UNHCR's Oral Submission before the Supreme Court regarding the Request for Leave to be Joined as Amicus Curiae in these Proceedings (Case HCJ 7146/12)

Jerusalem, 2 June 2013

Distinguished Judges,

1. UNHCR is grateful to this Honorable Court for allowing us to make some brief remarks regarding our request to join these proceedings as amicus curiae.

2. From the outset, let me first clarify that we are not here to argue against the Anti-Infiltration Law but against the application of this Law to asylum-seekers, refugees and persons with international protection needs in light of the 1951 Refugee Convention. In this regard, we would like to refer to the Explanatory Note to the Law, which according to the State is an integral part of the Law, and which states that the Law will be implemented in a manner conforming with the State of Israel's obligations according to international treaties, including the 1951 Refugee Convention.

3. Since the 1951 Refugee Convention is in the background of some of the discussions before the Court and as the agency is explicitly mandated by the international community to supervise the application of interventional conventions for the protection of refugees, we have a unique expertise in matters of international refugee law which we would like to make available to the Court.

4. UNHCR has a tradition of engaging with judicial institutions and has a history of amicus curiae interventions in various court cases around the world, including the European Court of Justice, the UK Supreme Court, courts in the United States and other countries with legal practices similar to those of the Israeli judicial system. Amicus Curiae were either filed upon request of a Court, other interested parties or on our own accord and always in a neutral and objective manner.

5. It is important to mention that the request of UNHCR to join the proceedings as amicus curiae is in no way meant or intended as an intervention of a foreign body in the Israeli political and juridical practices.

6. As said before, we are here to argue that the Law - which is obviously within Israel's sovereign right to legislate on any matter as it sees fit – should not be applied to persons of concern to UNHCR under its mandate and, therefore, not be applicable to asylum-seekers, refugees or other persons in need of international protection.

7. We are not going to present to the distinguished Court a full list of difficulties asylum-seekers and other protected persons face since the application of the Law started of June last year; this we do in our permanent and positive dialogue with the various state officials. We just want to highlight some issues which have become of urgent concern and show the impact of the Law:

8. First and foremost is the application of penalization clauses. Newly arriving non-Israeli nationals who enter the country in an irregular manner are being automatically detained for longer periods and treated as infiltrators, not taking into account the non-penalisation provision for asylum-seekers as stipulated in Article 31 of the 1951 Refugee Convention and affirmed through relevant Executive Committee Conclusions regarding detention.

9. Access to a proper asylum procedure: Although slightly improved, efforts to identify asylum-seekers and refugees are not being done in a manner in accordance with the 1951 Refugee Convention, Executive Committee Conclusions and international standards. In this regard, it is important to note that access to asylum and fair and efficient procedures are an essential element in the full application of the 1951 Refugee Convention.

10. Voluntary return from detention: There have been hundreds of cases of so-called "voluntary returns" of mainly Sudanese citizens, 500 from detention as mentioned this morning. However, the "voluntariness of return" from detention is questionable when the person concerned is given the choice between three years of detention or departure but without proper and thorough examination of his request for international protection and full determination of the potential danger facing him upon return.

11. Non-release of children and victims of torture or rape: While it has to be positively mentioned that women and children of Eritrean and Sudanese origin have been released, albeit some as a result of successful Court decisions, there are still some mothers from other countries with their young children in detention. Further, there are at least over 30 female and 100 male victims of torture (including also rape cases) in detention. This is contrary to guidance that such groups should not be held in detention.

12. Looking at the different documents before the Court, one cannot help noticing that asylum-seekers are labeled as infiltrators and economic migrants. While the Law creates a presumption that asylum-seekers who enter illegally are automatically infiltrators, such a statement cannot be made without a proper assessment of each case. The same applies to those labeled economic migrants. The key question to be asked when determining refugee status is not whether you came to Israel for work, but what compelled you to leave your country of origin and what will happen if you were to return there. These are determining factors in order to declare an asylum-seeker to be a refugee or – more broadly – to be in need of international protection where the *non-refoulement* principle applies. We have already heard about the rather high recognition rates of Eritreans in different countries. In this regard, I would like to mention that UNHCR has shared with the authorities its RSD

eligibility guidelines and we hope that refugee status determination assessments are done in light of these guidelines.

13. As stated, we do not wish to enumerate before this distinguished Court all the difficulties. The Explanatory Note to the Anti-Infiltration Law contains the specific reference for the State of Israel to implement the Law in conformity with the 1951 Refugee Convention. But the brief overview from before already illustrates the many shortcomings resulting from the application of the Law to the persons of concern. Therefore, our request to the distinguished High Court is to decide that the Law should not be applied to asylum-seekers, refugees or other persons in need of international protection.

14. UNHCR, the UN agency created for the purpose of solving asylum-seeker issues believes that the time has come to avoid severe measures, some of which are incompatible with the 1951 Refugee Convention and international standards. The fear from a pull factor of a prosperous and developed Israel is fully comprehensible. But now that the number of incoming persons has reduced to only some 30 new arrivals during the first four months of this year, mainly because of the building of the fence, Israel can generously forgo drastic measures and find positive solutions for those already in the country. UNHCR stands ready to assist and support such efforts.

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