

**Supreme Court of Israel
High Court of Justice**

HCI 7146/12

Requesting to submit an Amicus Curiae Brief: The United Nations High Commissioner
for Refugees (UNHCR)
Whose address is:
119 Hahashmonaim St., Tel Aviv

In the case between:

The Petitioners:

1. **Naget Serg Adam** (Minor, born 2011 – through her mother, petitioner number 2)
Eritrean citizen, Prison Number 1452305
2. **Zamzam Bosra Ahmad**
Eritrean citizen, Prison Number 1452303
3. **Abraham Masgana**
Eritrean citizen, Prison Number 1444239
4. **Gebremariam Mahari**
Eritrean citizen, Prison Number 1444879
5. **Amsalat Negossa Tekela**
Eritrean citizen, Prison Number 1444640
6. **Assaf - Aid Organization for Refugees and Asylum-seekers in Israel**
7. **Hotline for Migrant Workers**
8. **The Association for Civil Rights in Israel**
9. **Kav La'Oved**
10. **A.R.D.C – African Refugee Development Center**

Represented by the Following:

Adv. Yonathan Berman

**The Clinic for Migrants' Rights, Human Rights Program, Academic Center of Law
and Business**

Adv. Anat Ben Dor

Refugee Rights Clinic, Clinical Legal Education, Tel Aviv University

Adv. Oded Feller

The Association for Civil Rights in Israel

Adv. Assaf Weitzen

Hotline for Migrant Workers

V.

The Respondents:

1. **The Knesset**
By The Knesset Legal Representation, Kiryat Ben Gurion, Jerusalem
2. **Ministry of Interior**
3. **Ministry of Defense**
4. **Attorney General of Israel**
By State Attorney
Ministry of Justice, 29 Salah ad-Din St. Jerusalem

A Request to Join the Proceedings as Amicus Curiae

The Honorable Court is requested to grant UNHCR leave to join the proceedings as amicus curiae, and to bring forward its position, based on international law standards, regarding the important and principled issues raised in the petition.

1. UNHCR requesting for leave to join as amicus curiae

1.1 The United Nations High Commissioner for Refugees (“UNHCR”)¹ hereby requests leave to join as amicus curiae in the petition for constitutional order requested by Petitioners and instructing the Respondents to show cause for non-cancellation of the Law for the Prevention of Infiltration (offenses and judges) (amendment no. 3 and temporary order), 5772-2012 (hereafter “the Law”). UNHCR has a direct interest in the outcome of this petition, as it raises a number of legal issues relating to the entry, detention and removal of refugees and asylum-seekers.

1.2 UNHCR wishes to join these proceedings as a friend of the Court to assist the Supreme Court of Israel. In the proposed submissions below, UNHCR wishes to advance its own positions, and will take a neutral stance as between the positions of the Petitioners and the Respondents. UNHCR does not make submissions on the facts of the underlying individual cases or on evidentiary matters, but is concerned with the interpretation and application of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)² and its 1967 Protocol³ as a matter of law. UNHCR has an independent interest in the determination of this petition, which is distinct and separate from those of the Petitioners and Respondents.

1.3 According to this Court, a public body which is not a direct party to the proceedings but has a wide interest in solving the issue and is familiar with the subject-matter may be allowed to contribute to the Court’s proceedings when it has an interest in the issue and is capable of aiding the Court.⁴ According to the Court, relevant in this regard is inter alia the public body’s character, expertise and experience as well as the representation it offers to the public interest.⁵ Courts in Israel have on several occasions and in various types of proceedings allowed public bodies to join as amicus curiae.⁶

¹ This request does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

² The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ The 1967 Protocol Relating to the status of Refugees, 606 U.N.T.S. 267, <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁴ 7929/96 Kozali v. State of Israel 53(1),554, page 555.

(מ"ח 96/7929 קוזלי נ' מדינת ישראל, פ"ד נג' (1) 529, 554)

⁵ *ibid*, p. 555; For an analysis of the criteria, based also on subsequent rulings, see:

Doron and Tutari-Jubran (2006) “The birth and development of the Israeli ‘amicus curiae’”. *Ale’i Mishpat* 5, 65-108, p.77; see also Aharoni (2005), “The American friend – an outline of the amicus curiae”, *Ha’mishpat* 18, 30.

(דורון, י. ותותרי-ג'ובראן, מ. (2006). "לידתו והתפתחותו של 'ידיד בית-משפט' ישראלי". *עלי משפט*, ה', 108-65, עמ' 77 ואילך. כן ראו: אהרונים, מ. (2005), "הידיד האמריקני – קווים לדמותו של ה-Amicus Curiae (ידיד בית המשפט)", *המשפט* 18, יולי, 30).

⁶ Below is a list of cases in which amicus briefs were allowed, including cases in which some discussion of the Amicus status was included in the ruling. The list includes: constitutional and administrative cases, civil cases, and criminal cases:

1119/01 ז"ל למשל בג"ץ 07/746 נעמי רגן נ' משרד התחבורה (פסק דין מיום 5.1.2011); בג ראו ומינהליים חוקתיים (בהליכים – ישראל נ' מדינת מ"ב בע נתניה ושירותים ונופש" ניהול "החלטה 2531/05 ז"ל"); בג 115.4.2000 מיום הפנים (החלטה נ' משרד זריצקיה נ' ממשלת ישראל פ"ד נח(5) 826-824, 807 סוריק בית הכפר מועצת 2056/04 ז"ל); בג 26.6.2005 מיום משרד הבריאות (החלטה מיום 25.12.2006); בג"ץ 07/4957 אחיעזו ארגון ארצי של חברות כח אדם הפנים (החלטה נ' שר ערפה אבו 7803/06 ז"ל (2004)); בג ים-בת נ' עיריית מ"ב בע השקד פרח 1464/07 א)"ת מ"לתינוך נ' משרד התעשייה המסחר והתעסוקה (פסק דין מיום 24.1.2008); עת (4.4.2005 מיום מ (החלטה"בע לביטוח חברה נ' מגדל פרדו 11152/04 א"ראו למשל ע אזורחים). בהליכים 9.7.2007 מיום (החלטה י "נ' מ רחמיאן 7853/05 פ"); בהליכים פליליים ראו ע 29.9.2003 מיום הבריאות (החלטה נ' שר כללית בריאות שירות 9165/02 א"ע) 27.11.2006 (פסק דין מיום

1.4 The views UNHCR would like to present to this Court in these proceedings are informed by more than 60 years of experience supervising international refugee law instruments. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in some 120 countries. UNHCR is mandated to supervise the application of international refugee law conventions, including the 1951 Convention and its 1967 Protocol, and as such has a responsibility and unique expertise to present its views to this Court. UNHCR is of the opinion that the outcome of this petition will have far-reaching implications for the protection of refugees and asylum-seekers, in Israel and internationally. UNHCR's interest as *amicus curiae* is based on the organization's duty to fulfill its mandate of ensuring the consistent and coherent interpretation of international refugee law.

1.5 UNHCR is a global humanitarian and non-political organization. As a subsidiary organ of the United Nations, UNHCR has been entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.⁷ Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees⁸, which is reiterated in the Preamble of the 1951 Convention. In turn, Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions.⁹ A similar obligation for State Parties is laid down in Article II(1) of the 1967 Protocol. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook and Guidelines")¹⁰ as well as other notes and guidance, including UNHCR's Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention ("UNHCR Detention Guidelines") (attached as Appendix "A" to this brief).¹¹ UNHCR's supervisory responsibility is affirmed by Israel in the regulation of the Ministry of Interior¹² as well as by Israeli courts.¹³

⁷ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees* ("the Statute"), 14 December 1950, A/RES/428(V), <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

⁸ According to Article 8(a) of the Statute, 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto' [emphasis added].

⁹ According to Article 35(1) of the 1951 Convention 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'.

¹⁰ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (re-issued) December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

¹¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

¹² Procedure for Handling Political Asylum-seekers in Israel of 2 January 2011, see <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> (English version) and <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-he.pdf> (Hebrew version).

¹³ ע"מ 08/5107 פלוני נ' שר הפנים, 5.5.2009; כן ראו: ע"מ (ת"א) 07/1348 נישנה נ' משרד הפנים, 10.5.2007; ע"מ (ת"א) 07/1763 טקון נ' מדינת ישראל, 24.2.2009; בג"ץ 05/1543 נמורי נ' שר הפנים, 11.8.2005; ע"מ (ת"א) 05/1779 מוטגורי ריצ'רד (נ' משרד הפנים, 24.8.2006, פסקאות 12-11; ע"מ (י-ם) 11-09-729 סלומון נ' שר הפנים, 26.12.2011, פסקה 19

1.6 UNHCR has a long history of amicus curiae interventions in cases worldwide. UNHCR intervenes as amicus curiae before courts in cases which it considers as having serious implications for international refugee law. UNHCR has been granted intervener status by numerous courts, including the USA Circuit Courts of Appeal¹⁴ and the US Supreme Court,¹⁵ the UK Supreme Court (former House of Lords),¹⁶ the German Federal Constitutional Court,¹⁷ the Canadian Supreme Court,¹⁸ the European Court of Human Rights,¹⁹ and the Court of Justice of the European Union.²⁰

2. Introduction to UNHCR's submissions as amicus curiae

2.1 The 1951 Convention and its 1967 Protocol are the key international instruments governing the protection of refugees and address who is a refugee, his or her rights and responsibilities and the legal obligations of States Parties. By ratifying the 1951 Convention²¹ and acceding to the 1967 Protocol,²² Israel is bound by both instruments. Israel is also a party to other major international human rights instruments having a bearing on this case, in particular the 1966 International Covenant on Civil and Political Rights²³ and the 1989 Convention on the Rights of the Child.²⁴ The Government of Israel has repeatedly declared its commitment to respecting the 1951 Convention before courts in Israel.²⁵ This commitment

¹⁴ See for example, UN High Commissioner for Refugees, *Rocio Brenda Henriquez-Rivas, Petitioner v. Eric H. Holder, Jr, Attorney General, Respondent. The United Nations High Commissioner for Refugees' Amicus Curiae Brief in Support of Petitioner*, 23 February 2012, No. 09-71571 (A098-660-718), available at: <http://www.unhcr.org/refworld/docid/4f4c97c52.html>.

¹⁵ See for example, UN High Commissioner for Refugees, *Daniel Girmai Negusie, Petitioner, v. Michael Mukasey, United States Attorney General, Respondent. Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner*, 23 June 2008, available at: <http://www.unhcr.org/refworld/docid/486230652.html>.

¹⁶ See for example, UN High Commissioner for Refugees, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>.

¹⁷ See for example, UN High Commissioner for Refugees, *Stellungnahme an das Bundesverfassungsgericht im Verfahren 1 BvL 10/10*, December 2010, available at: <http://www.unhcr.org/refworld/docid/4d08ef5d2.html>.

¹⁸ See for example, UN High Commissioner for Refugees, *Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents). Factum of the Intervenor, United Nations High Commissioner for Refugees ("UNHCR")*, 8 March 2001, available at: <http://www.unhcr.org/refworld/docid/3e71bbe24.html>.

¹⁹ See for example, UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, Application No. 13058/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5212.html>.

²⁰ See for example, UN High Commissioner for Refugees, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: <http://www.unhcr.org/refworld/docid/4d493e822.html>.

²¹ Israel signed the 1951 Convention on 1 August 1951 and ratified it on 1 October 1954. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

²² Israel acceded to the 1967 Protocol on 14 June 1968. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

²³ The 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171. Israel signed the International Covenant on Civil and Political Rights (ICCPR) on 19 December 1966, and ratified it on 3 October 1991. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

²⁴ The 1989 Convention on the Rights of the Child, 1577 U.N.T.S. 3. Israel signed the Convention on the Rights of the Child (CRC) on 3 July 1990, and ratified it on 3 October 1991. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

²⁵ CA 9656/08 *The State of Israel v Saidi and others*, 15.12.2011, para 28.

(ע"א 9656/08 מדינת ישראל נ' סעדי, (טרם פורסם) פסק דין מיום 15.12.2011, פסקה 27-28)

is also affirmed in the Ministry of Interior's 2011 Procedure for Handling Political Asylum-seekers in Israel,²⁶ as well as by the Supreme Court of Israel.²⁷

2.2 UNHCR has a direct interest in the interpretation and application of the Law as its provisions have a serious impact on the rights of refugees and asylum-seekers seeking international protection in Israel. UNHCR is dedicated to supporting Israel in fulfilling its obligations under the 1951 Convention and 1967 Protocol. In that regard, during the development of the Law, UNHCR provided comments to the Parliament and Government expressing its views about the Law's application vis-à-vis refugees and asylum-seekers.²⁸

2.3 Against this background, UNHCR will set out its position on a number of issues raised in the petition and following the entry into force of the Law relating in particular to Articles 31 and 33 of the 1951 Convention. From the outset it is important to note that these Articles apply to refugees as well as asylum-seekers. In relation to asylum-seekers, although they are not explicitly referred to, recognition of refugee status does not make an individual a refugee, but rather only declares him or her to be one.²⁹ As Articles 31 and 33 are not conditioned on any particular period of stay in the territory, they have been accepted as applying to asylum-seekers, including those at the frontier.³⁰ Hence, reference is made in this brief to refugees, as well as asylum-seekers.

Admin. Pet. 3415-05-10 *Hernandez v MOI*, 14.8.2011, para 32

(עת"מ (מרכז) 10-05-3415 הרנגזז ל משרד הפנים, פסק דין מיום 14.8.2011, פסקה 32)

Admin. Pet. 2480-12-11 *Davies v MOI*, 4.4.2012)

(עת"מ (ת"א) 11-12-2480 דיוויס ל משרד הפנים, פסק דין מיום 4.4.2012, פסקה ד')

²⁶<http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf>,

(English

version)

or

<http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-he.pdf> (Hebrew version), page one

²⁷ע.מ. 2244/12, פלוגית נגד משרד הפנים, 21.8.2012, סעיף 18, וע.מ. 8675/11, מספן מזמור טדסה נגד משרד הפנים, 14.5.2012, סעיף 8.

²⁸ UNHCR sent the following letters, accompanied by detailed comments of the Law at its different stages: Letter to the Speaker of the Knesset of 15 December 2011; Letters to Ahaz Ben Ari (Legal Counselor to the Ministry of Defense) of 28 December 2010, 25 December 2010, 6 September 2010; Letter to M. Blass (Deputy Attorney General, Ministry of Justice) of 11 July 2009. UNHCR also participated in meetings of the Knesset Committee: Interior Committee meetings of: 3.2.2010, 18.2.2010, 25.7.2011, 10.8.2011, 14.11.2011, 13.12.2011, 19.12.2011, and the Committee on the Problem of Foreign Workers meeting of 2.1.2012 (הוועדה הזרים המיוחדת לבחינת בעיות העובדים הזרים).

²⁹ UNHCR Handbook at para. 28 and *Geneva Expert Round Table, 8-9 November 2001, United Nations High Commissioner for Refugees and the Graduate Institute of International Studies in Geneva, Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para. 10 (g), available at: <http://www.unhcr.org/refworld/docid/470a33b20.html>. This position was confirmed in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, at para. 16, where Simon Brown LJ concluded: "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." Upheld in *R. v. Asfaw* [2008] UKHL31, at para. 26. See, also Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), at pp.185, 192; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, at p.389.

³⁰ See, for example Executive Committee of the High Commissioner's Programme (ExCom) Conclusion No. 22 (XXXII), 1981, Section 2 (Admission and *Non-Refoulement*); ExCom Conclusion No. 81 (XLVIII), 1997, at para. (h) (no rejection at frontiers without the application of these procedures); ExCom Conclusion No. 82 (XLVIII), 1997, at para. (d) (admission of asylum applicants to State territory); ExCom Conclusion No. 85

2.4 Part 3 of UNHCR's submissions addresses issues concerning non-penalization of refugees and asylum-seekers for illegal entry and/or presence, including through detention. Part 4 focuses on the protection of the rights to liberty and security of refugees and asylum-seekers, and in Part 5, specific provisions in the Law concerning release from detention, are reviewed. Part 6 focuses on specific issues relating to the detention of refugee and asylum-seeking children. Part 7 then deals with issues relating to the principle of *non-refoulement*, including access to asylum procedures. A brief conclusion of these submissions will be provided in Part 8.

3. Prohibition on the penalization of refugees and asylum-seekers for illegal entry and/or presence

3.1 An 'infiltrator' is defined by the Law as "a person who is not a resident according to article 1 of the Population Registrar Law, 1965, who entered Israel not by way of a border crossing determined by the Minister of Interior according to Section 7 of the Entry into Israel Law."³¹ According to Section 7 of the Entry into Israel Law, everyone must enter Israel through a prescribed frontier station, reporting him- or herself to a frontier control officer and producing this officer with a valid passport or laissez-passer.³² Under Section 30(a) of the Law, "[t]he Minister of Defence or a person authorized by him may order in writing the deportation of an infiltrator", and stipulates further that "[t]he order shall be a legal warrant for holding the 'infiltrator' in custody pending his deportation". Because refugees and asylum-seekers are not exempted from the Law, they are classified as 'infiltrators' when having entered or being present in Israel irregularly and are thus subject to administrative detention when trying to enter and seek international protection in Israel. The amendments to the Law do not prescribe a maximum period for the detention in these circumstances. However, the amendments provide for a discretionary power, granted to the Head of Border Control, to release the 'infiltrator' in a number of specific listed circumstances (see below in Part 5).³³ The same provisions apply to the Detention Review Tribunals for Infiltrators (see below in Part 5).³⁴

3.2 Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore, an unlawful act.³⁵ Furthermore, the 1951 Convention provides in Article 31(1) that

(XLIX), 1998, at para. (q); ExCom Conclusion No. 99 (LV), 2004, at para. (l); ExCom Conclusion No. 108 (LIX), 2008. All ExCom Conclusions are available at: <http://www.unhcr.org/pages/49e6e6dd6.html>.

³¹ Section 1(b) (amended) of the Law. See also Article 10 of the Law according to which "A person who enters Israel without permission or who is in Israel unlawfully is, for the purpose of this Law, deemed to be an infiltrator so long as he has not proved the contrary".

³² According to Section 7 of the Entry into Israel Law "[n]o person, whether or not he is an Israel national, shall enter Israel otherwise than at one of the frontier stations prescribed by the Minister of the Interior by order published in Reshumot and after reporting there to a frontier control officer and producing to him a valid passport of laissez-passer. The Minister of the Interior may exempt a person from the provisions of this Section if in his opinion special circumstances justify his doing so". See: <http://www.israellawresourcecenter.org/israellaws/fulltext/entryintoisraellaw.htm>.

³³ Section 30A(ii) and (iii) (amended) of the Law.

³⁴ Section 30C (amended) of the Law.

³⁵ Article 14, *Universal Declaration of Human Rights*, 1948 (UDHR). UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>. UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, 12 February 1999, A/RES/53/125, available at: <http://www.unhcr.org/refworld/docid/3b00f52c0.html>

refugees and asylum-seekers shall not be penalized for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.³⁶ “Penalties” for the purposes of Article 31 includes the imposition of fines and detention.³⁷ The expression “coming directly” in Article 31(1) covers the situation of a person who enters, or is at the border, of the country in which asylum is sought and has come directly from his or her country of origin. The provision also protects from penalization refugees and asylum-seekers who transit an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept “coming directly” and each case must be judged on its merits. The provision further protects from penalization refugees and asylum-seekers who have traveled on from another country where his or her protection, safety or security could not be assured (interpreting in part “good cause”). “Illegal entry” would, *inter alia*, include arriving or securing entry without documents, through the use of expired, false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. “Illegal presence” would cover, for example, remaining after the elapse of a short, permitted period of stay.³⁸

3.3 In exercising the right to seek asylum, refugees and asylum-seekers are often forced to arrive at, or enter, a territory without prior authorization. Their position may thus differ fundamentally from that of ordinary migrants in that refugees and asylum-seekers may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation, including a valid passport or laissez-passer, in advance of their flight because of their fear of persecution and/or the urgency of their departure.³⁹ In other words, they may have good reason for their illegal entry or stay, and these factors, as well as the fact that refugees and asylum-seekers have often experienced traumatic events, need to be taken into account.⁴⁰

3.4 A law or policy penalizing - including through the use of administrative detention - refugees and asylum-seekers who have entered illegally and/or are present illegally, or those who use false documentation, without due regard to the circumstances of flight in individual cases, may amount to a breach of a State’s obligations in international law, in particular

and ExCom reference on point b) of Conclusion No. 82 in UN High Commissioner for Refugees, *Safeguarding Asylum*, 17 October 1997, No. 82 (XLVIII) - 1997, available at: <http://www.unhcr.org/refworld/docid/3ae68c958.html>.

³⁶ Article 31(1) of the 1951 Convention provides that ‘[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

³⁷ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, per Simon Brown LJ (no page numbers): ‘Self-evidently [the purpose of Article 31] was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.’

³⁸ See *Geneva Expert Round Table, 8-9 November 2001, United Nations High Commissioner for Refugees and the Graduate Institute of International Studies in Geneva, Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, available at: <http://www.unhcr.org/refworld/docid/470a33b20.html>.

³⁹ See also, UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: “[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention”, available at: <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

⁴⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

Article 31(1) of the 1951 Convention.⁴¹ Article 31 requires States to amend their laws to ensure that no person who is entitled to benefit from Article 31 is subject to such penalties.⁴² Further, the authority to order the deportation of an 'infiltrator' and a refusal to consider the merits of an applicant's asylum claim, will deny the asylum-seeker the right to seek asylum, and could risk or even result in *refoulement* (see Part 7). In conflict with the object and purpose of Article 31(1), the Law creates a presumption that refugees and asylum-seekers who enter Israel illegally are 'infiltrators'. In this way, the Law is stigmatizing, and does not take into account the special position of refugees and asylum-seekers under international law, nor their particular vulnerability.

4. The rights to liberty and security for refugees and asylum-seekers

4.1 As stipulated in Guideline 2 of UNHCR's Detention Guidelines, the fundamental rights to liberty and security of person⁴³ alongside freedom of movement⁴⁴ are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The Executive Committee of the High Commissioner's Programme (ExCom) has addressed on a number of occasions the detention of asylum-seekers.⁴⁵ These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.⁴⁶

4.2 As explained in UNHCR's Detention Guidelines - numbers 3, 4 and 5 - the rights to liberty and security of the person are substantive guarantees against unlawful as well as arbitrary detention. For any detention or deprivation of liberty to be lawful and not arbitrary, it must be in accordance with and authorized by law, which in turn needs to be compatible with international law, and based on an assessment of the individual's particular circumstances. Further, detention must be an exceptional measure only justified for a legitimate purpose and necessary, reasonable in all circumstances and proportionate to the legitimate purpose. Finally, alternatives to detention need to be considered.⁴⁷

⁴¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.1.4 (para. 32), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁴² *R v. Uxbridge Magistrates' Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, per Simon Brown LJ, referring in part to A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. II, 1972), 211.

⁴³ See, for example, Articles 3 and 9 Universal Declaration of Human Rights (UDHR) and Article 9 International Covenant on Civil and Political Rights (ICCPR).

⁴⁴ See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See, also, Article 12, *African Charter on Human and Peoples' Rights*, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, *Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto*, 1963; Article 45, Charter of Fundamental Rights of the European Union (CFREU).

⁴⁵ See, UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) –2000, third paragraph, all available at: <http://www.unhcr.org/41b041534.html>.

⁴⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, paragraph 1, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html>.

⁴⁷ For more detailed information please see paragraphs 15 to 43 of UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 3, 4 and 5, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

4.3 As explained in the preceding paragraph, and as affirmed by the Supreme Court of Israel,⁴⁸ detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if the entry and/or presence is illegal. In the context of detention of refugees and asylum-seekers, there are three purposes which are generally in line with international law when detention is assessed to be necessary in an individual case and proportionate to that purpose. These purposes include public order, public health or national security. In general, UNHCR identifies the following legitimate grounds for detaining asylum-seekers to protect public order: (1) to prevent absconding and/or in cases of likelihood of non-cooperation,⁴⁹ (2) for manifestly unfounded or clearly abusive claims in connection with accelerated procedures,⁵⁰ (3) for initial identity and/or security verification,⁵¹ and (4) in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based and which could not be obtained in the absence of detention.⁵² However, these exceptions to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, to groups of refugees or asylum-seekers without an individual assessment, or for an unlimited period of time.⁵³ Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained in this way.⁵⁴

4.4 Beyond an initial security screening, the automatic and continued detention of refugees and asylum-seekers classified as ‘infiltrators’ based on the sole reason of having entered Israel irregularly would not meet international standards. That is, any extension of detention beyond an initial security screening for a particular refugee or asylum-seeker would

⁴⁸ President Barak in H CJ 4702/94 *Al Tai and others v Minister of Interior*, PD 49(3) 843 states, in para. 13: “In exercising the authority of detention and incarceration, one must act proportionately (see Bagatz 3477/95 Ben-Atia v. Minister of Education, Culture and Sport). One must not arrest a person against whom a deportation order has been issued for a period that exceeds that which is necessary to fulfill the purpose underlying the detention. If the deportation does not take place within a reasonable period of time (that is not measured in years or several months), one can justify the continued detention only with a suspicion that the deportation purpose will not be realized – either because the deportee will escape pending imminent deportation, or because his release will endanger public peace and security (and as such he will fear to report back for deportation), or for another reason.”

(בג"ץ 94/4702 אל טאיי נגד שר הפנים, פ"ד מט(3) 843)

⁴⁹ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (para. 22), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵⁰ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (para. 23), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵¹ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (paras. 24-27), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵² UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (paras. 28), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵³ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (para. 28), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵⁴ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (para. 22), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

only be lawful if it is assessed in a proper procedure to be necessary, reasonable and proportionate measure to a legitimate purpose in their individual case.⁵⁵

4.5 According to the Explanatory Note to the Law its purpose is primarily one of deterrence, stating that the legal situation that was in place before the Law came into being gave incentives to people to come to Israel.⁵⁶ According to UNHCR, detention laws and policies aimed at deterrence are generally unlawful under international human rights and refugee law as (a) deterrence is not a legitimate purpose and (b) the policy objective is not based on an individual assessment as to the necessity to detain.⁵⁷ Moreover, there is a growing body of empirical evidence which shows that even the most stringent detention policies are not effective in deterring irregular migration,⁵⁸ further suggesting that such laws and policies with a deterrent purpose are arbitrary. Such a purpose also conflicts with the spirit of the 1951 Convention, the object of which is to establish an international protection regime for refugees.

4.6 As stated above in paragraph 3.1, according to Section 30(a) of the Law, the issuance of a deportation order against an 'infiltrator' forms a legal basis for the detention inter alia of refugees and asylum-seekers. However, detention for the purposes of deportation or removal is not a legitimate ground for detention of refugees and asylum-seekers under international law because they are not available for such deportation or removal until such time as they have exhausted appeal rights relating to their claim for international protection and it has been rejected (see also Part 7 on *non-refoulement*, including access to asylum procedures).⁵⁹

⁵⁵ UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4 (para.18), and 4.2 (para. 34), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵⁶ See Explanatory Note to the Anti-Infiltration Law, where it states that: "In recent years, the State of Israel has faced a drastic increase in the scope of infiltration across the border with Egypt, which does not take place at a border crossing. According to figures from the Population, Immigration and Border Control Authority, in 2010 alone 14,000 'infiltrators' were caught. The 'infiltrators' into Israel come from various countries, including countries which are hostile to Israel. Currently, the 'infiltrators' are placed in detention but they are released after a relatively short period of time, due to the fact that they are handled according to the Law of Entry into Israel – 1952 (hereinafter: the Law of Entry into Israel). This law does not permit detaining a person for more than sixty days. In practice, this creates a situation in which there is an incentive for a wave of increasing infiltration... This bill is intended primarily to allow for the detention of 'infiltrators' for a much longer period of time than that which is allowed for in the Law of Entry into Israel" .594 עמ' 28.3.2011, 577 הצעות חוק הממשלה

⁵⁷ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 3 and Guideline 4.1.4 (para. 32), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>, and Article 14, Universal Declaration of Human Rights, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, American Declaration of the Rights and Duties of Man, 1948 (ADRDM); Article 18, Charter of Fundamental Rights of the European Union, 2000, (CFREU); Article 31, 1951 Convention.

⁵⁸ See, A Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; International Detention Coalition (IDC), *There are Alternatives: A handbook for preventing unnecessary immigration detention*, 13 May 2011, ISBN 978-0-9871129-1-0, available at: <http://www.unhcr.org/refworld/docid/4f0c14252.html>; United Nations Special Rapporteur on the Human Rights of Migrants, Mr. François Crepeau, A/HRC/20/24, 2 April 2012, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf.

⁵⁹ See, *Al-Tayyar Abdelhakim v. Hungary*, Application no. 13058/11, Council of Europe: European Court of Human Rights, 23 October 2012, available at: <http://www.unhcr.org/refworld/docid/50866bd52.html>; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, Application No. 13058/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5212.html>; *Hendrin Ali Said and Aras Ali Said v. Hungary*, Application no. 13457/11, Council of Europe: European Court of Human Rights, 23 October 2012,

5. Provisions for release from detention

5.1 According to the Law, an 'infiltrator' held in detention will be brought before the Head of Border Control no later than seven working days from the beginning of his or her detention.⁶⁰ The Head of Border Control is authorized "in exceptional circumstances" to release an 'infiltrator' with a monetary, or any other guarantee in specific and exhaustively listed circumstances:⁶¹

- Due to the 'infiltrator's' age or medical condition, his being held in detention is likely to harm his health and there is no other way to prevent this stated harm;
- There are special humanitarian grounds ... justifying the release of the 'infiltrator' with a guarantee, including if as a result of his holding in detention, a minor will be left unaccompanied;
- The 'infiltrator' is a minor who is unaccompanied by his family members or a guardian;
- The 'infiltrator's' release will assist in his deportation proceedings.

Also, the Head of Border Control is authorized to release an 'infiltrator' with a guarantee if he is convinced that:⁶²

- The 'infiltrator' requested a permit and license for residency in Israel according to the Entry into Israel Law and the handling of his requests has not begun despite the fact that three months have passed since submitting the request;
- The 'infiltrator' submitted a request as stated in paragraph (1) [i.e. a request for a permit and license for residency] and no decision has been given as regards to his request despite the fact that nine months have passed since submitting the request.
- Three years have passed since the beginning of the 'infiltrator's' detention.

An 'infiltrator' will however not be released when:⁶³

- his deportation from Israel is prevented or delayed due to lack of full cooperation on his part, including the matter of verifying his identity or arranging for proceedings for deportation from Israel;
- his release would endanger national security, public order or public health; or
- an opinion by authorized security personnel was submitted to the Head of Border Control according to which in the 'infiltrator's' State or region of residence activities are being carried out which are likely to endanger Israel's national security or its citizens.

5.2 In addition to the Head of Border Control, the Detention Review Tribunals for Infiltrators, established by the Minister of Justice under the Law,⁶⁴ also have the authority to

available at: <http://www.unhcr.org/refworld/docid/50866af03cd.html> ; UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary*, 30 March 2012, Application No. 13457/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5e72.html>.

⁶⁰ Section 30A(i) (amended) of the Law.

⁶¹ Section 30A(ii) (amended) of the Law.

⁶² Section 30A(iii)(3) (amended) of the Law.

⁶³ Section 30A(iv) (amended) of the Law.

instruct the release of the ‘infiltrator’, and to set the conditions for release.⁶⁵ The authority of the Tribunals to release people from detention is, however, limited to the same circumstances listed in paragraph 5.1 above.⁶⁶ Review of the detention will be undertaken “no later than fourteen days from the day the detainment in detention began”.⁶⁷ According to the Law, the Tribunal reviews the detention within fourteen days and periodically thereafter every sixty days.⁶⁸

5.3 As mentioned above in paragraph 4.2 the default position must be liberty – and not detention – for refugees and asylum-seekers. Applying an exhaustive list of conditions that only in exceptional circumstances allow for the release of refugees and asylum-seekers from detention is not in line with international law. In fact, none of the exceptions explicitly relate to refugees and asylum-seekers. Article 9 of the International Covenant on Civil and Political Rights 1966, to which Israel is a party, provides explicitly that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary detention.” The emphasis is therefore on liberty, with the State being required to protect this right (see Part 4).

5.4 According to the Law, there is no maximum limit on the detention of an ‘infiltrator’ subject to a deportation order. As mentioned above in paragraph 5.1, the Law provides only for the possibility of release in a number of specifically listed circumstances and subject to the provision of a guarantee.⁶⁹ Such release is, however, at the discretion of the Head of Border Control⁷⁰, or on the authority of the Detention Review Tribunals for Infiltrators.⁷¹ One of the specifically listed circumstances for exceptional release is that “[t]hree years have passed since the beginning of the infiltrator’s detainment in detention”.⁷² Noting that this provision is not a maximum limit, but is only one of the discretionary bases for release, there is serious concern that asylum-seekers and refugees will be held in detention for prolonged, and even possibly indefinite, periods. The United Nations Human Rights Committee has, on numerous occasions, held that both prolonged and/or indefinite detention are contrary to Article 9, ICCPR.⁷³ Moreover, even if the period of three years were a maximum limit, it is extremely long compared to *maximum limits* set in other States Parties to the 1951 Convention and/or 1967 Protocol in the specific context of detention pending removal.⁷⁴ While maximum limits are useful guarantees against prolonged and/or indefinite detention, where they are applied in respect of asylum-seekers whose cases have not been finally

⁶⁴ Section 30C (amended) of the Law.

⁶⁵ Section 30D(i)(2) and (3) (amended) of the Law. In accordance with Section 30D(i)(1) (amended) of the Law the Detention Review Tribunals for Infiltrators have the authority to approve the detention.

⁶⁶ Section 30D(i)(2) (amended) of the Law refers to Section 30A(ii) and (iii) (amended) of the Law.

⁶⁷ Section 30E(i)(1) (amended) of the Law.

⁶⁸ Section 30D(i)(1) (amended) of the Law.

⁶⁹ Section 30A(ii) and (iii) (amended) of the Law.

⁷⁰ Section 30A(ii) and (iii) (amended) of the Law.

⁷¹ Section 30D(i)(2) (amended) of the Law.

⁷² Section 30A(iii)(3) (amended) of the Law.

⁷³ See, for example, *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>; *Baban et al. v. Australia*, CCPR/C/78/D/1014/2001, 6 August 2003.

⁷⁴ In the United States, for example, persons must be released after six months if “there is no significant likelihood of removal in the reasonably foreseeable future”, *Zadvydas v. Davis*, US Supreme Court, 533 US 678 (2001), page 701, available at: <http://www.unhcr.org/refworld/docid/3decaa6c4.html>. In the European Union, 6 months is the maximum period for persons detained pending removal (subject to two exceptional grounds for extension up to a further 12 months): Directive 2008/115/EC of the European Parliament and of the Council, 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:pdf>.

determined, the limits would generally need to be shorter than in the deportation context, otherwise they may amount to a penalty in contravention of Article 31(1), 1951 Convention. Refugees and asylum-seekers must not be held in detention for any longer than necessary. Where the justification for their detention is no longer valid, the refugee or asylum-seeker must be released immediately.⁷⁵

5.5 Moreover, according to international law, refugees and asylum-seekers in detention must be brought promptly before a judicial or other independent authority to have the detention decision reviewed (Article 9(4), ICCPR). This review needs to be automatic, and should ideally take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker.⁷⁶ Setting a maximum period of fourteen days for the Detention Review Tribunals for Infiltrators to review the detention is out of step with national practices in other 1951 States Parties. While there is limited guidance as to what constitutes acceptable periodic review, a study of the European Agency on Fundamental Rights indicates that over half of the Member States of the European Union prescribe limits, and of these, they range from 48-72 hours, with the maximum of any country being 10 days (Latvia).⁷⁷ Further, according to UNHCR and the United Nations Human Rights Committee, the Tribunal must possess the power to order release or to vary any conditions of release.⁷⁸ The power should not be limited to exceptional circumstances as mentioned in Section 30A(ii) and (iii) of the Law (see paragraph 5.1 above).

5.6 While detention of individual refugees and asylum-seekers may be resorted to for a legitimate purpose, including to protect national security, public order (which includes verification of identity) or public health, as mentioned above in paragraph 4.3, this can only be done based on an assessment of the particular individual circumstances and when it is necessary, reasonable and proportionate (see paragraph 4.2 above). Allowing for release only in exceptional and exhaustively listed circumstances is not in accordance with international human rights and refugee law.

5.7 Section 30(a2) of the Law obliges the Minister of Defence to cancel a deportation order if a permit and license for residency under the Entry into Israel Law has been given. However, the act of lodging an asylum claim does not grant such permit and residency.

⁷⁵ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 6 (para. 45), available at: <http://www.unhcr.org/refworld/docid/50348953b8.html>. See, *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>. See also, *Kanyo Aruforse v. Minister of Home Affairs and Two Others* (2010/1189) [2010] SGHC (25 January 2010) (South Gauteng High Court (Johannesburg)): 'A detained person has an absolute right not to be deprived of his freedom for a second longer than necessary by an official who cannot justify his detention' (para. 18), available at: <http://www.unhcr.org/refworld/docid/4c9368952.html>.

⁷⁶ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 7 (para. 47(iii)), available at: <http://www.unhcr.org/refworld/docid/50348953b8.html>.

⁷⁷ Back to Basics: the Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum Seekers, Stateless Persons and Migrants, April 2011, p. 38, sec. 5.2 Periodic review, available at: <http://www.unhcr.org/refworld/pdfid/4dc935fd2.pdf>.

⁷⁸ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 7 (para. 47(iii)), available at: <http://www.unhcr.org/refworld/docid/50348953b8.html>. Also, *A. v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>, and *C v. Australia*, HRC, Comm. No. 900/1999, 29 October 2002, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html>.

Rather, all persons detained under the Law are to have their asylum claims processed while they are *in* detention. Such individuals *may* be released if the processing of their claim has not begun after three months of submitting their request for a permit and license for residence under the Entry into Israel Law (which includes an asylum request) or no final decision has been given after nine months since submitting the same request.⁷⁹ The Explanatory Note specifies that the purpose of this provision is to ensure that their asylum requests will be dealt with without delay, providing the example of those claiming to be refugees.⁸⁰ Despite the desire to expedite asylum processing, administrative convenience is generally not a legitimate basis for detention. Although these provisions of the Law limit the detention periods for those who have requested a permit and license for residency in Israel,⁸¹ including asylum applicants, they nonetheless allow for considerable detention periods of three to nine months while the asylum application is being processed. Moreover, the Law is silent on the issue of when the “clock starts ticking” on an asylum request and what must be done by the Ministry of Interior to satisfy the three month and nine month time restrictions for handling the request. Additionally, it is unclear whether the nine month time limitation for obtaining a final decision in the asylum request includes the appeal process or court procedure or is limited to a first instance decision. As mentioned above in paragraph 4.3, the detention of asylum-seekers should be a measure of last resort and should not generally take place for the entire status determination procedure unless one or more of the legitimate purposes described in paragraph 4.3 are present.⁸²

5.8 A second concern to UNHCR in Section 30(a) is the prohibition on release to an ‘infiltrator’ from a State or region of residence that is likely to endanger Israel’s national security or that of its citizens. The effect of this general prohibition on release is that it would operate to require detention on a blanket, or group basis, without an assessment as to the necessity to detain the particular individual in question. Such blanket policies are in conflict with international human rights and refugee law (see in particular paragraph 4.4 on initial security screening), and implicate the prohibition on non-discrimination. What is relevant to determining the necessity of detention in an individual case, is not whether activities in the State or region of residence of the ‘infiltrator’ are likely to endanger Israel’s national security or that of its citizens, but whether the individual him- or herself poses a threat to national security such that detention is required.

6. Detention of refugee and asylum-seeking children

6.1 Under the Law, children seeking asylum as part of a family or who are unaccompanied may be detained as ‘infiltrators’, although unaccompanied minors may be released according to Section 30A(ii)(3). According to international law, children who are

⁷⁹ Section 30A(iii)(1) and (2) (amended) of the Law.

⁸⁰ This is a minor and indirect reference to the Regulation, 597 עמ' 28.3.2011, 577 הצעות חוק הממשלה

⁸¹ Procedure for Handling Political Asylum-seekers in Israel of 2 January 2011, see <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> (English version) and <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-he.pdf> (Hebrew version).

⁸² UNHCR Detention Guidelines, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 4.1.1 (para. 28), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

seeking asylum should in principle not be detained.⁸³ Overall, an ethic of care – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration.⁸⁴ The extreme vulnerability of a child takes precedence over the status as an “illegal alien”.⁸⁵ States need to:

“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”⁸⁶

6.2 All appropriate alternative care arrangements need to be considered whether children are accompanied by their parents, or they are unaccompanied. This is not only required by international law, but also because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children,⁸⁷ and the best interests of the child.⁸⁸ Detention that is not tailored to the rights of the child and does not comply with these requirements is arbitrary as a matter of international law.

6.3 In respect of unaccompanied or separated children, detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.⁸⁹ Where possible, they should be released into the care of family members who already have residency within the asylum country. Where this is not

⁸³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 9.2 (para. 51), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>. See also UN High Commissioner for Refugees, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para. 6.1, available at: <http://www.unhcr.org/refworld/docid/4f4c959f2.html>.

⁸⁴ CRC, Article 3 in conjunction with Article 22.

⁸⁵ *Muskhadzhiyeva and others v. Belgium*, (2010), ECtHR, App. No. 41442/07, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>.

⁸⁶ UNHCR ExCom Conclusion No. 107 (LVIII) – 2007, on *Children at Risk*, para. G (i), available at: <http://www.unhcr.org/refworld/docid/471897232.html>. UN High Commissioner for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>. See, also, International Detention Coalition (IDC), *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum-Seeking and Irregular Migrant Children Affected by Immigration Detention*, 2012, available at: <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; IDC, *Child Sensitive Community Assessment and Placement Model*, available at: <http://idcoalition.org/ccap-5step-model/>.

⁸⁷ *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>; *Muskhadzhiyeva and others v. Belgium* (2010), ECtHR, App. No. 41442/07, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>, in which it was held *inter alia* that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.

⁸⁸ CRC, Article 3. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 9.2 (para. 53), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁸⁹ *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>.

possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child-care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer-term solutions are being considered.⁹⁰ A primary objective must be the best interests of the child.⁹¹

7. The prohibition of *refoulement* of refugees and asylum-seekers, including access to asylum procedures

7.1 According to Section 30(a) of the Law “[t]he Minister of Defence or a person authorized by him may order in writing the deportation of an infiltrator, whether or not he has been charged under this Law. The order shall be a legal warrant for holding the infiltrator in custody pending his deportation”. With the amendments to the Law, the following has been added:

“[a] deportation order according to section (a) will not be implemented until after the Minister of Defence or a senior State employee authorized by him determined that it is possible to do so taking into account the personal circumstances of the infiltrator and the country targeted for his deportation.”⁹²

7.2 A further amendment stipulates that “if an infiltrator has been given a permit and license for residency in Israel according to the Entry into Israel Law, the Minister of Defence or a person authorized by him will cancel the deportation order that was given under Section (a)”.⁹³

7.3 An asylum-seeker cannot be deported or otherwise removed until his/her application for refugee status has been definitively determined.⁹⁴ This prohibition against the deportation or expulsion of an individual who has sought asylum, and whose claim has not yet been definitively determined, stems inter alia from States' *non-refoulement* obligations. The obligation of States not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently

⁹⁰ On reception conditions for children, see UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, para. 92, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>. WGAD, *Report to the Thirteenth Session of the Human Rights Council, A/HRC/13/30*, 15 January 2010, para. 60, available at: <http://www.unhcr.org/refworld/docid/502e0fa62.html>, “Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort.” *Mitunga v. Belgium*, (2006), ECtHR, App. No.13178/03, para. 103, available at: <http://www.unhcr.org/refworld/docid/45d5cef72.html>.

⁹¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guidelines 9.2 (para. 54), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁹² Section 30(a1) (amended) of the Law.

⁹³ Section 30(a2) (amended) of the Law.

⁹⁴ *Al-Tayyar Abdelhakim v. Hungary*, Application no. 13058/11, Council of Europe: European Court of Human Rights, 23 October 2012, available at: <http://www.unhcr.org/refworld/docid/50866bd52.html>, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, para. 3.3 (page 8), Application No. 13058/11, available at: <http://www.unhcr.org/refworld/docid/4f75d5212.html>. See also ECtHR, *R.U. v. Greece*, ECtHR, App. No. 2237/08, 7 June 2011, available at: <http://www.unhcr.org/refworld/docid/4f2aafc42.html>, at para. 94: “[I]l ressort du droit international et national, à savoir les articles 31-33 de la Convention de Genève relative au statut des réfugiés [...] que l’expulsion d’une personne ayant soumis une demande d’asile n’est pas permise jusqu’au traitement définitive de ladite demande”.

expressed in Article 33(1) of the 1951 Convention. It is also recognized as a norm of customary international law.⁹⁵ The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognized as such or whose application for status has not yet been determined (asylum-seekers), as well as to other persons recognized as being in need of international protection.⁹⁶

7.4 As already stated, States must regulate and apply their immigration policies with due regard to their obligations under the 1951 Convention.⁹⁷ This means that States cannot return such persons to their country of origin or another territory until such time as it has been definitively determined that they do not have international protection needs.⁹⁸ The discretionary power of the Minister of Defence to order the deportation of an 'infiltrator' under Section 30(A) of the Law fails to guarantee protection from *refoulement* for asylum-seekers, and could lead to a violation of the obligation.

7.5 Of particular concern is that the amendments to the Law do not provide an explicit safeguard ensuring the principle of *non-refoulement*. They do however make reference to the principle of *non-refoulement* in the Law's Explanatory Note, which, while not being a sufficient legal guarantee, should be read by the Court as implicit in the above provisions. In addition, the Ministry of Interior (MOI) regulation provides that the Procedure for Handling Political Asylum Claims in Israel "does not derogate from the case law, according to which no person is to be expelled to an area in which there is prospective threat to his life, under the principle of *non-refoulement*."⁹⁹ The principle of *non-refoulement* has also been recognized by the Supreme Court of Israel, holding that even if persons had entered Israel unlawfully, they were to be protected from return to threats to their life or liberty.¹⁰⁰ In other words, in the absence of an explicit guarantee, the Law needs to be read in line with Israel's international legal obligation not to return or expel (*refouler*) any person to where they face a threat to their life or freedom, or other serious human rights violations or serious harm.

7.6 Pursuant to the prohibition on *refoulement*, as well as the right to asylum, States are required to (i) advise individuals of their right to apply for refugee status and other forms of international protection and (ii) provide for fair and effective status determination

⁹⁵ UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, at preambular paragraph 4, available at: <http://www.unhcr.org/refworld/docid/3d60f557.html>.

⁹⁶ See ExCom Conclusion No. 6 (XXVIII), 1977, at para. (c), ExCom Conclusion No. 79 (XLVII), 1996, at para. (j), ExCom Conclusion No. 81 (XLVII), 1997, at para. (i), available at: <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, at para. 11, available at: <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

⁹⁷ See *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>.

⁹⁸ See, for example ExCom Conclusion No. 22 (XXXII), 1981, Section 2 (Admission and *Non-Refoulement*); ExCom Conclusion No. 81 (XLVIII), 1997, at para. (h) (no rejection at frontiers without the application of these procedures); ExCom Conclusion No. 82 (XLVIII), 1997, at para. (d) (admission of asylum applicants to State territory); ExCom Conclusion No. 85 (XLIX), 1998, at para. (q); ExCom Conclusion No. 99 (LV), 2004, at para. (l); ExCom Conclusion No. 108 (LIX), 2008.

⁹⁹ Procedure for Handling Political Asylum-seekers in Israel of 2 January 2011, page 1, see <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> (English version) and <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-he.pdf> (Hebrew version).

¹⁰⁰ President Barak in H CJ 4702/94 *Al Tai and others v Minister of Interior*, PD 49(3) 843, 848

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procedures.¹⁰¹ In addition, persons in detention must be given access to asylum procedures, and detention should not constitute an obstacle to an asylum-seeker's possibilities to pursue their asylum application. Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.¹⁰² Yet, in practice, asylum-seekers in detention in Israel do not have their asylum claims systematically reviewed, while access to legal and other support services is neither regularly available nor transparent. There is, for example, no clear information systematically provided to refugees and asylum-seekers in detention on the asylum procedure and how to access it. Of the asylum caseload, 95 per cent of the asylum-seekers held under the Law are from Eritrea and Sudan who, according to UNHCR and recognized by States Parties to the 1951 Convention and/or 1967 Protocol, have a high degree of protection needs.

8. Conclusion

8.1 UNHCR respectfully requests that this Honourable Court grant its request to join the proceedings as *amicus curiae* for the reasons set out above.

8.2 UNHCR is seriously concerned that the Law will wrongly stigmatize and penalize, including by way of lengthy detention, persons who are in need of international protection as refugees and who are claiming such protection from Israel.

8.3 In light of the above presented submissions UNHCR considers that the above-outlined provisions of the Law are not in conformity with international human rights and refugee law standards, including the 1951 Convention and the 1967 Protocol. Some of the provisions of the Law, should not be applied to refugees and asylum-seekers, while others need to carve out exceptions to guarantee the rights of refugees and asylum-seekers. Where the Explanatory Note refers to international safeguards, UNHCR urges the Court to read these into the relevant provisions as implicit terms.

8.4 This brief has been translated into Hebrew for the purposes of filing in the Supreme Court of Israel. The original English document is attached as Appendix "B".

8.5 UNHCR wishes to inform the Court that the Petitioner's attorney, Att. Yonatan Berman, has agreed to UNHCR's request to join the proceedings. Attorney of Respondent 1, Att. Gur Blay, responded that the request to join as *amicus* is not acceptable in legal proceedings in Israel. In light of this and the short time-frame, the Attorney of Respondent 1 shall submit its response to the request to join as *amicus* following the submission of the State's response. The Attorney of Respondents 2-4, Att. Michal Friedlander, notified that the preliminary response of Respondents 2-4 will be sent to the Honourable Court today.

William Tall
UNHCR Representative, Tel Aviv, March 7, 2013

¹⁰¹ ExCom Conclusion No. 85(XLIX), 1998, at para. (dd), available at: <http://www.unhcr.org/refworld/pdfid/4b28b1f2.pdf>.

¹⁰² See *I.M. v. France*, ECtHR, App. no. 9152/09, 2 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f2932442.html>.