees, as well as by the many groups and individuals who have been left out. We regret that because of the shortness of the time, it has been impossible to develop a fuller response to the recommendations contained in the Report. Furthermore, we are anxious to hear plans for the next steps in the process.

Amnesty International is a worldwide voluntary movement that works to prevent some of the gravest violations by governments of people's fundamental human rights. The main focus of its campaigning is to:

- *free all prisoners of conscience.* These are people detained anywhere for their beliefs or because of their ethnic origin, sex, colour or language - who have not used or advocated violence;
- *ensure fair and prompt trials for political prisoners;*
- *abolish the death penalty, torture and other cruel treatment of prisoners;*
- *end extrajudicial executions and "disappearances".*

Out of this mandate derives a particular, limited role related to refugees. We oppose the forcible return of persons to countries where they face the risk of arbitrary detention, torture, "disappearance" or execution.

Our refugee concerns lead us to monitor and report on the treatment of refugees around the world, and to advocate for the protection of those in need of asylum.

In 1997, we mounted a worldwide campaign to publicize the falling off around the world of commitment to refugee protection and to encourage the international community to respect its human rights obligations towards asylum-seekers.

In addition, Amnesty International researches and provides credible information on human rights situations worldwide. This information is frequently used in refugee status determination.

In Canada, our work on Amnesty International's "refugee mandate" lies in two main areas. We assist refugees whom we feel to be at risk of return to the kind of human rights violations Amnesty International condemns, either by supplying information to be used in the refugee determination process or, where that fails, by intervening with the Immigration Department or at the ministerial level to prevent the individual's removal from Canada to a country where they will be at risk. We also monitor the development of the legislative and regulatory regimes which govern Canada's treatment of asylum-seekers. Where we identify proposals or practices that we believe could result in the return of individuals to arbitrary detention, torture, "disappearance" or execution, we comment and campaign to effect change.

Amnesty International has made submissions to parliamentary Standing Committees on various Bills of concern to us. We presented briefs concerning the introduction of Bills C-55, C-86, and C-44. We have met with previous ministers of Immigration and senior officials of the Immigration Department, as well as administrators and members of the Immigration and Refugee Board. Internationally, Amnesty International is a regular observer at meetings of the Executive Committee of the UNHCR.

Amnesty International believes that there is much to value in Canada's treatment of asylum-seekers. For the most part, the Canadian system of refugee status determination meets international standards for treatment of asylum-seekers. Those who arrive at a Canadian port of entry are offered the opportunity to register an asylum application. The majority are permitted entry into the country, have the opportunity to seek legal counsel, are given adequate time to prepare their claim, and receive a hearing before an independent and trained body of decision-makers. Qualified interpreters are provided, and each asylum claim receives a thorough examination of the case.

However, from an international perspective, there are some important omissions in Canada's process. Most notable are the lack of an adequate appeal mechanism on the merits of a claim, and the political appointment process used in the selection of decision-makers. Consequently Amnesty International welcomed the appointment of the Legislative Advisory Group to review the Immigration Act; we hoped that this would represent an opportunity to address the deficiencies within the refugee determination system.

Amnesty International finds both positive and negative aspects to the recommendations of the Legislative Advisory Group.

We endorse Recommendation 82 which places Canada in a leadership role in generating international protection-oriented responses to refugee crises. We believe that Canada is well-positioned to influence the direction of international responses to the challenges of refugee protection.

Amnesty International also welcomes Recommendation 87 which calls for a Protection Act that would weigh protection claims against criteria consistent not only with Canada's obligations under the 1951 *UN Convention relating to the status of refugees* but also with "other current and developing human rights and humanitarian standards, violation of which would result in the endangerment of life and security of person....." We understand that this broadening of the protection determination would realize Canada's obligations under international law, notably *The UN Convention against Torture, and Other Cruel, Inhuman, Degrading Treatment or Punishment, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The Convention on the*

Rights of the Child, and obligations that arise under humanitarian law.

By ratifying these international conventions, Canada undertook to import them into domestic law. Adopting Recommendation 87 then would have the effect of finally bringing Canada into compliance with its international obligations in the immigration field.

We welcome the emphasis on extending protection overseas to those who are most vulnerable and most in need. The implications of this recommendation may be very broad. From our own standpoint, our rare attempts to gain the assistance of Canadian authorities to transport persons from situations of grave risk to safety in Canada have met with little success. We would welcome changes that allow Amnesty International to turn to Canada with confidence that protection could be quickly and effectively offered.

Much as we are open to the Report's recommendation to expand the application of international instruments of protection and to increase resources devoted to overseas identification of refugees, we are concerned that the Report's authors appear to propose these initiatives in a trade-off for restricting access to refugee protection *in Canada*. Amnesty International must oppose any diminishing of Canada's commitment to offering full protection under the Refugee Convention to *all* persons in Canada who qualify as refugees. No matter how thorough Canada's overseas program may become, it can never serve as a justification for *refoulement*.

There are other welcome aspects of the Report, but they arise in the context of recommendations to alter Canada's system so radically that it would fall short of international human rights and protection standards. We will try to indicate both our concerns and our approval as we discuss the recommendations and our ideas for their improvement.

One caveat: Amnesty International has a limited mandate vis-a-vis refugees: we oppose the forcible return of persons to countries where they may become prisoners of conscience, or be tortured, "disappeared" or executed. We can comment only on issues that fall within our mandate. The fact that we do not comment does not in any way reflect our support or lack of support for other recommendations.

The Legislative Review Report recommends that the Immigration and Refugee Board be replaced by a Protection Agency staffed by a cadre of career civil servants, who would be responsible for making initial decisions and considering appeals. The Protection Agency would operate under much tighter timelines than currently exist.

The Report does not make the case for why the CRDD should be disbanded.

Canada's decision in 1988 to establish an independent body charged with responsibility for deciding refugee claims was highly lauded. Canada's Immigration and Refugee Board, and in particular its Convention Refugee Determination Division, has served as a benchmark against which to measure decision-making bodies and procedures in other states. We would expect that if such a well-respected body is to be abandoned, it would not be without a full and public analysis and debate of the merits, shortcomings and costs both of the CRDD and of the proposed alternative.

Some of the possible rationale for targetting the CRDD can be found elsewhere. The CRDD has known its share of criticism over the past decade. Some have accused it of being too liberal, others of being too strict. Some find evidence of incompetence in the rare but sensationalized cases where decision-makers have failed to identify war criminals or other "undesirables" or in the complex cases where such individuals have been allowed to remain in Canada.

Efficiency and effectiveness are recurrent themes raised by the CRDD's most vocal critics. The CRDD has been called inefficient, too slow and too expensive, with a seemingly unshakeable backlog of cases.

The inference in the Report seems to be that efficiency gains will come with the transition from a quasi-judicial approach to an administrative approach for determining claims. The Report does not explain how an agency made up of career civil servants will be more efficient than an independent agency. In fact, the Department's record of efficiency in decision-making - with risk review (the PDRCC) and humanitarian and compassionate decision-making - do not bear out that assumption.

Efficiency is very much in the interest of genuine refugees, who desperately want to have their claims resolved. Long delays mean uncertainty about protection and keeps claimants separated from loved ones left behind, sometimes in unsafe situations. Efficiency means an end to waiting, and allows refugees to begin rebuilding shattered lives.

However, in a system where the refugee has the burden of making out his claim to protection and where there are complex and sensitive issues to be explored, only quasi-judicial proceedings provide an adequate setting.

Another criticism aimed at the current system is that members of the CRDD are too frequently appointed to their high-paying positions because of their political connections, rather than their demonstrated expertise and relevant experience. Members are replaced so often (again often for political reasons) that expertise is not able to develop and a substantial number of Members are always on a learning curve. This inefficiency could easily be remedied within the current model, if the political will exists.

Canadians expect fairness and impartiality in the many decisions made by government in other areas of law and social policy, from ruling on parking tickets to tax laws. Refugees whose safety or lives may be at stake deserve the same commitment - real and apparent - to fairness and impartiality. This requires a properly constituted independent tribunal.

Amnesty International therefore strongly support initiatives which seek to safeguard fairness but improve efficiency within the refugee determination system. We have identified the elements we believe are necessary for a fair refugee system. We urge the Minister to recognize that these goals can and must be met while still maintaining an independent tribunal.

Many of these points were made in the recent report of the Auditor General, and a report that Professor James Hathaway prepared for the IRB in 1993. Some initiatives have been taken to reform the determination process and improve processing times, but to very little avail.

Amnesty International does not deny that there are valid and important concerns surrounding Canada's refugee determination system. However each concern must be examined in turn, openly and candidly, and in all cases the refugees' need for protection, and Canada's obligation to offer that protection, must be the primary standards for judgment.

Recommendations 84 and 85 recommend the replacement of the IRB with career civil servants. The Report then takes pains to acknowledge concerns and obligations around independence in decision-making. The Report notes the "legal requirement to ensure the independence of the decision makers" and recognizes that there may be a perception that such independence is illusory where an agency is comprised of civil servants as opposed to Order-in-Council appointments. The report suggests that it is possible to design an agency that can be independent, with decision-makers who are free from bias and improper influence. But in the end the authors fail to produce a model that can satisfy these concerns.

When refugees ask for protection, they have the right to trust that the person making the decision will bring an impartial and expert eye to the case. Their very life or freedom may depend on it.

Independent decision-making matters to refugees. The issues are complex. They are also often very politically sensitive. Refugees flee for reasons which are grounded in politics and are profoundly influenced by politics. Their very flight has political consequences in the countries they leave, the countries they pass through, and those where they ultimately seek asylum. Acceptance of certain claims for protection may have serious foreign or domestic policy implications. It is impossible to ignore the fact that refugee determination is inherently and deeply political. It is, however, imperative that politics not be allowed to determine a refugee's fate.

Unfortunately, in most of the world, politics frequently get in the way of refugee protection. Refugees are accepted or turned away, well-received or mistreated, for reasons more closely connected to the political agendas of states than to the merits of the claims. In the United States in the 1980s, politics very much determined the way Central American refugees were received. The U.S. government was unwilling to recognize the claims of El Salvadorans and Guatemalans, fleeing human rights violations committed by military dictatorships receiving U.S. support. Again, in the 1990s Haitians fleeing a brutal military regime were turned away without any determination of their protection rights. This was on the direction of two successive American Presidents who were more prepared to face UNHCR and international condemnation than to manage negative public opinion against the fleeing Haitians.

Even in Canada this political pressure has been obvious. For example, many groups and individuals called for political interference in our refugee determination process when Roma refugees arrived from the Czech Republic in 1997. Some of those calls were grounded in racist stereotypes, others in concern about the implications for our political and economic relationship with the Czech Republic. Fortunately, the Minister was able to remind Canadians of the independence of our refugee determination system and deflect the calls for political interference. The claims for protection were left to be assessed on their merits.

It is of vital importance that decision-makers be insulated from the political process. When they are not, it is all too easy to introduce irrelevant considerations into the determination of protection. Refugees may be returned to face the same abuses from which they fled. For these reasons, Amnesty International has consistently called on governments to entrust the responsibility for deciding claims to independent agencies.

In each state, the body responsible for deciding asylum claims must be independent and specialized, with sole and exclusive responsibility for dealing with such claims. The decision-makers must have expertise in international human rights and refugee law. Their status and tenure should encourage the strongest possible guarantees of their competence, impartiality and independence. Decision-makers should be provided with objective and independent information about the human rights situation in asylum-seekers' countries of origin or any countries to which they might be sent.

Amnesty International is of the view that the recommendation to hand over decision-making about protection to civil servants profoundly compromises Canada's commitment to a fair application of the United Nations conventions regarding refugees. That refugee determination under this model would be influenced by political factors is beyond question. The Report itself suggests that independent determination of claims should not necessarily always be the agency's top priority; protection needs would, for example, be balanced against unspecified "broader national imperatives."

Those broader national imperatives might, for example, encourage the Minister to require the agency to refuse claims from a country with which Canada is seeking to foster closer commercial ties. Or, given that the Report suggests that the federal government should assume the social welfare and health care costs of claimants until they are either landed or removed from Canada, another national imperative might be to keep removals high so as to keep these costs down.

The Report also suggests that the administration of the agency's workload would be amenable to ministerial directives, such as an order to deal with the protection requests of one group over others. The Report concludes that "such directives cannot be seen as affecting the independence of the decision-makers." It is unclear to us how they could be seen in any other way. We are certain that such directives will be perceived as indicating the relative merit of one group of claims over another. They will be a cloud to the open-minded and even-handed assessment of the need for refugee protection.

Refugee determination, if it is to serve reliably its intended role of saving lives and protecting people from harm, must stand alone. It cannot be weighed and balanced against these and other kinds of national interests.

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Recommendation 101 proposes the codification of all requirements and time limits of the inland process. Claimants would be required to report to the protection agency within 3 business days of their arrival in Canada. Claimants then have 10 business days to submit their "claim for protection" form. A "protection interview" into the merits of the claim before a protection officer would be held within 6 weeks of the submission of the claim. Within that period, claimants would be required to provide "full and timely disclosure of identity and other documentation relevant to the protection application". Protection officers would provide claimants with a written positive or negative decision within 6 weeks of the date of the determination interview, that is, not later than twelve weeks after the initial claim.

The rationale for these short timelines is the authors' "conviction that delays in processing asylum claims are a major draw factor for unfounded refugee claims". (page 92) We would expect to find some objective support for the authors' "conviction", since it is upon that premise that the timelines and the onerous penalties for failing to meet those timelines are proposed. However, no statistical or other evidence is cited in the Report to substantiate this statement.

It is the view of Amnesty International that even if the Report's premise were true, the time limitations suggested in the report have the potential to put genuine refugees at risk. A review of decisions made by the IRB. would show that many claimants are found to be refugees even when a claim was made weeks or months after arrival in Canada. The timelines are demonstrably unrealistic and could conceivably achieve the opposite to efficiency as more

appeals are generated to redress poor decisions based on incomplete information and hasty preparation.

The Legislative Review envisages that claimants will be interviewed by a reception officer within hours of arrival in Canada, with an outside time limit of 3 days. As the Report contemplates a referral of claimants to NGOs and counsel "[o]n submission of a completed protection claim", we understand that this interview would take place in the absence of counsel or any other representative.

At the interview with the reception officer, "evidence" would be gathered. This could form the basis for the reception officer to make a written recommendation to a Protection Officer that refugee status be given without the necessity of a protection determination interview. Although there is no mention made of the reception officer making a negative recommendation at this point, clearly the possibility of is left open - just as port of entry notes are currently used to reflect on a claimant's credibility.

In the view of Amnesty International this interview with a reception officer is fraught with potential problems. Many claimants will be extremely tired after long hours of travel. Based on their experiences, many will be initially distrustful of or misinformed about the government officials they will be meeting, including the interpreters provided by the Canadian government. Others will be reluctant to discuss traumatic or difficult episodes at this point. In the experience of our members, a period of time is often required before the claimant develops sufficient trust in the system and loses her fear to speak openly about such incidents.

Although we have no concern about a meeting at which newly-arrived claimants are provided with information and forms, we seriously question the fairness and validity of an interview within hours or days of arrival that in any degree potentially affects the outcome of the refugee's claim.

Procedural time limits cannot be used to defeat substantive rights to claim refugee protection. Amnesty International recommends that after arrival in Canada, refugee claimants be referred to legal counsel, interpreters, and non-governmental organizations. We think it may be reasonable to establish a 10-day guideline for the first interview with the Protection Agency; thereafter a claimant could expect to be questioned, in the context of the reception interview, about the reasons for delay. In any event, the claim would proceed to the next stage.

Once the claimant has the form, she would have 10 business days to submit a protection claim. There is no indication in the report of the content of the claim form. However, the Review does

recommend that the "identification of factual issues from the claim and the conduct of appropriate research to complement factual shortcomings" be done in the 6 week period between the filing of the claim and the protection determination interview.

From this, we conclude that the form will have to contain a narrative of the facts upon which the claim is based, similar to that found in the current Personal Information Form (PIF) used by the CRDD.

In present refugee determinations, the PIF is an extremely important document, required to be submitted in every claim. The PIF establishes the basis for the claim, as well as providing a significant amount of useful background information. In practice, it is also a document frequently used to establish or discredit the claimant's credibility. It is also the basis for deciding whether the claim should be expedited.

Given the importance of the primary document that frames the claim - be it a PIF or the new form recommended by the Review - and given the serious nature of a refugee determination, in Amnesty International's view it is highly desirable that the PIF be prepared with the assistance of competent counsel and, where necessary, experienced interpreters. Without such assistance, it will frequently be difficult for refugee claimants to articulate adequately the basis for their fear of returning home.

It appears possible that the Protection Agency itself would be advising the claimant in the filling out of the form. There appears to us a clear conflict in having the body that is the decision-maker acting in the role of advisor.

It is noteworthy and troubling that the Legislative Review recommends that claimants be given access to NGOs, legal counsel and competent interpreters only *after* submission of their completed protection claims form. We question how the Review's authors think the form can be competently drafted by claimants alone. What of claimants who cannot speak or write English or French? What of those who are illiterate? What of those who will have trouble expressing the nature of their claims due to psychological trauma? What of the fact that, in the first days after their arrival in Canada, the majority of refugee claimants will be occupied with more immediate concerns such as feeding and sheltering themselves and their families? How can they be expected to frame their claim adequately in the complex legal and human rights context?

In Amnesty International's experience, even the 37 days currently provided claimants to complete their PIFs is sometimes inadequate to deal with the practicalities of life in a new country and to adequately draw out the issues around the need for protection. Determining what happened to individuals in their countries, and placing those experiences within the context of a refugee claim is frequently a slow and laborious process. This is particularly so when the

claimant comes from a country about which little is known in Canada.

To be blunt, a protection claim form, filled out without the assistance of counsel or qualified interpreters, due to be filed within thirteen business days of a person's arrival in Canada, cannot realistically form the basis upon which a serious refugee determination is to be conducted. In fact, one expects quite the opposite to be the case. Forms completed in such circumstances will in all likelihood be woefully inadequate as *the* major tool for determining protection needs, and as such will significantly damage the credibility and effectiveness of the entire refugee determination process.

Amnesty International recommends that access to NGOs, legal counsel and qualified interpreters be provided to refugee claimants *before* submission of the protection claim form, and that adequate time be given to prepare the form. At the very least the current standard of 37 days should be maintained. We are aware that this period often proves inadequate, and that much energy is expended dealing with requests for extensions. Here is an inefficiency that can be redressed. A realistic time frame can be chosen - two months perhaps - and then enforced.

Recommendation 105 would require that the interview for determining refugee claims be conducted within 6 weeks of the submission of the protection claim form. In the six week period, claimants are expected to obtain counsel, submit all relevant documentation and prepare for the interview. Again, in the view of Amnesty International, the time frame contemplated by the Review's authors is terribly unrealistic.

There is an unspoken assumption in the report that legal counsel will be readily available to take on the cases of refugee claimants. In our experience, particularly in the major urban areas where most claimants are to be found, it can often take weeks to arrange even an initial interview with a lawyer. There are many valid causes for this, including the challenges of arranging financing or obtaining legal aid and the limited numbers of lawyers with the confidence or languages of certain ethnic communities. Securing competent interpreters, without whom the preparation process cannot proceed, can also be time consuming.

In our experience of the current process for hearing and deciding claims in Canada, the role of legal counsel is critical. Determination of claims involves the application of several much-litigated defined terms - "persecution", "crimes against humanity", "internal flight alternative" being just three examples. Each of these has been the subject of much judicial interpretation in this country. We see nothing in the Report's recommendations to suggest that this need to interpret will not continue.

Refugee determinations affect a person's fundamental rights, including in some cases the right to life. In such cases, representation by competent counsel is essential. The role of lawyers in the determination process should, if anything, be facilitated and supported. The Report's recommended short time lines would render access to adequate legal advice and assistance virtually impossible, and thus weaken a refugee's ability to make known her need for protection.

Another troubling feature of the proposed model is the failure to build in time for the claimant, once she has learned the case she must meet, to put together the necessary evidence. There seems to be the expectation that she will be in a position to anticipate and/or respond to all the issues instantaneously. This is a serious flaw in the calculation of time limits.

The Report assumes that securing documents relevant to the claim is a task which can be completed expeditiously. In our experience, the opposite is often true. For example, the process of communicating what is required in Canada can be very slow because of inadequate mail or phone service in the home country. Locating or acquiring personal documents in the home country can be very difficult if the family left behind has been forced to move or if the government is not functioning to produce such documents. It can also be risky. Sending personal documents can be extremely slow where the postal service is undeveloped.

With respect to country information, we can state as a fact that obtaining up-to-date, relevant documentation can take a long time. Human rights monitors are only as effective as they are credible, so refugees and their advocates as well as the arbiters of refugee claims must understand that each request must be carefully dealt with. A request for information may be answered by looking in the organization's public documents. More frequently, such requests require considerable research, and checking and double checking with sources. Answers will not necessarily be available according to Canada's timelines.

Amnesty International is often a source of such information. It sometimes can take months to determine whether our International Secretariat can secure credible and trustworthy information central to a person's claim. This may be because reliable information proves hard or impossible to locate. Or it may be because of the volume of such requests from across the world, and the limited resources we have to answer them. Our resources after all rely entirely on donations from individuals.

Amnesty International recommends that there be a more realistic time period between the submission of the protection claim form and the refugee determination interview. In our view, a period of three months would be an appropriate guideline.

The Legislative Review recommends that decisions in refugee claims be made within six weeks of the Protection Officer's interview.

Although Amnesty International believes that such decisions should be rendered as soon as possible, we wonder what is proposed as a consequence for failure to meet that time limit? In any event, we question the wisdom of imposing any time limit. The underlying assumption is that refugee determinations are relatively easy to make. Evidence is overwhelming that this is a false assumption.

Very often it is extremely difficult to determine if a claimant is truly at risk. The claimant may come from a country about which little is known and scant information is available. The legal questions raised by a claim may well be complex. Since such decisions affect fundamental rights, by their very nature they often require considerable time for deliberation before they can be properly resolved.

There are practical realities missed altogether by the recommended sequence for registering and processing a claim, and by the proposed time limits.

We anticipate that in many cases, further information will be required after the interview with the protection officer because issues will arise at that time. Fairness requires any additional information obtained after the interview to be disclosed to the claimant, and an opportunity to be given to respond to the information. This will of course extend the time necessary to arrive at a decision.

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Amnesty International believes that access to an appeal of rejected claims is one of the minimum standards of fair refugee determination. The lack of an appeal on the merits has always been Amnesty International's most severe criticism of the current system in Canada.

We agree with the Report's comments about the inadequacy of the judicial review process to correct mistakes. We therefore welcome the recommendation to provide for an appeal. Nevertheless we note that some aspects of the proposed appeal are fundamentally flawed.

As with the first-level determination, appellate decision-makers are direct employees of Protection Agency and of the Minister. This raises once again our concerns about independence in decision-making. The fact that an appeal section is located within the same agency as the decision-makers of first instance is not of itself of concern to Amnesty International, provided both levels have sufficient independence from political interference and from each other.

The Report recommends deadlines of 15 days to make the appeal and 15 days to submit the evidence. Amnesty International believes this time frame is much too short to allow claimants to organize themselves and instruct their advocates. It doesn't contemplate the analysis of evidence, preparation of tapes and transcripts of the interview, gathering of supporting documents and new evidence.

The explanation preceding Recommendation 108 suggests that new evidence be considered only if it was not available at the interview. This notion of "availability" could be read very restrictively. We are worried that it could be interpreted to mean that we could not advance Amnesty International information that was not included in the interview - either because the claimant had been inadequately represented or because it was only after the decision was rendered that the need for supporting evidence became apparent.

We are concerned that a paper review alone is not sufficient to address cases where credibility was the main issue (as is often the case). According to the report, the Appeal Officer would only call for a hearing to judge the credibility of new evidence. Amnesty International believes that a hearing must also be held when the Protection Officer's judgment of the credibility of the claimant needs to be evaluated.

In Amnesty International's view the appeal should normally be of a judicial nature. The administrative nature of the proposed appeal, in which the role of counsel is reduced to a minimum and a hearing is replaced with an interview, is a concern. A meaningful appeal must offer the claimant full opportunity to have all arguments in her favour heard. This entails allowing counsel to present the case.

The narrow timelines (6 weeks to make a decision) could lead to appeals officers being under pressure to make quick decisions without properly evaluating the arguments or evidence. Amnesty International believes that a time limit on deciding appeals is inappropriate.

Amnesty International welcomes the recommendation to include in Canada's protection legislation "criteria consistent with Canada's obligations under the 1951 UN Convention and other current and developing human rights and humanitarian standards, violation of which would result in the endangerment of life and security of person....."

However, taken as a whole, the Report's recommendations are more concerned with limiting access to protection than to providing it. Amnesty International is concerned that much of the ground gained by adoption of Recommendation 87 may be lost in the recommendations regarding ineligibility, inadmissibility and cessation.

Under Canada's current regime, barring access to the refugee determination process has meant there is no Canadian forum in which to argue against *refoulement* for persons who, for one reason or another, fall outside the protection of the 1951 *UN Convention relating to the status of refugees* but who have other internationally recognized rights to protection at stake.

Article 3 (1) of the 1984 *Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment* extends protection against *refoulement* to all persons who would be returned to a country where they would be at risk of torture. The principle of *non-refoulement* is enshrined as well in other international human rights agreements: Article 3 of the *UN Declaration of Territorial Asylum*, Article 8 of the *UN Declaration on the Protection of all person from Enforced Disappearance*, and Principle no. 5 of the *UN principles on the effective prevention and investigation of extra legal, arbitrary and summary executions*. Only by going to international fora have refugee claimants been able to claim the protection of these conventions. Applications to various UN bodies with responsibility for overseeing these conventions is difficult, costly, time-consuming and very uncertain.

We hoped that the Legislative Review would facilitate the clarification of this difficult area of law and practice. We understand that the authors intend to import broader criteria into the determination of protection needs. They have however stopped short of wrestling with the thorny problem of the protection rights of people who fall into the "inadmissible" classes.

VI

The Report's recommendations reduce the number of reasons a claim for protection could be ineligible to be referred to the refugee determination process. Amnesty International believes all claims for asylum raise issues that warrant referral to the body responsible for determining protection needs.

Under Recommendation 97, persons who return to Canada within a year of being found not to be in need of protection, or who "come from" a safe third country would not have their claim referred to the Protection Agency. A "status determination officer" would have the power to turn such persons away from Canada, presumably in a summary way almost immediately after the person crossed the border.

While we understand the desire to deal expeditiously with frivolous claims for protection, we cannot endorse a system that is not open to the possibly exceptional case where the need for protection has changed in a relatively short time. Amnesty International knows very well that country conditions can change radically overnight. Current experience shows that a significant number of persons making a second claim are found to be in need of protection. We suspect that to a large degree this may be a reflection on the present inadequate appeal system. In any

event, the proper forum to weigh such questions of fact and law would be the hearing to determine protection needs - the protection interview in the proposed model. There, the second-time claimant could be asked to answer satisfactorily a set of threshold questions - a similar model to the judicial test for admission of new evidence - before the claim could be reconsidered. Given the thrust toward shorter processing time-frames, it cannot be supposed that there will be much cost to leaving this door open.

Likewise, Amnesty International does not believe that summary findings around safe third country are possible. Elsewhere in this brief we address the problems inherent in returning people to "safe" countries to have their refugee claims heard. Here we wish to emphasize that matching up a claimant with a class of claimants and then with a country called *safe for that class* implies a substantial exercise of judgment. "Classes" cannot be drawn in an air-tight way, nor do individuals always fit four-square within the characteristics of their class. Moreover, readmission agreements typically contain exceptions for person who meet definitions of being "in transit" only in the third country; there are even exceptions to the exceptions.

In all, there are important and sometimes complex questions to be determined before entry can be denied on the two grounds. There must be a residual discretion to find that, despite expectations, the need for protection is genuine. The principle of *non-refoulement* requires Canada to provide a procedure that allows for the exercise of this discretion.

Amnesty International believes that all eligibility provisions should be abandoned, and all persons claiming protection in Canada should be given access to the refugee determination process.

VI

The 1951 Refugee Convention allows for exclusion from refugee status of certain categories of people. It further allows for *refoulement* of persons found to be refugees but "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." These provisions draws a considerably narrower restriction than that applied in Canada.

Canada currently excludes from protection against *refoulement* many classes of persons under section 19 (1) and (2) of the Immigration Act. A senior immigration officer or an adjudicator makes a determination that effectively bars the way to the CRDD, the forum where claims to refugee protection can be made.

Amnesty International was very keen to know what process the Report would recommend for dealing with a refugee claimant who appears to be a person described in s.19(1), sub-

paragraphs (c) to (f). “Ineligibility” in the current sense of ‘barred from proceeding to the refugee determination tribunal’ is recommended to cover only the two categories noted above - reapplication within one year or passage through a safe third country. All the other section 46.01 eligibility concerns, including danger to the public cases and, presumably, the s.19(1) restrictions found in section 46.01(e) issues are referred to the Protection Agency under Recommendation 97.

This is an important point, we believe. It answers a long-time concern of Amnesty International. As the Protection Agency is responsible both for considering the now-inaccurately named “eligibility criteria” *and* the full range of human rights instruments, the Protection Agency will necessarily be engaged in considering both protection needs and the necessity to respond to issues of criminality.

Amnesty International heartily welcomes this development. Equally heartily, we regret the lack of guidance to the protection decision-makers as to how to find the balance between these important considerations.

Amnesty International is acutely aware of the delicacy of this balance. As a human rights organization we are often obliged to defend the fundamental human rights of persons whose behaviour we condemn. We campaign actively against impunity for human rights offenders, while at the same time upholding the fundamental human right of those same offenders not to be subjected to torture and worse treatment. We would campaign actively against a system that would offer freedom in Canada to people who are guilty of serious wrong-doing in other countries. However, deporting persons to countries where they face torture, enforced disappearance or extrajudicial execution is not the answer.

Amnesty International makes two recommendations in this area. First, we believe that decision-makers should be explicitly directed to apply a test of proportionality as they consider criminality factors (inadmissibility criteria) and protection needs. Second, decision-makers should not be obliged to choose between freeing or refouling persons whose acts Canada condemns.

VI b)

When a refugee claimant is proven to be guilty of serious crimes, Amnesty International calls for a balancing of the seriousness of the crimes against the level of persecution likely to be faced by the offender in the country of origin. If persecution feared upon return is so severe as to endanger the offender's life or security of the person, the fundamental principle of *non-refoulement* must be upheld. In the case where return carries with it a risk that is specifically addressed in an international instrument (such as in the UN Convention against torture) the issue of proportionality has already been decided: return is prohibited.

To apply the principle of proportionality, the decision-maker and the refugee claimant must have all the necessary information before them, including all information about the alleged offending behaviour. To this end Amnesty International believes it is imperative that the recommended code for procedural fairness (R128) apply to the adjudication of any protection case where there is an allegation of serious criminal activity.

The current procedure for reviewing security certificates issued by the Immigration Minister is a compelling example of the inadequacy and unfairness of taking a strictly technical approach to cases raising a complex mix of rights and obligations issues.

Proportionality can't be applied unless the seriousness of the offense is known. The current criminality provisions do not allow for an adequate assessment of important considerations. For example, a person can be found inadmissible on the basis of membership in an impugned organization without regard to the individual's position in the impugned organization, the extent to which the membership was voluntarily, or the measure of personal involvement in the activity which disqualifies the organization.

This can have results that offend logic and the UN Convention. For example, section 19(1)(f)(iii) denies refugee protection in any case when "there exists reasonable grounds to believe that individuals are or were members of organizations that there are reasonable grounds to believe are or were engaged in espionage, subversion or terrorism." Because the "reasonable grounds" standard applies to the organization as well as to the individual, and because past activity is as guilty as current activity, these provisions can have the effect of denying full protection to persons who were involved in organizations that have changed their activities from legitimate to subversive well after the claimant had abandoned the organization.

VI b)

Countries must give effect to prohibitions against *refoulement* by not returning anyone, even serious criminals, to countries where they face torture, enforced "disappearance" or execution. However, abiding by *non-refoulement* does not mean countries should allow human rights abusers to go free within Canadian society.

Amnesty International opposes the use of refugee protection regimes to shelter human rights abusers. We campaign actively against impunity for human rights offenders, calling upon all countries to bring such people to fair, speedy justice. Some countries have an effective regime to prosecute human rights abusers for offenses committed outside their borders. Canada currently has no such regime; establishing one would answer the troubling question of what to do with persons in our midst who may not be sent home, but who ought not to escape justice.

A further alternative in some cases would be an international criminal court. Amnesty International and others have campaigned for the establishment of an International Criminal Court; we recommend to the Minister's attention to our publications on the subject.

Under Recommendation 122 persons entering Canada with the intention to claim refugee status would normally be given provisional status until their claim can be decided. Failure to comply with all conditions for provisional status would lead to arrest, detention and removal. It appears that a person who refuses to cooperate foregoes any right to consideration of their need for protection.

Amnesty International is troubled by the possible consequences of a refugee claimant's failure to meet the requirement to apply immediately for passport. Asylum-seekers may have valid reason to fear signing such an application. Filing a passport application with the embassy of their home government will immediately make that state aware the claimant has left. At a minimum they may not have complied with exit control laws. Many home governments will understand the application is being sent on behalf of a person who has filed a claim for refugee status; needless to say those countries will not be pleased. Refugees may fear reprisals against their families and contacts left behind, many with good reason. In any event, it is entirely predictable that this will tremendously increase the trauma of flight and arrival in Canada for many, many asylum-seekers. While we understand the reasons for wanting such applications signed, surely this task can be put off to a later stage in the process with equal effectiveness. This is a cruel welcome.

In any event, Amnesty International seeks clarification that the passport or travel document application would remain on file and not be submitted to the home country unless and until the claim has been rejected, and that this will be explained to every refugee claimant as they are asked to sign the passport application. Of course there must be a guarantee that compliance on the part of a claimant with the requirement to sign an application for documentation from her home country will not *in any way* be raised as an issue in assessing the well-foundedness of the claim.

The UNHCR Guidelines on Detention of Asylum Seekers indicates that "[I]n view of the hardship which it involves, detention should normally be avoided"; "...as a general rule, asylum seekers should not be detained". Where detention occurs, "it should be proportional to the ends to be achieved and for a minimal period". Furthermore, detained asylum seekers should have the "right to challenge the lawfulness of the deprivation of liberty, promptly before a competent, independent and impartial authority."

Amnesty International finds the Report disturbingly vague about detention. Our concerns fall into two categories: the criteria by which a person can be detained and the physical conditions of detention itself.

We are disappointed that the Report makes no specific recommendation with respect to detention conditions. The section of the Report addressing the loss of provisional status suggests that there must be a detention environment which provides access to telephones, counsel and non-governmental organizations. (p106) There is however no specific Recommendation to bring the physical conditions of detention to a codified standard. Consequently there is no recommendation to end the accommo-ation of asylum-seekers along side criminals. Likewise there is no recognition of the current difficulties of getting access to counsel, or of concerned non-governmental organizations getting access to detention facilities. The need for attention to the physical conditions of detention was dramatically underscored by the death in detention of Michael Akhimen in 1996.

With respect to the imposition of detention, we agree with the report's suggestion that transparent and codified standards are required. However, the report fails to suggest the standard.

We believe that the refugee and immigration regime recommended by the Report could increase the incidence of detention. Whenever a person has no specific status under either the Protection Act or the Citizenship and Immigration Act, they are to be imprisoned. Detention has become the new, mandatory default status. It will follow a failure to meet any one of a number of time limits. It will follow on refusal to sign an application for a passport or travel document immediately upon arrival in Canada. It will follow any loss of provisional status, which can happen for numerous reasons. This is broader than internationally accepted guidelines on detention.

Under international law the burden remains with the state to explain why detention is necessary, and to ensure that it not continue longer than is strictly necessary. We recommend that, along with the recommended annual report to Parliament (R154) including data on exclusion, removal and deportation orders issued in the relevant year, the Minister be required to file data on the cause and frequency of detention of asylum-seekers, including the length of time such persons are held, where they are held, their nationalities, the reasons for detention, as well as a gender and age breakdown.

Recommendation 155 refers detention and removal concerns to the House of Commons Standing Committee on Citizenship and Immigration. We have notified the Standing Committee that we would like to address these issues. We understand that hearings are going on presently. To date we have had no response to our letter asking to address the Standing Committee.

Amnesty International supports the principle of ensuring that persons about to be removed have access to an assessment of risk involved in their removal. It is appropriate that the assessment be done by the body specializing in protection.

However, we find that the proposed standard is unclear.

The risk evaluation should not be focused exclusively on change of circumstances since the claimant's arrival or status determination, but should rather be forward looking and focused on risks if returned.

The assessment must weigh not only "risk to life", but also risk of torture, arbitrary detention as a prisoner of conscience, and enforced disappearance. In the event that any such risk exists, removal must not proceed. Amnesty International believes that the onus is on the state wishing to return an asylum-seeker to demonstrate that the removal can be effected safely.

It is only sensible to assess not just whether there is an area of the country where the person can live without risk, but also whether she can pass in safety through the regions she must transit in order to gain access to the areas safe for her. This has long been a very troubling blind spot in the removals plans made by Canadian officials.

The 48 hours timeline for submitting information is entirely unrealistic. Amnesty International information is an important source for such evaluations. We cannot possibly provide such information routinely on a few days' notice.

The risk review must extend to persons who are excluded from protection under the Refugee Convention because they are guilty of war crimes, crimes against humanity and other serious crimes. These persons are not excluded from the protection of the Convention Against Torture or the UN Declaration on the Protection of All Persons from Enforced Disappearance.

Amnesty International welcomes the goal of the creation of a system that will ensure that those claiming Canada's protection will receive that protection if they indeed need it.

Nevertheless, Amnesty International cannot support the proposed restrictions on the ministerial discretion. In any parliamentary system the minister responsible for refugee determination is ultimately responsible for ensuring that the state complies with all international conventions it has

ratified and with all relevant international law. This implies the ability to review and correct decisions, whether departmental or judicial.

Amnesty International has ample experience intervening successfully at the ministerial level in cases where the refugee determination system in Canada failed to protect persons in need of protection. In these cases, the minister's intervention was the single means left to prevent *refoulement* of persons in genuine need of protection. There will always be this need!

The international community long ago decided to protect the fundamental human rights of persons whose relationship with their own state has broken down. Yet, increasingly, those countries most able to provide protection regularly host the fewest refugees. Wealthy states are actively taking measures - ostensibly aimed at the efficient determination of responsibility for "processing" and protecting refugees - to keep refugees from their borders. By obstructing refugees from reaching their territory, wealthy states deflect enormous logistical and economic strain to countries with relatively few resources.

Many restrictive measures are designed more with an eye to the convenience and diplomatic relations of host countries than to the necessity of providing a reliable, secure system to identify persons in need of protection. Coupled with increasingly restrictive interpretations of protection rights, they put refugees at risk of *refoulement*.

While the desire for efficient management of claims for refugee protection is understandable, Amnesty International insists that every time a country is asked for protection, it is accountable under international law to ensure that the individual needs of the asylum-seeker are assessed and that *refoulement* does not take place. In other words, if Canada sends a refugee back to a "safe third country" which proves not to be safe, Canada has failed in its international obligations.

By negotiating readmission agreements and establishing the concept of the "safe third country", states mean to excuse themselves from considering the asylum claims of refugees who have passed through another country on their way to the state in which they claim asylum. Refugees are returned to the country they passed through, with the expectation that they will have their claim for protection determined there. However, experience shows that frequently little or no attention is paid by the returning country to whether the refugee will in fact get the protection she needs in the readmitting country.

International refugee law does not require that a refugee seek asylum in the first country whose territory she reaches. It is the country where a refugee applies for asylum which is obliged to

consider the application substantively and to ensure that the refugee is not directly or indirectly returned to persecution. The only recognized exception to this principle is when the applicant has already found effective protection in another country, known as the *first country of asylum*. Simply having been present in a country does not make it a first country of asylum.

While “safe third country” agreements may on paper require that the refugee protection practices of the third country meet international standards, both identifying that standard and controlling actual practice under such agreements have proved unmanageable. Many asylum-seekers have been subject to *refoulement* from third countries, and even from “fourth” or “fifth” countries. Chain deportation of asylum-seekers to countries where they may be persecuted is the result of states avoiding their responsibilities. The result is that there is no guarantee that refugees seeking asylum in the EU will have access to a fair and satisfactory asylum procedure. They may be returned to a third country outside the EU without any guarantee that they will be admitted, will have access to a fair and satisfactory asylum procedure or will be protected against *refoulement*.

Most “safe third country” practices violate the obligations each state has individually undertaken toward refugees. A state can only be released from its obligation to consider substantively an asylum application if that responsibility is explicitly assumed by another country which is indeed safe.

The Legislative Review Report makes a wholly unsupported assertion on the feeblest of arguments that Canada must join the club and make readmission agreements and lists of safe third countries. The authors ignore the lack of legal basis for this trend, i.e. the established right of an asylum-seeker to choose where to claim asylum.

Fleshing out Recommendation 95, the Report proposes that the minister be enabled to prescribe safe third countries in relation to classes of persons. The minister would table before the Standing Committee a statement indicating that a specified country

- complies with “relevant international law” on the protection of asylum-seekers,
- is safe for described classes of persons,
- is willing to allow any person in a described class to enter the country and remain there to have his/her refugee claim decided and, if found to be in need of refugee protection, to remain there pending settlement, and
- is party to an agreement with Canada regarding responsibility for examining refugee claims.

In Amnesty International’s view, beyond the lack of a legal basis for this initiative, the proposed scheme fails in at least one critical way: it is unacceptably vague about the standards countries must meet in order to be prescribed as safe. The requirement that the state comply with “relevant international law” on the protection of persons seeking asylum seems to set a standard of measure. However, international refugee law is nearly silent on two very important aspects of protection - the nature of the procedures to be used in determining refugee status, and the

substantive interpretation of the refugee definition. These are the fundamental determinants of whether refugees received the protection they require. With little guidance internationally, it is effectively left to individual states to determine what procedures they will use and what position they will take on a number of crucial interpretative points. Consequently the proposed requirement that international law be observed does little to ensure that genuine refugees seeking protection in a so-called safe country will receive it if Canada turns them away.

The Report proposes that “safe third country” regulations and a statement on countries meeting the standard be tabled before the Standing Committee and Parliament. This cannot substitute for the establishment of precise standards against which proposed third countries can be measured.

AI has developed and campaigned internationally on a set of minimum requirements for a fair and satisfactory asylum procedure which must exist before any country can be considered a “safe third country”. They are included in our published report *Fundamental standards for the protection of refugees* AI INDEX: POL 33/03/93, found at Appendix B.

Refugee protection is a sacred trust, a moral imperative and a legal obligation. We believe that most Canadians remain committed to keeping our doors open to individuals who face serious human rights violations in their home countries, and will support initiatives designed to strengthen our ability to protect refugees.

Refugee determination, however, is complex, sensitive and imperfect. It is forward looking, fraught with political implications, and takes place in a context where cultural, gender, trauma and linguistic barriers make decision-making a considerable challenge. There are no easy answers to the question - how best to identify genuine refugees. The report suggests that it can be an easy and rational process, carried out quickly and with very few delays. Our experience, however, is that this is very often not the case and that good decision-making in the refugee context requires time, care, sensitivity and attention.

Obviously, though, the opportunity to improve our approach to protecting refugees is a valuable one. We have attempted to outline our position regarding some of the proposals that have been made in that regard.

We have underscored our support for some of the recommendations, notably the suggestion that decision-makers be empowered to consider the full range of Canada’s international human rights obligations. We have welcomed the suggestion that Canada do more to protect refugees proactively, overseas, but expressed concern that this cannot justify refusing to protect refugees who do make it to our border.

We have, however, highlighted serious concerns we have on a number of fronts. We do not support the recommendation that decision-making be entrusted to an agency comprised of career civil servants. We believe that would compromise the independence of the decision-making body, which must be a cornerstone to Canada's system. We have also indicated that we believe the application and processing timelines proposed in the report to be unfair and unworkable. We believe that application deadlines are never justified, and have suggested that processing timelines should be expanded and understood as benchmarks rather than deadlines. We have tried to make it clear that we do support efforts to make the process more efficient, and that we believe there are a number of steps that can be taken which do that without sacrificing fairness.

We have welcomed the proposals for an appeal on the merits of refused claims and of a risk-assessment which takes place close to an individual's removal date. We have expressed some concerns, however, about the fact that the appeal body would not be independent and the risk-assessment would be limited only to change of circumstances concerns.

We have expressed serious concern regarding the report's proposals regarding access and eligibility, including safe third country provisions and excluding criminals and other "undesirables" from the protection stream. We are also concerned about the implications of some of the proposals regarding detention, including the possibility that refugee claimants would be detained if they refuse to sign passport applications.

We have, finally, highlighted our view that ministerial discretion is an important protection tool. It is a power that we have relied on many times to save lives and safeguard the freedom of individuals facing removal to dangerous situations. We do not accept the report's recommendation that the minister's power to intervene in this way be dramatically curtailed.

We look forward to continuing to participate in the process of refining Canada's approach to refugee determination.