

UNHCR's position on the status of Eritrean and Sudanese nationals defined as 'infiltrators' by Israel

1. As of September 2017, there are 37,885 persons defined as 'infiltrators' in Israel.¹ The legal term 'infiltrator' is defined in Article 1 of the Law on the Prevention of Infiltration - 1954, as a person who enters Israel through an unrecognized border entry point.² Eritrean and Sudanese nationals represent the largest groups of "infiltrators" following their irregular arrival through the formerly unfenced border with Egypt between 2006 and 2013.³ Many of these individuals registered with UNHCR Israel as asylum-seekers prior the July 2009-handover of refugee status determination (hereinafter: "RSD") functions to the Ministry of Interior.
2. 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.⁴ This has been acknowledged by Israel which has provided them with a limited protection in the form of non-removal.⁵
3. Only 3,567 Eritreans and 3,870 Sudanese have had pending asylum applications in June 2017.⁶ Many of Eritrean and Sudanese nationals have not applied for asylum.⁷ For most

¹ Ministry of Interior, Population, Immigration and Border Authority (hereinafter: "PIBA"), *Data regarding Foreigners in Israel 3/17*, 29 October 2017, available at:

https://www.gov.il/he/Departments/publications/reports/foreign_workers_report_q3_2017 (Hebrew).

² *Law on the Prevention of Infiltration – 1954*, unofficial translation is available at:

<http://www.refworld.org/docid/55116dca4.html>.

³ Currently, there are 7,731 Sudanese nationals and 27,018 Eritrean nationals remaining in Israel. PIBA, *Data regarding Foreigners in Israel 4/2016*, 2 March 2017, available at

https://www.gov.il/he/Departments/publications/reports/foreigners_in_israel_data_2016 (Hebrew). Additional 2,651 "infiltrators" are from the rest of Africa and further 485 from the rest of the world.

⁴ 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/4d4fe0ec2.html>; UNHCR, *UNHCR's Position on Sudanese Asylum-Seekers From Darfur*, 10 February 2006, available at: <http://www.refworld.org/docid/43f5dea84.html>.

⁵ 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.

⁶ According to information provided by the Ministry of Interior to UNHCR (October 2017).

⁷ Between 2013 and June 2017, only 12,295 Eritrean and Sudanese applied for asylum: 1,010 Eritreans and 952 Sudanese applied in 2013 (according to information provided by the Ministry of Interior to UNHCR in June 2014.) Additional 6781 Eritreans and 2701 Sudanese applied between 2014 and 2016. *Data regarding Foreigners in Israel 4/2016*, supra note 3, p. 7. Additional 527 Eritreans and 324 Sudanese applied in the first

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) a lack of information about the RSD, which became operational for these groups only in 2013;⁸ b) from distrust in the asylum system and c) from the fact that the status of asylum-seekers does not provide greater protection than what ‘infiltrators’ who are under the non-removal protection already enjoy;⁹ asylum-seeker status does not entitle access to basic assistance such as health, social security, welfare services and legal aid;¹⁰ it does not confer the right to work,¹¹ and does not exempt “infiltrators” from immigration detention and enforced residence.¹²

4. Furthermore, applications for asylum filed by Eritrean and Sudanese “infiltrators” are not processed fairly and effectively. The recognition rate for Eritrean and Sudanese

half of 2017 (according to information provided by the Ministry of Interior to UNHCR in October 2017). UNHCR does not have exact statistics on the number of applications submitted by Eritreans and Sudanese between 2009 and 2012.

⁸ 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, para. 14 (Hebrew).

⁹ All ‘infiltrators’ regardless of whether they applied for asylum or not, and including those whose asylum applications have been denied, receive a short-term renewable section 2(a)(5) conditional permit by virtue of Section 2(a)(5) of the *1952 Entry into Israel Law*.

¹⁰ National health insurance is provided to residents only pursuant to Article 3 of the *National Health Insurance Law - 1994*, available at: http://www.health.gov.il/LegislationLibrary/Bituah_01.pdf. (Hebrew). While the *Welfare Services Law - 1958* 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%D7%A0%D7%A9%D7%A8%D7%94%D7%A8%D7%95%D7%97%D7%94%D7%95%D7%94%D7%A9%D7%99%D7%A8%D7%95%D7%AA%D7%99%D7%9D%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99%D7%99%D7%9D.pdf> (Hebrew) and is still pending. The *Legal Aid Law - 1972* also does not limit legal assistance to residents, however 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 is pending: *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).

¹¹ 2(a)(5) permit holders are 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. *Kav LaOved v. Government* (6312/10), Israel: High Court of Justice, January 16, 2011. See also section 1K9 of the *Foreign Workers Law - 1991*, available at: https://www.nevo.co.il/law_html/Law01/P178_002.htm (Hebrew) 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).

¹² Under the amended *Law on the Prevention of Infiltration*, ‘infiltrators’ are subject to mandatory detention for a three-month period upon arrival. Article 30A(b)(5) includes a release ground for detainees with pending asylum claim that have not been processed for over 60 days. However, this has never been applied. Pursuant to Article 32D(a) Law, men are then further subject to a maximum 12-month residency period in a semi-open residence facility in Holot. (Article 32D(b) of the *Law on the Prevention of Infiltration* which enumerates exemptions does not exempt persons with pending asylum requests.

nationalities is less than 1%.¹³ Most asylum claims by Eritreans are rejected on the ground that desertion or draft evasion from the Eritrean national (including military) service does not entitle them to refugee status.¹⁴ Asylum requests by Sudanese from Darfur, Blue Nile and Kordofan regions have been pending for some years.¹⁵

5. Acknowledging the protection needs of the majority of the Eritrean and Sudanese population defined as ‘infiltrators’, which are akin to the protection needs of refugees, UNHCR considers them to be in a *refugee-like* situation¹⁶ and therefore as falling under its mandate.¹⁷ 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 Convention Relating to the Status of Refugees* (hereinafter: “*the 1951 Refugee Convention*”).¹⁸ As long as a person fulfills the substantial elements of the refugee definition of the *1951 Refugee Convention*, formal recognition is merely declaratory of an existing status.¹⁹
6. This is particularly valid in the Israeli context where lack of formal recognition of refugee status of persons defined as ‘infiltrators’ is linked to short comings in the

¹³ 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.

¹⁴ Only 8 Eritreans have been recognized by Israel. Information provided by PIBA to Amnesty International Israel’s request under the Freedom of Information Law (dated 14 December 2016).

¹⁵ Only one Darfuri was provided temporary residency visa (A-5) since July 2009-handover. The Minister of Interior has refused to set out a policy on Darfuris, opting instead to declare in July 2017 that 200 Darfuris over the age of 45 would receive temporary residency visa (A-5) provided they arrived to Israel Prior to October 2011. See *Adam A. v. Ministry of Interior - Population, Immigration and Border Authority* (2150-16), Israel: Jerusalem Appeals Tribunal, 15 November 2017, paras. 12-13, 19 (Hebrew).

¹⁶ 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>.

¹⁷ 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.

¹⁸ 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.

¹⁹ “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>.

asylum procedure.²⁰ In this context, it should be noted that the term “infiltrator”, as defined by Israeli law, does not in itself affect the protection status of an individual under the *1951 Refugee Convention*. Article 31(1) of the *1951 Refugee Convention* expressly stipulates that refugees,²¹ 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.²² This provision acknowledges that, as in many cases of Eritrean and Sudanese nationals, 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.²³ 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,²⁴ and not deny them their internationally recognized right to seek asylum.²⁵

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²⁰ As elaborated above in paragraph 4.

²¹ Article 31 of the 1951 Refugee Convention also covers asylum-seekers. See 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.

²² Article 31(1) protects from penalization refugees who transit an intermediate country for a short period of time without having applied for, or received, protection there. 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>.

²³ 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”.

²⁴ 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>.

²⁵ 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>.