TO INFILTRATE AND BEYOND:
DEMOCRATIC APPROACHES TO ASYLUM SEEKERS
IN THE UNITED STATES AND ISRAEL

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I. INTRODUCTION

It is two in the morning and you find yourself camping along the border with Egypt. As the night gets darker, your eyes strain as you lose sight of the Egyptian police sitting on the other side of the border, only 120 meters away. While waiting in the darkness of the night, you suddenly hear gunshots ring out and the sound of Egyptian police shouting at each other in Arabic. What you cannot hear, however, are the screams and shouts of those being targeted, as the ones still alive

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continue their trek towards Israel in silence. Eventually, some complete the journey, but many others never reach their destination.\(^1\)

Amidst this personal drama, Israeli Defense Force (IDF) soldiers both former (myself included) and current, vigilantly watch over that same border, waiting helplessly as African migrants stream toward it, desperately seeking asylum. Even when they do successfully reach their destination, the result is often not a happy one.

Stories like this have been recorded for years.\(^2\) "The journey to Israel for both Sudanese and Eritrean asylum seekers is fraught with risk and can last weeks or even years, culminating in a mad nighttime dash towards the border after being ferried across the Sinai Desert by smugglers."\(^3\) Just getting to that border involves not only serious security concerns, health risks, and time and energy allotments, but even more tempestuous, a harrowing last stage of the journey includes a trek along the 140-mile long Israeli-Egyptian border.\(^4\) Until recently,


4. See generally David M. Morriss, *Article, From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT’L L. 801, 849-50 (1996) (the border demarcations between Israel and Egypt have fluctuated throughout the history of the two countries. Since Israel’s return of the Sinai, which was captured in the 1967 war, there have been numerous arrangements and treaties, which have survived the test of time despite animosity on both sides. In fact, cooperation on issues such as asylum has taken place, sometimes publicly and sometimes out of the public eye.; see also Nada El-Kouny, *African Asylum Seekers Stranded in Limbo between Egypt, Israel*, AHRAMONLINE (Sept. 6, 2012),
this fence was no more than a couple feet tall at certain points and was heavily patrolled around the clock by both Egyptian guards and soldiers of the IDF on their respective side of the fence. Recent compilations of news agencies have attributed twenty-three (23) fatalities to the Egyptian Border Patrol guards in 2008 alone. The same reports provide evidence surrounding the deaths of women and children, many found with multiple gunshot wounds to the body. Recently, the violence and regularity of these border shootings has shocked the Israeli public.

As a soldier, I often dismissed the cruelty visited upon my senses by burying such sights deep within, but the Israeli public has not been so quick to silently accept these injustices. Many Israeli soldiers have taken it upon themselves to write political figures and demand action. They claimed feeling helpless and being so close brought


6. Perry, supra note 3, at 171.


8. Id. at 53-54.

9. See, e.g., David D. Kirkpatrick, New Egypt Law Effectively Bans Street Protests, N.Y. TIMES (Nov. 25 2013), http://www.nytimes.com/2013/11/26/world/middleeast/egypt-law-street-protests.html?_r=0 (Presumably the Egyptian public has been too consumed recently by political strife and tension in their own country to confront the shooting of migrants and asylees at the outskirts of their borders. The most current wave of asylum seekers passing through Egypt and into Israel coincided with government overthrows and crackdowns of political protests on the streets in Egypt.).

10. Perry, supra note 3, at 171.

11. Id.
back thoughts of the Holocaust, when Jews sat idly by all while watching similar, morally incomprehensible acts.\textsuperscript{12} Thirty (30) IDF reservists expressed their outraged stating, "We have always accused [Western] countries for standing idly by during the Holocaust of the Jewish people . . . And yet Israel is dodging its moral duty to help these distraught refugees. The act of capturing them . . . has nothing to do with defending the country."

The perilous journey conceived above represents but one likely experience among the thousands who have made it to Israel, and even more so, among the petitioners who have recently pled their case in front of the Israeli Supreme Court to rectify their treatment.\textsuperscript{14} Getting to these "zones of freedom" has proven to be far from the last battle for many of these asylum seekers.\textsuperscript{15} Their treatment and ability to stay away from the persecution they fled will prove to be a whole other battle. This set of trials and challenges, in fact, invoke the very core principles underlying asylum law as codified in the 1951 Convention Relating to the Status of Refugees ("1951 Convention"),\textsuperscript{16} originally meant to address the plight of post-WWII refugees but now extended to the chronic conflicts besetting so much of the world.\textsuperscript{17} The anchor of these core principles is the notion of non-refoulement: the firmly-

\begin{itemize}
\item 12. \textit{Id.}
\item 13. \textit{Id.}
\item 14. \textit{See} Noa Yachot & Adi Lerner, \textit{Cracks in the Detention Regime: Refugee Advocates See String of Court Wins}, +972 MAGAZINE (May 16, 2013), \url{http://972mag.com/cracks-in-the-detention-regime-refugee-advocates-see-string-of-court-wins/71607/} (The Israeli Supreme Court in HCJ 7146/12 \textit{Adam v. Knesset} discussed a handful of petitioners by name and even more who remain anonymous. All individual parties, however, were backed and/or accompanied by human rights groups and advocates. Together they are but a small fraction of those cases seeking justice by way of courts and other proceedings in Israel. One common advocate on behalf of these asylees is the Israeli Hotline for Migrant Workers, who recently obtained another win in a Be'er Sheva District Court. In this case a mother and her two daughters from Eritrea were released from detention on "special humanitarian grounds.").
\item 15. "Zones of freedom" is a term used by the author to reference great democracies.
\item 17. \textit{Id.} at Introductory Note.
\end{itemize}
held conviction that a receiving country must not return refugees to a political entity in which they will likely be subject to persecution.\textsuperscript{18}

International trends continue to support the notion that “[a]sylum seekers tend to flock to the nearest (relatively) stable states, rather than spreading out evenly across the globe.”\textsuperscript{19} The United States and Israel are two of these primary examples.\textsuperscript{20} Both countries pride themselves on having certain freedoms, liberties, rights and virtues, and the intersection of these ideals with the tangled realities of non-refoulement are at the root of recent dilemmas involving their asylum policies.

Like the United States, Israel is part of “the great fellowship of democracies who speak the same language of freedom and justice, and the right of every person to live in peace.”\textsuperscript{21} In fact, even one of Israel’s staunchest critics, former President Jimmy Carter,\textsuperscript{22} once described the two countries’ values as a common “belief in individual

\textsuperscript{18} Perry, supra note 3, at 161.
\textsuperscript{19} Id. at 168 (citing Benjamin Cook, Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market, 19 GEO. IMMIGR. L.J. 333, 344 (2004)).
\textsuperscript{20} See, e.g., Facts and Figures about Refugees, THE UN REFUGEE AGENCY, http://www.unhcr.org.uk/about-us/key-facts-and-figures.html (last visited Dec. 26, 2015) (Other primary examples of “asylee states” recently making headlines include: Australia, Indonesia, Iran, Iraq, Ethiopia, Lebanon, Afghanistan, the United Kingdom, Egypt and Sweden to name a few); see also Tom Nightingale & Eliza Borello, Asylum Seekers to be Transferred to Christmas Island After ‘Standoff’ between Australia and Indonesia, ABC NEWS (Nov. 9, 2013, 2:12 AM), http://www.abc.net.au/news/2013-11-09/future-of-asylum-seekers-uncertain/5080858. (Australia’s territory of Christmas Island stands as a recent example of asylees seeking a stable home but not finding themselves wanted by the country of refuge. After a deadlock over possession of a group of asylees, Australia caved to Indonesia’s refusal, and accepted nearly 60 asylum seekers onto their Christmas Island).
liberty, a common commitment to representative democracy, a common vision of human brotherhood, [and] the convention that there is no higher pursuit than that of peace with justice." 23 Another proud function of true democracies is the practice of due process—the fundamental belief that the accused will enjoy at least some level of official consideration before a judgment is issued—something both these countries take pride in. 24 Following the debut of the concept in the Magna Carta, 25 the term itself, as well as its modern meaning, first appeared in a subsequent fourteenth-century English statute. 26

This idea of due process continued to develop as a bedrock practice fundamental to these two countries via both domestic and international law. The dissection of its actual practice, however, will be crucial in the comparison of procedures and rights assigned to asylum seekers in both the United States and Israel under international and domestic laws. That is, when it comes to meeting the obligations and expectations of non-refoulement, are these countries successfully incorporating due process in the systems and procedures applied to asylum seekers? This article will argue that even with the high value placed on notions of justice and "freedom for all" there are still great gaps in practice and treatment as these values apply to asylum seekers. Current trends however seem to show both countries evolving in the right direction.

In exploring these asylum phenomena and the legal landscape meant to address them, Part II of the article will begin by first providing context through analysis of the terms used and their legal definitions as well as the international obligations enforcing them. As


24. Menachem Elon, Human Dignity and Freedom, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0009_0_09304.html (last visited on Nov. 22, 2015) (In 1992, Israel enacted the "Basic Law: Human Dignity and Freedom" to attribute constitutional status to basic principles of law. One of those principles is contained in Sections Two and Four, which provide for due process.); see also U.S. Const. amend V (West, Westlaw through Nov. 2015); see also U.S. Const. amend XIV, § 1 (West, Westlaw through Nov. 2015).


we will see, the manner in which these two countries label individuals seeking asylum greatly affects both the status and treatment these individuals are entitled to under the different legal systems. In this regard, Part III of this article will examine the evolution of asylum policies in the United States and subsequently in Israel, culminating in an in-depth analysis of a recent pivotal adjudication by Israel’s Supreme Court, tackling the country’s recent struggles dealing with African asylum seekers.27 Interestingly, despite the common principles embraced by these legal systems of due process and basic rights that extend to asylum seekers, both also frequently succumb to similar mistakes and mishandlings in the execution of due process in this context.

Additionally, Part IV of the article will analyze international norms and the possible implications extending to both countries under such obligations. Finally, this section will highlight developments in asylum trends and policies recently adapted to the broadening war zones and ever changing political situations of the world. In analyzing this issue, this article will consider the implementation of asylum law against the backdrop of responsibilities the United States and Israel have under international law.

II. THE CONCEPT OF ASYLUM SEEKERS

The longstanding principle of the United States that it “will not return a foreign national to a country where his life or freedom would be threatened” is, in itself, an expression of its commitment to non-refoulement, to which the principle of due process must be applied.28 By its very nature, this application implies some sort of systematic


procedural check before arbitrarily returning asylum-seekers back to their native country. “Traditionally, the United States has welcomed those fleeing persecution in their homelands. Since America is a nation of immigrants, many of whom have fled religious and political persecutions, this tradition is firmly embedded in the American character.”

Recent memory in fact provides salient examples whereby the United States has attempted to accommodate groups such as Cubans, Haitians, and other asylum seekers fleeing countries known for human rights violations and crackdowns on political dissidents. Complicating the realization of these common ideals is the fact that both the United States and Israel have dealt with large influxes of different immigrant groups, as refugees and asylum seekers continue to go to great lengths and cross dangerous barriers in an effort to feel safe and flee persecution. In doing so, both countries have encountered the benefits and burdens that come along with accommodating such individuals.

Beyond economic and security interests lie a whole plethora of complicated realities and administrative brakes on the asylum-granting process. These include the need to deter security threats as well as sheer numbers and asylum influxes that might unduly stress

29. Richard K. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations*, 45 MD. L. REV. 91, 92 (1986) (discussing the historical acceptance of refugees in America) [hereinafter Preston]; see also STAFF OF S. COMM. ON THE JUDICIARY, 96TH CONG., REP. ON IMMIGRATION LAW AND POLICY 15-25 (Comm. Print 1979) (evidences numbers dating back from 1776 observing that nearly 50,000,000 immigrants, of which 2,000,000 characterized as refugees, have entered the United States).

30. A great depiction of the United States’ evolution on the issue of accommodation for asylum seekers can be seen in Ruth Ellen Wasem’s CRS Report to Congress, which covers post-Mariel policies and legislation meant to assist various groups such as Haitians and Cubans. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 2-5 (2005), http://fpc.state.gov/documents/organization/47153.pdf [hereinafter CRS Report RS21349].

already taxed social and economic systems.\textsuperscript{32} Therefore, the need and option for asylum must be reconciled against both modern realities and international principles of law, with these conflicting considerations resolved within the context of upholding the highest virtues of these countries’ respective legal systems.\textsuperscript{33}

Determining who exactly meets the definition of an asylum seeker has fluctuated with the times, locations, and stages of international events. Typically asylum is defined by the act of refugees fleeing their country of origin as a means to escape specific threats or the perception thereof.\textsuperscript{34} For the United States as well as for other signatories to the 1951 Convention\textsuperscript{35} and 1967 Protocol, asylees must first “demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular group or political opinion” in order to be considered for asylum.\textsuperscript{36} “Under the law an alien cannot obtain asylum in the United States merely by citing general economic and political conditions in his homeland. He must [instead] show that he as an individual is likely to be singled out for persecution.”\textsuperscript{37} Upon

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\item \textsuperscript{32} In May of 2005 the United States passed the “Real ID Act” in response to the terrorist attacks of September 11, 2001. The legislation specifically targeted “vulnerable individuals” whom the United States historically granted protection: asylum seekers. Critics have argued that the legislation is overly broad and thus used as a tool to keep out or slow down asylum trends in the United States. See Marisa Silenzi Ciancarulo, \textit{Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise}, 43 H.A.R.V. J. ON L.E.G.I.S. 101, 101-02 (2006).
\item \textsuperscript{33} Specifically the virtues of due process and respect for human rights as discussed throughout the article.
\item \textsuperscript{34} 1951 Convention, \textit{supra} note 16; see generally Flowing Across Borders, THE UN REFUGEE AGENCY, \url{http://www.unhcr.org/pages/49c3646c125.html} (last visited Dec. 26, 2015).
\item \textsuperscript{35} 1951 Convention, \textit{supra} note 16.
arrival into the host country, asylum seekers will generally present their cases for review before an officer of the state or military official as in Israel's case, during which some minimal due process procedure is expected. If deemed to have lied in the process or discovered to have "participated in the persecution of other people," the individual will be placed in a special procedural category to be removed from the country—termed "expedited removal" in the United States—or simply denied. Expedited removal, as will be discussed later in depth, has raised grave and fundamental legal questions in the United States as regards to the proper application of due process, while its counterpart in Israel has sparked similar controversy regarding its adherence to its legal foundation.

Despite these ongoing concerns, the United States continues to try and follow through on its international obligations. Those obligations are based off two treaties: (1) the 1951 Convention Relating to the Status of Refugees and (2) its successor, the 1967 Protocol Relating to the Status of Refugees. As of 2010, there were 146 signatories/parties to one or both of these instruments, including Israel and the United States. The United States, specifically, ratified


38. CRS Report RL32621, supra note 30, at 4.

39. 8 U.S.C. § 1252 (2005). Furthermore, expedited removal can happen for other reasons besides failure to meet legal requirements. The procedure has and continues to be abused and criticized by many in the international community. See generally James E. Crowe, III, Running Afoul of the Principle of Non-Refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigration responsibility Act, 18 ST. LOUIS U. PUB. L. REV. 291, 297 (1999); See also CRS Report RL32621, supra note 30, at 1.


the latter protocol on November 1, 1968.\textsuperscript{43} Israel ratified the 1951 Convention on October 1, 1954\textsuperscript{44} and later acceded to the 1967 Protocol on June 14, 1968;\textsuperscript{45} becoming one of the few states in the Middle East to have bound itself to these international obligations.\textsuperscript{46} Together, these treaties in essence set out the basic requirements for the treatment of refugees, especially in regard to adherence to the principles of non-refoulement. 

Non-refoulement, as indicated above, is the bedrock tenet of the 1951 Convention. Literally translated from French, the term means "pushing back, turning back, and/or driving back"\textsuperscript{47} but, in the context of refugees, stands for the notion that "international law ... protects refugees from being returned to areas where their lives or freedom are likely to be in danger."\textsuperscript{48} The principle was formally codified in Article 13 of the 1951 Convention stating that "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the 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."\textsuperscript{49} Article 33 continues with exceptions and limitations to the aforementioned, while still leaving room for interpretation of the various included terms.\textsuperscript{50} Although the importance of the non-refoulement protections stem from the danger of returning an asylee back into imminent danger, there are other roadblocks should a country still desire to pursue such a course. Logistically, facilitating asylees' return back to their native

\textsuperscript{43} Id.
\textsuperscript{44} See 1951 Convention, supra note 16.
\textsuperscript{45} See 1967 Protocol, supra note 36.
\textsuperscript{46} 1951 Convention, supra note 16; see also 1967 Protocol, supra note 36.
\textsuperscript{47} THE OXFORD- HACHETTE FRENCH DICTIONARY 719 (4th ed. 2007).
\textsuperscript{49} Non-refoulement finds its roots in the 1951 Convention. See generally Crowe, supra note 39, at 297-300 (for additional discussion on the evolution of this principle); see also 1951 Convention, supra note 16, at art. 13.
\textsuperscript{50} 1951 Convention, supra note 16, art. 33.
countries, especially those with which the new host state has no relations, can prove quite tricky. This is especially true for Israel, as relations with neighboring countries have always been an issue.\(^{51}\)

Prior 1980, the United States' only international obligations were under the Protocol, but through implementation of the Refugee Act of 1980, the US set up its own distinct laws and regulations available to refugees and asylees whose applications would later become approved.\(^{52}\) In the United States, as elsewhere, the goal of many asylum seekers is to become legal permanent residents (LPRs).\(^{53}\) In following the 1967 United Nations Protocol Relating to the Status of Refugees, the United States incorporated its basic obligations under the treaty by putting forth procedures for those applying for asylum.\(^{54}\) This protocol does not require the party state to accept refugees, but it does guarantee that those countries follow some commonly agreed-to guidelines, guaranteeing certain minimal protections and rights to aliens meeting the definition of refugee contained therein.\(^{55}\)

Nonetheless, the United States government then took it upon itself to set basic regulations and procedures for compliance with these protocol obligations. The result was the Refugee Act of 1980, which allocates 5,000 spots for refugees, with that number collectively set annually by the President in consultation with Congress, and carried out by the Attorney General who is authorized to grant LPR status to

\(^{51}\) See generally YONAH ALEXANDER & NICHOLAS N. KITTRIE, ARAB & ISRAELI PERSPECTIVES ON THE MIDDLE EAST CONFLICT (AMS Press, 2d ed. 1973). Israel has been involved in 10 major wars with its neighbors since its birth as a country in 1948. In that year, 1948, as well as in 1967 and 1973, Israel found itself fighting for survival, against every one of its neighbors as well as those from other parts of the Middle East. Each time, Israel had managed to hold its ground and survive, but with little progress in relations with those very neighbors. Although treaties have been signed with both Egypt and Jordan in 1977 and 1994 respectively, tensions remain. Id.

\(^{52}\) Preston, supra note 29, at 96-99.


\(^{55}\) 1967 Protocol, supra note 36.
asylum seekers. Soon after, dilemmas surrounding application of due process toward *non-refoulement* began, initially as a result simply of the number of asylum seekers vastly exceeding the original annual quota of 5,000.

Since the 1980s, significant changes have been made, many taking into account major shifts in the political landscape. The 5,000-person asylum cap doubled by 1990, while the exodus in the wake of political unrest in Haiti, Central America, Cuba, and the end of the Cold War led to lengthy backlogs and reconsideration of judicial review procedures for denied asylum requests. One of the biggest changes began, however, following the 1993 bombing of the World Trade Center, whereby the administrations under George H.W. Bush and Bill Clinton sought to take into account possible terror threats as well as heightened claims of bogus applications. This policy, inevitably, led to greater skepticism about asylum applications and thus a great hazard of neglecting *non-refoulement* obligations.

As a response to the overflow of asylum applications, a mechanism was adopted which included legislation to put final decision-making authority for asylum into the hands of the Attorney General, whose judgment would be considered final. Although this policy was initially intended to address the Haitian asylum patterns, it quickly spread to considerations of other groups. Further complicating the implementation of due process is the limitation on judicial review set forth in Section 3 of the legislation, which states, “No Court shall have jurisdiction to review any determination of the

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58. *Id.* at 4.
59. *Id.* at 6.
61. 8 U.S.C. § 1158(a)(3) (effective June 1, 2009) (“No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).”).
Attorney General.” Unless circumstances change, in effect, the law generally prevents an asylee from attempting entry a second time.

As might be surmised, the final discretion over the process by the Attorney General, without recourse to the courts, is highly unusual in United States’ law and subject to abuse of what is essentially unchecked power. There are numerous examples of this phenomenon, several in particular helping to highlight the extent of overreach in the United States’ asylum policies. Beyond its consultative role in formulating executive orders to arbitrarily intercept vessels off US shores, the Attorney General also has the power (since the mid-1980s) to undertake expedited removal.

Most problematic about this delegated power is the manifest denial of due process and *habeas corpus* that it involves. Specifically, the Attorney General is permitted “to detain certain undocumented aliens, initially just Haitians, indefinitely without possibility of parole, in contrast to past procedures applied to aliens not likely to abscond or pose security risks.” The goal of such procedures, whether or not explicitly stated, has been to introduce barriers and deter other groups and individuals from seeking asylum in the United States. Clearly, such policies are indicative of core flaws in the asylum regime—not only the arbitrary nature of decisions but also a fundamental disconnect between the 1967 Protocol and the domestic laws supposedly created to support it. These laws, in practice, have often been far more concerned about unmanageable asylee numbers, especially individuals and groups from specific regions judged as high risk.

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63. 8 U.S.C. § 1158(a)(3) (effective June 1, 2009).
64. 8 U.S.C. § 1158(a)(2-3) (effective June 1, 2009).
67. Preston, *supra* note 29, at 94 (discussing a past example of expedited removal policies now covered in 8 C.F.R. § 212.5 and in accordance with § 235.3(b) and (c) of the same chapter).
69. Id.
Returning to the problem of non-refoulement, which is explicitly mentioned in Article 33 of the 1951 Convention, Congress began to address such overreaching authority by making changes in the 1980 legislation to clarify its legal expectations under the Protocol. The end result would be to bring “the United States into conformity with its international treaty obligations and United Nations agreements, which set an ideological neutral standard for asylum.” This effort also gave rise to changes in the act designed to eliminate preferences in conditional entry and, even more so, to place stringent limits on the Attorney General’s power to parole large numbers of refugees. Although each administration have had varying responses to different groups, the United States has continued to formulate its procedures and values to react to the times and needs of asylum seekers.

The non-refoulement principle has likewise been at the center of legal debates on asylum in Israel since the Israeli government is also a signatory to the 1951 Convention. Dr. Reuven Ziegler of the Israel Democracy Institute has gone as far as to say that Israel’s most recent positions have been presumably incompatible “with international refugee law.” As mentioned above, Israel ratified the 1951 Convention as well as the 1967 Protocol, which extended the former. Israel, however, has yet “to adopt the 1951 Convention into domestic

70. 1951 Convention, supra note 16, at art. 33.
71. See Pear, supra note 37, at 2.
72. Id. (discussing the Refugee Act of 1980, INA § 203(e)). Currently, the Attorney General cannot parole into the U.S. any refugee unless there is a compelling reason in the public interest to do so. INA § 212(d)(5)(A) & (B); 8 U.S.C. § 1182(d)(5)(A) & (B) (1982).
73. Id. at 2-3.
76. 1951 Convention, supra note 16; see also 1967 Protocol, supra note 36.
As a consequence, the 1951 Convention remains unenforceable in Israeli courts, even though it is used as a guidepost upon which judges rely for policy and decision-making. In fact, by building on these judges' decisions, the Israeli courts have attempted to use a 1994 ruling to extend Article 33 of the 1951 Convention's position on non-refoulement, binding the principle in its totality into Israeli law. Nevertheless, even with such deposits of law, Israel continues to fall below appropriate levels of intended obligations as set forth by the 1951 Convention, especially as it pertains to non-refoulement and procedural due process for African asylum seekers.

Although it has developed its own procedures for arriving at decisions on refugee status, Israel continues to partner with the United Nations High Commissioner for Refugees (UNHCR), a body that assists signatory member states in fulfilling their international obligations as they pertain to this area of the law. Professor Tally Kritzman-Amir has written heavily on the subject of "responsibility sharing" especially as it pertains to Israel's uneven burden of asylum requests. Taking into account multiple schools of thought in the context of real-world strains on Israel's hosting capacity, she has concluded that "international solidarity," in the form of burden sharing, is exactly what is needed to compensate for the unexpected influx of asylees. A failure to implement Ms. Kritzman-Amir's suggestion or to follow the UNHCR's ability to implement this

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77. Perry, supra note 3, at 162. It is important to note, however, that Israel made several reservations when obliging itself to the 1951 convention. Articles 8 and 12, dealing with exemptions to 'exceptional measures' and 'personal statuses of the individual (respectively) were carved out. Further, Articles 28 and 30 were adjusted; the former necessitating four caveats of its own. For more see 1951 Convention, supra note 16.

78. Id. (discussing the landmark decision El-Tai'i: HCJ 4702/94 ElTai’I v. Minster of Interior 49(3) PF 843, 844 [1994] (Isr.)).

79. Id.


82. Id.
strategy is evident in the proposals still being considered (or is unfortunate in light of other options being considered). In this proposal, Israel offered to pay African countries “between $1,000 and $1,500 for each asylum seeker these countries would be willing to accept into their territories.”\(^{83}\) Even where Israel can get the help from international bodies, the Jewish state continues “favoring its security and demographic objectives over its international obligations.”\(^{84}\)

In an effort to address the critical mass domestically, the Israeli government in 2012 put forth a new law to address the asylum crisis provoked by the dramatic influx of African asylum seekers, streaming in especially from the politically unstable states of Eritrea and Sudan.\(^{85}\) Known in English as the “Prevention of Infiltration Law,” the purpose of the law was originally to address both rises in criminal activity, as a result of the unsustainable numbers of asylees and the breakdown in local authority, as well as the impact of the refugees on the economy.\(^{86}\) “The explanatory note to the amendments, which is not legislation but indicates the Knesset’s intent, does emphasize ‘that provisions of the proposed bill shall be applied in a manner coinciding with Israel’s obligations according to international conventions, and specifically notes the [1951] Refugee Convention.’”\(^{87}\) Even so, when reading the amended act, it appears that non-refoulement is the only principle of the 1951 Convention has been incorporated.\(^{88}\) This made it the first provision of the 1951 Convention to actually be integrated into domestic legislation.\(^{89}\) However, the act did so on the shoulders of the controversial Law of Infiltration.

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83. Id. at 645-46 (citing Olmert and Livni Authorize: Israel will Offer African Countries Payments per Head for 10,000 Refugees, GLOBES (June 12, 2008), http://www.globes.co.il/news/docView.aspx?did=1000350888&fid=2.)
84. Perry, supra note 3, at 158.
87. Hebrew Immigrant Aid Society, Report 2012: Israel’s Asylum Procedures and the Prevention of Infiltration law, HIAS (Mar. 6, 2012), http://takeaction.hias.org/document.doc?id=131; see Ester M. Snyder, Israel: A Legal Research Guide (Vol. 37 2000). The Knesset is Israel’s parliament and constitutes the legislative branch. (“Its 120 members are elected via political party lists in direct, proportional elections which are held every four years or sooner if the government fails to win a vote of confidence or resigns.”).
88. Perry, supra note 3, at 162.
III. FROM LAW OF INFILTRATION TO THE SUPREME COURT

Concerns of terrorism, coupled with false asylum claims and their impact on the economy has brought about the need to redefine and recalculate methods for dealing with asylum seekers. Accordingly, Israel began to formulate its procedures by extending the term “infiltrator” from the 1954 Prevention of Infiltration Law. This created a plethora of legal ramifications, which prior to the most recent Supreme Court decision would define Israel’s policy on African asylum seekers.

Historically, threats to Israel’s national security prompted the “Prevention of Infiltration Law.” This 1954 law was enacted “to address the phenomenon of Palestinian Fedayeen, [or] armed militia members who attempted to infiltrate to attack Israeli targets, which was considered to be a security threat at the time.” “Labeling border-crossers as ‘infiltrators’ ... authorize[d] ... their (automatic) detention for up to three years following the (automatic) issuance of a deportation order. This [in effect] is in contravention to Article 5 of Israel’s Basic Law: Human Dignity and Liberty, which forms part of the country’s constitutional arrangement.” Article 5 specifically states, “[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.” Further, “[t]he court refrained from determining ... whether the legislation also violates the right to freedom of movement.” Equally important, the court’s ruling seemed to reflect concerns that due process and judicial review were not adequately provided to those deemed “infiltrators.”

90. Prevention of Infiltration (Offenses and Jurisdiction)(Amendment) Law, 5714-1954, 8 LSI 133, art. 12 (1953-54) (Isr.) [hereinafter Prevention of Infiltration]. Passed by the Knesset on the 11th Av, 5720 (4th August, 1960), and published in Sefer Ha-Chukkim No. 314 of the 19th Av, 5720 (12th August, 1960), p. 64; the Bill and an Explanatory Note were published in Hatza’ot Chok No. 426 of 5720, at 113.

91. Id.; see generally HCJ 7146/12 Adam v. Knesset.


93. Id.

94. Quashing Legislation, supra note 75.

95. Id.

96. Perry, supra note 3, at 164.
Additionally, similar concerns arose in the law’s legislative development; as it experienced. It went through several transformations and readings over the years. Consequently, the law was amended to its current form. These highly controversial provisions came into effect on January 18, 2012. In an attempt to deter further infiltration, these provisions sought to make the act of crossing Israel’s borders in an attempt to seek refuge a criminal act.

For example, “under the legislation, refugees would be held for three years in detention without trial or any charges being brought against them Refugees from enemy states, like Sudan, would be kept in indefinite detention.” Furthermore under the legislation, “[m]inors arriving without family members [would be] subject to the

97. May 19, 2008 brought about the most far-reaching evolution in the Prevention of Infiltration Law when, by a 21-1 vote, lawmakers in the Knesset proposed amendments of the law that would “allow Israeli authorities to imprison people who enter the country generally through the porous border with Egypt for up to five years.” This initial form of the law labeled “infiltrators,” as they are called, as those from “enemy states”, which includes countries such as Sudan; the punishment for such infiltration was set to be seven years in detainment. A 2011 report presented to the Knesset in the recent Supreme Court decision listed Sudanese asylees as comprising 25.1% of all asylum seekers. See Integrated Regional Information Networks (RIN), Israel: New Law Threatens to Imprison Refugees, REFWORLD (May 27, 2008), http://www.refworld.org/docid/4844053f38.html; see also Gilad Natan, National Programme to Meet the Problem of Infiltrators and Asylum Seekers Entering Israel Across the Egyptian Border, Knesset Research and Information Center (Jan. 25, 2011), http://www.knesset.gov.il/mmm/data/pdf/me02765.pdf [hereinafter Knesset Research Center Informational Report].


99. See generally HCJ 7146/12 Adam v. Knesset.

100. Prevention of Infiltration, supra note 90. This aspect is a remnant of its earlier form as well as some of the other provisions tailored in its last adoption. Another substantial change was the imprisonment period for infiltrators decreasing from 5 years to 3 years. The most dramatic change however was that those convicted even of a petty crime could be sentenced to life in prison automatically. Id.

same punishment." Moreover those "with weapons, including an ordinary pocket knife, [could] be jailed for up to 20 years." Further, "activists from human rights organizations caught operating shelters for refugees [or rendering any assistance whatsoever] and landlords who rent them apartments may [find] themselves charged with 'aiding infiltrators' and could be imprisoned for up to five years." Thus, the law did not make any apparent effort to distinguish refugees or undocumented immigrants from asylum seekers or even those individuals with discernible intent to cause harm.

A temporary three-year observation period was prescribed after the Law of Infiltration was enacted to allow compliance audit. This observation period was proposed to examine "the time impact of the proposed arrangement on the phenomenon of infiltration into Israel..." Additionally, amendments to Section 30a(c)(3) of the Law of Infiltration allowed Israel's Secretary of Defense to issue deportation orders and take infiltrators into custody for up to three years. This is similar to the Attorney General in the United States, who has exclusive jurisdiction over expedited removal orders and paroled asylum seekers coming in large groups from the same countries.

The original form of the Israeli law went even further, as it pertained to those who have made the journey successfully; including

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105. *Id.*

106. HCJ 7146/12 Adam v. Knesset, Justice E. Arbel's decision ¶ 28 (quoting Prevention of Infiltration Law, 5772-2012, SH No. 3 p. 594 (Isr.)).

107. *Id.*

108. *Id.*

migrant workers and asylum seekers who enter Israel without posing a threat to Israel's security. According to the law, migrant workers already in Israel "could be jailed for [even] minor offenses such as spraying graffiti or stealing a bicycle—infractions for which they would not have been detained before."\textsuperscript{110} Again, the primary intent of the law was to address those entering illegally or "those not regulated through the border station,"\textsuperscript{111} not those seeking asylum.

Although human rights observers roundly condemned it, the law did implement basic procedural and safety measures for those caught crossing into Israel. Detained individuals would receive medical attention, as well as water and food when available.\textsuperscript{112} Additionally, "those who filed for asylum [could] receive a temporary visa to remain in [the country]."\textsuperscript{113} However, this plan fell short as Sudanese and Eritreans, the majority of those seeking asylum, were exempted from asylee status. Nonetheless, in an ironic sort of consolation, they could receive a one-way ticket to Tel Aviv where their plights would often become more of a problem.\textsuperscript{114} The new law also decreased procedural safeguards when it extended detention periods from 96 hours to 14 days, whereby a person needs to be brought before a judge, and made it so that it could be up to "seven days before the first time the detainee needs to be met by a border control officer."\textsuperscript{115} Even

\begin{itemize}
\item \textsuperscript{110} Weiler-Polak, supra note 2.
\item \textsuperscript{111} HCJ 7146/12 Adam v. Knesset, Justice E. Arbel’s opinion, ¶ 20. In discussing the term infiltrator the Supreme Court in Israel made clear that the bulk of what was to be addressed involved asylees entering illegally over borders, specifically those with Egypt. \textit{id.} ¶¶ 26, 39. Asylees can enter via numerous methods including, but not limited to, overstaying a visa. The amendment and decision deal primarily with the former situation involving African asylees crossing the 245 km (152.2 miles) of border between Israel and Egypt. \textit{id.} ¶ 26.
\item \textsuperscript{112} Weiler-Polak, supra note 2.
\item \textsuperscript{113} \textit{id.}
\item \textsuperscript{114} See Harriet Sherwood, \textit{Israeli’s Attack African Migrants During Protest Against Refugees}, \textit{The Guardian}, (May 24, 2012, 6:14 AM), http://www.theguardian.com/world/2012/may/24/israelis-attack-african-migrants-protest. At its worst these protests became violent with threats also being made against the Africans. In one incident nearly 1000 demonstrators congregated in a section of Tel Aviv known for its African immigrants. During this demonstration, cars were damaged and African asylee’s assaulted. \textit{id.}
\item \textsuperscript{115} Prevention of Infiltration, \textit{supra} note 90, § 5(c)(i)(1).
\end{itemize}
worse, IDF soldiers, including myself, could issue deportation orders, with little to no specialized knowledge regarding refugees.116

The Israeli Supreme Court’s ruling on the law marked another major milestone, as it touched on fundamental issues related to Israel’s basic rights as a sovereign nation to formulate its own independent immigration policy.117 Analogous to the United States’ ability to grant permanent resident status, Israel could retain control over its “handling of [individual] permits and resident permits . . . [with] consideration subject to judicial review.”118

Although the law implemented some procedural checks in the spirit of due process, certainly more than in any of Israel’s neighbors, the totality of the legislation was not only deemed controversial by domestic and international media but also invoked criticism by humanitarian organizations the world throughout.119 It’s been said, “[i]n passing this act, the government—and the Knesset—chose to walk down a path that is incompatible with the protection of human freedom that is embedded in Israeli constitutional law and that is incompatible with Israel’s obligations under international refugee conventions.”120 Nonetheless, the amendment was passed by a margin of 37-8 and would last for just a little more than a year.121

According to the Immigration Authority of Israel, throughout the year of its existence, the amendment affected an estimated 54,500 “infiltrators” who entered the country by 2011.122 In 2011 alone,
17,258 infiltrators entered the state, an increase of 2,549 from the year prior.\textsuperscript{123} In addition, recent developments had imposed urgency in seeking a solution, a pressing need further amplified both by the aforementioned amendment and the droves of asylees confused about their status in the country.\textsuperscript{124} Thus, remedial measures were implemented by Israel to curb the systemic flow by means only Israel knows best.

While Israel was a country already known for its walls,\textsuperscript{125} recent improvements to the barrier between Israel and Egypt, has made it far more effective. After two years of work, Israel has completed a 140-mile-long fence “which stands about 15 to 20 feet high and includes multiple layers of barbed wire, communications equipment, a patrol road and asphalt track.”\textsuperscript{126} “It is similar to portions of the barrier that seal off the occupied West Bank from Israel, although that fence includes sections of concrete wall.”\textsuperscript{127}

Nonetheless, this fence has succeeded in substantially reducing the number of “infiltrators” entering Israel. “In 2012 the wall has [contributed to] a reduction [in infiltrators] from more than 2,000 a month in January . . . to fewer than 40 in December”\textsuperscript{128} of that same year. Furthermore, as previously mentioned, the legislation provided a

\textsuperscript{123} Id. Justice E. Arbel’s opinion, ¶ 5.

\textsuperscript{124} See Sherwood, supra note 114 (discussing the recent violence and protests in Tel Aviv against African asylees).

\textsuperscript{125} In fact, Eyal Weizman dedicated an entire book to the discussion of Israel’s walls and both their regional and international impact. Despite atrocious violations such as cutting off Palestinian villages and limiting access to necessities like schools and hospitals, Ariel Sharon’s (then current Minister of Agriculture and the Settlement Committee) wall had successfully curbed terrorist threats originating from the Palestinian territories. It was therefore seen by many in Israel as a success. Weizman’s book lays out the architectural feats accomplished by experts from all over the world, and discusses the wall’s influence on similar wall-building attempts.\textit{Eyal Weizman, Hollow Land: Israel’s Architecture of Occupation} (Verso) (2007).


\textsuperscript{127} Id.

\textsuperscript{128} Id.
three-year window period of observation. During this period, legislators considered the evolution of new developments; the fence being just one of those considerations. In fact, as we will soon see, the ultimate decision by the Supreme Court may have relied upon the fence’s recent success. Therefore, as the fence continues to be effective and achieve its purpose, it is possible that the legislation’s two main goals of deterrence and modification of the labor market, will be replaced with only one: the labor market issue itself, leaving the shortcomings in the Infiltration Law irrelevant in actual practice. However, following international media trends, Israel will likely face a whole new onslaught of international criticism for its border fence.

Aside from the international stage, qualms about the new law, and the fence, also sparked fierce domestic debates. Following heated protests and physical assaults against African asylum seekers within Israel, the government found itself obliged to address the problem more directly. In September 2013, different asylees brought about three consolidates cases before the Israeli Supreme Court. In Adam v. Knesset, an extended panel of nine justices decided the constitutionality of the amendment discussed above regarding its implications for similarly situated asylum seekers in addition to the parties themselves.

The case known in English as Adam v. the Knesset (or in Hebrew as הכספ ) was brought in an effort to address “the Constitutionality of the arrangement enacted by the Knesset in 2012 . . . which allow[ed] [the] holding [of] infiltrators in custody for a period of three years.” The decision united the court in a verdict, holding that the legislative arrangement was “unconstitutional because it disproportionately limits the constitutional right to liberty determined in Basic Law: Human Dignity and Liberty,” considered a key staple in Israel’s constitutional arrangement. Furthermore, the Court concluded that individual

129. HCJ 7146/12 Adam v. Knesset, Justice E. Arbel’s opinion, ¶ 28.
130. Id.
131. See Weizman, supra note 125 (for past, present and future criticisms of Israel’s fences).
132. Sherwood, supra note 114.
133. Adam v. Knesset Case Summary, supra note 27.
134. Id.
"examination and release" of all asylum seekers being held in custody would need to commence immediately and limit the process to a period of 90 days beginning the day of the judgment (September 16, 2013).135

Justice Edna Arbel, who penned the 120-page decision, spent a large portion of the case with an opening discussion on the present state of infiltrators in Israel.136 Using general statistics provided by the government,137 the opinion pointed out that the problem of African asylees in Israel may have been overstated but nonetheless was legitimate.138 Beyond the economical and deterrent purposes of the original amendment, she spoke about the hardships it brought upon the country and the immediacy for which legal redress was needed.139 In discussing the liberty rights enshrined in Israel's Basic Law, Justice Arbel wrote that "the point of departure should be that the amendment benefits the values of the State of Israel."140

The Court’s main purpose that day in September, however, was to determine whether the law "constituted a proper purpose" and thus to ascertain its necessity for the state as a vehicle for preservation of the country’s most basic interests.141 To weigh this purpose and interest, the court relied upon a test known as the proportionality test.142 The proportionality test was meant to consider "the nature of the injured

135. Id.
136. Id.
137. Knesset Research Center Informational Report, supra note 97.
138. HCJ 7146/12 Adam v. Knesset, Justice E. Arbel's opinion, ¶ 14. Studies were presented that showed "that the level of crime committed by infiltrators is lower that in society in general." Nonetheless, Israelis in cities like those of southern Tel Aviv commonly supported the need for the amendment under notions that the asylees were not only a drain on the economy, but more so, bad for the local area due to high crime rates. Id.
139. Id. Justice E. Arbel's opinion, ¶ 2.
141. Id. at 3.
right infringed and the strength of the injury relative to the speculative probability of securing the purpose.” 143 Nonetheless, the proportionality test relies on three prongs, which were each stringently analyzed by the court. These include assessments based on (1) the rational connection test (or rational affinity test), 144 (2) the harmful measure test, 145 and (3) the narrow proportionality test, 146 otherwise similar to a ‘cost-benefit’ analysis. 147 Under this analysis the court would invalidate the law should the state fail to meet its burden on any of the three tests. 148

The majority opinion tentatively acknowledged that the legislation passed the rational basis prong or first element of the proportionality test. 149 The legislation, however, began to slip as it approached the harmful measure test (or least restrictive means test as it is commonly known elsewhere) portion of the analysis (the second prong). There, the Court discussed the decreases in refugee numbers due to the success of the fence, and concluded there are other available alternatives that could be less restrictive and conform the principles and laws of the State of Israel. 150 Accordingly, the second prong

143. HCJ 7146/12 Adam v. Knesset, Justice E. Arbel’s opinion, ¶ 39.
144. This element considers whether the legislation has a “rational connection to [the Knesset’s] overall objective.” In other words the means used must be carefully designed to achieve the stated objective. “They must not be arbitrary, unfair or based on irrational considerations.” See generally Oakes Test, supra note 142.
145. Adam v. Knesset Case Summary, supra note 27, at 5. This test demands that the legislation violate the constitutional right as little as possible to achieve the purpose of the law. This element is similar to the United States constitutional analysis for strict scrutiny as applied to equal protection and free speech cases under the “narrowly tailored” requirement of that same test.
146. See generally id. Justice E. Arbel’s opinion, ¶¶ 20, 95, 109. “The third test is the proportionality test in the narrow sense, meaning that a reasonable relationship is required between the injury of the constitutional right and the public-social benefit accruing from the injury.” The Narrow Proportionality Test was used to consider how far the law might have deviated from the basic law requirements of the Israeli legal system. In essence it considers the proportionality of the violation of the constitutional and public benefit—Social benefit versus the injury. Id.
147. Quashing Legislation, supra note 75, at 2.
149. Id. at 3.
150. See id. at 3-4. Ziegler also mentions that as other potential options, the State could include “introducing a reporting requirement, having an ‘open’ detention
failed, thus, the legislation could not be found constitutional. Dr. Ziegler again recognized that "it is reasonable to assume that the legislation would have been upheld at least by some of the justices" had this fence not been meeting the aims of its construction.\footnote{151}

With the failure of the law at the second prong, the Court’s analysis could have stopped there, but the Justices decided to go further and consider the last prong of the proportionality test. At this juncture it was unanimously found that the third prong had not been satisfied—"that the law could not demonstrate a reasonable relationship between the violations of the constitutional right protected [and] the social benefit arising from it."\footnote{152}

Specifically, the Court considered whether "the benefit attained by taking infiltrators into custody [was] greater than the severe limitation of their rights."\footnote{153} The Court, in recognizing the asylees’ plight, as well as the core democratic values and human rights that the State holds so dear, raised further questions about the Law. With the third prong thereby also weighing against the Law, and with the finding of ample viable alternatives including the success of the fence itself, the Court overall found that the State for now needed to reassess its policies. In particular, the Court’s ruling implied a fundamental need to carefully extend due process and proper treatment for the asylees while in custody and before being sent back—in essence, the

centre, and/or employing asylum seekers in areas such as agriculture, where their residence would be employer-based. Conversely, the Court’s president, Justice Asher Grunis, asserted that these alternatives to detention should not necessarily be considered legislative alternatives, as they are executive rather than legislative acts, and held that such measures will not advance the prevention of infiltrator settlement in Israel. Hence, in his view, the legislation passes the second proportionality sub-test. Justice Uzi Vogelman adopted a more nuanced position, suggesting that it is clear that the fence is primarily responsible for the massive reduction in infiltration, but that since the legislation may also contribute, albeit insignificantly, it may pass the second sub-test, but will consequently fail the third sub-test.” \textit{See Quashing Legislation, supra} note 75, at 2.

\footnote{151. \textit{Id.}}

\footnote{152. HCJ 7146/12 Adam v. Knesset, Justice U. Vogelman’s opinion, ¶ 45 ("The arrangement established in the Amendment, the nullification of which we declare here, morally and disproportionately injuries the right of personal liberty, which is a basic right of any human per se, and does so while deviating from accepted principles in Israel and the countries of the enlightened world.").}

\footnote{153. \textit{Adam v. Knesset} Case Summary, \textit{supra} note 27, at 5.}
principle of non-refoulement for any asylee facing clear danger in his or her home country.\footnote{154} More importantly, the Court also took note of norms in other countries, invoking basic freedoms (such as freedom of movement) and restrictions such as check-ins,\footnote{155} thereby considering not only customary international obligations but also laws regarded as standard and appropriate.\footnote{156} In doing so, the Court noted the UNHCR’s guidelines on the detention of refugees, with their common thread of due process and non-refoulement,\footnote{157} specifically that “detention should be based on an assessment of the individual circumstances.”\footnote{158} Furthermore, the Court asserted that when balancing the permissible procedures and rights of “infiltrators”, the State’s interest of “public order, public health and national security” needed to be heavily considered.\footnote{159} One alternative proposed by the government entailed the use of an agreeable third party country to help facilitate the return of these asylum-seekers, but this was not actively raised in the case.\footnote{160}

\begin{itemize}
\item \footnote{154} See generally HCJ 7146/12 Adam v. Knesset.
\item \footnote{155} Id. Justice E. Arbel’s opinion, \num{107}. (The court discusses other signatories, in particular, France, Luxembourg, and South Africa’s check-in systems, as well as Germany and Switzerland’s asylum centers, when considering the possible alternatives that the state could have pursued. Although the numbers are not as substantial as those Israel must deal with—7,000 asylees in Poland to Israel’s estimated 50,000—Poland is discussed as an example where it employs “Temporary Residence Centers” for asylees.). For a complete diagnosis on the use of this program see generally, Olivia Victoria Andrzejczak, The Road to Dębak: Poland’s Chechen Diaspora, Polish-American Fulbright Commission (2006), http://refugee.pl/cms/site.files/File/Andrzejczak_The_Road_to_Debak.pdf.
\item \footnote{156} Id. \num{108} (discussing better alternatives for the state as it pertains to their detainment and processing of asylees).
\item \footnote{157} Id. \num{92}; see also UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, http://www.unhcr.org/505b10ee9.html; http://www.refworld.org/docid/503489533b8.html (last visited Dec. 27, 2015).
\item \footnote{158} Id. \num{92}.
\item \footnote{159} Id.
\item \footnote{160} One very recent option has come to fruition and seems to be a positive fix while staying within the confines of international obligations. It has been reported that Israel has reached an agreement with a third party ‘East African Country’ which will in turn absorb large numbers of the asylum seekers currently in detainment and floating around in the country. Such an option has been considered and/or used in
Such discussions suggest the Justices' consideration of international norms—such as *jus cogens*—which will be examined below/further.

While the Court did elucidate Israel's commitments in regard to international obligations, it did not add much about substantial discussions on defining the term "infiltrator" and, in turn, that concept's implicating Israel's international obligations and non-Jewish immigration to Israel. Dr. Ziegler again wrote that in relation to the discussion of refugee law by the Court "its [presence in the case] is best supported by interpretation of international refugee law rather than reliant on such interpretation." In other words, while the influence of refugee law is clearly implied throughout, it is not explicitly addressed despite its centrality to the issues at hand. Article 31 of the Refugee Convention was not mentioned once in Dr. Ziegler's account, since Israel "has not incorporated [such Articles] into its domestic policy, nor . . . adopted legislation regulating asylum and refugee status." In essence, the Court's ruling was an expedient disregarding of future asylum flows with an appeal to the practical success of the fence—thereby evading a more thorough evaluation of international obligations—while examining the contested legislation almost exclusively in terms of the asylee population already present.

Instead, it was with the concurring opinion of Justice Uzi Vogelman that the sweeping principles of *non-refoulement* and international obligations per the 1951 Convention were more directly addressed. In recognizing the dangers and difficulty in sending back...
such asylum seekers to countries where they could be harmed or where Israel could not facilitate a safe return, (for example in the case of enemies to the state of Israel,) Justice Vogelman applied the spirit of the non-refoulement principles to the detained asylees—qualifying his assertion with the expectation that the fence itself would diminish the need to tackle non-refoulement significantly in the future. Relying on a case heavily cited throughout the opinion, Justice Vogelman agreed with the majority’s opinion using the same proportionality test in his analysis and reaffirmed the notion that an asylee should not be sent back to a place where his freedom or life would be threatened, even if the individual application for asylum is rejected.

As can be seen what was omitted from the concurring opinion (and the majority opinion for that matter) was just as important as what was included. A recent case dealing with non-refoulement in Israel came in 2007, involving the “hot return” procedure “whereby Israel would return border-crossers to Egypt in coordination with the Egyptian authorities, without assessing the claims of potential asylum seekers.”

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164. *Id.* ¶ 36.
165. This case involved an Iraqi asylum seeker gaining entry into Israel through the Jordanian border. Ultimately the Court found that the principle of non-refoulement had to be adhered to, thus coinciding with the Country’s international obligations and national virtues. *See* HCJ 4702/94 ElTai’I v. Minster of Interior 49(3) PF 843, 844 (1994) (Isr.).
166. HCJ 7146/12 Adam v. Knesset, Justice U. Vogelman’s concurring opinion, ¶ 8.
167. *Id.* ¶ 9.
168. *See generally* HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense (2011) (Isr.). This case downplayed the notion of “hot returns,” which was brought to light in Israel when 44 Sudanese asylum seekers were deported to Egypt, having made successful journey to Israel. All 44 shortly disappeared. It was believed that under the last two administrations of both Israel and Egypt, (Olmert and Mubarak respectively) that a coordinated verbal agreement meant Egypt would silently return those crossing into Israel back through Egypt and eventually to their original place of departure. After this tragedy, however, the Court declared that—as these coordinated returns had stopped—there was no need to address the issue further. Should such activities resume, the Court said it would take another look and establish guidelines according to international Law and the countries’ obligations under them.
seekers.” Similarly, the Court then seemed to sidestep the issue, arguing that the numbers of such border-crossers were not significant enough to warrant more extensive consideration, instead choosing to deal with those who have made it across the border already.

In summation, the Court ultimately found that the prevention of long-term settlement by asylees was a proper legislative goal of the government. Conversely, however, it held that another legislative purpose, the prevention of further “infiltration”, is improper, as it is using detainees as a means to an end, which violates their human dignity and thus conflicts with Israel’s laws and values. The Court prescribed remedies including a maximum 90-day “administrative procedure” described above. This in effect would reaffirm the very due process ideals the country had begun to move away from. Further, a border control officer would be given authority to grant an asylee’s release on a bail type system, therefore sidestepping the need for a judicial determination. Presumably this could be used for cases involving innocent women and children, freeing up the resources of the tribunals for genuine dilemmas requiring more extensive judicial scrutiny. Together, the remedies instilled seemed to set Israel’s course back on the right track, reestablishing faith in its Basic Laws, Jewish values, and democratic ideals.

IV. CURRENT OBLIGATIONS IN REGARDS TO ASYLUM SEEKERS

Having considered both the domestic and international obligations of the United States and Israel, there is one additional element to

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170. HCJ 7146/12 Adam v. Knesset, Justice U. Vogelman’s concurring opinion, ¶ 45 (“The arrangement established in the Amendment, the nullification of which we declare here, mortally and disproportionately injures the right to personal liberty, which is a basic right of any human per se, and does so while deviating from the accepted principles in Israel and the countries of the enlightened world.”).

171. Id. ¶ 118.

172. Id.

173. Id.
consider, *jus cogens*.\(^\text{174}\) The prevalent international theory of *jus cogens* might further guide the application of universal norms to the treatment of asylum seekers, as practiced by both respective countries. This theory has been put forth by Alice Farmer, a former member of the UNHCR and present participant in Human Rights Watch, who argues that “non-refoulement in the refugee context has emerged as a *jus cogens* norm, in effect moving beyond treaty law.”\(^\text{175}\) In her paper, she considers not only the 1951 Convention but also “customary international law, arguments of scholars, state practice, and comparable articulations of the norm in other areas of international law such as torture.”\(^\text{176}\) As the principle pertains to non-refoulement, Farmer affirms that there is sufficient consensus to invoke *jus cogens*, yet she hesitates on the other hand to extend *jus cogens* as a basis to justify the exemptions to non-refoulement that are also internationally recognized.\(^\text{177}\) Using history, trends, and the exercise and/or adherence to international norms, she concludes that beyond any explicit acceptance of international obligations, countries have an implied obligation to observe rights pertaining to refugees and asylum seekers.\(^\text{178}\)

Considering that Farmer’s position is well-accepted, Israel and the United States can consider themselves equally bound to observe the

\(^{174}\) There is actually another consideration, which, for purposes of this article, has been omitted. Briefly, the different legal systems might account for some variance between both the application and approach of international and domestic law as it applies to asylum seekers. The two countries do however have similar ideals as discussed earlier in the paper. They also rest upon strong democratic principles. For an in-depth discussion on the legal make-up of each of these two countries, *See generally* Snyder, *supra* note 87; *see also* HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES: DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES (Lawbook Exchange 2000).

\(^{175}\) Farmer, *supra* note 60, at 3.

\(^{176}\) *Id.*

\(^{177}\) *Id.* Specifically, Farmer discusses the non-refoulement exceptions of “public order” and “national security.” These two exceptions amount to the very core of Israel’s purpose in enacting the legislation, which made its way to the Supreme Court. In that regard, Israel’s obligations might not have been subject to the non-refoulement implications of *jus cogens*. The United States might similarly disregard this principle of non-refoulement under the more current exception pertaining to anti-terrorism measures. *See id.* at 9-15.

\(^{178}\) *Id.* at 30-31.
fundamental rights guaranteed to asylum seekers. As discussed in her paper, these two countries must not fall into the gap that may ensue from the lack of consensus regarding exceptions of non-refoulement. 179 Nonetheless, the recent directions and responses to the ever-changing issue of asylum seekers might provide hope that both countries are recognizing their obligations, whether these obligations originate from treaty, international norms or *jus cogens* obligations, and embracing asylum seekers in an appropriate and responsible way.

In the United States, new and previously unconsidered groups, beyond the traditional patterns associated with persecuted ethnic blocs, have begun seeking asylum. 180 The aforementioned definition of asylum accounts for those fleeing persecution on grounds of “race, religion, nationality, [or] membership in a particular group or political opinion.” 181 Recently, however, this definition has been applied to include those fleeing persecution based on sexual orientation. 182 A recent article in the Moscow News reports that homosexuals from Russia have begun seeking asylee status in the United States following Russia’s decision to crack down on their community. 183 Like Reagan’s spiteful move towards the former Soviet Union in the 1980’s (by making room for communist defectors seeking asylum), 184 the United

179. *Id.* at 12.

180. Individuals from Mexico, Egypt, Central America, Somalia and elsewhere continue to come but within these groups some interesting trends are emerging. In Mexico for instance, drug cartels are exploiting the legal system by claiming credible fears back home. *See Mexican “Narco-refugees” Seek Political Asylum in U.S.*, JUDICIAL WATCH (Oct. 28, 2011)), http://www.judicialwatch.org/blog/2011/10/mexican-narco-refugees-seek-political-asylum-u-s/.

181. 1951 Convention, *supra* note 16.


184. Other policies at the time also sought to address emigration rights and human rights while spiting the Soviet -communist push of the day. Repealed recently (2012), the Jackson-Vanick Amendment denied most favored nation status to certain countries with non-market economies that restricted emigration. Similar to
States has begun accepting these individuals in small but increasing numbers whether for political reasons, humanitarian reasons or simply to make a point. In 2013 alone, 837 asylum requests were received. The hazards of traveling through dangerous territories are not at issue with this group, and so the prospect of their gaining asylum suggests that a new face of asylum must be taking shape.

Additionally, Israel has seen some marked changes of its own. Throughout its majority decision discussed above, the Court repeatedly acknowledges and nearly apologizes for the asylum situation as it affects residents like those in South Tel Aviv. In fact, the Court goes as far as saying that the Jewish people are a strong people and will adapt to the needs of others—as a persecuted people who once relied upon the same goodwill. With that said, the guidelines set forth by the Court in its decision left room open for new legislation to redress the asylum problem. In late November of 2013, the State of Israel ratified the new amendment to the Prevention of Infiltration Law. According to this new amendment, which takes into account the Court’s stance on the asylum issues, the State will add 550 additional officers to the anti-infiltration task force, thus living up to the democratic principles and notions of due process for which it has long prided itself. Further, financial assistance in the form of $3,500 would be given to assist those willing to return to their home countries voluntarily.

Regan’s (and other President’s) ability to waive asylum caps, so too was the President’s ability under this act. See Title IV of the Trade Act of 1974, P.L. 93-618, 88 Stat. 1978 (Jan. 3, 1975).


186. Novosti, supra note 183.


188. Id. Justice Y. Amit’s opinion, ¶ 2.


190. Id.

191. Id. (explaining the amount is up from $1,500 which is the amount offered just prior to the recent amendment).
Additionally, Israel's Attorney General's office has found its own way to accommodate this migrant population. In what some say is a compromise, yet others "a slap in the face," the Attorney General of Israel has different law to detain migrants and asylum seekers. Even though "the Supreme Court ordered their release in 90 days," Attorney General Weinstein and his senior aide Raz Nazri have ordered law enforcement "to keep on detaining any suspicious migrants and asylum seekers, including those who were meant to be released under the Supreme Court." At first glance this may seem like a step backwards, but in essence this move reflects the Supreme Court's goal of maintaining human rights and international obligations, while fulfilling the Attorney General's concerns regarding protection of the broader populace. Further, most of the asylum seekers being held have had their due process rights upheld and been granted the procedures prescribed by the Supreme Court in Israel.

To this day Israel has granted temporary residency to 600 refugees from Darfur and granted over 2,000 work permit to other from Eritrea. Only 2,000 cases remain to be reviewed. With thousands of asylum seekers still leaving their homes to escape persecution, it is important that a more robust system for evaluating asylum be put into place by Israel and, for that matter, all other signatories of the 1951 Convention.
and 1967 Protocol. Discussing this constant challenge, Yair Sheleg of the Israeli Democracy Institute has said, “On the one hand we learned the lesson (that) we should be moral, we should act morally, we should act by a universal code. The other lesson is that we have to strengthen our own national state.” It seems this is the direction in which Israel is going.

V. CONCLUSION

Whether abiding by standards set by international law or norms established through the principle of _jus cogens_, Israel needs to continue striving towards an adherence to values reaffirming its own moral compass. Throughout history, Jews have known what it means to be an immigrant, a refugee, or a “stranger.” Jewish citizens are commanded to “love the stranger for you were strangers in the land of Egypt.”

As Dr. Ziegler put it best in the case of Israel, “This landmark judgment presents an opportunity for Israel to adopt a sensible and humane policy towards its 54,000 asylum seekers that would, in turn, positively impact living conditions of Israeli citizens in the neighborhoods where African asylum seekers currently reside.”

One can only hope that, rather than attempting to modify the quashed legislation, the Knesset will seize this opportunity” when redrafting new legislation.

The United States, too, is a country of immigrants, refugees, and once-strangers, so the same respect should be extended to those seeking asylum from persecution. As two proud democratic countries sharing the same core values, both Israel and the United States should continue in the noble endeavor of upholding their international

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199. _Quashing Legislation_, supra note 75.

200. _Id._
obligations while caring for their citizens and remaining true to their fundamental beliefs.