UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Response by UNHCR to the Legal Representative on the Scheme for the 'Deposit of Funds for the Benefit of the Foreign Worker and Ensuring his Departure from Israel'

I. Introduction

1. This guidance is submitted by UNHCR in response to a request by the legal representative of Esther Segai Gersagher and others in the case of HCJ 2293/17 *Esther Segai Gersagher et al. v. The Knesset et al*[1] before the High Court of Israel regarding the legislative scheme for the 'deposit of funds for the benefit of the foreign worker and ensuring his departure from Israel'. The scheme was first introduced as part of the *2014 Law for the Prevention of Infiltration and to Ensure the Departure of Infiltrators from Israel*,[2] (hereinafter: "*the Law on Departure of Infiltrators*"); it was later amended on 3 January 2017 and came into effect on 1 May 2017.[3]

2. The *Law on Departure of Infiltrators*, amending the *1991 Foreign Workers Law*,[4] introduced an obligation on employers of those defined as 'infiltrators'[5] to allocate two

[1] *Esther Segai Gersagher et al. v. The Knesset* (2293/17), Israel: High Court of Justice, filed on 13 March 2017.

[2] The *Law for the Prevention of Infiltration and to Ensure the Departure of Infiltrators from Israel (Legislative Amendments and Temporary Order) - 2014*, available at: https://knesset.gov.il/privatelaw/data/19/3/904_3_1.rtf (Hebrew).

[3] The *Law for the Prevention of Infiltration and to Ensure the Departure of Infiltrators from* Israel *(Legislative Amendments and Temporary Order) (Amendment) - 2017*, available at: http://fs.knesset.gov.il//20/law/20_lsr_366894.pdf (Hebrew); Ministry of Interior, Population, Immigration and Border Authority (hereinafter: "PIBA"), *Regulation Number 9.0.0004, Deposit Procedure for Foreign Workers who are Infiltrators - Date of Update: 25 April 2017*, available at: https://www.gov.il/BlobFolder/policy/deposit_monies_for_infilitrators_procedure/he/9.0.0004.pdf (Hebrew).

[4] *Foreign Workers Law - 1991*, available at: https://www.nevo.co.il/law_html/Law01/P178_002.htm#Seif60 (Hebrew).

[5] The legal term 'infiltrator' is defined in Article 1 of the *Law on the Prevention of Infiltration - 1954* (available at: http://www.refworld.org/docid/55116dca4.html), as a person who enters Israel through an unrecognized border entry point. Most of UNHCR's population of concern in Israel (mostly Eritreans and Sudanese) are categorized as 'infiltrators' following their irregular arrival through the formerly unfenced border with Egypt. Under the amended *Law on the Prevention of Infiltration,* 'infiltrators' are subject to mandatory detention for a three-month period upon arrival. Men are then further subject to a 12-month residency period in a semi-open residence facility in Holot (pursuant to Amendment 6, the original Holot period was for an indefinite period until return to Eritrea or Sudan was possible). Article 32D(b) of the *Law on the Prevention of Infiltration* expressly exempts women and children, as well as men with dependent minors in Israel from this residency requirement. At present, the 12-month Holot residency period only applies to single Eritrean and non-Darfuri Sudanese men (this residency requirement in Holot also applies to those who have been living in Israel for years). As elaborated in paragraph 12, these men are prohibited from working while in Holot, and are prohibited from living or working in Tel Aviv or Eilat upon their release.

types of monthly deposits into a designated fund. One deposit equivalent to 16% of the employee's monthly salary is payable by the employer and substitutes the current obligatory deposits towards pension and benefits (which normally ranges between 12.5% and 14.8%, depending on the field of employment).[6] The other deposit equivalent to 20% of the employee's monthly salary is payable by the employee and is deducted from the employee's net salary.

3. The allocated sums accumulated in the fund are to be paid to the employee only upon departure from Israel and not beforehand (not even upon retirement or loss of working capacity. Along with departure, the law only refers to situations in the event of the death of the employee where the next of kin - spouse, child or parent - can claim the monies in the fund).[7] The State may expropriate up to 33% of the total accumulated sum[8] when the 'infiltrator' does not leave by the end of his authorized stay period in Israel.[9] The scheme does not apply to foreign workers or asylum-seekers who entered Israel lawfully.[10] The scheme also does not apply to persons who have already been granted refugee status, although the law is silent about whether an employee would be entitled to receive the monies put into the fund if they were subsequently granted refugee status.

4. According to the Explanatory Note of the *2014 Draft Law on Departure of Infiltrators*, this law serves two main purposes: to ensure the labour and social rights of 'infiltrators' and "to create a significant incentive for 'infiltrators' to depart Israel on time (when this is possible) and to prevent their integration in Israel".[11] An additional objective is to increase the cost of employment of 'infiltrators', thereby "preventing the dismissal of

[6] Except in areas where higher deposits are set in an extension order, for example, in the cleaning field.

[7] See Article 1K6 of the *Foreign Workers Law*, supra note 4.

[8] Article 1K4 of the *Foreign Workers Law, ibid*, establishes a mechanism where 67% of the money in the deposit is returned to the 'infiltrator' upon departure, while 33% of the money is subject to scaled penalties in case of late departure.

[9] The "end of stay in Israel" is defined as "the date on which he is supposed to leave Israel as determined in a final court judgment or in a notice from the Minister of Interior or the Head of Population, Immigration and Border Authority in the Ministry of Interior" (Article 1J2 of the *Foreign Workers Law, ibid.*). If it is established by the employee that he was prevented from leaving Israel within the stay period or that he overstayed due to a mistake or in good faith, an authorized Ministry of Interior staff may determine not to hold the overstay against the employee if to do so would be "unjust" (Article 1K4(b) of the *Foreign Workers Law, ibid.*).

[10] Usually, employment of migrant workers is authorized in advance through bilateral agreements with their country of nationality. Further, the law does not refer to asylum-seekers who entered Israel legally. For example, recently over 12,000 Ukrainian and Georgian nationals requested asylum in Israel (since 2014, 7,634 Ukrainian nationals and 4,431 Georgian nationals filed asylum claims). The law however, does not apply to them as they are not categorized as 'infiltrators'. PIBA, *Data regarding foreigners in Israel*, p.7, available at: https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_Israel_ data_2016_0.pdf (Hebrew).

[11] Explanatory Note for the *Proposal of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators and Foreign Workers from Israel (Amendments to the Law and Temporary Order) - 2014*, Government's proposed law 904, p. 446, 1 December 2014, available at: https://www.nevo.co.il/law_word/Law15/memshala-904.pdf (Hebrew).

Israeli workers out of preference for foreign workers whose cost of employment is currently lower".[12]

5. UNHCR provided its observations on the scheme on 26 November 2014 and 3 December 2014, where it expressed concerns that the draft Law is inconsistent with Israel's obligations under the *1951 Convention Relating to the Status of Refugees* (hereinafter: "*the 1951 Refugee Convention*")[13] and other international human rights instruments.[14] UNHCR further raised these concerns before the Knesset Interior Committee during deliberations on the draft Law on 2 December 2014 and during deliberations on the subsequent amendment on 21 November 2016.

6. Notwithstanding UNHCR's concerns, the bill and its subsequent amendment were passed by the Knesset. In UNHCR's view, the legislative scheme does not meet Israel's obligations under international refugee and human rights law towards persons defined as 'infiltrators' who are asylum-seekers or are in a *refugee-like* situation.[15]

II. The status of the population defined as 'infiltrators' and UNHCR's position vis-à-vis this group

7. The legislative scheme applies to employees who are defined as 'infiltrators' under Israeli law, namely, non-residents who entered Israel other than by way of a recognized border crossing.[16]

[12] Memorandum of the *2014 Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators and Foreign Workers from Israel (Amendments to the Law and Temporary Order)*, 20 November 2014, available at: https://www.nevo.co.il/law_word/Law11/42223.doc. The Memorandum of the Law is the first draft prepared by the Ministry of Justice to accompany the draft law. Following its submission to the Government for comments, a final Government bill is prepared along with the Explanatory Note for the Proposal of the Law.

[13] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html. Israel ratified the Convention on 1 October 1954 and acceded to the 1967 Protocol on 14 June 1968.

[14] A letter to Attorney Dina Zilber, Deputy Attorney-General and others, *UNHCR Comments on the Legislative Proposal: Law for the Prevention of Infiltration and to Ensure Departure of Infiltrators and Foreign Workers from Israel (Legislative Amendments and Temporary Order) – 2014*, 26 November 2014/HCR-68; A letter to Attorney Eyal Yinon Legal Adviser to the Knesset of Israel, *UNHCR Comments on the Legislative Proposal: Law for the Prevention of Infiltration and to Ensure Departure of Infiltrators and Foreign Workers from Israel (Legislative Amendments and Temporary Order) – 2014*, 3 December 2014/HCR-69.

[15] This sub-category is descriptive in nature and includes groups of persons who are outside their country or territory of origin and who face protection risks similar to those of refugees, but for whom refugee status has, for practical or other reasons, not been ascertained. UNHCR, *UNHCR Statistical Online Population Database: Sources, Methods and Data Considerations*, 1 January 2013, available at: http://www.unhcr.org/statistics/country/45c06c662/unhcr-statistical-online-population-database-sources-methods-data-considerations.html.

[16] Article 1 of the *Law on the Prevention of Infiltration (Offences and Jurisdiction) - 1954*. See also footnote 5. The scheme does not apply to 'infiltrators' that have been granted residency status (either as a recognized refugee or on humanitarian grounds).

8. As of April 2017, there are 39,274 persons defined as 'infiltrators' in Israel, mostly Eritrean and Sudanese nationals who entered Israel between the years 2006 and 2012.[17] Given the ongoing human rights violations in Sudan and Eritrea, the large majority of these individuals are presumed to be unable to return safely to their countries of origin at this time.[18] This has been acknowledged by Israel which has provided them with a limited protection in the form of *non-removal.*[19]

9. The status of persons defined as 'infiltrators' in Israel is precarious. Over half of Eritrean and Sudanese nationals have not applied for asylum.[20] For most of them, refraining from applying for asylum does not rule out the fact that they are in need of international protection. Rather, the decision stems from a lack of information about the refugee status determination (hereinafter: "RSD"), which became operational for these groups only in 2013,[21] from distrust in the asylum system and from the fact that applying for asylum in Israel does not provide status, services or rights beyond what 'infiltrators' who are under the non-removal protection already receive.[22]

10. The recognition rate for Eritrean and Sudanese nationalities is less than 1%.[23] Most asylum claims by Eritreans are rejected on the ground that desertion or draft evasion from the Eritrean national (including military) service does not fall under the refugee

[17] PIBA, *Data regarding foreigners in Israel*, p.3, available at: https://www.gov.il/BlobFolder/reports/foreign_workers_report_q1_2017/he/foreign_workers_stats_q1_2017.pdf (Hebrew).

[18] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, 20 April 2011, HCR/EG/ERT/11/01_Rev.1, available at: http://www.refworld.org/docid/4dafe0ec2.html; UNHCR, *UNHCR's Position on Sudanese Asylum-Seekers From Darfur*, 10 February 2006, available at: http://www.refworld.org/docid/43f5dea84.html.

[19] This non-removal policy covers Eritreans and Sudanese and allows their temporary stay in Israel. Whereas Eritreans are not returned based on the principle of *non-refoulement*, Sudanese are not returned to Sudan due to practical difficulties stemming from the absence of diplomatic relations. See *Tashuma Noga Desta et al. v. The Knesset et al*. (8665/14), Israel: High Court of Justice, 10 August 2015, para. 5, available at: http://elyon1.court.gov.il/files/14/650/086/C15/14086650.C15.pdf (Hebrew). Translation certified by UNHCR is available at: http://www.refworld.org/cases,ISR_SC,56af8ff04.html.

[20] According to the Ministry of Interior, only 14,309 individuals applied by the end of 2016; 7,282 claims remain pending.

[21] While 'infiltrators' are required to renew visas every few months (normally between 1-3 months), they are not provided during their visit with information on their right to apply for asylum or on the RSD process. Israel has not carried out information campaigns to raise awareness of potential refugees or provide legal assistance to those who might wish to apply. See *A.G. v. Ministry of Interior* (1279-16), Israel: Tel Aviv Appeals Tribunal, 6 November 2016, available at: http://www.justice.gov.il/SitePages/OpenFile.aspx?d=uHPZrVCR9Gavqc3KHaldticjyaZeSwr378yeXZKoL1c%3d (Hebrew).

[22] See paragraph 12.

[23] In comparison, according to EUROSTAT statistics, the combined refugee/subsidiary protection rate for Eritrean nationals has remained consistently high (average of 88% between 2014-2016, with 92% in the fourth quarter of 2016) and 57% for Sudanese nationals - see http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates,_30_main_citizenships_of_asylum_applicants_granted_decisions_in_the_EU-28,_4th_quarter_2016.png.

definition in the *1951 Refugee Convention*.[24] Asylum requests by Sudanese from Darfur, Blue Nile and Kordofan regions have been pending for some years,[25] and no decision is expected before the High Court delivers a decision on the legality of Israel's policy on involuntary removals to third countries.[26]

11. Acknowledging the protection needs of the majority of the population defined as 'infiltrators', which are akin to the protection needs of refugees, UNHCR considers them to be in a *refugee-like* situation and therefore as under its mandate.[27] This approach is based on the fundamental notion that the absence of formal recognition by a state of refugee status does not in itself preclude its obligations under the *1951 Refugee Convention*. As long as a person meets the refugee definition of the *1951 Refugee Convention*, formal recognition is merely declaratory of an existing status.[28] This is particularly valid in the Israeli context where lack of formal recognition of refugee status of persons defined as 'infiltrators' is linked to shortcomings in the asylum procedure.[29]

12. All 'infiltrators', regardless of whether they applied for asylum or not, and including those whose asylum applications have been denied, receive short-term renewable section 2(a)(5) conditional release visas,[30] which do not entitle them to access basic

[24] In a reply to the Administrative Tribunal, the State indicated that since 2009 until the beginning of July 2016, there have been 7,218 asylum requests filed by Eritreans, of whom 8 were recognized and 3,105 were pending.

[25] Out of over 3,600 applications filed by Sudanese, only one Darfuri was recognized as a refugee since UNHCR handed over all RSD functions to the Government in July 2009.

[26] Appeal (Jerusalem) *Hassan et al. v. Ministry of Interior* (1354-15, 1366-15), Israel: Jerusalem Appeals Tribunal, 4 May 2017, paras 17-19, available at: http://www.justice.gov.il/SitePages/OpenDocument.aspx?d=wHUhsXTu0a51MqL9OPKbdrpIPxR%2fpMzRllWXkICrRXw%3d (Hebrew).

[27] See footnote 15. UNHCR Israel commonly refers to this population as 'asylum-seekers', which captures the view that they are in need of international protection. This category includes Eritreans and Sudanese who have not filed an asylum claim but have benefited so far from a limited form of protection; persons who filed an asylum claim and their claims are still pending; as well as persons whose claims were rejected but are still in need of international protection.

[28] "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." See 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*, December 2011, HCR/1P/4/ENG/REV. 3, para. 28, available at: http://www.unhcr.org/4d93528a9.pdf. Since many of the 'infiltrators' are potential refugees (regardless of formal determination), it is appropriate that Part III uses the term refugees when analyzing their rights under the *1951 Refugee Convention*.

[29] As elaborated above in paragraph 10.

[30] A license by virtue of Section 2(a)(5) of the *1952 Entry into Israel Law*. See also Dr. Gilad Nathan Research and Information Center Israeli Parliament (Knesset), *The OECD Expert Group on Migration (Sopemi) Report Immigration in Israel* 2011-2012, p. 25, November 2012, available at: http://www.knesset.gov.il/mmm/data/pdf/me03131.pdf.

assistance such as health, social security,[31] or welfare services,[32] and legal aid.[33] Their employment situation is precarious: while formally not allowed to work, most are nevertheless employed by virtue of a High Court-sanctioned compromise whereby the Government does not carry out enforcement measures against employed 'infiltrators' and their employers for the time being.[34] Additionally, single Eritrean and Sudanese men are subject to mandatory residence in the semi-closed Holot facility for a period of up to one year, during which they are prohibited from working.[35] Upon release, they are excluded from both residing and working in either Tel Aviv or Eilat.[36] As a consequence, the 'infiltrator' community is one of the most disadvantaged in Israel.

13. According to a recent socio-economic assessment among this population commissioned by UNHCR and conducted by Independent Opinion Research and Strategy Ltd., roughly one third of the surveyed group reported either salaries or conditions that would amount to destitution (earning an income of up to NIS 1,500 per month).[37] One fifth earned between NIS 1,500-3,000 per month and the remainder earned over NIS 3,000 (with a small portion just under one-fifth who earned above NIS 5,000). According to Israel's National Insurance Institute report for the year 2015, an individual with a

[31] These services are limited to "residents". See Article 3 of the of the *National Health Insurance Law - 1994*, available at: http://www.health.gov.il/LegislationLibrary/Bituah_01.pdf. (Hebrew). See State Comptroller Annual Report 64C, *Foreigners who are not deportable from Israel*, 2014, p. 103, available at: http://www.mevaker.gov.il/he/Reports/Report_248/af07752c-7845-4f1d-ae97-23c45c702624/102-ver-5.pdf?AspxAutoDetectCookieSupport=1 (Hebrew) (hereinafter: "State Comptroller Report"). Unofficial English summation is available at: http://assaf.org.il/en/sites/default/files/Comptroller%20report%20%28English%29%20Mai%202014.pdf.

[32] *Welfare Services Law - 1958*. While this specific law is not restricted to "residents", the Ministry of Labour, Social Affairs and Social Services' policy prevents access to welfare services. See also the petition *ASSAF v. the Minister of Welfare and Social Affairs*, (8907/16), Israel: High Court of Justice, filed on 17 November 2016, available at: http://assaf.org.il/he/sites/default/files/downloads-from-pages/%D7%A2%D7%AA%D7%99%D7%A8%D7%94%20%D7%A0%27%20%D7%A9%D7%A8%20%D7%94%D7%A8%D7%95%D7%95%D7%97%D7%94%20%D7%95%D7%94%D7%A9%D7%99%D7%A8%D7%95%D7%AA%D7%99%D7%9D%20%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99%D7%99%D7%9D.pdf (Hebrew) and is still pending.

[33] *Legal Aid Law -1972*. While the law does not limit legal assistance to residents, the State does not provide free legal assistance to foreigners in general, but rather just for unaccompanied minors and victims of human trafficking. A petition concerning this issue was filed: *The Association for Civil Rights in Israel et al. v. The Legal Aid Department et al* (5262/16), Israel: High Court of Justice, filed on 30 June 2016, available at: http://www.acri.org.il/he/wp-content/uploads/2016/07/bagatz5262-16-siua-mishpati.pdf (Hebrew) and is still pending before the court.

[34] *Kav LaOved v. Government* (6312/10), Israel: High Court of Justice, January 16, 2011. See also section 1K9 of the *Foreign Workers Law* stating that "(t)he depositing of the amount of the deposit in respect of an infiltrator in a fund or bank account under this chapter (…) shall not constitute a confirmation of the legality of the (…) stay or work of a foreign worker who is an infiltrator in Israel." (Hebrew)

[35] Article 32F of the amended *Law for the Prevention of Infiltration*, supra note 5.

[36] Pursuant to Article 6(2) of the *Entry into Israel Law - 1952*. See also an example of a geographically limited permit which restricts residing and working in Eilat and Tel Aviv for those who were in "Holot", available at: https://www.gov.il/BlobFolder/policy/haasakat_ovdim_zarim/he/limited_permit.png (Hebrew).

[37] Dr. Dahlia Scheindlin and Rafi Barzilay, *Socio-Economic Assessment of Asylum-seekers in Israel - Results of Quantitative Survey - January 2017*, pp 16 and 28 (hereinafter: "Socio-Economic Assessment"). The actual survey was undertaken in November and December 2016.

monthly disposable income of less than NIS 3,158 is deemed poor, as are a couple whose income is less than NIS 5,053 per month.[38]

III. The scheme is at variance with international refugee and human rights law

III.1 The scheme constitutes unlawful penalization for irregular entry

14. The establishment of a fund containing deductions of a large proportion of the salaries of employees defined as 'infiltrators' and discouraging employers from hiring these employees constitutes a penalty imposed solely on the grounds of their irregular entry into Israel and thus contravenes the obligation set out in Article 31(1) of the *1951 Refugee Convention* which provides that refugees[39] shall not be penalized for their irregular entry or presence, provided they present themselves to the authorities without delay and show good cause for their irregular entry or presence.[40]

15. Every person has the right to seek and enjoy in other countries asylum and protection from persecution, serious human rights violations and other serious harm. Hence,

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[38] National Insurance Institute, *Poverty and Social Gaps in 2015, Annual Report*, December 2016, p. 5, available at: https://www.btl.gov.il/Publications/oni_report/Documents/oni2015.pdf (Hebrew).

[39] As stated by Guy Goodwin-Gill,

> *although expressed in terms of the 'refugee', this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or, in the words of the court in Adimi, [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, available at: http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html] to 'presumptive refugees'.*

Guy Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, available at: http://www.refworld.org/docid/470a33b10.html, p. 193. This interpretation also takes into account the declaratory nature of refugee status as highlighted in footnote 28. The term also applies to persons considered to be in a *refugee-like* situation, see paragraph 11 above.

[40] Article 31(1) of the *1951 Refugee 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.*

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 protection is sought and has come directly from his or her country of origin. The provision also protects from penalization refugees who transit an intermediate country for a short period of time without having applied for, or received, protection 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 who have traveled on from another country where his or her protection, safety or security could not be assured (interpreting in part "good cause"). "Irregular 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. See Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention - Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001*, June 2003, available at: http://www.refworld.org/docid/470a33b20.html. See also Guy Goodwin-Gill, in: Cambridge University Press, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, available at: http://www.refworld.org/docid/470a33b10.html.

seeking protection is not an unlawful act.[41] In exercising the right to seek protection, refugees are often forced to arrive at, or enter, a territory without prior authorization. Their position may thus differ fundamentally from that of migrants in that refugees 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 or visa, in advance of their flight because of their fear of persecution and/or the urgency of their departure.[42] In other words, they may have good reason for their irregular entry or initial stay, and these factors, as well as the fact that refugees have often experienced traumatic events, need to be taken into account.[43]

16. The legislative scheme, however, does not pay due regard to the circumstances of flight and entry in individual cases. The sole criterion for the application of economic restrictions is the irregular manner of entry into Israel and the subsequent designation as an 'infiltrator'. It is worth repeating that the scheme does not apply to non-'infiltrator' asylum-seekers. This scheme is therefore punitive and is at variance with Article 31(1) of the *1951 Refugee Convention*.

III.2 The scheme is detrimental to the ability of maintaining an adequate standard of living

17. The significant deductions have direct implications on the enjoyment of other rights, such as the right to an adequate standard of living, including adequate food, health and housing. States are obliged to take appropriate steps to ensure the realization of the right to an adequate standard of living, including adequate food, clothing, housing, medical care and necessary social services, as set out in Article 25 of the *Universal Declaration of Human Rights* and Article 11(1) of the *1966 International Covenant on Economic,*

[41] Article 14 of UN General Assembly, *Universal Declaration of Human Rights* (hereinafter: "UDHR"), 10 December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.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.refworld.org/docid/3b00f52c0.html and ExCom reference on point b) of Conclusion No. 82 in UNHCR, *Safeguarding Asylum No. 82 (XLVIII) - 1997*, 17 October 1997, No. 82 (XLVIII) - 1997, available at: http://www.refworld.org/docid/3ae68c958.html.

[42] See also UN General Assembly, *Report to the Seventh Session of the Human Rights Council - Report of the Working Group on Arbitrary Detention*, 10 January 2008, A/HRC/7/4, available at: http://www.refworld.org/docid/502e0eb02.html, 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".

[43] 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.refworld.org/docid/503489533b8.html.

Social and Cultural Rights (hereinafter: "ICESCR").[44] These rights apply to all persons, regardless of their immigration or other status.[45]

18. According to the UN Committee on Economic, Social and Cultural Rights (hereinafter: "CESCR"), States Parties' obligations under the Covenant are to be interpreted as follows:

> *A State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.*[46]

19. While each State has broad discretion as to the support it offers to asylum-seekers and persons in a refugee-like situation, the measures it imposes should ensure that, at a minimum, their basic dignity and rights are protected and that the situation is, in all the circumstances, adequate in relation to the country in which they have sought asylum.[47] Therefore, even if the measures are adopted, *inter alia*, in order to guarantee social benefit payments to this population, they must not result in the deterioration of their current situation below an adequate standard of living. This is particularly the case, where the state is not asked to *provide* support but rather *to refrain* from measures that impede their self-reliance.[48]

20. Indeed, to the extent that a measure by the state brings vulnerable asylum-seekers and individuals in a refugee-like situation into destitution, this could rise to a violation of the prohibition of cruel, inhuman or degrading treatment or punishment set out in Article 7 of the *International Covenant on Civil and Political Rights* (hereinafter:

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[44] Articles 2 and 25 of the *UDHR*, supra note 41; Article 11, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html.

[45] UN Committee on Economic, Social and Cultural Rights (hereinafter: "CESCR"), *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2 of the ICESCR), 2 July 2009, E/C.12/GC/20, para. 30, available at: http://www.unhcr.org/refworld/docid/4a60961f2.html.

[46] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para. 10, available at: http://www.refworld.org/docid/4538838e10.html.

[47] UNHCR, *Discussion Paper on Recommended Reception Standards for Asylum-Seekers in the Context of the Harmonisation of Refugee and Asylum Policies of the European Union*, para. 3, June 2000, available at: http://www.refworld.org/docid/3ae6b3378.html.

[48] See interpretation of the right to work as "the right not to be unfairly deprived of employment" or the obligation upon States parties to the ICESCR to refrain "from denying or limiting equal access to decent work for all persons". "Decent work" is referred to as work that "provides an income allowing workers to support themselves and their families". CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, paras 6, 7 and 23, available at: http://www.refworld.org/docid/4415453b4.html. Furthermore, the right to work is sometimes referred to as a "Hybrid Right" which contains two different kinds of right. "The negative aspect of the right concerned with freedom from unjustifiable discrimination and barriers in employment takes the form of a traditional civil liberty. The positive right plainly shares the characteristics of a social and economic right." Hugh Collins, "Is there a Human Right to Work?" in: Virgina Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives*, 2015, p. 26.

"ICCPR"),[49] to which Israel is a party.[50] The UN Human Rights Committee held recently that removal of vulnerable persons in need of international protection from Denmark to Italy, where they had no access to housing, health care, social benefits, employment and integration programmes, amounted to a violation of Article 7.[51] The Committee emphasized the obligation to conduct an individualized assessment as to the vulnerability of the applicants prior to taking measures that would subject them to conditions which were not adapted to the age of children and the vulnerability of the family.[52] Similarly, the Grand Chamber of the European Court of Human Rights (hereinafter: "ECtHR) held that an asylum-seeker who had spent months living in a state of material destitution in combination with prolonged uncertainty and the total lack of any prospects of his situation improving constituted a violation of Article 3 of the *European Convention on Human Rights* (hereinafter: ECHR).[53] The ECtHR further recognized the particular vulnerability of asylum-seekers because of the traumatic experiences many had endured previously, and emphasized that asylum-seekers belong to "a particularly underprivileged and vulnerable population group in need of special protection".[54]

21. The deduction of a significant percentage of the salaries of persons in a *refugee-like* situation - who already work in low-paying positions - without providing them with any social benefits, could result in the further impoverishment and for those who already earn minimum wage and below, it could lead to destitution.[55] Those who are expected to be particularly affected are the most vulnerable members of the population, that either cannot take on extra employment to make up for the deductions from their

[49] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

[50] Israel ratified the treaty on 3 October 1991.

[51] UN Human Rights Committee (hereinafter: "HRC"), *Warda Osman Jasin v. Denmark, CCPR/C/114/D/2360/2014*, 25 September 2015, available at: http://www.refworld.org/cases,HRC, 59315b644.html (case concerned a single mother of three children); HRC, *Raziyeh Rezaifar v. Denmark, CCPR/C/119/D/2512/2014*, 10 April 2017, available at: http://www.refworld.org/docid/592c0b134.html (case concerned a single mothers with mental illness and a minor child with heart disease); HRC, *Y.A.A. and F.H.M v. Denmark, CCPR/C/119/D/2681/2015*, 21 April 2017, available at: http://tbinternet.ohchr.org/Treaties/CCPR/ Shared%20Documents/DNK/CCPR_C_119_D_2681_2015_25882_E.pdf.

[52] *Warda Osman Jasin v. Denmark*, *ibid*, para. 8.9; *Raziyeh Rezaifar v.* Denmark, *ibid*, para. 8.9; Y.*A.A. and F.H.M v. Denmark, ibid*, para. 7.9.

[53] While Israel is not bound by the rulings of the ECtHR, its interpretation is nevertheless relevant on issues such as "adequate standard of living". ECtHR, *M.S.S. v. Belgium and Greece* (Application no. 30696/09), Grand Chamber judgment of 21 January 2011, paras 220, 232, 233 and 263, available at: http://www.unhcr.org/refworld/docid/4d39bc7f2.html. The ECtHR found Greece in violation of Article 3 of the ECHR due to the extremely poor conditions that the applicant was subject to while living in Greece where he did not receive any subsistence or accommodation from the State. Belgium was also found to be in breach of Article 3 ECHR as the authorities sent the applicant back to Greece where there was a real risk that he would face treatment that would be contrary to Article 3 ECHR.

[54] *Ibid*, paras 232 and 251.

[55] See above paragraphs 12-13.

salaries, such as single mothers and victims of domestic violence,[56] or those who are dependent on their family and community members for survival such as persons with physical and mental disabilities, among them victims of human trafficking and torture.[57]

22. The blind application of the scheme could bring about potentially devastating implications for vulnerable individuals and their children who are more susceptible than others to loss of housing, medical coverage, employment and means of subsistence. In such situations, the application of the scheme could not only run contrary to the obligation to provide an adequate standard of living but also to the prohibition in Article 7 of the ICCPR.

23. Children are particularly vulnerable to the implications of the reductions of their parents' incomes. UNHCR is concerned that this will have an immediate negative effect on the children's standard of living, as their parents would not be able to provide for their basic needs that are essential for their welfare and development such as health services or care arrangements.[58] For example, since non-Israeli children are not covered by the *1994 National Health Insurance Law*,[59] one of the biggest hurdles in children's health in Israel is the ability of their parents to pay for their health insurance. The only subsidized health insurance scheme, provided by the health care provider "Meuhedet", still imposes relatively expensive fees[60] which make the insurance unaffordable for some.

24. The *1989 Convention on the Rights of the Child* (hereinafter: "the CRC"), to which Israel is a party since 1991, obliges States to ensure the right of every child to a standard

[56] Socio-Economic Assessment, supra note 37, pp 13 and 16. "(I)n general women with children often are less likely to hold full time jobs". Additionally, it stated that "(t)here is an unsurprising but notable gender gap: 44% of women are among the lower range of earning up to NIS2,000/month, relative to 30% of men".

[57] The vulnerability of persons with a chronic medical condition, mental illnesses, victims of trafficking and victims of torture has been identified already in 2013 by the State Comptroller, who recommended that the State provide these groups with adequate health and welfare services. Israel, State Comptroller Report, supra note 31, pp 110, 116 and 118. In a 2016 study on the conditions of survivors of the Sinai torture camps conducted at the Haifa University, 66% of the men and 72% of the women surveyed, indicated that lack of money for food, rent or clothing constituted a real problem. 60% reported serious concerns over inaccessibility to medical treatment. Only 24% of the men and 15% of the women surveyed were employed on a full-time basis. The information is reproduced in Physicians for Human Rights, *Not Passive Victims - Towards the Rehabilitation of the Sinai Torture Survivors in Israel*, p. 16, August 2016, available at: http://cdn2.phr.org.il/wp-content/uploads/2016/11/2550_Sinai_Print_Eng-25.10.16-%D7%A1%D7%95%D7%A4%D7%99.pdf

[58] The harsh employment reality of persons defined as 'infiltrators' has resulted in the proliferation of substandard day-care frameworks for children 0-3 that provide long-hour service at relatively low cost. Yael Mayer and Michelle Slone, *Research Report: The Developmental Conditions of "Children's Warehouses" - The Unregulated Daycare centres for Children of Migrant Workers and Asylum-Seekers in Israel*, Tel-Aviv University, January 2016, p. 13, available at: http://www.acri.org.il/he/wp-content/uploads/2016/02/babysitters-report0116.pdf (Hebrew). Translation available at: https://view.publitas.com/p222-11245/developmental-conditions-of-childrens-warehouses-in-israel/page/1.

[59] See footnote 31; State Comptroller Report, supra note 31, p. 95.

[60] 120 NIS per month for a single child and 240 NIS per month for two children or more. Ministry of Health, *Providing Health Services to Minors who are in Israel and are not Insured according to the National Health Insurance Law - 15.3.2016*, available at: http://www.health.gov.il/hozer/mk05_2016.pdf (Hebrew).

of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27).[61] Specifically, Article 24(1) of the CRC explicitly states that every child, of whatever status, has the right "to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health". Moreover, since children in need of international protection are particularly vulnerable, legislative provisions should be interpreted and implemented in a manner that has the best interests of the child as a primary consideration.[62]

25. In sum, the deductions from the salaries of persons designated as 'infiltrators' coupled with the employer's deposit, and no entitlement to any social benefits such as severance pay or dependent allowance that are given to Israeli workers, contravenes their ability to maintain an adequate standard of living, and is at variance with Israel's obligations based both on international refugee and human rights law and standards.

III.3 The scheme interferes with the right to engage in wage-earning employment

26. Article 17(1) of the *1951 Refugee Convention* entails the obligation to accord to refugees "lawfully staying" in the country of asylum, the "most favourable treatment" accorded to other aliens "in the same circumstances, as regards to the right to engage in wage-earning employment".[63] Furthermore, Article 17(2)(a) of the *1951 Refugee Convention* requires that restrictive measures imposed on aliens for the protection of the national labour market not be applied to a refugee who has resided in the country for over three years.[64]

27. The applicability of Article 17 extends beyond formally recognized refugees.[65] The right to wage-earning employment is to be accorded to "refugees lawfully staying in" the territory of the country concerned, including persons who entered the country illegally. The UNHCR Note on Interpretation of "Lawfully Staying" states:

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[61] See UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html; see also the legal obligation to respect all rights of children, including economic, social and cultural rights regardless of migration status, UN Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, pp 11-12, available at: http://www.refworld.org/docid/51efb6fa4.html.

[62] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Defence for Children International (DCI) v. Belgium*, 13 July 2012, p.12, available at: http://www.refworld.org/docid/500419f32.html.

[63] Article 17(1) of the *1951 Refugee Convention* provides that "(t)he Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment".

[64] Article 17(2) of the *1951 Refugee Convention* provides that "(i)n any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions: (a) He has completed three years' residence in the country …".

[65] See above footnote 28.

> *Thus where a person enters a country illegally, but is allowed to stay because of personal circumstances sufficiently precarious to bring into play the non-refoulement obligation, it would be consistent with the intent of the framers of the 1951 Convention to regard that person as lawfully staying for the purposes of the Convention.*[66]

28. The term "lawfully staying in" the country refers to refugees with a significant level of attachment to the state of asylum,[67] evident by "a permitted, regularized stay of some duration".[68] It does not depend on a formal recognition of such person as a refugee by the state who may chooses not to regularize his status in order to avoid granting the rights in the *1951 Refugee Convention*.[69] According to Prof. James Hathaway:

> *(w)here … the formal status recognition procedure cannot be relied upon to function in a reasonably timely way, a state may not rely upon the absence of formal status to contradict the de facto reality of ongoing presence in the state party.*[70]

Hathaway further notes that persons whose asylum status has not been determined within three years have rights of access to the labour market under international law.

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[66] UNHCR, *"Lawfully Staying" - A Note on Interpretation*, 3 May 1988, para. 21, available at: http://www.refworld.org/docid/42ad93304.html (hereinafter: "Note on Interpretation"). See also *The Michigan Guidelines on the Right to Work* which note that

> *(t)he meaning of the term "lawful" must be ascertained in accordance with a good faith interpretation of the Refugee Convention, and in light of human rights treaties that protect rights on the basis of physical presence and the premise of equality. If a refugee's presence in the territory of a state party to the Convention is not unlawful, in that the state is aware, or should be aware, of the refugee's presence and the state is unable or unwilling to remove the refugee, then the refugee's presence may be regarded as lawful for the purposes of the Refugee Convention.*

University of Michigan Law School, *The Michigan Guidelines on the Right to Work*, 16 March 2010, available at: http://www.refworld.org/docid/4bbaf1242.html.

[67] James C. Hathaway, *The Rights of Refugees under International Law*, 2005, p. 156 (hereinafter: "Hathaway"). Under the *1951 Refugee Convention*, refugees are entitled to a progressively increasing array of rights as their legal attachment to the host country deepens. While basic rights are granted to all refugees, the acquisition of additional rights progresses as the legal status of refugees is consolidated. See also the explanation regarding the five levels of attachment:

> *At the lowest level of attachment, some refugees are simply subject to a state's jurisdiction, in the sense of being under its control or authority. A greater attachment is manifest when the refugee is physically present within a state's territory. A still more significant attachment is inherent when the refugee is deemed to be lawfully present within the state. The attachment is greater still when the refugee is lawfully staying in the country. Finally. A small number of rights are reserved for refugees who can demonstrate durable residence in the asylum state.*

[68] Note on Interpretation, supra note 66, para. 11.

[69] *Ibid*, paras 14 and 16.

[70] Hathaway, supra note 67, p. 755, footnote 125.

> *If, however, these procedures do not result in a decision within three years, there is nonetheless a duty under Art. 17(2)(a) to provide at least exemption from labor-market-based restrictions on access to employment.*[71]

29. This position was further underlined by Alice Edwards who argued that the prolonged stay of asylum-seekers (where, *e.g.*, status determination procedures have been subject to long delays or suspended) could *de facto* constitute "lawfully staying" of some duration.[72]

30. As noted above[73], individuals who entered Israel irregularly and designated as 'infiltrators' have been provided a form of protection, namely, *non-removal* from Israel; thus they constitute "refugees lawfully staying in" within the meaning of the *1951 Refugee Convention*. This interpretation is consistent with the protection scheme of the *1951 Refugee Convention* which is based on the *de facto* attachment to the host state.

31. Therefore, the scheme is at variance with both provisions of Article 17 of the *1951 Refugee Convention*. First, it contradicts the obligation to provide the "most favourable treatment" as the deduction rates set for employees who are 'infiltrators' are higher than the deductions from salaries of foreign workers and from the salaries of asylum-seekers who are not defined as 'infiltrators'. There is no deduction from the salary of latter; rather, the employer's obligation to deposit money into a fund towards pension and benefits is substituted by a deposit that is set at 700 NIS per month, which is substantially lower than 16% of a monthly salary. Second, the deposit requirement is applicable only to "foreign workers employed in the construction sector, or in unique technologies or by nursing care agencies".[74] Lastly, and most importantly, for foreign workers, the withholding of the fund serves as a deterrent against staying beyond a foreseeable date of departure, whereas in the case of the 'infiltrators', the withholding of the fund serves solely as a punitive measure since the date of departure is unknown and unpredictable.

32. The scheme further does not follow the provision of Article 17(2) *of the 1951 Refugee Convention* which requires states to remove restrictive measures imposed on aliens for the protection of the national labour market in relation to refugees who have resided in the country for over three years. The scheme applies to all 'infiltrators' regardless of how long they have been in the country.

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[71] *Ibid*, p. 755, footnote 126.

[72] Alice Edwards, "Article 17", in: Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, p. 965, 2011.

[73] See paragraph 12.

[74] PIBA, *Deposit Procedure for Foreign Workers Employed in the Construction Sector, or in unique Technologies or by Nursing Care Agencies, Procedure No.: 9.0.0003*, 1 August 2016, available at: https://www.gov.il/BlobFolder/policy/deposit_monies_foreign_workers_constructions_technology_procedure/he/9.0.0003_eng.pdf.

III.4 The scheme fails to ensure the right to equal remuneration for work of equal value, social security and property

33. The enjoyment of just and favourable conditions of work is a fundamental human right, and integral to human dignity and self-respect. For asylum-seekers and persons in a *refugee-like* situation, it can be crucial to their survival and self-sufficiency.[75] According to Article 7 of the ICESCR, Parties are required to safeguard the right of everyone to the enjoyment of just and favourable conditions of work and ensure "remuneration which provides all workers, as a minimum, with: (f)air wages and equal remuneration for work of equal value without distinction of any kind" and "(a) decent living for themselves and their families".[76] The right to just and favourable conditions of work is a right of everyone, without distinction of any kind.[77] Article 3 of the *1951 Refugee Convention* sets a general prohibition on discrimination applicable to all refugees notwithstanding their level of attachment to the State by obliging States to apply the provisions of the Convention without discrimination on the basis of "race, religion or country of origin".[78]

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[75] UNHCR, *UNHCR comments on the draft General Comment on the Right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)* May 2015, para. 6, available at: http://www.refworld.org/pdfid/55509dc14.pdf: "A policy which promotes self-reliance and reduces the need for prolonged dependence on the country of asylum or international assistance by making available work opportunities, is a policy which is mutually beneficial to refugees and host States regardless of what the durable solution may ultimately be". UNHCR, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, June 2006, POLAS/2006/02, p. 56, available at: http://www.refworld.org/docid/44bb9b684.html.

[76] Article 7 of the ICESCR, supra note 45, provides that

> *the States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant (…).*

See also the definition of "remuneration" which goes beyond the notion of "wage" or "salary" and includes "additional direct or indirect allowances in cash or in-kind paid by the employer to the employee that should be of a fair and reasonable amount, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities." See CESCR, *General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 26 April 2016, E/C.12/GC/23, p. 3, para. 7, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en (hereinafter: "General Comment 23").

[77] General Comment 23, *ibid*, paras 1 and 5. See also explicit reference to "*Refugee workers"* in para 47(i): *"*Because of their often precarious status, refugee workers remain vulnerable to exploitation, discrimination and abuse in the workplace, may be less well paid than nationals, and have longer working hours and more dangerous working conditions. States parties should enact legislation enabling refugees to work and under conditions no less favourable than for nationals".

[78] Article 2(2) of the ICESCR sets a prohibition on discrimination as well on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Furthermore, Article 6 of the *ILO Convention concerning Migration for Employment* underlines the obligation of each Member State "to apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals" in respect of, *inter alia*, remuneration, social security, and employment taxes. International Labour Organization,

34. While deposits are also deducted from the salaries of Israeli employees and diverted towards pensions, they rarely exceed 6% of their salaries and they give rise to social benefits, such as compensation for loss of working capacity or dependant allowances.[79] Additionally, another 12.5% to 14.8% is paid by the employer (6.5% towards pension and 6% to 8.3% towards severance pay). In contrast, the scheme establishing the fund, lacks any social security element. 'Infiltrators' are entitled to receive the deductions accumulated in the fund only upon departure from Israel or death.[80] Thus, apart from the significant differences in deduction rates between the salaries of Israeli employees and 'infiltrators', in essence the nature and purpose of the deductions are completely different and in the case of 'infiltrators', the deterrent and punitive purposes overshadow the social benefits purpose.

35. The scheme, therefore, fails to ensure equal remuneration for work of equal value and furthermore, raises the question whether a deduction of one fifth of a 'minimum wage' salary can provide a decent standard of living in terms of enabling the workers and their family to "enjoy other fundamental rights such as social security, health care, education, adequate standard of living including food, water and sanitation, housing, clothing and additional expenses such as commuting".[81]

36. Moreover, Article 24(1)(b) of the *1951 Refugee Convention* provides that refugees "lawfully staying in" the territory of a State party should be accorded the same treatment as is accorded to nationals with regard to social security, including old age pension.[82] While refugees may receive less benefits than a national in very specific and properly justified circumstances,[83] it does not mean that States can deny pension benefits altogether.[84] An old age pension mechanism that is not granted upon retirement but only

Migration for Employment Convention (Revised), C97, 1 July 1949, available at: http://www.refworld.org/docid/3ddb64057.html.

[79] Another 2.5% can be voluntarily deducted from the employee in order to benefit from a Training Fund. In this case the employer deposits another 7.5%.

[80] In the event of death, monies in the fund can be claimed by the person's next of kin (Article 1K6 of the *Foreign Workers Law*).

[81] General Comment 23, supra note 77, para. 18.

[82] See also Article 9 of the ICESCR, which ensures "the right of everyone to social security, including social insurance". This right is especially relevant "to the most disadvantaged and marginalized groups". See CESCR, *General Comment No. 19: The right to Social Security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, para. 23, available at: http://www.refworld.org/docid/47b17b5b39c.html.

[83] For example, benefits which are "payable wholly out of public funds", including "allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension". UNHCR, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, Article 24, para. 8, available at: http://www.refworld.org/docid/4785ee9d2.html.

[84] See also UNHCR, *UNHCR Observations on the proposed amendments to the Act No. 19 of 1997 (the National Insurance Act) and Regulations, Act No. 41 of 26 June 1998 concerning Cash Benefit for Parents with Small Children and the Law on supplementary benefit for persons who have only lived a short period in Norway*, October 2016, paras 13-14, available at: http://www.refworld.org/docid/581b39624.html.

upon departure from the State fails to ensure social security and may potentially create an underclass of elderly persons.

37. Lastly, the *1951 Refugee Convention* requires States to respect refugees' property rights based on the principle of non-discrimination. Article 13 specifically provides that States must afford refugees the same rights with regards to the acquisition of moveable property, including the acquisition of 'income',[85] as other foreigners.[86] Additionally, Article 29 of the *1951 Refugee Convention* protects refugees against the possibility of special "duties, charges or taxes, of any description whatsoever".[87]

38. As outlined above, the mechanism set out in the law allows these employees defined as 'infiltrators' to receive 20% of their monthly salaries only upon departure from Israel in order to create an incentive for them to leave Israel on time (when possible). However, as persons protected under the non-removal policy, their date of departure is neither foreseeable nor certain. The deposits therefore, serve as an *ipso facto* appropriation of their property which places an "individual and excessive burden" on persons who are vulnerable and entitled to the protection of the host state.

IV. Conclusion

39. UNHCR considers the deposit of funds scheme constitutes a penalty contrary to Article 31 of the *1951 Refugee Convention*. UNHCR further considers that these amendments will have a major negative impact on the basic rights of asylum-seekers and persons in a refugee-like situation. Owing to the high rate of the deduction, and its discriminatory and punitive nature, the new provisions may further deprive persons in need of international protection of their right to a decent living and enjoyment of associated basic rights, with dire consequences for them and their families.

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[85] Scott Leckie and Ekeziel Simperingham, "Article 13", in: Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol,* 2011, p. 892.

[86] Article 13 of the *1951 Refugee Convention* provides that "(t)he Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property".

[87] Article 29(1) of the *1951 Refugee Convention* provides that "(t)he Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations".