

Israel's Policies in Relation to African Asylum Seekers

Abstract

Since mid 2005, Israel has become a destination for thousands of Africans who are willing to take a long and risky journey to the country in order to escape the harsh realities of their own surroundings. However, Israel's policies towards asylum seekers have been mostly exclusionary and at times contradictory in nature which has mainly aimed at controlling and limiting entrance to its territory. Israel also does not have a proper system in place to monitor this influx. Nonetheless, once as per the authorities, a critical threshold has been crossed, asylum seekers are seen as a threat which can no longer be allowed to enter the territory. Accommodating measures have also often been rejected by citing self-preservation considerations. But despite this, the Asylum crisis in Israel is only known to few and very little is written about the meaning and significance of these developments.

Keywords: Israel, Asylum Seekers, African, Policy, Non-refoulement.

“International refugee law is in crisis...while governments proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants.”¹

The above observation made by Professors James Hathaway and R. Alexander Neve, undoubtedly, sums up the current disregard of international refugee law by States. The above statement reflects upon the unwillingness on part of States to provide refugee status to asylum seekers who flee their home countries because of fear of persecution.² Moreover, the people who flee to other States to seek refuge are dealt with in a harsh manner and are even forced to leave and never return. Individuals, who do get refugee status are given minimal protection and often denied benefits of welfare schemes provided by the State granting such status.³

This paper, in light of the above background, aims to provide an overview of Israel’s policies regarding African asylum seekers in relation with its international obligation to protect their rights.

Israel’s Asylum Regime:

“Believe me that I am aware of the harsh humanitarian problem which hides behind those numbers, behind this phenomenon... It is true that the war, the cruel, terrible civil war, the genocide in Darfur today, in Sudan, is a problem that is hard to watch, especially for people like ourselves. But we have to look at the numbers.”⁴

The above statement by Roni Bar-On, Israel’s Interior Minister reflects Israel’s concerns with regard to African asylum seekers. Over the last decade, thousands of men and women from African countries, predominantly from Sudan and Eritrea, who have been affected by the consequences of war have been seeking asylum in various nearby countries, especially Israel. There were times in 2008 where over a hundred African asylum seekers per night crossed the border into Israel.⁵ Instances like this point to several things, more importantly: (i) there are grave dangers to the lives and

¹ Avi Perry, “Solving Israel’s African Refugee Crisis”, *Virginia Journal of International Law*, 51 (1) (2010), pp. 157-184 at p. 166.

² *Ibid.*

³ Barak Kalir, “The Jewish State of Anxiety: Between Moral Obligation and Fearism in the Treatment of African Asylum Seekers in Israel”, *Journal of Ethnic and Migration Studies*, 41 (4) (2015), pp. 580-598 at p. 581.

⁴ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 177.

⁵ *Ibid* at p. 158.

properties of individuals if they continue to stay in their home States and hence seeking asylum in States which they believe is safer, becomes their only option and (ii) the concerns, especially that of sovereignty and security, of the States, which provide asylum to these individuals.

It is important to note that there is a difference between an asylum seeker and a refugee, although the former may become the latter. Under the Convention relating to the Status of Refugees, 1951, a refugee is a person who has crossed a political border of his home country and does not want to return to his country fearing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁶ On the other hand, “asylum seekers are people who have moved across international borders in search of protection under the Refugee Convention of 1951, but whose claim for refugee status has not yet been determined.”⁷ For them migration is neither a choice, nor a preference, it is a necessity.⁸ States that grant refuge are explicitly barred from discriminating among refugees on the basis of “race, religion or country of origin”⁹ and no State may enter a reservation to this provision.¹⁰ There is a presumption established by Article 3 that differential treatment based on any of the enumerated grounds is forbidden.¹¹ The 1951 Convention was drafted in the wake of the Second World War and Israel was one of the drafters and one of the first to sign and ratify the Convention and has acceded to the 1967 Protocol as well.¹² The Convention also recognizes the bedrock right of *non-refoulement*, according to which a State is prohibited from returning refugees or asylum seekers to other States in which their lives might be endangered.¹³ A narrow exception is carved out to this principle when there are “reasonable grounds” for regarding a *particular refugee* (emphasis added) as a threat to security of the State granting refuge.¹⁴ Apart from such circumstances, the Convention clearly intends that refugees are not to be

⁶ Article A Paragraph A (2) of the Convention of Refugees, 1951, “...owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

⁷ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 159.

⁸ Tally Kritzman-Amir, “Refugees and Asylum Seekers in the State of Israel”, *Israel Journal of Foreign Affairs*, VI (3) (2012), pp. 97-111 at p. 98.

⁹ Convention relating to the Status of Refugees 1951, Article 3.

¹⁰ Convention relating to the Status of Refugees 1951, Article 42.

¹¹ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 161.

¹² Tally Kritzman-Amir, “Refugees and Asylum Seekers in the State of Israel”, note 8, p. 98.

¹³ Convention relating to the Status of Refugees 1951, Article 33.

¹⁴ *Ibid*; also see Convention relating to the Status of Refugees 1951, Article 1 (F).

returned either to their home country or to other countries in which their lives would be at risk.¹⁵

Even though Israel ratified the Refugee Convention in 1954, it has not adopted the Convention into its domestic legislation due to which the Convention remains unenforceable in Israeli courts.¹⁶ However it has been accepted as a guide to informed judicial decision-making and in the *Al-Tai*¹⁷ case, the principle of *non-refoulement* has been declared as binding in Israeli law. It must be noted that since 1951, Israel has formally recognized only 170 refugees.¹⁸ Israel established its own procedures for determining refugee status in 2002 but continues to partner with the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) in processing claims. A memorandum issued by the Ministry of the Interior, “Regulations Regarding the Treatment of Asylum Seekers in Israel” (hereinafter “Asylum Regulations”) contains the terms of the partnership.¹⁹ According to the Asylum Regulations, the UNHCR performs the preliminary registrations and assessments. It receives and sorts the claims of asylum, interviews individual applicants, gathers relevant information and submits recommendations to a special body which is housed within the Ministry of the Interior, the Israeli National Status Granting Board (hereinafter “NSGB”).²⁰ This body has the responsibility of the ultimate disposition of all the claims for asylum. While their cases are still pending, the applicants who have been screened by the UNHCR receive renewable temporary worker permits (B-1 visas). Once they are recognized by the NSGB as refugees then they are entitled to renewable temporary residence permits (A-5 visas) and they get access to public healthcare and the right to

¹⁵ “The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary by Dr. Paul Weis’

<<http://www.unhcr.org/4ca34be29.pdf>> accessed 27 September 2016.

¹⁶ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 162; Yonathan Paz, “Ordered Disorder: African Asylum Seekers in Israel and Discursive Challenged to an Emerging Refugee Regime”, *Policy Development and Evaluation Service, United Nations High Commissioner for Refugees*, (2011), pp. 1-21 at p. 4.

¹⁷ HCJ 4702/94 Al-Tai v. Minister of Interior, Piskei Din 49(3) 843 (1995).

¹⁸ Press Release, Refugees Rights Forum, Asylum Seekers and Refugees in Israel: August 2009 Update 1 (Aug. 20, 2009), <<http://www.acri.org.il/pdf/refugees0809en.pdf>> accessed 28 September 2016; Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 163.

¹⁹ Anat Ben-Dor and Rami Adut, ‘Israel-A Safe Haven? Problems in the treatment offered by the State of Israel to Refugees and Asylum Seekers’ <<http://www.tau.ac.il/law/clinics/english/Safe%20heaven.pdf>> Annex A p. 68-71 accessed 27 September 2016.

²⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Country Operations Plan 2007 - Israel*, 1 September 2006, <<http://www.refworld.org/docid/45221d9d2.html>> accessed 28 September 2016.

seek employment.²¹

However, the above procedure involved in an individual getting refuge is heavily criticized. Firstly, there is no meaningful right to represent the asylum seekers before the competent authorities.²² Secondly, the same bodies responsible for the initial decisions review the appeals and rarely unsuccessful applicants are given detailed explanations for rejection²³ and thirdly, many asylum seekers are classified automatically as enemy nationals based on their country of origin.²⁴ According to Section 6 of the Asylum Regulations, Israel has a right not to grant a permit to stay in its territory to a national from an enemy or hostile State and relevant authorities from time to time determine who the enemy States are.²⁵ Sudan along with many Arab States are considered as enemy State by Israel and by extension, Sudanese nationals who are one of the biggest asylum seekers in Israel, are barred even from submitting applications.²⁶ In case any national of the enemy State enters Israel without proper documentation, then he will be subjected to executive detention as per Infiltration Law, 1954, which is an emergency legislation. The condition is not so different in case of Eritreans, who although not considered as enemy nationals, have been denied the opportunity to apply for refugee status and are subjected to detention.²⁷

The Israeli Parliament never lifted the state of emergency and the Infiltration Law, 1954 remains in force along with Entry Law of 1952, which includes safeguards such as judicial review and governs general immigration protocols.²⁸ When the number of asylum seekers drastically increased in 2006, Israel observed a policy of applying the Infiltration Law of 1954 to many African asylum seekers, hundreds of the asylum

²¹ Michael Kagan and Anat Ben-Dor, *Nowhere to Run: Gay Palestinian Asylum-Seekers in Israel* 39 (2008) <http://www.law.tau.ac.il/heb/_Uploads/dbsAttachedFiles/NowheretoRun.pdf> accessed 28 September 2016; also see Sinai Perils, Risks to Migrants, Refugees and Asylum Seekers in Egypt and Israel, *Human Rights Watch* 75 (2008) <<http://www.hrw.org/sites/default/files/reports/egypt1108webwcover.pdf>> accessed on 28 September 2016.

²² *Ibid.*

²³ Tally Kritzman-Amir, “Otherness as the Underlying principle in Israel’s Asylum Regime”, *Israel Law Review*, 42 (3) (2009), pp. 603-627 at p. 614.

²⁴ Michael Kagan and Anat Ben-Dor, Nowhere to Run: Gay Palestinian Asylum-Seekers in Israel, note 21, p. 40.

²⁵ Anat Ben-Dor and Rami Adut, Israel-A Safe Haven?, note 19, p. 70.

²⁶ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 163; Haim Yacobi, “Let Me Go to the City”: African Asylum Seekers, Racialization and the Politics of Space in Israel”, *Journal of Refugee Studies*, 24 (1) (2011), pp. 47-68 at p. 65.

²⁷ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 164.

²⁸ *Ibid.*

seekers were detained without judicial review and their rights under the human rights conventions such as the International Covenant on the Civil and Political Rights were violated and those detentions lasted for weeks or even months.²⁹ The asylum seekers face problems such as poverty, hunger, persecution etc. Apart from the legal obligations, the question of social justice also arises in this context, as to whether Israel has moral obligations towards these people or not.³⁰

Israel was founded as a Jewish State after the holocaust, which witnessed historical exclusion and tragic persecution of Jews on ethnic and religious grounds. Ever since, Israel is considered as a safe haven for Jews. On the other hand, it is often alleged that a country with this background is institutionally treating African asylum seekers inhumanely and even drafting draconian laws against their free movement and basic human rights.³¹ Israel's policies with respect to asylum seekers need to be comprehended in the light of its "basic laws".³² Every Jew in the world has a right to come, settle and acquire citizenship of Israel by virtue of Israel's Law of Return (1950). However, no such procedures are prescribed for conferring citizenship on non-Jews.³³ Right of non-nationals who are not "oleh" (a Jew who returned to Israel) to enter and reside in Israel is regulated by Law of Entry (1952), which defines procedures for acquiring an entry visa and also sets out the grounds on which non-nationals may be expelled.³⁴ Any Jew from across the world that comes to Israel has the right to apply for an "oleh" certificate and as under the Nationality Law (1952) he may become a citizen of Israel.³⁵

Historically, Israel's doors were open to Jews seeking refuge from persecution. For example, between 1989 and 2003 nearly one million Jewish immigrants were sheltered by Israel from the former Soviet Union and in 1991, it airlifted fifteen thousand Ethiopian Jews to Israel.³⁶ However, Israel's treatment of non-Jewish

²⁹ Haim Yacobi, "Let Me Go to the City: African Asylum Seekers, Racialization and the Politics of Space in Israel?", note 26, p. 57; Avi Perry, "Solving Israel's African Refugee Crisis", note 1, p. 164, 165.

³⁰ Tally Kritzman-Amir, "Refugees and Asylum Seekers in the State of Israel", note 8, p. 97.

³¹ Barak Kalir, "The Jewish State of Anxiety: Between Moral Obligation and Fearism in the Treatment of African Asylum Seekers in Israel", note 3, p. 582.

³² HCJ 4702/94 Al-Tai v. Minister of Interior, *Piskei Din* 49(3) 843 (1995).

³³ Hadas Yaron, Nurit Hashimshony-Yaffe and John Campbell, "Infiltrators or Refugees? An Analysis of Israel's Policy Towards African Asylum-Seekers", *International Migration*, 51 (4) (2013), pp. 144-157 at p. 145.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Avi Perry, "Solving Israel's African Refugee Crisis", note 1, p. 165.

refugees, especially the African asylum seekers have been different. By 2012, there were around 60,000 asylum seekers in Israel.³⁷ It is often said that Israel has one of the world's worst records in granting refugee status to people who escaped religious and ethnic cleansing in Sudan or oppression under the authoritarian regime in Eritrea. Israel even went on to invest around half a billion US dollars in 2012 fencing its borders with Egypt in order to prevent asylum seekers entering its territories. Further, it constructed one of the biggest detention camps, which had the capacity to accommodate 10,000 asylum seekers.³⁸

Article 3 governs the entire 1951 Convention including the duty of *non-refoulement*, which is enshrined in Article 33 and is equally applicable to actions taken within the territory of a State towards individuals seeking to enter its territory.³⁹ Article 44 of the Fourth Geneva Convention, which is ratified by Israel, also contains a similar principle.⁴⁰ In spite of this, the way African asylum seekers are treated by Israel based on the Infiltration Law of 1954 and Section 6 of Asylum Regulations shows the differentiation precisely on the basis of nationality, subjecting the applicants to defective asylum procedures, detention and even the risk of *refoulement*.⁴¹ Between July 2007 and October 2008, at least thirty-two Africans seeking to enter Israel were killed by the Egyptian border guards.⁴² Forty-eight asylum seekers who had entered Israel through Egypt were forcibly returned to Egypt in 2007, and from there twenty of them were subsequently returned to Sudan.⁴³ Israel has forcibly returned around 139 asylum seekers across border to Egypt since 2006.⁴⁴ Israel is in clear breach of obligations under International Law.

Israel's Concerns:

The main concerns for Israel in admitting African asylum seekers (especially Sudanese and Eritreans) are due to the reasons of security and demographics and a

³⁷ Barak Kalir, "The Jewish State of Anxiety: Between Moral Obligation and Fearism in the Treatment of African Asylum Seekers in Israel", note 3, p. 581.

³⁸ *Ibid.*

³⁹ Avi Perry, "Solving Israel's African Refugee Crisis", note 1, p. 165, 166.

⁴⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949, Article 44.

⁴¹ Anat Ben-Dor and Rami Adut, Israel-A Safe Haven?, note 19, p. 70; Avi Perry, "Solving Israel's African Refugee Crisis", note 1, p. 166.

⁴² Tally Kritzman-Amir and Thomas Spijkerboer, "On the Morality and Legality of Borders: Border Policies and Asylum Seekers", *Harvard Human Rights Journal*, vol 26 (2013), pp. 1-38 at p. 34.

⁴³ Avi Perry, "Solving Israel's African Refugee Crisis", note 1, p. 172.

⁴⁴ *Ibid* at p. 173.

minor concern with regard to economics. The major concerns originate from the core objectives of Israel, ‘maintaining a secure State against the threat of terrorism and preserving the Jewish character of the State’.⁴⁵ These concerns are often reflected in the Israeli Prime Minister Benjamin Netanyahu’s speeches.⁴⁶ However, it is very important to note that these three concerns are very distinct from one another and none of them justify Israel’s current policies towards the asylum seekers.

Israel has a right to defend its borders and shield its citizens from any attack and international law is clear about this right and does not create an obligation on any State to provide refuge to any individual who is a threat to the security of the State.⁴⁷ The Refugee Convention of 1951 provides for measures to be taken during wars in the interest of national security.⁴⁸ But it is equally clear in international law that only on the basis of specific evidence against a *particular* (emphasis added) asylum seeker, any such measures may be pursued and not on the basis of discrimination by nationality.⁴⁹ According to this, every African asylum seeker may be excluded by Israel for security reasons but such determinations must be made at an individual level rather collectively. It is also notable that Israel is a country with a mighty military establishment and there have not been any reports of asylum seekers being involved in terrorism or any other activity affecting national security.⁵⁰ As mentioned earlier, Israel has a right to defend itself from a threat of terrorism and a remedy lies in the careful screening of the asylum seekers in consistence with international law and discriminating asylum seekers based on their nationality or ethnicity would be unlawful.⁵¹

Conclusion

The influx of asylum seekers in Israel needs to be understood in terms of political, social and economical changes taking place in the regions around Israel. Issues such

⁴⁵ Michal Shamai and Yair Amir, Not the Promised Land: African Asylum Seekers and Refugees in Israel (2015) Qualitative Health Research <<http://qhr.sagepub.com.idpproxy.reading.ac.uk/content/early/2015/02/06/1049732315570131.full.pdf+html>> p. 2 accessed 27 September 2016; Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 173.

⁴⁶ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 173, 174.

⁴⁷ *Ibid* at p. 175.

⁴⁸ Convention relating to the Status of Refugees 1951, Article 9.

⁴⁹ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 175.

⁵⁰ Barak Kalir, “The Jewish State of Anxiety: Between Moral Obligation and Fearism in the Treatment of African Asylum Seekers in Israel”, note 3, p. 583.

⁵¹ Avi Perry, “Solving Israel’s African Refugee Crisis”, note 1, p. 175.

as, poverty, hunger, racial and ethnic discrimination, wars, along with the hope for a better and safe environment tend to play a significant role in individuals/groups migrating from their homeland. Among many who choose to migrate, refugees and asylum seekers are forced to leave their homeland. For these categories of people, migration becomes a necessity. As described above, the State of Israel, post 2005, has been facing a serious challenge of dealing with large numbers of asylum seekers coming into its territory seeking refuge. The government's policy towards dealing with the challenge, however, has not been very friendly towards these people. Israel's treatment of asylum seekers has only added to the sufferings of these people. The question then is, whether Israel, in the wake of international pressure, chooses to change its policies towards asylum seekers or continues its present stand towards them? Will the State of Israel pay regard to human rights considerations, international law, and the international responsibility it shares with other nations to protect asylum seekers or will it only look to its own interests? Will Israel adopt an accommodative policy towards asylum seeker and allow these people to become a part of Israel society or will it continue to exclude them on the basis of religion, race, security concerns etc.? These are some of the key questions, the answers to which will certainly have an impact, not only on Israel's standing in the international community but also on the lives of the asylum seekers and refugees.

Note that, it is only by honoring the obligations under the 1951 Convention and the 1967 Protocol, that Israel will be able to find a solution which is favorable to all. Israel needs to amend its asylum regulations (till the parliament passes a legislation dedicated to this issue), especially with regard to the individual screening process and ensure the availability of even the basic procedural safeguards to all the asylum seekers irrespective of country of origin. Israel cannot choose to defend its identity as a Jewish State at the cost of the lives of thousands of asylum seekers, especially when Israeli policies are in constant violation of international law. Furthermore, concrete steps need to be taken by those countries through which asylum seekers crossover and come to Israel. Protection of the rights of refugees and asylum seekers is a shared responsibility and hence, only when a shared effort is made by all the countries the problem will be solved. States should pay regard to human rights values and be accommodative and should move beyond the considerations of race, religion or ethnicity in helping the homeless get a new home, a new life and a new beginning.

As is rightfully stated by the UNHCR, “Refugee movements are not inevitable, but can be averted if action is taken to reduce or remove the threats which force people to leave their own country and seek sanctuary elsewhere.”⁵²

⁵² *Ibid* at p. 184.