

To Stay or to Leave? The Unsolved Dilemma of the Eritrean Asylum-Seekers in Israel

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INTRODUCTION

This work was conceived with the idea to analyze the conditions of Eritrean asylum-seekers in Israel who, according to the United Nations High Commissioner for Refugees (“UNHCR”), deserve international protection.¹ It seeks to highlight gaps in their protection and to identify gap-filling solutions that would be amenable to both Israeli authorities and Eritreans asylum-seekers.

This work will follow the usual path of an individual fleeing persecution in his or her country of origin and seeking a safe haven abroad. Thus, Part I of this work, after this introductory note, will be dedicated to the arrival of Eritrean asylum-seekers in Israel. Part II will focus on the reaction of Israeli authorities once the Eritreans have managed to enter the country. It will review attempts to remove the Eritreans as unwanted guests. Part III will scrutinize the conditions of the Eritrean asylum-seekers that manage, at least temporarily, to remain in Israel. The analysis will cover recent domestic legislation and the sort of “limbo” in which Eritreans find themselves, with very few rights, and with no clear future in Israel or elsewhere. Part IV will examine the status of essential socio-economic rights (right to work and right to health) that Eritrean asylum-seekers can claim within Israel. This Article concludes by illustrating the major challenges for the Eritrean asylum-seekers in Israel and by making recommendations to improve their situation in the country.

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¹ UNHCR’s Oral Comments on the Legislative Proposal: Law for the Prevention of Infiltration (Nov. 27, 2017) (on file with author).

I. ARRIVAL AND CLAIMS OF ERITREANS IN ISRAEL

Contemporary relations between Israel and Eritrea date back to the mid-1960s, albeit indirectly. During the conflict between Eritrea and Ethiopia, Israel trained the Ethiopian troops who were used to suppress the Eritrean bid for independence.² Currently, Israel is trying to build up good relations with Eritrea in an attempt to safeguard its interests in the Red Sea Basin.³

As of December 31, 2016, there were approximately 40,274 “persons of concern,” in Israel the majority of them (29,014) from Eritrea,⁴ a country where the UN Commission of Inquiry on Human Rights declared in 2016 that there were “[r]easonable grounds” to believe that crimes against humanity—namely enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape, and murder—have been committed.⁵

For many decades, neighboring countries have represented the first place of transit, but not the ultimate journey’s end, for Eritreans departing their own country. Especially after the deterioration of the situation in Yemen,⁶ the routes to Europe have become overland routes through Sudan to Libya or to Egypt and Israel.⁷ In this context, Israel’s geographic position is significant because it represents the only developed economy that has a long border with Africa.⁸

Eritreans seek asylum in Israel for a variety of reasons, such as persecution due to religious belief and political dissidence.⁹ In the realm of political dissidence,

² UNGA, Hum. Rts. Council, Rep. of the Detailed Findings of the Commission of Inquiry on Hum. Rts. in Eritrea ¶ 81, U.N. Doc. A/HRC/29/CRP.1/ (2015).

³ *Israel Completes Construction of Listening Post in Eritrea*, MIDDLE EAST MONITOR (June 20, 2016), <https://www.middleeastmonitor.com/20160620-israel-completes-construction-of-listening-post-in-eritrea/>.

⁴ Population and Immigration Authority, Statistics of Foreigners in Israel, 2016, Table A.2, 5, in Hebrew. Translation provided by UNHCR Israel.

⁵ U.N. Hum. Rts. Council, Rep. of the Commission of Inquiry on Hum. Rts. in Eritrea, ¶ 8, U.N. Doc. A/HRC/32/CRP.1 (2016).

⁶ *See, e.g.*, U.N. Hum. Rts. Council, Situation of Human Rights in Yemen, A/HRC/33/38 (2016).

⁷ *See* Hum. Rts. Council, *supra* note 2, ¶ 26.

⁸ Israel represents one of the twenty-four “developed markets” in the world. FTSE RUSSELL, FTSE COUNTRY CLASSIFICATION PROCESS (March 2018), http://www.ftse.com/products/downloads/FTSE_Country_Classification_Paper.pdf.

⁹ UNGA Hum. Rts. Council, *supra* note 2, ¶¶ 160–74, 631–76, 651; *see also* UNGA, Hum. Rts. Council, Report of the Special Rapporteur on the Situation of Human Rights in Eritrea, ¶¶ 6–7, A/HRC/35/39 (June 7, 2017).

many Eritreans fled their country of origin because they were subject to forced conscription into national service; a condition described by the UN Human Rights Council as analogous to slavery.¹⁰ However, aware of this situation, the authorities in Asmara have tightened the punishments of defectors who tried to flee the country.¹¹

Most Eritreans base their asylum claim on the fear of disproportionate punishment amounting to persecution for evading life-long military service; the government considers desertion an act of serious disloyalty. However, hundreds of asylum requests filed by Eritreans in Israel have been rejected in the recent past because Israel does not consider national service evaders to be deserving of refugee status.¹² Israeli officials have repeatedly affirmed that a simple fear of disproportionate punishment in Eritrea for avoiding national service does not amount to persecution based on political opinion; an individual must rather demonstrate that the punishment is dispensed for political reasons.¹³

When it signed the Convention Relating to the Status of Refugees, Israel affirmed its position that those who leave their home country because of persecution

¹⁰ See, e.g., UNGA Hum. Rts. Council, *supra* note 2, ¶ 451; see also UNGA Hum. Rts. Council, *supra* note 9, ¶¶ 13–14.

¹¹ See, e.g., EUROPEAN ASYLUM SUPPORT OFFICE, EASO COUNTRY OF ORIGIN INFORMATION REPORT, ERITREA NATIONAL SERVICE AND ILLEGAL EXIT 14 (Nov. 2016), <http://www.refworld.org/docid/585814974.html>. (“It is difficult for Eritreans to leave their country legally. In accordance with Article 11 of Proclamation 24/1992, a valid travel document (passport), a valid exit visa and a valid international health certificate are required in order to leave legally. In addition, individuals must also cross the border at a designated border control point (Article 10). In order to obtain the exit visa, Eritreans must be able to prove that they have completed the national service or that they have been granted an official exemption from it. They must also provide a reason for leaving the country.”); *id.* at 19 (“In accordance with Article 37.1 of the Proclamation on National Service of 1995, any infringement of that proclamation (including desertion) is punishable by two years’ imprisonment and/or a fine of 3 000 Birr. The right is reserved to apply stricter penalties according to the Eritrean Penal Code of 1991. Article 300 of the Penal Code of 1991 stipulates that desertion is punishable by a term of imprisonment of up to five years.”).

¹² Galia Sabar & Elizabeth Tzurkov, *Israel’s Policies Toward Asylum-Seekers: 2002–2014* (IAI Working Papers No. 15, May 2015), <http://www.osce.org/networks/165436?download=true>.

¹³ HUM. RTS. WATCH, “MAKE THEIR LIVES MISERABLE”—ISRAEL’S COERCION OF ERITREAN AND SUDANESE ASYLUM-SEEKERS TO LEAVE ISRAEL 8 (2014), https://www.hrw.org/sites/default/files/reports/israel0914_ForUpload_1.pdf; see also *id.* at 69.

deserve special protection under international law.¹⁴ Israel's Appeals Tribunal rejected the position that the 1951 Geneva Convention cannot apply to Eritrean asylum-seekers, but also rejected the Israeli authorities' argument that such an interpretation would automatically lead to the classification of asylum-seekers as refugees; the ruling held that each case should be assessed on an individual basis, but state practice has yet to fully embody that objective.¹⁵

In this regard, Human Rights Watch ("HRW") contended that Israeli asylum judges should recognize that the Eritrean regime considers desertion an act to which it imputes a political opinion, making it likely that those who desert will be persecuted; the concept of imputed political opinion, familiar to refugee law, therefore, should apply to this case.¹⁶ This assertion has been recently made in a couple of cases in Israeli lower courts (Appeals Tribunals), but the District Court which heard the appeal returned the case back to the Appeals Tribunal for further clarification.¹⁷

¹⁴ Convention Relating to the Status of Refugees, art. 4, Jul. 28, 1951, 189 U.N.T.S. 137.

¹⁵ Ilan Lior, *Landmark Ruling Gives New Hope to Eritrean Asylum-Seekers in Israel*, HAARETZ (Sep. 5, 2016), <http://www.haaretz.com/israel-news/.premium-1.740249>; see also AdminA 1010/14 Masegano Avraham v. Ministry of Interior, ¶¶ 151, 157 (2016) (Isr.) (summary on file with Author) ("I accept the approach of the appellant's counsel, supported by the opinion of UNHCR, that each asylum claim must be examined from a personal and individual perspective without regard to the possible widespread implications" . . . "Given the small numbers of asylum-seekers, and specifically Eritrean asylum-seekers, entering Israel in the past few years, there is no practical reason not to individually examine each asylum claim through full RSD. My opinion is that, in doing so, no weight at all should be given to the potential widespread implication of granting refugee status in light of the large number of similar asylum claims pending with the immigration authorities.") In this regard, I note that the Israeli claim does not only refer to the number of asylum-seekers in Israel at the moment but also that positive decisions will serve as a pull-factor for others to try and enter Israel irregularly.

¹⁶ HUM. RTS. WATCH, *supra* note 13, at 71. For an explanation of the concept of "imputed political opinion," see *Navas v. INS*, 217 F.3d 646, 659 (9th Cir. 2000) ("An applicant can also establish persecution on account of imputed political opinion - that is, on account of a political opinion attributed to him by his persecutors. To establish imputed political opinion, 'an applicant must show that his persecutors actually imputed a political opinion to him.' This can be done, as we noted earlier, by a showing of the relevant circumstances; accordingly, we have found persecution to be on account of imputed political opinion where the applicant is a member of a politically active family, other members of which have been persecuted in the past for their political beliefs, or where the persecutors' conduct or statements show that they are imputing a particular opinion to their victim.") (internal citations removed).

¹⁷ *Avraham* ¶ 162 ("Note, in accordance with this judgment, the basis for the well-founded fear means that the appellant has grounds for being recognized as a refugee due to being persecuted on

In a case decided in February 2018, Judge E. Azar clearly states: “It has been proven to me to the necessary level and beyond that the Appellant was severely and disproportionately punished for desertion of military service. This punishment should be viewed as persecution according to the definition of this term in the Refugee Convention.”¹⁸ However, “[t]he judgment should not be regarded as an *a priori* assertion that anyone who claims that he is a deserter or evader of military or national service in Eritrea is entitled to refugee status and, as Respondent’s counsel said, ‘not everything is black or white.’”¹⁹

Judge E. Azar also clearly states:

The Appellant does not have to prove that he personally, individually and specifically, will be persecuted on the basis of an imputed political outlook, and this demand constitutes an exception to the level of proof required by the Refugee Convention. There is considerable evidence that the extreme punishment imposed on Eritreans is due to political considerations and in any case it is not claimed that this is a regular criminal enforcement . . .²⁰ [E]ven if the fact that he [the Appellant] came to Israel was, in the eyes of the Appellant, because of the possibility that he could earn a living in Israel, it is clear that this economic interest does not negate the existence of a well-founded fear of persecution in his country. . . . The fact that an asylum-seeker has found his way to a developed country, and only there he has applied for asylum, does not necessarily indicate that he has no real and established grounds for asylum.²¹

Citing Wilen, in 2011 Paz stated that in the last years Israel has used the asylum-migration nexus to provide a dimension of security to what Wilen defines as “the epistemological and classificatory confusion.” This means that Israeli authorities

the basis of his imputed political opinion.”). In this regard, see also District Court, *PIBA v. Anonymous*, no date available, summary of the judgement, which states ‘The Judge states that the crux of the disagreement between the parties concerns the interpretation of the Convention and the required burden of proof (or ‘strength of evidence’) on the asylum-seeker in order to indicate a nexus between the ground of persecution and an imputed political opinion.’ Both documents are on file with author.

¹⁸ Appeal Tribunal in Jerusalem, Appeal (Jerusalem) 1010–14, February 15, 2018, ¶ 63 (on file with author).

¹⁹ *Id.* ¶ 67.

²⁰ *Id.* ¶ 22.

²¹ *Id.* ¶ 56.

have simply refused to label the people arriving from East Africa as “asylum-seekers” deeming them “infiltrators,”²² and, as such, a threat to local population employment.²³ Natan proposes a clear distinction between “infiltrators” and “asylum-seekers,” viewing them as different categories of individuals.²⁴

Israeli authorities have responded to the phenomenon of the entrance of Eastern African asylum-seekers by erecting a fence on the southern border of the state and by creating normative obstacles through legislative amendments.²⁵ On January 2, 2013 through Government Resolution No. 2507 of 28 November 2010, Israel finalized the erection of a 230-kilometer long security fence alongside the frontier with Egypt.²⁶ According to Israeli officials, the fence should stop illegal migration to Israel and has the additional purpose of blocking terrorists,²⁷ although in the 2013 *Adam* case it was stated that in the case of Eritreans:

²² Law for the Prevention of Infiltration, 5714–1954, § 1, <http://www.refworld.org/pdfid/55116dca4.pdf>, as amended (Isr.) (“‘Infiltrator’—a person who is not a resident according to section 1 of the Population Registrar Law, 1965, who entered Israel not by way of a border crossing determined by the Ministry of Interior according to section 7 of the Law of Entry into Israel.”) (unofficial translation).

²³ Yonathan Paz, *Ordered Disorder: African Asylum-Seekers in Israel and Discursive Challenges to an Emerging Refugee Regime* 8–9 (UNHCR, New Issues in Refugee Research, Paper No. 205 March 2011), <http://www.refworld.org/docid/4d7e19ab2.html>.

²⁴ GILAD NATAN, KNESSET RESEARCH & INFO. CTR., NATIONAL PROGRAMME TO MEET THE PROBLEM OF INFILTRATORS AND ASYLUM-SEEKERS ENTERING ISRAEL ACROSS THE EGYPTIAN BORDER (2011), <https://www.knesset.gov.il/mmm/data/pdf/me02765.pdf>.

²⁵ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, pt. I (2014) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184>; see also *id.* ¶ 28 (U. Vogelmann, J.) (“Since 2007, Israel has the phenomenon of infiltration bulk of nationals of African countries - most of them nationals of Eritrea . . . - enter its territory illegally, often crossing the not controlled Israel-Egypt border . . .”).

²⁶ Gov’t Res. No. 2507, Stopping Illegal Infiltration into Israel (Nov. 28, 2010) (Isr.), <https://www.scribd.com/document/76141903/Dec-2011-Israeli-Government-Decision-on-Infiltrators-Unofficial-English-Translation> (unofficial translation by Physicians for Human Rights—Israel).

²⁷ *Israel-Egypt Barrier*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/israel/fence-israel-egypt.htm> (last visited Aug. 28, 2017); see also Avi Perry, *Solving Israel’s African Refugee Crisis*, 51 VA. J. INT’L L. 173 (2010).

[W]e must recall that we are not facing terrorists who come to attack the residents of the State of Israel, but an unfortunate population that comes to us from a region that has suffered at the hands of fate and of man, a population that in Israel, too, lives a life of distress and poverty.²⁸

Comparative data indicate that world acceptance rates for asylum applications filed by Eritreans in the last ten years is higher than the percentage in Israel.²⁹ In 2014 and 2015, for instance, it has been noted that Israel's acceptance rate for Eritrean asylum-seekers has been close to zero³⁰ while in the European Union ninety-one percent of Eritreans have received refugee status or another form of protection during the fourth quarter of 2014; and eighty-nine percent, eighty-two percent, and eighty-six percent during the first three quarters of 2015, respectively.³¹

However, until 2013, according to Hotline for Refugees and Migrants, the Israel's principal non-governmental organization protecting the rights of refugees, Eritreans were not allowed to submit asylum applications. Only in that year Israeli authorities started to assess the asylum applications filed by Eritreans through the Refugee Status Determination ("RSD") procedure, but exclusively by those who were detained.³²

Yet, since the same year, the number of Eritreans entering Israel has dropped radically, to the point that in the first months of 2013 less than ten Eritreans per

²⁸ HCJ 7146/12 Adam v. The Knesset ¶ 120 (2013) (Arbel, J.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4>.

²⁹ UNHCR, CURRENT PROTECTION ENVIRONMENT FOR ASYLUM-SEEKERS IN ISRAEL: ISSUES OF CONCERN 13 (2016) (on file with author) ("[T]he recognition rate for Eritrean . . . asylum-seekers in the RSD procedure is among the lowest in the world (less than 1%)."

³⁰ See Ryan Brown, *Eritrean Refugees in Israel Sent to Uganda and Rwanda*, AL JAZEERA (Nov. 24, 2016), <http://www.aljazeera.com/indepth/features/2016/10/eritrean-refugees-israel-uganda-rwanda-161024130201856.html> ("Between 2009 and 2016, Israel granted official refugee status to 0.07 percent of all its Sudanese and Eritrean asylum-seekers - a total of four people.").

³¹ UNHCR, *supra* note 29, at 10 n.3.

³² *No Safe Haven: Israeli asylum policy as applied to Eritrean and Sudanese citizens*, HOTLINE FOR REFUGEES & MIGRANTS (Dec. 6, 2014), <http://hotline.org.il/wp-content/uploads/No-Safe-Haven.pdf>; see also UNHCR, *supra* note 29, at 16–17 ("In 2009, in response to an appeal by the Hotline for Migrant Workers (now the Hotline for Refugees and Migrants) demanding that . . . Eritrean nationals be allowed to submit applications for asylum, the Director of the RSD Unit responded: 'At this stage, the RSD Unit does not handle foreign subjects whose citizenship is Eritrean . . . , I would like to note that these subjects are nonetheless entitled to temporary protection.' Similar responses were received over the years regarding individual cases in which the unit was asked to allow Eritrean and Sudanese nationals to submit applications for asylum.")

month entered Israel. In this regard, Justice A. Grunis observed:

Is it the physical barrier that has caused the change, the change in the legal situation, or perhaps both these factors together? It seems to me that we must admit that we do not have a clear answer to the question as whether the fence, the law, or perhaps a combination of the two has caused the change.³³

II. (SUCCESSFUL) ATTEMPTS TO REMOVE UNDESIRE ERETR EANS?

That Eritrean asylum-seekers are not welcomed in Israel can be already evinced by the actions of the Ministry of Interior (“MoI”) who, through three letters written in 2009, 2010, and 2011 and addressed to Israeli lawyers, declared his disinclination to accept the asylum claims made by Eritreans because they were already taking advantage of a temporary policy of non-deportation put in place by the Government in Tel Aviv.³⁴

This is the situation despite the Supreme Court of Israel having described the living conditions in Eritrea in 2014 as follows:

With the establishment of the country democratic elections were held in Eritrea—the units which still exists in the country to date—where the President was elected, who is still serving as the same Head of State, Prime Minister and Supreme Commander of the Army. Only representatives of one party serve in Eritrea’s National Assembly, and any political organization which is not within the framework of this party or any other organization that criticizes this party is forbidden. According to recent reports, the Eritrean government violates human rights in a systematic and large-scale way³⁵

Israel, although aware of the life conditions in Eritrea but, at the same time, not available in accepting the burden of all the Eritreans in the country, during the first half of 2014 concluded several bilateral agreements with third African countries to send the Eritreans there. According to the local Government such agreements were designed to allow a “safe exit” to “infiltrators” residing in Israel.³⁶ The same agreements have been defined by UNHCR as agreements of “burden-shifting.”³⁷

According to the response given by officials in Tel Aviv these arrangements

³³ *Adam*, ¶ 2 (A. Grunis, J.).

³⁴ HUM RTS. WATCH, *supra* note 13, at 5.

³⁵ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 31 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184>.

³⁶ *Id.* ¶ 39.

³⁷ UNHCR, *supra* note 1, at 2.

represented the fruit of continuous contacts and the good relations that Israel entertains with Ethiopia,³⁸ Rwanda³⁹ and Uganda,⁴⁰ with rumors that, in return, at least Uganda could obtain cheaper weapons from Israel.⁴¹ However, as also Justice M. Naor noted in 2017, these agreements were secret and this aspect could create a sense of embarrassment in the Israeli authorities. But then, notwithstanding the secret character of the agreements, Justice M. Naor added that “secrecy in itself does not negate the legality of removal by virtue of the agreement, provided that it does indeed include all the required guarantees and enshrines the rights and status to be granted to those removed.”⁴²

In this regard, Israeli authorities have shown their appreciation for the 2010 UNHCR note in which the UN agency undertook a commitment to make every effort to find a suitable resettlement of asylum-seekers in Israel, at least until a final

³⁸ *But see* HUM RTS. WATCH, *supra* note 13, at 49. The protection of refugees in Ethiopia is regulated by Proc. No. 409/2004, Refugee Proclamation (July 19, 2004) (Eth.), <http://www.refworld.org/docid/44e04ed14.html>.

³⁹ HUM RTS. WATCH, *supra* note 13, at 48. The protection of refugees in Rwanda is now regulated by Itegeko Ryerekeye Impunzi [Law Relating to Refugees] of May 21, 2014, [Official Gazette of Rwanda], June 30, 2104, No. 26, <http://www.refworld.org/docid/53fb08cd4.html>.

⁴⁰ Illan Lior, *Israel Secretly Flying Asylum-Seekers to Uganda. \$3,500 Inducement, Pressure to Leave, Harsh Conditions Are Spurring Detainees to Go, Says One*, HAARETZ (Feb. 19, 2014) <http://www.haaretz.com/news/israel/1.575028>. About the situation of asylum-seekers in Uganda, see REPORTERS WITHOUT BORDERS, HOPE ON HOLD: AFRICAN ASYLUM-SEEKERS IN ISRAEL 3 (Oct. 23, 2013), <http://www.refworld.org/docid/5268d0fd4.html>. The protection of refugees in Uganda is regulated by Refugee Act 2006, Act 21 of 2006 (Uga.), and by Refugees Regulations 2010, S.I. 2010 No. 9 (Uga.). *See also* Andrew Green, *Inside Israel's Secret Program to Get Rid of African Refugees*, FOREIGN POL'Y (June 27, 2017), https://foreignpolicy.com/2017/06/27/inside-israels-secret-program-to-get-rid-of-african_refugees_uganda_rwanda/ (“Officials across several relevant ministries in Israel, Rwanda, and Uganda all issued denials or refused repeated requests for comment. But the nearly identical experiences of asylum-seekers arriving in Rwanda and Uganda, as well as their ability to bypass standard immigration channels and occasionally procure official documents from their handlers, suggests a level of government knowledge, if not direct involvement, in all three capitals.”).

⁴¹ Joseph Cox, *Uganda Are Taking Israel's Unwanted Asylum-Seekers to Get Cheaper Weapons*, VICE (Sept. 2, 2013), https://www.vice.com/en_uk/article/uganda-is-the-first-country-to-swap-african-refugees-for-israeli-weapons; *see also* Joseph Cox, *Israel Are Getting Rid of Their African Migrants by Including Them in Arms Deals*, VICE (Aug. 5, 2013), https://www.vice.com/en_uk/article/israel-is-giving-weapons-to-countries-that-will-accept-african-refugees.

⁴² AdminA 8101/15 Zegete v Minister of the Interior, 2 (2017) (summary provided by the High Court of Justice (Forced Relocation)) (on file with author).

political solution to problems in the Near East would have been found.⁴³ In this manner the resettlement of Eritreans was practiced, it would appear, more in their interest rather than in the interest of Israel. In any case, in 2018, UNHCR has established the Israel total projected resettlement need for Eritreans at 20,500 individual to be relocated elsewhere.⁴⁴

By way of contrast, asylum-seekers who freely left Israel in these same years indicate that their choice was dictated mainly by the desire to avoid protracted detention in prison,⁴⁵—the “Hadera-Gedera policy” dating back to 2008⁴⁶—and subsequent to pressure exercised by the Israeli MoI to urge them to leave.⁴⁷ They also added that they were being threatened by the Israeli government with deportation to “unsafe countries.”⁴⁸ In March 2015 Israel began to deport Eritrean nationals to countries in Africa—even without their consent—at the initiative of the Israel Population and Immigration Authority (“PIA”), a branch of the MoI.⁴⁹ In June 2015 Israeli authorities sent letters to Eritreans giving them thirty days to agree to take \$3500 and to be removed to an African country.⁵⁰

⁴³ STATE OF ISRAEL, MINISTRY OF INTERIOR, PROCEDURE FOR HANDLING POLITICAL ASYLUM-SEEKERS IN ISRAEL ¶¶ 10, 12 (Jan. 2, 2011). In addition, UNHCR resettles vulnerable persons of concern including from Eritrea as a general exercise of its mandate and not in connection to paragraph 10 of the 2011 procedure. UNHCR manages to resettle a very small number each year (100 to 200 people) (information on file with author).

⁴⁴ UNHCR, PROJECTED GLOBAL RESETTLEMENT NEEDS (2019), at 66 (2018), <http://www.unhcr.org/5b28a7df4.pdf>.

⁴⁵ Karin Fathimath Afeef, *A Promised Land for Refugees? Asylum and Migration to Israel*, 11–12 (UNHCR, New Issues in Refugee Research, Paper No. 183 Dec. 2009).

⁴⁶ *Id.* at 13 (“Israeli authorities insisted that, in order to be released from detention, asylum-seekers would have to sign a document that would disqualify them from living and working central Israel, which is also the commercial and urban heartland of the country and includes Tel Aviv and . . . was defined as south of Hadera and north of Gedera.”). However, Eli Yishai, the Minister of the Interior, cancelled the policy in July 2009 because of public and media pressure. *Id.*

⁴⁷ “Voluntary” Departure, HOTLINE FOR REFUGEES & MIGRANTS, <http://hotline.org.il/en/refugees-and-asylum-seekers-en/voluntary-departure/> (last visited Aug. 2, 2018).

⁴⁸ *Israel Hands Out Deportation Notices to Asylum-Seekers*, AL JAZEERA (Apr. 16, 2015), <http://www.aljazeera.com/news/2015/04/israel-asylum-seekers-deportation-150416140125742.html>.

⁴⁹ Illan Lior, *Israel Will Deport Eritrean, Sudanese Refugees to Africa Under New Policy*, HAARETZ (Mar. 31, 2015), <http://www.haaretz.com/israel-news/.premium-1.649688>.

⁵⁰ Santorri Chamley, *No Refuge: The Plight of Africans in Israel*, NEW AFRICAN (June 24, 2015), [<https://web.archive.org/web/20150630104422/http://newafricanmagazine.com/no-refuge-the-plight-of-africans-in-israel/>]. In this regard, see also, AdminC (BS), 5126-07-15, *A.G.Tz. et al v. The*

On the other hand, on November 8, 2015, Justice R. Barkai rejected a petition by several human rights organizations, concluding that there was no substantial basis to affirm that those who leave for a third country are under additional fear, threat or persecution:

The Petitioners have not upheld the burden of proof that these “Third Countries” are countries that endanger the well-being, freedom or safety of people who go there. The cases and testimonies brought before me do not reflect an objective situation of exposing abuse or persecution on the part of those countries. From an evidentiary basis, it can be concluded at a high level, that the testimonies of these witnesses come from people who voluntary choose not to accept status in a third country, and who at their own volition crossed the border into another country.⁵¹

Eritreans also reported that they left Israel because they were dispossessed of any legal status in the country and were therefore obliged to renew their temporary permits frequently. Eritreans further reported humiliating treatment by local authorities, who prevented them from enjoying their guaranteed rights and not providing any stability whatsoever.⁵² As of 2015, a number of more than 3000 asylum-seekers from Eritrea (and Sudan) had departed from Israel for Ethiopia, Rwanda and Uganda.⁵³

The agreements with these countries have not been advertised publically so that they practically remain unchallengeable⁵⁴: asylum-seekers have no alternative than trusting Israeli promises to receive the essential protection they need once at their destination. Yet, history has shown that the right of Eritreans to apply for asylum once they arrive in their African country of destination has been limited.⁵⁵ This situation occurred in spite of the fact that these countries of destination are all parties to both the 1951 Geneva Convention and to the 1969 OAU Convention Governing

State of Israel: The Ministry of the Interior et al. ¶ 23 (Nov. 8, 2015) (Isr.), <http://hotline.org.il/legal-action/2ndsaharonimrwanda/>.

⁵¹ *A.G.Tz* ¶ 25.

⁵² INTERNATIONAL REFUGEE RIGHTS INITIATIVE, “I WAS LEFT WITH NOTHING”: “VOLUNTARY” DEPARTURES OF ASYLUM-SEEKERS FROM ISRAEL TO RWANDA AND UGANDA, 2 (2015), <http://www.refworld.org/docid/55ee8c3a4.html>.

⁵³ Brown, *supra* note 30.

⁵⁴ Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 537–38 (1991).

⁵⁵ INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 48, at 227; *see also* HOTLINE FOR REFUGEES & MIGRANTS, DEPORTED TO UNKNOWN, 23–24 (2015), <http://hotline.org.il/wp-content/uploads/2015/12/Deported-To-The-Unkown.pdf>.

the Specific Aspects of Refugee Problems in Africa (“1969 OAU Convention”),⁵⁶ whose Article 2(1) (“Asylum”) stipulates: “Member States of the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”

Israel’s Attorney General approved these relocation agreements after having required the Foreign Ministry and the Government’s Special Representative on the repatriation of “infiltrators” to verify that the host countries fulfill six conditions: **1)** no presence of wars or general riots; **2)** the UNHCR’s current policy position does not state that removals to these states should not be carried out; **3)** no danger to the life or freedom of the “infiltrator” on the basis of his/her nationality, political opinion, race, religion, or belonging to a particular social group within the territory of those countries;⁵⁷ **4)** respect for the principle of *non-refoulement*—enunciated in Article 33 of the 1951 Geneva Convention⁵⁸—by those states, meaning no expulsion of Eritreans to another state where his/her life or liberty would be in danger.

Finally, **5)** in the countries of destination there should be in force a ban on torture and inhumane and degrading treatment, allowing ‘infiltrators’ to live in dignity and allowing them to access to RSD procedure, or a protection status or guarantee of *non-refoulement*; and **6)** these states undertake to allow “the infiltrator” to live in dignity, make a living and stay in the country.⁵⁹

The principle of *non-refoulement* includes a ban on indirect rejection, intending expulsion to a county that may, in its turn, deport the asylum-seeker to another

⁵⁶ OAU Convention Governing the Special Aspects of Refugee Problems in Africa art. I, Sept. 10, 1969, 1001 U.N.T.S. 45.

⁵⁷ These are the five grounds of persecution enunciated in Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

⁵⁸ *Id.* art. 33 (“1. 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. 2. The benefit of the present provision 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.”).

⁵⁹ INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 48, at 8.

country where his/her life or freedom will be in jeopardy.⁶⁰ In this regard, the State of Israel still adopts a policy of “temporary non-removal” of Eritreans from Israel, this measure having been considered consistent with the principle of *non-refoulement* by the High Court of Justice.⁶¹

However, on August 14, 2018, Judge M. Feshititsky at the Jerusalem Special Appeals Court recommended that the Israeli authorities end the non-removal policy for Eritreans, noting that Israel should return Eritreans because of the “great suffering caused to Israeli residents living in proximity to the infiltrators in the city streets, the helplessness of the legal system at putting them on criminal trial, and the failure of solutions tried so far.” The judge justified his recommendation citing the recent peace agreement between Eritrea and Ethiopia,⁶² although Israeli Officials have shown a lot of prudence on how this agreement will affect Eritreans in Israel,⁶³ and the intention to shorten the compulsory military service duration in Eritrea to eighteen months.⁶⁴

Yet, Judge M. Feshititsky noted that if his recommendation were not accepted and the Government of Israel would not return Eritreans, at that moment the Government should grant Eritreans permanent status in Israel, not keeping them in an

⁶⁰ Letter from the Yehuda Weinstein, Attorney General to Gideon Sa’ar Minister of Interior, 2–3 (No. 2013-0004-5129 June 27, 2013) (Isr.) (unofficial translation by UNHCR), <http://www.refworld.org/docid/5511388d4.html>.

⁶¹ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 2 (2014) (E. Arbel, J.) (Isr.), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184>; *see also* HCJ 8665/14 Tashuma v. The Knesset ¶ 5 (2015) (M. Naor, J.) (“Conversely, due to the state in Eritrea and with respect to its nationals, the State is adopting a ‘temporary non-deportation’ policy. This is in accordance with the customary principle of international law whereby a person shall not be deported to a place where there is an inherent danger to his life or liberty (the *non-refoulement* principle; also see, *inter alia*, section 33 of the Refugee Convention).”).

⁶² *See, e.g.*, T.G., *How Ethiopia and Eritrea Made Peace*, ECONOMIST (July 17, 2018) <https://www.economist.com/the-economist-explains/2018/07/17/how-ethiopia-and-eritrea-made-peace>.

⁶³ L. Yaron, *Too Soon to Say if Eritrean Asylum Seekers Can Be Sent Back Home, Say Israeli Officials*, HAARETZ (July 25, 2018), <https://www.haaretz.com/israel-news/.premium-too-soon-to-say-if-eritreans-can-be-sent-back-home-says-israel-1.6314161>.

⁶⁴ *See, e.g.*, A. Maasho, *Eritrean Conscripts Told Unlimited National Service Will End*, REUTERS (July 23, 2018), <https://www.reuters.com/article/us-eritrea-military/eritrea-conscripts-told-unlimited-national-service-will-end-sources-idUSKBN1KD1ZD>.

indeterminate limbo state.⁶⁵

Furthermore, as established by paragraph 11 of the 2013 Procedures for the Departure of Eritreans from Israel: “In any stage of the interview [scheduled when an Eritrean ‘infiltrator’ under detention wishes to leave Israel], the Applicant may withdraw his request to depart from Israel and to end the interview or ask to continue it at a different time.”⁶⁶

Nonetheless, it is not clear to what degree the transfers of Eritreans from Israel to Ethiopia, Rwanda and Uganda completely satisfy the requirements to legally enter into these countries. The lack of transparency during the process precludes an unequivocal response to this question, but the International Refugee Rights Initiative (“IRRI”) notes that the transfer of asylum-seekers from Israel to Ethiopia, Rwanda and Uganda, leaving them in the respective countries of destination with no legal status, can be equivalent to the smuggling of migrants.⁶⁷ However, in this regard, Justice M. Naor in the 2017 case (concerning the relocation policy of “infiltrators”) *Sagitta et al. v. The Minister of Interior* speaking about the possible relocation of Eritreans to a fourth country affirmed that, not only the deportation to Rwanda or Uganda cannot represent a “smuggling” but also that the appellants “failed to show that in practice their smuggling to the fourth country was forced or that they agreed to it for ‘lack of choice’” (between staying in the third country without legal status, or being illegally smuggled to the fourth country).⁶⁸ Justice M. Naor continued in affirming that “the claim that the deportees agreed to them being smuggled since they were told that they would not receive legal status in the third

⁶⁵ Summary of the decision of adjudicator Menahem Pazsitzky (unofficial translation): on file with author. See also Y.J. Bob, *Lower Court: Eritrean Asylum Seekers Can Be Deported to Country of Origin*, JERUSALEM POST (Aug. 15, 2018) <https://www.jpost.com/Israel-News/Lower-court-Eritrean-asylum-seekers-can-be-deported-to-country-of-origin-564916> (“The judge wrote that PIBA’s decision was reasonable when it did not accept a specific Eritrean – and many similar cases – as a refugee, based on a legal opinion that “refugee requests based solely on desertion or avoiding serving in the Eritrean army do not constitute political persecution”, and they would need to prove political persecution to be considered refugees.”)

⁶⁶ Weinstein, *supra* note 60, at 2.

⁶⁷ INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 52, at 28–29; see also HOTLINE FOR REFUGEES & MIGRANTS, *supra* note 55, at 11 (“Eight Eritrean citizens testified to being held captive in Kigali and forbidden to leave the place where they were being held, until they were smuggled to Uganda.”).

⁶⁸ AdminA 8101/15 *Sagitta v. The Minister of Interior* ¶ 60 (2017) (Isr.) (M. Naor, J.) (on file with author).

country has little support in the evidentiary foundation presented by the Appellants. Thus, a review of the affidavits they submitted reveals that only one of the eight affidavits noted that he was told that he would not receive legal status in the third country.”⁶⁹

In February 2013, the UNHCR office in Tel Aviv contended that an agreement with Eritrean asylum-seekers to return home (for those who were sent back to Eritrea) could not be considered as “voluntary”⁷⁰ having them as a sole alternative the detention in Israel.⁷¹ In effect, as the Israeli High Court of Justice affirmed in 2014:

Thus, leaving the country may be deemed compulsory deportation (and not “voluntary: return) not only in situations where the State officially instructs upon the deportation of an individual, but also when the State adopts severe and particular offensive measures designated to exert pressure that will lead to the “voluntary” return from the country.⁷²

In August 2015, the UNHCR explained that the situation of Eritreans in Rwanda could not be viewed as favorable because the national RSD Committee, in charge of assessing the relative applications had not yet been established in Kigali, with Rwandan authorities that had not put in place any alternative temporary protection policy for Eritreans.⁷³

⁶⁹ *Id.* ¶ 61.

⁷⁰ Basic Law: Human Dignity and Liberty, 5752–1992, § 6, https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (Isr.). (“(a) All persons are free to leave Israel. (b) Every Israel national has the right of entry into Israel from abroad.”).

⁷¹ HUM RTS. WATCH, *supra* note 13, at 5. *See also* HOTLINE FOR REFUGEES AND MIGRANTS, RWANDA OR SAHARONIM 7 (2015) (“In the last two years the Israeli MOI has used various methods to coerce Africans to leave Israel and return to their homelands or to third countries. The systematic pressure used includes: Imprisonment in Saharonim prison; Detention at the Holot facility; Withholding of legal status; Withholding of work permits; Requirement to frequently renew the permits and conditioning the renewal in obtaining documents such as salary slips and apartment rent contracts that many asylum-seekers cannot obtain; Spreading information about agreements with third countries that agree to accept asylum-seekers from Israel . . .”). *See also* the personal stories, told by Eritreans, in HOTLINE FOR REFUGEES AND MIGRANTS, FORGOTTEN IN PRISON: THE PROLONGED DETENTION OF MIGRANTS (2016).

⁷² HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 110 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/txis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>; *see also id.*, ¶¶ 112.

⁷³ INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 52, at 16; *see* Itegeko Ryerekeye Impunzi [Law Relating To Refugees] of May 21, 2014, arts. 3–6, [Official Gazette of Rwanda], June 30, 2104, No. 26, <http://www.refworld.org/docid/53fb08cd4.html>; *id.* art. 4.

However, in the ruling (delivered on August 28, 2017) of the 2015 Administrative Appeal *Zegete v. Minister of Interior*, it was unanimously decided by the High Court of Justice that there was no reason to prevent the removal of “infiltrators” to a third country, the court holding that there was no proof that the third country—Rwanda, in this case—was unsafe. In addition, it was held that all the procedural conditions to remove the “infiltrators” were satisfied. Finally, it was also found satisfactory the mechanism put in place by the competent Israeli authorities to monitor the treatment of those removes in the third country.⁷⁴

According to Justice M. Naor, the drafter of the main opinion in this case, the option of removal to third countries was offered only to “infiltrators” not having applied for asylum or whose asylum application was rejected. According to the Israeli approach, Eritreans refusing to be removed were not cooperating with removal and, as a consequence, they could have been placed in custody in line with Section 13 (“Deportation”) of the 1952 Entry into Israel Law.⁷⁵

As I mentioned above, the attitude of the Israeli Government towards Eritreans was equated by the IRRI as a “smuggling of migrants,” whose definition is found in the 2000 UN Protocol against the Smuggling of Migrants by Land, Sea and Air,⁷⁶ where Article 3(a) (“Use of Terms”) defines the expression “smuggling of migrants” as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the

⁷⁴ AdminA 8101/15 *Zegete v Minister of the Interior*, 1 (2017) (summary provided by the High Court of Justice (Forced Relocation)) (on file with author).

⁷⁵ Entry into Israel Law (also known as “Nationality Law”), 5712–1952, 6 L.S.I. 50 (Isr.). In detail, Section 13 (“Deportation”) stipulates as follows: “a) In respect of a person other than an Israel national or an *oleh* under the Law of the Return, 5710-1950, the Minister of the Interior may issue an order of deportation if such person is in Israel without a permit of residence; b) A person in respect of whom an order of deportation has been issued shall leave Israel and shall not return so long as the order of deportation has been cancelled; c) Where an order of deportation has been issued in respect of any person a frontier control officer or police officer may arrest him and detain him in such place and manner as the Minister of the Interior may prescribe, until his departure or deportation from Israel; d) The Minister of the Interior may direct that an order of deportation shall be carried out at the expense of the person in respect of whom it has been issued or at the expense of the employer who employed him in Israel without first receiving the permit of the Minister for the said employment or after the expiry of the said permit.” To lodge an appeal at this law, see the following Guidelines for Submission of an Appeal at <http://www.justice.gov.il/En/Units/AppelsTribunal/Pages/AppelsTribunal.aspx>.

⁷⁶ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 Nov. 15, 2000, 2241 U.N.T.S. 507.

person is not a national or a permanent resident.” In effect, to date,⁷⁷ Israel, that has not been an active part in the drafting of the protocol,⁷⁸ has not adopted this protocol, yet, as also Uganda has not (although the country signed the protocol on December 12, 2000). In converse, Ethiopia (since 2012) and, above all, Rwanda (since October 4, 2006: the other country, with Uganda, representing the main destination for Eritreans from Israel) are party to this protocol. The Rwandan government, not only has committed itself in fighting human smuggling at a domestic level⁷⁹ but also as a part of the African Union⁸⁰ and of the East African Community (“EAC”).⁸¹ It is true, however, that as these governments do not receive the Eritreans for a mere act of generosity, their attitude could seem in violation of Article 3 of the 2000 UN Protocol against the Smuggling of Migrants by Land Sea and Air.⁸²

Yet, since July 23, 2008, Israel has ratified the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,⁸³ and the Knesset Research and Information Centre (“KRIC”) has undertaken a study in 2009 affirming that the Israeli

⁷⁷ October 30, 2017.

⁷⁸ See UNITED NATIONS, TRAVAUX PREPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO (2006), https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf.

⁷⁹ See, e.g., *Interpol Stop Operation Targets People Smuggling Networks in Rwanda*, INTERPOL, (June 10, 2013), <https://www.interpol.int/News-and-media/News/2013/N20130610>.

⁸⁰ AU, Exec. Council, *The Migration Policy Framework for Africa*, at ¶ 2.1, EX.CL/276 (IX) (2006) (“Recommended Strategies: ‘Strengthen national policy, structures and laws to establish co-ordinated and integrated approaches at national level through, among others, incorporating the United Nations Convention Against Trans-national Organized Crime and its two additional Protocols (2000) . . . ; Develop common regional countermeasures, that incorporate considerations to encourage more legal channels and orderly migration, dismantle international organized criminal syndicates, prosecute smugglers and others involved in such activities while, at the same time providing humane treatment for migrants; Encourage regional consultative processes and dialogue on irregular migration to promote greater policy coherence at the national, Sub-regional and regional levels; Reinforce and encourage joint cross-border patrols between neighboring States; Adopt comprehensive information collation systems on smuggling to facilitate the tracking and dissemination of information on the trends, patterns and changing nature of smuggling routes as well as the establishment of databases on convicted smugglers.”).

⁸¹ *Overview of Migration Management*, E. AFR. CMTY., <https://www.eac.int/immigration/migration-management>. Rwanda has been part of the EAC since 2007.

⁸² 2241 U.N.T.S. 507

⁸³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art.

policy towards asylum-seekers and “infiltrators” had no intention to really face the problem of the status of Eritreans, avoiding to conceive a policy on the matter having a long-term view.⁸⁴

In the 2016 UNGA Declaration for Refugees and Migrants, the UN encouraged the ratification of the protocol against the smuggling of migrants.⁸⁵ Several months afterwards, on the occasion of a debate at the General Assembly, Mr. I. Amer, Israeli Representative at the United Nations, declared that “Israel, a State founded by refugees, had been doing its part for those in need.”⁸⁶

In any event, as affirmed by Justice M. Naor in August 2017: the authority of the Minister of Interior to deport Eritrean applies to their relocation to third countries. As a rule, Eritreans’ accord to the deportation is not mandatory for the deportation to be legal: they can be deported also against their will.⁸⁷ Concerning the relocation, several conditions need to be respected, among them: a legal agreement on relocation to the third country must be binding fixing the obligations of the third country to accept who is relocated to its territory and to grant him/her effective protection. In addition, nothing prevents the relocation of the Eritreans by virtue of a confidential agreement whose text is not published or even by virtue an oral agreement. Finally, nothing prevents an agreement of relocation from not openly protecting the right of the Eritreans to enforce the obligations included in it by legal means, on condition that the Eritreans previously know their rights and are granted assistance in case of a violation of their rights, including access to the judicial system in the third country.⁸⁸ For what concerned the holding in custody of the aliens in the

3(a), Nov. 15, 2000, 2237 U.N.T.S. 319. Article 3(a) (“Use of terms”) of the Protocol defines “trafficking in persons” as the “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

⁸⁴ GILAD NATAN, THE KNESSET: THE RESEARCH AND INFORMATION CENTER, MIGRANT WORKERS AND VICTIMS OF HUMAN TRAFFICKING: THE GOVERNMENT’S POLICY AND ACTIVITY OF THE IMMIGRATION AUTHORITY 7 (2009), <http://www.knesset.gov.il/mmm/data/pdf/me02294.pdf>.

⁸⁵ G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶ 34 (Oct. 3, 2016).

⁸⁶ Press Release, United Nations, Top UNHCR Official, at General Assembly, Stresses Need to Counter Isolationist Rhetoric Surrounding Refugees in Mediterranean, Reframe Narrative, GA/11903 (Apr. 7, 2017), <https://www.un.org/press/en/2017/ga11903.doc>.

⁸⁷ AdminA 8101/15 Sagitta v. The Minister of Interior ¶ 126 (2017) (Isr.) (M. Naor, J.) (on file with author).

⁸⁸ *Id.*

case of their not cooperation in case of relocation, Justice M. Naor first observed that once a deportation order has been hand out against an “infiltrator,” he/she can be placed in custody for the purpose of ensuring his relocation from Israel. Furthermore, the release of an illegal alien from custody should be considered if one or more of the grounds set for it exists, and in any event, he/she should be free no later than 60 days after his/her entry into custody. However, it is possible to continue to hold an “infiltrator” in custody for a period longer than 60 days if one of the grounds for prolonging the custody is met—namely, lack of cooperation with the deportation or danger to the public order or his/her health conditions. Finally:

[s]ince the consent of an illegal alien is not required for the purpose of his/her deportation, and it does not constitute part of the legal basis for the deportation, objecting to the deportation does not lawfully prevent or delay the deportation. . . . The consent of a person to deportation must be genuine and based on the principle of free choice and the principle of informed consent. . . . The interpretation that a person’s objection to deportation should be regarded as a lack of cooperation cannot coexist with the demand for genuine and free consent If an illegal alien does not consent to his/her deportation, he/she may be held in custody for a period of time not exceeding 60 days. During this time, it is possible to try to persuade him/her using means that do not affect his/her ability to make a free choice or to try to find alternative ways to deport him/her against his will.⁸⁹

III. WHICH OPPORTUNITIES EXIST FOR ERITREAN ASYLUM-SEEKERS IN ISRAEL IN LIGHT OF RECENT DOMESTIC LEGISLATION AND JURISPRUDENCE?

Eritreans claim to be entitled to refugee status given the continuing human rights violations perpetrated in their country of origin.⁹⁰ From July 2009, the Israeli MoI has assumed the major responsibility in registering asylum-seekers and in implementing the process of RSD; previously the UNHCR played the main role in both situations.⁹¹ Nevertheless, in 2009 and 2010 the Israeli RSD unit did not deal with

⁸⁹ *Id.* at 80–81.

⁹⁰ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶¶ 33, 23–24 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/txis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

⁹¹ UNHCR, SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES FOR THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS’ COMPILATION REPORT - UNIVERSAL PERIODIC REVIEW: ISRAEL 2 (2013). *But see id.* at 4 (“[I]t is clear that further efforts are required. The absence of a systematic procedure and the inadequate capacity of the Ministry make it difficult, for example, to promptly and fairly process asylum claims. A significant number of applicants are forced to wait several months or longer to have their claims reviewed.”).

Eritrean asylum-seekers because the temporary protection to which they were entitled was deemed sufficient by Israeli officials.⁹²

As mentioned above, the official position of Israeli authorities is that the majority of Eritrean “infiltrators” are immigrants entering Israel for economic reasons.⁹³

In the 2013 *Adam* case, the Israeli Supreme Court unanimously established that Section 30(A)(c)(3) of 2011 Amendment No. 3 to the 1954 Prevention of Infiltration Law (authorizing the detention of “infiltrators” for three years)⁹⁴ was unconstitutional⁹⁵ because it violated the right to liberty guaranteed by Article 5 of the 1992 Israeli Basic Law: Human Dignity and Liberty,⁹⁶ and, consequently declared invalid, as should the entire Amendment, because it was not possible to detach the article in question from the entire body of norms provided in the Amendment.⁹⁷ The 1952 Law of Entry into Israel, in force until the enactment of the Amendment, replaced it when this was declared null and void.⁹⁸

According to the separate opinion by Justice E. Hayut in the *Adam* case, Amendment No. 3 raised mainly two concerns to rectify. First, it provided no convincing answer to the difficulties created by the influx of thousands of “infiltrators” to Israel: the mere detention of “infiltrators” revealed it to be ineffective. Second,

⁹² YONATAN BERMAN, HOTLINE FOR MIGRANT WORKERS, UNTIL OUR HEARTS ARE COMPLETELY HARDENED: ASYLUM PROCEDURES IN ISRAEL 9, (Shevy Korzen trans., 2012); *see also* *Border Barrier to Keep Asylum-Seekers Out*, IRIN (Nov. 11, 2010), <http://www.irinnews.org/report/91058/israel-border-barrier-keep-asylum-seekers-out> (“[Eritreans] are granted collective ‘temporary protection’—an unstable status without any real rights—that protects them from deportation, and refuses to conduct individual examinations of asylum requests, which would allow it to recognize asylum-seekers as refugees.”).

⁹³ *Eitan*, ¶¶ 6–7.

⁹⁴ Law for the Prevention of Infiltration, 5772-2012, § 30(A)(c), (Isr.) (“The Head of Border Control is authorized to release an infiltrator with guaranty if he is convinced that . . . three years have passed since the beginning of the infiltrator’s detainment in detention.”).

⁹⁵ HCJ 7146/12 *Adam v. The Knesset* ¶ 150 (2013) (Arbel, J.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4> (“With the agreement of all nine justices on the panel, it is established that the period of custody of three years, as stated in the Prevention of Infiltration Law, is unconstitutional since it is contrary to the Basic Law: Human Dignity and Liberty.”).

⁹⁶ Basic Law: Human Dignity and Liberty, 5752–1992, https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (Isr.) (“There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.”).

⁹⁷ *Adam* ¶ 150.

⁹⁸ *Id.*

the amendment violated the constitutional right to liberty of aliens, even if illegally in the country.⁹⁹ UNHCR agreed with this perspective.¹⁰⁰ In effect:

[a person] who has been deprived of his liberty cannot enjoy the diverse choices life offers to the free person, including the choice of a place of work, maintenance of a normal family and social life, consumption of culture and leisure, and so forth. The injury to an individual's liberty is irreversible, and no financial compensation can make amends.¹⁰¹

The constitutional right to human dignity and liberty applies to all persons, both Israeli citizens, as well as to every category of foreigners who enters Israel under any circumstance.¹⁰²

In the *Adam* case it is significant, although reference was made to the 1951 Geneva Convention¹⁰³ as well as to the UNHCR Detention Guidelines¹⁰⁴ that these instruments were merely used as an interpretive basis for Israeli legislation. Israel had ratified the 1951 Geneva Convention on October 1, 1954, and it had also acceded to its 1967 New York Protocol on June 14, 1968.¹⁰⁵

In the *Woldu* case, decided in April 2013, the Israeli Supreme Court overruled a Lower Court's pronouncement and contended that each case of an asylum-seeker demanding relief due to previous torture from which he/she suffered in Sinai¹⁰⁶ was

⁹⁹ *Id.* ¶ 2. As Justice N. Hendel also observed, “[a]ccording to the state’s approach, the amendment to the law is based primarily on two purposes: Firstly—to prevent the infiltrators settling in Israel, and secondly—to block the phenomenon of infiltration.” *Id.* ¶ 2.

¹⁰⁰ UNHCR, *supra* note 91, at 5.

¹⁰¹ *Adam* ¶ 72; *see also id.* ¶ 73.

¹⁰² *Id.* ¶ 113.

¹⁰³ *See id.* at 7, 43, 95, 136.

¹⁰⁴ *See id.* at 64, 74; *see also* UNHCR, GUIDELINES ON THE APPLICABLE CRITERIA & STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION ¶¶ 14, 16, 17 (2012), <http://www.refworld.org/docid/503489533b8.html>.

¹⁰⁵ *See Adam* ¶ 7 (“However, we should note that the Convention has not been absorbed as a law in domestic Israeli law and constitutes only the undertaking of the State of Israel on the international conventional level. This means that the interpretative assumption established in case law, known as the assumption of consistency, applies to this law, stating that there is consistency between the laws of the state and the norms of international law binding on the State of Israel. That is to say, Israeli law is, as far as possible, to be interpreted in a manner consistent with international law.”). For the 1967 New York Protocol, see Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791, 267.

¹⁰⁶ *Sinai Torture Camps*, HOTLINE FOR REFUGEES & MIGRANTS, <http://hotline.org.il/en/refugees-and-asylum-seekers-en/sinai-torture-camps/> (last accessed Aug. 3, 2018) (“In 2009, activists of the Hotline for Refugees and Migrants began encountering female asylum-seekers in the prisons

required to be scrutinized based on its own merit because it is imaginable that imprisoned people surviving torture could have both their mental and physical condition harmed. In view of that understanding, the Supreme Court seized on the fact that these people were victims of torture and could meet a definition of an “exceptional humanitarian case” and, therefore, function as a provision for their discharge under Article 30 A b) 2 of the 1954 the Anti-Infiltration Law.¹⁰⁷

Moreover, in the *Anonymous* case, decided in April 2013, the Beersheba District Judge stated, in the case of pre-adolescent boys and girls, that their age suffices to constitute an “exceptional humanitarian case.” This is truer especially if the pre-teens have been jailed for almost a year and with regard to whom deportation from Israel is not imminent, considering that they are Eritrean and, thus, collectively protected by the Israeli government.¹⁰⁸

But, in the 2014 *Eitan* case, Justice I. Amit highlighted that to enter Israel would not constitute a preeminent “flight from persecution” alternative for Eritreans, because Israel does not border Eritrea. According to Justice I. Amit, Eritreans who decided to move to Israel were pushed more from considerations of economic character than from an effective need to be protected from persecution.¹⁰⁹ Conversely,

for asylum-seekers in Israel who reported being raped by smugglers who held them captive in Sinai. In early 2010, testimonies began arriving of male asylum-seekers being held and tortured in Sinai to extract ransoms from their relatives. Since 2010, the Open Clinic run by the NGO Physicians for Human Rights-Israel began documenting the testimonies of survivors of the torture camps in Sinai. They have collected the testimonies of about 1,000 torture survivors. Most of them are Eritreans, who came to receive medical care at the Clinic.”)

¹⁰⁷ HCJ 1689/13 Siamon Woldu v. Minister of Interior (2013) (Isr.). (unofficial UNHCR summary on file with author). Article 30(A)(b)(2) stipulates, “[t]he Head of Border Control is authorized in exceptional circumstances to release an infiltrator with a monetary guarantee, with a bank guaranty or another suitable guaranty (in this law—guarantee), if he is convinced that there exists one of the following: . . . 2) There are other, special humanitarian grounds from those stated in paragraph i) justifying the release of the infiltrator with a guarantee, including if as a result of his detainment in detention, a minor will be left unaccompanied.”

¹⁰⁸ Ad.P (BS) 44920-03-13 Anonymous v. Minister of Interior, PM (Apr. 18, 2013) (unofficial summary on file with author) (Isr.). For information on the collective protection of Eritreans, see *Refugees and Asylum-Seekers in Israel: Ineffective Protection*, AMNESTY INT’L, (2013), <http://www.amnesty.org.il/?CategoryID=319&ArticleID=347>.

¹⁰⁹ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 8 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/txis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

in the same case, Eritrean petitioners contended that the “infiltrators” in Israel consist largely of asylum-seekers fleeing from countries where they suffer persecution.¹¹⁰

However, accepting as valid the difficulty of the return of Eritreans to their country of origin,¹¹¹ in 2013 the government of Israel adopted Amendment No. 4 to the 1954 Prevention of Infiltration Law. Through this amendment, on one hand the government is required to deal with the phenomenon of infiltration and its consequences and, on the other hand, to provide basic living conditions for “infiltrators,” not specifically only Eritreans, who were already in the country.¹¹² Nevertheless, Amendment No. 4 authorized the detention for one year of any “infiltrator” entering Israel after its enforcement (Section 30(A)(c)).¹¹³ In addition, Amendment No. 4 provided for the establishment of a “residency center” destined for “infiltrators” who could not be removed from Israel.¹¹⁴

As the petitioners stated in the 2014 *Eitan* case, in their opinion: “[T]he dominant purpose of Amendment No. 4 of the Law . . . is to ‘break the spirit’ of the ‘infiltrators,’ so that they consent to ‘voluntarily’ leave Israel to countries where they face imminent danger for their lives and liberty. This purpose, as is claimed, is invalid.”¹¹⁵

¹¹⁰ *Id.* ¶ 6; *see also id.* ¶ 12 (“According to the petitioners, the first petitioner fled Eritrea after it was forced to serve in national service imposed for 16 years . . . Petitioner 2 infiltrated Israel on 26/6/2012. The petition claimed that he fled from Eritrea after refusing to enlist in the regular army there, as an Orthodox priest whose faith prohibits such service.”).

¹¹¹ Berman, *supra* note 92, at 11–12.

¹¹² *Eitan*, ¶ 17.

¹¹³ Law for the Prevention of Infiltration, 5774-2013, SH No. 2419, § 30(A)(c) (Isr.) (“The Head of Border Control shall release an infiltrator with guarantee if one year has passed since the beginning of the infiltrator’s detention.”).

¹¹⁴ *Id.* § 32(B) (“The Minister of Internal Security may declare by order a certain place as a residency center for the purpose of this chapter.”); *see also* Reuven Ziegler, *The Israeli Supreme Court’s Decision on Detention of Asylum-Seekers*, INTEREST GRP. ON MIGRATION & REFUGEE L. (Sept. 29, 2014), <https://migreflaw.wordpress.com/2014/09/29/publication-the-israeli-supreme-courts-decision-on-detention-of-asylum-seekers/>; Press Release, UNHCR, UNHCR is Concerned at New Amendment to Israel’s Law on the Prevention of Infiltration (Jan. 10, 2014), <http://www.unhcr.org/52cfe2a09.html>.

¹¹⁵ *Eitan*, ¶ 107.

Thus, on adoption of Amendment No. 4 the Holot “Residency Centre” was established in the Negev desert¹¹⁶ but HRW defined this center as a “legal fiction”:¹¹⁷ Israeli officials claimed that the Eritreans were not technically “detained” in the center because they could leave it for a few hours at a time although they needed to report three times a day¹¹⁸ and spend the night in the compound.¹¹⁹

In effect, in the end, the High Court, siding with petitioners and HRW declared that “[C]hapter 4 of the Law—in its entirety—does not pass constitutional scrutiny. In the sphere of the remedy, we deemed that it is correct to suspend the declaration of the repeal, concerning Chapter 4 in its entirety, to ninety days after the date of this ruling.”¹²⁰

Through Amendment No. 6, adopted by the Knesset on 8 February 2016, Article 32 D of the Law for the Prevention of Infiltration (Offences and Judgment), 1954, prescribes now that:

- a) If the Head of Border Control has found that there is a difficulty of any kind in carrying out the deportation of an infiltrator to his country of origin, he may order that the infiltrator shall reside in the residency center until his deportation or departure from Israel or until another date to be determined, but for no longer than a period of 12 months¹²¹

Amendment No. 6 reduced the duration of the mandatory detention period upon arrival under Article 30A (from three years, to three months), a period that—in any event—is inconsistent with international law.¹²² Amendment No. 6 also reduced the

¹¹⁶ *Id.* ¶ 126; see also UNHCR, *supra* note 114; Perry, *supra* note 27, at 164–65.

¹¹⁷ HUM. RTS. WATCH, *supra* note 13, at 27 (“Holot is a detention center in all but name. Israel’s Defense Ministry built the center. The Israeli Prison Service guards it. A four-meter-high fence surrounds the center. The December 10 law states that ‘residents’ must report three times a day and that ‘residents’ must be inside the center between 10 pm and 6 am.”).

¹¹⁸ See *Eitan* ¶ 127 (“[M]y conclusion is that the requirement that the ‘infiltrator’ report three times a day to the Center means a severe infringement to the liberty and dignity of the ‘infiltrators.’ It is not consistent with the right to liberty; it is not sufficient to provide the ‘infiltrators’ with a dignified human existence. Is the infringement on these rights proportionate?”).

¹¹⁹ HUM. RTS. WATCH, *supra* note 13, at 7.

¹²⁰ *Eitan* ¶ 208.

¹²¹ Law for the Prevention of Infiltration, 5776—2016 (Isr.) (unofficial translation on file with author).

¹²² UNHCR, *supra* note 1, at 1.

period of “infiltrator” status from twenty months, as originally provided by Amendment No. 5, to twelve months.¹²³ This last amendment, in turn, was adopted by the Knesset on 8 December 2014, modifying Article 32 D.¹²⁴ The new provision is currently identified as Article 32 U,¹²⁵ and the time of residence was reduced to twelve months following the opinion that Justice M. Naor expressed in the judgment of the 2015 *Tashuma* case.¹²⁶

According to Article 32 H of Amendment No. 5, provision not changed by Amendment No. 6, the residency center remains closed between 10:00 P.M. and 6:00 A.M. with all the residents that should be inside the compound during those hours.¹²⁷

Yet, as Justice Naor noted in in the *Tashuma* case:

Holding an ‘infiltrator’ in detention infringes his right to physical liberty, an infringement which also has consequences on additional rights. Alongside the infringement on the right to liberty, holding an ‘infiltrator’ in detention also infringes his right to dignity Naturally, reducing the term of detention alone does not negate the described infringement on the ‘infiltrators’ constitutional rights.¹²⁸

Later, in the same judgement (the following paragraph referring to residency under the abovementioned Article 32(D) and (U)) Chief Justice Naor further concluded: “it cannot be denied: albeit the conditions for residency in the center were improved, they are not sufficient.”¹²⁹

As mentioned above, currently Israeli authorities do not deport Eritreans to their home countries but are protected by Israel under a temporary policy of *non-refoulement*.¹³⁰

¹²³ Law for the Prevention of Infiltration, 5776—2016 (Isr.) (unofficial translation on file with author).

¹²⁴ Law for the Prevention of Infiltration, 5775—2014 (Isr.) (unofficial translation on file with author).

¹²⁵ Consolidated version of Amendments No. 5 and No. 6 to the Law for the Prevention of Infiltration, unpublished document received by UNHCR Israel (on file with author).

¹²⁶ See HCJ 8665/14 *Tashuma v. The Knesset* ¶ 116 (2015) (M. Naor, C.J.).

¹²⁷ Law for the Prevention of Infiltration, 5776—2016 (Isr.) (unofficial translation on file with author).

¹²⁸ *Tashuma*, ¶ 32.

¹²⁹ *Id.* ¶ 106.

¹³⁰ HCJ 7385/13 *Eitan—Israeli Immigration Policy Center v. The Israeli Government*, ¶ 1 (2014) (E. Hayut, J.) (Isr.), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

Asylum-seekers who are not detained and go through the asylum procedure, are granted a three-month “conditional release” permit (also called “2(a)(5) Permit” based on the number of the relevant article in the Entry into Israel Law),¹³¹ that should assure asylum-seekers a renewable temporary protection, regardless whether they have already submitted an asylum claim or not.¹³² For several years, Eritrean asylum-seekers did not receive any visa once their application for refugee status had been rejected by the Israeli government, although they were still appealing against the rejection.¹³³ Consequently, for long periods of time Eritreans remained without visa as a result of ineffective visa procedures. Even holding a “conditional release” visa did not permit Eritreans to access basic services or lawful employment.¹³⁴ However, currently, with the exception of Eritreans being sent to the Holot residency center, the rest continue to receive the 2(a)(5) visa on account of the no-return policy.¹³⁵

It may also occur that one member of a family may be granted the ‘conditional release’ visa whereas other non-Eritrean members with no protection status are denied the same kind of protection, thus becoming subject to deportation. This state of affairs usually happens if, in the case of a couple, one party is an Eritrean and the other one Ethiopian. The Eritrean will be granted a “conditional release” visa and will be protected from deportation but the Ethiopian spouse will not. The Israeli MoI does not consider that domestic law in both Eritrea and Ethiopia does not permit this couple to reside in either of the two countries of the nationality of the spouse.¹³⁶ However, having personally spoken to an Israeli lawyer, she confirmed to me that, among her clients, there are currently also Eritrean-Ethiopian couples where both spouses, although of different nationalities, receive protection.¹³⁷

¹³¹ BERMAN, *supra* note 92, at 17, n.25.

¹³² UNHCR, *supra* note 91, at 6.

¹³³ ISRAEL MINISTRY OF INTERIOR, POPULATION & IMMIGRATION AUTHORITY, PROCEDURE NO. 5.2.0012, PROCEDURE FOR HANDLING POLITICAL ASYLUM-SEEKERS IN ISRAEL ¶ 9(a)(1) (2017).

¹³⁴ UNHCR, *supra* note 91, at 1–2.

¹³⁵ Declaration by the Head of the Legal Department, UNHCR, Tel Aviv (on file with author).

¹³⁶ African Refugee Development Centre, 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)” 3–4 (Sept. 1, 2011); *see also* Hadas Yaron et al., “*Infiltrators*” or *Refugees? An Analysis of Israel’s Policy Towards African Asylum-Seekers*, 51 INT’L MIGRATION 153 (2013).

¹³⁷ Statement by Dr. T. Kritzman-Amir (on file with author).

IV. RIGHTS DENIED TO ERITREANS?

In 2010, the UN Working Group on Arbitrary Detention addressed the question of “infiltrators” in Israel. The UN Working Group linked the “infiltrators” to the principle of *non-refoulement*. The UN Working group indicated that where the obstacles preventing the expulsion of an “infiltrator” are not under his or her responsibility, he or she should be released, otherwise his/her imprisonment would potentially become “indefinite.”¹³⁸

In 2003, the UN Human Rights Committee declared that the incarceration of an illegal alien, failing an effective deportation process, constituted arbitrary detention.¹³⁹ Pertaining to asylum-seekers, their detention while their application is under review by the relevant local authorities, challenges international standards.¹⁴⁰ In this regard, O. Field illustrated and analyzed a number of measures that may be put in place in order to achieve the goals of Israel without the aggressive effect on the right to liberty.¹⁴¹

There is no clear regulatory arrangement regarding the question of the right of ‘infiltrators’ to work in Israel. The solution adopted by the Israeli authorities is to refuse to grant work permits to ‘infiltrators’ but, at the same time, until now they have failed to enforce this legal prohibition.¹⁴² Nonetheless, in January 2008 the

¹³⁸ UNGA, Report of the Working Group on Arbitrary Detention, ¶ 63, A/HRC/13/30 (Jan. 18, 2010); *see also* UNHCR, *supra* note 94, at Guideline 4, ¶ 15.

¹³⁹ Omar Sharif Baban v. Australia, CCPR/C/78/D/1014/2001, Views, UN Human Rights Committee, ¶ 7.2 (Sept. 18, 2003); *see also* U.N., Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, ¶ 18 (Dec. 16, 2014) (“Asylum-seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.”).

¹⁴⁰ UNHCR, *supra* note 94, Guideline 4.1, ¶ 21; *see also id.* ¶ 31 (“Detention that is not pursued for a legitimate purpose would be arbitrary.”).

¹⁴¹ OPHELIA FIELD, ALTERNATIVES TO DETENTION OF ASYLUM-SEEKERS AND REFUGEES, ¶ 80, POLAS/2006/03 (April 2006), <http://www.refworld.org/docid/4472e8b84.html>.

¹⁴² H CJ 7146/12 Adam v. The Knesset ¶ 1 (2013) (E. Hayut, J.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4>.

Israeli Immigration Directorate delivered B1 visas to the 2,000 Eritreans living in Israel,¹⁴³ granting them the right to work.¹⁴⁴

Presently, the employment of asylum-seekers in Israel, although tolerated, is discouraged by the government. The 2(a)(5) Permit formally does not entitle Eritreans to work. However, in pursuing a Supreme Court's negotiated compromise, Israeli authorities do not carry out enforcement measures against employed asylum-seekers and their employers but a media campaign by the MoI cautioning against hiring foreign workers illegally, caused confusion among employers.¹⁴⁵ This confusion augmented when the Knesset, along with Amendment No. 5 in December 2014 passed a law (known as "Deposit Fund Law", implemented in 2017, it came into effect on May 1, 2018) that, recently challenged by a group of NGOs, required the employers to deposit 20 percent of an asylum seeker's wages in a designated fund with the money returned to the employee only whether and when he/she leaves the country.¹⁴⁶ This law essentially constitutes an amendment to the 1991 Foreign Workers Law.¹⁴⁷ Chapter D of the amended Foreign Workers Law, Article 1K1 (a) clearly stipulates:

¹⁴³ For information about the B1 visa, see Israel Ministry of Foreign Affairs' website at <http://mfa.gov.il/MFA/ConsularServices/Pages/Visas.aspx> ("B/1 Work visa: This visa is for a person whose stay in Israel is approved for a limited period of time for the purpose of work. This visa is given to experts and artists, among others, and is granted solely with the approval of the MoI. . . ."); see also HUM. RTS. WATCH, SINAI PERILS: RISKS TO MIGRANTS, REFUGEES AND ASYLUM-SEEKERS IN EGYPT AND ISRAEL 81 (Nov. 12, 2008), <http://www.refworld.org/docid/491aebbd2.html>.

¹⁴⁴ Sabar & Tzurkov, *supra* note 12, at 7.

¹⁴⁵ UNHCR, *supra* note 29, at 15.

¹⁴⁶ Illana Lior, *Law Forces Asylum-Seekers to Set Aside Fifth of Salary, to Be Paid Out When They Leave Israel*, HAARETZ (Jan. 4, 2017), <http://www.haaretz.com/israel-news/.premium-1.762910> ("The employers of African asylum-seekers will be required to set aside an additional sum equal to 16 percent of the salary of the asylum-seeker. A substantial portion of the fund will be liable for confiscation if the asylum-seeker does not leave the country by the designated date."); *The Deposit Fund for Refugees, Asylum Seekers and Its Destructive Consequences*, WORKER'S HOTLINE (June 5, 2017), <http://www.kavlaoved.org.il/en/the-deposit-fund-for-refugees-asylum-seekers-and-its-destructive-consequences/>. But see *The Supreme Court Agrees That Israel's Escrow Plan for Asylum Seekers "Steals"*, NAAJU (July 25, 2018), <http://naaju.com/uganda/the-supreme-court-agrees-that-israels-escrow-plan-for-asylum-seekers-steals-israel-news> ("Shmueli responded that the problem must be solved, but the fact that employers steal asylum seekers does not make the law unconstitutional; it simply means that criminal complaints must be filed against employers.")

¹⁴⁷ For the text of the 1991 original law, see <https://www.ktalegal.com/israel-immigration/the-law/item/147-foreign-workers-law-prohibition-of-unlawful-employment-and-assurance-of-fair-conditions> (last accessed 4 November 2018).

[A]n employer of a foreign worker who is an infiltrator will deposit on his behalf a deposit in the sum equivalent to 36% of the employee's salary for the month in which the deposit is paid [...]; part of the deposit equivalent to 16% of his salary as stated will be paid by the employer [...] and the part of the deposit equivalent to 20% of the salary will be deducted by the employer from the salary of the infiltrator for the same month [...].

Article 1K1 (c) and (d) clarify:

(c) The deposit regarding the infiltrator will be paid by the employer, in a manner set by the Minister of Interior, to the fund or the bank account, every month, at a date as stated in section (d), for the employment of the foreign worker who is an infiltrator in the month which preceded the date of the payment.

(d) The deposit will be paid on a date at which the employer has to pay the salary of the foreign worker who is an infiltrator for the month for which the deposit is paid.

Article 1K9 (“Reservation”), however, highlights that:

The depositing of the amount of the deposit in respect of an infiltrator in a fund or bank account under this chapter [...] shall not constitute a confirmation of the legality of the employment of the foreign worker by an employer or the legality of his stay or work of a foreign worker who is an infiltrator in Israel.¹⁴⁸

It has to be noted that also in this amendment asylum-seekers are always defined as “infiltrators.”

According to a note circulating in July 2017, UNHCR considers the “Deposit Fund Law” contrary to Article 31 (1) of the 1951 Refugee Convention providing that refugees shall not be penalized for their irregular entry or presence, provided they present themselves to the authorities without delay and show good cause for their irregular entry or presence. In addition UNHCR considers that this new law has deleterious effects on the basic rights of asylum seekers. Finally, because of the high rate of the deduction, and its discriminatory nature, the law may deprive Eritreans of their right to a fair living, enjoying the correspondent rights to it.¹⁴⁹

According to regulations relating to the deposits who will enter into force in

¹⁴⁸ Foreign Workers Law as amended on December 8, 2014 (unofficial translation on file with author).

¹⁴⁹ UNHCR, RESPONSE BY UNHCR TO THE LEGAL REPRESENTATIVE ON THE SCHEME FOR THE ‘DEPOSIT OF FUNDS FOR THE BENEFIT OF THE FOREIGN WORKER AND ENSURING HIS DEPARTURE FROM ISRAEL’ ¶ 39 (2017), <https://law.acri.org.il/he/wp-content/uploads/2017/07/bagatz2293-17-asylum-seekers-wages-UNHCR-0717.pdf>.

November 2018, under certain conditions, the infiltrator is now entitled to receive part of the deposit money.¹⁵⁰

In addition, Eritrean asylum-seekers cannot work independently as self-employed individuals. This happens in spite of the fact that the 1968 Licensing of Business Law does not limit asylum-seekers from obtaining a license for their business.¹⁵¹ The policy of the licensing authority allows only the holders of at least a one year visa (A5-visa holders)¹⁵² to open a business, effectively limiting self-employment.

¹⁵⁰ Foreign Workers Regulations (types of cases and conditions under which a foreign worker who is an infiltrator is entitled to receive the deposit money prior to his departure from Israel in cases other than for temporary exit), 2018 (unofficial translation on file with author). Regulation No. 1 ('Entitlement to receive part of the deposit money') disposes as follows: '1.A foreign worker who is an infiltrator and the Population and Immigration Authority has approved in writing that he falls under one of the following criteria listed in sections (1) to (5) below and entered Israel before the day of commencement of these regulations, or in section (6) is entitled to receive part of the deposit money as stated in section 2 even before the date stated in section 1K4 (a) of the Law, in the manner stated in section 3: (1) Minor; (2) Those over the age of 60 years; (3) Women; (4) Father of a dependent minor who is under his sole care due to the medical condition of the minor's mother, or because the mother died or is not in Israel, and he is not married to another and there is no other person known publicly to be his spouse; (5) Someone for whom a border control officer is persuaded that because of his age or state of health, including mental health, failure to receive the deposit monies prior to the date stated in section 1K4 (a), may cause harm to his health as mentioned, and there is no other way to prevent the stated damage; (6) Someone for whom the Israeli police notified that there is prima facie evidence that an offense was committed against him under sections 375A or 377A (a) or (b) of the Penal Code – 1977.'

¹⁵¹ Licensing of Businesses Law, 5728–1968 (Isr.), http://www.eng.mni.gov.il/FinanceIsrael/Docs/En/legislation/Others/5728_1968_Licensing%20of_Businesses_Law.pdf.

¹⁵² Temporary Resident Visa A 5: 'This status confers on the holder a work permit, and after 186 days from the date of grant - full social rights. It is a temporary status which is generally renewed every year. Granting the status is subject to the discretion of the authorities. It is customary to grant a status of this type to people who are in the process of proceedings of receiving a permanent status. Receiving the visa is subject to proving terms which may differ from one case to another, in accordance with the rules. In any event, it is necessary to prove that the centre of life of the applicant is in Israel. In the event that the status is granted on humanitarian grounds and not under another procedure, the procedure of changing status from status A5 to a permanent resident provides that after 4 years in this type of status one may submit an application for permanent residence.' Information available at: <http://gb-law.co.il/en/regulating-of-status/temporary-resident-visa-a5/> accessed 28 August 2017. See: <http://www.sviva.gov.il/English/Legislation/Documents/Licensing%20of%20Businesses%20Laws%20and%20Regulations/LicensingOfBusinessesLaw1968-Excerpts.pdf>

The Israeli Supreme Court recently, in 2017, delivered two judgements further curbing the prospects of occupation for asylum-seekers in the country. In one of the judgements, the Court held that employers recruiting “foreign workers,” including Eritreans, could be charged a twenty percent tax. The Court decided in this way in spite of the fact that Eritreans have been under a temporary protection regime in Israel for more than ten years.¹⁵³ In the second judgment, the Court decided that the Ministry of Finance’s directive, according to which Eritreans could not be employed to work for agencies offering services to the governmental and municipal sectors, was lawful.¹⁵⁴ In these judgments the Court found inapplicable both Article 29(1) (“Fiscal Charges”)¹⁵⁵ and 17(2) (“Wage-Earning Employment”)¹⁵⁶ of the 1951 Geneva Convention protecting refugees. However, Articles 29(1) and 17(2) speak about “refugees,” and the Eritreans are not formally refugees. J. Hathaway, basing his analysis on the *travaux préparatoires* of the convention, argued that some of its provisions apply not only for recognized refugees (“refugees lawfully staying in the territory,” according to the expression used, for instance, in Article 17(1)), but also for asylum-seekers, especially those whose decision of their refugee

¹⁵³ CA 4946/16 Saad v. Revenue Services, Ashkelon Branch (2017) (Isr.), [https://perma.cc/SN6E-KD9B] (in Hebrew) (summarized in Yuval Livnat, *Israeli Supreme Court Rules: Taxation and Employment Restrictions on Employers of “Foreign Workers” Apply to Employers of Asylum Seekers Too*, REFLAW (Oct. 31, 2017), <http://www.reflaw.org/israeli-supreme-court-rules-taxation-and-employment-restrictions-on-employers-of-foreign-workers-apply-to-employers-of-asylum-seekers-too/>).

¹⁵⁴ AdminA9001/16 Y. B. Si Resources v. General Accountant, Ministry of Finance (2017) (Isr.), [https://perma.cc/9J2Z-QX6T] (in Hebrew) (summarized in Livnat, *supra* note 153).

¹⁵⁵ See Convention Relating to the Status of Refugees, art. 29(1), July 28, 1951, 189 U.N.T.S. 137 (“The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.”)

¹⁵⁶ See *id.* art. 17(2) (“In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labor market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions: (a) He has completed three years’ residence in the country; (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse; (c) He has one or more children possessing the nationality of the country of residence.”)

status is pending for a long time.¹⁵⁷ Many of these individuals have certainly “completed three years’ residence in the country,” according to what Article 17(2) stipulates. Furthermore, J. Hathaway also observes that Article 17(2) confers a duty to relieve refugees from restrictive procedures “whether the restriction is formally directed at non-citizens themselves, or at [their] employers.”¹⁵⁸

All these measures decided, coupled with defective asylum procedures, result in the continued weakening of asylum-seekers’ capability to live in Israel thus encouraging their departure from the country.¹⁵⁹

Concerning their health rights, asylum-seekers are generally not covered by the National Health Insurance Law which guarantees complete medical cover exclusively for Israeli citizens and residents.¹⁶⁰ Health insurance is available to asylum-seekers only if purchased by them privately at a substantial cost or by their employers as required by the Foreign Workers Law.¹⁶¹

Thus, although employed asylum-seekers should theoretically have medical cover, private insurance policies for asylum-seekers are not as comprehensive as those provided to Israeli citizens and residents. Additionally, some employers fail to provide health insurance to asylum-seeker employees, through this acting contrary to the legal obligation for them to provide the insurance to their employees.¹⁶²

A main source of concern is that unemployed asylum-seekers (who often include the most vulnerable members of that population) do not have access by law to public health insurance under the National Health Insurance Law.¹⁶³

Emergency medical services are provided to asylum-seekers under the 1996 Patients’ Rights Act,¹⁶⁴ but asylum-seekers who are not able to pay for their emergency care are often denied treatment the next time they approach the hospital in

¹⁵⁷ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 184–85, 192 (2005).

¹⁵⁸ *Id.* at 760–61.

¹⁵⁹ UNHCR, *supra* note 29, at 16.

¹⁶⁰ Rights of the Insured Under the National Health Insurance Law, STATE OF ISRAEL MINISTRY OF HEALTH, <http://www.health.gov.il/English/Topics/RightsInsured/RightsUnderLaw/Pages/default.aspx/> (last visited Aug. 3, 2018); *see also* MINISTRY OF ALIYAH & IMMIGRANT ABSORPTION, *HEALTH SERVICES IN ISRAEL 6* (6th ed. 2015), http://www.moia.gov.il/Publications/health_en.pdf.

¹⁶¹ Foreign Workers Law, 5751–1991, art. 1D, <http://www.refworld.org/docid/4c36ed992.html>.

¹⁶² UNHCR, *supra* note 29, at 16.

¹⁶³ MINISTRY OF ALIYAH & IMMIGRANT ABSORPTION, *supra* note 160, at 19.

¹⁶⁴ Patient’s Rights Act, 5756–1996, art. 11A, <http://www.iracm.com/wp-content/uploads/2013/01/loi-sur-les-brevets-1996-anglais-3539.pdf>.

which they were treated previously.¹⁶⁵

Asylum-seekers may access to legal counsel, but, for instance, the only non-governmental organization (“NGO”) allowed to meet with the asylum-seekers who are interned in centers, Hotline for Refugees and Migrants, has limited opportunities to visit them. In order to meet with asylum-seekers and assess their claims, the NGO must have in advance a list of their names and identification numbers. Often, meetings with the NGO for the interned asylum-seekers become possible exclusively if their family or friends, outside the facility, know how to reach the NGO.¹⁶⁶

CONCLUSION: CHALLENGES FOR ERITREANS AND PROPOSALS TO IMPROVE THEIR SITUATION IN ISRAEL

During the period from 2010 to 2012, crimes among the population of Eritreans who qualified for group protection in Israel were at the center of a public debate.¹⁶⁷ However, studies conducted by the KRIC showed that crime rates among the population of Eritreans in Israel were lower than among the general population.¹⁶⁸

Facing this situation, Israel is confronted with a difficult choice. Either it can continue to ignore the reality that tens of thousands of Eritreans will not be leaving Israel soon or the State continues to spend money attempting to force them to “voluntary” repatriate to what had been currently defined the “North Korea of Africa.”¹⁶⁹ Alternatively, Israel can offer them a stable legal status in the country until they can return in safety and dignity to Eritrea.¹⁷⁰

Incidentally, in 2014 the Israeli High Court of Justice affirmed that: “[T]he right to dignity means that it is not sufficient to satisfy the most immediate needs of the prisoner, detainee or ‘infiltrator,’ and the authority is not fulfilling its obligation to satisfy these when their liberty is deprived and the living conditions only permit their continued survival.”¹⁷¹

¹⁶⁵ UNHCR, *supra* note 29, at 17.

¹⁶⁶ REPORTERS WITHOUT BORDERS, *supra* note 40, at 4.

¹⁶⁷ BERMAN, *supra* note 92, at 9–10.

¹⁶⁸ GILAD NATAN, THE OECD EXPERT GROUP ON MIGRATION (SOPEMI) REPORT IMMIGRATION IN ISRAEL 2011–2012, at 34–35 (2012), <http://www.knesset.gov.il/mmm/data/pdf/me03131.pdf>.

¹⁶⁹ *Refugees, Migrants or Infiltrators?*, AFR. REFUGEE DEVELOPMENT CTR., <https://www.ardc-israel.org/refugees-or-infiltrators> (last visited Aug. 3, 2018).

¹⁷⁰ HUM. RTS. WATCH, *supra* note 13, at 10–11.

¹⁷¹ HCJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 106 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

A solution to solving the current dilemma will be to provide Eritreans with a renewable temporary status and work authorization until they could return home safely. Such measure is in line, for instance, with the renewable temporary protection system adopted already by the European Union,¹⁷² and under which assistance and protection against *refoulement* have been extended on a group basis, without proceeding to the determination of refugee status, this last aspect seemingly not be of interest for Israeli authorities. However, this form of protection should be supplemented by the opportunity to give access to the asylum procedure for those disinclined to return and calling for international protection.¹⁷³

In my opinion, this measure is reasonable because the Israeli authorities have shown an inability to process a large number of applications for asylum in a fair manner and because, given the human right abuses in the asylum-seekers' home country, the government in Tel Aviv cannot deport Eritreans. Israel should try to implement its asylum procedures to include complementary forms of protection¹⁷⁴ for people fleeing grave human rights abuses and/or indiscriminate violence rising from armed conflict. Complementary protection is, in fact, generally understood also to cover persons outside their countries of origin who, nevertheless, are in need of international protection because of a serious threat to their liberty, life, or security in the country of origin, without having any tie to one of the grounds enumerated in the 1951 Geneva Convention. For instance, persons for whom the threat rises as a result of serious public disorder or individuals fleeing the indiscriminate effects of violence in a conflict situation, with no existing element of persecution.¹⁷⁵ In addition, Israel may decide to allow Eritreans a prolonged stay for "compassionate" (for reasons of age, medical condition, or family connections of the Eritreans) or "practical" reasons when, for instance, removal is not feasible, because transportation is not possible and/or travel documents are unobtainable.¹⁷⁶ Nevertheless, until

¹⁷² Council Directive 2001/55/EC of July 20, 2001, 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, 2001 OJ L.212/12-212/23.

¹⁷³ UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 24, HCR/1P/4/ENG/REV. 3 (2001).

¹⁷⁴ HUM. RTS. WATCH, *supra* note 13, at 74.

¹⁷⁵ UNHCR, Complementary Forms of Protection, at 3, U.N. Doc. EC/50/SC/CRP.18 (2001), <http://www.refworld.org/docid/47fdfb491a.html>

¹⁷⁶ *Id.* at 1–2.

now, Israel refrains from doing so because it fears it will encourage others to come.¹⁷⁷

According to the recently approved “Procedure for the Removal to third countries” Eritreans whose asylum application have been submitted after January 1, 2018, been rejected or not submitted at all need to leave Israel within sixty days otherwise proceedings of enforcement would have been adopted.¹⁷⁸ However, such procedure does not apply to several categories of persons, including minors, and women, recognized victims by the Israeli Police of human trafficking.¹⁷⁹ In addition, as Rwanda and Uganda are the countries of destination designed for Eritreans removed, the Eritrean candidate to be removed towards those countries should raise to the Israeli clerk possible problems that he or she could find once arrived in those countries.¹⁸⁰ In the categories subjected to removal we have also Eritreans that, as February 1, 2018 have a visa close to expiration date and, going to renew it at the offices of the Authority and the Border Control Officer discover that he or she is eligible for removal.¹⁸¹ In any case, the Eritrean designated to be relocated in Rwanda or Uganda has fourteen days from the notification of the date of departure to submit written arguments and he or she will receive a response by the Border Control Officer within thirty days from the date of submission.¹⁸²

In this sense it is significant, however, to note how still in January 2018 both Rwanda and Uganda deny the stipulation of any agreement for the relocation of Eritreans from Israel in those countries.¹⁸³ By coincidence, this denial came exactly when UNHCR appealed to Israel to stop the relocation of Eritreans in Sub-Saharan Africa because a number of “infiltrators” assigned to be relocated in Rwanda or

¹⁷⁷ Opinion by Dr T. Kritzman-Amir (on file with author).

¹⁷⁸ Information on the “Procedure for Removal to a Third Country,” at 1 (Jan. 1, 2018) (on file with author).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 3.

¹⁸¹ PIBA, PROCEDURE FOR RELOCATION TO THIRD COUNTRIES, ¶ 4.1 (Jan. 1, 2018) (on file with author).

¹⁸² *Id.* ¶¶ 4.6, 4.7.

¹⁸³ *Rwanda, Uganda Deny Israel Deal to Host African Migrants*, MAIL & GUARDIAN (Jan. 8, 2018), <https://mg.co.za/article/2018-01-08-rwanda-uganda-deny-israel-deal-to-host-african-migrants>.

Uganda risked their lives by trying to travel to Europe via Libya, instead.¹⁸⁴ Later in the year, on March 1, UN experts urged Israel to stop the deportation of Eritreans. On this occasion, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, T. Achiume, deplored the discriminatory nature of the policy. She was “[d]eeply concerned that this policy specifically targets individuals from sub-Saharan Africa. By singling out Eritrean and Sudanese nationals, the policy clearly breaches the prohibition of discrimination on the basis of race and national origin.”¹⁸⁵

In effect, the lack of transparency in the Israeli behavior often leaves Eritreans in Uganda in an uncertain position in relation to the local authorities. Eritreans know that the official Ugandan position is that they are “trespassers” as defined by Uganda’s State Minister for Relief, Disaster Preparedness and Refugees Musa Ecweru. Eritreans are aware that their ambiguous legal status in Uganda makes them vulnerable.¹⁸⁶

However, on April 13, 2018 the Ugandan government announced that it was considering a request by Israel to relocate about 500 Eritrean and Sudanese nationals in the country with the Ugandan government affirming that asylum-seekers would have undergone a severe screening process before receiving asylum in the country.¹⁸⁷ But on April 24, the Israeli Government announced that it had abandoned a plan to deport African migrants having illegally entered the country because it failed to find a country available to host the Eritreans and the Sudanese.¹⁸⁸

In this intricate situation we note, however, that Justice U. Vogelmann had observed that the State Comptroller’s report shows that since by the end of 2013 the

¹⁸⁴ Press Release, UNHCR, UNHCR Appeals to Israel over Forced Relocations Policy (Jan. 9, 2018), <http://www.unhcr.org/news/briefing/2018/1/5a548e064/unhcr-appeals-israel-forced-relocations-policy.html>.

¹⁸⁵ *Israel: UN Experts Urge Immediate Halt of Plans to Deport Eritrean and Sudanese Nationals*, OHCHR, (March 1, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22741&LangID=E>

¹⁸⁶ IRRI, ERITREAN REFUGEES IN KAMPALA AND THE UGANDAN ASYLUM SYSTEM, 5–6 (2018), <http://refugee-rights.org/wp-content/uploads/2018/07/Eritrean-refugees-in-Kampala-.pdf>.

¹⁸⁷ *New Testimonies Show Israeli Deportations Putting Eritrean and Sudanese Asylum-Seekers at Risk in Uganda*, AMNESTY INT’L (April 13, 2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/MDE1582252018ENGLISH.PDF>.

¹⁸⁸ *Israel Abandons Plan to Forcibly Deport African Migrants*, REUTERS (Apr. 24, 2018) <https://www.reuters.com/article/us-israel-migrants/israel-abandons-plan-to-forcibly-deport-african-migrants-idUSKBN1HV20Y>.

Israeli MoI already did not accept additional asylum applications filed by immigrants from Eritrea who were not already in custody.¹⁸⁹

Finally, Israel should ensure that all asylum-seekers, including Eritreans, lawfully in the country have the opportunity to access both wage-earning jobs as well as healthcare.¹⁹⁰ It is in the interest of Israel to approve measures to provide asylum-seekers the rights essential to the affirmation of their dignity and welfare because this is expected to improve the probabilities of an effective integration for the Eritreans, very few until now, who will ultimately be granted refugee status.¹⁹¹

Recent judgments by the domestic courts in Israel presented this state with an opportunity to formulate a different policy accommodating the needs of the Eritrean “infiltrators”/asylum-seekers. In spite of these judgments, the policy applied to Eritreans seems not to have changed. This means that Israel seems to utilize the present situation of the Eritreans in the country as a means to deflect the intentions of others who would like to seek asylum there.

Nevertheless, the situation of Eritrean asylum-seekers in Israel has not been always so negative. As abovementioned, in January 2008, the MoI granted work visas to 2000 Eritreans entering Israel before December 25, 2007. In March 2008 an additional 600 visas were issued to Eritreans and, although they have faced complications in renewing these permits, this development constituted a significant indication showing that the Israeli officials had introduced measures to assist and try to integrate asylum-seekers in the local fabric,¹⁹² given that local integration may represent the favorite solution for some refugees. In particular, it could represent the best solution for those who are not expected to return because of the traumatic experiences having provoked the flight,¹⁹³ that it is exactly the case of Eritreans in Israel.

¹⁸⁹ H CJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 34 (2014) (U. Vogelmann, J.) (Isr.), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

¹⁹⁰ HUM. RTS. WATCH, *supra* note 13, at 12–13.

¹⁹¹ ROSA DA COSTA, RIGHTS OF REFUGEES IN THE CONTEXT OF INTEGRATION: LEGAL STANDARDS AND RECOMMENDATIONS, 27–28, POLAS/2006/02 (2006), <http://www.refworld.org/docid/44bb9b684.html>.

¹⁹² Afeef, *supra* note 45, at 14.

¹⁹³ UNHCR, Local Integration and Self-Reliance, at 4, EC/55/SC/CRP.15 (June 2, 2005), <http://www.refworld.org/docid/478b3ce12.html>.

The international community¹⁹⁴ should also play its part. In the words of the UN Commission of Inquiry on Human Rights in Eritrea 2015 Report, the International Community should:

c) Identify long-term solutions to help Eritrean refugees, including local integration in the first-asylum country and resettlement in third countries, and strengthen international solidarity in sharing the responsibility to care for Eritrean refugees and migrants; d) Promote channels of regular migration from Eritrea to reduce clandestine channels, in particular by ensuring that they no longer have to risk their lives crossing the Mediterranean; in this regard, the issue of securing refugee routes should be considered at the international level to provide safe passage to fleeing persons.¹⁹⁵

In my opinion, the Israeli government should discontinue the custody of Eritreans asylum-seekers, shut down the Holot facility, and refrain from detaining those who refuse to quit Israel for a third country. This measure has been confirmed by the High Court of Justice in August 2017, affirming that the custody should not exceed sixty days except if the detained represents a danger to the public or to its health and if he/she does not cooperate with the removal, the same judgment having been also established that the lack of agreement to be removed does not constitute a lack of cooperation.¹⁹⁶ On January 3, 2018 the Israeli Minister of Interior, along with the Minister of Public Security, decided to close Holot in the upcoming months because it was not encouraging the departure of the “infiltrators” from Israel but it was rather representing a burden.¹⁹⁷

Moreover, the authorities in Tel Aviv should guarantee that Eritreans are well informed about their right to apply for asylum and that their applications will be assessed without delay as also highlighted by the Executive Committee of UNHCR

¹⁹⁴ For a definition of ‘International Community,’ see Georges Abi-Saab, *Whither the International Community?*, 9 EUR. J. INT’L L. 249 (1998) (“Indeed, this community could be, according to the case in point, that of the states of the world, that of the peoples of those states or of the world as such (thus merging into the concept of humanity) or, furthermore, of the active part of those peoples, in the form of international public opinion or international civil society. Personally, I will use the term here in the sense of community of states, but without ignoring the social forces which make those states act or which transcend them sometimes by acting through alternative circuits of their own construction.”).

¹⁹⁵ UNGA Hum. Rts. Council, *supra* note 2, ¶ 1536(c), (d).

¹⁹⁶ AdminA 8101/15 Zegete v Minister of the Interior, 4 (2017) (summary provided by the High Court of Justice (Forced Relocation)) (on file with author).

¹⁹⁷ English Summary of the announcement made by the Secretary of the Government, following the Government discussion regarding removal of ‘infiltrators,’ January 3, 2018, at 1.

in its work.¹⁹⁸

To conclude, in addition to the protection enshrined in the 1951 Geneva Convention, Israeli officials should develop a policy on complementary protection which could offer safeguards to people at risk of serious harm in their home countries and not meeting the conditions to be granted refugee status.¹⁹⁹

A number of Israelis have been sympathetic to the cause of the Eritreans, although racism represents another key issue affecting their acceptance in Israel. Eritreans in Israel have been the victims of a series of voluntary or involuntary racist attacks.²⁰⁰ For instance, on October 18, 2015, in Beersheba, an Eritrean migrant was shot and beaten by a crowd that erroneously supposed he was a Palestinian gunman.²⁰¹ As, perhaps in a provocative way, G. Levy entitled his article on the newspaper Hareetz in January 2016: “Israel has always been xenophobic, it just

¹⁹⁸ UNHCR Executive Committee, Determination of Refugee Status, Conclusion No. 8 (XXVIII), U.N. Doc. 12A (A/32/12/Add.1) (Oct. 12, 1977) (“e) [The] procedures for the determination of refugee status should satisfy the following basic requirements: (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might me within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority. (ii) The applicant should receive the necessary guidance as to the procedure to be followed. (iii) There should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance. (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR. (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status. (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem. (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.”

¹⁹⁹ INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 52, at 4.

²⁰⁰ Chamley, *supra* note 50.

²⁰¹ Press Release, Eritrian Ministry of Information, Eritrea Condemns Killing of National in Israel “by Mistake” (Oct. 19, 2015), <http://www.tesfanews.net/eritrea-condemns-killing-of-national-in-israel/>.

used to be better at hiding it.”²⁰²

In recent years, since the number of African migrants and asylum-seekers in Israel has increased, the UNHCR has become alarmed by the xenophobic declarations made by several public officials, for instance, claiming that ‘infiltrators’ bear the major responsibility for the increase in crime in the country.²⁰³ It is true, however, that in November 2015, the Israeli representative at the United Nations, N. Yesod, made a solemn declaration in front at the UN Third Committee (Social, Humanitarian & Cultural Issues) affirming that in Israel, the Ministry of Education had developed programs such as the “Other is Me” to reduce prejudice and violence among students and to better understand the importance of coexistence in Israeli society, with also Israeli civil society involved in social inclusion initiatives.²⁰⁴

It is also important to understand the dynamics of migration to Israel. Influenced by Zionist ideology and the requirement to sustain a Jewish majority, the Israeli migration regime has been historically exclusionary, distinguishing between Jewish and non-Jewish asylum-seekers.²⁰⁵ Additionally, naturalization remains inaccessible for non-Jewish refugees²⁰⁶ although Article 34 of the 1951 Geneva Convention prescribes otherwise.²⁰⁷

The Holocaust represents a fundamental component of Israeli society, playing a crucial role in determining attitudes and policies towards asylum-seekers, trying to find some space in the local society also to them in the full respect of their human rights. In effect, the arrival of asylum-seekers should be understood in the context

²⁰² Gideon Levy, *Israel Has Always Been Xenophobic, It Just Used to be Better at Hiding It*, HARETZ (Jan. 3, 2016), <https://www.haaretz.com/opinion/.premium-1.695077>.

²⁰³ UNHCR, *supra* note 81, at 3.

²⁰⁴ Nadav Yesod, Israeli Mission to the United Nations, Israel’s Statement on Racism, Racial Discrimination and Xenophobia to the U.N. Third Committee (Nov. 2, 2015), <http://embassies.gov.il/MFA/InternatlOrgs/Issues/Pages/Israel-statement-on-racism-racial-discrimination-and-xenophobia-2-Nov-2015.aspx>.

²⁰⁵ Afeef, *supra* note 45, at 20.

²⁰⁶ Perry, *supra* note 27, at 179.

²⁰⁷ Convention Relating to the Status of Refugees, art. 34, July 28, 1951, 189 U.N.T.S. 137 (“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”).

of the fact that Israel was founded as a sanctuary for Jewish people after the Holocaust.²⁰⁸ With this approach, Eritreans could be perceived by Israeli public opinion as “intruders” because they would like to “occupy” a territory already “destined” to someone else who was fleeing persecution.

The further influx of aliens has amplified the tension between nationalism and a range of humanitarian responses which followed the first arrival of Eritreans.²⁰⁹ In this regard, a new law for the prevention of infiltration has been proposed in 2017 that seems harsher not only towards the “infiltrators” (with the desire of the legislator to provide tools in order to remove Eritreans from city centers) but also towards employers hiring Eritreans not in accordance with the existing norms.²¹⁰

The increasing phenomenon of Eritreans entering Israel in the last decades shows how much the country needs to adopt a new immigration/asylum policy, as well as define the ways in which it will be implemented.²¹¹

This immigration/asylum policy should fully comply with international legal norms and should be developed through multilateral approaches. Short of that, Israel will probably face mounting international condemnation,²¹² and run the risk of remaining politically isolated as a result of its treatment of asylum-seekers.²¹³ In

²⁰⁸ Tally Kritzman-Amir, *Refugees and Asylum-Seekers in the State of Israel*, 6 ISR. J. FOREIGN AFF., Sept. 2012, at 97.

²⁰⁹ Paz, *supra* note 23, at 12–13; see also Adriana Kamp et al., *Contesting the Limits of Political Participation: Latinos and Black African Migrant Workers in Israel*, 23 ETHNIC & RACIAL STUD. 109 (2000).

²¹⁰ Draft Law for the Prevention of Infiltration (Offences and Judgement) (Temporary Order)-2017- Accreditation by the Ministerial Committee for Legislative Issues, Proposal for Decision, unofficial translation, at 4, 5 (on file with author)

²¹¹ Aaron Magid, *Why the Israeli Supreme Court Ruling on African Migrants is Not Enough*, DAILY BEAST (Sept. 19, 2013), <http://www.thedailybeast.com/articles/2013/09/19/why-the-israeli-supreme-court-ruling-on-african-migrants-is-not-enough.html>.

²¹² *Israel “Fails to Meet” African Asylum-Seekers’ Basic Needs in Detention Facilities*, RT (Feb. 29, 2016), <https://www.rt.com/news/333996-israel-migrants-human-rights/> (“Israeli detention centers for African asylum-seekers are overcrowded, prison-like facilities where residents suffer from a lack of basic needs including health and translation services, clothing, proper food and legal advice, a report from a human rights group reveals. The Hotline for Refugees and Migrants. . . released a report on Monday reviewing conditions in four Israeli migrant detention centers—Holot, Saharonim, Givon and Yahalom. The report is based on interviews with 72 people held there, as well as official reports and freedom of information requests. It uncovers major deficiencies in the treatment of migrants, who are mostly asylum-seekers from Sudan and Eritrea.”).

²¹³ Yaron et al., *supra* note 136, at 153–54.

effect, in a report dated January 22, 2018, HRW recommended that the Israeli Government complete a review of how Eritrean asylum-seekers have been prevented from seeking asylum and how existing procedures preclude a fair assessment of their claims.²¹⁴ In response to that, on February 20, the Israeli Government started with the incarceration of seven Eritrean “infiltrators” after they refused to be relocated to Rwanda, reducing the options for Eritreans to two: leave to a third African country with a lot of uncertainty about their legal status or being indefinitely jailed.²¹⁵ Many of them seem to opt for the jail option,²¹⁶ also because they are negatively impressed by the experiences of the other Eritreans already arrived in Rwanda, who denounced the lack of any sort of stability for them since they landed in Kigali²¹⁷ and sometimes claims to have even been trafficked to other African countries.²¹⁸ Between July and August of 2018, however, a new initiative has been launched, in order to house tens of Eritrean individuals and families in kibbutzim. Such initiative has been implemented by a network of activist volunteers, filling the void left by a government that, in their opinion, seem unconcerned by the asylum seekers destiny while they are in Israel.²¹⁹ That is why the Kibbutz Resettlement

²¹⁴ Israel: Don’t Lock Up Asylum Seekers, HUM. RTS. WATCH (Jan. 22, 2018), <https://www.hrw.org/news/2018/01/22/israel-dont-lock-asylum-seekers>.

²¹⁵ Yael Marom, *Asylum Seekers Begin Hunger Strike to Protest Deportation Deadline*, +972 BLOG (Feb. 21, 2018), <https://972mag.com/asylum-seekers-begin-hunger-strike-to-protest-deportation-deadline/133310/>.

²¹⁶ *African Migrants in Israel Opt for Jail over Deportation*, NEWS24 (Feb. 7, 2018), <https://www.news24.com/Africa/News/african-migrants-in-israel-opt-for-jail-over-deportation-20180207>.

²¹⁷ Oren Ziv, *Sent to Rwanda by Israel: “We Have No Food or Work. Don’t Come Here”*, +972 BLOG (FEB. 10, 2018), <https://972mag.com/sent-to-rwanda-by-israel-we-have-no-food-or-work-dont-come-here/133024/>.

²¹⁸ Joshua Leifer, *Asylum Seekers Sent to Rwanda Warn: “If You Don’t Want to Die, Stay in Israel”*, +972 BLOG (Feb. 2, 2018), <https://972mag.com/asylum-seekers-who-left-israel-warn-if-you-dont-want-to-die-stay-in-israel/132847/> (“According to the refugees’ testimonies, in Rwanda, they had their travel documents, and in some cases their \$3,500 travel grants, stolen from them. They were also denied legal status and the ability to work in Rwanda. They recalled being trafficked into Uganda, where they were imprisoned, threatened, and robbed again. From Uganda, they crossed into South Sudan, where they were incarcerated for lacking any forms of documentation. After South Sudan, they continued to Sudan, and then to Libya. Their fear of being forced to return to Eritrea pushed them to risk the journey to Libya.”).

²¹⁹ A. Kaplan Sommer, *On Israeli Kibbutz, Eritrean Asylum Seekers Look for a Quieter Life*, HAARETZ (July 26, 2018) <https://www.haaretz.com/israel-news/.premium.MAGAZINE-on-israeli-kibbutz-eritrean-asylum-seekers-look-for-a-quieter-life-1.6316400>.

Sponsorship Initiative has been born.²²⁰ This occurred while, at the end of July, Justice Minister A. Shaked highlighted that Eritreans will be returned to their home country once that the unlimited Eritrean National Service will be over.²²¹

By way of final conclusion, it is important to point out that Eritreans cannot remain in Eritrea against their will and they have to have the right to leave the country and seek protection elsewhere because, in Eritrea, as Justice U. Vogelman maintained, the “situation of human rights . . . is horrendous”²²² and, as T. Micheal, Eritrean, pointed out in an article published on the Jerusalem Post on October 22, 2018: “Eritrean asylum seekers in Israel and around the world did not flee our country because of war with Ethiopia; we Eritreans fled our beloved home because of the tyrant, [...] who oppressed us—and his regime is still in power.”²²³

²²⁰ *Kibbutz Resettlement Sponsorship Initiative*, <https://www.israelandasylumseekers.org/kibbutz-resettlement> (last accessed, November 1, 2018).

²²¹ L. Yaron, J. Lis, *Justice Minister Vows Israel Will Deport Eritreans as Soon Eritrea Ends Indefinite Military Service*, HAARETZ (July 25, 2018) <https://www.haaretz.com/israel-news/israel-will-deport-eritreans-when-indefinite-military-service-ends-1>.

²²² H CJ 7385/13 Eitan—Israeli Immigration Policy Center v. The Israeli Government, ¶ 30 (2014) (U. Vogelman, J.) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/open-docpdf.pdf?reldoc=y&docid=54e607184j>.

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