SUBMISSIONS

Of the Immigration and Legal Committee to the Standing Committee on Citizenship and Immigration, Regarding Bill C-11, *An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act*[1]

The Immigration and Legal Committee

The Immigration Legal Committee (ILC) is an autonomous working group of the Law Union of Ontario. Founded in 2007, the ILC is composed of law students, legal workers and lawyers. We provide support to grassroots refugee and migrant justice campaigns, and information and resources to organizations serving refugee and migrant communities in Toronto. In addition, the ILC reviews changes to refugee law, and engages in media work on matters affecting refugee and migrant communities.

Endorsement of Other Submissions

The ILC has reviewed Bill C-11 in detail. We endorse the submissions of other Toronto-based refugee law groups such as the Refugee Lawyers' Association and the Canadian Council for Refugees regarding the bill's detrimental changes to the refugee application process. These include changes to the Humanitarian and Compassionate procedure [H&C], the Pre-Removal Risk Assessment procedure [PRAA], and the bill's impact on the ability of refugee claimants to effectively access counsel in the timeframes proposed by Minister of Citizenship and Immigration Jason Kenney.

Refugee Law is Administrative in Nature, Not Criminal

Bill C-11 will have long-ranging effects on refugee and migrant communities in Canada, and on Canadian society as a whole. Such effects have been insufficiently considered by media and during refugee-law discussions about the bill. Refugee law is part of immigration law, and immigration law falls under administrative law. The ILC feels that by setting into motion a range of effects that are beyond the traditional scope of administrative law, Bill C-11 fundamentally misunderstands the nature of administrative law.

While criminal law is fundamentally *penal* and seeks to punish people for wrongdoing, administrative law is fundamentally *regulatory*. Canadian administrative law regulates "the organization and operation of administrative agencies... and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public."[2] It is "based on the principle that government action, whatever form it takes, must (strictly speaking) be legal, and that citizens who are affected by unlawful acts of government officials must have effective remedies if the Canadian system of public administration is to be accepted and maintained."[3]

Refugee law, as a form of administrative law, must ensure the integrity of government action. This entails first, that Canadian refugee law must adhere to domestic

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[1] Bill C-11, *An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act*, 3rd Sess., 40th Parl., 2010.
[2] *Black's Law Dictionary*, *s.v.* "administrative law."
[3] *The Canadian Encyclopedia*, *s.v.* "administrative law," online: <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0000043>.

precedents, and second, that Canadian refugee law must adhere to international and customary legal standards pertaining to refugees and migrants.

Creating a Domestic Culture of Enforcement

The *Immigration and Refugee Protection Act* is an administrative-law statute. Disrupting its harmonies in one area will cause reverberating discordant effects in other areas. Because it is not intended to be penal in nature, it has "lower standards of proof and broader liability rules" than criminal law.[4] To treat immigration law as if it were criminal in nature is to push against its purpose and content and distort the meticulous character of its administrative processes, as worked out in the courts. With Bill C-11, refugee law imports the enforcement model of criminal law into the immigration law context. Because administrative law largely lacks the human-rights safeguards developed by criminal law, an enforcement model is inappropriate to the refugee-law context.

The Supreme Court of Canada (SCC) recognized non-citizens as a discrete and insular minority especially vulnerable to discrimination in its first equality rights case.[5] Yet, as Kent Roach notes, the lower standards of proof and broader liability rules in immigration law "have not been evaluated by either the public or the courts in light of" this SCC holding.[6] The controversy surrounding Bill C-11 presents an opportunity to consider how Canada was already acting contrary to its domestic legal obligations before this bill was introduced.

Yet instead of remedying these problems, Bill C-11 worsens them. A non-status person found during an illegal search by the Canada Border Services Agency [CBSA] cannot be analogized to a smoking gun. Unlike a gun, a non-status person will not be protected by criminal-law rules of evidence. While a criminal trial cannot proceed without correctly gathered evidence, a person picked up during an illegal raid will, notwithstanding the illegality of the search, be subject to deportation.

Nor can immigration law as a whole be analogized to the criminal law as a whole. If enforcement procedures developed in the criminal law context are imported into immigration law with Bill C-11, the failure of the bill to simultaneously import criminal law safeguards for human rights creates a grievous asymmetry. This asymmetry violates Canada's domestic obligation to recognize non-citizens as a discrete and insular minority particularly vulnerable to discrimination. In delaying access to H&C and PRRA procedures to failed refugee claimants, *the long-range impact of Bill C-11 will be to give increased justification to enforcement procedures*—and simultaneously to justify increasingly violent forms of enforcement such as the large-scale raids and random sweeps we have begun to witness. The bill contains no provision to ensure accountability by CBSA officers, whose only mandate becomes to remove failed claimants as quickly as possible and within 12 months of a negative refugee decision. Because no amount of legislation will stop people from migrating when they have to, the long-range effect of Bill C-11 will be to create a larger underclass of vulnerable, non-status people in Canada.

The ILC feels that the operating principle of the bill is one of suspicion of refugees and hostility to the very act of making a claim. Far from creating "balanced

[4] Kent Roach, "Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain" 27:5 *Cardozo Law Review* 2151 at 2187 [Roach].
[5] *Andrews v. Law Soc'y of B.C.*, [1989] 1 S.C.R. 149.
[6] Roach, *supra* note 4 at 2187.

refugee reform," in gutting the H&C and PRRA procedures the bill is part and parcel of a systematic "immigration exclusion" program, and will have the long-term effect of increasing animosity to refugee and migrant communities within the Canadian media and public, and encouraging racial profiling by CBSA officers.

As a form of administrative law, refugee law must operate in accordance with Canada's international obligations and not be animated by domestic hostility to refugees. Such a misunderstanding of refugee law is particularly alarming in the administrative context, in which agencies are empowered to develop their own guidelines. Intended to simplify the law and implement operating procedures that comply with it, these guidelines may be the only point of contact between CBSA officers and Canadian or international refugee law. If Bill C-11 as the law on which these procedures are based makes an ideological error (as we believe it does), then the guidelines may amplify this error and apply its effects to the lived experience of migrant communities through increased enforcement. A culture of suspicion and racialization will ensue.

Failure of Bill C-11 to Adhere to Canada's International-Law Commitments

Immigration in Canada operates on a presumption that non-citizens are inadmissible to the country and that immigration procedures provide exceptions to this general rule.[7] Yet the legality of the state's ability to deport non-citizens is limited; deportation must accord with international law.[8]

Bill C-11 railroads over this limitation, privileging political expediency over refugee protection. The bill invites the perception of refugee applicants as "undeserving freeloaders" on Canadian social services, and the emphasis on political expediency over protection is not in conformity with Canada's international legal obligations. The effect of the bill is to further reduce Canada's international commitments to mere lip service. A 2001 Report of the Standing Senate Committee on Human Rights identified such lip service as problematic: the "gap... between our willingness to participate in human rights instruments at the international level and our commitment to ensuring that the obligations contained in these instruments are fully effective" is a roadblock against the "deeply felt moral and legal duty of... all Canadians to ensure that our country does its utmost to protect and encourage respect for human rights," and "needlessly jeopardize[s]" Canada's international reputation.[9] The ILC feels that not only does Bill C-11 not further such goals, but it is indeed contrary to Canada's international legal obligations in several ways.

International law is of two kinds, treaty law and customary law. Customary law is binding on Canada regardless of whether it has been incorporated domestically,[10]

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[7] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 11(1) [*IRPA*].

[8] "State Jurisdiction Over Persons: Deportation of Aliens," in Hugh Kindred, et al., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 630.

[9] Canada, Senate, Standing Senate Committee on Human Rights, "Promises to Keep: Implementing Canada's Human Rights Obligations" (December 2001), online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02dec01-e.htm#B.%20%20%20%20%20%20Domestic%20Human%20Rights%20Mechanisms%20in%20Canada> at I(C)(1) and III(C) ["Promises to Keep"].

[10] See *Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 at 553-554 (C.A.); and R. St. J. Macdonald, "The Relationship Between International Law and Domestic Law in Canada," in Macdonald, Morris, and Johnston, eds., *Canadian Perspectives on International Law and Organization* (1974) at 111.

although it can be "superseded by valid statute law covering the same ground."[11] Treaty law is only binding on Canada if it has been incorporated domestically, irrespective of ratification.[12] Incorporation of treaty law can occur through statute or case law.

Customary Law

At customary law, Canada is under a binding obligation to respect *jus cogens* norms such as the prohibition on returning a person to a country where they may be persecuted or tortured. The timeframes proposed by the Minister are too hasty to ensure that this obligation is meticulously respected. In addition, Canada is bound by the customary norms set out in the UN *Declaration on the Rights of Individuals Who Are Not Citizens of the Country in Which They Live*. Art. 7 requires that a state expelling an alien must allow the alien "to submit the reasons why he or she should not be expelled" for review by the competent authorities.[13] The expedited removal process under Bill C-11, which delays access to H&C and PRRA procedures for failed refugee claimants, prioritizes removal over refugee applicants' right to submit and have reviewed the reasons why they should not be removed. Absent an explicit ouster, this is contrary to customary international law.

Bill C-11 may also compromise the safety and security of stateless persons. By emphasizing enforcement over refugee safety, Bill C-11 risks creating a bureaucracy in which the enforcement of deportation orders takes precedence over ensuring that stateless persons are sent to countries willing to receive them. This example of burden-shifting may result in long-term detention that goes unmonitored because carried out trans-nationally, causing Canada to be in violation of its customary international obligations.

Treaty Law

At treaty law,[14] Canada is subject to 1) the duty of non-refoulement in Art. 33(1) of the *Refugee Convention*; and 2) the prohibition on unreasonable detention of refugees encompassed in Art. 31 of the *Refugee Convention*, which prohibits the imposition of penalties by state parties "on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in" a state's territory without authorization, "provided they present themselves

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[11] "Promises to Keep," *supra* note 9 at I(C)(2)(b)(i).

[12] "International treaty law must be incorporated into Canadian domestic law through legislation in order to have direct legal effect. Therefore, while signing and ratifying an international covenant gives the illusion of Canada's compliance, in reality it has no legal effect in our domestic law." ("Promises to Keep," *ibid*. at I(C)(2)(b)(i).)

[13] *Declaration on the Rights of Individuals Who Are Not Citizens of the Country in Which They Live*, GA Res. 40/144, UN GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (1985) 252.

[14] Canada is a state party to the *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, Vol. 189, p. 137, entered into force on 22 April 1954 and ratified by Canada 4 June 1969 [*Refugee Convention*]; the *Protocol relating to the Status of Refugees* (1967), United Nations, Treaty Series, Vol. 606, p. 267, entered into force on 4 October 1967 and ratified by Canada 4 June 1969; and the *Convention on the Reduction of Statelessness* (1961), United Nations, Treaty Series, Vol. 989, p. 175, entered into force on 13 December 1975. See for ratification information: UNHRCOR, "States Parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol" (1 October 2008), 58th Sess., online: <http://www.unhcr.org/3b73b0d63.pdf> at 2; and "Promises to Keep," *supra* note 9 at III(F).

without delay to the authorities and show good cause for their illegal entry or presence."[15]

1) *The duty of non-refoulement* was intended to express an international commitment "that refugees would never gain be returned to face death or imprisonment, as had many Jewish refugees during the Holocaust."[16] It prohibits expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion," subject only to the restriction that the duty cannot be claimed by a refugee whom there are reasonable grounds to regard as a danger to national security or who has been convicted of a serious crime and constitutes a danger to the community of the country in which she or he is.[17] The expedited removal process and emphasis on enforcement of Bill C-11 risk violating, with their haste, the duty of non-refoulement in the case of "legitimate" refugee claimants.

2) In view of Art. 31, the UNHCR takes the position that "*detention of asylum seekers should be the exception*, not the rule" and is only acceptable in cases like terrorism; but even in those cases, "detention should always comply with due process."[18] When justified in the name of ascertaining identity, detention should be *brief*; and alternatives to detention should be implemented wherever possible (e.g. release with reporting obligations).[19] Canada currently has no upper limits on the length of detention for the purposes of removal (in contract with the US, which has 6-month limit). The emphasis on expedited removal in Bill C-11 promises to aggravate the likelihood that Canada will violate its international obligations under the new system.

Addressing in 2001 why Canada should not adopt the US system of expedited removals, Stephen M. Knight observed that "[m]any immigration officers seem very much aware of the unreviewable finality of their actions, and behave accordingly."[20] He documents a number of problems with expedited removals, including "cases of refusals to admit persons to the U.S., based on questionable judgment calls or mistaken understandings of the controlling law" by officers; and a report that immigration officers had threatened an Algerian survivor of torture with immediate return following his request for asylum, ending in a suicide attempt.[21] Canada is inviting similar problems with Bill C-11.

International Law Values

Even where treaty law has not been domestically incorporated, it has been found at common law to be *a mandatory interpretive aid to domestic law*. Courts will interpret

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[15] Refugee Convention at Art. 31.
[16] Kathleen M. Keller, "A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement" (1999) 2 Yale Human Rights and Development Law Journal 183 at 183.
[17] *Refugee Convention*, *supra* note 14 at Art. 33(1) and (2).
[18] UNHRC, "Ten Refugee Protection Concerns in the Aftermath of September 11" (Press Release) (23 October 2001), online: <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3bd5469b7>; emphasis added.
[19] UNHRC, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) at 3, online: <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf>.
[20] Stephen Knight, "Defining Due Process Down: Expedited Removal in the United States" (2001) 19 Refuge 41 at 41.
[21] *Ibid*. at 43.

Parliament to have intended to conform with international-law values wherever possible, preferring interpretations of statutes that reflect such values over interpretations that do not.[22] In addition, the Supreme Court of Canada observed in *Keegstra* and *Suresh* that even where international treaties have not been formally incorporated into domestic law, they will still have persuasive value and inform its interpretation.[23]

Interdiction describes the attempt to prevent or deter irregular migrants from reaching Canada's borders. Interdiction measures include 1) attempts to prevent migrants from reaching state borders; 2) attempts to "burden-shift" refugee processing applications to other countries; and 3) attempts to discourage migration by making conditions for refugee applicants uncomfortable.[24] Bill C-11 is indirectly guilty of all three of these but seems directly guilty of the third, trespassing against the values of international law.

Conclusion

The ILC anticipates that Bill C-11 will exclude migrants who need it from refugee protection, including large groups of poor migrants from the global south; contribute nothing to addressing the situation of large numbers of people living without status in Canada, who may number as many as 200,000; create an even larger underclass of non-status people in Canada who are unable to access refugee protection, in violation of Canada's international obligations; increase the emphasis on enforcement while decreasing the emphasis on protection by gutting access to the H&C and PRRA procedures for failed refugee claimants; aggravate existing attitudes of racism and hostility toward refugees in Canadian society and media; and exacerbate gender-based violence and other forms of violence experienced by migrants and refugees, who face increased barriers in respect of meeting tight timelines.

Because of our connections to grassroots migrant justice movements, the ILC is aware that the introduction of Bill C-11 has given rise in many communities to deep-seated fears that the bill will invite ongoing and increasingly violent reprisals against undocumented people, migrant communities, and racialized communities. Such effects are already visible in government rhetoric and Canadian media.

For all of the reasons set out in these submissions, the ILC is opposed to the passing of Bill C-11 and calls on the Standing Committee to oppose it.

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[22] *Baker v. Canada* (M.C.I.), [1999] S.C.J. No. 39 at para. 70.
[23] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 838; and *Suresh v. Canada* (M.C.I.), [2002] 1 S.C.R. 3.
[24] Emily Carasco, Donald Galloway, Sharryn J. Aiken, and Audrey Macklin, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2007) at 479.