African refugees: International legal standards of recognition and its application in Israel

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Executive Summary

In this thesis it will be argued on the one hand, that Israel's compliance with refugee law is below international refugee protection standards. The State of Israel has historically accorded permanent refugee status to just a few individuals and generally prefers to accord temporary asylum. Israel started to receive large numbers of asylum seekers only recently, thus, the available amount of scholarly research on the subject is also very recent. However, the methodology of choice to prepare this paper was that of literature review of primary and secondary sources regarding refugee and asylum seekers in Israel and in the European Union, to allow for a comparison of the situation of African asylum seekers in Israel with that of refugees in the EU.

On the other hand, it will be argued that temporary protection is misunderstood not only by means of its application in Israel but also in most Western States. The main instrument that commands international refugee law is the 1951 United Nations Convention and Protocol relating to the Status of Refugees. While this Convention does not require that refugee status be of a permanent nature, it does require that there be international co-operation. It therefore follows that protection can be interpreted as a temporary status until repatriation is feasible and, when repatriation is not possible, the international community as a whole should shoulder more permanent solutions. If this is correct, temporary status in Israel should be commanded by the Refugee Convention with a view to a durable solution that requires of inter- or multi-governmental agreements based on the required international co-operation.

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Acronyms and Hebrew Terms

ACRI	Association for Civil Rights in Israel
ARDC	African Refugee Development Center
CEAS	Common European Asylum System
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Halakhah	Jewish Law
HMW	Hotline for Migrant Workers
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDPs	Internally Displaced Persons
Knesset	Unicameral legislature of the Israeli Government
MOI	Ministry of Interior
NGO	Non-governmental organization
PHR-I	Physicians for Human Rights-Israel
RSD	Refugee Status Determination
Sharia	Islamic Law
UN	United Nations
UNAMID	African Union – United Nations Mission in Darfur
UNHCR	Unites Nation High Commissioner for Refugees

Introduction

Since 2006, following numerous instances of political crisis and instability in various African countries, thousands of people started fleeing persecution. Israel is the only developed country which is accessible by land from the African continent and the number of asylum seekers that started entering it irregularly increased drastically from one year to the next. Until 2009, the United Nations High Commissioner for Refugees (UNHCR) was in charge of hearing and assessing all refugee claims and deciding on asylum seekers' status[1]. Until that year, the estimated number of asylum seekers amounted to 21,880[2]. From this moment on, the process of Refugee Status Determination was handed over to the Israeli authorities, and more specifically to the Ministry of Interior (MOI). The number of presumed *de facto* stateless people or refugees today in the country is of more than 60,000[3].

Israel's immigration policies favour Jewish immigration[4], and those who enter the country illegally are presumed infiltrators[5]. Refugees, asylum seekers and others fleeing persecution in their countries of origin do not fall into the realm of immigration under international law. Their treatment is governed by the 1951 United Nations Convention and Protocol relating to the Status of Refugees (Refugee Convention or 1951 Convention) to which Israel is a State Party. However, Israel devised a system by which it manages to circumvent its obligations under the Convention by refusing to apply Refugee Status Determination procedures

[1] UNHCR Israel Fact Sheet – June 2010, available at: http://www.unhcr.org/4c9084a89.html [accessed in November 2013].
[2] Id.
[3] Human Rights Watch, "Israel: Amend 'Anti-Infiltration' Law", June 2012. Available at: http://www.hrw.org/news/2012/06/10/israel-amend-anti-infiltration-law [accessed in March 2013].
[4] See Law of Return 5710-1950 (July 1950).
[5] See Prevention of Infiltration (Offences and Jurisdiction) Law 5714 – 1954 (1954), as amended in 2012.

to the majority of its asylum seekers[6] – the Eritreans and the Sudanese which jointly represent almost 90% of the asylum seeker population in the country – and by instead granting them a 'Temporary Protection status' according to which it assumes that it can accord the rights it sees fit and not those enshrined in the Convention[7].

This thesis argues that Israel's treatment of African asylum seekers does not meet international refugee protection standards and that the concept of temporary protection is misunderstood, not only by means of its application in Israel but also in most Western States. In Chapter 1, I will outline the current state of affairs in Sudan and Eritrea and explain some very specific characteristics of Israel's existence that might help us understand its reticence in accepting newcomers on a permanent basis outside the 'Law of Return' realm. In Chapter 2, I will present the international legal standards concerning asylum and refugee protection according to the Refugee Convention and other international instruments of binding force. I will argue that these instruments do not require that the rights granted by them be of a permanent nature, thus, the rights accorded under temporary protection should be precisely the same as those contained in these international legal instruments. Lastly, I will present the European standards applicable to refugees and asylum seekers which are also based on the questionable idea that temporary status is not governed by the Refugee Convention. In Chapter 3, I will thoroughly discuss Israel's asylum policy, emphasising the practical consequences it has over asylum seekers' lives.

[6] Y. Berman, *(*Adv. Yonatan Berman is a Senior Law Clerk at The Supreme Court of Israel and Director of the Clinic for Migrants' Rights at the College of Law and Business in Ramat Gan, Israel) 'Until our hearths are completely hardened. Asylum Procedures in Israel', (2012), Hotline for Migrant Workers, available at: http://www.hotline.org.il/english/pdf/asylum_procedures_2012_eng.pdf [accessed in June 2013].

[7] T. Kritzman-Amir, "'Otherness' as the underlying principle in Israel's asylum regime" (2009) 42 *Israel Law Review* no. 3: 603-627; T. Kritzman-Amir and Y. Berman, 'Responsibility sharing and the rights of refugees: The case of Israel' (2009) 41 *George Washington International Law Review*, no. 3, 619-649.

I will conclude this work with an evaluation of the situation of African asylum seekers in Israel today as well as with an assessment of the future scenario they might be confronted with shortly, taking into account the legislative changes that are taking place as this thesis is in progress. I will argue that refugee protection is an international enterprise, and that as such, the responsibility of caring for those who flee persecution should be shouldered by the international community as a whole. I will apply this hypothesis to the Israeli situation and recommend a path the government could take in order to pursue both its demographic interests while ensuring compliance with international law towards the well-being of asylum seekers.

Chapter 1: African asylum seekers in Israel

1.1. Current situation in north-west Africa

This Chapter will be divided into two sections: the first section will contain a brief background of Sudan and Eritrea, countries which produce a substantial number of refugees; the second part will present Israel's background and outline the challenges it faces as a destination country. Earlier historical events will be overlooked or only shortly accounted for, since in order to understand the current state of affairs, the focus needs to be on what it is going on today. An understanding of the situation in these distinct places is necessary to comprehend the migration flows from Sudan and Eritrea and the reticence present in Israel to absorb those who fled.

1.1.1a – Sudan: A brief look at its recent history[8]

Sudan gained its independence in January 1956 and was until recently the biggest country on the African continent. Following its independence, the first Sudanese civil war broke out between the Muslim Sudanese from the North and the traditional Animist and Christians from the South. The war lasted for seventeen years until autonomy was granted to the South part of the country in 1972. However, in 1983 when the President declared Sharia law throughout the country, the non-Muslims of the south established the Sudan People's Liberation Army (SPLA) to demand that Sharia be repealed. The government refused to lift the law and ordered the army to crush the rebels in the South,[9] giving way to a new civil war that lasted until 2005. In 1989, the current president, Omar al-Bashir led a military coup and became the new leader of the country. Immediately after the coup, he declared the state of emergency, suspended the

[8] For a more detail review, see: United Nations, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', January 2005, available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed in March 2013].

[9] H. Buchanan, 'Escape from Darfur: Why Israel Needs to Adopt a Comprehensive Domestic Refugee Law' (2008) 11 *Chapman Law Review*, at 605.

constitution and dissolved the Parliament[10]. Since his self-appointment as ruler of Sudan, al-Bashir introduced aspects of Sharia Law, thereby furthering the resistance of the non-Islamic South.[11] He also abolished political parties, trade unions and prohibited demonstrations.[12]

Only in 1993 was a return to civilian rule announced and it took another three years for elections to take place. Al-Bashir was elected President with an overwhelming majority and tensions between the different factions escalated. The SPLA became stronger rapidly and began attacking key government and military posts; the government in turn, responded by "bombing (…) civilian targets, such as hospitals, churches, and United Nations humanitarian aid centers (and) armed northern Muslim tribesmen to commit atrocities by raiding southern villages".[13] Since the government was in need of uniting its forces, it withdrew those in rural areas to have more presence in the urban ones, thereby leaving control of the rural areas entirely in the hands of the militia.[14] The government's desperate move included calling on Arab local tribes to fight the rebels in exchange for land. As a result, in due time and with the financial and military aid of the government's army, these local tribes developed into a pro-governmental militia known as the Janjaweed.

At the beginning of 2005, a peace agreement was signed between the Government and the SPLA which gave a strong autonomy to the Southern region of the country – restoring the autonomy they enjoyed in the past – and an option for future secession. However, violence continued to escalate in the Northern part of the country and especially in Darfur[15].

[10] A. Cowell, 'Military Coup in Sudan Ousts Civilian Regime', The New York Times, July 1989, available at: http://www.nytimes.com/1989/07/01/world/military-coup-in-sudan-ousts-civilian-regime.html [accessed in March 2013].
[11] BBC News, 'Profile: Sudan's President Bashir', November 2003, available at: http://news.bbc.co.uk/2/hi/africa/3273569.stm [accessed in March 2013].
[12] Id.
[13] Buchanan, Escape from Darfur, 605.
[14] Supra note 8, Para.66.
[15] For a map of Sudan see annex 2.

1.1.2a – Sudan: Ethnic civil war as a cause of migration flows

In Darfur, a region located in the North-Western part of the country, tensions had always been present between the nomadic Arab Muslims and the sedentary black Muslims over land use rights.[16] However, these tensions had not been violent until the government armed the Arab groups originally to defeat the non-Muslim SPLA. The Arab groups (Janjaweed) took advantage of the armed support they were getting from the government and turned to attack the sedentary population. Unfortunately, evidence suggests that the Sudanese government continued to support these militias[17] in a conflict that is no longer religious but ethnic.

United Nations representatives have categorized these attacks as amounting to ethnic cleansing[18] and the report of the International Commission of Inquiry on Darfur to the Secretary General of the United Nations (from now on the UN), estimated 1,65 million internally displaced persons (IDPs) in Darfur and more than 200,000 Darfuri refugees in Chad[19]. The International Commission also found that "[g]overnment forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement" and that the attacks were so widespread and systematic that they "may amount to crimes against humanity"[20].

In a letter to the UN Security Council, Human Rights Watch expressed that the Sudanese government's refusal to allow UN forces in the region can only be interpreted as the

[16] Buchanan, Escape from Darfur, 3.
[17] Buchanan, Escape from Darfur, 4.
[18] UN News Centre, 'UN rapporteurs gravely concerned by reports of ethnic cleansing in Sudan', March 2004, available at: http://www.un.org/apps/news/story.asp?NewsID=10234&Cr=Sudan [accessed in June 2013].
[19] Supra note 8.
[20] Id.

government's eagerness to "preserve and consolidate 'ethnic cleansing' of its own citizens for its own political purposes"[21].

1.1.3a – Sudan: The current state of affairs

Following a referendum held in January 2011, the Southern populations of Sudan seceded and declared independence in July 2011, making South Sudan the newest state in the world. In spite of Sudan's recognition of the new state, there is a continuous disagreement on the sharing of oil-reserves and border disputes with violent encounters are frequent. The most recent data gathered from the border area show that Abyei, Southern Kordofan and the Blue Nile state[22] are the most affected areas from which tens of thousands of civilians continue to flee and become internally displaced persons (IDP) or refugees in neighbouring Ethiopia[23].

In Darfur, the situation remained the same, with an estimated 2.5 million of displaced people and the government's refusal to accept African Union or UN missions in certain parts of the territory. Human rights abuses, including the arrest of presumed government opponents, torture while in detention, arbitrary killings and raids continued while there have been violent searches in IDP camps where arrests of residents as well as sexual assaults against women and girls have been carried out by government forces.[24] Seventeen political parties were banned due to their ethnic link and anyone presumed to be a member – even if only due to their ethnic background – could be subjected to arrest and a variety of physical and mental abuses.[25]

[21] P. Tikirambudde, 'Letter to the U.N. Security Council on Sudan Sanctions and Civilian Protection in Darfur', HRW, August 2006, Para.14, available at: http://www.hrw.org/news/2006/08/14/letter-un-security-council-sudan-sanctions-and-civilian-protection-darfur [accessed in March 2013].
[22] For a map of Sudan and South Sudan's borders, see annex 2.
[23] HRW, 'World Report 2012: Sudan', available at: http://www.hrw.org/world-report-2012/world-report-2012-sudan [accessed in March 2013].
[24] Id.
[25] Id.

The Sudanese government accused the United Nations – African Union Mission in Darfur (UNAMID) of forging reports and in October 2012, a peacekeeper was killed and three others got injured in an attack by unknown troops.[26] A report by the Secretary-General on UNAMID, released in January 2013, stated that attacks on IDPs continued and it documented a number of violations of the right to physical integrity, arbitrary arrests and sexual and gender-based violence.[27] In addition, UNAMID's overland movement was limited on several occasions and their mobility in the region has become more difficult due to access obstructions and bureaucratic impediments. Certain areas of Darfur were still absolutely inaccessible by any humanitarian organization or mission and six national non-governmental organizations (NGOs) were unregistered, thereby preventing the delivery of humanitarian assistance for approximately 30,000 recipients.[28]

The state of affairs in Darfur among other areas of Sudan remains unsolved and people continue to be displaced and forced to find other places in which to live, sometimes in neighbouring countries, and sometimes further away. Similarly to Sudan, Eritreans are also fleeing their homeland, escaping from a government that not only cannot protect them but that is in most cases, the reason for their flight.

1.1.1b – Eritrea: A brief look around its recent history[29]

Following the end of the Second World War, Eritrea was placed under British administration until a UN resolution of 1950 placed Eritrea as "an autonomous unit federate with

[26] Sudan Tribune, 'Sudanese army say rebels behind UNAMID reports on Hashaba clashes', November 2012, available at: http://www.sudantribune.com/spip.php?article44598 [accessed in March 2013].
[27] United Nations – Security Council – UNAMID Report S/2013/22, Subtitle IV: Rule of law, governance and human rights, January 2013, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_22.pdf [accessed in March 2013].
[28] Id. Subtitle V: Humanitarian Situation.
[29] For a more detail review, see: Library of Congress, 'County Profile: Eritrea', September 2005, available at: http://lcweb2.loc.gov/frd/cs/profiles/Eritrea.pdf [accessed in June 2013].

Ethiopia."[30] Eritrea was supposed to control all its domestic affairs under its local administration; however the importance of Eritrea's coastline and mineral resources prompted the Ethiopian government to gradually take over Eritrea's autonomy.[31] Finally, in 1962, Ethiopia dissolved Eritrea's federation altogether which led to a rapid escalation of violence.

Fighting continued until 1991, when the Eritrean People's Liberation Front (EPLF), lead by Isaias Afewerki, took control over the entire Eritrean territory. Mediated by the United States of America the Ethiopian government and the Provisional Government of Eritrea agreed to hold a referendum regarding secession. The referendum showed that nearly the totality of Eritreans wanted to have their own country and in May 1993, Eritrea formally declared its independence, having Isaias Afewerki as its first president.

The following year, the EPLF became a political party – the People's Front for Democracy and Justice (PFDJ) – which remains the only legal political party in Eritrea until today. In addition, in order to legitimize this one-party government, the president made use of the vast number of Eritrean exiles abroad and rapidly created institutions in which they could engage and support his newly established control.[32]

The country drafted a Constitution in 1997 but it never came into force; the same document called for elections which were never held.[33] In September 2001, when the world had its eyes on the World Trade Center attacks, President Afewerki arrested eleven of the fifteen government members who called for the implementation of the Constitution and for democratic

[30] Resolution adopted by the General Assembly at its 5th session, Ad Hoc Pol. Committee, Eritrea: report of the United Nations Commission for Eritrea; report of the interim Committee of the General Assembly on the report of the United Nations Commission for Eritrea, A/RES/390(V)[A-B], (December 2nd 1950).
[31] Library of Congress, 'County Profile: Eritrea', 3.
[32] T.M. Redeker Hepner, 'Transnational governance and the centralization of state power in Eritrea and exile' (2008) 31 *Ethnic and Racial Studies*, no. 3, at 481.
[33] S.B. Keetharuth, 'Report of the Special Rapporteur on the situation of human rights in Eritrea', United Nations General Assembly – Human Rights Council A/HRC/23/53, May 2013, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.53_ENG.pdf [accessed in June 2013].

elections. All of them were arbitrarily arrested and held incommunicado, without charges and in unknown locations and they have remained in this situation for over 10 years.[34] The National Assembly never met again since many of its members are either imprisoned or have fled the country.[35]

1.1.2b – Eritrea in the local and international context

In its short life as an independent state, Eritrea has been in conflict with all its immediate neighbours – Djibouti, Ethiopia, Sudan and Yemen[36] – over territorial and/or political issues and even though the disagreements have been solved, relationships remain tense[37]. Eritrea maintains diplomatic relationships with a not very significant number of countries and has been sanctioned by the international community twice[38].

Afewerki's government has a strict policy of self-reliance in which humanitarian and development assistance by international actors is restricted.[39] Specialist on Eritrea, Dr. Redeker Hepner characterized the state as a "highly centralized, nationalist, authoritarian project that has obliterated civil society and rebuffed foreign interventions, while also establishing itself as a transnational entity with a global institutional reach."[40] Eritrea's internal policies, added to the delicate situation with its neighbours, contribute to the country's isolation both at regional and international level.

[34] Amnesty International, 'Eritrea: Prisoners of conscience held for a decade must be released, September 2011, available at: http://www.amnesty.org/en/news-and-updates/eritrea-prisoners-conscience-held-decade-must-be-released-2011-09-15 [accessed in June 2013].
[35] Library of Congress, *County Profile: Eritrea*, 13.
[36] For a map of Eritrea, see annex 1.
[37] Keetharuth, HRC Report on Eritrea, 6.
[38] United Nations News Centre, 'Security Council imposes sanctions on Eritrea', December 2009, available at: http://www.un.org/apps/news/story.asp?NewsID=33337&Cr=somali&Cr1=#.Ucg_FflQFhc; United Nations News Centre, 'Security Council expands sanctions on Eritrea over support for armed group', 5 December 2011, available at: http://www.un.org/apps/news/story.asp?NewsID=40628&Cr=eritrea&Cr1#.UcgeJvlQFhd [accessed in June 2013].
[39] Keetharuth, HRC Report on Eritrea, 6.
[40] Redeker Hepner, 'Transnational governance and the centralization of state power in Eritrea and exile', 478.

1.1.3b – Eritrea: Indefinite military conscription and other gross human rights violations as a cause for defection

The PFDJ is the only political party in Eritrea; all others are not represented in the Government because they are illegal.[41] There has been no independent press in the country since 2001 when the Government closed down independent media and arrested "an undisclosed number of journalists"[42], who were held incommunicado without charges. According to Reporters without Borders, Eritrea ranks last of all countries in the world on freedom of information, the situation being characterized as worse than in North Korea.[43]

Separation of powers is inexistent and all governmental functions are centralized with the President and a number of close collaborators.[44] A variety of other abuses against both groups and individuals are commonplace. In the Report of the Special Rapporteur on the situation of human rights in Eritrea, there is a non-exhaustive list of the most frequent violations of people's rights:

> "[H]uman rights violations committed in Eritrea include, but are not limited to, extrajudicial killings; the ruthless implementation of a shoot-to-kill policy of persons attempting to cross borders; enforced disappearances and incommunicado detention; arbitrary arrests and detentions; widespread torture, both physical and psychological, during interrogation by the police, military and security forces; inhumane prison conditions; compulsory national service of an unspecified and extended duration; no respect for civil liberties, including the freedoms of expression and opinion, assembly, association, religious belief and movement; discrimination against women, and sexual and gender-based violence; violation of child rights, including conscription, which has a profound impact on education; and precarious living conditions."[45]

[41] Library of Congress, *County Profile: Eritrea*, 14.
[42] Id.
[43] Reporters without borders, 'Press Freedom Index 2013', available at: http://en.rsf.org/spip.php?page=classement&id_rubrique=1054 [accessed in June 2013].
[44] Keetharuth, HRC Report on Eritrea, 8.
[45] Keetharuth, HRC Report on Eritrea, 9. An in depth account on each of these cases is given in the Report.

Military service is, in theory, compulsory for a term of eighteen months, however, in practice, it is extended indefinitely both for men and childless women. According to a Human Rights Watch (HRW) Report, secondary school children are also recruited to start their military training, thus completing their final grade in Sawa military camp.[46] Exit visas are required for all Eritrean nationals to legally leave the country and they are generally refused to men between 18 and 54 and to women between 18 and 47[47] who are presumed able to serve in the army. Even many of those who were granted permission to leave after paying a deposit (intended to guarantee their return) chose not to come back, such as the national football team, the leading domestic football team and some Olympic athletes.[48]

To date there is no single NGO (either national or international) operating in Eritrea[49] which makes it extremely difficult to collect information on the numbers and the scale of abuses. Different reports estimate the number of arbitrarily detained people between 5,000 and 10,000, not including national service defectors who amount to tens of thousands.[50] Regardless of the risks involved when attempting to leave the country, on average more than 4,000 people flee Eritrea each month.[51] In general, fear of prolonged military conscription, arbitrary arrests or detention and torture or persecution on grounds of religious belief count among the main reasons for people to flee.[52]

[46] HRW, 'Service for Life – State repression and Indefinite Conscription in Eritrea', 2009, p3, available at: http://www.hrw.org/sites/default/files/reports/eritrea0409web_0.pdf [accessed in June 2013].
[47] Keetharuth, HRC Report on Eritrea, 13.
[48] A. Simon, "Analysis: Why would anyone defect from 'flawless' Eritrea?", the Daily Maverick (South Africa), December 2012, available at: http://www.dailymaverick.co.za/article/2012-12-06-analysis-why-would-anyone-defect-from-flawless-eritrea#.UcgeHflQFhd [accessed in June 2013].
[49] Keetharuth, HRC Report on Eritrea, 13.
[50] HRW,' Country Summary: Eritrea', January 2012, p1, available at: http://www.hrw.org/sites/default/files/related_material/eritrea_2012.pdf [accessed in June 2013].
[51] Keetharuth, HRC Report on Eritrea, 17.
[52] Id.

The plight of those who succeed to escape, is not over when they do so, the 'guilt' is merely shifted to their relatives or to others who might have helped them in their run, while Eritreans whose application for asylum failed and are repatriated, usually disappear.[53] Moreover, all Eritreans living abroad have to pay a 2% income tax even when they were granted refugee status; failure of payment may result in the punishment of family members by arbitrary detention, fines, denial of their right to do business, revoking of licenses or land expropriation[54] in accordance to a policy of "guilt by association."[55] The reason for this is rooted in Eritrea's history: with a system sustained for decades by a "diasporic network of emigrants and refugees from previous political eras, many who have not lived in Eritrea since independence"[56], many remain loyal to the system which brought independence to the nation while sceptical to their fellow citizens' suffering inside it. Embassies abroad form the centre of these operations by which the PFDJ obtains much of its financial profits.[57]

Given the instability in these two geographical areas described above as well as in a few other parts of Africa, thousands of people started fleeing persecution in search of a safe haven. Israel is the only developed country which is accessible by land from the African continent and the number of asylum seekers that started entering it irregularly increased drastically from one year to the next. The following section will elaborate on the background of the State of Israel and the specific challenges it faces as a destination country for refugees.

[53] Keetharuth, HRC Report on Eritrea, 10.
[54] HRW, 'Service for Life', 75.
[55] Keetharuth, HRC Report on Eritrea, 12.
[56] Dr. Tricia Marie Redeker Hepner is the Vice Chair of African Studies of the University of Tennessee and a Specialist on Eritrea with Amnesty International USA since 2005. The passage is from a non-peer reviewed publication called "Open Letter to Israel: Eritreans are Not Economic Refugees" of 2012.
[57] T.M. Redeker Hepner, *Soldiers, martyrs, traitors, and exiles: Political Conflict in Eritrea and the Diaspora*, (Philadelphia, University of Pennsylvania Press, 2009), p.158.

1.2. Israel, the only Jewish state

The State of Israel declared its independence on 14th May 1948. The country is a small multiparty democratic Republic in the Middle East with an estimated population of 8,018,000[58] (excluding the West Bank and Gaza). Since its establishment, Israel is a Jewish state, erected after a long history of a population in exile and prompted by the events that took place in Europe during the Second World War. Israel has Two Basic Laws enacted in 1992 that serve as a Bill of Rights and therefore, apply to everyone under Israeli jurisdiction.[59] These are respectively the *Basic Law: Human Dignity and Liberty* and the *Basic Law: Freedom of Occupation*, which both in turn reaffirm that the protection of these basic rights is in accordance with "the values of the State of Israel as a Jewish and democratic state"[60] and with "the principles set forth in the Declaration of the Establishment of the State of Israel"[61] respectively (see below).

The Jewish and democratic character of this country are not conflicting but rather two sides of the same coin[62]: on the one hand, the state being Jewish represents its history to be connected to the history of the Jewish people, its holy days to reflect Jewish heritage, a State that will cultivate Jewish culture and education and which is based on the ethics of the Bible.[63] On the other hand, its democratic character represents the values present in any modern democracy; consensus, equal participation for all citizens in the election of governments (directly or

[58] Israeli Ministry of Foreign Affairs, 'About Israel', available at: http://mfa.gov.il/MFA/AboutIsrael/Pages/default.aspx [accessed in May 2013].
[59] A. Barak, 'The value of the State of Israel as a Jewish and democratic state' (2011) 21 *Jewish Law Association Studies*, at 1.
[60] Basic Law: Human Dignity and Liberty (1992).
[61] Basic Law: Freedom of Occupation (1994). This Basic Law: Freedom of Occupation (1994) repeals and replaces the former Basic Law on freedom of occupation (1992).
[62] On the compatibility of these two aspects see: M. Elon, 'The values of a Jewish and democratic state: the task of reaching a synthesis' (2002) 3 *Human Rights Review*, no. 2: 36-84; J. Fox & J. Rynhold, 'A Jewish and Democratic State? Comparing Government Involvement in Religion in Israel with other Democracies' (2008) 9 *Totalitarian Movements & Political Religions*, no. 4: 507-531; A. Barak, 'The value of the State of Israel as a Jewish and democratic state' (2011) 21 *Jewish Law Association Studies*: 6-18; A.Yakobson, and A. Rubinstein, *Israel and the family of nations: the Jewish nation-state and human rights*, (London, Routledge, 2009).
[63] For a complete account on the Jewish character of the State of Israel see also supra note 62.

indirectly), the equality of all its inhabitants, separation of powers and the independence of the judiciary, the primacy of the rule of law, and respect for human rights.[64] There is no parallel to a 'Jewish and democratic' definition in any other Western legal system because Israel's uniqueness "is embedded in the history of the Jewish Nation, which for close to 3,000 years created and developed a legal system that governed the lives of the Jewish people when they had a sovereign state of their own—a relatively short period—and during the nearly two thousand years they lived in the Diaspora without political independence."[65] In short, the character of Israel as a Jewish and democratic state does not mean that one of these aspects will have primacy over the other one but rather that basic principles will be interpreted to achieve a dual-value objective.[66]

Already in its declaration of independence, the basic principles on which the State of Israel is based were framed as follows:

> "THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."[67]

[64] Barak, 'The value of the State of Israel as a Jewish and democratic state', 8. It is worth noting that when a States' interest, whatever it might be, conflicts with someone's rights, it is an independent judiciary that will ultimately settle the issue; this happens in every democratic society. For other views on democracy and the relation of religion and democracy in Israel, refer to Fox and Rynhold, *infra* note 66.
[65] M. Elon, 'The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis' (2002) 3 *Human Rights Review*, no. 2: at 37.
[66] Elon, 'The Values of a Jewish and Democratic State', 39; Fox and Rynhold argue that a comparison of Israel to other democracies shows that all types of government involvement in religion (GIR) which exist in Israel also exist in other democracies. This implies that the extent of GIR in Israel does not undermine its democratic character. (Their) results also show that, while democracies tend to have lower levels of GIR than non-democracies, the relationship between GIR and regime is nonlinear (from abstract). For a complete account, please refer too: J. Fox & J. Rynhold, 'A Jewish and Democratic State? Comparing Government Involvement in Religion in Israel with other Democracies' (2008) 9 *Totalitarian Movements & Political Religions*, no. 4: 507-531.
[67] Declaration of the Establishment of the State of Israel. (1948), Para 13.

Jews inside Israel are not granted more rights than non-Jews, the *right to return* which applies to those outside Israel's jurisdiction "predates the State of Israel. It is this right which built the State. It is based on the unbroken historical connection between the people and the homeland."[68] Thus, the State of Israel does not see itself as an immigration country but as a state of return, in which every Jewish person is already perceived as part of its society and has an inherent right – and not a differential one – to return to it.[69] Under the Halakhah "children of mixed couples are considered Jewish by birth if the child's mother is Jewish"[70] but the Law of Return, applies to Jews and to "a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew"[71] and thus, many people not religiously consider Jewish and sometimes even defined by themselves as non-Jews immigrate to Israel and assimilate successfully.[72]

Other countries, such as Greece, Hungary, Germany, Italy, Ireland and Finland have laws that favour their own ethno-cultural kin group on immigration issues and accord citizenship privileges to their own diaspora members.[73] Prof. Dr. Smooha describes as 'ethnic democracies' those in which the ethnic nation precedes the formation of the state, these are also characterized by a majority of the population which is committed to democracy and the existence of a real or perceived threat to the survival of the nation ingrained in a minority, which is manageable in size but is sometimes affiliated to an external entity that is either an enemy or an ill-disposed agent. Such is the case of

[68] Elon, 'The Values of a Jewish and Democratic State', 49.
[69] It has been argued that conferring this right on every Jew of the Diaspora does not reflect the interest of the citizens already in the country, both for the minority as for the majority. For more on the topic, please refer to: C. Gans, *A Just Zionism: On the Morality of the Jewish State*, (Oxford University Press, 2008).
[70] A. Yakobson, 'Joining the Jewish people: non-Jewish immigrants from the former USSR, Israeli identity and Jewish peoplehood' (2010) 43 *Israel Law Review*, no. 1, at 220.
[71] Law of Return (Amendment No. 2) 5730-1970 (1970), Section 4A.
[72] For an account of on non-Jewish assimilation, refer to supra note 70.
[73] Yakobson and Rubinstein, *Israel and the family of nations*.

Israel and many of the states of the former Soviet Union such as Latvia, Estonia and Slovakia.[74] Smooha follows to ensure that 'ethnic democracies' are compatible with universal minority rights since they grant "individual civil, political and social rights as well as collective linguistic and national rights to minorities (and they are) compatible with the extension of legal protection, affirmative action, cultural autonomy and power-sharing to minorities."[75]

Having said this, Israel's practice of favouring their own people for immigration purposes is not based on the apologetic argument that 'everybody does it', but it is based on an international principle of state sovereignty which allows each and every state in the world to determine who is allowed and who is not allowed to immigrate to it. Being in favour or against this practice is a matter of choice but there is no principled justification to demand that a state ceases it. Furthermore, issues of immigration are almost always debated within the framework of domestic law, therefore, also in Israel issues concerning immigration should be debated within Israeli law and human rights law[76], regardless of whether those rights are recognized internationally.[77]

The fact that Israel is the only Jewish state is not its only unique attribute. Israel's position in the world is also unique: it is a country surrounded by enemy states, which has been

[74] S. Smooha, 'The model of ethnic democracy: Israel as a Jewish and democratic state' (2002) 8 *Nations And Nationalism*, no. 4: 475-503.
[75] Id, at 483. Moreover, the "high compatibility of ethnic democracy with international standards can also be deduced, for instance, from the fact that almost all states in Central-Eastern Europe signed the Council of Europe agreements although some of them are or are becoming ethnic democracies. Slovakia and Estonia, for instance, were not called upon to amend the preamble to their constitutions, which declare them to be ethnic democracies".
[76] Human rights are universal and thus should be accorded to everyone, however each country has a duty to ensure the rights of those already under their jurisdiction. There is no basis to infer that a State has a duty to allow newcomers in, to whom it will eventually be compelled to accord rights.
[77] R. Gavison, 'Immigration and the human rights discourse: The universality of human rights and the relevance of states and of numbers' (2010) 43 *Israel Law Review*, no.1, at 38.

fighting terror also from within even before the term was adopted,[78] it was attacked in seven occasions that led to recognized wars, it has fought two intifadas and a number of different types of armed conflicts. Thus, it follows that restrictions on immigration will emanate from security concerns as well. On the other hand, Israel is a stable country with a strong economy, with good social, health and educational standards and with a low index of poverty and unemployment.[79]

While Israel's immigration law is unquestionable, refugee law transcends it. Refugee law is governed by the 1951 United Nations Convention relating to the Status of Refugees and should have nothing to do with each state's immigration policies and interests. The refugee protection regime embodies a number of legal documents of international character that will be discussed in Chapter 2 but such an overarching scheme does not exist for migration. The problem therefore arises where measures taken against 'illegal' immigration affect the protection of refugees.[80] Some authors sustain that Israel's asylum policy mirrors its immigration regime[81] and security matters are generally put forward to justify treating illegal immigrants (including asylum seekers) as if they where infiltrators, or in other words, enemies of the state. As put by former Chief Justice Aharon Barak, "the end does not justify the means (…) security is not above all else (and) the proper objective of increasing security does not justify serious harm to the lives of many."[82] Though he was not referring to African asylum seekers in particular, it is clear that even security concerns cannot be used to trump asylum seekers' rights, which include a right to remain in the country and acquire a legal status and corresponding rights. While Israel's

[78] The term "War on Terror" was first used by U.S. President George W. Bush on 20 September 2001 as a result of the operations which started after the terrorist attacks on the World Trade Center.
[79] For indicators, see OECD Better Life Index, available at: http://www.oecdbetterlifeindex.org/countries/israel/ [accessed in September 2013].
[80] W.M. Maas, 'Fleeing to Europe: Europeanization and the right to seek refugee status' (2008), *Institute of Social Studies*, Working Papers--General Series: 454, Chapter 2.1.
[81] See Kritzman-Amir in supra note 7.
[82] A. Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *The University Of Toronto Law Journal*, no. 2, at 377.

abidance with refugee law standards will be discussed in detail in Chapter 3, the next Chapter will provide an overview of what exactly these international legal standards regarding asylum and refugee protection are.

Chapter 2: International Legal Standards concerning asylum and refugee protection

2.1. The Refugee Convention and its Protocol

The principal international instrument which defines a refugee and demands action from refugee receiving states is the 1951 UN Convention relating to the Status of Refugees, entered into force April 22, 1954. This international instrument was drafted and adopted a few years after the end of the Second World War, with Israel as one of its first signatory members.[83]

When drafted, Article 1 of the Convention defined a refugee as someone who "[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[84] This first definition was amended by the 1967 Protocol which removed the temporal and geographic elements of the definition.

The Refugee Convention sets forth a long list of recommendations and obligations that the respective State Parties need to comply with. As such, the 1951 Convention dictates that a Contracting State shall allow the refugees in its territory access to courts of law, to employment, to public education and to identity papers,[85] but all of these provisions are written in such a way that they provide no uniform understanding of what the minimum standards should be in practice. Most importantly the Refugee Convention enshrines the principle of non-refoulement according to which no one shall be returned "to the frontiers of territories where his life or

[83] T. Kritzman-Amir, 'Refugees and asylum seekers in the State of Israel' (2012) 6 *The Israeli Journal of Foreign Affairs*, no.3, at 98.
[84] United Nations Convention and protocol relating to the status of refugees, Article 1 (A) (2).
[85] Articles 16; 17,18 and 19; 22 and 27 respectively.

freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[86] Although the prohibition on refoulement is unequivocal, it does not oblige a party to grant asylum nor does it prevent it from sending the person to a willing third state in which his life or freedom would not be threatened.[87] Moreover, precise guidelines to determine the right to seek protection are also lacking, resulting in an uneven understanding among countries on what those should be. Discrepancies on the Conventions' application are checked only by public opinion, national and international non-state actors and national judicial interpretation[88] instead of emanating from the Convention itself or being checked by a specialised mechanism.

Additionally, just as the Convention fails to answer which state has the responsibility of according the rights enshrined in it to refugees, it recognizes that some states will face a heavier burden than others for which it calls for 'international co-operation' in view of a 'satisfactory solution.'[89] The 1951 Convention does not define what 'co-operation' means, neither does it set up rules on how to allocate duties[90], nor does it outline what a satisfactory solution is. One such solution could be naturalization which is recommended in the Convention in the following terms: "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees…."[91] As phrased, naturalization is not a requirement but rather a choice, and it remains unclear which state should seek to naturalize refugees; the actual hosting state or other states as a way of co-operating with the former. The Statute of the Office of the United Nations High Commissioner for Refugees, which was created by the General Assembly and adopted in 1950,

[86] Id. Article 33.
[87] M. Campagna, 'Effective Protection against Refoulement in Europe: Minimizing Exclusionism in Search of a Common European Asylum System' (2009) 17 *International And Comparative Law Review*, at 134.
[88] Campagna, 'Effective Protection against Refoulement in Europe', 135.
[89] Refugee Convention, Preamble, para. 4.
[90] Kritzman-Amir and Berman, 'Responsibility sharing and the rights of refugees, 631.
[91] Refugee Convention, Art. 34.

could be seen as a response from the international community to work collectively. This instrument was the first one to mention co-operation relating to refugees as it called upon governments to co-operate with UNHCR in a diverse array of ways.[92] However, it was utopic from the start since it calls on states to co-operate only on an altruistic manner given that the UNHCR lacks enforcement measures to compel them. The Statute states that "[t]he work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees"[93] but in reality, it consists of delegates from different countries and is financed under the budget of the UN and by voluntary contributions from States, which already taints UNHCR's non-political character from the very start.

There are in addition 'soft law' instruments such as the annual conclusions of UNHCR Executive Committee (EXCOM) and a number of UN General Assembly Resolutions, in which the concepts of co-operation and responsibility sharing have been advanced. These instruments are non-binding and merely "'recall,' 'mention,' 'notice,' 'reaffirm,' 'emphasize,' or 'stress' (or other similar verbs) the general idea of responsibility sharing, but do not give any substance to the notion" and it has been like that for over fifty years now[94].

Apart from the lack of clear norms to achieve proper standards of protection, another very complicated issue concerning refugees is the difficulty in properly assessing their claims and distinguishing refugees from economic migrants which fall in the realm of regular (as opposed to forced) migration. This problem is one of the most contentious issues in Israel, coupled with the country's reluctance to provide permanent residency status to them. The 1951

[92] See Statute of the Office of the United Nations High Commissioner for Refugees, Chapter 2, para. 8.
[93] Statute of the Office of the United Nations High Commissioner for Refugees, Chapter 1, para. 2.
[94] Kritzman-Amir and Berman, 'Responsibility sharing and the rights of refugees', 631.

Convention clearly states that it ceases to apply when the circumstances which initially gave rise to an asylum claim cease to exist.[95] It can correctly be inferred, therefore, that refugee status is not *per se* a permanent one. Prof. Hathaway and Neve accurately pointed out that "international law presently requires no more than the provision of rights-regarding temporary protection"[96] and that Western States' historical practice of according permanent status responded to an interest-convergence between refugees and states that has disappeared today. The first notion of a refugee that the world had, was that of an educated European Jew, hence, cultural assimilation in the host country was relatively easy, helped meet the labour shortages created by the Second World War and answered to Western ideological or strategic interests at the wake of the Cold War.

Nowadays, the majority of the refugee population worldwide remains in Third World countries[97] where temporary protection rarely becomes permanent.[98] Prof. Schuck also noted that "[t]emporary refuge is the keystone of the refugee protection structure"[99] and that "the number of individuals granted (permanent) asylum is but a tiny fraction of those who actually receive protection."[100] Consequently, if one considers that what the Refugee Convention stipulates is in fact temporary protection, one might be surprised to notice that it is silent on repatriation. The best durable solution is indeed repatriation[101], when circumstances permit and in conditions of

[95] United Nations Convention and protocol relating to the status of refugees, Article 1(C)(5).
[96] J.C. Hathaway and R.A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal*, at 119.
[97] UNHCR, Facts and Figures about Refugees, (Data gathered until the end of 2012), available at: http://www.unhcr.org.uk/about-us/key-facts-and-figures.html [accessed in June 2013].
[98] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 132.
[99] P.H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 *Yale Journal of International Law*, no.2, at 268.
[100] Schuck, 'Refugee Burden-Sharing', 264.
[101] UNHCR, Voluntary Repatriation, available at: http://www.unhcr.org/pages/49c3646cfe.html [accessed in November 2013].

dignity and safety. However, in cases where an ongoing conflict exists, temporary protection risks becoming indefinite.

Different proposals to complement the system or to completely dismantle it in favour of a new one, be it by a model of 'common but differentiated responsibility' (Hathaway and Neve) or by setting a refugee quota system (Schuck) have been advanced to ensure that refugees that cannot be repatriated during a reasonable temporary period, are resettled in other states under different contractual obligations.[102] But it has been noted that "[i]n states having a tradition of equating refugee status with the right to remain permanently in the asylum state, there is a fear that the arrival of refugees may, if sufficiently widespread, lead to social changes not desired by the host society."[103] The reluctance of Western States to take refugees in and facilitate their assimilation exists because the interest-convergence that existed in the past has disappeared and because states now see refugee claims as a 'back door' to immigration. Such is the case of most of the developed world, but while the current system does have these insurmountable shortcomings, it is almost impossible to guarantee that repatriation will be possible at the end of a period of temporary protection. This is because in many cases repatriation would cease to be a valid option for those who have been under temporary protection for several years. Indefinite temporary protection would amount to inhuman treatment given that refugees would not be able

[102] Hathaway and Neve ascribe the failure of the current refugee system to the lack of solution-oriented aims, the failure of refugee law to reduce the conflict with immigration control objectives and the lack of shared responsibilities and burdens of protection among countries. They propose a complementary model of associations of states that they call 'interest-convergence groups' in which a group will agree in advance to protect refugees who arrive at the territory of any state member of the group by contributing differently; some states will provide temporary asylum without having to bear the costs of protection themselves and states - generally those outside the conflict zone - will bear the economic costs and only take into their territories those humanitarian or other special cases that require resettlement. Peter Schuck proposes a system of refugee quotas in which states will commit to assure temporary protection or permanent resettlement to a number of refugees over a given time frame. Then, participating states would be allowed to trade their quotas by paying other states to fulfil their obligations in a market-like environment. A deeper presentation of these models exceeds the purpose of this paper but for an analysis on both *see:* D. Anker, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1998) 11 *Harvard Human Rights Journal*, 295.

[103] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 138.

to recover their lost sense of stability while relocation before circumstances allow it would be in breach of the principle of non-refoulement; hence, the matter is not easily solved. A solution to the dilemma could be to have a decision made on a case-by-case basis by the UNHCR and other organizations in the countries of origin which are aware of the situation on the ground and the real possibilities for successful return. In any case, for states to stop perceiving refugee protection as an internationally imposed burden, repatriation needs to be a feasible solution.

This confusion on whether refugee status equates to a permanent condition or rather a temporary one with a goal to repatriate has not been addressed by the leading organization that relates to refugee welfare. The UNHCR has taken the position that sometimes, temporary group protection was needed because most of the individuals in the group would satisfy the Convention's criteria, but at other times it has departed from this position by suggesting that temporary protection is a 'complementary protection measure' not fully governed by it. This position clearly provided a basis for States to believe that they are free to determine which rights will be granted to those temporarily protected and that they are not required to fulfil all their obligations under the Convention with regards to them.[104]

Last but not least, the deficient definition advanced by UNHCR has made its way to a more permanent one that other organizations and entities have adopted, evident in the widespread use of the term 'temporary protection' as "a procedure of an *exceptional character*

[104] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 167. *See also* UNHCR, 'Protecting Refugees – Q&A' which clearly treats temporary protection as something different to what is advanced by the Refugee Convention: "Nations at times offer 'temporary protection' when they face a sudden mass influx of people (…) In such circumstances people can be speedily admitted to safe countries, but without any guarantee of permanent asylum" and follows stating that temporary protection "only complements, and does not substitute for, the wider protection measures, including formal refugee status, offered by the 1951 Convention", available at: http://www.unhcr.se/en/who-we-help/refugees/protecting-refugees-qa.html [accessed in September 2013].

during an emergency situation that involves a mass influx of displaced persons"[105] or "an *exceptional measure* to provide displaced persons (…) immediate and temporary protection."[106] As it is perceived today, temporary protection would normally apply collectively, would be short-termed, applied when people from the same country or area arrive at a given place in great numbers, and the rights accorded to them would be less than those that would be granted if the person was recognized as a refugee with a more permanent status. This understanding of temporary protection raises certain questions regarding the legality of the practice, since "among those granted temporary protection are individuals who would meet the criteria of the Convention (…) and could be recognized as such if their case were examined individually."[107] To sum up, the Refugee Convention does not require refugee status to be permanent, so there is no normative basis to defend that temporary protection should assign less or different rights to those under a collective system of protection. The main difference between the two protection systems is that temporary measures have historically been taken in connection to groups of fleeing people and not on an individual basis as required by the Convention. However, since nothing precludes a subsequent individual assessment of claims at the end of collective protection, all other differences that had been allotted to these two terms are no more than an inconsistent way of interpretation by different states that has not been resolved yet by an international organism.

[105] ECRE, 'Temporary Protection', available at: http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html (italics are mine) [accessed in September 2013].
[106] European Commission, 'Temporary Protection', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm (italics are mine) [accessed in September 2013].
[107] Kritzman-Amir, 'Refugees and asylum seekers in the State of Israel', 101.

2.2 Human rights standards relevant to refugees and asylum seekers

There are a number of rights that are inherent to the human condition and that apply to every human being irrespective of who he/she is, where he/she is and what his/her situation is, and there is another group of rights that applies specifically to people in a given circumstance. In the remainder of this Chapter, we will look at the rights that are relevant for refugees and asylum seekers.

The Universal Declaration of Human Rights (UDHR) sets forth in its Article 15 the right to have a nationality while Article 14 of the same document embodies the right to seek asylum from persecution in a country other than one's own.[108] Nowadays there are several reasons why a person may be born stateless or rendered stateless, with the most generalized way of being rendered stateless being due to persecution in the country of nationality. The last hundred years the world has witnessed persecution based on religion, ethnicity, nationality, political and sexual affiliation and disability among other grounds. The impossibility of victims of persecution to avail themselves of state protection in their homeland (be it because the persecution is carried out by the government itself or by non-state actors that the government either sponsors or fails to control) renders these people vulnerable to serious harm or even death, which is the reason why they are forced to seek protection outside their countries of nationality. The entire world agreed on the gravity of this issue following the unparalleled scale and violence of religious and ethnic persecution in Europe during the Second World War and that is why shortly after, the Refugee Convention was drafted and adopted.

[108] Universal Declaration of Human Rights, (1948).

In addition, human rights treaties, such as the International Covenant on Civil and Political Rights, entered into force 23 March 1976, (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976, (ICESCR) provide for rights which are also of relevance to refugees. Article 2 of the ICCPR sets forth that Contracting Parties undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[109] Under this light, refugees shall not be subjected to cruel, inhuman or degrading treatment,[110] shall be free from arbitrary arrest or detention, and when detained, should have access to proceedings before a Court to determine the lawfulness of detention.[111] Similarly, Article 2 of the ICESCR provides for non-discrimination as to the allocation of rights enshrined in the Covenant and allows for the right to work,[112] to adequate housing for oneself and family members[113] and to the highest possible standard of physical and mental health.[114]

States normally try to avoid granting these rights when it comes to refugees.[115] Some states have stressed that a full automatic allocation of rights could accelerate integration in the host country and make repatriation less likely. However, some have been recently acknowledging that those people who where self-sufficient in their host states are better equipped for their transition back to their counties of origin in the future.[116] There are reasons to

[109] ICCPR, Art. 2 (1)
[110] ICCPR, Art. 7
[111] ICCPR, Art. 9 (1) & (4)
[112] ICESCR, Art. 6 (1)
[113] ICESCR, Art. 11 (1)
[114] ICESCR, Art 12 (1)
[115] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 168.
[116] Id.

believe that if temporary protection was viewed as an empowering experience to help those temporarily protected to be prepared for a safe return home when conditions allow, states would be more willing to take them in and would be able to do it in a more regular basis. It is therefore crucial for repatriation to be a practicable solution, that refugees are not deprived of rights and liberties that define their identity, since otherwise, they would be aliens upon return and would – contrary to what was first exposed – be driven to identify more with their host society than with their own in their countries of origin. If collective identity does not flourish and the refugee community comes to identify with the host society, the chances for successful repatriation would be proportionally reduced.[117]

2.3 European standards applicable to refugees and asylum seekers

Many of the standards included in international human rights instruments are also provided for at a European level. The Member States of the Council of Europe are all parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which entered into force 3 September 1953. This instrument, like the UN Covenants, begins by stating that Parties "shall secure to everyone within their jurisdiction the rights and freedoms defined (in the) Convention"[118] and follows to guarantee a right to liberty and security of person,[119] a right to privacy and family life[120] and a prohibition of discrimination on any ground.[121] Other rights and freedoms that are not of a civil or political character, such as access

[117] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 175.
[118] ECHR. Art. 1.
[119] ECHR, Art. 5. It is important to note that under the ECHR, Art 5 (1) (f), detention to prevent unlawful entry into a state is considered viable, however, those deprived of liberty shall be granted access to take proceedings to challenge the lawfulness of their detention.
[120] ECHR, Art. 8.
[121] ECHR, Art. 14.

for non-nationals to social housing and housing benefits,[122] to health[123] and to work[124] among other social services[125] were included in the European Social Charter of 1961 (revised in 1996) which also established a supervisory mechanism – the European Committee of Social Rights – to monitor compliance with the Charter.

A different regional format is the European Union (EU), an economic and political union of 28 countries which operates through treaties and agreements voluntarily entered in by its Member States.[126] EU law prescribes the results that must be achieved in a given area but allows for each country to adapt their own internal legislation the way they see fit to meet those goals.[127] All members of the EU are Parties to the ECHR and agreements are currently in progress for the EU itself to accede to it, in which case, EU legal action would be submitted to the European Court of Human Rights' (ECtHR) external control[128].

The European Union has been working on a Common European Asylum System (CEAS) plan since 1999,[129] intended to get its members' national laws regarding asylum in line with each other. The UN Refugee Convention binds all EU Member States and the right to asylum is in addition, proclaimed in the Charter of Fundamental Rights of the European Union.[130] In order to

[122] European Social Charter, Art. 16.
[123] Id., Art. 13 & Art. 19.
[124] Id., Art. 18
[125] Id., see Art. 14.
[126] European Union, Basic Information, available at: http://europa.eu/about-eu/basic-information/index_en.htm [accessed in September 2013].
[127] European Commission, Application of EU law, available at: http://ec.europa.eu/eu_law/introduction/what_directive_en.htm [accessed in September 2013].
[128] Council of Europe, Newsroom, 'Milestone reached in negotiations on accession of the EU to the European Convention on Human Rights', 5 April 2013, available at: http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10 [accessed in November 2013].
[129] Commission of the European Communities, communication from the Commission to the European Parliament, the council, the European economic and social Committee and the committee of regions policy plan on asylum an integrated approach to protection across the EU, June 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF [accessed in October 2013].
[130] Charter of Fundamental Rights of the EU, (2000/C 364/01), Article 18 states: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January

harmonize asylum practices in all states, a number of regulations and directives have been adopted: in 2003, the Council adopted the Dublin Regulation[131] which established a hierarchical criterion to determine which Member State had the responsibility of examining a person's application for asylum. The 'Dublin system' created by it has proven to be a failure not only for those people claiming asylum but also for those States that due to their South-Eastern location directly received the bulk of the influx and found themselves confronted with little cooperation from other EU States. The absence of a burden-sharing mechanism prompted these states to implement defensive policies and *non-entrée* mechanisms which now make it harder for asylum seekers to seek protection in Europe.[132] In 2004, the Qualification Directive[133] was adopted to "ensure that Member States apply a common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."[134] This Directive broadened the scope of protection to include those enjoying subsidiary forms of assistance – which was unprecedented in international law – but continued to operate under the assumption that all member states are able to provide the same standards of assistance in practice, which is obviously impossible.

1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community", available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf [accessed in October 2013].

[131] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin Regulation'), February 2003, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF [accessed in October 2013].

[132] For more on how EU asylum and immigration policies have had a negative effect on the right to seek asylum see: W.M. Maas, 'Fleeing to Europe: Europeanization and the right to seek refugee status' (2008), *Institute of Social Studies*, Working Papers--General Series: 454. For examples of *non-entrée* mechanisms *see:* ECRE Weekly Bulletin, 'Spain illegally pushing back migrants to Morocco', 22 November 2013, available at: http://www.ecre.org/media/news/weekly-bulletin.html; Inter Press Service New Agency, 'Syrian Refugees Illegally Pushed Back', 20 November 2013, available at: http://www.ipsnews.net/2013/11/syrian-refugees-illegally-pushed-back/ [accessed in October 2013].

[133] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 April 2004.

[134] Id, Preamble, para. 6.

The Asylum Procedures Directive of 2005[135] introduced a basic framework on the procedures to be followed in assessing asylum claims and guaranteeing their substantive review. In other words, while it still does not guarantee a right to asylum, it does set the minimum standards that Member States have to apply to grant or withdraw refugee status, thereby guaranteeing a right to access the procedure. With a guaranteed access to the procedure, the likelihood of refoulement is notably reduced. However, once an asylum seeker has entered the procedure in any given State, this State can exercise discretion on whether a safe non-EU 'third country' exists in which the applicant could expect to seek protection instead of that in Europe and it can also exercise discretion with regards to the sort of safeguards that the deciding country should take from the third country before sending someone to it.[136] While the intention of the Asylum Procedure Directive was one of ensuring access to an asylum procedure, this discretion afforded to each Member State to decide whether a safe third country exists, renders the directive obsolete in those States which chose to adopt a loose understanding.[137] Still, it is of importance in those countries which adopted a narrower interpretation and are not using the exception as if it were the rule.

Along the path of completing the CEAS, there was a revised Qualification Directive in 2011[138] and the adoption of the Reception Condition Directive in 2013[139] in which rules determining asylum-related detention where clearly outlined. Once again, these can be efficiently

[135] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, 1 December 2005.
[136] Campagna, 'Effective Protection against *Refoulement* in Europe', 143.
[137] See for example the 2011 Hungarian Helsinki Committee Report, 'Serbia as a safe third country: A wrong presumption' in which an analysis of Hungary's expulsion of asylum seekers to Serbia demonstrates that its understanding of Serbia as a safe third country is in breach of the ECHR, available at: http://helsinki.hu/wp-content/uploads/HHC-report-Serbia-as-S3C.pdf [accessed in November 2013].
[138] DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
[139] DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

applied in a few European countries but it is not a reality for the whole of the European Union, especially due to the geographical location of some countries which experience an influx of migrants that exceeds the amounts they can process or host.[140] On its First Annual Report of the Asylum Information Database (AIDA) project – in which the asylum systems of 14 EU States where analysed – it was reported that still in 2013, States continue to apply different criteria to determine which of them are responsible for the examination of an application, that the hierarchy of criteria is not always respected – resulting in separation of families, – that the humanitarian clauses are rarely applied, that the use of asylum-related detention is frequent and that other social matters such as access to shelter and employment also differ from country to country.[141]

Negotiations on certain social rights derived in the recast 2013 Reception Conditions Directive in which it was decided that Member States shall grant permission to work "no later than 9 months from the date when the application for international protection was lodged...."[142] However, the Directive stipulates as well that "Member States shall decide the conditions for granting access to the labour market (...) in accordance with their national law" and that "[f]or reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals."[143] Similarly, with regards to the health care system, States are only obliged to ensure emergency care[144] and when material reception is needed, it allows for each State to determine the sort of help to be given, the conditions to be met in order to get it and

[140] Those countries that serve as 'entries to Europe' are the ones which find it more difficult to cope with their number. For example see: UNHCR, 'Current Issues of Refugee Protection in Greece', July 2013, available at: http://www.unhcr.gr/fileadmin/Greece/News/2013/PCjuly/Greece_Positions_July_2013_EN.pdf [accessed in November 2013]; or the Asylum Information Database Annual Report 2012/2013, 'Not there yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System', available at: http://www.asylumineurope.org/annual-report-20122013 [accessed in November 2013].
[141] Asylum Information Database Annual Report 2012/2013, 'Not there yet', 21.
[142] Supra note 139 , Art 15 (1)
[143] Id, Art 15 (2)
[144] Id, Art 19 (1)

allows for differential treatment between applicants and nationals.[145] Lastly, the modalities for reception conditions should "guarantee an adequate standard of living"[146] which needless to say, paves the way for a very broad understanding of what exactly 'adequate' means.

Also, the Dublin system allows for a State to send an applicant back to another EU Member State which is, according to this structure set, responsible for handling the application. The presumption of equal treatment is visible here too, where a state can send an applicant to another EU state without infringing on the principle of non-refoulement, if only in theory. A 2011 landmark case of the ECtHR,[147] concerned an Afghan asylum seeker who was transferred from Belgium back to Greece as required by the Dublin system since that had been his port of entry into the European Union. In Greece, the applicant was detained in unacceptable conditions and later on left to fend for himself on the streets. The Court found Greece in violation of Article 3 (prohibition of torture, inhuman or degrading treatment) of the ECHR with regards to the detention conditions and of Article 13 (right to an effective remedy) in conjunction with Article 3 for the shortcomings of Greek asylum procedure. Likewise, it found Belgium in violation of Article 3 for transferring the applicant to Greece since it was already aware of the degrading detention and living conditions given to asylum seekers there and of Article 13 taken in conjunction with Article 3 for the lack of an effective remedy to challenge the expulsion order. Traditionally Article 3 had never been interpreted as obliging a state to provide a home or financial assistance to refugees but according to the Court in this same case, it does now, given

[145] Id, Art 17
[146] Id, Art 18
[147] CASE OF M.S.S. v. BELGIUM AND GREECE, Application no. 30696/09, Grand Chamber, 21/01/2011.

that it has passed into positive law at EU level and as such, renewed the understanding of Article 3 vis-à-vis refugees who constitute a 'particular vulnerable group.'[148]

The shortcomings of the Dublin system have been made evident by the ECtHR, and while decisions are by definition non-binding, they do provide ample guidance for proper operation. Litigation under the ECHR proved that "mutual trust can no longer be considered to provide *per se* a sufficient basis for intra-EU transfers of asylum seekers"[149] and that a state might be held responsible of a violation of the Convention if a number of guarantees are not taken into account such as the situation in the country of origin, compliance with the Convention (both in law and in practise) by the intermediate State, or reports of recognized organizations such as the UNHCR.[150]

The presumptions of a 'safe third country' does not stand alone since a 'safe country of origin' presumption exist as well, first introduced in the conclusions of the Council of Ministers in 1992 by which "a safe country of origin is a country 'which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist.'"[151] Generally each state has its own 'safe country of origin list', which is in theory used to avoid dealing with unfounded applications. In practice, the use of the list means that those asylum seekers who originate from countries on the list, will have an expeditious examination of their applications and an extra burden to

[148] V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 *European Journal of Migration & Law*, no.1, at 22.
[149] Id. at 29.
[150] Id. at 29.
[151] G.V. Veldhoen, "Asylum in the European Union: the 'safe country of origin principle.' Research and Documentation Papers, People's Europe Series W-7." (1996): Archive of European Integration, p.2, available at: http://aei.pitt.edu/4906/1/4906.pdf [accessed in November 2013].

demonstrate that the presumption of safety does not apply in their individual cases.[152] The fact that an asylum seeker from country X might have a burden of proof higher if applying for asylum in country A (who consider his/her country safe) than in country B (which does not), illustrates how the 'safe country of origin' principle runs counter to the idea of a Common European Asylum System which "should guarantee every applicant the same chance of success regardless of the Member State in which he or she lodges an application."[153]

Despite the mentioned shortcomings of the CEAS, efforts are still being made for the EU to be able to provide protection to asylum seekers while ensuring respect for their human rights on a fair basis. Indeed, while procedures and conditions will likely never be the same all across Europe, some of the actual differences can be addressed and reduced. Meanwhile, since there is no international court able to provide a common interpretation of the Refugee Convention, it is up for each state to apply it, both at the legislative level and judicial level. Some authors have already expressed that refugee law provides an ample opportunity for greater transnational judicial dialogue in shaping it, but regrettably reality is far away from there still[154].

Lastly, it is worth mentioning that the EU has a specific Directive on Temporary Protection[155] which was a response to the mass influxes of displaced persons after the conflicts in the former Yugoslavia, Kosovo and other places. It was devised to reduce disparities on the reception and treatment of people in cases of mass influxes and to promote burden-sharing and

[152] ECRE, 'Safe countries of origin: An inconvenient truth', 2012, available at: http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/341-safe-countries-of-origin-an-inconvenient-truth.html [accessed in November 2013].
[153] Id.
[154] For more on judicial application of Refugee Law, see: H. Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 *International & Comparative Law Quarterly*, no. 3: 519-543.
[155] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

interstate solidarity among member states.[156] Temporary protection in the EU has an upper period of 3 years in which the receiving country shall provide documents to those protected,[157] as well as authorise employment,[158] ensure accessible housing,[159] provide social welfare and health services,[160] education,[161] among other right already set forth by the Refugee Convention. What is more, "[m]ember States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker (...)"[162] which adds to the misunderstanding that rights under the Convention and under a system of temporary protection should in any way be different, as was explained in Section 1 of this chapter. The most important aspect of this Directive is the set of conditions to be met for voluntary return to take place with respect for human dignity[163] and the exceptions expected to be made on humanitarian or other grounds on particular cases.[164] As seen before, the Refugee Convention does not mention repatriation and this is the first instrument of binding force that acknowledges it. However, its application still needs to be seen given that the mechanisms established have never been put into practise yet.[165]

It is important to realise that while the European system does provide for some sharing of responsibilities, this is not its primary intention. The sharing is intended only among European states and not to alleviate the burden of third world countries which host the majority of the

[156] Supra note 106.
[157] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 8.
[158] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 12.
[159] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 13 (1).
[160] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 13 (2).
[161] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 14.
[162] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art 19 (1).
[163] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art. 21 (1).
[164] COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001, Art. 22 (2) & Art. 23 (1).
[165] Under Art. 5 of the Directive the Council and the Commission shall establish the existence of a mass influx for the Directive to be triggered. In October 2013, the European Parliament called for a humanitarian conference aimed at helping Syria's refugees to work on contingency planning that would include the possibility of applying the Directive for the first time, available at: http://www.europarl.europa.eu/news/en/news-room/content/20131008IPR21712/html/Parliament-calls-for-humanitarian-conference-on-Syrian-refugee-crisis [accessed in November 2013].

refugees of the world, nor is it aimed at helping those who face the greater number of arrivals to cope with them (outside or inside Europe), nor for moral considerations either. It is arguably aimed to control the free movement of refugees from state to state given Europe's open internal borders.

Resettlement on the other hand – among European states or at global level – in which a state agrees to take a refugee from another state and to grant him/her permanent residency or naturalization, can be considered as a form of responsibility sharing. However, just a few states in the world are part of UNHCR's resettlement program and only 1% of the refugees under its mandate are submitted for it.[166] Resettlement is not an obligation and it appears to be more a matter of symbolic generosity than a means of relieving states that cannot offer effective protection.[167]

The importance of highlighting the issues presented in the EU's Directives and Regulations and the differences in their reception and application in the European countries will help us understand what is happening in Israel with other instruments of binding force. The EU's Reception Conditions Directive cites for example that "The grounds for detention shall be laid down in national law,"[168] which means that even if Israel was part of the EU, then it would not be in bridge of the Directive for detaining migrants as we will see it does. In the case of Israel, however, it is the content of the law which was heavily contested and which will be discussed in detail in Section 2 of the following Chapter.

[166] UNHCR, Resettlement – 'A new beginning in a Third Country', available at: http://www.unhcr.org/pages/4a16b1676.html [accessed in November 2013].
[167] Kritzman-Amir and Berman, 'Responsibility sharing and the rights of refugees', 634.
[168] Supra note 139, Art 8 (3).

Chapter 3: Israel's asylum policy

As shown in the previous chapter, the "refugee problem" is a worldwide issue and there are diverse instruments which shape either refugee law or complementary protection systems. Various countries are having significant internal problems dealing with the massive influx of asylum seekers and Israel is no exception. Until 1 July 2009, the United Nations High Commissioner for Refugees was in charge of Refugee Status Determination (RSD) in Israel.[169] Based in Tel Aviv, the UNHCR was responsible for the registration and the assessment of cases of asylum seekers arriving in the country. Until that year, the estimated number of asylum seekers amounted to 21,880.[170] From July 2009, the process of RSD was taken over by the Israeli Ministry of Interior (MOI), though the UNHCR remained in the country in order to monitor Israel's compliance with international law, to give recommendations in special cases and to ensure a favourable environment given that "certain legislative initiatives (...) could prove harmful to asylum."[171]

Many of Israel's asylum seekers had suffered torture and other forms of abuse in their countries of origin and faced similar treatment on their way to Israel. The majority of asylum seekers were smuggled into Israel through its Sinai Peninsula border with Egypt after paying Bedouin smugglers to help them reach their destination.[172] While *en route*, many have suffered

[169] Supra note 1.
[170] UNHCR Israel Fact Sheet – June 2010. Available at: http://www.unhcr.org/4c9084a89.html [accessed in March 2013].
[171] Id. – UNHCR's main activities in Israel - Advocacy.
[172] H. Yacobi, 'African Refugees' Influx in Israel from a Socio-Political Perspective', (2004) CARIM Research Reports, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole (FI): European University Institute.

torture, rape, beatings and have been kept hostage until ransom was paid.[173]

3.1. Implementation of international treaty obligations at national level

The Partition Plan which ordered the evacuation of the British Mandate of Palestine and the creation of two states was adopted by the United Nations General Assembly (UNGA) in its Resolution 181 of 1947.[174] Both countries were supposed to adopt a democratic constitution to be recognized as such, but this never materialized. Immediately following the declaration of independence of the Jewish state, the Palestinian Arab forces – with the military aid of Egypt, Jordan, Iraq, Syria and Lebanon – attacked the state of Israel in what is known as the 1948 Arab-Israeli war. The war ended with an Israeli victory and its annexation of parts of the territory which were allotted to the Palestinian state. The rest of the territory, namely the West Bank and Gaza, were occupied by Jordan and Egypt respectively. As a result of the war, international recognition of the state of Israel was granted before the country had time to adopt a constitution and in the end such a constitution was never formally adopted. One crucial obstacle for this was the division among orthodox Jews and secular Jews about the role that the Halakhah – the traditional Jewish Law – should play in the State's legal system and generating opposing fractions along these lines was useless at a time when unity was needed the most.[175]

[173] For a detailed account of Eritreans routes and destinations *see*: K Jacobsen, S. Robinson and L. Lijnders, '*Ransom, Collaborators, Corruption: Sinai Trafficking and Transnational Networks from Eritrea to Israel',* (2013), A case study of the Eritrean Migration System. Feinstein International Center, Tufts University: Medford, USA.
[174] Resolution adopted by the General Assembly at its 2nd session, Ad Hoc Committee on Palestinian Question, Future government of Palestine, A/RES/181(II)[A-B], (November 29th 1947).
[175] M. Edelman, *Courts, Politics, and Culture in Israel*, (University Press of Virginia, 1994), Chapter 1: Politics and the Constitution in Israel, p. 8.

The law which prevailed in the country in the period before independence was the English one, not only through its system but also in the application of its precedents in all areas of the law.[176] However, since its establishment the country has absorbed many lawyers trained in different legal traditions, which has lead to an enrichment of the Israeli legal system, and the adoption of other institutions unknown to the British as well as some aspects of the Halakhah.[177] The task of uniting a very diverse Israeli society under a democratic government required an independent body to promote "the principles of human dignity, freedom, and equality, and of establishing rules of fair government, [this role] fell largely to the Supreme Court."[178]

Israel has a number of Basic Laws which formed the starting point of its future Constitution. These laws have been adopted in their current form and regulate most of Israel's constitutional system but until 1992, there was no Bill of Rights. Nevertheless, the Supreme Court filled this void by holding on an early landmark decision that those civil rights accepted in democratic societies are a part of the legal system of Israel.[179] Thus, despite not having a formal Constitution, 'constitutional' values are still protected by Israeli Courts and it is explicitly stated in the Basic Law regulating the judiciary that judgments by the Supreme Court of Israel – which has an appellate function – shall bind all lower Courts of the country.[180]

With regards to the relationship between national laws and a country's obligations under international law, when there is a breach of the latter by the former, the international rule should prevail.[181] The draft Declaration on Rights and duties of states endorsed by the UNGA in 1949 specified the following: "Every state has the duty to carry out in good faith its obligations arising

[176] M. Mautner, *Law and the culture of Israel*, (Oxford University Press, 2011), Chapter 2: The cultural struggles over the shaping of the Law, p.37.
[177] A. Barak, "Foreword", in I. Zamir and A. Zysblat, *Public Law in Israel*, (Clarendon Press – Oxford, 1996).
[178] Id.
[179] H.C. 73/53, 87/53. Kol Ha'am Company Ltd v. Minister of Interior. 7 PD 871. 1953.
[180] Basic Law. The Judiciary (1984). Art 20 (b).
[181] E. Denza, 'The relationship between international and national law', p. 425 in Ed. M.D. Evans, *International Law* (Second Edition), (Oxford University Press, 2006).

from treaties and other sources of international law, and it may not invoke provisions in its constitutions or its laws as an excuse for failure to perform this duty."[182] In addition, the Vienna Convention on the Law of Treaties of 1969 has a similar provision stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[183]

Having said this, there are two main doctrines concerning the relationship between international and national law. In monist countries, international law does not have to be incorporated in national law and is automatically considered as part of the law of the land. By contrast, in dualist countries, international law has to be translated into domestic law through national legislation.[184] Israel mainly follows this dualist model.[185]

However, despite being a state party to the 1951 Refugee Convention and its 1967 Protocol, Israel has not enacted national legislation relating to refugees and asylum seekers and has only recently established a set of internal procedures for screening them.[186] Nonetheless, the Convention does have effect in Israel given that by being a party to it, an Israeli Court "which interprets legislation, will always prefer an interpretation which accords with the provisions of the Convention."[187] In any case, this as such also forms part of the problem, since in order to make use of what the Convention provides for, it is necessary to litigate, which is not always an option. It has been put forward that the country might have been wary of enacting proper legislation in accordance with the Convention due to the general public association of the term

[182] Resolutions adopted by the General Assembly at its 4th session, Draft Declaration on Rights and Duties of States, A/RES/375(IV), (December 6th 1949), Article 13.
[183] Vienna Convention on the Law of Treaties. 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331. Article 27.
[184] R. Müllerson, *Ordering Anarchy:International Law in International Society*, Martinus Nijhoff Publishers, 2000, Vol. 37, p. 182. ISBN 90-411-1408-4.
[185] Kritzman-Amir, 'Otherness', 615.
[186] Kritzman-Amir, 'Otherness', 614.
[187] A. Ben-Dor and R. Adut, 'Israel – A Safe Haven? Problems in the treatment Offered by the State of Israel to Refugees and Asylum Seekers' (2003) *Buchmann Faculty of Law*. Tel Aviv University, at 21, citing A. Barak, *Interpretation in Law*, Vol. 2, 'Statutory Interpretation', Nevo Press, 2nd ed., 1994, at p. 576.

"refugee" with Palestinians.[188] However, this remains only a speculation since Palestinians would fall out of the scope of the Convention in Israel anyway.[189]

Local and international NGO's have in practice filled this gap in legislation created by the authorities. For example, the plight to get asylum seekers a legal status is mostly advanced by the ARDC[190] which also runs a shelter for women and children. An NGO running under the name of ASSAF[191] is engaged with aid and social help, while PHR-I[192] is primarily the clinic which provides medical assistance to asylum seekers. Next, ACRI[193] ensures accountability for violations of human rights in general, HMW[194] promotes the rights of undocumented migrant workers and refugees, and the Refugee Rights Clinic at Tel Aviv University[195] provides legal assistance to asylum seekers, promotes legal and policy reform through research and teaches refugee law to Israeli lawyers. These and other organizations have proven immensely important since they provide different forms of assistance to these vulnerable populations and work to

[188] K.F. Afeef, 'A promised land for refugees? Asylum and migration in Israel' (2009) New Issues in Refugee Research, Research Paper No. 183, at 6. Available at: http://www.ecoi.net/file_upload/1002_1261130955_il-unhcr.pdf [accessed in June 2013].

[189] Art. 1D of the Refugee Convention states that persons who receive assistance from organs or agencies of the UN other than the UNHCR are not entitled to its protection. Nowadays, Palestinians in Jordan, Lebanon, Syria and in the Occupied Territories fall under the assistance of UNRWA, but, if that assistance ceased to exist for any reason, then they would fall under the Convention. Palestinians outside the aforementioned countries do fall under UNHCR and it remains unclear whether they should since they fall under UNRWA's mandate first. *For a more detailed discussion see supra note 187*: Ben-Dor and Adut, 'Israel – A Safe Haven?', 1-93; also: UNHCR, *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees,* October 2009, available at: http://www.refworld.org/docid/4add77d42.html [accessed in June 2013].

[190] The African Refugee Development Center is an NGO founded by asylum seekers which provides paralegal help to asylum seekers. Site: http://www.ardc-israel.org/ [accessed in May 2013].

[191] Hebrew acronym for 'Organization for Aiding Refugees' is an Israel non-profit organization founded by Israelis which deals with humanitarian asylum claims. Site: http://www.assaf.org.il/en/ [accessed in May 2013]

[192] Physicians for Human Rights – Israel is a NGO which provides health care for migrant population and manage medical related applications and claims. Site: http://www.phr.org.il/default.asp?PageID=4 [accessed in May 2013].

[193] The Association for Civil Rights in Israel has a mandate to ensure Israel's accountability and respect for human rights, by addressing violations committed by the Israeli authorities in Israel, the Occupied Territories, or elsewhere. ACRI's Legal Department takes on cases that have the potential to set precedents, raise issues of principle, and effect broad-based policy change. Every year, ACRI argues dozens of precedent-setting cases before the Supreme Court, and also seeks redress before district and labour courts, government ministries, and Knesset committees, available at: http://www.acri.org.il/en/

[194] Hotline for Migrant Workers, available at: http://www.hotline.org.il/english/index.htm

[195] Refugee Rights Clinic, Tel Aviv University, Buchmann Faculty of Law, available at: http://www.law.tau.ac.il/Eng/?CategoryID=269 [accessed in November 2013]

bring them closer to the Israeli society. These organizations are also active in highlighting such violations of refugee rights to local and international media as well as in setting precedents at Israeli courts and bringing petitions.[196] Most of these organizations have taken legal action either separately or jointly.

3.2. Obstacles for asylum seekers

The obstacles that asylum seekers face in Israel are various in nature: apart from a lack of domestic legislation to screen asylum seekers and assess each particular case, the few regulations that do exist appear to act as a barrier for possible claims, since they are interpreted in a way in which they limit asylum seekers' rights and render their situation more difficult. This section will analyse the Israeli Procedure for Handling Political Asylum Seekers in Israel, the Prevention of Infiltration Law and the construction of a fence along the Egyptian-Israeli border.

3.2.1 – The Procedure for Handling Political Asylum Seekers in Israel

The Procedure for Handling Political Asylum Seekers in Israel entered into force in early 2011 and has the main objective of preventing the deportation of those who applied for political asylum in the country until a final decision regarding their cases is made.[197] The Procedure sets a time limit of one year since the date of entry into Israel, for asylum seekers to submit an application for asylum. When submitted after the deadline, the applications can be rejected 'out of hand' (without conducting an assessment of the claim). If special reasons exist for a late submission, the authorities can decide whether to accept the application or not. This rule,

[196] For example: Administrative Petition (Jerusalem) 53765-03-12, ASSAF—Aid Organization for Refugees and Asylum Seekers in Israel et al. v. Minister of the Interior (June 7, 2012); Supreme Court HCJ 4845/12 ASSAF v. Welfare and Social Services Ministry in Kritzman-Amir, '*Refugees and Asylum Seekers in the State of Israel',* 109.

[197] Procedure for Handling Political Asylum Seekers in Israel, Purpose of the Procedure, January 2011, available at: http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf [accessed in November 2013].

although not unique in the world and most likely enacted to avoid dealing with claims of migrants just in search for better economic opportunities, poses numerous barriers to refugees who might have a spectrum of valid reasons for not filing an application in time.[198]

Those who are not initially rejected, enter a process mined with problems related to the procedure in practice, such as having initial interrogations in which "the underlying assumption […] is that the applicant is lying, and the aim of the process is to uncover these lies"[199] and "[e]very mistake or lapse of memory are attributed to 'lack of credibility', which consequently justifies rejecting the asylum claim."[200] Rejection letters appear to be produced *en masse* and include a very short explanation of the grounds of refusal.[201] 'Contradictions' in the statements made by asylum seekers are generally taken as lack of credibility too, while misinterpretations occurring from translations are still not accepted as an explanation factor by the Ministry of Interior (MOI).[202] In addition, it has been revealed that the MOI tries to find contradictions in minor details which are not relevant to the claims to discover the (already assumed) non-authentic statements.[203] This is not only contrary to international practice in refugee law but also contrary to Israeli state practice in other legal fields, such as the credibility of witnesses in criminal proceedings.[204]

[198] For a more detailed account on each and every practice of the Israeli Asylum System see, supra note 6.
[199] Berman, *"Until our hearths are completely hardened"*, 28.
[200] Berman, *"Until our hearths are completely hardened"*, 30.
[201] Kritzman-Amir, 'Otherness', 615.
[202] Berman, *"Until our hearths are completely hardened"*, 49.
[203] Berman, *"Until our hearths are completely hardened"*, 30.
[204] Berman, *"Until our hearths are completely hardened"*, 31. Find examples of different Court rulings – in and outside Israel – regarding witness credibility in which the inability to recollect peripheral data, does not undermine the credibility of the account. Pages 32-33 list a few examples of questions that the MOI used to determine credibility, such as the colour of a bus a person travelled in or the name of the director of a University another person attended.

Last but not least, the Population and Immigration Authority of the MOI which deals with asylum claims is understaffed and in 2012 had only nine RSD officials.[205] Diverse NGOs are raising their voices against low recognition rates and alleged discriminatory policies on the basis of nationality. The country has been widely criticized for not conducting RSD procedures to nationals of certain enemy states.[206] At the moment, no RSD is available for Sudanese and Eritrean nationals who are entitled to collective temporary protection (which in the past has also been the case for nationals of the Ivory Coast, Liberia, Sierra Leona, Togo and the Democratic Republic of the Congo.)[207] These temporary protection licenses will be discussed at a later stage, but at this point it is necessary to point out that Section 10 of the Procedure reads:

> "The State of Israel reserves the right not to absorb into Israel and not to grant permits to stay in Israel to subjects of enemy or hostile states – as determined from time to time by the authorized authorities, and so long as they have that status, and the question of their release on bond will be considered on a case by case basis, according to the circumstances and to security considerations".

However, it is unclear whether this section allows for completely disregarding Sudanese claims or just allows for withholding permanent residency since even though Sudanese asylum seekers are not allowed to stay indefinitely, they are still entitled to collective temporary protection.[208] As said before, those entitled to temporary protection – independent on whether they come from an enemy state or not – are not entitled to individual RDS procedures. Thus, the majority of asylum seekers who arrives to Israel, do not enter the process.[209]

[205] Hotline for Migrant Workers, 'The Prevention of Infiltration Law' (2012), at 2, available at: http://www.hotline.org.il/english/pdf/Prevention_of_Infiltration_Law_Eng.pdf [accessed in May 2013].
[206] See R. Ziegler, "A Matter of Definition: On 'Infiltrators' and 'Asylum Seekers' in Israel", (2011) *The Israel Democracy Institute*, available at: http://en.idi.org.il/10973.aspx [accessed in March 2013] and; A. Perry, 'Solving Israel's African Refugee Crisis', (2010) 51 *Virginia Journal of International Law*, no. 1: 157-184.
[207] Kritzman-Amir, "Otherness", 617
[208] For a deeper analysis on the issue, and the difference between permissible discrimination in immigration law and impermissible discrimination in refugee law, *see supra note 197*: Perry, 'Solving Israel's African Refugee Crisis', 157-184.
[209] Kritzman-Amir, 'Otherness', 617.

3.2.2 – The Prevention of Infiltration Law

Israel suffers unrelenting terrorist attacks on a regular basis, thus security concerns are at the top of the government's agenda. Between 2000 and 2007, 542 people were killed in 140 different terrorist attacks, including suicide bombings.[210] The Prevention of Infiltration or Anti-Infiltration law[211] was enacted in 1954 to prevent enemy state terrorists from entering the country and carrying out attacks. This law provided for the assumption that any illegal border crosser who is a national of an enemy state, or passed through one before entering Israel, is an "infiltrator". A recent amendment to this law passed its last hearing at the Knesset in January 2012[212], broadening the scope of its application to any illegal border crosser and allowing for longer periods of detention. In the explanatory notes of the proposal for this amendment of the Anti-Infiltration Law, it is stated that the 'Law of Entry to Israel' which regulated entry previously, provided for only 60 days of detention and that this short period was an incentive for an increase in infiltration numbers.[213] In other words, extending the period of detention was intended to cause a deterrent effect on future immigrants. As it stood until recently, the fact that the law allowed for anyone who entered the country illegally to be presumed an 'infiltrator', resulted in people being prone to detention and being subject to a complete disregard of the general norms which applied to criminal law cases. As such, infiltrators did not have the possibility to challenge their status legally and could be prosecuted due to the illegality of entry.

[210] Israel Ministry of Foreign Affairs, 'Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles' (Sept 1993), available at: http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since.aspx [accessed in June 2013].
[211] Prevention of Infiltration (Offences and Jurisdiction) Law, 5714 – 1954 (1954).
[212] Ministry of Justice, Prevention of Infiltration Law (Offences and Jurisdiction), 18 January 2012, available in Hebrew at: http://www.justice.gov.il/NR/rdonlyres/A4F2702C-837B-482D-BCC0-9B718CFEF150/32992/2332.pdf [accessed in June 2013].
[213] Ministry of Justice, Explanatory notes for the proposal for the amendment of the Anti-Infiltration Law, March 2011, available in Hebrew at: http://www.justice.gov.il/NR/rdonlyres/F7844F16-FEA5-4863-9070-763F957D1AE1/26847/577.pdf [accessed in March 2013].

Moreover, since there is a non-expulsion policy for nationals of Eritrea, these people could be in detention for a period of up to three years before trial or eventual deportation – if ever allowed – and indefinitely if they were nationals of an enemy state[214] such as the Sudanese.

In principle, people deprived from their freedom under this law needed to have their cases reviewed by a Tribunal fourteen days after their initial detention, after which they could be released on bail or continue to be held detained. Although no lawyers were allowed before the Tribunal, their decisions could be appealed to an administrative court with the proper legal representation.[215]

The amended bill made no distinction between migrant workers, asylum seekers and actual infiltrators, thus, treating all in the same manner. Pointing out a few aspects of this bill that summarily contradicted international refugee law, the following elements can be highlighted: To punish asylum seekers for their illegal entry is contrary to Article 31 of the Refugee Convention and not to provide them access to courts to prove their status contradicts international law as set forth in Art 9 (4) of the ICCPR and Art. 16 of the Refugee Convention. Deportation without a proper assessment on whether an expulsion might render the persons' life or freedom at risk is contrary to Article 33 of the 1951 Convention and the *jus cogens* principle of non-refoulement.[216] What is more, minors were likely to be treated in the exact same way.[217]

It should be noticed that asylum seekers do not always end up in detention and that periods of confinement vary: the law enabled a border control officer to release an infiltrator if

[214] Id.
[215] Supra note 3.
[216] The principle of non-refoulement is considered a jus cogens norm for many authors. For further references see: A. Farmer, 'Non-refoulement and Jus Cogens: Limiting anti-terrorism measures that threaten refugee protection' (2008) 23 *Georgetown Immigration Law Journal*, no 1:1-38; *or;* J. Allain, 'The jus cogens Nature of non-refoulement' (2001) 13 *International Journal of Refugee Law*, no. 4: 533-558.
[217] African Refugee Development Center, 'Anti-Infiltration Bill passes into Law', January 2012, available at: http://ardc-israel.org/en/article/anti-infiltration-bill-passes-law [accessed in March 2013].

needed due to their age, state of health, or if the authorities had not begun processing their request within three months since their arrival or of those whose request was not addressed during the first nine months since their arrival.[218] Nevertheless, release from prison did not mean that an individual's claim would be heard. Sudanese and Eritreans, which constitute approximately 90% of the total asylum-seeker population in Israel,[219] get temporary group or prima facie protection when their identity is established and do not enter the RSD process in the same way as nationals of other countries do. In short however, people enjoying group protection as well as those who undergo RSD, generally get *2(a)(5) licenses* – temporary residency permits – until a final decision is rendered.

In March 2013, a petition was brought to the Israeli Supreme Court sitting as the High Court of Justice by Sudanese and Eritrean nationals held in detention under the Prevention of Infiltration Law. The petition was brought in partnership with a number of human rights organizations and endorsed by the UNHCR which asked for permission to submit an *amicus curiae*[220] brief. The hearing concluded with the Court issuing an *order nisi*[221] for the State to explain why the Anti-Infiltration Law should not be repealed.[222] The government responded in June of the same year, and in a landmark decision of 16 September 2013, the High Court of Justice unanimously invalidated the amendment of the anti-infiltration law on the grounds that such long periods of detention violate a person's right to liberty and is in conflict with Israel's Basic Law as well as with international human rights standards. The Justices noted that those

[218] The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954. (Section 30 contains a number of reasons that might enable release).
[219] HCJ 7146/12, Adam v. the Knesset, Final Judgement, 16 September 2013, para. 6, available in Hebrew at: http://elyon1.court.gov.il/files/12/460/071/b24/12071460.b24.htm [accessed in June 2013]
[220] T. Nasher, "UN refugee agency petitions High Court to overturn 'infiltration' law', Haaretz, 12 March 2013, available at: http://www.haaretz.com/news/national/un-refugee-agency-petitions-high-court-to-overturn-infiltration-law.premium-1.508765 [accessed in March 2013].
[221] These orders provide for a certain rule to become legally binding unless a given condition is met.
[222] HCJ 7146/12: Adam et al v. The Knesset et al, Petition for Order Nisi, 12 March 2013, available in Hebrew at: http://elyon1.court.gov.il/files/12/460/071/11s/12071460.11s.htm [accessed in June 2013].

detained under the anti-infiltration law are mostly Eritreans and Sudanese, who cannot be deported even if they are not recognized as refugees. Detention would only be justified with a view to deportation, otherwise it is not justified and should not be authorized.[223] The ruling included considerations with regards to the situations prevailing in both African countries and expressed that even when a person would not be considered a refugee, refoulement is prohibited even by an intermediate state that might in turn refouler the person to his/her country of origin.[224] Justice Arbel wrote that 'temporary protection' as the name implies is meant to be temporary and does not have the goal of facilitating settlement in the host country. However, she noted that it is difficult to maintain a policy of temporary protection over time and as a consequence examination of eligibility should inevitably follow.[225] While applying the limitation clause contained in the Israeli Basic Laws which states that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required,"[226] the Court found that the 2012 amendment served both a proper and an improper purpose. The purpose of preventing long-term settlement was found proper but the purpose of preventing further infiltration by deterrence was found to violate human dignity.[227] At the proportionality test stage which consists on a three-prong examination based on (a) a rational connection between the objectives and the means, (b) the least drastic means to achieve the objective and (c) the proportional effect (proportionality stricto sensu)[228], seven of the nine Justices agreed that the amendment failed on the second stage

[223] HCJ 7146/12, final Judgement, 2013, para 19.
[224] HCJ 7146/12, final Judgement , para 8.
[225] HCJ 7146/12, final Judgement , para 9.
[226] Basic Law: Human Dignity and Liberty, (1992) Art. 8.
[227] R. Ziegler, 'Quashing Legislation Mandating Lengthy Detention of Asylum-Seekers - A Resolute Yet Cautious Israeli Supreme Court Judgment' (2013) *The Israel Democracy Institute*, available at: http://en.idi.org.il/analysis/articles/quashing-legislation-mandating-lengthy-detention-of-asylum-seekers [accessed in June 1013].
[228] For a detailed explanation on proportionality *see supra note 82*: Barak, 'Proportional Effect', 369 – 382.

and they unanimously agreed that it failed on the last one.[229] Explanations and rationales were varied as shown by the fact that all Justices wrote separate opinions.

Other considerations such as asylum seekers' impact on public safety, security and in the country's economy were addressed as well and so was the fact that the decrease in infiltration numbers might have to do more with the completion of the fence along the Sinai border than with the law's amendment. Despite the positive impact of this ruling for the rights of Israel's asylum seekers, a number of aspects are still unsettling. One of these is that the verdict gave way to a re-evaluation of the circumstances if massive influx happens to reappear and it was written that "[e]ven under the present circumstances, there is nothing to stop the legislation of a new law that would allow for imprisonment for a significantly shorter period."[230] Furthermore, there was little reliance on international refugee law which should command this subject, there was an explicit mention that temporary protected people do not enjoy the same rights as those granted (permanent) refugee status[231] and while the Court stressed its empathy for the demographic changes and the plight of those who live where asylum seekers reside, only Justice Hayut urged the state to seek this chance to clarify the 'fog' surrounding the status of Eritrean and Sudanese nationals and warned about the human rights implications of their precarious stance.[232]

The Court instructed the state to examine the cases of all those currently imprisoned within 90 days from the verdict. Since that ruling, only a few people have been released, with most people arguably being kept until a new amendment comes into force to replace the quashed

[229] Supra note 227.
[230] Id.
[231] HCJ 7146/12, final Judgement, para 9.
[232] Id.

one.[233] There are around 1,750 other persons still held under this law.[234] With the prevention of infiltration law amendment quashed, the African asylum-seeker community could have started to enjoy some of the freedoms they should have enjoyed from the very beginning. However, as it stands now, their situation will remain uncertain until the country adopts a more comprehensive policy towards them.

3.2.3 – The fence along the Sinai border[235]

The recently finished fence across the Israeli-Egyptian border was first proposed by former Prime Minister Ariel Sharon in December 2005 after a Palestinian terrorist managed to enter the country[236], but it was not until early 2010 that the project was approved by then Prime Minister, Benjamin Netanyahu. The project had two purposes: to secure Israel's borders from neighbouring militants and terrorists and to prevent illegal immigrants from flooding the state and threaten its Jewish character.[237] Despite a 2010 statement by the Prime Minister in which he assured that refugees would still be allowed in, by mid 2012 there were reported cases of asylum seekers trapped between the fences of the two countries. Later that year, the refusal of entry of a group of about 20 Eritreans received extensive worldwide coverage.[238] In addition, over the past few years, Egyptian border authorities have arrested hundreds of immigrants who were trying to

[233] ACRI, 'Rights groups file motion for contempt of High Court decision to overturn Anti-Infiltration Law', 28 October 2013, available at: http://www.acri.org.il/en/2013/10/28/infiltration-contempt/ [accessed in November 2013].
[234] HCJ 7146/12, final Judgement, Para 35.
[235] For a map of Israel and its borders, see annex 3.
[236] T. Butcher, 'Sharon presses for fence across Sinai', The Telegraph, 7 December 2005, available at: http://www.telegraph.co.uk/news/worldnews/middleeast/1504945/Sharon-presses-for-fence-across-Sinai.html [accessed in March 2013].
[237] B. Ravid, 'Netanyahu: Illegal African immigrants - a threat to Israel's Jewish character', Haaretz, 18 July 2010, available at: http://www.haaretz.com/news/national/netanyahu-illegal-african-immigrants-a-threat-to-israel-s-jewish-character-1.302653 [accessed in November 2013].
[238] R. Ziegler, 'Trapped between the Fences', (2012) *The Israel Democracy Institute*, available at: http://en.idi.org.il/analysis/articles/trapped-between-the-fences [accessed in March 2013].

cross the border and shot to death several others.[239] This practice is ongoing, with the last reported case being from February 2013.[240] There is only one official border crossing between the two countries and there was not a single person who claimed asylum there, possibly for fear of the Egyptian authorities shooting or arresting them.[241] Given that the rest of the border is fenced now, the actual possibilities for asylum seekers to get to Israel have considerably decreased.

The mentioned refusal for granting entry follows a comprehensive governmental policy of deterrence but is in contravention of previous Israeli Supreme Court decisions relating to the principle of non-refoulement. In a landmark case, of 1994[242] the High Court of Justice discussed that the principle of non-refoulement applies both to persons who qualify as refugees and to those who do not. In short, the principle of non-refoulement applies to anyone whose life or liberty may be impaired if returned. In the landmark decision discussed above regarding the constitutionality of the anti-infiltration amendment of 2012, the fence was said to be one of the pillars to deal with the infiltration phenomenon though it was also noted that it was reported to have an additional purpose of combating smuggling and drug trafficking[243].

In any case, its construction is not in contravention of any law and Israel has a right to build it, but while its existence is not unlawful, it will further limit the possibilities of seeking asylum in Israel. Now that the challenges for asylum seekers to enter Israel and to access refugee status have been explained, we will elaborate on what alternative status asylum seekers can and do obtain in the country.

[239] BBC News, 'Migrants killed on Egypt's border', 27 March 2008. Available at: http://news.bbc.co.uk/2/hi/middle_east/7317269.stm ; BBC News, 'Sudanese killed on Egypt's border', 19 August 2008, available at: http://news.bbc.co.uk/2/hi/africa/7570971.stm [accessed in March 2013].
[240] The Times of Israel, 'Egyptian soldiers kill migrant trying to enter Israel', 6 February 2013, available at: http://www.timesofisrael.com/egyptian-soldiers-kill-migrant-trying-to-enter-israel/ [accessed in March 2013].
[241] Supra note 3.
[242] HCJ 4702/94, Al-Tai'i et al v. Minister of Interior, PD 49 (3) (1994).
[243] HCJ 7146/12, para 26.

3.3. The status of African migrants: The 2(a)(5) license

The 2(a)(5) license has unavoidably been mentioned already but will be thoroughly explained in the following paragraphs. These licences are what the vast majority of asylum seekers are given in Israel. The permit 2(a)(5) or 'conditional release license' – previously called 'conditional release visa'[244] – is an authorization to remain in the country and nothing more. This permit states that holders are not allowed to work but the government never enforced this prohibition of employment. In addition, a judgment of the Central District Court of 2010[245] explicitly stated that 2(a)(5) holders have a right to work in order to fend for themselves since a negation of this would result in a breach of their right to dignity[246] which is one of the pillars of Israel's Basic Laws. In reality, confusion prevails and many employers who are not familiar with the government's practices and the judicial decisions on the matter, are wary of hiring people who hold this type of permit.

The licenses are the only residency permits that asylum seekers can aspire to obtain in Israel, with very few exceptions.[247] These permits prevent arrest and deportation but provide for no social rights and no future guarantees. The conditional release licenses have to be renewed every three months and those asylum seekers who are not from Eritrea or Sudan, live in constant fear of their permits being revoked at any time. Nationals from Eritrea and Sudan are entitled to

[244] Law of Conditional Release from Imprisonment 5761-2001 (2001).
[245] AP 35858-06-01, Seiko and others v. Ministry of the Interior, July 2010, cited in Ziegler, 'A Matter of Definition'.
[246] Id.
[247] According to the ARDC World Refugee Day Report of 2011, since Israel's establishment "less than 140 individuals have been recognized as refugees under the Refugee Convention", p.9, available at: http://ardc-israel.org/sites/default/files/refugee_day_report_final_2011_0.pdf, [accessed in October 2013].However, Ben Dor and Adut speak of higher numbers drawn of the several dozen Vietnamese refugees that the State offered refuge in 1977, another 100 that were admitted in 1979, another 100 from Bosnia which were invited by the government and given permanent residence among others *in* Ben-Dor and Adut, '*Israel – A Safe Haven?*', 20; and Kritzman-Amir tells us that "data relating to refugees and asylum seekers in Israel are incomplete and contradictory" and that while a very small number had been recognized as such, near 100 are the ones who remain in the country nowadays and not the total amount granted refugee status *in* T. Kritzman-Amir, 'Refugees and asylum seekers in the State of Israel' (2012) *The Israeli Journal of Foreign Affairs*, no.3, 97-111: at 100 &101 respectively.

renew their licenses for as long as the group protection is in force, but live with the constant fear that this might end at any time as it happened with Ivorians,[248] the Congolese and the South Sudanese[249] after they gained their independence.

With around 90 % of the total asylum-seeker population under collective status, the State of Israel is assessing a comparatively small amount of refugee claims while reluctantly allowing the majority to stay since they are by definition 'non-repatriable.'[250] To cut down the number of new arrivals, the government implemented a wide array of measures: the mass deportation of those nationals who lose the collective protection was the first one,[251] followed by the amendment of the Prevention of Infiltration Law, the construction of the fence along the border with Egypt and the expansion of the detention facility located in the Negev. All of these, coupled with the social restrictions inherent in the 2(a)(5) permits, were supposed to act as a massive disincentive and deterrent for newcomers.

With regards to social benefits, asylum seekers are not entitled to many of them. Health care in Israel is compulsory for everyone but it is not free. The National Health Insurance Law, in force since 1995, sets forth that every person is obliged to purchase medical insurance which continues to be partially funded by the government.[252] Asylum seekers are generally in a

[248] Ganulin, S., 'End of group protection for Ivorian asylum seekers', African Refugee Development Center, January 2012, available at: http://www.ardc-israel.org/en/article/end-group-protection-ivorian-asylum-seekers [accessed in March 2013].
[249] D. Weiler-Polak and The Associated Press, 'Israel to deport South Sudan refugees following formation of independent state', Haaretz, 31 January 2012, available at: http://www.haaretz.com/news/national/israel-to-deport-south-sudan-refugees-following-formation-of-independent-state-1.410208 [accessed in March 2013]; *see also* Kritzman-Amir, 'Refugees and asylum seekers in the State of Israel', 102.
[250] R. Ziegler, 'Asylum Seekers in Israel: A Snapshot' (2012) *The Israel Democracy Institute*, available at: http://en.idi.org.il/analysis/articles/asylum-seekers-in-israel-a-snapshot [accessed in June 2013].
[251] A. De Boer and L. Lijnders, 'The end of temporary group protection for south Sudanese in Israel: A perspective from the African Refugee Development Center', writing for the ARDC, *Fahmu Refugee Legal Aid Newsleter*, July 2012, available at: http://frlan.tumblr.com/post/26302350820/the-end-of-temporary-group-protection-for-south [accessed in March 2013].
[252] Israel Ministry of Foreign Affairs, National Health Insurance, September 1995, available at: http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/National%20Health%20Insurance [accessed in March 2013].

vulnerable economic position and most of them do not have the means to purchase insurance for themselves and their families. In such cases, these people rely on NGO's and can access governmental free treatment only in cases of emergency. Women, however, receive labour and pre- and post-natal assistance from municipal institutions; nurseries provide pregnancy and infant-care services and some hospitals provide for abortions of unwanted pregnancies generally resulting from rape suffered in the Sinai Peninsula on the way to Israel on the hands of Bedouin smugglers.[253]

It is clear that refugee recognition in Israel is very low in comparison to other western countries.[254] However, the numbers might be misleading since such a comparison always refers to asylum seekers' recognition rates as Convention refugees and does not include persons granted other forms of protection. Having now detailed some obstacles that asylum seekers are facing in Israel, I will devote the last part of this work to provide an assessment of the situation of African asylum seekers in Israel and the actual prospects for change, and as well as attempt to expose a number of ways in which refugee protection could be enhanced at a global and local level.

[253] ARDC, "NGO response to 'List of issues to be taken up in connection with the consideration of the third periodic reports of Israel concerning Articles 1 to 15 of the International Covenant on Economic, Social and Cultural Rights (E/C. 12/isr/3)'", September 2011, at 7, available at: http://ardc-israel.org/sites/default/files/09-01-11_ardc_response_to_cescr_list_of_issues.doc_0.pdf [accessed in March 2013].
[254] Berman, *"Until our hearths are completely hardened"*, 52 – 53.

Conclusion

As exposed previously, the Refugee Convention broadly states who is a refugee and puts forth a number of rights to be accorded to these people. However, there are no procedural rules, in the sense that the Convention does not mention which state should be responsible for granting protection. In addition, though it calls for international co-operation, it does not specify in which manner this should be achieved. Moreover, it sets a limit to its application without any regard to procedures and safeguards to be taken in case it ceases to apply and it does not provide for long-term solutions. As discussed, the Convention is silent on repatriation and even though relocation and resettlement have been exercised on an occasional basis, it has been a solution for a very small percentage of those people in need of international aid and also, more a charitable gesture than a Convention requirement.

We have seen that the position taken at times by the UNHCR with regards to temporary protection status is controversial since it avows the understanding that the rights enshrined in the Refugee Convention are to be applied to permanent asylum beneficiaries and not always to temporary protected persons. Apart from this, there are differences in the application of these two at EU level and in Israel. While the European Union generally grants permanent status and rarely revokes it, Israel has historically refused to grant permanent refugee status, except for a few rare cases. Another important difference between temporary group protections in most of the developed world compared to that of Israeli is that those who are granted this status in the former, are allowed to have their claims assessed on an individual basis, something which has seldom been the case in the latter. In the past, the Israeli government has attracted both national and international criticism due to the deportation of whole communities whose temporary

protection had ended.[255] While some of those people might have been ready to go back voluntarily or be repatriated at a later stage, deportation took place before a proper assessment of the real situation in the countries of origin was performed and without a thorough assessment of individual claims, which means that people were sent back to places where they could still be at risk. For these reasons, the main focus of the criticisms on Israel's refugee policies should not be quantitative but qualitative.

If we are ready to accept temporary protection as what is required by the Refugee Convention, our goals should then be to accord all the rights enshrined in it to temporary protected refugees, to have a clear goal towards repatriation and to work together with the refugee population towards this end. In cases when temporary protection exceeds a given time limit,[256] resettlement needs to be the second best option and be available for more refugees than it is nowadays. Inter-state co-operation needs to be properly defined in the myriad of forms it could take. It could be framed in terms of financial assistance or in terms of resettlement capacity depending on the socio-political situation of each state, but how to assess each state's responsibility in this area remains a difficult question to answer. Given that each refugee crisis is unique, there might be no universal model for co-operation and *ad hoc* responses – that would take into account the situation of both the sending and the receiving state, the refugee population concerned and their needs in time and space – might prove more helpful. These inter- or multi-governmental agreements should involve the UNHCR to ensure that all rights encompassed in the 1951 Convention are respected in both the sending and receiving country, as well as to ensure that all safeguards for safety and dignity of those transferred are respected during the

[255] See for example: D. Williams, 'Israel moves to deport Ivorians in migrant crackdown', Reuters, 18 June 2012, available at: http://www.reuters.com/article/2012/06/18/us-israel-ivorycoast-migrants-idUSBRE85H0Y620120618 [accessed in November 2013]; or *supra note* 251.
[256] According to the Council Directive on temporary protection (COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001) this time limit should be of 3 years, Anker proposes approximately 5 years in Anker, 'Crisis and Cure', 302.

process. This way states can pursue their ethnographic interests while at the same time keeping refugees safe.

For as long as refugee law remains framed in aspirational terms without any clarification from binding sources and for as long as the UNHCR remains able to provide only recommendations but is powerless to effect the necessary changes, there is a bleak future for the majority of refugees around the globe. Due to the confrontational aspect of refugee law and immigration, and the prevalence of national sovereignty over moral obligations, an effective enforcement mechanism has now more than ever become a necessity.

For African asylum seekers in Israel, the situation will not improve unless political changes take place. Up until now, courts have done much to quash legislation that was in conflict with asylum seekers' rights. However, the situation appears to re-emerge in cycles. The quashed amendment of the Prevention of Infiltration Law and the High Court's order to release those detained under it within 90 days,[257] prompted the government to rapidly publish a new amendment which reduced the time of detention from 3 years to 1. This proposed amendment was not approved by the Knesset yet, but if it passes as it stands now, it will allow for the authorities to transfer those who still cannot be deported after the period of detention to an 'open facility' in which they will be allowed to work within the facility only. People in the open facility will be able to leave during the day but will be required to show up for attendance checks three times a day to ensure they are not working outside the facility. Housing, medical services and food would be provided by the authorities as well as education for the children.[258] It is clear that

[257] Supra note 219.
[258] ACRI, 'Government Approves New Draconian Anti-Infiltration Bill', 12 November 2013, available at: http://www.acri.org.il/en/2013/11/18/new-anti-infiltration/ [accessed in November 2013]; I. Lior, 'Cabinet paves way for shortened detention without trial of African migrants', Haaretz, 17 November 2013, available at: http://www.haaretz.com/news/national/.premium-1.558542 [accessed in November 2013].

the government's intention with this amendment is to keep asylum seekers isolated from the rest of the population, thereby defying the Supreme Court's ruling.

Deterrence might still be what the authorities have in mind since at the wake of a promissory note, the government backfired again. Two other modifications have been made regarding asylum seekers and foreigners in general in Israel. The first of these was to give those released from prison a new 2(a)(5) licence with the addition that they will not live or work in Tel Aviv or Eilat, despite the fact that it remains unclear how the government will enforce this.[259] The main problem of this addition in asylum seekers licences is that now it will be harder for them to find work in less populated and economically active areas. The second one was with regards to a pending case[260] brought by a number of Israeli NGO's challenging the authorities' practice of refusing to add the father's name on the birth certificates of children born to immigrants, with the justification referring to the legal ramifications that assuming paternity will have on civil matters such as custody and child support.[261] While the case was pending, the state disclosed its plan to stop issuing official birth certificates altogether. The explanation for this was that it was necessary to avoid future claims to stay in the country or to obtain legal status. However, Israel does not grant automatic citizenship to those born in the country if children are born to non-citizens, so this justification appears to be rather weak. In addition, it will harm children born from now on since the lack of an official birth certificate might make it more difficult for them to acquire other documents in the future.[262]

[259] E. Omri, 'Released Infiltrators: not to Tel Aviv, not to Eilat', Ynet, 3 November 2013, available at: http://www.ynet.co.il/articles/0,7340,L-4449055,00.html (Hebrew) [accessed in November 2013]
[260] Petition for Order Nisi HCJ 1528/13 (2013).
[261] I. Lior, 'Israel to stop issuing birth certificates to children of foreigners', Haaretz, 20 November 2013, available at: http://www.haaretz.com/news/national/.premium-1.559046 [accessed in November 2013].
[262] Id.

To sum up, there are two main problems with Israel's asylum system. The first one has to do with the rights which the country provides to its asylum seekers under the temporary protected status of the 2(a)(5) and the second one has to do with the lack of proposals for a durable solution once temporary status is over. The first problem needs to be solved internally, the second one requires the co-operation of other states; it requires a responsibility or burden-sharing mechanism at international level. While refugees do not have the right to claim for protection in a specific state, they do have the right as refugees to be granted a status governed by law, to be free from detention (even if it is in an 'open facility'), to wage earning employment or self employment, to move freely in the contracting state, to choose where to live and to be free from refoulement.[263]

It seems, however, on the basis of both public statements and governmental practice that the Israeli government is convinced that no changes are necessary with regards to the treatment it extends to asylum seekers. In this way, the government is pretending that if it acts harsh enough, these people will want to leave out of their own accord, ignoring the simple fact that the longer they stay there, the more likely it is that they will do so on a permanent basis. Moreover, the number of asylum seekers in Israel today is unlikely to modify the Jewish character of the state. As explained at an earlier stage, its Jewish character is based on cultural aspects and the historical links of the land with the history of the Jewish people as a nation, and has therefore little to do with a majority percentage. Even if all current asylum seekers were to stay permanently in Israel, this would hardly modify the Jewish majority of the state. In any case, the proposal advanced here is not to naturalize all asylum seekers but rather to provide them with the proper means for their self-sufficiency while different, more durable and more satisfactory

[263] See Section 2.1.

solutions are being pondered upon. By refusing to treat asylum seekers humanely, Israel is clearly in breach of international refugee law, including the Refugee Convention it has signed and ratified. Internal and external criticism and court challenges alone will however unlikely result in the required changes; a consensus among the internal actors of the state with a clear view to long term solutions is needed. Local NGO's should lobby for the government to take on its responsibilities under international law and put into effect agreements implementing the world's shared responsibility towards refugees.

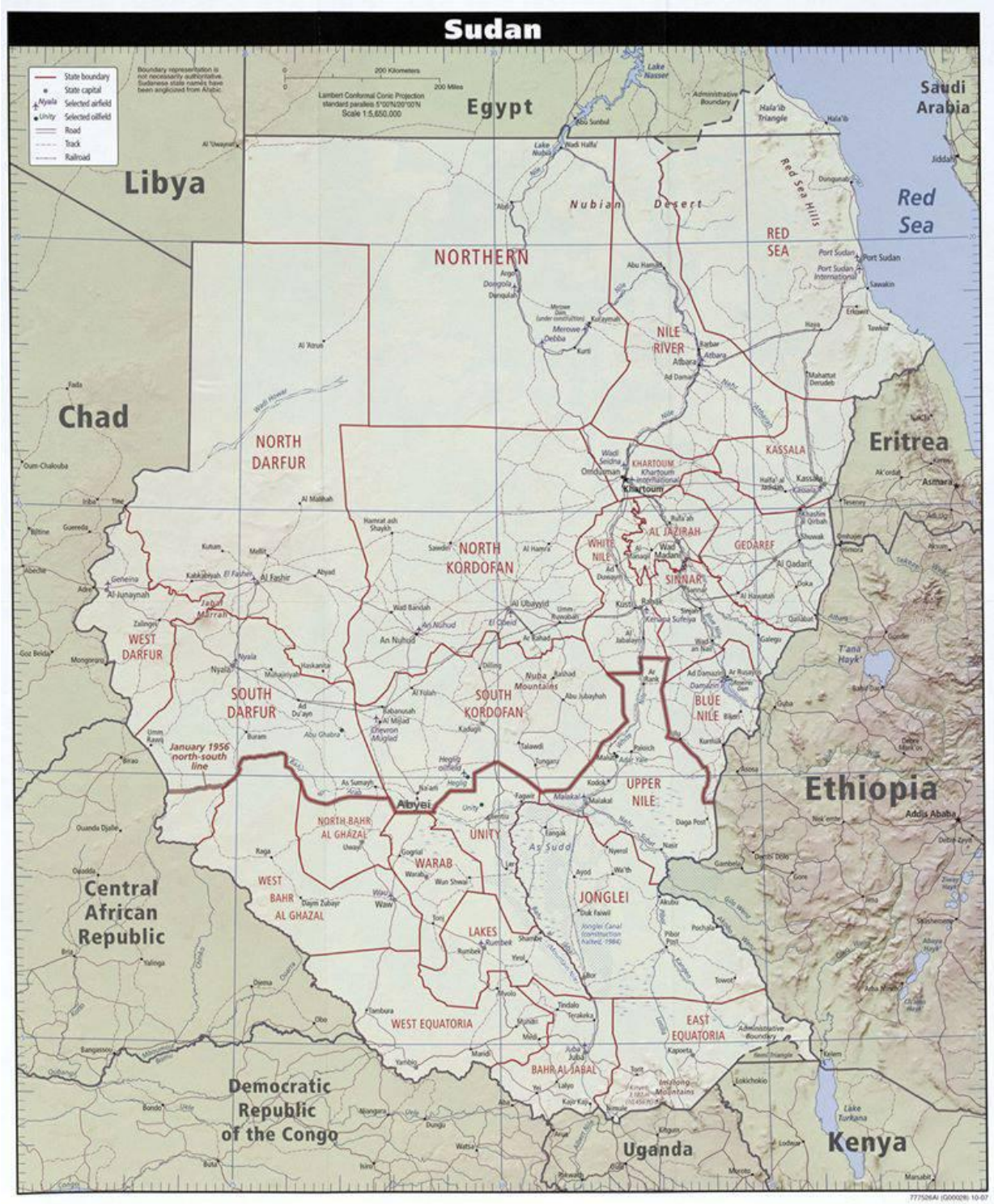
ANNEXES

1 Map of Eritrea

Source: Central Intelligence Agency

2 Map of Sudan and South Sudan

Source: University of Texas Libraries



3 Map of Israel

Source: Central Intelligence Agency

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