# Because We Were Strangers



## Applying Burden-Sharing as a Durable Solution for African Asylum Seekers in Israel

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7/24/2012

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**Abstract**

*My Major Research Paper is an examination of non-Jewish African asylum seekers entering Israel from the Sinai Peninsula. I argue that the best way of solving the current crisis is through the implementation of a robust burden-sharing scheme.*

*My research paper is split into three sections. The first section examines the ethical dimensions of non-Jewish asylum seekers in Israel. I argue that Israel's founding as a Zionist state, meant to protect Jews from harm, gives it special responsibilities to African asylum seekers fleeing persecution. The best way to fulfill this responsibility is through the principle of humanitarianism.*

*The second section examines a brief history of refugee protection and Israel's status in it, starting with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. It then examines how Israel's system of refugee protection attempts to meet its international obligations to African asylum seekers.*

*Finally, the third section examines a solution to the influx of African asylum seekers – burden-sharing, a legal mechanism by which host countries can send refugees to safe, third countries. I argue that burden-sharing remains one of the few durable solutions available to the State of Israel, but Israel is ultimately failing to implement this policy because it lacks a refugee determination system. To justify this claim, I examine burden-sharing in international law, followed by an account of different jurisdictions application of burden-sharing, including the European Union. Finally, I examine how burden-sharing can be theoretically applied to non-Jewish African asylum seekers in Israel.*

**Introduction**

Israel was founded in 1948 as a direct consequence of the immense loss suffered by the Jews of Europe during the Holocaust. It became the homeland for all Jewish people – not only for those who called themselves Israeli, but to all Jews living outside of Israel – the Diaspora. This principle of protection highlights the fundamental notion that Jews forever have a place of refuge in the event of persecution, or worse, genocide.

As a member of the international community, Israel has a duty to protect the vulnerable. This duty is derived from international law. Facing a recent flood of non-Jewish African asylum seekers entering Israel through the Sinai Peninsula, they have failed their obligations. For the most part, these individuals have been persecuted by their country of origin and cannot return without facing additional persecution.

This issue has been marked by a void of academic attention. Afeef (2009) attributes this to several factors. First, asylum migration into Israel is a relatively new issue. It only garnered international attention when violence erupted on the streets of south Tel Aviv – pitting thousands of local residents against the asylum seekers living in the neighbourhood. [1] Second, most academics working on the issue in Israel have also been engaged in local asylum politics. They have spent many hours defending the rights of asylum seekers and have not had sufficient time to produce scholarship. Third, the asylum seekers constitute a small proportion of the total number of migrants in Israel (estimated at 285,000 in 2009). For these reasons, scholarship on this community has been limited (Afeef, 2009, p. 1).

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1 See for instance, May 2012: "African asylum seekers injured in Tel Aviv race riots"
http://www.guardian.co.uk/world/2012/may/24/tel-aviv-protest-violence-immigration

My Major Research Paper is split into three sections. I will begin with a brief explanation of the current immigration situation, followed by an explanation as to how non-Jewish African asylum seekers arrived in Israel. The first section will examine the ethical dimensions of non-Jewish asylum seekers in Israel. I will argue that Israel's founding as a Zionist state – meant to protect Jews from harm – gives it special responsibilities to African refugees fleeing persecution. The best way to fulfill this responsibility is through the principle of humanitarianism.

The second section will examine a brief history of refugee protection and Israel's status in it, starting with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. It will then examine how Israel's system of refugee protection attempts to meet its international obligations to African asylum seekers.

The third section will examine a possible solution to the influx of African asylum seekers – burden-sharing, a legal mechanism by which host countries can send refugees to safe, third countries. I will argue that burden-sharing remains one of the few durable solutions available to the State of Israel, but Israel is ultimately failing to implement this policy because it lacks a refugee determination system. To justify this claim, I will examine burden-sharing in international law, followed by an account of different jurisdictions' application of burden-sharing, including the European Union. Finally, I will examine how burden-sharing can be theoretically applied to non-Jewish African asylum seekers in Israel.

**Current Situation**

*Jewish versus Non-Jewish Immigration*

In order to understand current policies toward African non-Jewish asylum seekers in Israel, it is important to contextualize the Israeli migration regime which is split between Jewish and non-Jewish immigration.

Jewish immigration to modern Israel, referred to as *aliyah* (meaning "ascension"), retains its root in political Zionism – the notion that, like other people, Jews have an inalienable right to self determination (Afeef, 2009, p. 3). Some scholars have called Israel "a democracy with a mission" where as a Jewish state, its mission is to perpetuate the existence of Jewish self determination. From this perspective, they view the maintenance of a Jewish majority as essential to the country's very survival (Avineri, Orgad, Rubinstein, Gavison, & Merkaz Metsilah (Israel), 2010, p. 27).

Jewish immigration is also characterized by positive discrimination where "specific groups are designated for special treatment" (Joppke, 2005, p. 158). While not as pernicious in its intent as negative discrimination, it is generally limited in liberal states. However, positive discrimination is viewed as legitimate when the group in question suffers through persecution (Joppke, 2005, p. 158). Defenders of this practice say that having suffered 2,000 years of persecution, Jews have earned the right to positive discrimination through the Law of Return (Joppke, 2005, p. 159).

The Law of Return provides the right of *aliyah* to every Jew and is perceived as a natural right: "Strictly speaking, the Law of Return incapacitates the Israeli state from restricting Jewish

immigration and thus reveals this state to be the property of all Jews in the world, and not the state's citizens" (Joppke, 2005, p. 162). The law defines a Jew as "a person who was born of a Jewish mother or has become converted to Judaism" (Quoted in Senor, Singer, & Council on Foreign Relations., 2009, p. 131). Citizenship status may also be granted to non-Jewish spouses of Jews, to non-Jewish children and grandchildren of Jews and to their spouses (Senor et al., 2009, p. 131). The Law of Return has been enormously successful in attracting Jewish immigration to Israel. In 1948, Israel's population was only 806,000 – today that figure is over 7.1 million people, a ninefold increase in sixty years (Senor et al., 2009, p. 126).

Despite the rapid increase in population, Israel remains the only Western democracy without an immigration policy (Avineri et al., 2010). This is primarily due to the assumption that Israel is not an immigration state. Indeed, the Law of Return, as quoted by Israel's first Prime Minister, David Ben- Gurion, is "'a bill of rights...guaranteed to all Jews in the diaspora,' and Israel was subsequently 'a state for Jews everywhere'" (Joppke, 2005, p. 162).

Jews from all corners of the world have either voluntarily made Israel home or have been forced out of their homes and into Israel through pogroms or famine. Israel is home to a very diverse population – from Arab Jews who were exiled after Israel was created in 1948, mostly from Morocco and Iraq, to Soviet Jews who escaped the former USSR after it collapsed in 1991.

Israel has also gone through great lengths to protect vulnerable Jewish communities around the world. For example, in 1984, the Israeli government led a secret airlift mission, known as Operation Moses, to bring 8,000 Ethiopian Jews to Israel. This was followed by Operation Solomon where 14,500 Ethiopian Jews were brought to Israel (Senor et al., 2009, p. 122-123).

Ethiopian immigration has proven to be a significant financial burden for the state with nearly half of Ethiopian Israelis between the ages of 25 and 44 unemployed and a majority relying on the welfare system (Senor et al., 2009, p. 122-123). Yet, despite this burden, Israel believed that saving this population from famine and oppression was more important than their economic potential. However, if they were not Jews, this operation would have never been possible.

It is therefore unsurprising that non-Jewish immigration to Israel is strongly discouraged by the State of Israel, "as their presence undermines and challenges the state's ethno-national foundations" (Afeef, 2009, p. 3). Israel, however, began importing non-Jewish labour in the 1990s for two reasons. First, Israel began restricting Palestinian workers from entering the Israeli labour market. These restrictions were imposed on Palestinians living in the Occupied Territories. Second, at the same period, Israel was experiencing tremendous growth in its economy. After substantial pressure from business groups, "the Israeli government decided to ease restrictions on working permits to so-called foreign workers from countries such as Romania, Thailand, Turkey and the Philippines and needed cheap labour to sustain its growth" (Afeef, 2009, p. 5). There is no accurate or comprehensive data on the extent of non-Jewish immigration, though several estimates in the past two decades place the number as high as several hundred thousand – roughly one tenth of the population (Avineri et al., 2010, p. 37). According to one report, issued by the The Metzilah Center for Zionist, Jewish, Liberal and Humanist Thought, estimates include:

more than 130,000 family migrants (mostly Palestinians who entered Israel under family-reunification arrangements), 250,000-400,000 labo[u]r migrants (more than half of whom

stay on in Israel without legal permits), more than 320,000 persons who immigrated from

the former Soviet Union under the Law of Return as relatives of Jews but are not

themselves considered Jewish according to the definition of the Law of Return, and

several thousand refugees and members of the *Falashmura* [Ethiopian Jewish]

community (Avineri et al., 2010, p. 37).

*African Asylum Seekers*

**Figure 1** - Asylum Application in Israel (Originally published in Afeef, 2009, p. 8)
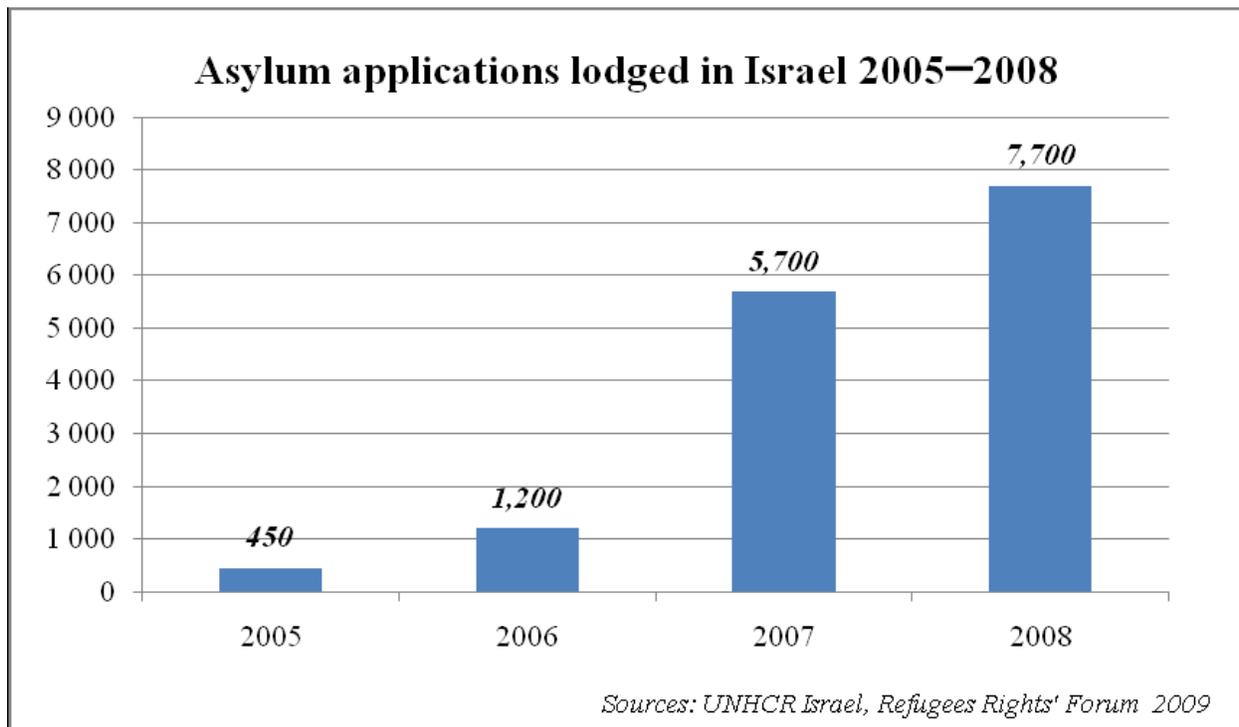


In 2006, African asylum seekers began entering in Israel from the Egypt-Israel border at

an increasing rate (Afeef, 2009, p. 7). According to data from the United Nations High

Commissioner for Refugees (UNHCR) (see Figure 1), asylum applications in Israel have

increased significantly. The latest UNHCR data show 7,700 applicants (including 3,058 from

Eretria and 2,139 from Sudan (Perry, 2010, p. 170)) in 2008 compared to 5,700 (including 1,751 from Eretria and 1829 from Sudan (Perry, 2010, p. 170)) in 2007, 1,200 in 2006 and 450 in 2005. Since 2005, 15,050 asylum seekers have sought refuge in Israel. For asylum seekers originating from Sudan and Eretria, no case by case assessment is made of their status; instead, temporary collective protection is issued to these nationals until the situation in their country improves (Avineri et al., 2010, p. 57).

More current numbers, however, show the number of asylum seekers applying for status recognition in Israel has decreased significantly. According to a 2011 report by Israel's Population, Immigration and Borders Authority (PIBA), "approximately 3,000 asylum seekers have entered Israel this [2011] year which is substantially lower than for the same period last year" (Howard-Cooper, 2011, p. 1). This decrease in new applicants is likely due to new preventative measures taken by Israel – including a new fence restricting access to Israel and a prison which will house thousands of asylum seekers. Both policies are examined in the pages that follow.

In May 2012, tensions began to escalate between African asylum seekers and local residents in south Tel Aviv, including several fire bombings of Africans' homes in their neighbourhood (CBC News, 2012). There were several protests where many were calling asylum seekers a nuisance who cause crime (CBC News, 2012). As a result of these renewed pressures, Israel will begin deporting asylum seekers they deem to have come to Israel illegally.

In an effort to accelerate the pace of deportation, Prime Minister Benyamin Netanyahu met with his cabinet in June 2012 to discuss the matter. The cabinet split asylum seekers into two different categories. The first is comprised of 25,000 asylum seekers from countries which Israel

has diplomatic relations with and where there is no barrier to repatriating them under international law. The countries in this category include South Sudan, the Ivory Coast, Ghana and Ethiopia (Ravid, 2012). The second is comprised of 35,000 asylum seekers from countries where, if returned, the individuals in question would be at risk. The countries in this category include Eritrea, Sudan and Somalia (Ravid, 2012).

South Sudanese asylum seekers are in the process of being deported after a Jerusalem court ruled that Israel was no longer obligated to extend de facto asylum to 1,500 South Sudanese living in Israel (Reuters, 2012). The courts believe that South Sudan, after being recognized as a state last year, is now safe for their nationals to return. This ruling is in line with the UNHCR who has ruled the 'collective protection' status can now be revoked for all South Sudanese nationals (Reuters, 2012).

In order to prevent future African asylum seekers from entering into the country, Israel will continue to build its security fence along the Israel-Egypt border. This will dramatically decrease the amount of new arrivals and dissuade asylum seekers presently in Egypt from making the dangerous trek into Israel. Even if an asylum seeker manages to enter into the country, Israel is currently building a massive detention centre near the Egyptian border that is expected to hold 3,000 asylum seekers. It will act as a further deterrent (CBC News, 2012).

**Section I: Ethics**

The current situation with respect to African asylum seekers in Israel brings forth an important ethical question: Is it legitimate for Israel to favour Jews over non-Jews in its immigration policy? Chaim Gans, Professor of Law at the University of Tel Aviv, argues that states have the right to determine their immigration policy. This right is derived principally from

the notion that every state has the right to national self-determination (Gans, 1998, p. 159).

Israel's Law of Return can be justified on the basis that before Israel came into existence, Jews had no political protection, which resulted in devastating consequences. Thus, the Law of Return is based on the principle of corrective justice; that is, it gives Jews the right to political protection (Gans, 1998, p. 160).

At its core, however, Israel perpetuates the idea of a homogenous nation state encompassing all of their members, at the exclusion of non-members (Gans, 1998, p. 169). This practice is not unique to Israel – other states such as Germany and Japan promote this practice too. Gans suggests that this practice is problematic in so far as it "does not fit in well with four prominent liberal ideals: pluralism, freedom of movement, well-being and equality" (Gans, 1998, p. 170). According to Gans, homogenous nation states are problematic in the following ways: (1) they limit diverse lifestyles within the border of the state and undermines the pursuit of a cosmopolitan lifestyle; (2) they impose considerable restrictions on immigration which drastically reduces the freedom of movement and migration in the world; and, (3) they prevent a more equal distribution of the world's wealth (Gans, 1998, p. 170).

However, these reasons alone "are not sufficient for rejecting any expression of national self-determination, and they are not sufficient for rejecting immigration policies which are only partly based on nationalist considerations" (Gans, 1998, p. 171). Indeed, homogenous states like Israel can be justified using three liberal justifications (Gans, 1998, p. 171).

The first principle states that "the national requirements of potential immigrants must bear considerable weight within the balance upon which states determine their immigration policies, stands and falls with the right to national self-determination" (Gans, 1998, p. 171). In

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this sense, the right to self-determination is a powerful right which "places significant responsibilities and duties on individuals, states and the international community, responsibilities and duties which they owe to national groups and to individuals qua their members" (Gans, 1998, p. 171). In other words, as it has been argued at the United Nations, the Jewish people are justified in self-determination, this gives Jews special weight to immigrate to Israel.

The second principle states that "the right of national groups to absorb that number of their members which is required for the maintenance of their self-determination" (Gans, 1998, p. 174). This principle justifies Israel's use of the Law of Return by allowing Israel to prioritize Jews over non-Jews, so long as the Law of Return is applied in the maintenance of its self-determination.

The third principle, and the most applicable to this paper, asserts that "states have an obligation to absorb the refugees and persecuted members of national groups enjoying self determination within their framework, and also to prefer the members of these groups when considering the admission of immigrants under the other categories forming their immigration quotas" (Gans, 1998, p. 175). From this principle, one can infer that Israel is obligated to absorb refugees, even those who are not Jewish, so long as it does not threaten Israel's inalienable right to self-determination.

Furthermore, for liberal-democratic states like Israel, the duty to accept refugees can be found in the principle of humanitarianism. Humanitarianism derives its roots from the biblical parable of the Good Samaritan which "has commonly been formalized in the principle that there is a duty incumbent upon each and every individual to assist those in great distress or suffering when the costs of doing so are low" (Gibney, 1999, p. 178). The principle of humanitarianism is

an effective tool for liberal democratic states because it addresses certain moral claims without demanding outlandish responsibilities from the states. It achieves this in three ways.

First, humanitarianism focuses specifically on outsiders whose need is the greatest, without compromising the need for a state to provide its citizens with safety and security. This gives the principle both pragmatic and achievable aims.

Second, humanitarianism remains cautious on the demands of states – humanitarianism demands states take in refugees, but only up the point where certain costs are incurred. In other words, humanitarianism "does not demand that states go right up to the edge of a morally undesirable state of affairs" (Gibney, 1999, p. 178). Equally important, it does not specify how a state ought to solve a refugee crisis – whether through resettlement or through naturalization.

Third, humanitarianism "is able to align the moral demands upon states with what is politically possible" (Gibney, 1999, p. 178). In this way, the 'low cost' states pay for helping refugees is translated into pragmatic policy, instead of some unattainable ideal.

Instead of applying the principle of humanitarianism to the African asylum seekers, Israel has done what many liberal democratic states do – implement deterrent measures to reduce unfounded claims. The principle of humanitarianism does not prevent liberal-democratic states from enacting such preventative measures; yet, it also implores Israel to "recognize that humanitarianism still demands that they find other ways to fulfill their obligations to needy outsiders, preferably by engaging in the managed resettlement of refugees currently housed in makeshift and insecure camps" (Gibney, 1999, p. 179).

While recognizing its existential need to remain a Jewish democracy, Israel could still do much more to resettle genuine refugees outside of its borders, such as the implementation of a burden-sharing scheme which will be analyzed in detail in the third section.

**Section II: International Law**

*International Refugee Protection*

UNHCR, as empowered by the UN General Assembly, is tasked "to promote international conventions and agreements for the protection of refugees and supervise their implementation" (Ben-Dor & Adut, 2003, p. 17). Originally founded in 1950, it was tasked with managing 1.2 million refugees in war-torn Europe; however, its mandate soon expanded to an additional five years when it became apparent that crises around the world were continuing, forcing thousands of people to become refugees (Ben-Dor & Adut, 2003, p. 14). One year later, the international community created the 1951 Convention Relating to the Status of Refugees, establishing basic standards for asylum and refugee protection. The original intention of the Convention was aimed as an instrument in post-World War Two resettlement  and "limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe" (UNHCR, 1951, p. 4).

Under the 1951 Convention, the definition of a refugee extends to a person who:

...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; or who, not having a nationality and being

outside the country of his former habitual residence as a result of such events, is unable

or, owing to such fear, is unwilling to return to it (UNHCR, 1951, Article 1: A(2)).

The temporal restrictions were removed after the international community realized there

was a need to protect all vulnerable people and adopted the 1967 Protocol Relating to the Status

of Refugees (herein referred to as 1967 Protocol) which removed the temporal and geographic

limitations of the protocol.

Under Article 3 of the Convention, states are forbidden from discriminating on the basis

of "race, religion or country of origin" and may not make reservations on this provision (Perry,

2010, p. 161). In other words, the rejection of a refugee on these aforementioned groups is

strictly prohibited under international law.

Convention refugees (also known as 'statutory refugees') are thus characterized by four

elemental characteristics: "(1) they are outside their country of origin; (2) they are unable or

unwilling to seek or take advantage of the protection of that country, or to return there; (3) such

inability or unwillingness is attributable to a well-founded fear of being persecuted; and, (4) the

persecution feared is based on reasons of race, religion, nationality, membership of a particular

social group, or political opinion" (Goodwin-Gill & McAdam, 2007, p. 37).

In considering whether or not an asylum seeker qualifies as a Convention refugee, the

most important central feature triggering international protection is violence or the risk of

violence. Those individuals who claim refugee status for economic, convenience or criminal

intent are therefore excluded from consideration (Goodwin-Gill & McAdam, 2007, p. 49).

Convention refugees are also entitled to minimum rights. These rights include: freedom to practice his/her religion and freedom in regards to the religious education of his/her children (Article 4); the right of access to the courts (Article 16); the right to elementary education (Article 22); and, public relief and assistance (Article 23) (Ben-Dor & Adut, 2003, p. 14).

The most important legal consequence in the protection of refugees is Article 33(1) of the 1951 Convention, the principle of non- *refoulement* (Goodwin-Gill & McAdam, 2007, p. 1)[2]. This principle "prohibits states from returning refugees or asylum seekers to other states in which their lives are endangered on the basis of their race, religion, nationality, membership in a particular social group, or political opinion" (Perry, 2010, p. 161). Moreover, this principle "applies across a broad class, even if the resulting regime of law and practice is far from adequate either for states or individuals" (Goodwin-Gill & McAdam, 2007, p. 50).

In addition to Article 33(1), non-*refoulement* has legal basis in a number of domestic and international declarations, including United Nations Declaration on Territorial Asylum (Article 3(1)); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (Article III(3)); American Human Rights Convention (Article 22(8)); Resolution on Asylum to Persons in Danger of Persecution; and, Principles Concerning the Treatment of Refugees (adopted by the Asian-African Legal Consultative Committee) (UNHCR 1977). The principle of non-*refoulement* has been so widely adopted that many scholars and practitioners consider it to be an aspect of customary international law. This interpretation means that states who have not signed or ratified a treaty prohibiting *refoulement* must still abide by this principle. In order to

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[2] Article 33 (1) of 1951 Convention states: No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

prove customary international law, non-*refoulment* "requires consistency and generality of practice, but no particular duration; universality and complete uniformity are not required, but the practice must be accepted as law" (Goodwin-Gill & McAdam, 2007, p. 346).

International organizations also support the principle of non-*refoulement* as customary international law. UN General Assembly resolutions consistently and unanimously endorse this principle, while UNHCR has encountered numerous situations where it made states not party to either the 1951 Convention or the 1967 Protocol respect the principle of non-*refoulement* (Goodwin-Gill & McAdam, 2007, p. 346-347). Thus, the prohibition on states to send back individuals to countries that practice "torture or cruel, inhuman or degrading treatment or punishment is absolute" (Goodwin-Gill & McAdam, 2007, p. 345).

There are exceptions to the principle of non-*refoulement*. These are derived from the 1951 Convention (Article 33(2)), which states:

> The benefit of the present provision [i.e. Article 33(1) referred to above] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country (Article 33(2)).

However, these two exceptions "must be applied in a manner proportional to the anticipated threat to the asylum seeker or refugee should he be returned to the place where he is in danger" (Ben-Dor & Adut, 2003, p. 15). Goodwin-Gill suggests that the principle of non-*refoulement* "applies from the moment the asylum seeker presents himself for admission into the country, i.e.,

the principle also embraces the non return of a person who has arrived at the frontier" (Ben-Dor & Adut, 2003, p. 16). This interpretation suggests that the way in which the asylum seeker entered into the country, whether lawfully or unlawfully, is immaterial to ensuring both asylum seekers and refugees are not returned to their country of origin (Ben-Dor & Adut, 2003, p. 16). The discussion of these exceptions within international law will prove crucial when examining the current refugee policy of the State of Israel.

*Israel and Refugee Protection*

Israel ratified the 1951 Convention in 1954, and acceded to the 1967 Protocol in 1968. However, it has yet to adopt the 1951 Convention into domestic legislation, meaning that legally, the 1951 Convention is unenforceable in Israeli law (Ben-Dor & Adut, 2003, p. 20-21). The Convention "is not a legally binding document that could serve as a basis for individuals to make claims in Israeli domestic courts" (Kritzman-Amir, 2009a, p. 16). As a consequence, Israel is not legally bound by the Convention. Nevertheless, Israeli courts have used it as a guiding principle in judicial decision-making (Ben-Dor & Adut, 2003, p. 20-21). In particular, the Israeli Supreme Court has made statements in full support of non-*refoulement,* one of the most important principles in the Refugee Convention:

> [A] person may not be deported from Israel to a place in which his life or liberty are
> threatened. Every governmental power – including the power to deport under the Entry
> into Israel Law – must be implemented on the basis of the recognition of 'the value of a
> human being, the sanctity of his life and his freedom'…. (Section 1 of Basic Law:
> Human Dignity and Liberty) (Ben-Dor & Adut, 2003, p. 34).

Furthermore, non-*refoulement* was declared binding in Israeli domestic law through the landmark *El-Tai'i* case (Perry, 2010, p. 162). The case is also significant in that Chief Justice Barak "ruled that the purpose of the detention was to ensure the deportation. If there was no country to which the detainee could be deported to, he ruled that an alternative to detention must be explored" (Ben-Dor & Kagan, 2006, p. 6).

However, Israel took a controversial measure against asylum seekers who infiltrate into Israel from Egypt. The policy, known as 'Hot Return', was adopted by former Prime Minister Ehud Olmert with the approval of former Egyptian President Hosni Mubarak (Buchanan, 2008, p. 617). Under the policy, "Israel return[ed] to Egypt asylum seekers who penetrated through the Israel-Egyptian border, as long as they are intercepted shortly after their entry into Israel nearby the border" (Kritzman-Amir & Berman, 2009, p. 18). The enforcement of the 'Hot Return' policy began to take effect on August 19, 2007, when Israel deported forty-eight asylum seekers to Egypt, including asylum seekers from Darfur (Buchanan, 2008, p. 618). While the true scope of the policy is still unknown, recent Supreme Court records indicate that at least 200 asylum seekers were returned to Egypt via 'Hot Return' (Kritzman-Amir & Berman, 2009, p. 18) (Paz, 2011, p. 6).

The legality of this policy is subject to significant controversy. Some legal scholars argue that "Israel's 'Hot Return' policy violates the 1951 Convention's non-*refoulement* provision by returning asylum seekers from Darfur to Egypt" (Buchanan, 2008, p. 621). It does so by violating Article 33, which "prohibits the return of refugees to any place where their lives or freedom would be threatened" (Buchanan, 2008, p. 621-622). Legal scholar Holly Buchanan, whose work specifically focuses on Sudanese asylum seekers and refugees, asserts: "[t]he lives

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and freedom of asylum seekers and refugees from Darfur are threatened in Egypt based on their race and nationality. Sudanese refugees and asylum seekers, including those from Darfur, have experienced extreme racial discrimination and police abuse in Egypt" (Buchanan, 2008, p. 622). Buchanan insists that Egypt is not a safe country for refugees and asylum seekers. In fact, documented abuses of asylum seekers and refugees are frequent, including an incident in December 2005 where "at least twenty-seven Sudanese protestors in Egypt died after police used water cannons and batons to clear out a resettlement camp" (Buchanan, 2008, p. 622). Meanwhile, Israel claims that it is not violating international law (non-*refoulement*) as it has not returned the asylum seeker to his or her country of origin where he or she may face persecution or death; instead, Israel argues it is returning the asylum seekers to Egypt, a safe third country (Kritzman-Amir & Berman, 2009, p. 18).

Israel's defensive response to accusations of 'Hot Return' is not surprising to legal scholars. According to Kagan and Ben-Dor, Israel's asylum system is still in its 'nascent' stage (Ben-Dor & Kagan, 2006, p. 3). This is because "Israel still has not enact[ed] asylum legislation, and depends heavily on the UNHCR to interview asylum-seekers and assess their cases". Indeed, a 2001 unpublished memorandum issued by the Interior Ministry entitled "Regulations Regarding the Treatment of Asylum Seekers in Israel (hereafter "Regulations Regarding Asylum Seekers") attempts to demonstrate how Israel is building its refugee determination system (Ben-Dor & Adut, 2003, p. 68-71 [Annex A]). The status determination process was to be conducted in accordance with Israeli law and in consideration of the 1951 Convention and the 1967 Protocol (Ben-Dor 2003: 70). However, upon further analysis, "these regulations do not fully comply with the provisions of the 1951 Convention and fail to incorporate an adequate portion of the UNHCR guidelines" (Buchanan, 2008, p. 617).

The memorandum makes clear that the UNHCR's responsibility lies in the preliminary hearing of the asylum seeker. Next, the "UNHCR representative will determine whether the application warrants examination and determination by the relevant Israeli authorities" (Ben-Dor & Adut, 2003, p. 68). As a general rule, if the applicant passes the pre-screening by UNHCR staff, the applicant will be given a temporary permit to stay in Israel (Ben-Dor & Adut, 2003, p. 68).

In order to make a final determination of applicants' status, an advisory board was set up with a public figure (retired judge or senior advocate) serving as its head. This board is also comprised of different relevant ministries (including Justice and Foreign Affairs), along with a UNHCR representative under the caveats that the UNHCR representative would not be privy to "classified security information" and that the board could meet without this individual present (Ben-Dor & Adut, 2003, p. 69). The decision to grant refugee status is the sole prerogative of the Minister of the Interior, although that decision is made in consultation with the Advisory Committee. If the application is approved, the applicant is given an "appropriate permit to enable him to remain in Israel" (Ben-Dor & Adut, 2003, p. 70).

However, the Regulations Regarding Asylum Seekers also makes clear that the jurisdiction to determine refugee status lies solely with Israel, eliminating the possibility that UNHCR will issue refugee status documents  (Ben-Dor & Adut, 2003, p. 70). Moreover, security takes precedence over any legal refugee application, as illustrated by Section 6: "The State of Israel reserves the right, not to absorb into Israel, or to grant a permit to enable the stay in Israel, of [sic] subjects of enemy or  hostile states" (Ben-Dor & Adut, 2003, p. 70). In effect this means that individuals claiming asylum from Sudan would be rejected solely on the basis that Israel

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considers Sudan an enemy state. This is especially problematic as "one-quarter of all asylum seekers in Israel over the past decade, are barred even from submitting applications due to a presumption of dangerousness" (Perry, 2010, p. 163).

There are two additional problems with these proposed regulations. First, the regulations contradict Refugee Status Determination (RSD) procedure recommendations which stipulate that all applicants are entitled to an interview and applicants' status will not be made solely on the basis the papers presented. Second, the proposed regulations do not include a prohibition on refoulement (Buchanan, 2008, p. 617).

*African Asylum Seekers in Israel*

The Israeli asylum system, which was created in 2002, adopted a narrow interpretation reading of Article 1(D) of the Refugee Convention.[3] This interpretation ensured that Palestinians, who are eligible for United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) assistance, would not be eligible for asylum in Israel (Kritzman-Amir, 2009, p. 4). The asylum system also included the category of 'enemy national' (which includes all Arab and Muslim states) as excluded from the asylum process (Kritzman-Amir, 2009, p. 4). As a result, asylum seekers entering Israel from states considered to be 'enemy nationals' are subject to the 1954 Infiltration Law without judicial review (Kritzman-Amir, 2009, p. 4).

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[3] Article 1(D) of the Refugee Convention states that "[t]his Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

The detention policy of asylum seekers in Israel shifted in January 2006. Before this period, asylum seekers were detained under the 1952 Entry to Israel law. Under this regular immigration law, asylum seekers are detained according to signed orders by the Minister of Interior. However, by early 2006, detention policy switched to a system that categorized asylum seekers as 'enemy nationals'(Ben-Dor & Kagan, 2006, p. 11). Those who fall under this category are subject to the 1954 Infiltration Law. The law was originally created to prevent enemy Arab nationals from infiltrating into the country and was set to expire one year after it had passed in the Knesset; however, the state of emergency was never lifted and the law is still in effect (Perry, 2010, p. 164). The Law does not consider the motives of the person crossing the border and entering Israel and "establishes a presumption that a person who has entered Israel without an entry permit or who is present in Israel unlawfully, is an infiltrator" (Ben-Dor & Adut, 2003, p. 30). Unlike the Entry to Israel immigration law, the Infiltration law "has no judicial review of detentions ordered by the army" (Ben-Dor & Kagan, 2006, p. 11). In practice, the law is not applied uniformly; some asylum seekers are held in detention for two or three years, others conditionally released from prisons, while others have been deported to their country of origin (Ben-Dor & Adut, 2003, p. 31).

In 2008, Members of Knesset (MKs) proposed a new law to reflect the influx of African asylum seekers in Israel and to attempt to stop this irregular migration (Stoil, 2011). The new law, which passed in June 2012, "makes illegal migrants and asylum seekers liable to jail, without trial or deportation, if caught staying in Israel for long periods. In addition, anyone helping migrants or providing them with shelter could face prison sentences of between five and 15 years" (Weiler-Polak, 2012). This new law has been criticized by human rights organizations, including Amnesty International, which noted the law is "inconsistent with international human

rights treaties to which Israel is a State Party, notably the obligation of non-refoulement found in the Convention relating to the Status of Refugees (Refugee Convention), as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Civil and Political Rights (ICCPR)" (Amnesty International, 2008, p. 1). Scholars and activists claim that the Infiltration Law breaches Israel's obligations under international law; in  particular, Article 3 of the 1951 Convention which forbids states from discriminating refugees on the basis of race, religion or national origin (Perry, 2010, p. 165). Furthermore, in Article 33(1), the duty of non-*refoulement* should be applied equally to both enemy nationals and refugees, when the enemy national does not enjoy the protection of any government and as long as the enemy national meets the requirements of a Convention refugee  (Perry, 2010, p. 166). Finally, Article 44 of the Fourth Geneva Convention (ratified by Israel in 1951) states that: "[A] Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government" (Perry, 2010, p. 166).

This practice, argue some legal scholars, contravenes international legal protections. Tally Kritzman-Amir, a professor of law at the Academic Center of Law and Business, argues "Asylum policies should be governed by the Refugee Convention and by international humanitarian moralist principles, whereas immigration regimes should be governed by the principle of state sovereignty" (Kritzman-Amir, 2009a, p. 5). The author argues that Israel's asylum policies do not observe this basic principle. In fact, asylum, citizenship and immigration policies "are mainly intended to exclude the 'other' – the non-Jewish asylum seeker, and

especially the Palestinian, the Arab, or the Muslim refugee, regardless of the circumstances that brought them to Israel" (Kritzman-Amir, 2009, p. 5).

In April 2006, in an effort to change the definition of asylum seekers as 'enemy nationals', several Israeli NGOs, including the Refugee Rights Clinic and the Hotline for Migrant Workers, challenged the legality of the detentions under the Infiltration Law to the Israeli High Court of Justice (Ben-Dor & Kagan, 2006, p. 11). The case is significant in that the State of Israel for the first time explained their rationale for assessing Sudanese asylum seekers through the "presumption of dangerousness", the primary rationale by which the state legitimized the detention of these individuals. The court ruling is viewed a significant victory for all those who opposed the indefinite detention of asylum seekers:

> I accept the argument submitted by the detainees counsel, that there is a moral flaw, when you brand all the people who infiltrated from Sudan as dangerous, just because Sudan is an enemy country... and this is when most of the infiltrators were recognized as refugees who fled their country due to persecution based on political opinion, religion or ethnic origin, and where the government of their country participated in the persecution (Ben-Dor & Kagan, 2006, p. 11).

Israel's legal obligations under these circumstances are dependent on Egypt's compliance with the 1951 Convention. This is because if asylum seekers entering Israel from Egypt were given the rights guaranteed to them by the 1951 Convention, they would have no claim to asylum in Israel. However, since Egypt is not fulfilling its duty of protection, safety and security, African asylum seekers have a just claim to make refugee protection within Israel. In addition, Israel has a duty not to return the asylum seeker back to Egypt (non- *refoulement*) due to Israel's

knowledge that "they will be subject to persecution in Egypt or that Egypt will subsequently

return them to their states of origin" (Perry, 2010, p. 172). These asylum seekers do not flee to

Israel out of choice; rather, they flee because their home countries have been ravaged by war and

genocide or have left because of a fear of human rights abuses committed by their government

(Perry, 2010, p. 170).

The journey for African asylum seekers in Israel is marred by risk and fear, often taking

months to complete. The vast majority of these asylum seekers have entered Israel from the Sinai

border between Israel and Egypt. In order to get to the border, the general practice is to hire

smugglers who bring the asylum seeker within walking distance of the Egypt-Israel border (on

the Egyptian side). Although the border is technically a closed security zone, the 266 kilometre

Egypt-Israel border remains physically open (Human Rights Watch (Organization) & Van

Esveld, 2008, p. 11). [4]

Once they reach the Egypt-Israel border, they must enter Israel unnoticed. If caught,

asylum seekers will face brutality from Egyptian soldiers, including in some cases the killing of

young children (Perry, 2010, p. 170). According to Human Rights Watch figures, "between July

2007 and mid-October 2008, Egyptian border guards killed at least thirty-two Africans seeking

to enter Israel" (Perry, 2010, p. 170).

For Sudanese asylum seekers in Israel, their motivation to leave Egypt occurred as a

flashpoint. In 2005, Sudanese asylum seekers protested in front of the UNHCR office in Cairo

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[4] In response to the increased numbers of asylum seekers (along with renewed tensions with Egypt and a view that the Sinai represents a 'wild west'), the Israeli government began construction of a fence that will run the entirety of the border with Egypt. The construction of the fence is set to be completed by the end of 2012 and will make it more difficult for asylum seekers to enter from the Egypt-Israel border crossing (Lewis, 2012).

against the suspicion of refugee status applications and sub-standard living conditions (Afeef, 2009, p. 9). This sit-in protest lasted several months until Egyptian security forces broke up the demonstration, killing 28 refugees and asylum seekers. This event coupled with the "deteriorating asylum conditions and lack of durable solutions in Egypt" influenced many Sudanese asylum seekers to make the dangerous journey to Israel (Afeef, 2009, p. 9).

What concerns observers is not Israel's legal right to defend its borders from those it deems to be threats to peace and security; rather, it is the way Israel justifies the inadmissibility of certain nationals. International law is clear that even in times of war, measures taken to exclude asylum seekers from entry must be done on a case to case basis, rather than on the basis of discrimination by nationality (Perry, 2010, p. 173). However, Israel has responded to such legal obligations by creating an asylum system "that essentially mimics its immigration laws in preferring Jews and in categorically discriminating against non-Jewish refugees, particularly those from enemy states" (Perry, 2010, p. 158). Clearly an asylum system that discriminates on the basis of nationality contravenes international norms set out in the Refugee Convention.

Another concern is that under current law, a recognized refugee (of whom there are very few) is granted temporary residency status; however, refugees are unable to naturalize or gain a permanent status in Israel (Kritzman-Amir, 2009, p. 17). As a consequence of this temporary status, scholars argue that refugees are unable to fully participate in Israeli society and are not given the ability to find stability in their lives (Kritzman-Amir, 2009, p. 17). While this practice is not a requirement under the Refugee Convention, it is common practice in many countries to naturalize refugees (Kritzman-Amir, 2009, p. 17).

Israel's response to non-Jewish African asylum seekers has been defended by the state as pragmatic, rather than legal:

> Israel's primary concerns with admitting Sudanese and Eritrean asylum seekers sound [sic] in security and demographics. These concerns emanate from two of Israel's core objectives: maintaining a secure state against the threat of terrorism and preserving the majority Jewish character of that state (Perry, 2010, p. 173).

Moreover, responding to the rationale for the planned security barrier between Egypt and Israel, Prime Minister Netanyahu spoke about the "need to protect the State of Israel and its future as a Jewish and democratic state...[t]he quantity of infiltrators will only increase..." (Perry, 2010, p. 173). The security barrier, which began construction in November 2010, is estimated to be finished by mid-2012 (6 months earlier than originally anticipated) at a cost of NIS 1.35 billion ($360 million US) (Hartman, 2011). When complete, the security barrier will cover the entire 240 kilometers making 'infiltration' of the border much more difficult (Hartman, 2011). In fact, according to the Defense Ministry, there "has been a 50 percent drop in the number of "infiltrators" who have entered Israel in comparison to the same period of time in 2010" (Hartman, 2011). The building of the security fence helps to explain why the numbers of African asylum seekers has dropped dramatically in 2011.

Another strategy to prevent asylum seekers from entering into Israel is to amend existing law. In January 2012, Israeli lawmakers debated the merits of amending the 1954 Prevention of Infiltration Law to include migrant workers and asylum seekers who do not pose a threat to Israel's security (Lis, 2012). This bill would make it legal to detain migrant workers and asylum seekers for minor infractions such as spray painting graffiti or stealing a bicycle, and could be

held in jail between three years and life (Lis, 2012). Moreover, the bill would also penalize anyone who shelters or offers assistance to an illegal migrant worker or asylum seeker. The penalty for this infraction would carry up to 5 years in jail but increase to 15 years if the accused is found with a weapon or is trafficking in drugs or women (Lis, 2012).

There is another option which could allow for both the safety of the African Asylum seekers and the maintenance of Israeli identity and security, which is explored in the next section.

## Section III: Burden-sharing

*An introduction to Burden-sharing*

The term burden-sharing is defined as "the equitable international division of responsibility for refugees" (Perry, 2010, p. 181). The term also implies cooperation, which is a hotly contested principle of international relations. Burden-sharing as a concept has its origins in the 1960s. Initially it did not apply to refugees and was only meant to define collective goods or common initiatives that should be shared between states in Europe (Thielemann, 2003, p. 225). More recently, the definition of burden-sharing has expanded to include a wide-variety of global responsibilities from international security and climate change to forced migration and refugee crises (Thielemann, 2003, p. 225).

Some scholars argue that cooperation between states is a defining principle of modern international relations, even arguing that the principle ought to be considered customary international law (Hurwitz, 2009, p. 138). Other scholars argue that there is little evidence to suggest this is the case (Hurwitz, 2009, p. 161). The principle of cooperation in international

relations first appears in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States. This principle is a *vital* characteristic to any successful international burden-sharing regime. The declaration states that:

> States have a duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences (Hurwitz, 2009, p. 138).

The contentious nature of cooperation in international relations makes refugee burden-sharing a hotly debated subject. In fact, even the word 'burden-sharing' connotes contention amongst those who actively support the rights of refugees. One such advocate is Tally Kritzman-Amir who firmly rejects the term on the basis that it is offensive to refugees because it "reduces refugees and immigrants as an encumbrance" (Kritzman-Amir, 2009b, p. 359 (footnote 19)). Instead, Kritzman-Amir prefers to employ the term 'responsibility-sharing' to describe a system that attempts to share the responsibility for the socio-political and economic problems refugees cause to a host nation. It is from this context that he asks: "[w]hen refugees leave their country of nationality, which country is responsible for protecting and providing for them?" (Kritzman-Amir, 2009b, p. 356). Kritzman-Amir believes that the responsibility for protecting refugees must be shared internationally because "[a]ssuming a shared responsibility for refugee migration

not only is fair and just, but also would be beneficial to world order and global security and help States to better plan their immigration policies" (Kritzman-Amir, 2009, p. 362). [5]

Despite the controversy, the proper application of burden-sharing to the non-Jewish African asylum seekers constitutes one of few durable solutions in helping to resolve the crisis in Israel. This section will begin with an explanation of burden-sharing in international law, followed by an account of the application of burden-sharing in different jurisdictions, including the European Union. Finally, I will examine burden-sharing when applied to non-Jewish African asylum seekers in Israel. I will do this in an effort to see whether burden-sharing can be used as a durable solution to the current crisis.

*Burden-sharing in International Law*

International law establishes general principles of burden-sharing but rarely makes direct reference to the way it ought to be implemented by States; rather, it leaves specific implementation and mechanisms up to individual state decision-making (Kritzman-Amir, 2009b, p. 376). Burden-sharing, as a fundamental principle of international law, can be found in several places. The Charter of the United Nations, under International, Economic and Social Co-operation mentions burden-sharing in Article 55 and Article 56. In part, Article 55 says that Member states shall promote "higher standards of living, full employment, and conditions of economic and social progress and development" (United Nations, 1945); Article 56 says that all Members shall "pledge themselves to take joint and separate action in co–operation with the

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[5] For coherency purposes, I will use the term 'burden-sharing' instead of 'responsibility sharing' as it is the more popular term in the academic literature. However, I do recognize that there exists a considerable amount of controversy surrounding the use of this term.

Organization for the achievement of the purposes set forth in Article 55" (United Nations, 1945). Moreover, the aforementioned Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States further elaborates on the principles set out in the UN charter, while the 1966 International Convention on Economic, Social and Cultural Rights and the 1986 Declaration on the Right to Development both contain mention of burden-sharing (Kritzman-Amir, 2009b, p. 376).

Burden-sharing is also specifically acknowledged in paragraph 4 of the Preamble of the Convention Relating to the Status of Refugees (Refugee Convention): "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation (UNHCR, 2001)." Some legal scholars would also argue that the non-*refoulement* provision contained within the Refugee Convention "arguably forces States to negotiate responsibility sharing [burden-sharing] because it bars States from 'dumping' refugees in other countries" (Kritzman-Amir, 2009, p. 377).

Moreover, burden-sharing is also mentioned in several regional contexts. For example, in the African region, Article II(4) of the 1969 Organization of African Unity's (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa included burden-sharing after decolonization brought a massive influx of refugees in Africa (UNHCR, 2001). In the Asian region, Paragraph III of the 1987 Addendum to the 1966 Bangkok Principles Concerning the Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee (AALCC) mentions the need for "the principle of international solidarity and burden-sharing" to be applied to "all aspects of the refugee situation" (UNHCR, 2001).

As a method of resolving refugee influxes, burden-sharing has been around for quite some time. For example, legal scholars in the 1970s proposed a system known as the 'refugee per GNP' index whereby "[t]he idea was to assign refugees worldwide by matching refugee preferences with host countries ranked according to an index of wealth and population density" (Suhrke, 1998, p. 397). This scheme was revised in the mid-90s, after a dramatic globalized restriction on asylum, the "the old idea of sharing schemes that would distribute refugees among recipient states was revived as a potential solution to the asylum crisis" (Suhrke, 1998, p. 396). The logic of the scheme was that burden-sharing is one of collective action and would thus strengthen the protection of refugees. The alternative is unilateral national measures which are viewed as less effective because one state has less of an ability to absorb a refugee population than collective action by two or more states.

In theory, burden-sharing comes in two forms: fiscal burden-sharing and physical burden sharing (Hurwitz, 2009, p. 147). Fiscal burden-sharing consists of financial transfers by industrialized countries to assistance programmes usually run by the UNHCR (Hurwitz, 2009, p. 147), while physical burden-sharing is defined as the resettlement of refugees from first asylum countries (Hurwitz, 2009, p. 150).

Fiscal burden-sharing "applies equally to situations of mass influx and to individual arrivals" and is widely accepted as a key component in international cooperation, particularly in refugee protection. It is often included as part of development aid in North-South cooperation (Hurwitz, 2009, p. 147). The most prominent example of fiscal burden-sharing is assistance programmes through the UNHCR.

The second form, known as physical burden-sharing, refers to the physical resettlement of refugees. According to Agnès Hurwitz, author of *The Collective Responsibility of States to Protect Refugees*, this form of burden-sharing "has been inconsistent, and while in recent years, serious efforts have been undertaken to encourage States to accept further obligations, these commitments have remained limited" (Hurwitz, 2009, p. 150). This position is confirmed by Peter H. Schuck of Yale Law School, who states that burden-sharing continues to remain a weak norm under international law and practice (Schuck, 1997, p. 253). Schuck points to state sovereignty as a key impediment to the successful implementation of a burden-sharing regime. This is because states are the principal creators and executioners of human rights violations. They fail to prevent private groups from committing violations, and refuse to intervene when human rights are being systematically violated, arguing that state sovereignty must be protected (Schuck, 1997, p. 247).Yet for the foreseeable future, genuine human rights protections can only be achieved "by sovereign states or by other entities such as supranational agencies and nongovernmental organizations (NGOs) working with their assistance or sufferance" (Schuck, 1997, p. 247). Schuck concedes that to ignore or deny the importance of state sovereignty "is to engage in a dangerous fatuity" (Schuck, 1997, p. 247).

*UNHCR and Burden-sharing*

The Executive Committee of the UNHCR Programme (ExCom) provides parameters for the implementation of burden-sharing in refugee influx situations. There are two specific circumstances where burden-sharing should be implemented: when "[a] mass influx may place unduly heavy burdens on certain countries, and a satisfactory solution could not be achieved without international cooperation" (UNHCR, 2001) and when "[s]tates should, within the

framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, states that have admitted a mass influx of refugees" (UNHCR, 2001).

Aside from these two circumstances, burden-sharing is also increasingly used "to address the humanitarian consequences, and to enable the respective countries of asylum or origin to meet their obligations". This admission results from the recognition that refugees often enter host countries that are poor. Lacking the infrastructure and suffering from a poor economy, the host country must divert considerable resources to maintain minimum standards for refugee populations. Refugee populations can often adversely impact economic, environmental, socio-political, and peace and security (UNHCR, 2001).

The most significant normative development on resettlement came with the signing of the Multilateral Framework of Understandings on Resettlement. Launched by the UNHCR in June 2004, "[i]t lays down in a non-binding instrument, the roles and responsibilities of parties involved in resettlement processes, including specific undertakings relating to registration and documentation, selection criteria, family unity, transparency, the integrity of the process and programme delivery, as well as reception and integration of refugees" (Hurwitz, 2009, pp. 151–152).

Indeed, the UNHCR views burden-sharing as an important tool for durable solutions, but does not believe that states should, as a precondition, insist on burden-sharing agreements, because respect for human rights should always take priority:

[The Executive Committee] recognizes that international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection

principles; stresses, however, in this regard, that access to asylum and the meeting by

States of their protection obligations should not be dependent on burden-sharing

arrangements first being in place, particularly because respect for fundamental human

rights and humanitarian principles is an obligation for all members of the international

community (Hurwitz, 2009, p. 144).

The UNHCR does, however, resettle a small number of vulnerable refugees to host countries.

Current UNHCR statistics show that 23 states participate in resettlement programmes[6] with 11

additional states[7] indicating their willingness to participate in the programme (UNHCR, 2010, p.

3). Despite the increased participation of resettlement countries, the global expansion of the

resettlement program remains limited with most well-established participating countries not

increasing their refugee resettlement intake to meet global needs (UNHCR, 2010, p. 3). As

Figure 2 below demonstrates, the number of resettlement submission exceeded the number of

resettlement places provided by states. For example, in 2009, there were approximately 130,000

UNHCR resettlement submissions and only 80,000 resettlement places provided by states.

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[6] Argentina, Australia, Brazil, Canada, Chile, the Czech Republic, Denmark, Finland, France, Iceland, Ireland, Japan, the Netherlands, New Zealand, Norway, Paraguay, Portugal, Romania, Spain, Sweden, United Kingdom, Uruguay, and the United States of America.
[7] Belgium, France, Germany, Italy, Japan, Luxembourg, Portugal, Romania, Spain, Switzerland and the Czech Republic.

**Figure 2** - UNHCR resettlement submissions (Originally published in UNHCR, 2010, p. 3)
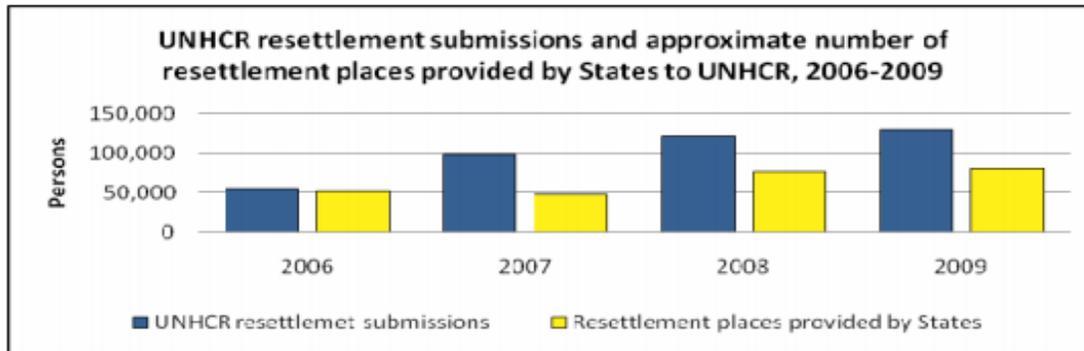


The reasons for countries' participation are varied. Shared state proposals on burden-sharing "have typically come from governments trying to relieve what they perceive as a disproportionate influx on their own territory" (Suhrke, 1998, p. 397). However, most states view burden-sharing with a certain degree of trepidation as they are "wary of institutionalized schemes that would commit them to take a certain proportion of future refugees flows of unknown frequency and magnitude" (Suhrke, 1998, p. 397).

Nonetheless, burden-sharing schemes can also act as an insurance mechanism by assuming that states would prefer to protect refugees if they have guarantees that the burden for absorbing the refugees will be shared equally. In this respect, "arrangements that distribute refugees or asylum seekers according to principles of need and equity suggest benefits to all sides" (Suhrke, 1998, p. 398). States have an interest in working together to solve a refugee crises. This interest comes from both a moral duty and an international obligation:

> In refugee matters, the logic of burden-sharing starts from the premise that helping
> refugees is a jointly held moral duty and obligation under international law. By
> institutionalizing the sharing in accordance with agreed principles of equity, states can

discharge these obligations in a manner that simultaneously promotes national interests (Suhrke, 1998, p. 398).

*European Union and Burden-sharing*

Of all the participating regions, the European Union (EU) is known for having the most progressive policies on burden-sharing. The EU formerly adopted a Directive on burden-sharing after the crisis in former Yugoslavia in 2000. The Directive sought to introduce "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 bearing the consequences thereof" (Hurwitz, 2009, p. 155).

The Directive introduced fiscal burden-sharing through a mechanism known as the European Refugee Fund. The Fund was created "to support and encourage the efforts of the Member States in receiving and bearing the consequences of receiving refugees and displaced persons" (Hurwitz, 2009, p. 147). In 10 years, two funds were created totalling €330 million ($401 million USD) (Hurwitz, 2009, p. 147). However, physical burden-sharing implementation has been more contentious in the EU. The EU concedes "that only the lowest level of commitment would be acceptable to some Member States" (Hurwitz, 2009, p. 155). In practice, this is known as 'double voluntary action' where both the host state and the beneficiaries of temporary protection would have to agree for temporary protection to be undertaken. In 2003, the EU attempted to take a more 'integrated approach' to burden-sharing, which included both fiscal and physical burden-sharing (Hurwitz, 2009, p. 155).

The European experience with burden-sharing schemes could provide Israel a model of how to deal with African asylum seekers. However, as we shall see, there is little movement toward the implementation of such a scheme.

*Burden-sharing and Israel*

Of all the literature on burden-sharing, only two articles could be found that have attempted to apply burden-sharing directly to non-Jewish African asylum seekers and refugees in Israel. The first article, written by Tally Kritzman-Amir and Yonathan Berman, is an examination of the legal and moral underpinnings of a theoretical burden-sharing regime in Israel. The authors do not put much faith in the politicians or their words; rather, they believe that the court is the only institution capable of imposing a burden-sharing system in Israel. The second article, written by Avi Perry, makes an attempt at building a burden-sharing regime in Israel to deal with the present crisis. Only briefly does it examine this burden-sharing regime and present an argument as to how, in theory, the regime would operate. Unfortunately, as recent events have demonstrated, burden-sharing has not been applied in Israel.

African asylum seekers have only been entering Israel in significant numbers since 2006, so the issue is relatively new and the durable solutions are underdeveloped. Also, many of the legal scholars who write on burden-sharing issues are also activists, spending most of their time lobbying the Israeli government and working with refugee organizations to ensure the equitable treatment of this vulnerable population. Burden-sharing schemes are generally favoured when the country in question already has a respected refugee determination system. As mentioned in the previous chapter, Israel does not have a proper system in place and, thus, would have a

difficult time convincing other nations to participate in a burden-sharing scheme. Finally, relative to other countries in the region, Israel's own refugee burden (or responsibility as Kritzman-Amir would put it) is very small. Under normal circumstances, burden-sharing regimes are generally used when there is a genuine influx of people. The debate on whether Israel is experiencing an influx has been the subject of significant controversy.

In *Responsibility Sharing and the Rights of Refugees: The Case of Israel*, Tally Kritzman-Amir and Yonatan Berman, critically analyze the implementation of an Israeli asylum regime through the use of burden-sharing (Kritzman-Amir & Berman, 2009, p. 1). The authors make the argument that in order to understand Israel's position on burden-sharing, it is important to examine the Israeli discourse on the issue. In this sense the conversation on burden-sharing is characterized by:

> a lack of reference to Israel's international law obligations towards refugees; merely a vague reference to the moral obligation of Israel to those refugees; a general reluctance to share any of the responsibilities and burdens that refugee protection may entail; a belief that other states (either developed or developing ones) should bear responsibility for the refugees present in Israel; disinformation about the magnitude of the phenomenon of asylum seeking; and disregard of the responsibility taken by other countries in the region (Kritzman-Amir & Berman, 2009, p. 16).

Kritzman-Amir and Berman point to several statements made by notable Israeli politicians that suggest most politicians see African asylum seekers as 'economic migrants' instead of asylum seekers. In October 2007, the authors note that former Prime Minister Ehud Olmert told the Israeli Parliament that all 5,000 asylum seekers who entered Israel from 2006 to

2007 where 'economic migrants' when this was not the case. In reality, 498 asylum seekers where identified as Darfurian refugees, while the majority of the other asylum seekers did not undergo status determination procedures, so their identities could not be verified (Kritzman-Amir & Berman, 2009, p. 16).

Other statements from politicians have evoked demographic concerns – that if Israel were to allow Sudanese asylum seekers to stay in the country, it would represent a demographic threat to the Jewish character of Israel because, according to the statement, there are millions of Sudanese in Egypt who are willing to come to Israel. The following statement was made in May 2006 by then Minister of Interior Roni Bar'on:

> [i]t is true that the war, the cruel hard civil war in Darfur in Sudan, is a problem which is difficult to observe, especially to a people as us. But we must look at the numbers. ... The problem is that today there are three million Sudanese refugees wandering around in Egypt. ... Dozens of them, perhaps almost hundreds, have already infiltrated Israel, and their number is increasing, the phenomenon is not stopping. Some of them even applied for asylum in Israel. The UN's attempts to find a third country for the resettlement of Sudanese asylum seekers are limited. The UN cannot properly deal with this issue, and if we do not stop it at the border or by creating a situation in which the infiltrators will not want to put themselves in, we are inviting a flood (Kritzman-Amir & Berman, 2009, p. 16).

Kritzman-Amir and Berman suggest that this kind of language helps to "invoke what they [the politicians] perceive to be Israel's self interest as the reason why Israel should not take upon

itself part of the responsibility for refugees" (Kritzman-Amir & Berman, 2009, p. 18). However, these answers consistently avoid questions of the legal responsibility Israel has toward refugees.

Kritzman-Amir and Berman also correctly assert there is an immense problem in labelling Egypt as a 'safe third country'. This argument has been used by the Israeli government in the past to legitimize returning asylum seekers at the Egypt-Israel border. The authors point to Egypt's record in returning asylum seekers to their country of origin and Egypt's poor human rights record. But more importantly, they emphasize that Israel has an international responsibility to share the burden of refugees in the region. If Israel simply returns the asylum seeker to Egypt, these individuals could be returning to risk. Moreover, Israel "has a far better capacity to protect asylum seekers than Egypt given its democratic nature, affluent economy, and human rights tradition" (Kritzman-Amir & Berman, 2009, p. 18).

As proof of Israel's lack of participation in burden-sharing, the authors present a compelling look at the Sudanese population around the world. According to UNHCR numbers, at the end of 2008 there were 1,749,536 'persons of concern'.[8] Israel granted status to just 600, which is negligible especially if one examines how many Sudanese its neighbours accept. While these figures remain true, the authors fail to mention Israel's size may be a contributing factor in the small figures. Nevertheless, the argument is a powerful one: Israel must do more to shoulder the burden of refugees around the world – and one clear way to do this is by implementing a burden-sharing scheme (Kritzman-Amir & Berman, 2009, p. 22).

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[8] Persons of Concern include refugees, persons in refugee like situations, internally displaced persons, asylum seekers whose application is pending, and other sub-categories.

Finally, Kritzman-Amir and Berman view the Israeli courts as an effective means of applying burden-sharing to Israel. The courts have taken activist positions on immigration and human rights in the past. The authors remain confident that the Israeli courts could impose a more fair system by comparing the court decisions of other jurisdictions outside Israel in order to find the right policy for the country (Kritzman-Amir & Berman, 2009, p. 24-25).

The second article written on burden-sharing in Israel is *Solving Israel's African Refugee Crisis* by Avi Perry. The author makes an argument in favour of a burden-sharing scheme by presenting a pragmatic plan for its implementation. Prior to any burden-sharing implementation, Perry insists that, "[t]he best course for Israel is to establish and adhere to impartial procedures for individually screening the thousands of African asylum seekers entering the state" (Perry, 2010, p. 180). This refugee determination system would adhere to the 1951 Convention and the 1967 Protocol, "as well as with the humanitarian values of a democracy and of the Jewish tradition; it may even help restore Israel's tarnished reputation within the international community" (Perry, 2010, p. 180). Under this system, Israel would be allowed, under exceptional circumstances, to detain individuals for security purposes, "but procedural safeguards must include reasonable limits on periods of detention, access to legal counsel, and the availability of judicial review" (Perry, 2010, p. 180).

Once this system has been established – and refugees recognized, the burden of caring for these refugees "should not fall to Israel alone solely by accident of its geographical proximity to crisis centers in Africa. Such an arbitrary allocation lacks moral justifiability" (Perry, 2010, p.

180).[9] Perry suggests that rather than offering refugees long-term protection, Israel ought to focus on offering refugees short-term protection. Short-term protection is preferred because of Israel's unique demographic makeup and stated goals of maintaining a Jewish majority. Offering long-term protection to a population that does not share these demographic characteristics "may increase the indirect costs of social integration for African refugees" (Perry, 2010, p. 181). This solution, asserts Perry, meets international obligations, as a descriptive rather than aspirational solution, and accounts for what Israel would realistically do.

Moreover, Perry believes that a realistic burden-sharing scheme for Israel would emulate a market-based refugee quota based on the work of Professor Peter Schuck. This scheme proposes that "proportional allocations are made among states according to absorption capacities but states are able to buy and sell their resettlement obligations" (Perry, 2010, p. 181). This, Perry insists, could happen with as little as two contracting states. This is important because of Israel's poor or non-existent diplomatic relations with the majority of its geographic neighbours.

Perry identifies three stages in which a burden-sharing scheme could be introduced in Israel. First, a burden-sharing scheme would have to be authorized through the legislative assembly. This would also be the time for the government to approve an internationally recognized asylum process where recognized refugees would have domestic legislative protection. This would be a controversial move, particularly in this tough economic climate, where budgets are constantly being cut. Perry correctly insists that in order for this to be

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[9] The notion that refugees enter countries in morally arbitrary means is shared by Kritzman-Amir, who argues in *Not in My Backyard : On the Morality of Responsibility Sharing in Refugee Law*: "[I]t seems that a fairer responsibility-sharing system using established criteria should replace the current, arbitrary distribution of responsibility" (Kritzman-Amir, 2009, p. 375).

effective, parliamentarians must be reminded that their obligation to protect refugees does not simply come from an altruistic obligation, but a legal one. Thus, participation is mandatory. Second, Israel needs to find partners who would be willing to resettle refugees from Africa. There are very few countries willing to do this, but Perry believes that states that are socially similar – in both demographic make-up and language – could integrate the population with relative ease. This process of resettlement can be done in one of two ways – through altruism or through financial incentive. The latter would prove more effective, as few states currently take refugees for purely altruistic reasons. Lastly, Perry believes that the UNHCR could prove to be a crucial ally in this burden-sharing regime as it "could assist during this critical third stage by providing advice and serving as a neutral mediator" (Perry, 2010, p. 181).

Both articles agree that returning refugees to Egypt is both morally wrong and internationally prohibited. Instead, the articles advocate that Israel implement a refugee determination system. This process must comply with international law while also allowing Israel to exclude those asylum seekers it deems too dangerous to stay. Perry appears more comfortable allowing Israel to decide this; however, Kritzman-Amir and Berman appear more sceptical about Israel's intentions. Instead, the authors would prefer a system that places checks and balances on the determination process. The inclusion of the courts would allow for fairer outcomes for those asylum seekers trying to stay in Israel.

Moreover, both articles agree that a burden-sharing scheme is necessary, although they disagree on how this scheme would come about. Perry believes Israel should find a legally acceptable way of returning African asylum seekers because of Israel's unique demographic imperatives. Israel ought to develop a burden-sharing scheme that ensures that genuine refugees

go to countries that have similar culture and background. One way to incentivize countries to comply with Israel's request would be to offer monetary compensation to the countries that accept refugees. Meanwhile, Kritzman-Amir and Berman appear highly sceptical of Israel's intentions, especially of the politicians who use the asylum seekers as political fodder. For these authors, if a burden-sharing scheme were to develop in Israel, the courts would have to play a large role in ensuring the implementation of a fair system. The authors suggest that Israel is not playing its part in hosting refugees. Before any scheme can be implemented, Kritzman-Amir and Berman suggest that Israel accept that it has a responsibility to absorb more refugees than it is presently willing to absorb.

The European experience with burden-sharing demonstrates that effective schemes are only possible when all sides show a willingness to solve the conflict. Similarly, to be an effective policy, Israel must demonstrate to future burden-sharing partners that it is willing to integrate and assimilate some refugees into the country. Therefore, as a sign of good faith, Israel should demonstrate a willingness to integrate a few hundred Sudanese refugees. This move would help demonstrate to any potential partner that despite demographic and political concerns, Israel takes protection of refugees very seriously.

As a policy option, a burden-sharing scheme would provide Israel with an effective and legal tool for solving the present refugee crisis. Burden-sharing allows Israel to find safe, third resettlement countries which would have an easier time resettling these refugee. This policy also ensures Israel remains compliant with the legal obligation not to return vulnerable members of the international community to their country of origin.

Israel should also build a regulated and fair refugee determination system which is modelled on successful determination processes around the world. If an asylum seeker is determined to be a genuine refugee, the refugee should be afforded the right to work, the right to health care and the right to education. Once again, these changes would allow Israel to demonstrate to its burden-sharing partners how seriously it takes the protection of refugees and how its policy leaders have learnt from the mistakes of the past.

Obviously it should not be expected that Israel offer permanent residency to all refugees entering its borders, but doing more, even if more is mostly a symbolic gesture, will surely do more to win over potential partners in a future burden-sharing scheme.

**Conclusion**

Despite significant pressure from anti-refugee groups, Israel has an opportunity to both fulfill its mandate as a Jewish and democratic state and to fulfill its legal and moral commitments to the African asylum seekers.

From an ethical perspective, Israel should build a refugee determination system based on the principle of humanitarianism which views outsiders whose needs are greatest as most deserving of protection by the state. The principle of humanitarianism would also allow Israel to remain both Jewish and democratic by limiting the amount of refugees allowed to permanently stay in Israel.

This pragmatic view of Israel's ethical responsibilities toward African asylum seekers is substantiated in international refugee law, so long as Israel abides by the provisions set forth in the 1951 Refugee Convention, with emphasis placed on guaranteeing the principle of non-

*refoulement*. In Israel's case, the principle of non-*refoulement* should also apply in returning refugees to Egypt where they can be expected to be mistreated.

If Israel is forbidden from returning refugees to their country of origin and, given its size, incapable of integrating hundreds of thousands of non-Jewish refugees, then Israel should consider a burden-sharing scheme. To do this, Israel must first initiate an internationally recognized refugee determination system which objectively differentiates between genuine Convention Refugees and economic migrants. The best way to ensure a just burden-sharing scheme is through the Israeli courts, which have a history of making judgements contrary to government concerns. Israel should also allow for refugees to find work, education and social provisions while being afforded protection by the state.

Once a refugee determination system is operational, Israel can legitimately seek international assistance from states that take refugees via burden-sharing schemes. For this scheme to work, Israel would have to agree to take a certain proportion of refugees. This would show that Israel is working in good faith with its partners.

Unfortunately, this scheme would be difficult to implement in Israel. Israel's relationship with international law has been to ignore rulings when they do not serve its narrow interests. The irony of Israel is that without international law, it would have never been created; it is the international recognition at the United Nations in 1949 which gave Israel its legitimacy. Yet, when faced with legitimate criticism for its policies, Israel will often ignore the very law that helped to create it.

Modern-day Israel is founded on the idea that after 2,000 years of being landless and persecuted refugees, the Jewish people have suffered enough. Since 1948, Israel has existed as a symbol to the world that through perseverance, hard work and determination, the Jewish people can overcome immense tragedy. In short, the Jewish people know what it was like to be a refugee. This theme of caring for the refugee, the stranger, is also found in the Old Testament. The Torah says in Exodus 23:9: "You shall not oppress a stranger, since you yourselves know the feelings of a stranger, for you also were strangers in the land of Egypt". Given the Jewish people's experience with persecution, one would hope that Israel, as the modern day symbol of Judaism, would do much more to ensure that modern day refugees are given safety and security in its own country.

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