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RÉSEAU EURO-MÉDITERRANÉEN DES DROITS DE L'HOMME
الشبكة الأوروبية ـ المتوسطية لحقوق الإنسان

Disclaimer: This report was finalized on 1 May 2010. On 28 July 2010, the anti infiltration bill was withdrawn at the request of the Ministry of Defence. This development was received by local and international NGOs with satisfaction, but also with apprehension. In a motion passed on 18 July 2010, the government had decided that a team headed by the Minister of Justice and the Minister of the Interior would offer additional solutions to the problem of infiltration, within 60 days. Thus the possibility that the forthcoming proposal will make no provision to protect the rights of refugees remains.

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Conclusion and Recommendations

Israel's asylum system is best described as a restrictive series of *ad hoc* arrangements developed in response to the vagaries of refugee flows to the country from Egypt. It lacks the objectivity and predictability characteristic of a comprehensive, transparent asylum policy rooted in the rule of law and reflecting international legal obligations incurred under the 1951 Convention, particularly *non-refoulement*. As a result its constituent elements – most recently the Anti-Infiltration Bill – are open to varying interpretations. It should not surprise the government then that civil society view the Anti-Infiltration Bill as targeted at refugees: in the absence of a coherent, humanitarian refugee policy that delivers on Israel's international legal obligations, the Bill comes across as yet another restrictive element of Israel's asylum adhocracy, the ambiguity of which runs the serious risk of violating refugees' rights under international laws that Israel has acceded to.

The government of Israel should:

1. Develop, in partnership with Israeli and international civil society, and adopt a comprehensive asylum policy and related legislation and procedures to domesticate Israel's obligations under the 1951 Convention;

2. Apply such legislation and procedures consistently and transparently;

3. Eliminate practices, from law and from practice, that contravene Israel's obligations under the 1951 Convention, including Hot Return and an exceedingly restrictive application of the refugee definition such that the recognition of refugee status becomes extremely rare;

4. Eliminate the administrative detention of refugees;

5. Afford individuals benefitting from temporary protected status the right to work in Israel;

6. Not adopt the Anti-Infiltration Bill, primarily because of the threat it poses to the peremptory international legal norm of *non-refoulement*;

7. Alternatively, if security considerations prevent discarding the Bill in its entirely, it should be amended prior to its next parliamentary reading to clarify that under no circumstances should it be applied to refugees;

8. Israel must adhere to its obligations under the 1951 Convention in letter as well as in spirit. If it continues to recognise refugee status on an exceptional basis and employs restrictive doctrines to limit the range of individuals who qualify for refugee status, amending the Bill such that it is not applied to refugees will be of no practical effect. Thus if the Bill is amended instead of dropped, the amendment must be interpreted in line with the third recommendation above.

9. If it is passed into law, officials charged with the Anti-Infiltration Bill's practical implementation must be trained to ensure its application does not lead to the

refoulement of refugees: anyone apprehended for illegal entry into Israel must be interviewed by someone trained in refugee law, with the assistance of a qualified interpreter, to determine if the person should be treated as a refugee. If so, such person must immediately be dealt with under the regime developed pursuant to the first recommendation above.

Acknowledgment: The main purpose of this report is to analyse the Israeli asylum system, and more particularly the impact of the Israeli "anti-infiltration bill" on refugees and asylum seekers.

"Refugees" is to be understood in line with the definition provided by the 1951 Geneva Convention and the UNHCR enlarged mandate. A section of this report is dedicated to analysing the impact of the anti-infiltration bill on Palestinians. However, the report does not make a general analysis of the situation of Palestinians living in Israel and in the Occupied Palestinian Territory. Several reports have been previously published by the EMHRN and its members on this matter as well on the situation of Palestinian refugees in the neighbouring countries. They can be found on the EMHRN's website (www.euromedrights.org) and blog (www.euromed-migrasyl.blogspot.com).

Finally, it is to be underlined that references made in this report to "illegal" entry into Israel, are made in reference to the Israeli law, hence to what Israel considers as its own territory. Israel applies its legislations and policies to parts of the Occupied Palestinian Territory, including East Jerusalem, in contravention with international law. The analysis made in this report should in no way be understood as a possible acceptance by the EMHRN of the de facto occupation and/or annexation of territories which are not part of the State of Israel, as defined by the 1967 UN Security Council's resolutions (242 and 446).

Israel's Anti-Infiltration Bill:
Another Aspect of Asylum Adhocracy
June 2010

1. Introduction

The state of Israel was founded in 1948 as, among other things, a sanctuary for Jews, yet refugees fleeing persecution today find no safe haven there. Over sixty years after its founding, Israel does not have a predictable, objective asylum system rooted in the rule of law and its international obligations under the *1951 Convention relating to the Status of Refugees* (the 1951 Convention), which Israel ratified in 1954. Rather, the refugee regime, in terms of both status determination and conditions of stay, is restrictive and inconsistent, governed on an *ad hoc* basis. If the *2008 Prevention of Infiltration Law* (the Anti-Infiltration Bill or the Bill) currently pending in parliament (the Knesset) is passed in its current form, things will become even worse for refugees.

Gravely concerned about this state of affairs, in April 2010 the Euro-Mediterranean Human Rights Network (EMHRN) sent two representatives of Fahamu and a representative of its member, the Italian Refugee Council (CIR), on a week-long mission to Israel, to investigate its asylum system in general and the Anti-Infiltration Bill in particular through meetings with civil society, government, refugees and the United Nations High Commissioner for Refugees (UNHCR).[1] This report summarises the findings of their mission and some supplementary desk-based research, and recommends law and policy reform to bring Israel's asylum system in line with its international legal obligations.

This report begins by contextualising the Anti-Infiltration Bill within Israel's asylum system, however, this system must also be contextualised within the particularities of Israeli statehood. With this context and background in place, the report goes on to describe the Anti-Infiltration Bill: its historic origins, what it proposes, how it will effect refugees and civil society if passed into law and how it falls short of Israel's international legal obligations. The report concludes by recommending that Israeli lawmakers adopt and implement a comprehensive asylum policy, which would include discarding or amending the Bill.

2. Context and Background

2.1. Israeli Statehood

No analysis of asylum policy in Israel can be divorced from the historic and ideological particularities of the state itself. Israel is a state with a purpose, founded on the Zionist ideal of a Jewish homeland where Jews would have a right of self-determination. Early Zionists began legitimising and consolidating this vision by encouraging Jewish immigration to Palestine as early as 1882 (Afeef, 2009). This quest for demographic majority has persisted post-independence and is a central factor driving Israeli migration policy, which is comprised of two parallel regimes: one for Jews and people of Jewish ancestry, who are welcomed with open arms, and another for non-Jews, for whom permanent migration to Israel is generally impossible. Short-term immigration under this latter regime has, however, recently expanded, largely due to the exclusion of Palestinian labour and the associated increased demand for labour from abroad. Nevertheless, a fundamental tenet of Zionism is ethno-nationalism, the legacy of which has been a drive to preserve a

[1] A list of organisations interviewed during the mission is attached as Annex I.

majority Jewish population in Israel. Seventy-five per cent of Israel's current population is Jewish. Migration of all types is viewed as a threat to this dominant demographic position, and countering this threat is a major factor influencing Israel's response to refugees.

A second critical factor driving asylum policy in Israel is what the State perceived as a necessary response to terrorism and openly hostile neighbours. Nineteen of the United Nations' 192 member states do not recognise Israel's existence, instead referring to it as the 'Zionist entity'. This climate of hostility has led to the creation of Israel's massive military and security apparatus and has allowed the country to remain in a perpetual state of public emergency since four days after its founding over 60 years ago. Indeed, the enforceability of several Israeli legislative acts is conditioned on the persistence of the state of emergency. A constant and overriding concern with defence and security is therefore a driver of all Israeli policy, not least its asylum policy. The very term 'infiltrator', the historic roots of which are discussed in more detail below, belies this concern and the xenophobia it engenders.

Israel's highly restrictive approach to refugees is thus in large part the result of a drive to ensure that a Jewish demographic majority can live in its homeland in absolute security. Whether this concern will win out over competing interests in the long term remains to be seen. In recent history, government and public attitudes have been influenced by the humanitarian imperative and pragmatic concerns, such as the demands of the labour market (Afeef, 2009). Furthermore, Israel is modelled on principles of western liberal democracy and tensions between this form of government and ethnic nationalism are always salient. A primary objective of this report of EMHRN's mission is to be part of the push for change in favour of tolerance, multiculturalism and respect for human rights and international law in Israel.

2.2. The Israeli Asylum System

Small numbers of refugees had been entering Israel via Sinai over the past fifteen years but the numbers began to increase exponentially following the three-month long peaceful protest staged in 2005 by Sudanese refugees in Cairo, which ended tragically in December of that year when Egyptian authorities forcibly dispersed the demonstrators, killing at least 27 of them (Azzam, 2006). Since then, Israel has received more than 17,000 asylum applications (Afeef, 2009).[2] There are currently approximately 25,000 refugees in Israel. Most refugees in Israel originate from sub-Saharan Africa,[3] in particular Eritrea and Sudan. The Sudanese are usually smuggled by networks of Bedouin people traffickers from Cairo across the Sinai Peninsula to Israel's southern border with Egypt, while Eritreans often arrive directly from Eritrea or after having spent time in Egypt, Ethiopia or Sudan. Israel also has refugees from, among other countries, Colombia, Cote d'Ivoire, the Democratic Republic of Congo, Myanmar, Nigeria and Sri Lanka; some of them enter the country on work visas, others as religious pilgrims.

The government has yet to publicise any comprehensive policy to deal with these population inflows. While Israel has basic immigration laws – the *1952 Entry to Israel Law* (the Entry Law) and the *1950 Law of Return* with respect to Jewish immigrants, along with various migrant labour schemes – initial responses to the surge of refugees in 2006 were *ad hoc* and inconsistent. Recently, however, the contours of

[2] A consideration of Palestinian refugees in Israel, who are excluded from the international refugee protection regime by Article 1D of the *1951 Convention relating to the Status of Refugees*, was beyond the scope of the mission and hence is not included in this report.

[3] Jews who flee persecution to Israel are not considered refugees because they have the right to enter and remain there under the *1950 Law of Return*.

an Israeli asylum policy have begun to emerge – in particular since the move to take over refugee status determination from UNHCR – although its development has been slow, contradictory and the government's lack of transparency has left refugees and civil society unable to form reasonable expectations about what Israeli asylum policy is or how exactly it is administered. To the extent possible, the below outlines the asylum process as experienced by most refugees entering Israel from Sinai, whose journey through the system begins at the southern border and ends with either the receipt of 'deferred deportation' status or a deportation order or, in very rare cases, recognition of refugee status.

2.2.1. Hot Return and Detention

Refugees who are apprehended after managing to cross the Sinai border – Egypt catches many on its side; such individuals are detained and charged with attempted infiltration of Israel, or sometimes killed – are either returned to Egypt pursuant to the policy of 'immediate coordinated return' (Hot Return) or held indefinitely at Saharonim. Saharonim is a 'tent city' inside Ketsiot detention centre, a refugee detention centre constructed in 2007 in the Negev desert.

Under the Hot Return policy, refugees are returned to Egypt by Israeli army soldiers or border police officers within 72 hours of crossing, without being given the formal opportunity to apply for asylum, in contravention of Articles 32 and 33 of the 1951 Convention. The state legally justifies such returns by construing them as the prevention of entry, rather than as deportation (Human Rights Watch, 2009). Under the international legal norm of *non-refoulement*, however, temporal proximity between entry and return is irrelevant. In 1977, UNCHR's Executive Committee (ExCom), of which Israel is a member, noted the fundamental importance of *non-refoulement* at borders (ExCom conclusion 6) and reaffirmed this principle in 2004 when it called on states to ensure 'full respect for the fundamental principle of *non-refoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs' (ExCom conclusion 99).

In August 2007, non-governmental organisations (NGOs) in Israel challenged the Hot Return policy using the case of 48 Darfuris who had been returned to Egypt during the previous month and whose whereabouts remain unknown (according to a 26 February 2008 article in the *International Herald Tribune*, some of them were deported by Egypt to Sudan). As a result, the Israeli High Court of Justice required the state to implement a procedure to differentiate, at the border, between individuals in need of protection and individuals who may be returned. The state complied in December 2007. The procedure, which is outlined in detail by Human Rights Watch (2009), requires only that the capturing force interrogate the individual within six hours of apprehension, following a standard set of questions that does not include whether he/she fears persecution in his/her country of origin or Egypt. Interpretation is not mandatory; only a standard of 'basic communication' is required. The individual can be returned to Egypt unless the questioning reveals a 'real danger to life'; this is a much lower threshold than that under the 1951 Convention. Under that instrument, no one with a 'well founded fear of persecution' can be returned to his/her country of origin or habitual residence.

Individuals who are not *refouled* to Egypt pursuant to Hot Return – the majority, since it has been employed in less than 500 cases – are taken by the army or border police to Saharonim at Ketsiot. Over 1,500 refugees are currently in immigration detention in Israel, at Saharonim and elsewhere. Israel does not, however, have a clear immigration detention policy. Generally, Eritreans and Sudanese are supposed to be released once nationality is established and they can be given temporary protection. In practice, however, they are often kept longer, only being released when necessary

to make space for new arrivals. Individuals from other countries are to be kept in detention for the duration of refugee status determination, and individuals with disputed nationality, or who are otherwise non-deportable, are held indefinitely. Certain individuals have been held at Ketsiot for over two years. A stateless individual originating from Cote d'Ivoire has been held at Givon – originally a criminal penitentiary now used for refugees – since 2006 (Weller-Polak, 2010).

The very limited number of individuals who are not apprehended at the border usually travel to Tel Aviv, where they may receive deferred deportation status, humanitarian protection or commence the refugee status determination process.

2.2.2. Deferred Deportation and Humanitarian Protection

The Israeli government took over refugee status determination from UNHCR in July 2009. However, because Eritreans and Sudanese – who constitute 90% of Israel's refugee population – automatically receive 'deferred deportation' status, in which a deportation order is issued with suspensive effect, the majority of refugees are not subject to status adjudication. Instead, they face identification procedures administered by the registration unit in Lod (officially called the 'infiltrators questioning unit'), in which the refugee must prove his/her nationality. This can be a fairly straightforward process. Frequently, however, identification documents are lacking or their authenticity is disputed; this is particularly common among individuals from Eritrea, who are regularly alleged to in fact be Ethiopian.

Once nationality is established, Eritreans and Sudanese are accorded deferred deportation status, evidenced by the 2(a)5 'conditional release document'. This permit is valid for one or three months, seemingly at the whim of the official issuing it. According to the Ministry of the Interior, however, the validity period of the 2(a)5 permit is based on the policy prevailing on the date of issue. In any case, the permit must be renewed upon expiration, for which there is a significant fee. Furthermore, there is no guarantee of renewal. Because they are denied access to refugee status and its attendant rights and promise of a durable solution, and accorded only very short term permits, Eritrean and Sudanese refugees in Israel exist in a state of legal limbo, able to plan for the next three months at most. The relative security, certainty and predictability of refugee status or even a residence permit of reasonable duration, which would enable refugees to rebuild their lives and invest in the future, are entirely lacking.

Deferred deportation status evidenced by the 2(a)5 permit does not afford the right to work in Israel, although in practice the government does not pursue individuals working unlawfully or their employers, and refugees – who are usually employed as cleaners in hotels and restaurants – pay taxes and social security (of which they will never benefit) through automatic payroll deductions. Others work in the informal economy.

Some refugees from the Democratic Republic of Congo, as well as some who are awaiting status determination, receive a B1 permit. In addition, almost all 2,000 Eritreans who arrived in Israel prior to 24 December 2007 received a B1 permit. This status affords the right to work, although there does not seem to be any principled basis on which those who have received a B1 permit can be distinguished from those offered a 2(a)5 permit – it may have been to address an immediate problem of overcrowded detention centres. According to the Hotline for Migrant Workers (Hotline), about half of the Eritreans lost their B1 permits when their cases were transferred from UNHCR to the Ministry of the Interior, which accused them of being 'imposters'. About 1,000 Eritreans still hold the B1 permit.

In addition to the non-deportation of Eritreans and Sudanese, Israel offers humanitarian protection to nationals of certain war-torn states on the basis of nationality. Currently, only individuals from the Democratic Republic of Congo benefit from humanitarian protection. In 2008, some 500 individuals from Darfur received humanitarian protected status. Once the situation in the country of origin is deemed to have changed sufficiently to warrant safe return there, humanitarian protection ceases and individuals wishing to remain in Israel must undergo individual status determination.

2.2.3. Refugee Status Determination

Refugees from countries other than Eritrea and Sudan are subject to status determination, which since 2009 has been conducted by the Israeli government. Prior to that, UNHCR adjudicated refugee status claims. Until 2002, UNHCR headquarters in Geneva handled refugee status determination. In 2002, the National Status Granting Body (NSGB), an inter-ministerial board comprised of representatives from the ministries of foreign affairs, the interior and justice, was established. From 2002 until 2009, UNHCR's resident office in Israel would conduct refugee status determination and recommend an outcome to the NSGB, which in turn would make a positive recommendation to the Minister of the Interior or a negative recommendation to the Population, Immigration and Border Crossing Authority – the NSGB does not have decision-making power and can only make recommendations. According to the Ministry of the Interior, the NSGB adhered to UNHCR's recommendations '99.9%' of the time, although civil society in Israel dispute this. It seems that UNHCR was as restrictive in its view of refugee status as the NSGB is at present.

Since 1 July 2009, refugee status determination has been conducted by Ministry of the Interior. The first step in the status determination process is registration with the Lod unit. Each non-Eritrean or Sudanese case then proceeds to the refugee status determination unit in south Tel Aviv. Established in 2009, this unit is run by the Ministry of the Interior and is staffed by 25 caseworkers who were trained by UNHCR and the Tel Aviv office of the NGO Hebrew Immigrant Aid Society. Following an interview with the refugee, the status determination unit recommends either the grant or denial of refugee status to the NSGB. The NSGB reviews each recommendation, often deliberating over e-mail,[4] and then makes either a positive recommendation to the Minister of the Interior or a negative recommendation to the head of the Population, Immigration and Border Crossing Authority. The NSGB generally follows the recommendation of the south Tel Aviv status determination unit, which is to say it almost never recommends the recognition of refugee status.

Since Israel's founding in 1948, it has recognised approximately 170 refugees (approximately 100 of whom have now resettled in Canada). According to a query made by Hotline on 12 April 2010, in 2008 the NSGB considered 1,596 cases forwarded by UNHCR and recommended the recognition of refugee status in *only one* of them. In 2009, the NSGB considered 1,615 cases, *only two* of which received refugee status. As the most developed country in its region, Israeli authorities fear Israel will become a magnet for labour migrants. A recently published report of the 2 March 2010 proceedings of the Knesset's Migrant Workers Committee reveals how the new head of the Population, Immigration and Border Crossing Authority, Amnon ben Ami, views refugees: 'only fractions of percents…can be defined as refugees…We are talking about illegal migrant workers, illegal residents'.

[4] According to a query made by Hotline on 12 April 2010, the NSGB convened twice in 2008 (in July and November) and four times in 2009 (in September, October, November and December). During these six meetings, 52 cases were discussed, of a total of 3,211 asylum applications received. All other requests (98.4%) were rejected by e-mail correspondence without an in-person discussion of the case.

Refugee status is evidenced by the A5 temporary residence permit, which is issued for a period of one year and must be renewed upon expiration. Recognised refugees benefit from most socio-economic rights afforded to Israelis, including the right to work and access to state funded health care. Refugees who are not recognised are issued with a deportation order. A rejected refugee's only recourse is to file an application for a re-hearing or petition an administrative court for review of the asylum decision. Re-hearings are only granted where new facts have arisen and the decision making process is identical to that at first instance, meaning that refugee status is rarely granted pursuant to a re-hearing. Judicial review by an administrative court requires legal representation and so is beyond the reach of most refugees. A refugee who does not apply for a re-hearing or judicial review, or whose re-hearing or judicial review proceeding is not successful, becomes deportable. Where Israel does not have diplomatic relations with the country of origin, the deportation order cannot be executed and the rejected refugee often ends up staying in Israel, without status or rights.

2.3. Availability of Legal Aid and Civil Society Activism

Israel's Ministry of Justice includes a legal aid unit for civil matters. Strictly speaking, Israeli citizenship is not required to qualify for legal aid, however the relevant law's ambiguous drafting has allowed it to be interpreted as such. The unit thus provides free legal aid only to Israelis who meet basic eligibility criteria. Recognised refugees are treated like citizens for the purposes of legal aid, however, it is during the status determination process, before a refugee has been formally recognised as such, that individuals are most in need of legal aid. Unaccompanied refugee children also receive legal aid, but only in respect of matters relating to detention. The end result is that state funded legal aid is not available during registration or refugee status determination, nor is it available, with the exception of unaccompanied minors, in respect of detention. Thankfully, a few NGOs provide legal or paralegal aid in respect of registration, status determination and detention: African Refugee Development Centre (ARDC), Hotline and the Refugee Rights Clinic at Tel Aviv University, all of which are located in Tel Aviv. Their resources are, however, stretched very thin. ARDC does not have a lawyer on staff, while Hotline has two and the Refugee Rights Clinic has two plus a number of law students. Israel's tens of thousands of refugees are thus served by only four lawyers and a handful of paralegals.

Despite the limited availability of refugee legal aid, a range of NGOs conduct policy advocacy relating to refugee rights and certain organisations focus on refugees' psychosocial needs or physical health. Policy advocacy is undertaken by NGOs individually and through a consortium known as the Refugees' Rights Forum, comprised of Aid to Refugees and Asylum Seekers (ASSAF), Amnesty International, ARDC, the Association for Civil Rights in Israel, Hotline, Israel Religious Action Centre/Movement for Progressive Judaism, Kav LaOved, Physicians for Human Rights and the University Refugee Rights Clinic. Psychosocial assistance is offered by ASSAF, Carmel Shelter provides accommodation and support to a limited number of refugee women at risk and Physicians for Human Rights operates a free medical clinic. Mesila, a project of the Municipality of Tel Aviv-Yafo, provides humanitarian assistance, community empowerment courses and information to refugees and other foreign nationals in the city.

These organisations' critically important work may, however, be under threat. The *2010 Bill on Disclosure Requirements for Recipients of Support from a Foreign Political Entity*, which is currently pending in the Knesset, would require that any NGO receiving foreign or inter-governmental funding (from, for example, donor states, the European Commission or UNHCR) register as a political party and

declare all foreign sources of funding. Most worrying, if the bill is passed any NGO in receipt of funding from a foreign government and/or inter-governmental body would be reclassified as a political entity, thereby loosing its tax exempt status and, in consequence, access to further foreign funding. This threat is in addition to certain provisions of the Anti-Infiltration Bill described below, which criminalise the provision of assistance to 'infiltrators'.

3. The Anti-Infiltration Bill

3.1. 'Infiltration' in Historical and Contemporary Perspective

If passed, the Ministry of Defence's Anti-Infiltration Bill would replace the *Prevention of Infiltration Law* (the Infiltration Law or the Law), a security instrument enacted in 1954 to prevent unauthorised arrivals from neighbouring states, in particular *fedayeen*: militant elements within the Palestinian refugee population who were attempting to enter Israel from Gaza, the West Bank, Lebanon or Syria to stage terrorist attacks. The Infiltration Law was part of Israel's package of emergency legislation whose application depended on the existence of the state of emergency; the Law still applies because the official state of emergency remains in force.[5] The application of the new anti-infiltration legislation, if passed into law, would not depend on the state of emergency. It is part of a broader plan to eliminate the contingency of various legislative acts on the state of emergency.

There is some overlap between the Infiltration Law and the Entry Law[6], namely with respect to illegal entry to and stay in Israel. Legal authorities can choose which instrument to apply. The Entry Law's sanctions regime is relatively more lenient. Under this instrument, the penalty for illegal entry or stay is one year in prison (Article 12); under the Infiltration Law, it is five years (Article 2). The Entry Law also contains several due process safeguards, added in a 2001 amendment. These include periodic semi-judicial review of administrative detention and certain guarantees with respect to conditions of detention. Such safeguards of liberty and dignity are distinctly absent from the Infiltration Law.

Despite the option of employing the relatively more just Entry Law, since 2006 the Infiltration Law has been applied to refugees, likely for its deterrent effect (Refugee Rights Forum, 2008). Reacting swiftly to this development, in 2006 Hotline and the Refugee Rights Clinic at Tel Aviv University challenged the application of the Infiltration Law to refugees in the Supreme Court. In response, the government instituted two important changes to the Law's implementation: an *ad hoc* review mechanism was established to review the cases of every refugee detained under the Infiltration Law – which led to the release of over 300 Sudanese refugees from detention – and the government agreed to deal with all detained refugees under the Entry Law rather than the Infiltration Law, provided the case passed a preliminary security screening. Now the cases of most detained refugees are transferred from the Infiltration Law to the Entry Law within about two weeks of apprehension. Perhaps because refugees are clearly beyond the scope of the original legislative intent of countering terrorism, as evidenced by the Supreme Court's reaction to the civil society challenge, the Anti-Infiltration Bill was tabled in 2008 to replace the Infiltration Law. Its adoption would result in the even harsher treatment of refugees, and would impact those who help them. Indeed, the Bill effectively criminalises asylum seeking and the rendering of assistance to refugees.

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[5] It is a near certainty that the state of emergency will be extended yet again when it comes up for review on 30 June of this year.

[6] See: http://www.unhcr.org/refworld/country,,,LEGISLATION,ISR,,3ae6b4ec0,0.html (unofficial translation of the entry law – does not include latest amendments)

Infiltration is a wide-ranging security concept in Israel; refugees are only one among several groups to which the concept has been applied. In addition to *fedayeen* under the Infiltration Law, a 1969 military order termed 'infiltrator' any unauthorised entrant to the occupied West Bank from an enumerated state (Egypt, Jordan, Lebanon and Syria). Moreover, the range of individuals who may be termed 'infiltrators' seems to be expanding: with the application of the Infiltration Law to refugees from 2006 and, in April 2010, with military orders 1650 (substantive) and 1649 (procedural). Updating the 1969 order, order 1650 defines all residents of the West Bank as potential 'infiltrators' by requiring each of them to hold an official permit issued by the Israeli military commander or by Israeli authorities (under the 1969 order, lawful presence in the West Bank could be proved via any document evidencing West Bank residence). Indeed, the order defines as an 'infiltrator' any person who entered the West Bank unlawfully or who is present in the West Bank and does not lawfully hold the requisite permit. Any person deemed an 'infiltrator' under the former definition may be sentenced to seven years imprisonment, while those falling under the latter category may be sentenced to three years in prison; both types of 'infiltrator' are subject to deportation to the Gaza Strip, with limited access to judicial review. Such deportation would be a grave breach of Article 49 of the *Fourth Geneva Convention*, which prohibits any kind of forcible transfer as well as the deportation of civilians from an occupied territory[7].

3.2. Overview of the Anti-Infiltration Bill[8]

The applicability of the Anti-Infiltration Bill is much broader than the new military orders. The Bill relates to unlawful entry and presence in any part of Israel (under Israel's own definition of its territory, i.e. including in the Occupied Palestinian Territory), whereas the orders cover only the West Bank. Under the Bill, an 'infiltrator' is any person who has entered Israel illegally, which means via an entry point not prescribed by the Ministry of the Interior, without proper authorisation (Article 1). This definition catches most refugees. An 'infiltrator' is liable to i) imprisonment (Article 2) (however such imprisonment is not pursuant to a regular criminal charge and trial, with its attendant procedural safeguards including a heavy burden of proof); or ii) deportation 'as soon as possible' (Article 6(a)). The Bill is in clear violation of Article 31 of the 1951 Convention. According to the explanatory notes, the underlying rationale of the Bill is to 'cause the exit of infiltrators and those who reside in Israel without a permit as soon as possible and to detain them until then'.

Infiltration is punishable by five years in prison (Article 2), or seven years if the 'infiltrator' is from Afghanistan, the Gaza Strip, Iran, Iraq, Lebanon, Libya, Pakistan, Sudan (which produces almost half of refugees arriving in Israel), Syria or Yemen (Article 3). Differential punitive regimes based on country of origin is clear nationality-based discrimination, in contravention of international human rights (Article 2 of the Universal Declaration of Human Rights) and refugee law (Article 3 of the 1951 Convention). Prison terms are even longer if infiltration is 'aggravated', which includes possession of a knife or capture with a person in possession of a knife (Article 4). The Bill prescribes the same criminal penalties for any person who assists an 'infiltrator' in entering Israel and/or facilitates his/her stay in the country, effectively criminalising much civil society refugee rights work (Article 5).

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[7] For more details on the updated military orders: http://en.euromedrights.org/index.php/news/emhrn_releases/67/4300.html

[8] Refugees' Rights Forum 2008 document titled 'Background Information on Proposed Legislation: Prevention of Infiltration Law – 2008' provides an excellent and detailed summary of the Bill.

In cases where the authorised official (a lieutenant colonel or other high ranking army officer authorised by the Defence Minister with regard to the law) is certain that the alleged 'infiltrator' has entered Israel 'recently', deportation may occur within 72 hours of the suspected unlawful entry, effectively formalising Hot Return (Article 11(a)). Otherwise, deportation would occur pursuant to the issuance of a deportation order by the Minister of the Interior, following an interim period of administrative detention (Article 8(a)). Where the 'infiltrator' is charged and found guilty of the crime of infiltration, deportation is generally abortive of the criminal prison term (Article 6).

Administrative detention is subject to semi-judicial review (Articles 17-19), however a tribunal would not be authorised to release an individual if i) he/she does not cooperate with his/her deportation (Article 15(b)(1)); ii) release might endanger Israel's security, safety or public health (Article 15(b)(2)); or iii) activities in his/her country of origin or habitual residence might endanger Israel's security, regardless of whether the individual was involved in such activities (Article 15(b)(3)). Refugees' Rights Forum (2008) point out that Article 15(b)(1) resembles Article 13F(b)(1) of the Entry Law, which authorities interpret such that detainees who declare the intention to seek asylum in Israel are deemed to be uncooperative with deportation procedures, justifying continued detention. It is also worth noting that the Bill's administrative detention regime makes no provision for children or unaccompanied minors.

3.2.1. Applicability to Palestinians

The Anti-Infiltration Bill applies to anyone who has entered Israel (under Israel's own definition of its territory, i.e. including the Occupied Palestinian Territory) illegally, meaning it could be applied to any Palestinian who entered in an unauthorised manner. The Bill, however, contains stronger procedural safeguards than the Entry Law, which authorises the almost summary deportation of Palestinian residents of the Occupied Territory, following only a brief hearing (Article 13(10)). Under the Anti-Infiltration Bill, by contrast, deportation requires an order signed by the Minister of the Interior (Article 6(b)) and a waiting period of three days between issuance of the order and deportation. It also, among other procedural safeguards, provides for minimum conditions of detention, which would not violate health or dignity (Article 14(a)). From a due process perspective, therefore, a Palestinian 'infiltrator' should 'prefer' being subject to the regime proposed under the Bill to that currently in place pursuant to the Entry Law. The Bill, however, provides that none of its clauses should be interpreted so as to detract from or provide an alternative to the deportation procedures applicable to Palestinians under the Entry Law (Article 11(b)).

3.3. Contrasting Interpretations

The Israeli government and civil society have sharply contrasting interpretations of the Bill's purpose. The Bill and its explanatory notes contain enough contradiction to warrant such divergent viewpoints. The government view, as articulated in the instrument's explanatory notes and during EMHRN interviews, is that the proposed law is a response to the security threat inherent in the growing number of suspect individuals – not refugees – entering Israel illegally through its porous border with Egypt. According to the government, the Bill provides a tool through which to address such entrants by initially casting a very wide net, dealing with all illegal entrants under the Anti-Infiltration Bill. After initial apprehension and screening, however, 'infiltrators' who are deemed not to pose a security risk – refugees would generally fall within this category – would be dealt with under the more generous Entry Law. Indeed, in a meeting with EMHRN, representatives of the Ministries of Justice and Foreign Affairs reiterated a promise they had previously made to Israeli civil society: to amend the Bill prior to its next Knesset reading such that it would clearly and unambiguously state that it is not to be applied to refugees. It is worth noting that the effect of such

an amendment would depend entirely on Israel's view of refugee status. If Israel continues to interpret the refugee definition in an exceedingly restrictive manner and employ restrictive doctrines limiting the range of individuals that may be recognised as a refugee – for example, in court briefs Israel has argued that no one arriving from a third country via Egypt would qualify for refugee status in Israel, since such individuals should have sought asylum in Egypt – then exempting refugees from the Anti-Infiltration Bill would not really limit the range of individuals to whom the Bill could be applied.

If the legislative intent was not to include refugees within the ambit of the Bill, as claimed by the government, it is curious that the Bill's criminal regime is equally applicable to all 'infiltrators', whether or not the individual is ultimately deemed to pose a security threat. This suggests that the proposed law is aimed at deterring all infiltration, regardless of whether the motivation for entering Israel is to seek asylum or commit an act of terrorism. If 'infiltrators' who are not deemed to pose a security risk are ultimately to be treated under the Entry Law, it is equally curious that this arrangement is described in the explanatory notes but not within the Bill itself; the Bill provides only that once it has been ascertained that the 'infiltrator' does not pose a security risk, application of the Entry Law is not precluded (Article 12(a)). Furthermore, if the Bill is the response to a security threat, why do the explanatory notes maintain that most recent 'infiltrators' to Israel have not been security related? And given this fact, why does the Bill presume that anyone who enters Israel illegally does so with sinister motives? It is also worth noting that Israel already has a mighty military and security apparatus in place. That the government is dealing effectively with terrorist threats, but has been unable to stem the rising tide of forced migrants, suggests that the Anti-Infiltration Bill is a tool to address the latter, rather than the former, phenomenon.

Even if the Bill is genuinely security motivated, its approach of initially casting a very wide net that would trap all illegal entrants, including refugees, risks the unintended consequence of *refoulement*, in contravention of Article 33 of the 1951 Convention and Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The Bill makes it too easy to return people to Egypt: an unrepresented refugee, weary from the arduous journey across Sinai and knowing nothing of Israel's asylum system, may not know how to articulate his/her well founded fear of persecution in a manner that would prevent him/her from being considered an 'infiltrator' rather than a refugee. The United Nations Committee Against Torture agrees. In its May 2009 Concluding Observations in respect of Israel, the Committee note their concern 'that article 11 of this draft law allows Israeli Defence Forces officers to order the return of an "infiltrator" to the State or area of origin within 72 hours, without any exceptions, procedures or safeguards. The Committee considers that this procedure, void of any provision taking into account the principle of *non-refoulement*, is not in line with the State party's obligations under article 3 of the Convention'. Furthermore, if the Bill is security motivated, is it reasonable for the Israeli government to deport 'infiltrators' per its Hot Return provisions? If a person is really a security threat, might it not be more prudent to detain and question him/her, instead of deporting him/her to Egypt, from where he/she might try entering Israel again, perhaps with more success on the second attempt?

The Anti-Infiltration Bill and its explanatory notes contain sufficient contradiction to warrant viewing the Bill's purpose as stated by the government with some scepticism. Furthermore, even if the Bill is aimed only at bolstering security, it poses enough of a threat to the *jus cogens* norm of *non-refoulement* that it should not be adopted, or at the very least it should be amended to make non-refoulement a much less likely

unintended consequence. This has been the view of civil society in Israel. Seizing on its contradictions and its timing, Israeli refugee rights advocates maintain that the Anti-Infiltration Bill is the government's response to recent steep increases in refugee flows to Israel, aimed at deterrence. Because the Infiltration Law has, since 2006, been applied to refugees, they have no doubt that its successor law will be as well.

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Annex I: Interviews Conducted During Mission

Government of Israel
-Legal Aid Department, Ministry of Justice, Adv. Anat Bahat and Adv. Eyal Globus
-Ministry of Foreign Affairs, Simona Halperin
-Legislation and Consulting Department, Ministry of Justice, Adv. Avital Shternberg
-Immigration Authority, Ministry of the Interior, Adv. Sara Shaul

Civil Society
-African Refugees Development Centre, Yohanes Bayu and Hadas Yaron
-Aid to Refugees and Asylum Seekers, Nathalie Rubin
-Amnesty International, Oded Dinar and Rona Moran
-Carmel Shelter, Rita Zukahira
-Hebrew Immigrant Aid Society, Joel Moss
-Hotline for Migrant Workers, Shevy Korzen, Yonatan Berman and Sigal Rozen
-Yotam Feldman, jounalist, Haaretz newspaper
-Physicians for Human Rights, Ran Cohen and Hadas Ziv
-Refugee Rights Clinic, Tel Aviv University, Yuval Livnat and Anat Ben Dor

Inter-governmental Organisations
-United Nations High Commissioner for Refugees, William Tall