

DOCTORAL RESEARCH DISSERTATION  
IN POLITICAL SCIENCE

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THE EVOLUTION OF ASYLUM REGIME  
IN ISRAEL (1948-2017)

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## **ACRONYMS**

CBS Central Bureau of Statistics (Israel)

HCJ High Court of Justice (Israel)

IDF Israel Defence Forces

LOR Law of Return

MFA Ministry of Foreign Affairs (Israel)

MK Member of Knesset (Israeli Parliament)

NGO Non Governmental Organisation

NSGB National Status Granting Board (Israel)

PHR Physicians for Human Rights in Israel

PIBA Population, Immigration and Borders Authority (Israel)

PLO Palestinian Liberation Organization

RSD Refugee Status Determination

RSDP Refugee Status Determination Procedure

SLA South Lebanese Army

UNHCR United Nation High Commissioner for Refugees

# **LIST OF INTERVIEWS CONDUCTED FOR THIS PAPER<sup>1</sup>**

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<sup>1</sup> Some interviewees requested to remain partially or completely anonymous.

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D. Darfurian student and asylum seeker in Israel. D. arrived in Israel when he was 16, alone, as an unaccompanied minor fleeing the war in Darfur. After several months in detention he was moved to a Jewish religious boarding school of the Ministry of Education where he concluded his studies when he was 19.

DR. GAL HARMAT, senior officer at UN Women, and the NGO Nonviolent Peaceforce, currently working in Sud-Sudan.

JOHN DONDIT, one of the two South Sudanese students to graduate from the Sde Boker Ecological high school. Escaped from the South Sudan at the age of 6 to Egypt and came to Israel together with his family through the Sinai desert when he was 14. While the other student was deported with his family to South Sudan in 2011, Dondit's family was allowed to stay for danger his father faces in the South Sudan. Dondit became famous in Israel 2013 when he successfully participated in the local version of the "American Idol" or the "X factor". His participation in the show was accompanied by strong reactions to his identity as African refugee and infiltrator. While there were hateful reactions, his overall experience in the show and with the public was very positive.

DR. & ATTY KHENIN DOV, MK for the left wing, Jewish-Arab *Hadash* party and one of the most active politicians in Israel in recent years to promote the rights of migrants and asylum seekers.

DR. KRITAMZN-AMIR TALLY, Assistant Professor at Academic Center of Law and Business. Kritzman-Amir is a researcher specialising in asylum seekers and migrants in Israel and has written extensively on the subject for the past 10 years.

PROF. KUNDA GIDON, Faculty of Social Science, Tel Aviv University. Prof. Kunda is an anthropologist researching and working with African migrants since 2009.

ATT. LILING JEAN-MARK, CEO of CIMI, Center for International Migration and Integration (CIMI), an independent non-profit organization dedicated to assisting Israel in meeting its migration challenges.

M., coordinator of volunteering programs at the Sde Boker pre-army *Mechina* (educational preparatory program). The students of the *Mechina* have chosen to volunteer at the Saharonim prison for infiltrating migrants, once a week, for the past three years.

MAROM ORIT, Aid Organization for Refugees and Asylum Seekers in Israel (Assaf), Head of Refugees department.

MENUHIN NEOMI, senior teacher and Holocaust program director at the Sde-Boker Ecological boarding school. Ms. Menuchin was responsible for the school's initiative to accept and support two South-Sudanese students for two years, until their graduation. Under Menuchin's guidance the entire school participated in the project, connecting it to their Jewish history studies about the Holocaust and refugeedom.

ATTY. MORAG DORIT, Head of the legal department at the Ministry of Education and atty. Sofy, a senior lawyer in the department.

MUSTAFA ABDALLAH, Darfur refugee, restaurant owner and a prominent figure in the African community in Tel Aviv. In Israel since 2007. Received a temporary residence

permit in 2009 as part of the 500 special permits given by Olmert's government (Mr. Mustafa received it later than most others who came with him).

PAZ YONATHAN, Center for International Migration and Integration (CIMI), Labour Migrants Department and researcher on asylum related issues.

ROBINSON SARAH, Amnesty Int. Israel, Head of Refugees section and academic researcher on themes of Asylum migration and Human Trafficking.

SARID YOSSI, former senior politician who served as Minister of Education and Minister of the Environment, as well as a MK for various central-left parties between 1974-2006. Sarid was personally involved in bringing to Israel refugees from ex-Yugoslavia during the 1990's and to facilitate the absorption of non-Jewish migrants' children in the Israeli education system.

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Y., former senior official at the Prime Minister's office.

YISHAI ELI, former Minister of Interior (2001-2002, 2009-2013), Minister of Labour and Social Welfare (1996-2000), Minister of Labour, Industry and Trade (2006-2009) and Deputy Prime Minister (2001-2002, 2006-2013) and MK since 1996. Yishai was one of the most conspicuous political figures to oppose African migration and as Minister of Interior (second term) was a controversial figure in the government's fight against African infiltration.





# **DOCTORAL RESEARCH DISSERTATION**

## **THE EVOLUTION OF THE ISRAELI ASYLUM REGIME 1948-2017**

### **ABSTRACT**

In the last decade, asylum seeking migration has provoked fundamental legal, political and moral quandaries throughout the Western world, although the number of asylum seekers has been marginal in proportion to the general population (averaging 0.5% and very rarely exceeding 2%), and smaller than that of other groups of migrants. Nevertheless, the issue has created severe political crises throughout Europe and the US and jeopardised the integrity of the EU. Why is that? What is it about the challenges of asylum that provokes such confusion and strife? Is it because it touches upon deep and sensitive components of our collective identities? Within the contemporary world order, based on the nation-state as the predominant political paradigm of sovereignty, the right for asylum is formally separated from immigration policies. While each state can manage immigration according to its interests, asylum is proclaimed a basic human right safeguarded by international refugee law. Most institutional and specialised debates over asylum migration follow this separation, focusing on legal principles and procedures, economic costs, burden sharing and crises management. However, political and public discourses on the subject tend to focus on questions of national security, identity, sovereignty and the perceived opposition between national and universal solidarity.

Israel, the Jewish nation-state, was founded by a people that represented in the West the prototype of an unassimilated ethnic, religious and cultural minority. In the aftermath of the Holocaust and within the perpetual Arab-Israeli conflict, Israel's status as a haven for all Jews emerged as a pivotal force in the state's national identity. Contrarily, the arrival in recent years of significant numbers of non-Jewish irregular migrants from Africa has been defined by Israeli governments and in the

public discourse as an existential national threat to Israel's fundamental definition as both Jewish and democratic. The government and parliament have prompt stern and effective anti-immigration policies which have received political and public support while being fiercely challenged by components of civil society and human rights associations. In an unprecedented level of opposition to the decisions of the legislative and executive branches, the Supreme Court has annulled two versions of the anti-infiltration law, and amended the third, in the name of Israel's constitutional commitment to liberal-democratic values and international jurisprudence. The intense legal struggle over asylum policy threatened to alter the court's authority of judicial review and provoked a re-negotiation of the constitutional balance of power between the branches of the state. As elsewhere in the world, the various competing agendas regarding asylum and unauthorised migration in Israel expose profoundly different worldviews on the fundamental values of the Israeli state and society.

Here presented is an investigation of the historical course that brought Israel's asylum regime to its current developments, as well as the regime's interplay with the various competing worldviews regarding Israel's definition as a Jewish and democratic state. The Israeli case offers a telling, perhaps extreme, example to how nationalism, universal values and asylum intertwine, and how past experiences of persecution and refugeedom affect a nation's willingness to grant asylum to others.

## INTRODUCTION

Between 2005 and 2007, while I was studying for my bachelor's degree at Tel Aviv University, I had the privilege to guide foreign student groups, mostly Jewish, at the Yad-Vashem national museum of the Holocaust in Jerusalem. At the end of the tours we would hold a concluding talk in which the students could share the thoughts and feelings that came up during the visit and elaborate them together. Perhaps because these were mostly young people, the talks would very often move from the past to discuss its meanings in the present. Other genocides and mass organised violence against innocent people were recurring concerns, provoking reflection on whether our views and emotions regarding the *Shoa* should or could influence our positions on current issues.

During the summer of 2008, while walking the ancient streets of Rome not far from the Coliseum, I became witness to a disquieting occurrence: in a sudden raid the police closed in on a large area and rounded up all those who happened to be there and seemed as a certain kind of foreigners. Apparent tourists and people with a western air, like myself, were spared. The suspected immigrants were amassed inside a park, and brought on board a transportable closed container. Those waiting outside the container were ordered to sit on the ground and wait their turn in silence. Many of those who came out of the presumably makeshift office were put on police vans and taken away. Every now and then the policemen sent to patrol the area would bring in more people. More than that I could not see because the whole concentration area was sealed to the public and as I was standing outside of it and looking in a police officer ordered me bluntly to walk away.

The time was that of the newly elected fourth Berlusconi government, in which La Lega Nord<sup>2</sup> was Berlusconi's senior partner in the Centre-Right coalition. The *DDL Sicurezza 2008* (Proposal for Law: Security 2008) was just presented in the Parliament, introducing for the first time in Italy clandestine entry or sojourn as a criminal offence to which detention was obligatory and the penalty was set between six months to four years of prison. In August Italy signed the Benghazi Treaty, according to which the Italian state

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<sup>2</sup> *Lega Nord per l'Indipendenza della Padania* (North League for the Independence of Padania). A regional based party, La Lega Nord has promoted anti-immigration policies as a central part of its political agenda.

would compensate Libya with five billion dollars for the damages of its past colonial occupation. In exchange, Libya would curb unauthorized immigration parting from its shores and directed to Italy. The treaty enabled the realisation of the Italian “push-backs” (*Respingimenti*) in open sea of migrant-carrying boats. The “push-backs” usually consisted of boarding the migrants on an Italian vessel, giving them the impression they would be brought safely to Italian soil. Instead, the migrants were transported back to Libya and handed over to the authorities there. They were then put in Libyan prisons, which were financed by Italy and the European Union. In 2012 the European Court of Human Rights condemned Italy for the “push-backs”, defining them illegal under international law, and sanctioned monetary compensation to victims of the policy<sup>3</sup>.

In July 2009 the Security proposal became law<sup>4</sup>, sparking widespread opposition. A group of Italian intellectuals appealed to the European public opinion by writing a letter of protest against the law, stating:

“[The Government and Parliament have passed] the adoption of laws discriminating against immigrants, laws the likes of which we had not seen in this country since the passing of the Fascist Race Laws. The victim of the discrimination has changed: it is no longer the Jews but the undocumented migrant population, hundreds of thousands of people. But the discriminating measures have not changed: if passed, these new laws may, for example, forbid mixed marriages.”<sup>5</sup>

I too could not avoid the linkage to Europe’s traumatic past, particularly the fate of the Jews during the years leading to the Holocaust. Three out of my four grandparents were forced to migrate from their homes. Fortunately, they all did so before the beginning of the Second World War. They all found refuge in Palestine, today’s Israel. Most of their family members were not as fortunate. Some had to endure a life threatening and gruelling odyssey in order to escape. The majority perished in the camps. I was lucky enough to be

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<sup>3</sup> The European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, judgement given 23.2.2012.

<sup>4</sup> Law n. 94/09 of 15.7.2009, GU n. 170 of 24.7.2009 (suppl. ord.).

<sup>5</sup> Camilleri, Tabucchi, Maraini, Fo, Rame, Ovadia, Scaparro, Amelio, Wu Ming, “Against the Reintroduction of Race Laws in Europe”, 29.6.2009. Available at: <http://temi.repubblica.it/micromega-online/against-the-reintroduction-of-race-laws-in-europe/> (retrieved 1.4.2014)

born as a full citizen in a free and stable democratic state, established as a clear response to the Holocaust and origins.

Two months before the *DDL Sicurezza 2008* was presented in the Italian Parliament, the Israeli government presented its own anti-immigration law proposal in the *Knesset* (the Israeli Parliament) under the name of “Prevention of Infiltration Law”. The Israeli proposal came in reaction to increasing numbers of African migrants crossing the Sinai desert and entering Israel through its land border with Egypt. The phenomenon began in the late 1990’s on a low scale and surged after 2005. It included mostly Sudanese and Eritrean citizens, with a conspicuous group of Darfurians fleeing civil war and genocide. In 2007 Israel allowed 600 refugees from Darfur who previously entered from Egypt to stay in the country, granting them temporary residential status as a special gesture of good will in light of Israel’s special responsibility towards victims of mass murder. At the same time, however, the Israeli government wanted the African migration to cease and promoted harsh legislation and government proposals meant to deter African migration<sup>6</sup>. As of 2009, in concurrence with a change of government in Israel (from a central-left to a central-right coalition), Israel’s policy became increasingly more restrictive towards African migrants, as unauthorised entrance from the southern border grew constantly to include thousands of people every month. A fear that Israel would be swept by a “mass flood” from Africa became common in the public and the establishment alike. A vehement debate in the media about the migrants and their effects on Israeli society gradually transformed the dominant public view of the migrants from ‘refugees’ to ‘infiltrators’. Local neighbourhood committees in areas heavily populated with African migrants organised stern opposition to the mixture of migrants among Israeli residents. The Prime Minister described the African migration as an existential threat to the Jewish and democratic character of the State<sup>7</sup>.

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<sup>6</sup> The proposal for the “Prevention of Infiltration Law” was based on an old law from 1954, which imposed severe punishments of prolonged prison time on anyone who entered Israel unauthorized arriving from enemy states, as well as on whoever helped them to do so or to stay illegally in the country. The government had the majority in the house and passed the proposal in a preliminary vote, but encountered fierce public opposition and eventually decided not to pass the bill. In 2011, the successive government passed a new version of amendments to the Prevention of Infiltration Law. The central amendment in it, introducing a minimum three years detention period for infiltrators, was annulled later by the Israeli Supreme Court.

<sup>7</sup> “Jewish and Democratic” is the fundamental definition of the State of Israel in its legislation and political discourse. It is perceived as a mutually dependent equation, which has to be fully realised, in

Other political figures, including ministers and Knesset members, spoke of the migrants as the provocateurs of crime and diseases, “a threat to our women” and even as “cancer in our body”. Racism and Xenophobia did not linger behind. Although small in number, and with no official support, violent attacks of Africans and their property, carried out by Israelis, took place in the streets of Tel-Aviv and Jerusalem.

## **THE OBJECT OF THE RESEARCH**

The seed, or the need, to address and deepen my comprehension on the ways in which we treat Others, foreigners, strangers, began there, out of these personal experiences and within the wider general context of the current age of migration. I became growingly interested in immigration, especially unauthorised migration to Italy and Israel. The differences and similarities between the two countries provoked my curiosity. Meanwhile, my studies of contemporary history in the University of Roma Tre focused on issues related to nationalism, the nation-state, human rights, migration and economic history. I began reflecting on western policies toward immigration, and especially asylum seeking migration, as it seemed to encompass all these spheres of interest<sup>8</sup>. It became gradually clear that the immigration and asylum regimes of a certain country are a looking glass to its national identity and priority of shared values. Analytically speaking, the idea is that we can infer the core by examining the margins. That is to study the nature of a nation’s collective identity by investigating its boundaries: who is permitted in, who is left outside and how Others are treated. There are several overlapping concepts and terms that are relevant to this discussion. Society, the dominant group, the nation, the state, the polity, The Political; these are all possible ways to identify the core that I am speaking of. Out of the analysis of Israel’s asylum regime (IAR) the work presented hereinafter explores the ways in which the state’s apparatuses interpret the idea of the nation when dealing with asylum seeking migrants<sup>9</sup>.

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the sense that the state must be simultaneously both Jewish and democratic. For the quote, see, e.g., Prime Minister Netanyahu’s speech from January 2013 at the official ceremony for the completion of the fence along Israel’s border with Egypt. Available at the Prime Minister’s Office, official online publication: <http://www.pmo.gov.il/MediaCenter/Speeches/Pages/speechgader020112.aspx> (last visited 1.4.2017).

<sup>8</sup> I will return later on in the first chapter to explain the special virtues of asylum migration as a sub-group in general migration studies that led me to focus on it for the purposes of this research.

<sup>9</sup> In Israel, this means the state’s Jewishness, usually understood as an ethnic-national essence.

The questions I am interested in are potentially relevant to any country, so I had to narrow down my field of inquiry. After a first general review of different case studies I chose to limit myself, at least in this stage of my academic career, to Western developed countries. Although the wealthy West hosts only a minority of the world's refugees, asylum seekers and Internally Displaced Persons (IDPs), several differences in the approach to the issue led me to this choice:

- Contemporary international law and jurisprudence is still dominated by Western thought systems, organizations, mechanisms and standards.
- Asylum, as a legal construct in international law, was created under a Western logic of protected human rights and continues to be managed in that way.
- Nationalism and the nation-state, and the dominant political order based upon them, are all Western constructs deriving from Western concepts of identity and legitimate use of power.

For these traits and others, my questions and reflections were more naturally situated within the Western context. There is no surprise here, as it is a circular line of thought that connects that which I know to that which I ask and therefore where would I look for answers. Zooming further in, I had to decide on a specific case study. I found several countries to be promising in the type of research questions and findings they could provide. Germany, Italy, Israel, Australia, Spain and the USA were all good candidates. Considering my personal background, skills and intimate knowledge I decided to focus on Israel's asylum regime for my post-graduate research. I believe the Israeli case can be understood as a particularly telling example for the interplay between asylum and identity. The Jewish nation-state was created to serve as a safe haven for every Jew in the world. In its foundation, due to Jewish history of persecution and the Holocaust, it was perceived by many as an "asylum-state". In this aspect, Israel is an exemplar, as we can describe most nation-states as asylum states, in the sense that they are envisioned as a safe haven for the members of the majority group, both as individuals and as a national group<sup>10</sup>.

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<sup>10</sup> See more on nation-states as containing both 'civil' and 'ethnic' components in different equilibriums at Smith, *The nation in history: historiographical debates about ethnicity and nationalism* (UPNE, 2000).



The question of granting asylum to others cannot be separated from this fundamental function of the modern nation-state. This is the reason why those perceived as part of the nation, of ‘us’, are normally allowed in automatically, while the reception of foreigners, even those fleeing for their life or freedom, tends to be difficult and contested. The fact that the legal concept of asylum derives from international law and is understood as an undeniable individual human right to be granted to all those entitled of its protection regardless of the interests of the host country heightens the tension between national and international sovereignty on the matter. While in Europe this tension takes the form of national versus supranational sovereignty because of the role of the EU, in Israel it is mostly referred to as the perceived opposition between Jewish national interests and liberal-democratic international values<sup>11</sup>.

These and other reasons for the value of the Israel case study to the broader debates over asylum migration and nationalism are expounded throughout the dissertation. However, in order to induce any conclusions out of the Israeli asylum regime we must first analyse it, its evolution and the forces that have shaped it. Therefore, the main premise of this essay is to identify and explicate the historical evolution of Israel’s asylum regime from the creation of the state in 1948 to the present. The subsequent reflections about identity, nationalism, asylum law and migration are further discussed in the first chapter and are intertwined all along the historical analysis.

## **INSTITUTIONAL FRAMEWORK AND FIELDWORK**

I began my research at the final stages of my Master’s studies in Roma Tre’s History department (Storia e Società, Facoltà di Lettere). It mostly consisted of reviewing literature on Asylum Migration and Asylum Law, both specifically in Israel and generally in the world. I commenced field research in Israel thanks to a special scholarship given by the University of Roma Tre. After my return to Italy and graduation, I presented a joint doctoral research project to Roma Tre’s Political Science department and the Ben-Gurion

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<sup>11</sup> In Israeli public discourse, it is known as “Jewish” and/or “Democratic”, based on Israel’s definition as Jewish and democratic in its constitutional Basic Laws. Ben-Nun calls it “Universalism vs. Exceptionalism”. It is the main hypothesis underlying his book *Seeking Asylum in Israel. Refugees and the History of Migration Law* (2017).

Research Institute for the Study of Israel and Zionism at BGU. The proposed project was a compared study of Italy's and Israel's asylum regimes. It was accepted and in November 2014 I began my studies. The first year and a half were spent mostly in Rome and combined broad interdisciplinary studies of the doctoral program with field specific literature review. In this period, to complement the literature review on migration, asylum and nationalism with the latest work in the field, I also participated extensively in international conferences, workshops and a research group at the EUI. In the second part of the doctoral program I moved back to Israel to continue field research. It composed mostly of gathering and analysing primary sources and conducted a series of interviews with people related to the different aspects of asylum seeking migration in Israel. The interviewees were key representatives of the state (current and former government officials and politicians), asylum seekers, UN officials, academics, senior staff of NGOs, jurists, teachers and social activists<sup>12</sup>. In addition, my time in Israel has served to familiarise and introduce myself to the local relevant academic community. This was important in order to situate the research in the contemporary Israeli academic and political context.

## **METHODOLOGY AND COMPOSITION**

The research methodology follows the Annales' approach to history, especially their concept of "total" or "general" history and the understanding of the present by studying its relations to the past<sup>13</sup>. The idea is to establish a dialogue between the current situation and the past developments that created it. The underlying question is "how did we get here?". Therefore, the first stage of investigation sought to identify the forces shaping the current IAR, to then allow the exploration of their origins. Through primary and secondary sources, including a series of interviews conducted with key actors<sup>14</sup>, these central forces were identified:

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<sup>12</sup> See the full list prior to this introduction.

<sup>13</sup> See the works of Febvre, Bloch, Braudel, Le Roy Ladurie discussed later in the first chapter. For an introduction to Annales school of thought on history and historiography, see Harsgor, M., "Total History: The Annales School", *Journal of Contemporary History*, Vol. 13, No. 1 (Jan., 1978), pp. 1-13.

<sup>14</sup> The interviews are part of a larger research on Israel's asylum regime ongoing since 2013. So far 28 interviews have been conducted with key representatives of the state (current and former government officials), politicians, asylum seekers, UN officials, academics, senior staff of NGOs, jurists, teachers

- Israel's migration regime, in which asylum migration is a sub-group (or perhaps a 'step-child').
- Israel's Jewish-national character.
- Israel's liberal-democratic character.
- The role of international refugee law in the Israeli legal system.
- Israeli perceptions of refugees and refugeedom.
- Security and securitization.

The next step was to go back to the past, beginning with the early years of statehood, and scrutinize the development of these elements in light of their influence on the evolution of the IAR. The task of choosing what to focus on and what to exclude has obviously determined much of the outcome. Whenever I could I used the relevant literature to sustain my choices. At times, I had to rely solely on my own interpretation. In both cases I sought to render the selection clear and back it with evidence from primary sources.

The structure of the paper is similar to that of the research conducted. It first identifies and analyses the foundations and evolution of the IAR in light of their relations to its contemporary developments. Combined chronological and thematic considerations set the order of discussion. In the conclusions, the paper offers a more comprehensive analysis bringing together the different elements, to offer a framework that can better elucidate the main forces that have determined the evolution of the IAR. Moreover, it allows to revise the analytic point of view and ask how have the controversy and challenges of in-coming forced migration reshaped national identity and the negotiation over the definitions and balances of the state's core values?

The dissertation is divided into five chapters. The first chapter sets the theoretical and methodological framework for the research and discussion. The second chapter is dedicated to the founding years of the state of Israel, 1948-1954. The third chapter runs from the 1950's until the end the 1980's. The forth chapter focuses on the 1990's until the threshold of 2001. The final chapter explores the contemporary developments of the IAR since 2001 up to 2017.

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and social activists.

The thought behind the separation is thematic. The founding years serve as the defining conceptual point of departure to what comes afterwards. The years up to the end of the 1980's follow accordingly most of the principles already cemented in the founding years. The 1990's open a new era in the history of non-Jewish immigration to Israel, which creates the immediate context to the contemporary asylum-migration nexus in the first decade of the 2000's and the gradual official formation of Israel's asylum regime. Finally, in the conclusions, the answers to the research questions are entwined together to demonstrate the advantages of the method of investigation employed throughout the dissertation. Thus, the historical study of the Israeli case offers a prototype for the analysis of the evolution of other asylum regimes.

## **RESEARCH MATERIAL**

The controversy related to the issue at hand heavily influenced the nature of the available sources of information and research about it. Considered a phenomenon of only recent years, Israel's asylum regime has been addressed so far by a limited extent of professional literature. Some of the works were published as academic scholarship and some as grey literature<sup>15</sup>. When discerning the prevailing tone and motivation that underscore most works, the boundaries between the two genres of research become blurred. Often the feeling is that the difference between the academic articles and the position papers is merely one of structure and form, instead of premise or goals. Many academic articles openly criticise government policies while others are apologetic, seeking to justify them<sup>16</sup>.

Most of the research available focuses on the last decade or so, usually giving some kind of general background and then concentrating on the increasing numbers of migrants who entered after 2005. Valuable information and analysis can be found in scholarship concerned with immigration and immigration policy as a whole, but these works naturally lack the specific moral and legal weight asylum and refugees carry, especially in the Israeli context. I have not found a work that set out to convey the complete evolution of Israel's asylum regime. Nor there is a detailed account of the events most relevant to the process, from the establishment of the state in 1948 and onwards. Therefore, a lacuna is

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<sup>15</sup> Mostly advocacy papers and reports to various organisations.

<sup>16</sup> The latter are less common and usually more self-evident in style.

encountered when one seeks to elaborate a mental picture of Israel's asylum regime, let alone a comprehensive understanding of it. This want is most probably due to the limited scope of research on the subject and the relatively short period of time it has received adequate academic attention. There may be another reason, however. Most of the scholars occupied with asylum and refugeedom<sup>17</sup> in Israel are sociologists, jurists or migration and Human Rights specialists. It seems historians have given little regard to these themes in their Israeli context.

In order to construct and then analyse a historical review that does not exist, I had to use a variety of materials deriving from different sources. The inter-disciplinary nature of asylum related issues extended this tendency. The research was based on available literature and the interviews, 30 in number, almost all conducted in person<sup>18</sup>. The interviews accentuated what I have sensed by reading the research literature: fundamental aspects of Israel's history and identity from the pre-2001 period were crucial to the comprehension of the current asylum regime, but the connection between the two parts, past and present, lingered in the haze. As a source of information and insight, the interviews were invaluable for the understanding of the contemporary situation and perceptions. In some cases, they were helpful also in the reconstruction of past events, but in the writing of the paper I preferred to rely on written documents and literature for corroboration rather than personal memories. Some of the existing scholarship relies on media publications as historical reference. I have tried to avoid such use, because of the sensibility of the subject and the various political, cultural and ideological stances different media have endorsed in the public debate over it. Instead, I used primary sources whenever I could. These sources included historical documents such as laws, conventions, official data and statistics, Parliament protocols, government decisions and Courts' rulings.

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<sup>17</sup> Throughout this paper I have used 'refugeedom' as a noun that derives from 'being a refugee'. See more at Gatrell, *The Making of the Modern Refugee* (2013), pg. 7. Others have used 'refugeeness' in a similar way.

<sup>18</sup> Three were done by telephone. Post-interview clarifications were made via email or telephone.

# **CHAPTER I**

## **THEORETICAL FOUNDATIONS FOR A HISTORICAL ANALYSIS**

### **RESEARCH QUESTIONS, THEORETICAL FRAMEWORK, METHOD, SOURCES, CONTRIBUTION**

#### **RESEARCH QUESTIONS - INTRODUCTION AND PROBLEMATISATION**

The research questions are composed of layers. The first layer wishes to understand how did the Israeli asylum regime evolve to its current state; And what were the central factors to determine its evolution. Based on this historical analysis, the second layer focuses on the relations between Israel's asylum regime and its national collective identity. It will question: has Israel's perception of nationhood and national identity significantly influenced the way it has treated forced migrants and refugees? And how has the institution of asylum interplayed with the Jewish-national and liberal-democratic fundamentals of the Jewish nation-state?

#### **TERMINOLOGY**

- Who is a refugee? The distinction between forced migrants, asylum seekers, refugees and other migrants (usually referred to in the West as either illegal, unauthorised, undocumented or economic migrants) has become in recent years an issue of fierce debate which can determine the legal status of the migrant. In hope to avoid controversy, I will regard forced migrants as people who were forced to leave their homelands to save their lives, liberty or basic human dignity. Asylum seekers are people who have officially asked for asylum or for whom the right of Non-Refoulement (non-deportation) should be reserved. The term refugees will be used in regards to those who have been recognised by a state as such, either via a Refugee Status Determination (RSD) process, or through an ad-hoc decision.

- Asylum Regime. The choice of the term ‘asylum regime’ aspires to a holistic vision of the different facets of the treatment given to forced migrants<sup>19</sup> by the state. A regime is not merely a set of laws, regulations or government policies but also the way they are, or are not, implemented by the varied state apparatuses<sup>20</sup>. This regime determines most public aspects of the lives of forced migrants in the country and thus its analysis must entail an interdisciplinary approach over different areas of research.
- The boundaries of the Israeli asylum regime. In the Israeli case the asylum regime is legally limited to non-Jewish and non-Palestinian forced migrants, for reasons explained later in this paper. Therefore, the focus of the field of inquiry of this work follows the official legal distinction. However, the impact of Jewish and Palestinian forced migrants on the Israeli asylum regime is of great importance and it is in through this lens that the role of these two groups will be analysed.

## LAYER I

The first layer sets the frame and main goals of the research. Conceptually, I see the regime as a dynamic process in the making, to be understood as an evolution through time

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<sup>19</sup> The distinction between forced migrants, asylum seekers, refugees and other migrants (usually referred to in the West as either illegal, unauthorised, undocumented or economic migrants) has become in recent years an issue of fierce debate which can determine the legal status of the migrant. To avoid controversy, I will regard here forced migrants and asylum seekers as people who have officially asked for asylum or for whom the right of Non-Refoulement (non-deportation) should be reserved. The term refugees will be used in regards to those who have been recognised by a state as such, either via a Refugee Status Determination (RSD) process, or through an ad-hoc decision.

<sup>20</sup> To be distinguished from policy. In this paper I use ‘asylum policy’ as the course of action decided upon by a public body, most frequently the government, while the ‘asylum regime’ is the actual treatment given by the state through its various representatives to asylum seekers. Thus, for example, the government had decided upon a policy that denies permission to work for all infiltrators (unauthorised forced migrants who have entered the country, mostly through Egypt) residing in the country but was not able to fully implement this policy due to legal restraints imposed by the attorney general, the justice department or the courts. Similarly, the government had ordered the army to hold migrants taken at the border in custody until the Prison Service would be able to transfer them to its facilities, but when the facilities became full and the transfer lingered, the army often released most migrants after a few days of initial detainment. The term ‘regime’ will therefore include both the policy and the actual result in everyday reality, in these cases the inability (or perhaps resistance) of the judicial system or the army to follow the government’s directives.

and thus deeply related to its historic and geopolitical changing contexts. Therefore, in order to understand the current asylum regime and the main reasons it became what it is, we must go back in time and reconstruct a historical analysis of its evolution. Parting from this assumption, the principal disciplinary approach of the research will be historical analysis. It will rely and borrow from other disciplines and theories when needed in order to tackle important components of the asylum regime<sup>21</sup>. In searching for the ‘main factors’ I try to focus the investigation on the central elements which have influenced and conditioned the Israeli asylum regime. A historical analysis of every aspect of its evolution is beyond the scope of this research. The theoretical framework that I have chosen for this endeavour is based on the Annales school of thought.

## **THE ANNALES APPROACH TO HISTORY: A THEORETICAL FRAMEWORK**

The investigation of an asylum regime, by the nature of its object, is inherently interdisciplinary. It spans political, sociological, juridical, philosophical, anthropological, economic, health, welfare and security aspects of public reality and policy, just to name the central ones. How does one research all that? What are the tools and methods the researcher should use when trying to grasp the phenomenon of asylum regime as a whole? As briefly mentioned in the opening, my choice is the historical approach. As the Greek and Latin origins of the word suggest, history merges together knowledge, inquiry, story, narrative and past events. Conceptually speaking, history, as the “study of past events, particularly in human affairs” and “the past considered as a whole”<sup>22</sup> may include all the different facets of a certain phenomenon, period or question. This of course is more an aspiration than an actual possibility, for we can never consider *all* such aspects, but only strive to include the most in an endeavour to grasp the past as a whole. As Carr shows us, the craft of the historian is precisely that of sifting through past events or facts, categorising them as “facts of history” or “other facts about the past”<sup>23</sup>. In doing so, the historian is already interpreting the past according to his interest, judgement, cultural background,

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<sup>21</sup> More on the methodology used in the research can be found later in this chapter.

<sup>22</sup> "History" n.1 & 1.1 respectively, *OED Online*. Oxford University Press, March 2017. Web. 11 June 2017.

<sup>23</sup> Carr, *What is history?* pg. 10 (1962, New York: Knopf).



previous knowledge, etc. This process of interpretation is unavoidable and therefore requires awareness and caution. But it shouldn't refrain us from making the necessary efforts to get as close as we can to a broad, complex and unbiased understanding of our research object.

My main inspiration in this endeavour is the Annales school's approach to Total/General history, Social history and the Longue Durée as they appear in the writings of Febvre, Bloch, Braudel and Le Roy Ladurie<sup>24</sup>. The later's notion: "History is the synthesis of all social sciences (sciences de l'homme) turned towards the past"<sup>25</sup> is the evolution of Febvre's idea of Total History, Bloch's bold statement about the scope of history ("The only true history is universal history")<sup>26</sup> and Braudel's approach to the role of historical research in the understanding of civilizations and societies. A vital part for my research is the notion that the present cannot be understood without the past as it's forebear. Bloch argues that the study of the present is impossible for the present is only a fleeting moment, which disappears immediately as it appears. Therefore, all research is concerned with past events, and ever more so research of human action or behaviour. The question is how do we define the past and the present and the relations between them: what are their boundaries and interlinks? In Bloch's interpretation it is precisely the connection between the past and the present, the fact the present constitutes a direct continuum of the past, that renders history as a science most relevant:

"History concerns all time that is accessible to us, and so both past and present - and both need to be studied, since understanding of either depends on understanding the other: Understanding the present state of the world requires studying the past, including the developments that have led up to the present and in order to recognise those which recur in it. Our understanding of the past is also dependent on present reality, since present reality has shaped our minds, the way we

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<sup>24</sup> Febvre, *A Geographical Introduction to History* (1925) and *A New Kind of History* (1973), Bloch, *Apologie pour l'histoire ou Métier d'historien* (1949), Braudel, *On History* (1980), Le Roy Ladurie, *The Peasants of Languedoc* ([1966] 1974).

<sup>25</sup> Harsgor (1978).

<sup>26</sup> Bloch, *Apologie*, pg. 40, the translation is mine. In another part he elaborates: "History is "the science of men in time" - wherever the human element enters, enters history. So history encompasses a "total history" of all human activity and development. Through it, one basically studies how humans have interacted with the world and amongst themselves..."

think and feel - in short, the way we look upon the past is dependent on the way we look upon the present. [...] Increased understanding of past and of present thus each facilitate the other, and so there is something of a feedback loop - the better you know the present, the better you can know the past, which in turn allows you to better know the present, and so forth.”<sup>27</sup>

## LAYER II

The second layer of enquiry stems from the first and exposes the main hypothesis of the research. It recognises special relations between nationalism and asylum in the context of the nation-state system. An intimate link connects the foundation of the Jewish nation-state and the concept of national asylum. The state of Israel was founded by a people that represented for over a millennium in Europe the prototype of an unassimilated ethnic, religious and cultural minority. This difficult and at times tragic co-existence reached its abyss in the holocaust, the founding trauma that led to, or expedited, the creation of the Jewish state in 1948. During the years before and after the extermination of the Jews in Europe, Jewish refugees constituted an unresolved problem of international concern. In the aftermath of destruction, the legacy of refugeedom<sup>28</sup> emerged as a pivotal force in the making of the nascent state’s national identity, as is starkly expressed in Israel’s declaration of independence as well as in its immigration and citizenship laws. Its status as a safe haven, which maintains an open-gate policy for all Jewish immigrants, is widely understood by Israelis and Jews as an underlying responsibility of the Jewish state and one of the ultimate reasons for its very existence. Jewish asylum seekers, as all Jewish immigrants, are granted almost automatic citizenship and the state has proven its willingness to go to great lengths in order to save Jewish communities from harm’s way around the globe, most recently in Ethiopia and the former Soviet Union. This deeply rooted commitment to Jewish immigration has been a fundamental part of the long lasting Zionist endeavour to create an independent and democratic Jewish polity, in order to redeem the Jews as a people from

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<sup>27</sup> Bloch, *Idem*.

<sup>28</sup> Throughout this paper I have used ‘refugeedom’ as a noun that derives from ‘being a refugee’. See more at Gatrell, Peter. *The Making of the Modern Refugee* (Oxford University Press, 2013), pg. 7. Others have used ‘refugeeness’ in a similar way.

their long lasting status as a religious and ethnic minority, scattered in the diaspora. For this end, a Jewish majority has been widely perceived as a vital condition to the creation of a democratic Jewish nation state. In the dominant Israeli political and public discourse, without a Jewish majority there is no way to ensure the Jewish or democratic nature of the state and its function as a safe haven to Jews in the world.

The commitment to Jewish immigration and asylum discourages other non-Jewish forms of immigration to Israel<sup>29</sup>. These dynamics are also highly relevant to the understanding of Israel's asylum regime. Accordingly, the acceptance of significant numbers of non-Jewish forced migrants could create a national threat to the Jewish and democratic character of the state.

In order to for the reader to evaluate the problematisation of the research questions and the logics of the dissertation's goals and methodology, I will first outline the subject matter by summarising the development of Israel's asylum regime.

## **BRIEF HISTORY OF ISRAEL'S ASYLUM REGIME**

Israel was one of the first countries to sign and ratify the two main international charters guaranteeing the rights of refugees<sup>30</sup>. The reason for this may be found in the state's Jewish heritage, its liberal values and its desire to be part of the international community at large and the Western developed world. Nevertheless, to this day Israel has not incorporated its international commitments into its own local primary legislation, and therefore there is no primary law determining the status of refugees in the country (nor is

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<sup>29</sup> Joppke & Rosenhek claim Israel is an "ethnic immigration country" in "Contesting ethnic immigration: Germany and Israel". *European Journal of Sociology*, Volume 43, Issue 03, pp. 301-335 (December 2002) and Afeef, Karin Fathimath describes an "ethnically stratified migration regime" in "A promised land for refugees? Asylum and migration in Israel", *NEW ISSUES IN REFUGEE RESEARCH*, Research Paper No. 183, Policy Development and Evaluation Service (UNHCR: December 2009).

<sup>30</sup> The 1951 Convention Relating to the Status of Refugees, which focused on European refugees was ratified by Israel in 1954. The convention's Protocol from 1967 globalises its scope and was accepted by Israel in 1968. For Israel's signing and adherence see UN, *The refugee convention (1954)*, pg.192 and UNHCR, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", available at: <http://www.unhcr.org/3b73b0d63.html> (visited 20.10.2017).

there a single and comprehensive law to manage non-Jewish immigration, but rather an array of inter-governmental regulations based on several different laws<sup>31</sup>).

The lack of legislation has not prevented Israeli governments from formally accepting groups of people identified as refugees on six special, ad-hoc occasions: from Vietnam in 1977 and 1979 (approximately 400 of the so called “Boat People”), From Bosnia in 1993 (about 100 Bosnian Muslims), from Kosovo in 1999 (about 100 Albanians), from Lebanon in 2000 (some 2000 of the ex-SLA fighters and their families) and finally from Darfur in 2007 (circa 500 refugees already present in Israel)<sup>32</sup>.

Alongside these humanitarian gestures, from the late 1970’s to the 1990’s fewer than one hundred individual asylum seekers, mostly Ethiopians, sought refuge in Israel. Most of them were eventually resettled elsewhere with the help of the UNHCR as Israel retained its position as a transit country rather than a permanent host. The late 1990’s saw some expansion of irregular and forced migration to Israel and as a result in 2001 the state enacted initial steps toward regulating its asylum regime when Meni Mazuz, the Attorney General, first formulated basic procedures for the handling of asylum requests<sup>33</sup>. But until 2006 there were still only several hundred asylum seekers in the country and thus the phenomenon was considered marginal by the state and its politicians, and had little place in public discourse. The situation changed with the escalating arrival of African migrants, mostly Sudanese and Eritrean, through Egypt. The following table presents the estimated number of infiltrators (irregular migrants, mostly African, who have entered the country through the Egyptian border) entering Israel per year according to state authorities<sup>34</sup>:

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<sup>31</sup> See more at the Immigration law proposal 2637/18/P 5771/2010 proposed by Kadima and other MPs on 11.10.2010, which was widely based on the Avineri, Orgad and Rubinstein / Mezila Centre paper, “Managing Global Migration: A Strategy for Immigration Policy in Israel” (2009). See also the original Immigration Law Proposal from 1952, H.C. (“Law Proposals”) 106 (27.2.1952). Retrieved on 3.3.2016 from: [http://www.nevo.co.il/Law\\_word/law17/PROP-0106.pdf](http://www.nevo.co.il/Law_word/law17/PROP-0106.pdf)

<sup>32</sup> Ben Herzog has analysed the parliamentary discussions over all occasions besides the one of 2007 (Herzog 2003, 2009a). On the importance of Herzog’s work see more at the state of the art part of this chapter.

<sup>33</sup> Israel’s Attorney General Office “Regulations Regarding the Treatment of Asylum Seekers in Israel” brought in Ben-Dor & Adut, *Israel - A Safe Haven? Problems in the Treatment Offered by the State of Israel to Refugees and Asylum Seekers*, TAU Legal Clinique & Physicians for Human Rights Report and Position Paper, pp. 21-27 (September 2003), Annex A, pp. 68-72.

<sup>34</sup> State of Israel, The Administration of Border Crossings, Population and Immigration (PIBA, in Hebrew). “Foreigners’ data in Israel, 2/2017, July 2017”, pg. 4. Available at:

<b>Until 2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
2696	4998	8695	5179	14613	17268	10427

<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>Total Entries</b>	<b>Total Present in 2017</b>
10427	119	42	229	39	17	64312	38540

To put these numbers in context, according to the same data at the end of 2014 there were circa 75,000 legal foreign workers, 15,000 illegal workers and 90,000 people who entered as tourists and had overstayed their visa duration. The distribution of the infiltrators' nationality is as follows<sup>35</sup>:

<b>Sudan</b>	<b>Eritrea</b>	<b>Rest of Africa</b>	<b>Rest of World</b>	<b>Total</b>
7869	27494	2680	497	38540
20%	72%	7%	1%	100%

In 2009 the Refugee Status Determination (RSD) process was transferred from the UNHCR's local office to the newly founded Population, Immigration and Border Authority (PIBA). Since 2010 the government has vigorously addressed the issue of irregular migration through the Egyptian border by promoting legislation and allocating substantial funds to stop infiltration. The premise underlying government policy is that the migrants arrive to Israel to seek work and improve their living standards. Therefore, they are classified as illegal labour migrants and not as asylum seekers. This definition assists the state to act for their removal from the country. The legal difficulty arises from the fact that most of the African immigrants are from Eritrea and Sudan, both recognised

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[https://www.gov.il/BlobFolder/generalpage/foreign\\_workers\\_stats/he/foreign\\_workers\\_stats\\_q2\\_2017\\_1.pdf](https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf) Data updated as of 30.6.17 (visited 26.9.2017).

<sup>35</sup> idem.

internationally for their humanitarian crises and widespread violations of human rights. Deportation of these migrants back to their home countries or to Egypt may contradict the Non-Refoulement principal in international refugee law and Israeli case law. Moreover, it would be highly complicated on a practical level due to the nature of Israel's relations with the two countries and the political circumstances in Egypt.

The most common criticism of the state's responses to recent unauthorised migration is that they are either insufficient, inconsistent, arbitrary, ad-hoc or contradictory. These claims are voiced by most parts of the social, political, media and academic spectrum debating on the subject. It includes those who wish to assist the migrants, those who oppose their presence, and those seeking a middle ground between the needs of the state and those of the migrants, in accordance with human rights and international law. Some have claimed that this inconsistency is deliberate. Yonathan Paz argues that it is based on an "ordering principle which aims to deliver a clear and unwelcoming message [... and] to send a 'no-entry' signal"<sup>36</sup> and continues:

"The tension between Israel's democratic structures, backed by its international commitments, and the state's attempts to shape technologies of power which control and limit entrance to its territory, is expressed in a response to asylum seekers that can be understood as 'ordered disorder'."<sup>37</sup>

In 2010 Israel began the construction of a 240 km long fence along its border with Egypt. The barrier has had a major impact on the arrival of migrants with numbers plummeting from as high as 16,850 per year in 2011 towards as few as 15 at the end of 2012 and reaching a complete halt by August 2013<sup>38</sup>. Recently, Prime Minister Netanyahu

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<sup>36</sup> Paz, UNHCR, "Ordered Disorder: African asylum seekers in Israel and discursive challenges to an emerging refugee regime" (2011), pg. 5. See also Kritzman-Amir, "Refugees and Asylum Seekers in the State of Israel" (2012), pg. 102 and Berman, Hotline for Migrant Workers and Asylum Seekers, "Until Our Hearts Are Completely Hardened: Asylum Procedures in Israel" (2012).

<sup>37</sup> Paz, *ibid.*

<sup>38</sup> State of Israel, PIBA. "Annual Summary Report 2012" and "Data Regarding Foreigners in Israel 2013", both available in Hebrew at: <http://www.piba.gov.il/publicationandtender/summery/pages/default.aspx>. Most cognoscenti relate the plummet to the building of the fence. The Government and PIBA insist that the measures taken against migrants' liberties in Israel have had a crucial role as well. But a study on the reasons for the standstill in migration from Africa to Israel has not been conducted yet.

declared that after obstructing their arrival, the government is operating to remove the infiltrators currently present in Israel. Indeed, existing detention centres have been enlarged, and a massive Open Facility for the confinement of thousands of un-deportable migrants has been built. Restrictions have been imposed on infiltrators' ability to work and to send money out of the country. State authorities have put much effort into finding a way to deport migrants to another ("third") African country, without clearly defying the Non-Refoulement principle. These measures are the government's response to the "asylum-migration nexus" and through them it intends to both remove the unauthorised migrants present in Israel while discouraging new ones from arriving.

The government's policy has received broad political and public support while simultaneously being ardently opposed by components of civil society, mostly academia and NGOs, and the more liberal press<sup>39</sup>. Certain aspects of the policy have also been severely criticised in the Israeli judicial system and by international organisations such as the UNHCR.

An emblematic manifestation of these dynamics could be found in the evolution and contestation of the 1954 Prevention of Infiltration Law<sup>40</sup>. The law is currently the main legal basis for government policy aimed at the removal of African infiltrators arriving to Israel through Egypt<sup>41</sup>. Originally, the law was meant to curb Palestinians from entering the country in the 1950s and for that purpose distinguished infiltration from other illegal entries to the country. Conceived as an emergency security provision the law enables special and severe measures against infiltrators, including abbreviated military trial with limited rights of appeal, immediate deportation, prolonged incarceration for infiltrators and those who assist them, especially in cases of armed infiltrators intended on carrying out

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<sup>39</sup> Most notably *Haaretz*, a centre-left Israeli daily, which is considered the voice of Israel's liberal and secular elite.

<sup>40</sup> Prevention of Infiltration (Offences and Jurisdiction) Law, 5714/1954, S.H. 160; Bill and an Explanatory Note, (no. 161), 1953, H.H. 172. An authorized English translation is available at: <http://www.israelawresourcecenter.org/emergencyregs/fulltext/preventioninfiltrationlaw.htm> (visited 4.3.17).

<sup>41</sup> See Israeli Government Decision No. 2104 published on the Israeli Prime Minister's Office official site (in Heb., visited 2.9.2017): <http://www.pmo.gov.il/Secretary/GovDecisions/2010/Pages/des2104.aspx> and Israel's High Court of Justice (hereinafter HCJ) 7146/12 Adam and others v. The Knesset and others; Doe and others v. Ministry of Interior and others (1192/13); Tahangas and others v. Ministry of Interior (1247/13) 7 March 2013 (Heb.), summary of the state's response, clause 51, pg. 30.

violent attacks. The law is still in effect today (2016), and has been amended five times (1960, 2007, 2012 and 2013, 2014)<sup>42</sup>. In an unprecedented level of opposition to the decisions of the legislative and executive branches, the supreme court has annulled two amendments of the anti-infiltration law<sup>43</sup>, and limited the third<sup>44</sup>, in the name of Israel's constitutional commitment to liberal-democratic values<sup>45</sup> and international jurisprudence. The following citation of the supreme court, sitting as the High Court of Justice (HCJ), from the verdict which repealed the amendments to the anti infiltration law for the second time in 2014 is highly revealing:

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<sup>42</sup> The amendments to the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714/1954 appear in:

S.H No. 314 of 5720/1960, pg. 64, S.H. No. 2109 of 5767/2007, pg. 463, S.H No. 2332 of 5772/2012, pg. 119 and S.H 2419 of 5774/2013, pg. 85. For the list of its amendments by year see the Knesset's Hebrew on-line site:

<http://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawSecondary.aspx?lawitemid=560724> (visited 25.10.2017)

<sup>43</sup> See HCJ 7146/12 Adam v. the Knesset et al. 16 September 2013 (in Hebrew. For an unofficial English translation see: <http://www.refworld.org/docid/524e7ab54.html> [accessed 30 October 2015]), HCJ 7385/13-8425/13 Eitan v. the Israeli Government et al. 22 September 2014 (Hebrew. For an unofficial English translation see: <http://www.refworld.org/docid/54e605334.html> (visited 30.10.17)).

For a legal analysis of the appeals and court decisions see Ruvi Ziegler's (2014) "Second Strike and you are (finally) out? The Quashing of the Prevention of Infiltration Law (Amendment no. 4)", European Society of International Law Migration & Refugee Law Interest Group Blog. Available at: [www.migreflaw.wordpress.com/2014/09/29/publication-the-israeli-supreme-courts-decision-on-detention-of-asylum-seekers/](http://www.migreflaw.wordpress.com/2014/09/29/publication-the-israeli-supreme-courts-decision-on-detention-of-asylum-seekers/) (accessed Nov. 2015) and also in further detail at <http://en.idi.org.il/search?sw=ziegler> (accessed Nov. 2015). For a more general review of the role of the Israeli courts in the evolution of Israel's asylum regime see Tally Kritzman-Amir "The Role of the Courts in the Shaping of Israel's Asylum Regime", *Masei Mishpat*, Vol. 5, (2013).

<sup>44</sup> HCJ 8665/14 Desta v. The Knesset et al. 3 February 2015 (final decision given, in Hebrew, on 8.11.2015). An unofficial translation of the summation of the decision can be found here: <http://hotline.org.il/wp-content/uploads/2013/12/Decision-11-August-2015-Summary-ENG.pdf> (accessed Nov. 2015). For analysis see Ziegler "In the Land of Hidden Legislative Aims: HCJ 8665/14 (Detention of Asylum-Seekers in Israel - Round 3)" at: [http://en.idi.org.il/analysis/articles/in-the-land-of-hidden-legislative-aims-hcj-866514-\(detention-of-asylum-seekers-in-israel-round-3\)/](http://en.idi.org.il/analysis/articles/in-the-land-of-hidden-legislative-aims-hcj-866514-(detention-of-asylum-seekers-in-israel-round-3)/) (accessed Nov. 2015).

<sup>45</sup> As they are expressed in the 1994 amendment to the "Purpose" clause of the Basic Law: Freedom of Occupation (1994) and Basic Law: Human Dignity and Liberty (1992):

"Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel."



“The question before us is the matter of the constitutionality of Amendment No. 4 of the Law for the Prevention of Infiltration – on both its parts. The starting point for the constitutional scrutiny is that before us we have a law of the Knesset, which expresses the will of the elected officials. As such, this Honorable Court is required to act with restraint and prudence during the examination of its constitutionality. No one denies that particular prudence is required when dealing with a law that was enacted a short period of time after its previous version was repealed by this Court (the Adam Case Ruling). Nonetheless, such prudence does not mean that this Court is exempt from performing its duties which are imposed upon it in our constitutional regime. It is imperative that we verify that Amendment No. 4 does not unlawfully infringe on any human rights that are anchored in the Basic Laws. The prudent characteristics of the examination are derived from the balance between the doctrine of the tyranny of the masses and the doctrine of the separation of powers and the Court’s duty to protect human rights and the principle values set at the foundation of our government.”<sup>46</sup>

The High Court’s authority for judicial review of prime legislation is founded upon the constitutional status of the Basic Laws (*Hukei Yesod*), and the Violation of Rights clause, also known as the Limiting Paragraph (*Piskat Habagbala*):

“There shall be no violation of rights [or of “freedom of occupation”] except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law.”<sup>47</sup>

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<sup>46</sup> HCJ 8425/13, V, A, 1 (23). For an unofficial English translation see *Eitan – Israeli Immigration Policy Center et al. v. The Israeli Government et al.*, HCJ 8425/13, HCJ 7385/13, Israel: High Court of Justice, 22 September 2014, available at: <http://www.refworld.org/docid/54e605334.html> [accessed 29 January 2016].

<sup>47</sup> The Limiting Paragraph appears in both Basic Law: Freedom of Occupation (1994) clause 4 and Basic Law: Human Dignity and Liberty (1992) clause 8, amended in 1994. For the role of the Basic Laws in Israel’s constitutional system see Rubinstein & Medina. *The Constitutional Law in the State of Israel* (Hebrew), 6<sup>th</sup> Edition. (Tel Aviv, Shoken: 2006). For a wider and comparative analysis of Israel’s constitutional system see: Sapir, Barak-Erez, Barak (eds.). *Israeli Constitutional Law in the Making* (Oxford: Hart, 2014).

In the case of the Anti-Infiltration law which enabled detention of non-removable migrants, the court scrutinised whether it was in odds with the rights guaranteed by the Basic Law: Human Dignity and Liberty. The stated purpose of the Basic Law is: “to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state”<sup>48</sup>.

The legislation of the Basic Law: Human Dignity and Liberty in 1992 (along side the Basic Law: Freedom of Occupation in 1994) fortified the legal status of Human Rights in Israel and became the main legal instrument to protect these rights<sup>49</sup>. Through the Limiting Paragraph, it revised the relationship and balance of power between the government, the Knesset and the High Court of Justice, enabling the later to become the ultimate guarantor of human and civil rights. The two Basic Laws of 1992 have been referred to as the opening act of a “Judicial Revolution” in which the Supreme Court has become a major influence on the shaping of government policy and the parliament’s law making<sup>50</sup>. Since the mid 1990’s, and in light of the Judicial Revolution, appeals to the HCJ have become a pivotal tool for Israeli Human Rights organizations in their confrontation with the establishment<sup>51</sup>. One of the most conspicuous areas in this regard in recent years

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<sup>48</sup> Basic Law: Human Dignity and Liberty (1992) clause 1, “Purpose”.

<sup>49</sup> See more at Rubinstein, Amnon. “The Story of the Basic Laws” (In Hebrew: Sipuram Shel Hukei-Hayesod), *Law and Man* (Heb: *Mishpat Ve-Adam*), pp. 79-109 (September 2012).

<sup>50</sup> See more at, e.g., Barak–Erez, Daphne. "Judicial review of politics: the Israeli case." *Journal of Law and Society* 29.4 (2002), pp. 611-631 and Weill, Rivka. "Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power." *Hastings Constitutional Law Quarterly* 39.2 (2011).

The interpretation the HCJ gave to the Limiting Paragraph bolstered Judicial Review in Israel and has been the protagonist of major debates in Israeli jurisprudence and politics. Quintessential to the creation and development of the Judicial Review was the former President of the Supreme Court Aharon Barak. While Barak enjoyed extensive authority and support in the judicial system, he was also criticised for his judicial activism by scholars, politicians and fellow justices. See, e.g., the critical account given by Robert Bork in *Coercing Virtue: The Worldwide Rule of Judges*, ch. 3, (AEI Press: 2003), pp. 111-134. Bork argues that: “The Israeli Supreme Court is making itself the dominant institution in the nation, an authority no other court in the world has achieved.” (pg. 111).

<sup>51</sup> For a wider view of the juxtaposition between law and culture in the context of a major power struggle within Israeli society between Western liberal and Jewish religious values, see Mautner, *Law and the Culture of Israel* (2011).

has been the controversy over asylum policy in general and the Anti-Infiltration law in particular<sup>52</sup>.

It is my surmise that the various competing agendas regarding asylum and unauthorised migration in Israel expose profoundly different worldviews on the fundamental values of the Israeli state and society. At the very core of the current struggle, both legally and ideologically, is Israel's definition as a Jewish and democratic nation-state<sup>53</sup>. This fundamental definition is customarily understood in Israeli legislation and the dominant political discourse as a mutually dependent equation, which must be fully realised, in the sense that the state must be simultaneously both Jewish and democratic. What are the definitions and contents of the two terms, however, are open and highly contested questions.

Because the way we define and treat others is so intimately related to the construction of our own identity, it is not surprising that the question of granting asylum to large numbers of non-Jewish migrants touches upon an array of formidable quandaries: Is a Jewish state simply a state where Jews live? Is it religiously, ethnically or culturally Jewish? Should it uphold certain values? Does it have a special commitment to persecuted people due to Jewish history? Similar questions can be raised about the nature of 'democratic': Is it first and foremost governed by the will of the people? Must a democratic state safeguard basic liberal values such as human rights? Is the judicial system obliged to protect the rights of minorities, of individuals and of foreigners against the will of the majority? Can a state be fully democratic only towards its own citizens? To what extent a

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<sup>52</sup> For an in depth analysis of the role the courts play in the formation of Israel's asylum regime, see Kritzman-Amir (2013).

<sup>53</sup> The Declaration of Independence is considered to be the origin of this definition. Although the word "democratic" does not appear in the declaration, the references in it to the state's future constitution and elected institutions coupled with the specific guarantees to civil and human liberal rights are considered by Israeli legislation and jurisprudence to be the basis for Israel's liberal-democratic character. The first time the term "democratic" appeared in official legislation was in the constitutional "Basic Law: The Knesset" (1985) and was later reified in the "Basic Law: Human Dignity and Liberty" (1992) and the "Basic Law: Freedom of Occupation" (originally from 1992, revised in 1994). See "Basic Law: the Knesset", Amendment No. 9 to section 7A: "Prevention of participation of candidates' list", paragraph 2., "Basic Law: Human Dignity and Liberty", paragraph 1: "*Basic principles*" (amendment) and paragraph 1a: "Purpose", and "Basic Law: Freedom of Occupation" (1994, revised), paragraph 1: "*Basic principles*" and paragraph 2: "Purpose". See more at the above mentioned Rubinstein & Medina (2006).

democratic state may use exceptional, non liberal-democratic measures to protect its national identity and homogeneity? Finally, how do the two parts, the Jewish national and the liberal democratic come together?

This crucial, and perhaps endless debate<sup>54</sup> cannot be fully addressed in this research. Yet its role in the evolution of Israel's asylum regime is vital. As Ben Herzog shows, Jewish heritage and values were central in the Knesset's debates on the acceptance of refugees in the past. It continues to be an important justification for a generous asylum regime, alongside a liberal and universal stand on immigration and forced migration. On the other hand, the danger that the arrival of many non-Jewish migrants, including asylum seekers and refugees, will turn Israel into a non-Jewish state is one of the pivotal arguments for a stern and narrowly interpreted asylum policy.

It is therefore one of the goals of this research to investigate whether, and if so how, did the constant tension and potential opposition between the two essential characteristics, Jewish-national and democratic-liberal, coupled with Israel's commitments to International law, have determined the political, legal and social space in which the Israeli asylum regime has evolved.

Moreover, we can revise the analytic point of view and ask how have the controversy and challenges of in-coming forced migration reshaped the negotiation over the definition and balance of the basic values of the state?

By pursuing the nexus between nationalism and asylum in the Israeli context we have arrived at the final question of this research: how does the issue of asylum interplay with the Jewish and democratic fundamentals of the state of Israel? In other words, from an analytical point of view, I wish to examine whether asylum regime and the discourse around

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<sup>54</sup> There is a wide and durable debate on the nature of the Israel polity and how does or should it be both Jewish and democratic. From turn of the century Zionist leaders such as Herzl and Ehad Ha'am to current day proposals by parliament members, think tanks and intellectuals. See, e.g., Sapir, Barak-Erez, Barak (eds., 2014), Part 9 pp. 473-531, Yakobson and Rubinstein. *Israel and the family of nations: The Jewish nation-state and human rights*. (Taylor & Francis: 2009), and Ruth Gavison. "Constitutional Anchoring of Israel's Vision: Recommendations Submitted to the Minister of Justice" (2013). For the original Hebrew version see: <http://index.justice.gov.il/StateIdentity/Pages/default.aspx> (visited 10.9.17). This official web page introduces the debate over "Constitutional anchoring of the state's identity". For an English version of the document see: <http://www.gavison.com/#!home/ccuh> (visited 10.9.17).

it have a unique efficiency in the evaluation of the balance between the Jewish-national and liberal-democratic components of Israeli statehood. In order to clarify let us return to the contention over the Anti-Infiltration law. In the wake of the second annulment of the amendments to the law by the HCJ and in anticipation of the “third round” of the consecutive amendment and appeal, several coalition members proposed to limit the extent of judicial review in the Basic Law: Human Dignity and Liberty<sup>55</sup>. They proposed to introduce to it a paragraph similar to paragraph 8 of the Basic Law: Freedom of Occupation, the “Effect of nonconforming law” Paragraph (*Piskat HaHitgabrut*), which states: “A provision of a law that violates freedom of occupation shall be of effect [...] if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law;”. The proposal received government support but has not been voted upon yet in the Knesset. It provoked strong opposition against it in the name of Israel’s democratic obligations to human rights and the safeguarding of the authority of the supreme court as their protector. Thus, the dispute over asylum policy has spilled over and assumed a role in the deep, long lasting controversy over primacy between Israel’s basic values and the equilibrium of power between the state’s branches.

## **FROM MICRO TO MACRO: ISRAEL AS A CASE STUDY WITHIN A LARGER CONTEXT - THEORETICAL FRAMEWORK (II LAYER)**

It is possible to make another step forward and consider the analytical efficiency of regarding asylum as a prism through which to examine the balance mentioned above in a broader context, that of Western democratic nation-states.

The Israeli example offers a revealing case study for the problems and challenges that arise from the superimposition of asylum and migration in Western, liberal-democratic, economically developed countries. For the past one-hundred years human migration has constituted one of the principal challenges for the international community and many individual states, forcing them to confront fundamental issues of international law, national identity, state sovereignty, human rights and human liberties. Throughout

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<sup>55</sup> See private Bill proposals P/19/1406 and P/19/1944 at: <https://www.knesset.gov.il/privatelaw/data/20/1374.rtf> (retrieved 10.3.16).

history migrants have been the bearers of change, questioning and unsettling established orders, provoking host societies to re-evaluate their values, customs and basic conceptions. As Simmel's *Stranger*<sup>56</sup>, migrants elude fixed definitions and therefore often find themselves positioned in intermediate realms, attracted and repelled by competing forces already present before their arrival. A focal manifestation of this pattern is the linkage between migration and globalization in reciprocally reinforcing relations. Together they pose onerous questions to the contemporary world order based on the nation-state as the predominant paradigm of sovereignty. I wish to examine whether the encounter between migrants and the liberal-democratic values of western countries reveals the inherent tension between 'nation' and 'state' within the political construct of the nation-state. According to Federico Chabod, the modern liberal nation-state was envisioned as a means of guaranteeing the liberties and rights of individuals through the aggregation of a nation, which proclaims the sovereignty of the people over any internal or external ruler<sup>57</sup>. The basic idea is that of a group of people who share a common fate partake in a social contract, which constitutes the moral and legal grounds of the state. Migrants' appeal to be accepted and integrated into society is often interpreted as contradicting the state's duty and need to foster political cohesion through the construction of national identity. As a result, many western states invest significant efforts to curb immigration, including that of asylum seekers. The contradiction between basic human liberties and rights, such as protection from discrimination, freedom of movement and freedom of occupation, and states' interests to prevent undesired immigration, especially in the case of asylum seekers, raises difficult moral, juridical, social and economic dilemmas.

In contemporary international law, the right to asylum is formally separated from immigration policies. While each state can manage immigration according to its interests, asylum is proclaimed a basic human right safeguarded by International refugee law. Therefore, most institutional and specialised debates over asylum migration focus on legal principles and procedures, economic burdens and crises management. However, political and public discourses on the subject tend to focus on questions of identity, national security and the opposition between national and universal solidarity. Thus, on both a conceptual

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<sup>56</sup> Simmel (1950).

<sup>57</sup> Chabod (1961).

and practical level, the most challenging scenarios to states' obedience to the International refugee law are those in which a large number of forced migrants attempt to enter a sovereign state. As long as the right to asylum is requested by a small number of individuals the obligation of the state to grant asylum to those who are perceived as true victims of persecution is usually not in question. Once the numbers rise the migrants tend to be regarded as a threat to social, economic or national security or cohesion. As a result, the principle of asylum, and at times even that of Non-Refoulement, becomes highly contested. A gap is then created between the legal distinctions regarding economic and asylum migrants on one hand and real practices on the ground on the other. When states are legally required to accept forced migrants against government or public will, they are likely to create mechanisms which allow them to avoid adhering to the moral principles and their legal obligations according to International Refugee law. These mechanisms include the closer of borders, 'third country' and remote borders agreements, the profusion of fences and push back operations.

The developments of the asylum migration crisis in Europe in recent years, especially in 2015-2016, starkly expose these processes. The crisis has provoked strife within and among European states, bringing into question European integration, the Schengen free movement agreement, the EU's legitimacy and its super-national authority. Why is it that asylum policy has stirred such deep variances and sensibilities, far more than other highly contested or problematic issues such as the European monetary union, the EU's failed constitution, the war in Crimea or the different national debts crises? As before, the current research cannot address such a complex inquiry, but the question itself is prominent to this research's analytical context, inspiring and guiding the suggested reflection on asylum regime.

Asylum seekers share many characteristics with other migrants but differ in two essential aspects: the first is their legal status, which is protected and guaranteed by specific international charters and international refugee law. The second is the conceptual assumption that their presence in the host country is temporary, that is until the troubles which forced them out of their homeland will come to an end. The two aspects are intertwined and stem from the fact that asylum seekers, by definition, are people who aver to be fleeing for their lives, seeking shelter from imminent danger. By doing so they challenge the compliance of hosting countries with fundamental standards of human rights

and international law, both of which are ultimately conceptual structures that are intimately linked to the origins of the nation-state. Christian Reus-Smit's recent work argues that the demand for individual rights through self-determination was a fundamental factor in the collapse of empires and the ascent of the nation-state as the predominant political structure in the world today<sup>58</sup>. I wish to consider Reus-Smit's account in relation to Aristide Zolberg's identification of the rise of the modern nation-state from the ashes of the old empires as the first and main generator of modern refugees, i.e. people who are persecuted by their own country and therefore forced to migrate<sup>59</sup>. Zolberg's reflections are inspired by Hannah Arendt's analysis of the European refugees' crises, a phenomenon that severely undermined the fledgling political order based on the nation-state in Europe between the two World Wars<sup>60</sup>. It is in Arendt's writing that one can find the way to connect the dots between human rights, nationalism, nation states and asylum seeking migration. The result is a metaphoric web in which forced migrants travel along its radials in search of safe haven. In their quest, they lay bare the external and internal boundaries of national identity and human rights. In this sense, asylum seekers and refugees are a sub-group within the broader phenomenon of international migration particularly enabled to expose the constant tension between individual human liberty and the rule of law on one hand and the Nation on the other in the contemporary international political system.

## **STATE OF THE ART – LITERATURE ON ASYLUM IN ISRAEL**

The broader theoretical bases for the inquiry have been already explained. Therefore, this part will focus on the study of asylum regime in Israel, which is still limited and comprises mostly academic articles and institutional or non-governmental (NGOs') reports. The distinction between the different types of research is often blurred, as many of the academic scholars are also NGO members and most institutional reports are made within a certain political context which may condition them to a variety of extents.

Only two comprehensive studies have been published so far on the subject. The first is Kritzman-Amir (ed.). *Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli*

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<sup>58</sup> Reus-Smith (2013).

<sup>59</sup> Zolberg (1983 & 1989).

<sup>60</sup> Arendt (1973 [1951]).



*Asylum Policy*<sup>61</sup>. The book is the product of an interdisciplinary collaboration between a group of scholars and practitioners who conducted research between 2010-2011 on various aspects of asylum in Israel. Tally Kritzman-Amir, the head of the group and editor of the volume, is a legal expert who has written extensively on asylum in Israel since 2008. The authors of the book, come from a broad scope of disciplines, among them: law, sociology, anthropology, psychology, psychiatry, political science and social work. The second is Gilad Ben-Nun's *Seeking Asylum in Israel*<sup>62</sup> which uses the methods of Global History to analyse how the struggle between universalism and exceptionalism have shaped the Israeli asylum system. Ben-Nun is an historian of diplomacy and international law with practitioner's experience as an ex Middle-East program officer at UNDP. His book begins with an in-depth investigation into the making of the Convention Relating to the Status of Refugees in 1951. He does so from the perspective of the central role played by Dr Jacob Robinson, Israel's representative to the Conference of Plenipotentiaries. The book then leaps forward to 2005 and the contemporary struggle over asylum policies in Israel, leading up to approval of the Anti-Infiltration law amendment in the end of 2014. His rich narration reveals the multifaceted nature of the public, political and legal process of policy development in the field of asylum in Israel.

Other main works to be considered are those by Ben-Dor & Adout (2003), Adout (2007), Willen (2003, ed. 2007), Kemp & Kritzman-Amir (2008), Herzog (2009a & 2009b), Kritzman-Amir (2009, 2010, 2011, 2012), Sabar (2010, 2015), Mann (2010), Natan (2011a, 2011b), Berman (2012), Kalir (2014), Ziegler (2015), and finally Kritzman-Amir (ed. 2015). The interdisciplinary nature of asylum related topics makes it difficult to associate this scholarship to one disciplinary perspective. Most of the work stems from a mixture of a social-political and legal approach and chooses to focus on a certain aspect of asylum in the Israeli context. Notable exceptions are two papers published by the UNHCR, which give a more holistic analysis of the matter (Afeef, 2009 and Paz, 2011) and Gilad Natan's (2011a, 2011b) reports at the Knesset's research centre. Kritzman-Amir & Spijkerboer (2013) and Kritzman-Amir (2013) on the other hand, provide specific legal reflections on border controls and Israeli court rulings. Ruvy Ziegler's (2011-2014, 2015) work covers

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<sup>61</sup> In Hebrew, published by Van-Leer and Hakibbutz Hameuchad, 2015.

<sup>62</sup> I.B Tauris, 2017.

from a variety of legal perspectives the ongoing judicial review over asylum in Israel and the limbo legal status Eritrean and Sudanese migrants find themselves in.

The first publication of governmental procedures for asylum in 2001<sup>63</sup> is often seen as the watershed from which one can begin considering an asylum regime. Thus, very little attention is given to the period prior to 2001. The exceptions to this tendency are the following:

Kritzman-Amir's Introduction to *Where Levinsky Meets Asmara*, which provides a helpful synopsis to the Israeli asylum system and the theoretical framework of its study in recent years<sup>64</sup>. Ben-Nun's book first chapter describing Israel instrumental role in the creation of the 1951 Refugee Convention through the work of Dr Robinson<sup>65</sup>. Ben Herzog who conducted a comprehensive political discourse analysis of all the parliamentary debates in the Knesset regarding the first six ad-hoc occasions in which Israel chose to give shelter to refugees from around the world between 1977 and 2001. His findings position Jewish refugeedom at the centre of the discourse on giving asylum to others (together with Jewish history and values)<sup>66</sup>. Sharon Harel expounds the genealogy of the UNHCR role in the Israeli asylum regime. From mainly a transit country in which asylum seekers waited for resettlement, Israel shifted to a "Hybrid model" around the year 2000, to end up with an "Autonomous model" from 2010 and onwards<sup>67</sup>. Ben-Dor & Adout (2003) provide a partial but invaluable summary of asylum related events from 1977 to 2002, while Ben-Nun (2013) and Giladi (2014) examine the 1951 Convention Relating to the Status of Refugees in the Israeli context. Ziegler (2015) gives a concise account of the development of the Israeli legal framework for asylum while Afeef (2009) also effectively describes shortly the development of the Israeli asylum regime.

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<sup>63</sup> See Ben-Dor & Adut (2003).

<sup>64</sup> Kritzman-Amir (ed. 2015), pp. 9-36.

<sup>65</sup> Ben-Nun (2017), pp. 19-86.

<sup>66</sup> Herzog, "Between nationalism and humanitarianism: the glocal discourse on refugees" (2009a), pg. 185, and more at pp. 193-196 and Herzog (2003) pg. 32, 66-69 and 80-82.

<sup>67</sup> Harel, "Israel's Asylum Mechanism" in Kritzman-Amir (ed.) (2015), pp. 43-88.

## RESEARCH CONTRIBUTION

With these important works in mind, a comprehensive historical research on the evolution of the Israeli asylum regime is still wanting. Therefore, the first premise is to identify and explicate the historical evolution of Israel's asylum regime from the establishment of the state in 1948 until present day, in order to answer the first layer of investigation (as it is formulated at the beginning of this chapter). The second premise is to then address the remaining two research questions, which I understand as components of a more political reflection in its nature. The end result shall intertwine together the historical study and the political analysis. The novelty of the proposed research is therefore twofold: first in its historical perspective. The majority of the works written on asylum in Israel are not written from a historical approach nor do they use the methods and principles of history as their main research discipline<sup>68</sup>. I believe that one of the results of this lacuna is that the debate over asylum in Israel lacks a historical frame of reference, particularly if one wishes to understand the forces that have formulated its regime. The second contribution would be in the emphasis on the interplay between asylum and the essential elements of the definition of Israel as a nation-state and the construction of its national identity. These themes are present in some degree in part of the scholarship on asylum<sup>69</sup> but are rarely the focal point of interest<sup>70</sup>.

## SOURCES

The research relies on a combination of existing literature, primary sources and an ongoing series of semi-structured interviews with key representatives of the different aspects of the Israeli asylum regime throughout its development.

1. The Literature. Due to the intrinsically interdisciplinary nature of the research, it is necessary to go beyond the existing literature on asylum in Israel (elaborated in the state of the art section). To keep the investigation and discussion in focus I will try

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<sup>68</sup> The few exceptions, some of them choose only partially a historical methodology, are noted earlier in this section.

<sup>69</sup> See, e.g., Afef (2009), Paz (2011), Ziegler (2011-2014).

<sup>70</sup> Exceptions would be Krtizman-Amir (2010) and Herzog (2003 and 2009a).

to use mainstream, widely accepted studies as the base for my own work and when needed complete them with alternative approaches by other authors, theories or schools of thought. To give an example, for the interpretation of the 1951 Refugee Convention, the literature written or edited by the UNHCR, James C. Hathaway and Guy Goodwin-Gill will be the central sources for reference. On specific issues that are important enough in the overall economy of the analysis of the Israeli case, for instance the asylum-economic migration nexus, I will look into the contemporary scholarly debate and try to extract the representatives of each major current on the subject. The same approach will be applied in highly controversial issues such as the role of Israel in the question of the Palestinian refugees in which the 'central' base will be provided by the works of Anita Shapira, Benny Morris, Avi Shalaim, Shabtai Tevet and Yoav Gelber with reference to authors Efraim Karsh and Rashid Khalidi or the heated controversy over the views of Ilan Pappé, as 'alternative' approaches.

2. The primary sources are mainly composed from state produced documents, such as: laws and legislation bills, regulations, memorandums, reports and court records (with special attention to the HCJ's verdicts), government decisions, parliament protocols, statistical reports (mostly done by the CBS), etc.; Other public or international produced documents such as UN, OECD, EU and State Department reports and data; Other archival materials such as official and private correspondence, memoirs, etc.; Written answers (via emails) to specific questions sent to relevant actors for the purpose of this research; Finally , oral accounts collected in semi-structured interviews (I will always try to corroborate oral accounts with documentation. When this is not possible I will underline the fact that the memory in question has no documental support).
3. The interviews. A series of 30 interviews has been conducted and contributed greatly to my understanding of asylum regime in Israel. The interviewees include current and former state officials of all levels from the different state apparatuses (government, parliament, judicial system, Immigration authority, security, education, welfare and health systems, etc.), UNHCR officials, asylum seekers,

academics, senior staff of NGOs and social activists. These interviews have proven to be valuable in three main aspects:

- To construct a comprehensive picture of the varied facets of the asylum regime from the different point of views the interviewees bring with them.
- To reveal the motives, restraints, beliefs and perceptions of the main actors who have helped create Israel's asylum regime.
- To test, evaluate and receive feedback for the work-in-progress hypotheses from the people who have contributed to the creation of the subject of the research.

## METHODOLOGY

To seek responses to the research questions it is necessary to first create a historical reconstruction of the evolution of asylum regime in Israel. I began realising this goal in the master's thesis and have continued to work on it ever since. The method I have been using for the historical reconstruction is made out of three phases:

- Identifying the major developments related to asylum regime and positioning them chronologically.
- Connecting singular developments into meaningful relations between them.
- Analysing the influence these relations have had over the evolution of the asylum regime, and thus discerning the cardinal patterns and central factors.

This model of investigation is inspired by Clifford Geertz's Webs of Significances<sup>71</sup>. Geertz, in his anthropological study of cultures, explains his concept as such:

"[...] believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."<sup>72</sup>

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<sup>71</sup> Geertz. *The Interpretation of Cultures* (Basic Books: 1973).

<sup>72</sup> Geertz (1973), pg. 5.

For the sake of this research, asylum regime could be understood as a web, or a sphere, made out of several diverse webs. Each aspect of asylum regime (e.g. the legal, political, bureaucratic, cultural, media, economic) could be seen as a web of its own connected to the others in multiple links.

The first stage is therefore to identify the basic elements which create the webs. It is potentially disorienting as one must search for the ‘nodes and threads’ who are relevant and important to the evolution of asylum regime within a potentially endless sea of developments, events, laws, debates, etc. In many senses it is a continuous, circular toil. Once a first scheme is created, it tends to “call in” other related issues, all with their own depth and complexities. To give an example, the Law of Return (1950) is Israel’s first, and arguably only, immigration law. In itself it is important to the understanding of asylum as it sets the grounds for Israel’s immigration regime. In analysing the law historically, the efforts to determine who is a Jew under the law’s definition become salient and inevitably touch upon a whole set of quandaries. From here one can explore the various debates on who is a Jew in the *Halacha*, in Israeli jurisprudence or in Zionist thought. Obviously, it is necessary to draw the line at some point. I try to do that by evaluating the interplay and influence the theme in question has with other major developments in the asylum regime I can identify. I understand these as ‘meaningful relations’. They are the threads of the web and are elaborated in the second phase of the reconstruction. If an identified ‘node’ or element interrelates or influences many other elements then it is probable to have a significant impact in the evolution of asylum regime as a whole. Contrarily, if it is redeemed isolated, it may indicate it has a limited role. The last phase focuses on these ‘meaningful relations’ which connect different ‘nodes’. If the ‘nodes’ involved are important, or there are many of them, the more important a ‘relation’ tends to be (these considerations are principally qualitative and not quantitative in nature).

If we would try to imagine the result of this investigation, we may borrow from Social Network Analysis (SNA) to create a meaningful mental map of the historical evolution of the institution of asylum regime. This map will resemble an elaborated web which consists of ‘nodes’ connected between them with different ‘meaningful relations’ (in SNA terminology: ties, edges) which, optimistically, reveal spaces and central factors that have mainly determined the evolution of asylum regime.

Once the historical reconstruction had been realised, an examination of the key research questions ensued. The first two questions regard the evolution of the Israeli asylum regime. I understand the evolution of a regime as a process which develops within specific historical and political contexts which change through time and create a conceptual space. This conceptual space is made of the constant tensions that exist between pivotal factors in the evolution of the state itself. Here the link between the above mentioned first and second layers of the research questions manifests itself. Based on the work done in this research I have recognised four major factors: Jewish national identity, liberal-democratic principles, the conflict between Jewish and Palestinian refugeedom and Israel's commitment to International law and institutions as part of the traditional strategic alliance with Western democratic developed countries. In the final part of the dissertation I argue that Israel's asylum regime has evolved within the space created by these components and the interplay between them. The working assumption is that major events, laws, government decisions and external forces were able to push or pull the regime in different directions, but always in reference to the different pillars of this space-frame.

The framework of investigation and interpretation described thus far accompanies the historical reconstruction and its critical analysis throughout the dissertation. In the conclusions, I examine whether it is possible to relate the Israeli case to the wider formation of asylum regimes in Western democratic countries. From a theoretical perspective, the work suggests that the historical approach and the political emphasis on the tension between liberal-democratic universal values and particularistic national identities may be pertinent to the understanding of asylum regimes in other case studies, and perhaps, to a certain extent, also to the evolution of the international refugee law and protection regime.

## CHAPTER II

### THE EARLY FOUNDATIONS OF ISRAEL'S ASYLUM REGIME (1948-1954)

The following chapter focuses on the state's formative years from 1948 to 1954. In this period, an extensive process of state-building created the infrastructure of the Israeli polity. The foundations were laid for Israel's political, legal, economic and immigration systems and institutions. Although an asylum regime was not established as such at the time<sup>73</sup>, the bases for its later evolution is there to be found. Therefore, the aim of this chapter is to identify and analyse the early foundations that have determined the IAR's evolution.

#### THE ESTABLISHMENT OF THE STATE OF ISRAEL (1948)

Through the establishment of a Jewish and democratic nation state Israel was envisioned to realise the 'natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State'<sup>74</sup>. Especially after the Holocaust, an independent Jewish state was seen as the only cure to what was known as the 'Jewish problem'<sup>75</sup>. The Declaration of Independence defined Israel's character as a Jewish and liberal-democratic nation state<sup>76</sup>. By supporting the justification for its creation with '...the

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<sup>73</sup> because the relevant refugees of the time were either Jewish or Palestinian and both were not perceived by the state, or by international refugee law, as political Convention refugees with a legal claim for asylum due to their personal situation.

<sup>74</sup> "The Declaration of the Establishment of the State of Israel" (5 Iyar 5708, 14.5.1948. Hereinafter, "The Declaration of Independence), paragraph 10 of the English translation retrieved from the official site of the Israeli Parliament, the *Knesset*: [http://knesset.gov.il/docs/eng/megilat\\_eng.htm](http://knesset.gov.il/docs/eng/megilat_eng.htm) (accessed July 2015). From hereinafter referred to as the Declaration of Independence.

<sup>75</sup> The Declaration of Independence paragraphs 6-7.

<sup>76</sup> Although the word "democratic" does not appear in the declaration, the references in it to the state's future constitution and elected institutions coupled with the specific guarantees to civil and human liberal rights are considered by Israeli legislation and jurisprudence to be the basis for Israel's liberal-democratic character. The first time the term "democratic" appeared in official legislation was in 1985 in the amendment to the constitutional "Basic Law: the Knesset" (1958) and was later reified in the "Basic Law: Human Dignity and Liberty" (1992) and the "Basic Law: Freedom of Occupation" (originally from 1992, revised in 1994). See "Basic Law: the Knesset", Amendment No. 9 to section



strength of the resolution of the United Nations General Assembly<sup>77</sup>, the founding members sought to include Israel within the international community and declared Israel to ‘be faithful to the principles of the Charter of the United Nations’<sup>78</sup>. The triangular basic character of the state as Jewish, liberal-democratic and a member of the international community was realized in later years by internal legislation, the signing of international conventions, official policy, case law and the dominant political discourse. To my understanding, most of Israel’s policymaking to this day has strived to remain within this conceptual triangle, each time interpreting differently the balance between its three components. The foundations and evolution of its immigration and asylum policies, as they are explicated in the following pages, are a clear example of this endeavour.

When enunciating the core values of the state to be, the founding members chose to place first the state’s commitment to ‘be open for Jewish immigration and for the ingathering of the Exiles’<sup>79</sup>. From its very first day Israel was meant to be a *Jewish* immigration state<sup>80</sup>, following the Zionist vision which aspired to resolve the plight of the Jews in the diaspora by Jewish immigration to Palestine. It is important to emphasize here that Zionist (and later Israeli) terminology does not regard Jewish immigration to Israel as ‘immigration’ but rather as ‘*Aliyah*’, literally meaning ‘ascent’ in Hebrew, a term taken from Jewish tradition to indicate the centrality of the land of Israel to Jewish identity. The right of Jews from the Diaspora to freely come and reside in Israel is called the right of ‘Return’, in the sense that they are returning to their ancestral homeland, not immigrating to a new country<sup>81</sup>. Jewish immigration and demography have always been a cardinal element for the

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7A (1985): "Prevention of participation of candidates' list", paragraph 2., "Basic Law: Human Dignity and Liberty", paragraph 1: "Basic principles" (amendment) and paragraph 1a: "Purpose", and "Basic Law: Freedom of Occupation" (1994, revised), paragraph 1: "Basic principles" and paragraph 2: "Purpose".

For further insight see Rubinstein, "The Story of the Basic Laws" (2012).

<sup>77</sup> The Declaration of Independence, para. 11.

<sup>78</sup> The Declaration of Independence, para. 12.

<sup>79</sup> The Declaration of Independence, para. 12.

<sup>80</sup> This notion found its legal realisation in the basic and arguably only law of immigration to Israel, 'The Law of Return' (1950). See also Joppke & Rosenhek (2002), pp. 308-312, Amir-Kritzman, 'Otherness as the underlying principal in Israel's asylum regime' (2010), pp 607-608, and Afeef (2009), pp. 2-3. Kemp, Adriana and Rajjman, Rebeca, 'Foreigners in the Jewish state: the new politics of migrant-labor in Israel', *Sociologia Israelit* 3, 1: 79–110 (Hebrew, 2000).

<sup>81</sup> See more at Gavison, 'The Law of Return at Sixty Years: History, Ideology, Justification' (Mezilah, 2010), pg. 20 and Perez, "Israel's Law of Return: A Qualified Justification" (2011) and Joppke & Rosenhek (2002).

fulfilment of the Zionist project.<sup>82</sup> Without a Jewish demographic base there could be no national entity, nor any effective process of nation and state building<sup>83</sup>. By opening Israel to Jews from around the world, Zionist leaders responded to two of their elemental needs: to create a safe haven for persecuted Jews of the diaspora and at the same time to generate a Jewish majority critical for the creation of a Jewish democratic state. The fact that an Arab majority populated Palestine made large scale Jewish immigration appeared to be the only way to respond to these intertwined exigencies. As Joppke and Rosenhek put it ‘the full significance of Jewish immigration derives from a conflictive geopolitical environment in which demography is seen as destiny’<sup>84</sup>. The struggle for the existence of a Jewish state in Israel-Palestine has always been a demographic issue and deeply connected to overlapping issues of forced migration, immigration and asylum.

## **THE WAR OF INDEPENDENCE (1947-1949)**

The establishment of Israel took place in the midst of civil war between Jews and Arabs over the future of Palestine. The day after the proclamation of independence the British mandate in Palestine ended and a coalition of regular army units from Egypt, Syria, Jordan, Lebanon and Iraq joined the Palestinian militia in their fight against the Jewish forces<sup>85</sup>. Their declared goal was the destruction of the nascent Jewish state<sup>86</sup>. A historiographical debate exists over the question whether Jewish defeat and destruction were plausible, but that is of less importance to this paper’s focus on the IAR. What is

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<sup>82</sup> For the centrality of demography and Jewish immigration in the Zionist nation/state building of Israel see, e.g., Shapira, *Israel: A History* (Brandeis University Press, 2012), Goldscheider, *Israel’s Changing Society. Population, Ethnicity & Development* (2002), pp. 12-21, 30-32, 43-64 and Joppke & Rosenhek (2002), pp. 308-312.

<sup>83</sup> Joppke & Rosenhek (2002), pp. 309-12.

<sup>84</sup> Joppke & Rosenhek (2002), pg. 308. On page 309 they continue this line of thought:

‘Part of the legitimation of Israel as a Jewish state is that it should provide a shelter for Jews threatened by persecution. This motif was mentioned in the presentation of the Law of Return in the Knesset.’ and ‘...Jewish immigration is grounded not only in the ethnocultural idiom that defines the Israeli polity, but also in material state building imperatives. The Zionist colonial project was from the start founded on immigration flows, and the existence of a pre-state Zionist community in Palestine was entirely the result of successive waves of Jewish immigration. After the establishment of the state, Jewish immigration continued to play a fundamental role in the demographic make-up of Israeli society.’

<sup>85</sup> See Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881–2001* (2001), pp. 215-258.

<sup>86</sup> See Lapierre in *O Jerusalem!* (1972), pg. 408, quoted by Morris (2001), pg. 219.

important is that the idea of total destruction in case of defeat became a cornerstone in Israeli collective mentality, repeatedly evoked in discourses concerned with national security<sup>87</sup>. In recent years, identifying incoming unauthorised migration as an existential threat to society in general and to Israel's Jewish and democratic character in particular, has become a common argument in the public debate over immigration and asylum policy<sup>88</sup>.

The 1948 war brought to full maturity the demographic aspect of the Jewish-Arab conflict over Palestine. Both sides recognised the importance of population predominance and conducted their efforts accordingly<sup>89</sup>. Correlation between demographic distribution and sovereignty was the logic behind the various pre-war international partition proposals, which sought a peaceful solution to the suppurating conflict. Such was the underlying logic of UN resolution 181 (II) in November 1947<sup>90</sup>. In the context of war, most of the fighting followed the lines separating Jewish and Arab populations. Civil presence was the base for military control and activity. This meant, in most cases, that once land was won through combat the population of the losing side either ran away, was forcibly evacuated or in some cases even massacred<sup>91</sup>. A highly politicised scholarly debate is still conducted over these

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<sup>87</sup> See Oren Barak, Gabriel Sheffer (ed.), *Existential Threats and Civil-security Relations* (2009), pp. 89-90 and throughout chapters 4-8. See also Shlaim, *The Iron wall. Israel and the Arab world* (2001).

<sup>88</sup> See, e.g., Gavison and Elran, (Eds.), Mezila Centre, 'Unauthorised Immigration as a Challenge to Israel' (Heb., June 2013) and Prime Minister Netanyahu's repeated declarations on the matter. (Just to quote one, see his speech from January 2013 at the official ceremony for the completion of the fence along Israel's border with Egypt, available at the Prime Minister's Office, official online publication: <http://www.pmo.gov.il/MediaCenter/Speeches/Pages/speechgader020112.aspx> (last visited 1.4.2017).

<sup>89</sup> Morris 2001: 253-5 and 2004: 60-1, Gavison, 'The Law of Return at Sixty Years: History, Ideology, Justification' (2010), pg. 20 and Goldscheider, (2002), pp. 65-70.

<sup>90</sup> See U.N General Assembly Resolution 181 (II), 29 November 1947, pp. 132-133 and throughout chapters II and III, which specify the proposed borders between the Jewish and the Arab state.

<sup>91</sup> This was the outcome in all of the Jewish territories that fell under Arab control such as the Jewish quarter of old Jerusalem, and in the majority of Arab towns and villages captured by Israel across the land. See Shapira (2012), pp. 158-162 and 171-176. See also Morris (2001) pp. 214, 223-226, 252-258 and Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2004). For the story of the Etzion enclave see Morris, 'Road to Jerusalem', pp. 138-140. The causes of Palestinian refugedom are one of the most controversial issues in the political and historical debate regarding Middle-eastern history. For a historiographical critique of Morris's authority on the matter, see Karsh, 'Benny Morris's Reign of Error, Revisited The Post-Zionist Critique' (2005). See more at Morris's (2001) note for the critics on his work: pg. 710, note 372.

matters<sup>92</sup> and over the question whether a substantial part of the Palestinian refugees was deported by Israeli forces following government orders and premediated plans<sup>93</sup>. For the later evolution of the IAR, it is sufficient to acknowledge at this point that the Palestinian refugees were not allowed to return to their homes once they had left them<sup>94</sup>. The Israeli motivation of this policy was twofold: military concerns regarding the reestablishment of Arab enclaves behind Israeli lines coupled with long term political goals to secure a Jewish majority in the new state<sup>95</sup>. Israel's realisation as both Jewish and democratic made demography a key consideration during the war and after it<sup>96</sup>. A good illustration for this is the decision not to seize Gaza and the West Bank in the second phase of the war in which the Israeli army (IDF) enjoyed military superiority. Due to the overwhelming Arab majority in these territories, the provisional government feared that seizing them would provoke international condemnation as well as jeopardise Israel's Jewish majority<sup>97</sup>.

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<sup>92</sup> See e.g., Shapira (2012), pg. 174 central paragraph, Morris (2001), pg. 245 and pp. 255-258, Etzioni Tree and Javelin: The Golani Brigade's Route of Battle (Heb., 1950), pp. 307-310.

<sup>93</sup> Several scholars have described the Palestinian forced migration as 'Ethnic Cleansing'. Other scholars in Israel and abroad ardently contested this view. See more at Pappé, *The Ethnic Cleansing of Palestine* (2006) and Khalidi, *Plan Dalet: The Zionist Master Plan for the Conquest of Palestine* (1961) for the ethnic cleansing interpretation. Anita Shapira claims that there was no Israeli master plan of mass deportation but rather a domino process beginning with a spontaneous voluntary flight of Palestinians which transformed into a new demographic reality, presenting 'an opportunity that should not be missed' by the Israeli government. See Shapira, (2012), pg. 175. See also Gelber, *Palestine, 1948: War, escape and the emergence of the Palestinian refugee problem* (2006), as an example for a challenging view of the theory of Ethnic Cleansing and Morris, 'The Liar as Hero' (2011) for a straight forward criticism of the academic integrity and methods of Pappé's research.

<sup>94</sup> According to Shapira, this policy became official during the summer of 1948. Shapira (2012), pp. 171-176.

<sup>95</sup> See Morris, *The border Wars 1949-1956* (1993), Morris (2004) and Gelber (2006).

<sup>96</sup> Morris (2001), pp. 253-255 and Morris (2004), pp. 60-61.

<sup>97</sup> Lavid 2012, Morris (2001), pp. 240-246. For David Ben-Gurion's central role in the decision see, among others, Tal, 'The 1948 war – David Ben-Gurion's War' (2003), pp. 135-136. For a debate about David Ben-Gurion's famous quote from 1965 that the decision was 'A cry for generations', see Lavid, 'A cry for generations' or an intentional decision? – A historical and historiographical discussion regarding the issue of the non-conquest of the West Bank in the 1948 War' (2012).

## LARGE-SCALE DEMOGRAPHIC CHANGES SECURE ISRAEL'S JEWISH MAJORITY

The war ended in 1949<sup>98</sup> consolidating Israel's existence and its military strength and significantly widening its territory in respect of the international partition plans. Aliyah was now legal, increasing Jewish population twofold during the first three years of statehood<sup>99</sup>. The immigrants came mainly from Europe and the Middle East. Many of them were refugees, either survivors of the Holocaust or Jews fleeing Arab countries in the aftermath of the war. Their arrival to Israel was seen as a homecoming fulfilling the purpose for which the state was created<sup>100</sup>. Their legal right to come and settle in Israel was not due to their refugeedom but to their ethnic\national identity and right of return<sup>101</sup>.

Jewish immigration and Palestinian displacement radically altered the demographic balance of the nascent state; According to the pre-war partition plan (UN 181) the Jewish state was supposed to have some 600,000 Jewish and 400,000 Arab citizens. Instead, by the end of 1951 there were 1,404,400 Jews and 173,000 Arabs inside Israel's territory. In percentages, Jewish population in what would have been the Jewish state grew from roughly 60% to as much as 89%, while Arab population plummeted from 40% in the partition's proposal to approximately 11% in the state of Israel<sup>102</sup>. These dramatic demographic transformations enabled the emergence of a 'normal' Jewish state befitting

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<sup>98</sup> Shapira (2012), pp. 170-173, and Morris (2001), pp. 249-252.

<sup>99</sup> Aliyah numbers increased from an average of circa 20,000 a year between 1945-1948 (pre-state) to 101,800 in 1948 (post-independence), 239,600 in 1949, 170,000 in 1950 and 175,000 in 1951. See Goldscheider (2002), pp. 7-8 and 47-50. All together, between 1948 and 1999, roughly three million Jews immigrated to Israel. See Goldscheider (2002), pg. 50.

<sup>100</sup> Herzog (2003), pg. 27.

<sup>101</sup> See more in Herzog (2003), Perez (2011), Afeef (2009), Jopkke & Rosenhek (2002).

<sup>102</sup> CBS, Statistical Abstract of Israel 2013 (2013), Table 2.2, pp. 90-91, Goldscheider (2002), pp. 7-8, 47-50 and 69 and Cohen, 'From Haven to Heaven: Changing patterns of immigration to Israel' (2002), pp. 40-42, Shapira (2012)

pg. 174, 3rd paragraph. More at:<http://lib.cet.ac.il/pages/item.asp?item=12938&source=638>.

156,000 'Muslims, Christians and Druze' according to Israel's Central Bureau of Statistics. See Statistical Abstract of Israel (2013), Table 2.2 at pp 90-91, available on the CBS's official site (visited 22.9.2017). See also Goldscheider (2002), pg. 69 and Morris (2001), pp. 252. Steve Israel, Contemporary Jewish Demography (2002),

the European idealtypus of unity between nation, state and territory, thus fulfilling long-lasting Zionist aspirations<sup>103</sup>.

## **THE QUESTION OF PALESTINIAN REFUGEES AND THE PALESTINIAN RIGHT OF RETURN**

The end of the war did not however resolve the tribulation of Palestinian refugees but rather eternalised it as a pivotal aspect of the Arab-Israeli conflict. In Arabic, the war assumed the name an-Nakbah [disaster, cataclysm]. The Palestinian right of return became a key symbol for Palestinian national identity and a constant claim for any peaceful resolution<sup>104</sup>. In contrast, Israeli political and public discourses usually deny any Palestinian right of return categorically, and perceive it as an existential threat to the Jewish character of the state<sup>105</sup>. The number of Palestinian refugees caused by the war is disputed with

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<sup>103</sup> Shapira (2012), pp. 171-175.

<sup>104</sup> See Khalidi (ed.), *All That Remains: the Palestinian villages occupied and depopulated by Israel in 1948* (2006), Preface and Introduction, pp. XV-XXXIV and Said, *The Question of Palestine* (1992), pp. 83-114.

Needs newer arab references? Official PA papers? The Arab league peace initiative? OLP/PA charters?

<sup>105</sup> See Gavizon, 'The Jewish state: principal justification and desired character' (in Hebrew: 'Hamedina hayehudit: hazdaka ekronit udmuta harezuya' (2002) and Yoppke and Rosenhek (2002), p. 332. In 2001 the Knesset, under Labor majority, in direct relation to the ongoing negotiations with the Palestinians, passed the 'Entrenchment of the Negation of the Right to Return Law' (Chok Shirium Shlilat Zchut Hashiva) passed on 1.1.2001, requiring an absolute parliamentary majority for the return of refugees back to Israel. The law considers 'refugees' those 'who left Israel for the cause of war', including the 'displaced of 1967' and the 'refugees of 1948' and their family members. See Knesset Law Proposals Registry number 1772 of 10.1.2001.

estimations shifting between half a million to a million at the time the fighting ceased in 1949<sup>106</sup>. Current Israeli historiography usually chooses 700,000 as probable estimation<sup>107</sup>.

In their flight the refugees were scattered between Gaza, the West Bank, Egypt, Jordan, Syria and Lebanon. Shapira maintains that in the context of its time, Israel's policy towards the refugees was considered a normal consequence of wars provoked by ethnic rivalry. In some cases, such policies were deemed necessary for the creation of national homogeneities in the new political order based on nation states<sup>108</sup>. She compares the Israeli scenario to Central and Eastern Europe in the wake of the First and Second World Wars and concludes:

The Israeli leadership saw itself confronting exactly the same situation [...] The Palestinians had caused the war and they now bore its consequences. Decreasing the Arab minority in Israel was considered a natural outcome of the Palestinians' open hostility to the state. Moreover, just as Germany had absorbed the German refugees from the east, and Poland had absorbed Polish refugees, there seemed no reason why the Arab states should not absorb the Palestinian refugees.<sup>109</sup>

But they did not. Most Arab countries (except Jordan) which have hosted the Palestinian refugees have refused to absorb and naturalise them insisting that their exile was transitory and should end by exercising the Right of Return to their original lands, i.e. Palestine<sup>110</sup>. Antithetically, the prevailing conviction in Israel was, and still is, that this

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<sup>106</sup> There were 711,000 according to the 'General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine' (U.N. General Assembly Official Records, 5th Session, Supplement No. 18, Document A/1367/Rev., 23.10.1950). The number goes up as high as 957,000 (in 1950) in the 'Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East' (U.N. General Assembly Official Records, 6th Session, Supplement No. 16, Document A/1905. 28.9.1951). Shapira reckons about 700,000 (Shapira (2012), pg. 174), while Morris claims that is impossible to reconstruct an exact figure, therefore he chooses the British foreign ministry's broad assessment of 'between 600,000 to 760,000' as the most probable (for a thorough discussion of the varied evaluations see Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2004), Appendix I, pp. 602-604).

<sup>107</sup> Morris (2004), 602-4, Shapira (2012), 174.

<sup>108</sup> Shapira (2012), pp. 174-175.

<sup>109</sup> Shapira (2012), pg. 175, central paragraph. On the Israeli leadership's view on the transfer of Arab population see also Morris (2001), pp. 253-254.

<sup>110</sup> see Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002), pp. 42-43, Shapira (2012) and Morris (2001), pg. 258 last paragraph. other international reference?

would mean the end of the Jewish state. Palestinian refugeedom should therefore be resolved through resettlement elsewhere<sup>111</sup>.

The status of the Palestinian refugees has been preserved for more than 65 years with no solution in sight. The international community has assisted them through UNRWA<sup>112</sup>, which works exclusively with Palestinian refugees under a repeatedly renewed UN mandate<sup>113</sup>. Those who receive aid from UNRWA are excluded in most cases from the recognition and protection of the 1951 Refugees Convention<sup>114</sup> (article 1D) and consequently are not treated by the UNHCR<sup>115</sup>. Due to their lack of status under the refugee convention, coupled with Israel's interpretation of paragraph 9 And 1954 reservation to the Refugee Convention's article 8<sup>116</sup> regarding enemy nationals, Israel does not accept asylum requests from Palestinian refugees<sup>117</sup>, with the exception of those who collaborated with its security apparatus<sup>118</sup> and arguably, in some cases of Palestinian LGBTs<sup>119</sup>.

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<sup>111</sup> Morris (2004), pp. 312-334, Zilbershats & Goren-Amitai 'Return of Palestinian Refugees to the State of Israel', Metzilah Centre (2011).

<sup>112</sup> see United Nations General Assembly's resolution 302 (IV) of 8 December 1949.

<sup>113</sup> See UNRWA's official site at: <http://www.unrwa.org/who-we-are> (visited 16.10.2017)

<sup>114</sup> See 'The Convention Regarding the Status of Refugees' (1951), paragraph D., UNHCR's official site (visited 18.10.2017).

See UN General Assembly, Convention Relating to the Status of Refugees (1954), Ch. 1, Art. 1, paragraph D, United Nations, Treaty Series, vol. 189, pp. 136-220 and 'UN High Commissioner for Refugees (UNHCR), Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', October 2009, available at: <http://www.refworld.org/docid/4add77d42.html> [accessed 18 October 2015]

For a more in depth analysis of the exclusion/inclusion of Palestinian refugees from International asylum law see: Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002), Takkenberg *The Status of Palestinian Refugees in International Law* (Oxford: 1998) and Zilbershats & Goren-Amitai / Metzilah (2011).

<sup>115</sup> For a focused discussion of the legal status of Palestinian refugees and its political and practical consequences, see Akram (2002), Alex Takkenberg, *The status of Palestinian refugees in international law* (Oxford University Press on Demand, 1998).

<sup>116</sup> Michael Kagan, "Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East" (2007). Scholarly Works. Paper 635.

<sup>117</sup> section 6 of the 2001 Attorney General's regulations.

<sup>118</sup> Menachem Hofnung, "Policy Making by No Decisions: Palestinian Informers at the High Court of Justice" in Jonathan Simon, Hadar Aviram, Rosann Greenspan (eds), *The Legal Process and the Promise of Justice: Studies Inspired by the Work of Malcolm Feeley*. Cambridge, Cambridge University Press (forthcoming, 2017).

<sup>119</sup> See HC 9815/04 John Doe Vs. the Minister of the Interior, Aeyal Gross, "The Politics of LGBT rights in Israel and beyond: nationality, normativity, and Queer Politics." *Colum. Hum. Rts. L. Rev.* 46



## JEWISH AND PALESTINIAN REFUGEEEDOM AT THE ROOTS OF ISRAELI ASYLUM CONCEPTION

Since its beginning, Zionist visions of establishing a Jewish nation state (or national home) that would resolve the Jewish Question were challenged by the presence of the Palestinians. Nevertheless, the Zionist movement was able to transform most of mandatory Palestine into Israel in a revolutionary, typically modernist, perhaps even messianic, irrepressible thrust<sup>120</sup>. A major consequence of this transformation was the birth of what is known as the Palestinian Question or Problem. Israel's first foreign minister, Moshe Sharett (Shertok), referred to the Palestinian exodus of 1948 in these words: '[...] it was one of those revolutionary changes after which history does not return to the status quo ante.'<sup>121</sup> Although many decades have passed during which the demographic Jewish majority has held steadily at a ratio of over 80% of the population, the trepidation that this historical process might be reversed is still very much present in the Israeli political discourse<sup>122</sup>. Manifestation of this concern can be found in the Entrenchment of the Negation of the Right to Return Law<sup>123</sup> passed in 2001, requiring an absolute parliamentary

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(2014): 81, Kagan, Michael, Anat Ben-Dor, and Aelad Cahana. *Nowhere to run: Gay Palestinian asylum-seekers in Israel*. Tel Aviv University, Faculty of Law, Public Interest Law Program, 2008.

<sup>120</sup> For an analysis of Zionism as a revolutionary movement see Shapira, *Visions in Conflict* (Hebrew: ההליכה על קו האופק, 1989), Avineri, *The making of modern Zionism: intellectual origins of the Jewish state* (1981) and Vital, 'Zionism as Revolution? Zionism as Rebellion?' (1998). For the view of Zionism as a modern-secular messianic movement see Along, Reinharz and Shapira (eds.), *Zionism and Religion* (1998), pp. 1-9 and 250-272 and Shapira (1989), pp. 11-22. For an Arab account of this historical transformation from a more personal and prosaic point of view, see Habibi, *The Secret Life of Saeed the Pessoptimist* (Arabic: الوقائع الغربية في اختفاء سعيد أبي النحس المتشائل, 1974).

<sup>121</sup> Shapira (2012), pg. 174, citing Gelber, *Independence and Nakba* (Heb., 2004) Source: a meeting of the provisional government, 16.6.1948. The subject of discussion was the question of the Palestinian refugees.

<sup>122</sup> See Zilbershats & Goren-Amitai / Metzilah (2011), Netanyahu's insistence on recognition of Israel as a Jewish state by the Palestinians and the discussions around the current law proposal 'Basic Law: Israel as the Nation-State of the Jewish People' (ישראל – יסוד-חוק הצעת) העם של הלאום מדינת – ישראל / 1550/19). The English version of the original bill proposal from 2011 can be found here: [http://index.justice.gov.il/StateIdentity/InformationInEnglish/Documents/Basic%20Law%20110911%20\(1\).pdf](http://index.justice.gov.il/StateIdentity/InformationInEnglish/Documents/Basic%20Law%20110911%20(1).pdf). (visited 28.10.2017).

<sup>123</sup> Entrenchment of the Negation of the Right to Return Law, 5761—2001, S.H. 1772 (in Hebrew: ס"ח 1772-2001-א'התשס, חוק שריון שלילת זכות השיבה).

majority for the return of refugees back to Israel; and the Citizenship and Entry into Israel (Temporary Order) Law from 2003<sup>124</sup>, which directs the Minister of Interior to categorically deny citizenship or permits of residence in Israel to any resident of the West Bank, the Gaza strip and some enemy states.

Ben Herzog researched all the discussions in the Knesset [Israeli parliament] regarding the six incidents in which Israel chose to give shelter to refugees from around the world between 1977 and 2001. His findings position Jewish refugeedom at the centre of the discourse on giving asylum to others (together with Jewish values)<sup>125</sup>. Furthermore, Herzog claims that:

‘In the collective memory of Jewish-Zionist society, two main historical signifiers constitute the notion of refugee: The Holocaust and the Palestinian Refugees.’<sup>126</sup> Following Herzog’s conclusions I wish to argue that the general Israeli tendency to view the conflict with the Palestinians as ‘it is Us or Them’ spills over to the dichotomy of refugeedom: there could be only one rightful refugeedom and only one Right of Return to the land, either Jewish or Arab<sup>127</sup>. The use of the term ‘refugees’ therefore unearths simultaneously a double existential fear: first is the memory of persecution and annihilation, from when ‘we were the refugees’, a chronic and terrible condition of Jewish existence which came to an end only with the creation of the Jewish state. Then comes the looming perception that if the other refugeedom, that of the Palestinians, will be fully recognised, it would lead to the loss of the only possible safe haven, i.e. Israel. Hence, in a perception of a zero sum game, Jewish and Palestinian refugeedom appear as interconnected in a Möbius ring in which the end of one refugeedom leads to the beginning of the other<sup>128</sup>.

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<sup>124</sup> Citizenship and Entry into Israel (Temporary Order) Law, 2003, published on 6.8.2003 in S.H. 1901, pg. 544. See further explanation of this law in section 10 The Nationality Law (1952) Barak-Erez Daphne, ‘Israel: Citizenship and immigration law in the vise of security, nationality, and human rights’ (2008)

<sup>125</sup> Herzog, ‘Between nationalism and humanitarianism: the glocal discourse on refugees’ (2009a), pg. 185, and more at pp. 193-196 and Herzog (2003) pg. 32, 66-69 and 80-82.

<sup>126</sup> Herzog (2003), pp. 26-29.

<sup>127</sup> Herzog does not call it a dichotomy, that is my supplement. He does connect the two groups though, to some extent, in a cause and effect relation. See also in Paz (2011), pp. 8-10.

<sup>128</sup> For a recent reflection on this syndrome see Zvi Bareli’s analysis of why Israel did not help Palestinian refugees under siege at the Yarmouk camp in the Syrian civil war: “Zvi Bareli, Be a 'good Arab,' dear Oudeh: Let us ignore Yarmouk”, Haaretz, published in English on 15.4.2015: <http://www.haaretz.com/opinion/.premium-1.651804>

Israeli law, jurisprudence, asylum procedures and public discourse, along with much of the literature concerned with the IAR, incline to separate the questions relating to Palestinian refugees from those of other refugees and asylum seekers<sup>129</sup>. The legal basis for the separation is the exclusion of Palestinian refugees from the protection of the 1951 Refugee Convention<sup>130</sup>. From a political point of view such separations are justified by placing the issue of Palestinian refugees exclusively inside the context of the Arab-Israeli conflict, thus exempting Israel from being responsible for the refugees as long as the conflict persists<sup>131</sup>. A theoretical reasoning might or might not justify separation on a political or ethical level but could accept it for the sake of analytical efficiency<sup>132</sup>. While these justifications are reasonable and at times necessary, I wish to claim that the evolution of the IAR is deeply conditioned by Israel's ongoing confrontation with Palestinian refugeeedom within the context of demographic rivalry between Jews and Palestinians over statehood and land<sup>133</sup>. This does not mean that the connections are linear or always

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For the original text in Hebrew see: <http://www.haaretz.co.il/opinions/.premium-1.2613762>

<sup>129</sup> See, e.g., Ben-Dor & Adut (2003) pp. 28-29, Ben Dor & Kagan, 'Nowhere to Run. Gay Palestinian Asylum Seekers in Israel' (2008) pp. 20-23, 33-45, Afeef (2009), Martins (2009), Avineri, Orgad and Rubinstein / Mezila Centre, 'Managing Global Migration: A Strategy for Immigration Policy in Israel' (2009) and Zilbershats & Goren-Amitai / Metzilah (2011). An exception to this tendency could be found, as mentioned above, in Herzog (2003, 2009), Paz (2011) and Kritzman-Amir (2010, 2012).

<sup>130</sup> See UN General Assembly, Convention Relating to the Status of Refugees (1954), Ch. 1, Art. 1, paragraph D, United Nations, Treaty Series, vol. 189, pp. 136-220 and 'UN High Commissioner for Refugees (UNHCR), Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', October 2009, available at: <http://www.refworld.org/docid/4add77d42.html> [accessed 18 October 2015]

For a more in depth analysis of the exclusion/inclusion of Palestinian refugees from International asylum law see: Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002), Takkenbergand 'The Status of Palestinian Refugees in International Law (Oxford: 1998) and Zilbershats & Goren-Amitai / Metzilah (2011).

<sup>131</sup> See, e.g., Avineri, Orgad and Rubinstein / Metzilah (2010) and Zilbershats & Goren-Amitai / Metzilah (2011).

<sup>132</sup> See, e.g., Afeef (2009), Kirschenbaum 'Israel, Refugees and Collective Identity', e-International Relations (July, 2013).

<sup>133</sup> See more at Amir-Kritzman, 'Otherness as the underlying principal in Israel's asylum regime' (2010), Avineri, Orgad and Rubinstein (2010), Gavison (2013), Herzog (2003) and (2009a), Afeef (2009). About the importance to maintain a Jewish majority as crucial for the survival of the state see: Shafir & Peled 'Citizenship and Stratification in an Ethnic Democracy'. Ethnic and Racial Studies 21, no. 3 (1998) pp. 408-427, Yiftachel 'Ethnocracy' and Its Discontents: Minorities, Protests, and the Israeli Polity. Critical Inquiry 26, no. 4 (2000) pp. 725-756, and Ethnocracy: Land and Identity Politics in Israel/Palestine. University of Pennsylvania Press (2006), Gavison 'Jewish and Democratic? a

coherent. They can lead to very different results in different circumstances. Nevertheless, in order to comprehend the evolution of the IAR one must always place it in context, which is conditioned by the conflict with the Palestinians and their demand for return. I am not alone to reach this conclusion. In his discourse analysis Herzog found that in most cases Israeli parliament members discussing ad-hoc humanitarian gestures to non-Jewish refugees 'did not connect the Palestinian refugees with the general notion of humanitarian refuge-ness'. Herzog explains this by sustaining that 'The data show that accepting refugees in Israel is possible only when it is justified as Zionist humanitarianism, which is disconnected from the discussion on the Palestinian refugees.' Finally, Herzog concludes that 'The discourse on the 'humanitarian refugees' is a mechanism of denial – which does not mean erasure, but rather a practice of double exclusion of the Palestinian refugees.'<sup>134</sup>

In his analysis for the UNHCR of the Israeli response to the recent influx of African migrants and asylum seekers, Jonathan Paz points to a direct link:

The state fears that recognizing African asylum seekers as refugees will open the Pandora's Box of Palestinian refugees' claims for territory, compensation and most importantly, right of return. Combined, these demands are perceived as a threat for the country's ethnonational character and its very existence as a Jewish and democratic state [...] Although the two refugee issues' are not legally or practically related, the primordial/contemporary presence of the Palestinian refugees shapes immigration debate in Israel. As one interviewee claimed, the issue of Palestinian refugees accompanies any discussion about African refugees.<sup>135</sup>

Tally Kritzman-Amir goes one step ahead in her critique:

'Asylum regimes should be governed by the Refugee Convention and by international humanitarian moral principles, whereas immigration regimes should

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Rejoinder to the 'Ethnic Democracy' Debate'. *Israel Studies* 4, no. 1 (1999) pp. 44-72, Smooha 'Ethnic democracy: Israel as an archetype.' *Israel Studies* 2.2 (1997) pp. 198-241 and 'The model of ethnic democracy: Israel as a Jewish and democratic state.' *Nations and Nationalism* 8.4 (2002) pp. 475-503; finally, Lustick 'Israel as a non-Arab state: The political implications of mass immigration of non-Jews'. *The Middle East Journal*; 53, 3 (1999) pp. 417-433.

<sup>134</sup> Herzog (2009a), pg. 198, 201, 201 respectively.

<sup>135</sup> Paz (2011) pg. 9.

be governed by the principle of state sovereignty. Nevertheless, in Israel, the asylum, citizenship, and immigration policies are mainly intended to exclude the ‘other’—the non-Jewish asylum seeker, and especially the Palestinian, the Arab, or the Muslim refugee, regardless of the circumstances that brought them to Israel.’<sup>136</sup>

Avi Perry seems to accept Kritzman-Amir’s criticism and expounds its roots:

‘Israel inhabits a tenuous and unique position with regard to these asylum seekers. It is challenged to reconcile its security and demographic objectives — maintaining a secure, Jewish-majority state — with its obligations under the relevant instruments of international refugee law, foremost among them being the 1951 Convention Relating to the Status of Refugees [...] Israel chiefly has defended its detention policies and its refusal to permit enemy nationals [mostly Sudanese] to apply for asylum on pragmatic, rather than legal, grounds. Israel’s primary concerns with admitting Sudanese and Eritrean asylum seekers sound in security and demographics. These concerns emanate from two of Israel’s core objectives: maintaining a secure state against the threat of terrorism and preserving the majority-Jewish character of that state.’<sup>137</sup>

Although Perry here does not refer directly to the Palestinians, the two core objectives, ‘security’ and ‘demography’, do.

Arnon Soffer, the editor of the position paper ‘Refugees or Work Immigrants from African Countries’ sustains a restrictive Israeli asylum-migration policy by arguing that the African migrants pose an existential threat to Israel as a Jewish state:

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<sup>136</sup> Kritzman-Amir (2010) pp. 605-606.

<sup>137</sup> Perry ‘Solving Israel’s African Refugee Crisis Israel’ (2010) pg. 158 and 173 respectively.

‘The question is how many Israel could further absorb so the speakers of the organisations for Human rights would agree that we have arrived to the red line that should not be passed. Are they willing to absorb another half a million, million? [...] To the 7.3 million people which constitute the Israeli society in mid 2009, 300,000 Palestinians were added [...] To them one must add 30,000 African refugees/migrants (estimated mean) and to them - another quarter of a million labor migrants. Thus, the number of foreigners who have entered Israel since 1967 is about 600,000 people, which are 7.5% of the residing population (in total 8 million people in Israel). Together with all the non-Jews residing in Israel [mostly Israeli Arabs/Palestinians] their overall portion will be 30%!'<sup>138</sup>

Interviews conducted for this paper confirm the dual approach presented above regarding the nexus demographic rivalry - Palestinian refugees - IAR. At first, all most all interviewees automatically separated the Palestinians from the asylum discourse. On the other hand, when asked about the state’s reluctance to absorb substantial numbers of non-Jewish asylum seekers, demographic rivalry between Arabs and Jews was almost as much of an automatic (‘obvious’) context for the discussion as was the initial separation. As Soffer, most interviewees supporting a restrictive asylum/migration regime saw demography as a key factor in deciding Israel’s asylum policy and some integrated the number of asylum seekers/migrants in Israel with other non-Jewish populations, most conspicuously, Israeli Arabs and Palestinians. In contrast, among those in favour of a pro-asylum regime there was a tendency to belittle the demographic importance of the asylum seekers’ population. Several politicians, legal experts and social activists also suggested that the problem of Palestinian Return is one of the reasons that hitherto Israel has not incorporated its international commitments regarding asylum into its domestic primary legislation<sup>139</sup>. On a legal and practical level, any public, political or juridical debate over a comprehensive law of asylum would most probably have to address, or explicitly exclude,

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<sup>138</sup> Soffer, Arnon (ed.), *Refugees or Work Immigrants from African Countries* (Hebrew) Haifa: National Security College Research Center and the Haikin Chair for Geostrategic Studies at the University of Haifa (2009), pp. 11-12 (the excerpt was translated by the author of this paper). The other major argument Soffer bases his view on is the claim that the vast majority of the African migrants in the country are economic migrants rather than refugees.

<sup>139</sup> See also Ben-Dor & Adut (2003), pg. 27, Paz (2011), pg. 9.

asylum rights for Palestinian refugees. A telling symptom of the superimposition of the Palestinian Question and asylum in Israel is found in the Infiltration law.

## **PALESTINIAN INFILTRATION AND THE LAW FOR PREVENTION OF INFILTRATION (1948-1954)**

The war and the displacement of the Palestinians also gave birth to Palestinian infiltration, which ended up having unpredictable ties to asylum seeking migration into Israel, many years later. Starting from 1948 and steadily increasing, infiltration of Palestinians across the Israeli lines (and eventually borders) became a major security concern for the Israeli army and government. The infiltration was of a mixed nature. Where in the beginning infiltration was carried out mostly by civilians, trying to return to their homes or to their fields, after the cease fire agreements of 1949 the conflict transmuted into low key skirmishes often provoked by ‘Fedayeen’ (guerrilla) infiltrators, who attacked Israeli targets and hurt both civilians and security personnel. In the 1950’s it became a focal element in the tension between Israel and its neighbours, mostly Egypt and Jordan, increasingly manipulated for military and political goals<sup>140</sup>. Israel responded to the infiltrations with a series of reprisal attacks meant to create deterrence and force enemy governments to thwart infiltrations. Military activities were coupled with domestic legislation: in 1954 the Knesset passed the Prevention of Infiltration Law, which distinguished infiltration from other illegal entrance to the country. Conceived as an emergency security provision the law enables special and severe measures against infiltrators, including abbreviated military trial with limited rights of appeal, immediate deportation, prolonged incarceration (also to those who assists them), especially in cases of armed infiltrators intended on carrying out violent attacks<sup>141</sup>. The law is in effect until

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<sup>140</sup> See Morris (2001), pp. 269-291 and Avi Shlaim, *The Iron Wall* (2001), chapters 2-3. For a more in depth view of the period and the issue of Infiltration see Morris, *Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (1997).

<sup>141</sup> Prevention of Infiltration Law; Bill and an Explanatory Note, (no. 161), 1953, H.H. 172. An authorised English translation is available at: <http://www.israelawresourcecenter.org/emergencyregs/fulltext/preventioninfiltrationlaw.htm>

today (2017), with four amendments<sup>142</sup>. It is currently the main piece of legislation used to support government policy regarding African migrants and asylum seekers arriving to Israel through Egypt<sup>143</sup>. Although there is very little in common between Palestinian infiltration in the 1950's and African irregular migration in the 2000's, the government and parliament chose to use the anti-Palestinian Infiltration law to stop African irregular migration. By doing so they framed African migration as a security threat, just like Palestinian infiltration. This kind of identification has outreaching symbolic and practical consequences in the public debate and the state apparatuses' approach. The matter requires further analysis of its own. To this end historic analysis of legal texts and composers' intentions, as well as institutional anthropologic examinations of bureaucratic memory and mythology could be highly effective.

## **INTERNATIONAL LAW, HUMAN RIGHTS TREATIES AND THE UN**

Israel joined the United Nations on 11.5.1949<sup>144</sup>, shortly after the end of the war and while the armistice negotiations were still under way in Rhodes. By joining, Israel ratified its commitment to the UN's charter, already made explicit in the Declaration of Independence, thereby laying the grounds for the introduction of International Law in its juridical system, including the basis for an asylum regime<sup>145</sup>.

Yehuda Blum, an Israeli scholar of Jurisprudence and ambassador to the UN between 1978-1984, defines the relationship between Israel and the UN as 'not easy' and

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<sup>142</sup> The amendments to the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714/1954 appear in:

S.H No. 314 of 5720/1960, pg. 64, S.H. No. 2109 of 5767/2007, pg. 463, S.H No. 2332 of 5772/2012, pg. 119, S.H 2419 of 5774/2013, pg. 85, and S.H 2483 of 5775/2014, pp 84-102.

<sup>143</sup> See Israeli Government Decision No. 2104 published on the Israeli Prime Minister's Office official site (in Heb., visited 2.9.2017): <http://www.pmo.gov.il/Secretary/GovDecisions/2010/Pages/des2104.aspx> and Israel's High Court of Justice (hereinafter HCJ) 7146/12 Adam and others v. The *Knesset* and others; Doe and others v. Ministry of Interior and others (1192/13); Tahangas and others v. Ministry of Interior (1247/13) 7 March 2013 (Heb.), summary of the state's response, clause 51, pg. 30.

<sup>144</sup> United Nations' General Assembly Resolution 273 (III) from 11.5.1949. See also the UN's official press release regarding Israel's application to the UN in which it accepts the Charter, available at: <http://unispal.un.org/UNISPAL.NSF/0/78A0353093806A8C85256A71006253E9> (visited 14.9.2017)

<sup>145</sup> The Declaration of Independence, cit. supra, para. 12.



‘ambivalent’<sup>146</sup>. In the early days of both the UN and Israel, the Jewish state received its official international legitimacy directly from the UN’s partition plan (Resolution 181) and its acceptance as a full member. Blum identifies the aims and purposes of the UN, brought forth by its Charter, with the lofty principles which had been first proclaimed by the prophets of Israel in Jerusalem some twenty-eight hundred years ago, to wit, the equality and brotherhood of man, the intrinsic value and dignity of the human being, social justice, general disarmament and eternal peace among nations<sup>147</sup>. Blum’s words allure to those of the Declaration of Independence, which states: ‘[The state of Israel] will be based on freedom, justice and peace as envisaged by the prophets of Israel’<sup>148</sup>. The values of the ‘prophets of Israel’ have been repeatedly invoked in Israel’s public and juridical discourses ever since, as the bedrock of Israel’s commitments to fundamental human rights and human dignity, including the granting of asylum to refugees<sup>149</sup>.

Despite the kinship of ideals, the relationship between Israel and the UN began to sour soon after Israel was founded. The UN’s inability to implement Resolution 181 and the fact it did not intervene to protect Israel from invasion in the war of 1948 were the first blows<sup>150</sup>. They probably contributed substantially to subsequent Israeli mistrust in the international body and community in later years. The failure to reach a ceasefire agreement in the summer and autumn of 1948 and the dispute over the question of the Palestinian refugees ended in the assassination of the UN’s official mediator to the Palestine conflict, Count Bernadotte, by an Israeli right-wing resistance group<sup>151</sup>. The UN did eventually manage to negotiate the armistice agreements in 1949 but throughout the 1950’s and 1960’s it lost its ability to effectively contribute to Middle East peace-making. The persistence of Palestinian refugedom and the Arab-Israeli conflict in the context of the Cold War coupled with a constant anti-Israeli majority at the General Assembly resulted in Israel’s isolation and condemnation. Israeli-UN political relations plummeted in 1975 with UN Resolution 3379 (XXX) determining that Zionism ‘was a form of racism and racial discrimination’. According to Blum ‘in the course of the decade that followed afterwards,

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<sup>146</sup> Blum, ‘Israel and the United Nations: a retrospective overview’ (1998), pg. 69.

<sup>147</sup> Blum, *ibidem*.

<sup>148</sup> Declaration of Independence, *cit. supra*, para 12.

<sup>149</sup> Herzog (2003) and HCJ 7146/12 Adam and others v. The *Knesset* and others.

<sup>150</sup> Blum (1998), pp. 70-71.

<sup>151</sup> See Morris (2001), pp. 235-237.

[the relations reached] ...the nadir of estrangement and alienation.<sup>152</sup> Improvement appeared slowly in the mid 1980's, as the Cold War lost its grip on global politics with the weakening and eventually disintegration of the U.S.S.R. Consequently, in 1991 the General Assembly repealed the 1975 Zionism-Racism resolution.<sup>153</sup>

## **INTERNATIONAL TREATIES**

The picture portrayed by Blum could be problematized in view of the ongoing legal and administrative collaboration of Israel with the UN's efforts to promote international law and international conventions. The later were and still are the basis of Israel's developing case law and legislation on matters relating to human rights, including refugee law<sup>154</sup>. Customary law and widely accepted international Declaratory Treaties are automatically incorporated into Israeli law, as long as they do not contradict primary legislation. As for Constitutive Treaties, they are not incorporated automatically into Israeli law, even if they do bind the state in the international sphere. In order to become part of Israeli law a Constitutive Treaty needs to be transformed into legislation<sup>155</sup>.

Nevertheless, the Supreme Court sometimes examines the problems brought before it *inter alia* in the light of treaties which have not been transformed. This position may be the result of a basic assumption that Israel intends to fulfil its international commitments.<sup>156</sup>

Israel has signed all the main international treaties on human rights, although it did not sign most of their additional protocols, nor did it transform some of them into local

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<sup>152</sup> Blum (1998), pg. 69, central paragraph with further explanations at pg. 75.

<sup>153</sup> UN Resolution 46/86 of 16.12.1991. See Blum (1998), pg. 76.

<sup>154</sup> Lerner, 'International Law and the State of Israel' (1995), pp. 384-387 and 391-392. For an articulated review of the incorporation of International Law and Treaties into Israel's legal system and legislation, see Lapidoth, 'International Law within the Israel Legal System' (1990).

<sup>155</sup> Lerner (1995), pp. 287-386.

<sup>156</sup> Lapidoth (1990), pg. 468.

legislation<sup>157</sup><sup>158</sup>. The signing of a treaty did not necessarily mean the state of Israel had a strong motivation to implement the convention, as is the case with other countries as well. Usually, it meant that Israel did not oppose the treaty and that it had an interest to be part of the international community which endorsed the treaty. This was usually the case when a majority of states in the world signed a certain convention<sup>159</sup>.

As can be seen by the dates of signing and ratification, substantial time gaps have characterised Israel's ratification of the treaties it signed. The implementation of a treaty by the government, or the incorporation of its contents into Israeli legislation by the Knesset, entailed in most cases other incentives. These could be aroused by changing

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<sup>157</sup> Lapidoth (1990). A list of international conventions on human rights which Israel signed can be found on the official site of Israel's Ministry of Foreign Affairs: <http://mfa.gov.il/MFA/MFA-Archive/1999/Pages/International%20Conventions%20on%20Human%20Rights.aspx> (visited 28.9.2017).

For a more detailed table on Israel's adherence to International Treaties, including Israel's reservations to the Treaties, see 'The Rule of Law in Armed Conflicts Project' (RULAC) of the Geneva Academy of International Humanitarian Law and Human rights:

<http://www.geneva-academy.ch/RULAC/index.php> (visited 29.9.2017).

For the full list of all treaties Israel has signed, in Hebrew, including bibliographic references to Kitvei Amana (Israel Treaty Series) see: <http://www.nevo.co.il/amana.aspx> (visited 29.9.2017).

See also Lerner, 'International Law and the State of Israel', in Shapira (ed.), Introduction to the law of Israel (1995), pp. 391-392.

<sup>158</sup> Among the treaties Israel signed, which are relevant to refugee law, we can find the following: Convention on the Prevention and Punishment of the crime of Genocide (1948, Israel's adherence date: 09.03.50), Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949, Israel's adherence date 06.07.51), Convention for the Suppression of the Traffic in Persons or the Exploitation of the Prostitution of Others (1950, Israel's adherence date: 28.12.1950), Convention Relating to the Status of Refugees (1951, Israel's adherence date: 1.10.1954), Convention on the Political Rights of Women (1953, Israel's adherence date: 6.7.1954), Convention Relating to the Status of Stateless Persons (1954 Israel's adherence date: 23.12.1958), Convention on the Reduction of Statelessness (1961, Israel's adherence date: 30.8.1961), International Convention on the Elimination of all Forms of Racial Discrimination (1966, Israel's adherence date: 03.01.79), International Covenant on Economic, Social and Cultural Rights (1966, Israel's adherence date: 3.10.1991), International Covenant on Civil and Political Rights (1966, Israel's adherence date: 3.10.1991), Protocol Relating to the Status of Refugees (1967, Israel's adherence date: 14.6.1968), Convention on the Elimination of all Forms of Discrimination Against Women (1980, Israel's adherence date: 3.10.1991), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984, Israel's adherence date: 3.10.1991), and the Convention on the Rights of the Child (1990, Israel's adherence date: 3.10.1991).

<sup>159</sup> For an analysis of the process leading to the signing and ratification of the Convention Relating to the Status of Refugees see GILADI, ROTEM. *A 'Historical Commitment'? Identity and Ideology in Israel's Attitude to the Refugee Convention 1951-4*, The International History Review 37.4 (2015): 745-767.

circumstances that required regulation, such as the influx of migrants in the 1990's and 2000's. It could also stem from a demand of the courts to introduce legislation, especially the High Court of Justice, or from an array of political interests, international pressure and conditioning by international instruments such as other UN conventions, multi or bilateral trade agreements, adherence to charters of International organisations, etc<sup>160</sup>.

There are also examples of conventions Israel signed and then officially refused to ratify, notifying the UN that it was not obliged by its signature<sup>161</sup>. One explanation to this inconsistency is the Israeli mechanism of treaty signing and ratification, which is in the hands of the government, while the Knesset is the only body in Israel authorised to pass primary legislation<sup>162</sup>. If a treaty was ratified by the government but did not receive support in the Knesset, the most probable result will be international ratification without incorporation into local legislation<sup>163</sup>. When this is the case, secondary legislation by the state authorities and court rulings can introduce the contents of conventions into Israeli law. An effective example is the 'Procedure for Handling Political Asylum Seekers in Israel' (First enacted in 2002 and ultimately updated in 2011), which explicitly states the: *Purpose of the Procedure* [:] 'To set out the process of handling political asylum seekers in Israel, and those who were recognised as refugees by the Interior Minister by virtue of the 1951

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<sup>160</sup> See, e.g., Lapidoth (1990), pg. 461 and Giladi, *ibid.* In the interviews conducted for this research, all causes mentioned have been referred to in regard of various conventions and their implementation or incorporation. For example, the formulation of the first 'Procedure for Handling Political Asylum Seekers in Israel' in 2001 was attributed to the arrival of growing numbers of asylum seekers while extensive cooperation with the International Organisation for Migration (IOM) in recent years has been explained also by Israel's obligations to the Organisation for Economic Co-operation and Development (OECD) since it became a member in 2010. For OECD's interest in migration and immigration to Israel see, e.g., OECD, 'International Migration to Israel and its Impact', in *International Migration Outlook 2011*, OECD Publishing.

[http://dx.doi.org/10.1787/migr\\_outlook-2011-9-en](http://dx.doi.org/10.1787/migr_outlook-2011-9-en) (visited 30.9.2017). move to main text?).

<sup>161</sup> See, e.g., the case of the Rome Statute (1998) signed by Israel in 2000: 'Although Israel has signed the 1998 Rome Statute on 28 August 2002, the Secretary-General received from the Government of Israel, the following communication: '...in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.'

See RULAC (2014).

<sup>162</sup> Lerner (1995), pg. 387.

<sup>163</sup> Lapidoth (1990), pp. 458-464.

Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.<sup>164</sup>

Other important examples of recent incorporations of conventions' principles in the sphere of Asylum Law can be found in the special protection and aid given to unaccompanied migrant children and victims of torture or trafficking<sup>165</sup>.

## **EARLY STATEHOOD: LEGALISING JEWISH IMMIGRATION AND THE JEWISH RIGHT OF RETURN (1950-1951)**

One of the first acts of the provisional government after the state's proclamation was to annul British Mandate's restrictions on Jewish immigration<sup>166</sup>. It then began legal preparatory work for legislation regarding citizenship and immigration. After two years and 17 drafts, on the 3.5.1950 the Ministry of Justice presented to the government a proposal for a combined Citizenship Law, which refrained from any discrimination between Jews and non-Jews in matters of immigration and naturalisation. It was supposed to be a 'neutral' liberal-democratic law, in the spirit of the commitments for complete civil equality stated in the Declaration of Independence. This is not to suggest that the proposal was aimed to relegate Jewish immigration from the pinnacle of the state's priorities. Nor that Jewish and non-Jewish immigration to Israel were to receive equal support from the state. The predominance of Jewish immigration was supposed to be accomplished through policy and bureaucracy rather than legislation, by leaving much room for consideration to the Minister of Internal Affairs in deciding who shall be admitted to the country<sup>167</sup>.

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<sup>164</sup> State of Israel, Population, Immigration and Borders Authority (PIBA), 'Procedure for Handling Political Asylum Seekers in Israel' (2011), procedure number 5.2.0012, effective as of 2.1.2011, pg. 1. For many other examples of the introduction or consideration of International Conventions in the formation of Israeli law see different *Knesset* research papers at: [https://www.knesset.gov.il/mmm/keywords\\_search.asp](https://www.knesset.gov.il/mmm/keywords_search.asp) (visited 30.9.2017)

<sup>165</sup> See, e.g., PIBA, Procedure for Unaccompanied Minors (Heb.), procedure number 10.1.0016, in effect as of 1.7.2011. Available on PIBA's official site: <http://www.piba.gov.il/Regulations/10.1.0016.pdf> (retrieved 1.4.2014). See also Nathan, The Knesset Research and Information Center, 'Israel Sopemi Report, Immigration in Israel 2010-2011', (2011), pg. 21.

<sup>166</sup> Gavison (2010), pg. 23 and Goldscheider (2002), pg. 50.

<sup>167</sup> Gavison (2010), pp. 24-25.

The juxtaposition of official legislation with actual policy and administration could be comprehended as an effort to confront the tension between Israel's commitment to 'be open for Jewish immigration and for the Ingathering of the Exiles' and its adherence to liberal-universal values such as equality and justice<sup>168</sup>. Jurist and Knesset member Zerach Warhaftig of the Zionist religious party (Hapoel Hamizrachi), who was also the director of the Institute for the Study of Jewish Law in the Ministry of Justice, passionately opposed the logic of legislation/policy contradiction. In a memorandum from 7.12.1949 he wrote:

It is inevitable that the Citizenship Law in the State of Israel will struggle with the apparent contradiction between two fundamental principles of the state: a) the ingathering of Israel's exiles; b) the guarantee of equal rights for every citizen and resident. The realisation of the goal of Zionism — Kibbutz Galuyot [the ingathering of Jewish exiles] — requires a special stance toward Aliyah from the Jewish Diaspora and the naturalisation of its immigrants. There is a need and a necessity to give expression to this stance in law. Every disregard for or an attempted neglect of the quest for an appropriate way to underscore the principle of Kibbutz Galuyot in law, out of fear of creating a disparity of treatment between Jews and non-Jews, will only pass the core of the problem on to the administration. Apparent discrimination will perhaps disappear from the law, but not from life. Camouflaged discrimination is far worse than open and clearly defined discrimination. Leaving the organisation and formal arrangement of these matters in the hands of the governmental administration is likely to undermine the rule of law in effect in the country, and will undermine the principle of equal rights at the stage of execution, which is the critical stage of any law.<sup>169</sup>

Confirming Warhaftig's critique, the government eventually rejected the bill proposed by the Ministry of Justice and instead chose to split the Law into two, with one law decreeing exclusively Jewish immigration and the other regulating naturalisation of both Jews and non-Jews<sup>170</sup>. The tendency to avoid clear cut legal resolution in deeply controversial matters resulting in contradicting duality between legislation and policy,

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<sup>168</sup> The Declaration of Independence, cit. supra, para. 12. As mentioned earlier, these commitments appear together in the Declaration, with Aliyah and the 'ingathering of the exiles' opening the paragraph and the liberal-civil principles ensuing.

<sup>169</sup> cited at Gavison (2010), pg. 24-25.

<sup>170</sup> Naturalisation was regulated in 1952 by the Nationality Law, which is discussed later in this paper. See, e.g., Perez (2011), pg. 77.

which Warhaftig was concerned about, has since repeated itself in the Israeli political-legal system. Among the most striking examples are the replacement of an Israeli constitution with the gradual adaptation of the Basic Laws and the ongoing control over the West Bank without legal annexation. This duality is also highly relevant for the understanding of the evolution of the IAR, in which the lack of an immigration and/or asylum law is the pivotal manifestation. Among other demonstrations are the limbo state created by the use of prolonged group Temporary Protection, the related inability of ‘non deportable’ individuals to apply for asylum, the incongruent policy denying work permits to these populations despite their lengthy stay in the country and lack of other means of provision accompanied by a tacit agreement of the government not to prosecute employers who hire them, and finally the detention of only a small part of the ‘non deportable’ population based on arbitrary criteria of differentiation<sup>171</sup>. This inconsistency has led many critiques, from both hardliners and asylum seekers advocates, to claim that Israel has no coherent asylum policy<sup>172</sup>.

## **THE LAW OF RETURN (1950)**

On 5.7.1950 the Knesset passed the Law of Return, the primary political and legal instrument through which the State of Israel has sought to fulfil its Zionist destiny of becoming a Jewish state<sup>173</sup>. Under the first clause of the law ‘Every Jew has the right to come to this country as an Oleh.’<sup>174</sup> An Oleh is an individual who is making Aliyah, i.e. a Jew immigrating to Israel. The Law of Return (LOR) can be considered as Israel’s main immigration law, but the term ‘immigration’ (Hagira) does not appear in it. The terminology here is important. The law is carefully intended to differ Aliyah from regular

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<sup>171</sup> See more at Krtizman.Amir ‘Introduction’ in Kritzman-Amir (ed. 2015) pp. 20-36.

<sup>172</sup> See, e.g., Avineri, Orgad and Rubinstein (2010), Mezila (2013), Soffer 2009, OECD ‘International Migration to Israel and its Impact’, in International Migration Outlook (2011) pg. 233. available at: [http://dx.doi.org/10.1787/migr\\_outlook-2011-9-en](http://dx.doi.org/10.1787/migr_outlook-2011-9-en) (accessed 19.10.2015), Paz (2011), Berman ‘Until our hearts are completely hardened. Asylum procedures in Israel’ Hotline for Migrant Workers (2012) pp. 8-13, Hadas Yaron ‘Divide and Rule’ through order and disorder: the politics of asylum in Israel - bureaucracy and public discourse’ in Kritzman-Amir (ed. 2015) pp. 88-110.

<sup>173</sup> Gavison, Law of Return (2010) and Perez (2011).

<sup>174</sup> The Law of Return 5710/1950, S.H. 51, art. 1, pg. 159; the Bill and an Explanatory Note were published in H.C 48 (27.6.1950), pg. 189.

immigration, by deeming Aliyah as homecoming, the returning of a Jew to his or her homeland. Gavison emphasises that the law deliberately affirms the act of Aliyah as a right, ‘in the sense that it is forbidden to prevent a Jew from exercising it’<sup>175</sup>.

The original Law of Return did not specify who is to be considered a Jew. In fact, in the early years of its enactment, the legal definition of a Jew in Israel was unclear and open to an array of interpretations. This ambiguity, although constantly present in Jewish history and tradition, became increasingly challenged and criticised during the 1960’s. Eventually, after the Supreme Court found itself obliged to rule in the matter, the Knesset amended the Law of Return in 1970, stating:

“For the purposes of this Law, ‘Jew’ means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.”<sup>176</sup> In response to increasing Aliyah in the post-1967 period, the amendment also expanded the scope of the law to: “A child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.”<sup>177</sup>

The Law of Return, together with the Nationality Law (1952) and the Entry Into Israel Law (1952)<sup>178</sup>, create the legal foundations of Israel’s policies regarding non-citizens wishing to temporarily or permanently reside in the country. To this day, there is no single comprehensive immigration law in Israel<sup>179</sup>.

Thus, the LOR remains the main instrument of Israel’s immigration policies<sup>180</sup>,

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<sup>175</sup> The first amendment to the LOR from 1954 authorises the Minister of Interior to deny the possibility of Aliyah to an Oleh that ‘is engaged in an activity directed against the Jewish people, endangers the public health, the security of the state or is a person with a criminal past, likely to endanger public welfare.’ See LOR 5714/1954 (Amendment No. 1, clause N.2, ‘Oleh’s visa’) and Gavison (2010), pg. 26.

<sup>176</sup> Law of Return (Amendment No. 2) 5730/1970, art. 4 (B). See more at Gavison (2010).

<sup>177</sup> Law of Return (Amendment No. 2) 5730/1970, art. 4(A). See more at Gavison, *ibid*.

<sup>178</sup> Both laws are discussed later in this paper.

<sup>179</sup> For an analysis and recommendations of Israel’s immigration policy, including proposals for an Israeli Immigration Law, see: Immigration law proposal 2637/18/P 5771/2010 proposed by Kadima and other MPs on the 11.10.2010, Avineri, Orgad and Rubinstein, *Mezila* (2009) and Gavison, *Mezila* (2013).

<sup>180</sup> Perez (2011), pg. 77.



designed to favour and encourage Jewish immigration, leading to what Afeef calls an ‘ethnically stratified migration regime.’<sup>181</sup>

## THE NATIONALITY LAW (1952)

On 1.4.1952 the Israeli parliament passed the Nationality Law<sup>182</sup> (Hok HaEzrachut – literally ‘The Citizenship Law’), which constitutes the ways in which a person becomes an Israeli citizen. There is no other way to acquire Israeli citizenship other than by the provisions of this law<sup>183</sup>. As discussed before, originally the Nationality Law was envisioned to be a combined law regulating both citizenship and immigration to Israel based on universal and liberal principles with no distinction between Jews and non-Jews<sup>184</sup>.

In 1950 the government and Knesset decided to address Jewish immigration first, by creating the Law of Return. The question of citizenship, for both Jews and non-Jews, remained open. It was only two years afterwards, with the passing of the Nationality Law that an Israeli nationality was created and regulated<sup>185</sup>. The Nationality Law could be considered a neutral citizenship law, similar to other Western citizenship laws, besides its inclusion of the Right of Return for Jews as specified in the Law of Return<sup>186</sup>. Indeed, the Nationality Law completes the Law of Return by granting citizenship to every Jewish immigrant (*Oleh*).

The Nationality Law begins by stating the virtues for which one is to acquire Israeli citizenship<sup>187</sup>. Jewish Right of Return is the first among these virtues<sup>188</sup>, followed by: residence in Israel<sup>189</sup>, birth<sup>190</sup> or naturalisation<sup>191</sup>. Residence became the main agency

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<sup>181</sup> Afeef, (2009), pg. 3.

<sup>182</sup> Israeli Nationality Law 5712/1952, S.H. No. 95 (published 8th April, 1952), P. 146; the Bill was published in H.C. No. 93 (21.11.1952).

<sup>183</sup> Nationality Law 5712/1952, art. 1.

<sup>184</sup> See ‘Legalizing Jewish Immigration and the Jewish Right of Return’ earlier in this paper, and Gavison (2010), pp. 24-30.

<sup>185</sup> Warsoff, ‘Citizenship in the State of Israel – A Comment’ (1958).

<sup>186</sup> See, e.g., Barak-Erez Daphne, ‘Israel: Citizenship and immigration law in the vise of security, nationality, and human rights’ (2008), pg. 184, Yoppke & Rosenhek (2002) and Perez (2011).

<sup>187</sup> Nationality Law 5712/1952, art. 1

<sup>188</sup> Nationality Law 5712/1952, art. 2

<sup>189</sup> Nationality Law 5712/1952, art. 3

<sup>190</sup> Nationality Law 5712/1952, art. 4

<sup>191</sup> Nationality Law 5712/1952, art 5-9.

through which Arabs who were citizens of Mandatory Palestine (and remained residents in Israel after the war) received citizenship. The virtue of birth followed the principle of *Jus Sanguinis* enabling an Israeli citizen to pass citizenship on to his/her children. Finally, naturalisation was meant mostly for family reunification of non-Jewish relatives of citizens<sup>192</sup>. The Nationality Law distinguishes between the criteria granting automatic citizenship (return, residence and birth) and the option of naturalisation, which was widely left to the discretion of the Minister of Interior. In fact, to this day the possibility of naturalisation has been severely restricted, and except for cases of family reunification or people who fought in or alongside the IDF, the Ministry of Internal Affairs has only rarely allowed it<sup>193</sup>. Thus, while the Nationality Law was supposed to balance the Law of Return in the state's inner contradiction between universal equality and Jewish particularism, one may conclude that Warhaftig's words about passing 'the core of the problem on to the administration' found their fulfilment.

From its legislation until 2013, the Nationality law was amended 11 times. The amendments addressed issues of citizenship in cases such as family reunification, adoption, service in the Israeli army and the revocation of citizenship in case of treason or immigration to an enemy country<sup>194</sup>.

As mentioned before, in 2003 the Knesset passed the Citizenship and Entry into Israel (Temporary Order) Law<sup>195</sup>, which directs the Minister of Interior to categorically deny citizenship or permits of residence in Israel to residents of the West Bank, the Gaza strip and some enemy states. The law effectively amends both the Nationality Law and the Entry to Israel Law, addressed hereinafter. There are a few exceptions allowed in it to the general principle: mainly regarding certain age groups of men and women and since 2007, temporary residence in some humanitarian cases. The intention behind the amendment was to prevent Palestinians from the Territories to reside in Israel, mostly through marriage with Arab citizens of Israel. It was enacted in the height of the Second Intifadah as a provisional measure to address the special security situation and hence designed to be of

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<sup>192</sup> Gavison, (2010), pp. 30-31 and note 176 on pg. 151. See also Avineri, Orgad and Rubinstein (2010).

<sup>193</sup> Perez (2011), pg. 77 and Afeef (2009), pg. 3.

<sup>194</sup> For the legislative history of the amendment, see Adalah, (Barak, C.J., paras. 1 – 6). Cited in Barak-Erez (2008) pg. 185.

<sup>195</sup> Citizenship and Entry into Israel (Temporary Order) Law, 2003, published on 6.8.2003 in S.H. 1901, pg. 544.

limited duration. It has been prolonged ever since and withstood some 11 petitions against it to the High Court of Justice. The petitions' predominant argument was that the law was unconstitutional for it defies the Basic Law: Human Dignity and Liberty. The legal justification to the amendment was the need to prevent potential support for Palestinian terrorists by their relatives and friends residing in Israel. However, Daphne Barak-Erez asserts that:

Many of the politicians who defended the amendment in the public arena also raised demographic concerns regarding the prospect of Israel remaining a Jewish state if the Arab minority were allowed to grow significantly by virtue of marriages with Palestinians from the occupied territories. The petitioners argued that the underlying purpose of the amendment, indeed, was demographic engineering. As noted, the justices rejected this argument and considered the amendment to be concerned only with promoting security.<sup>196</sup>

## **ENTRY TO ISRAEL LAW (1952)**

With the passing of the Entry into Israel Law<sup>197</sup> (Hereinafter, 'Entry Law') on 26.8.1952, the Knesset completed the work of regulating the different ways a person can enter, stay or reside in Israel, begun with the Law of Return and the Nationality Law. The first provision of the Entry into Israel Law states:

'The entry of a person, other than an Israel national or an oleh under the Law of the Return [...] into Israel shall be by visa, and his residence in Israel shall be by permit of residence, under this Law.'<sup>198</sup>

The law then defines the different types of visas and permits of residence, all to be

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<sup>196</sup> Barak-Erez (2008), pg. 186 at the bottom. In private interviews, several Knesset Members (MKs) and State officials acknowledged the importance of demographic consideration behind the making law and its continued prolongation. See, e.g., Adalah, (Barak, C.J., paras. 79 – 81) and Ben-Shemesh, 'Constitutional Rights, Immigration and Demography: Following the High Court of Justice Judgment Concerning the Constitutionality of the Citizenship and Entry into Israel Law' (Heb., 2006).

<sup>197</sup> Entry to Israel Law 5712/1952, S.H. (Book of Laws) 111 (5.9.1952), page 354; for the Bill and an Explanatory Note see H.C. (Law Proposals) 106 (27.2.1952), pg. 134.

<sup>198</sup> Entry to Israel Law, art. 1 ('General Provision'), 'Laws of the State of Israel: Authorised Translation from the Hebrew, Volume 6'. Government Printer, Jerusalem, Israel (1948-1987), p. 159-162. Retrieved on 13.3.2014 from: <http://www.israelawresourcecenter.org/israelaws/fulltext/entryintoisraelaw.htm>

granted by the Minister of Interior or appointed officers<sup>199</sup>. The Minister is in charge of the implementation of the law and has almost complete discretion in doing so<sup>200</sup>. The law continues by determining the procedures of entry into Israel, the revocation of visas and permits, the punishment for violating any of the provisions of the law, deportation procedures, the possibility to appeal to the Minister, exemptions from the law and finally the repeal of the Mandatory Immigration Ordinance of 1941, which was replaced by the Entry Law. Based on the Entry Law, in 1955 the Entry into Israel Ordinance was formulated as the administrative tool for the implementation of the law. It was replaced in 1974 by a new ordinance of the same name<sup>201</sup>.

In the originally proposed bill the Entry into Israel Law was named the 'Immigration Law' (Chok HaHagira)<sup>202</sup>. In fact, the main difference between the proposal bill and the law that eventually passed lies in the bill's second chapter, entitled 'Immigration' (Hagira), which has been completely omitted from the law. The chapter stated that an immigration officer may grant an immigration visa to a person who wishes to immigrate to Israel and settle in the country, or a permit of residence to a person that did not arrive with an immigration visa but once in Israel has expressed the wish to settle in it. In the Entry Law there is no mentioning of 'immigration', nor of an 'immigration officer'. Instead, most of the authorities instated in the proposal upon the immigration officer, or the Minister of Foreign Affairs who appoints him, are passed to the Minister of Interior, or to Frontier Control Officers appointed by the Minister<sup>203</sup>. As was the case with the Law of Return, here too the semantics are important. Unlike the bill the law does not conceive the possibility of immigration. Since a separate immigration law does not exist to this day, the probable conclusion is that according to Israel's body of laws the Israeli legislators have not been interested in entitling non-Jewish immigration to the country<sup>204</sup>.

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<sup>199</sup> Entry to Israel Law, art. 2-6 and art. 15 (b) and 16 (a).

<sup>200</sup> Entry to Israel Law, art. 14 and 15 (a).

<sup>201</sup> Takanot HaKnisa LeIsrael ('Entry into Israel Ordinance') 5716/1955 and Takanot HaKnisa LeIsrael ('Entry into Israel Ordinance') 5734/1974.

<sup>202</sup> Haza'at Chok HaHagira ('Immigration Law Proposal') H.C. ('Law Proposals') 106 (27.2.1952), ch. 2, art. 3 and 4, pg. 134. Retrieved on 13.3.2014 from: [http://www.nevo.co.il/Law\\_word/law17/PROP-0106.pdf](http://www.nevo.co.il/Law_word/law17/PROP-0106.pdf)

<sup>203</sup> See Immigration Law Proposal (1952), ch. 3 art. 6-7 and 18 compared with Entry into Israel Law (1952), art. 2-6 and 15.

<sup>204</sup> See Afeef (2009), Perez (2011), pg. 77, Kritzman-Amir (2013) and Goldscheider (2002), pp.43-64.

Since 1952 the Entry Law has been amended 24 times. 18 of these amendments were made between 2000 and 2012, mostly for the regulation of foreign workers, but also introducing provisions that regard or affect unauthorised migrants and victims of human trafficking<sup>205</sup>.

According to current procedures and due to the absence of an Israeli refugee law, the Entry Law regulates also the treatment and eventual detainment of asylum seekers who enter the country without authorisation or proper documentation<sup>206</sup>, as long as they have entered through an authorised Frontier Station. All those who have entered through an unauthorised breach, including asylum seekers, fall under the jurisdiction of the Prevention of Infiltration Law 1954 and its amendments<sup>207</sup>. In this context, detainment is the key difference between the two laws, although not the only one. Under the Entry Law a person entering Israel without permission can be detained until his or her deportation. If that person is not deportable, mostly for the Non-Refoulement principle, then the regular maximum length of detainment is 60 days<sup>208</sup>. The amendments to the Infiltration Law have prolonged the detention period to one year in an Open Facility<sup>209</sup>. In practice, the implementation of both laws in relation to asylum-seeking migration has varied. The two main factors to determine under which law a migrant should be treated, and how the laws were implemented, were the timing of entry and the migrant's identity. Timing was important due to changes in policy, in the status of the laws and their amendments and the capacity of the detainment centres. The identity of the migrants influenced whether they were considered nationals of enemy states or not, with usually far more rigid treatment reserved to the former (such as migrants from Sudan)<sup>210</sup>.

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<sup>205</sup> Amendment for Law of Entry to protect the dignity of unauthorised migrants and traffic victims. See Maria Rabinovitch, Knesset Research Centre, 'Activity of the State of Israel's Actions in the Fight Against Human Trafficking: the Treatment of Women Trafficking' (2013) pg. 34.

<sup>206</sup> PIBA, 'Procedure for Handling Political Asylum Seekers in Israel' (2011) available at: <http://www.piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> (retrieved 14.3.2014)

<sup>207</sup> Under current legislation, the entrance into Israel in any way other than through an authorised station constitutes the definition of 'Infiltration'. Thus an 'Infiltrator' is a person who entered the state not through an authorised station, regardless of his or her asylum request. See Prevention of Infiltration Law 5714/1954.

<sup>208</sup> Ben Dor and Adut (2003).

<sup>209</sup> Prevention of Infiltration Law 5776/2016.

<sup>210</sup> See Ben-Dor & Adut (2003), pp. 17-26, Kritzman-Amir (2012) and Afeef (2009).

## THE CONVENTION RELATING TO THE STATUS OF REFUGEES (1951-1954)

The Convention Relating to the Status of Refugees (Hereinafter, ‘The Refugees Convention’) was signed on 28.7.1951 and entered into force after the first six states had ratified it, on 22.4.1954<sup>211</sup>. The Refugees convention is the cornerstone of modern international refugee law and the main legal reference for current Israeli asylum jurisprudence, case law and procedures<sup>212</sup>. The Convention is based on previous international instruments relating to refugees, all developed as part of the emerging international system of human rights law in the 20th century<sup>213</sup>. In contrast to its forerunners, which applied only to specific groups of refugees based on their race or country of origin, the 1951 Convention endorses a single definition of the term ‘refugee’, emphasising the individual and universal character of the protection given to victims of political and other forms of persecution<sup>214</sup>. To this day it provides the most comprehensive codification of the rights of refugees on the international level<sup>215</sup>. The Convention defines

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<sup>211</sup> UN General Assembly, Convention Relating to the Status of Refugees (1954), United Nations, Treaty Series, vol. 189, pp. 136-220. Hereinafter, the original text of the Convention will be cited as UN, the refugee convention (1954).

<sup>212</sup> UNHCR, The Convention and Protocol Relating to the Status of Refugees, special publication for the 60th anniversary of the signing of the Convention (2011), introductory note, pp. 2-5 and Hathaway, The Rights of Refugees under International Law (2005), pg. 91. For the dependence of Israeli asylum regulations on the Convention and the Protocol see State of Israel, Ministry of Interior, Population Immigration and Border Authority (Hereinafter PIBA), ‘Procedure for Handling Political Asylum Seekers in Israel’ (2011) available at: <http://www.piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> (retrieved 14.3.2014)

For further reading on the interpretation and application of the refugee convention and Protocol in Israeli policy and case law see Ben Dor and Adut, ‘The State of Israel, Safe Haven? Problems in the State of Israel’s handling of Refugees and Asylum Seekers’ (2003) pg. 17 and Kritzman-Amir, ‘The Role of the Courts in the Shaping of Israel’s Asylum Regime’ (2013).

<sup>213</sup> See UN, The refugee convention (1954), Ch. 1, Art. 1 A (1). For an in depth account of the development of International Refugee Law in the context of Human rights Law leading to the 1951 Refugees convention see Hathaway (2005), pp. 75-93, Hathaway, ‘The Evolution of Refugee Law 1920-1950,’ (1984) and Schmahl, ‘Article 1 A para. 1’, in Zimmermann (ed.) The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentare, General Provisions (2011), pg. 247-279.

<sup>214</sup> UNHCR (2011), pg. 3 and Schmahl, idem, (2011), pg. 260.

<sup>215</sup> UNHCR (2011), pg. 3. See more at Goodwin-Gill, The Refugee in International Law, Third Edition (2007), pp. 7-11 and 35-37.

who is a refugee, when does a person cease to be a refugee, what are the rights and duties of refugees in their host country and what are the legal obligations of signatory states towards refugees. At the base of these obligations are three quintessential principles: Non-Discrimination, Non-Penalisation and Non-Refoulement. The first determines that the Convention's provisions will be applied without discrimination regarding race, religion or country of origin<sup>216</sup>. Non-Penalisation stipulates that refugees should not be penalised for their illegal entry or stay in a host country<sup>217</sup>. The third principle, Non-Refoulement, is the core of the protection guaranteed to refugees by the convention, i.e. that no contracting state shall expel or return (refouler) a refugee against her or his will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.<sup>218</sup>

Other rights guaranteed by the Convention include access to justice, to education, to work, to housing and social aid, freedom of religion and the provision for special documentation, previously known as 'Nansen passports'<sup>219</sup>. The standard for these rights varies from country to country, depending on their local laws and norms, but should always be on the spectrum between the 'same treatment as is accorded to nationals' regarding some rights, and 'not less favourable than that accorded to aliens generally in the same circumstances [legally residing in the country]' regarding others<sup>220</sup>. Finally, the Convention states that the contracting states shall facilitate the assimilation and naturalisation of refugees as far as possible<sup>221</sup>.

The Convention defines a refugee as any person who was considered as such by specific former international agreements<sup>222</sup> or has a 'well-founded fear of being persecuted

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<sup>216</sup> UN, The Refugee Convention (1954), article 3 and UNHCR (2011), pg. 3, central para.

<sup>217</sup> UN, The Refugee Convention (1954), article 31 and UNHCR, *ibid.*

<sup>218</sup> UN, The Refugee Convention (1954), article 33, UNHCR, *ibid.* (2011) and UNHCR (2007-8), pg. 5.

<sup>219</sup> UN, The Refugee Convention (1954). See, accordingly, ch. II 'Juridical Status', especially Art. 16. 'Access to courts', art. 22 Public education, ch. III 'Gainful Employment', ch. IV 'Welfare', Art. 4 'Religion', and Article 28 and 'Annex Specimen Travel Document' (pg. 214 in the original text of the Convention) and UNHCR (2011), pg. 3.

<sup>220</sup> UN, The Refugee Convention (1954). See, e.g. chapters III 'Gainful Employment', and IV ('Welfare').

<sup>221</sup> UN, The Refugee Convention (1954), art. 34.

<sup>222</sup> The Convention states that 'For the purposes of the present Convention, the term 'refugee' shall apply to any person who: Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation;' See UN, The refugee

for reasons of race, religion, nationality, membership of a particular social group or political opinion' for which he or she 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.<sup>223</sup> This definition has become the bedrock of International Refugee Law<sup>224</sup>.

The Convention specifies three categories of people for whom it does not apply, even if they do qualify under its refugee definition<sup>225</sup>:

1. Persons receiving aid from another UN body<sup>226</sup>.
2. Persons enjoying similar rights to those of citizens of the host country.
3. Persons considered to have committed crimes against peace, against humanity, crimes of war, serious non-political crimes<sup>227</sup> or perpetrators of acts contrary to the purposes and principles of the United Nations.

The Convention was conceived in the aftermath of WWII and thus regards only people who became refugees before 1.1.1951 due to events occurring in Europe.<sup>228</sup> It was supposed to supply the fundament of international collaboration (mostly Western-European<sup>229</sup>) in dealing with the millions of refugees and stateless persons who were

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convention (1954), Ch. 1, Art. 1 A (1).

<sup>223</sup> UN, The refugee convention (1954), Ch. 1, Art. 1 A (2).

<sup>224</sup> See Goodwin-Gill, *The Refugee in International Law*, Third Edition (2007), pp. 35-37 and Mahler and Zimmermann, 'Article 1 A para. 2 1951 Convention', *General Provisions* (2011), pg. 298. For its interpretation in Israeli case law see, e.g., Kritzman-Amir (2013).

<sup>225</sup> UN, The refugee convention (1954), Ch. 1, Art. 1, paragraphs D, E and F.

<sup>226</sup> Perhaps the most notable to be encompassed in this provision are the Palestinian Refugees, which were already under the supervision of UNRAW in 1951. See UNHCR, *Idem* (2011), pg. 4.

<sup>227</sup> Committed 'outside the country of refuge prior to his admission to that country as a refugee' (Paragraph F (b) of the refugee convention).

<sup>228</sup> The Convention allows each contracting state to freely choose between two definitions of this limitation: '(a) events occurring in Europe before 1 January 1951 or (b) in Europe or elsewhere before 1 January 1951' (UN, The refugee convention (1954), Ch. 1, Art. 1, paragraph B (1)). Many scholars give notice only the exclusive European interpretation. See, e.g., UNHCR (2011), pg. 2. Both the temporal and geographical limits were lifted by the 1967 Protocol to the Convention, which is discussed later.

<sup>229</sup> Russia and other ex-Communist Eastern-European countries acceded the 1951 Convention only



forced to leave their countries or their place of residence due to Nazi occupation, the War and the consequent formation of the Soviet bloc in Eastern Europe<sup>230</sup>. Jewish Holocaust survivors constituted one of the most conspicuous groups among these refugees. Between WWII and 1950, various international Organisations handled the European refugee crises. Among them were the Displaced Persons Branch of the Supreme Headquarters of the Allies Expeditionary Force (SHAEF), the International Committee on refugees (IGCR), the International Refugee Organisation (IRO) and the UN Relief and Rehabilitation Administration (UNRRA)<sup>231</sup>.

In 1949 the UN's General Assembly decided to establish a High Commissioner's Office for Refugees, later known as the UNHCR, as of 1.1.1951<sup>232</sup>. Accompanying the creation of the UNHCR was the drafting of the Refugee Convention<sup>233</sup>. At the time, the intention behind the Convention and the initiation of the UNHCR was that it should provide a permanent solution for a temporary crisis of particular gravity and distress<sup>234</sup>. Instead, by 2015 UNHCR data counted over 65.3 million forced migrants worldwide, from which about 21.3 million were refugees<sup>235</sup>. The Refugee Convention has been criticised frequently on many of its aspects. The two principal points on which the Convention has been found in want are the vagueness of the requisites for obtaining Refugee Status and the narrowness of the refugee definition, which leaves many people in flight and in need of international protection outside the scope of the Convention. In order to compensate for both lacunas, an array of legal instruments has been developed since the signing of the Convention to present day. Most crucial is the 1967 protocol to the Convention that

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after the fall of the U.S.S.R and the communist block. See UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', available at: <http://www.unhcr.org/3b73b0d63.html> (visited 23.9.2017), and Klug, 'Regional Developments: Europe' (2011), pg. 147.

<sup>230</sup> Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol'(2011), pg. 45.

<sup>231</sup> Herzog (2003), pg.12 top para.

<sup>232</sup> UN Resolution 319 (IV), of 3 December 1949. The Organisation was officially instituted by UN's Resolution 428 (V) of 14 December 1950 and the annexed statute.

<sup>233</sup> UN's Resolution 429 (V) of 14 December 1950.

<sup>234</sup> UN's Resolution 428 (V) of 14 December 1950, Annex (Statute), Ch. 1, General Provision, Articles 1 and 5. The Statute established the UNHCR with a 3 years mandate. By the end of 1953 the General Assembly was to view whether or not to continue its existence. See also Ben Dor & Adut (2003), pg. 15.

<sup>235</sup> UNHCR, Global Trends Forced Displacement in 2015 (2016): <http://www.unhcr.org/576408cd7.pdf>.

annulled the temporal and geographic limitations of the Refugee Convention, thus making it universal in its intentions and nature<sup>236</sup>. Other instruments include regional treaties, states' legislations, international case law, UN resolutions and guidelines given from time to time by the UNHCR to update the content of international protection in respect of evolving needs<sup>237</sup>. To this end, UNHCR has adopted a broad definition of the persons under its mandate to include any person who is left without the protection of the government of his or her state of origin<sup>238</sup>.

## **ISRAEL AND THE SIGNING AND RATIFICATION OF THE REFUGEE CONVENTION**

On 1.8.1951 Dr Jacob Robinson, the legal adviser to the Israeli mission to the UN, signed the Refugee Convention. Israel, alongside a substantial representation of international Jewish organisations, was one of the 26 countries to participate in the UN's Conference of Plenipotentiaries in which the final version of the Convention was drafted and signed<sup>239</sup>. At the end of the conference, Israel was one of the first to sign the Convention, three days after its official presentation, and the 10<sup>th</sup> to ratify it in 1954, after the Convention already came into force<sup>240</sup>. Various scholars writing about the IAR bring forth these facts to suggest it demonstrates Israel's commitment at the time to the safeguarding and promotion of refugees' rights. This commitment is linked to the tragic role forced migration has had in Jewish history, particularly before and after the Holocaust<sup>241</sup>. Ben-Nun brings in detail the sophisticated abilities with which Dr Robinson

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<sup>236</sup> Protocol Relating to the Status of Refugees (1967), Article I, General Provision, para. 3.

<sup>237</sup> Goodwin-Gill, *The Refugee in International Law*, Third Edition (2007), pp. 35-50.

<sup>238</sup> Goodwin-Gill (2007), pg. 49.

<sup>239</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951), A/CONF.2/108/Rev.1. Robinson, who represented Israel, is said to have had a pivotal role in the stipulation of some of the Convention's articles and the general success of the conference. See Ben-Nun, 'The Israeli Roots of Article 3 and Article 6' (2013).

<sup>240</sup> UN, *The refugee convention* (1954), pg.192 and UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', available at: <http://www.unhcr.org/3b73b0d63.html> (visited 20.9.2017)

<sup>241</sup> See Ben-Dor & Adut (2003), Kritzman and Kerp (2008), Afeef (2009), Paz (2011), Kritzman (2013).

helped create an inner circle of jurists and diplomats devoted to universal humanitarianism within the Convention's drafters<sup>242</sup>. According to Ben-Nun, it is this inner circle that enabled the Convention to become the powerful underlying legal basis for international refugee law that it is today.

While it is easier to ascertain such special sensitivity to the Convention and Refugee Law to world Jewry, the state of Israel's approach to them has been less coherent. The most important fact alluding to this inconsistency is the absence of asylum legislation. To this day Israel has not embedded its international commitments relating to refugees in its local body of laws. As a consequence, the IAR has been designed by different government policies, local judicial interpretation to international law and the Refugee Convention, and changing administrative regulations. As many writers observe, the result of this want in legislation made the IAR often seem unplanned, contradictory, and ad hoc in its nature<sup>243</sup>.

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Contrary to this general view, Gilad Rotem argues that the attitude of the Israeli establishment to the Convention was between 'ambivalent to hostile', with Robinson needing to exert considerable pressure on the Israeli foreign office to sign and ratify the Convention. See Giladi, 'A 'Historical Commitment'? Identity and Ideology in Israel's Attitude to the Refugee Convention 1951-1954' (2014, forthcoming, draft manuscript).

<sup>242</sup> Ben-Nun (2017), chapter I, pp. 19-86.

<sup>243</sup> Avineri, Orgad and Rubinstein (2010), Nathan, Knesset Research Centre (2009, 2011), Afeef (2009) Paz (2011) and Kirtzman-Amir (2012).

## CHAPTER III

### STATEHOOD (1954 – 1989)

#### 1956 THE ISRAELI-EGYPTIAN SUEZ WAR

Between 1952 and 1955 the problem of Palestinian infiltration provoked low-key, unremitting fighting between Israel and Arab forces, mostly those of Egypt and Jordan in Gaza and the West Bank. The conflict culminated in the autumn of 1956 with Israel invading the Gaza Strip and the Sinai Peninsula, in a large-scale military operation coordinated with Britain and France, which were seeking to preserve their colonial power in North Africa in general and control over the Suez Canal in particular. Between 29.10-7.11.1956, the IDF took control over the Sinai Peninsula and the Gaza Strip. Under UN Resolution 997 (ES-I) and heavy pressure from the U.S and the U.S.S.R Israel was forced to withdraw from all Egyptian territory in March 1957<sup>244</sup>. Although being a military success, the war is considered a political and diplomatic failure, especially for Britain and France, but also to Israel. According to Morris the war exacerbated and radicalized the Arab-Israeli conflict:

“If the destruction of Israel was not *Arab policy* before, after 1956 it most certainly was... What many Arab leaders had long claimed had now been “proved” – Israel was the imperialists’ cat’s-paw in the Middle East”.<sup>245</sup>

Although the 1956 war is not connected directly to the development of Israel’s asylum regime, it is an important stage in the broader context of the history of Israeli-Egyptian relations and specifically of the Sinai Peninsula, which has been the primary route for asylum-seeking migration to Israel since the 1990’s.

#### THE END OF MARTIAL LAW OVER ISRAELI ARABS (1966)

From 1948 until 1966 the Arab citizens of Israel were subjected to martial law, under the prolongation of the Mandatory Defence (Emergency) Regulation from 1945.

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<sup>244</sup> Morris, *Righteous Victims* (2001), pp. 289-301.

<sup>245</sup> Morris (2001), pg. 301 at the bottom.

This meant that while all Israeli citizens of Arab descent were formally equal citizens of Israel, and enjoyed all civil rights guaranteed by the state, including the right to vote and to be elected to parliament, most of them were excluded from the Israeli judicial system and did not enjoy basic rights such as the freedom of movement or of occupation. Land expropriation, curfews, administrative detentions and risk of expulsions and annulment of citizenship were other aspects regulated by the military government under the martial law and the complementary special legislation<sup>246</sup>.

At first, the military government operated parallel to the Ministry of Minorities until the later was abolished in 1949<sup>247</sup>. From 1950, military government was the main administration responsible for Arab citizens. Thus, public civil matters were dependent on a security based apparatus and perspective in which police, army and intelligence officers held extensive influence over the everyday lives of Arab citizens and communities<sup>248</sup>.

Throughout the 1950's and 1960's calls were made to end the martial law by both Jewish and Arab civil and political society's exponents. These calls were also translated into several bills presented to the Knesset, but with no avail. Security considerations based on an underlying fear that the Arab population of Israel was not loyal to the state, overruled liberal-democratic arguments. The martial law was terminated in November 1966 by a government order under Prime Minister Eshkol. Still, the Military government was replaced by the police, which maintained similar control and surveillance over Israel's Arab citizens for several more years<sup>249</sup>. Gradually, these measures have been lifted, with some exceptions still in vigour until today.

The history of Israel's Arab minority is obviously not part of this paper's concern. The reason I have chosen to include the issue of Martial Law and the Military Government is a reflection I had after reading Hannah Arendt's passages about the connection between the legal status of refugees in Europe before WWII, the 'special treatment' they received

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<sup>246</sup> Shapira (2012), pp.196-198.

<sup>247</sup> Elina, "Good Intentions: Characteristics of the Minority Office, 14.5.1948 – 1.7.1949" (2008).

<sup>248</sup> Segev, 1967: Israel, the War, and the Year that Transformed the Middle East (2007), Pp. 67- 71.

<sup>249</sup> Segev (2007), Pp. 74- 76.

in their host countries, which segregated them both fiscally and legally from general society, and the profound impact this experience had on those states' apparatuses<sup>250</sup>.

Martial Law in Israel ended in 1966 for its Arab citizens, but in 1967, due to the outcome of the Six Days War, Martial Law and Military Government were imposed on the Arab population of Gaza and the West Bank. This means that out of the 65 years of Israel's existence, in 64 of them a military regime has been incorporated into the state's apparatus.

This fact must be taken in consideration when analysing the political, administrative and security related culture in Israel<sup>251</sup>. When examining the way state bodies deal with individuals or groups who are non-Jews, non-citizens, and are present in the country without authorization, as are asylum seekers, this assumption becomes all the more relevant<sup>252</sup>.

## **THE SIX DAYS WAR (1967)**

The Six-Day War of June 1967 was a major watershed in the history of Israel, the Arab-Israeli conflict, and of the Middle East. Due to the war Israel more than quadrupled its size, altering the geography of the region and the dominant military and political perceptions regarding it.

From 1967 onwards Israel was seen as a regional superpower, at the centre of international attention, especially for the United- States, which would gradually become Israel's major ally and supporter<sup>253</sup>. Internally, the staggering victory in the war revolutionized Israeli reality affecting almost every sphere of public life from political

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<sup>250</sup> Arendt, Hannah. *The Origins of Totalitarianism* (1973 [1951]), The Decline of the Nation-State and the End

of the Rights of Man, pp. 267-304.

<sup>251</sup> To develop this line of thought see Azoulay and Ophir, *This Regime Which is not One – Occupation and Democracy Between the Sea and the River (1967 - )*, (2008).

<sup>252</sup> The logic brought forth in this passage clearly intensifies when the asylum seekers are Arab or Muslim, as could be seen, for example, in the current implementation of the Prevention of Infiltration Law on African asylum seekers or the central role the military establishment has in the management of Israel's asylum regime. See more: Kritzman-Amir (2010) and the references in this paper to the role Palestinian refugeedom plays in Israel's asylum regime.

<sup>253</sup> Reich, *A Brief History of Israel* (2012), pp. 84-90 and Morris (2001), pg. 329.

psychology to economics, from demography to religion<sup>254</sup>. The most evident transformations were in geography and demography. At the end of the fighting Israel had conquered the whole of the Sinai Peninsula, the Gaza Strip, The Golan Heights and the West Bank, including the ancient part of Jerusalem and the Holy sites it encompasses. With the land came also a large Arab population. More than a million Palestinians living in Gaza and the West Bank, some of them refugees from 1948, were now under Israeli control<sup>255</sup>.

The conquest of the Territories re-confronted Israel with the Palestinian refugees. Since the end of the Independence War, the dominant narrative in Israel was that the refugees left by their own choice following their leaders' and Arab countries' calls. The fate of the refugees after the war remained mostly outside the realm of public awareness. Tom Segev relates that when the IDF entered the refugee camps in Gaza and the West Bank, Israelis "were stunned at what they found, and realized that a solution had to be reached quickly. "We have a moral obligation," wrote Amos Elon in *Haaretz* a week after the war, "because the road to Israel's independence was paved on the backs of these people, and they paid, with their bodies, their property, and their future, for the pogroms in the Ukraine and the Nazi gas chambers."<sup>256</sup> Nevertheless, Segev describes Elon's words as extraordinary and claims that:

"Like most Israelis, [Prime Minister] Eshkol found it difficult to acknowledge that Israel bore even partial responsibility for creating the refugee problem. The almost existential need to believe that Zionism had caused no injustice was deep-seated."<sup>257</sup>

Still, the Refugee problem troubled the government and public opinion. The general consensus was that "something was to be done". An array of proposals unfolded, from taking 200,000 refugees back into Israel, to seeking "population-exchange" agreements with Arab countries such as Iraq, alluding to the absorption in Israel of the *Mizrachi* Middle-Eastern Jews in the 1950's. According to Segev, Eshkol and Defence Minister Dayan's preferred option was promoting the emigration of Palestinian Refugees to Arab countries or to other parts of the world. In order to advance emigration different plans were conceived and some implanted, mostly under secrecy. These efforts included facilitating

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<sup>254</sup> Segev, *1967: Israel, the War, and the Year that Transformed the Middle East* (2007a).

<sup>255</sup> Morris (2001), pg. 329-330 and 336-343.

<sup>256</sup> Segev, "The June 1967 War and the Palestinian Refugee Problem" (2007b), pg. 7.

<sup>257</sup> Segev (2007b), pg. 8.

travel documents, travel arrangements, paying for airfares and even handing out “resettlement grants” for those who agreed to voluntarily emigrate. There were reports that a military governor intentionally eroded living standards in order to encourage emigration, but this policy was not adopted by the government<sup>258</sup>. All together between 200,000-250,000 Palestinians left the Territories during the year after the war. Most of them were refugees from 1948 or refugees’ descendents. Segev asserts that no mass deportations were made, therefore suggesting that the bulk left on their own. It is hard to estimate the influence the government’s emigration plans had on the numbers of departures. As a result of the mass flight, a refugee crisis was created in Jordan, attracting international attention. Many refugees wished to return to the Territories but Israel refused. Violent incidents between the army and refugees who tried to sneak back to their homes put the Israeli government under international pressure. Finally Israel accepted some 14,000 back into the Territories<sup>259</sup>.

At first, the prevailing hope in the government was that the territories won could be bargained for peace, by using the war’s stunning outcome to force the Arab countries to accept Israel’s existence and might as an irrevocable reality. Very quickly these hopes were soured as a result of both external and internal factors. In October 1967 the government repealed its previous decision to negotiate land for peace and instead decided that Israel would not return to the pre-war borders but would draw its future boundaries on its security needs<sup>260</sup>.

From 1967 until this day, Israeli control over the territories it captured in the Six Days War had become a central source of controversy, both inside and outside Israel. At the core of this controversy was and still is the legal status of the occupied, or disputed,

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<sup>258</sup> Segev (2007b), pg. 9-17.

<sup>259</sup> Segev (2007b), pg. 15-19.

<sup>260</sup> Morris (2001), pg. 330. For a more extended and vivid account of the different views regarding the future of the Territories, see Segev, (2007a), pp. 543-553.



territories, and their inhabitants<sup>261</sup>. While Israel officially annexed East Jerusalem in 1968<sup>262</sup> and the Golan Heights in 1981<sup>263</sup>, it has not extended Israeli civil jurisdiction to the West Bank and the Gaza Strip. Instead, Israel maintains in these areas Martial Law administered by the army's Military Government<sup>264</sup>. The reason no Israeli government has decided on the annexation of the Territories is first and foremost demographic. Annexation of the areas where millions of Palestinians live in will force Israel to decide on their civil and political status. Granting these people citizenship will severely undermine Jewish majority in the country, while incorporating the land without giving Palestinian inhabitants equal rights would be seen as the construction of an apartheid regime. In either cases, Israel's character as a Jewish and democratic nation-state will be jeopardized. Referring to the Territories as "Disputed" keeps these quandaries open. The fact that legal status remained temporary and undetermined has not prevented from the Israeli establishment to introduce far-reaching changes within the Territories by implementing official and unofficial policies, mostly generated for the acquisition of land<sup>265</sup>.

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<sup>261</sup> There is still an on-going fierce international debate over the legality of Israel's control of the Golan Heights, the West Bank and the outer boundaries of the Gaza Strip (the Sinai Peninsula was returned to Egypt as part of the 1979 peace agreements and Israel has unilaterally evacuated its forces and settlers from the Gaza Strip in 2005). While international sources usually refer to the West Bank and Gaza as the "Palestinian" or "Occupied Territories", Israeli official terminology sustains they are "Disputed Territories". In the Israeli public discourse the Territories are also referred to at times as "Liberated". This terminology was official and predominant in Israel in past years. See, Segev, (2007a), pg. 534. Today it is used mostly regarding the old city of Jerusalem, or as a representation of a more nationalistic, right wing political inclination. Hereinafter, the West Bank and the Gaza Strip will also be referred to as "the Territories".

<sup>262</sup> For the Knesset's decision of annexation see Law and Administration Ordinance (Amendment No. 11) Law, 5727/1967. For the international opposition to the annexation see UN, General Assembly Resolution 2253 (ES-V) of 4 July 1967. For further reading see also Lustick, "Has Israel Annexed East Jerusalem?" (1997).

<sup>263</sup> For the Knesset's decision of annexation see; Golan Heights Law 5742/1981 (Heb.) English explanation available at: <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/golan%20heights%20law.aspx> (visited 23.9.2017). For the international opposition to the annexation see: Security Council Resolution 497 (1981) of 17 December 1981, available at: <http://unispal.un.org/UNISPAL.NSF/0/73D6B4C70D1A92B7852560DF0064F101> (visited 23.9.2017).

<sup>264</sup> Excluded from this rule are the Israeli citizens residing in the West Bank, also known as 'settlers', to whom Israeli regular law does apply.

<sup>265</sup> Morris (2001), pp. 332-336

The historical reasons for which Israel has maintained control over the Territories and the Palestinian population for more than 45 years (on a “temporary basis”) are vast and complex and are not part of this paper. In my view, the relevance here to the evolution of Israel’s asylum regime is three folded. First, the question of the Territories probably the most striking challenge to Israel’s Jewish and democratic character and its adherence to international law. Second, the legal “limbo state” of the territories results in constant and conflicting confrontation of the security system and other state bodies with a large population of non-citizens under its control. Last, and perhaps the clearest, is the economic factor. While the Territories remained separate from proper Israel in most aspects of public life, the Israeli and Palestinian markets became increasingly entangled and interdependent in varied sectors such as goods, services, labour and infrastructure. Most relevant to the evolution of asylum migration to Israel, was the growing dependence of the Israeli economy on incoming Palestinian workers.

As we will see later, asylum migration in Israel frequently overlaps with labour migration in many aspects, especially regarding push and pull factors. Therefore, the Israeli dependence on foreign cheap labour is a necessary background to issues related with asylum migration and asylum regime in Israel. In his article "Foreign Workers in Israel: History and Theory" David Bartram argues that:

“The essential background to Israel's experience with foreign contract and illegal workers consists of its experience with the Palestinians since 1967. The occupation deepened the articulation of Israel's ethnic divisions with labour market stratification, and the long-term use of Palestinian labour has created a rigid dependency on cheap unskilled labour. Foreign workers have been brought to Israel in most cases when Palestinians were unavailable.”<sup>266</sup>

By the mid-1980’s, around 110,000 Palestinians were employed in Israel, roughly half of them without permits. They constituted 6-7 percent of the general labour force although in sectoral terms the percentages were much higher – peaking at 25 percent of

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<sup>266</sup> Bartram, “Foreign Workers in Israel: History and Theory” (1998), pg. 308.

Israeli agricultural jobs and 45 percent of construction jobs<sup>267</sup>. Eventually, the numbers declined drastically in the mid-1990's following the increase in terrorist attacks within Israel and the logic of separating Israel and the Territories formulated in the context of the Oslo Agreements. As Bartram describes, the Palestinian work force was ultimately replaced by 'foreign workers', among them many asylum seekers<sup>268</sup>.

## POST WAR BLOOM (1968-1973)

The Six Days War ended abruptly the economic recession in Israel, making way to an economic boom<sup>269</sup>. It also brought about a renewed honeymoon between Israel and the Jewish Diaspora, manifested in tens of thousands of new Jewish immigrants and a surge of donations<sup>270</sup>. In 1968, in response to the growing numbers of *Aliyah*, the government created the Ministry of *Aliyah*, responsible for the facilitation and absorption of Jewish immigrants in the country. A previous Ministry with similar mandate was initiated in 1948 under the name "Ministry of Immigration" but was rescinded in 1949. During the 1970's the newly established Ministry was responsible for the absorption of a large wave of *Aliyah* from the U.S.S.R, made possible after a long endeavour to bring the Soviet government to allow Jews to freely emigrate. Since then, the Ministry has developed an extensive net of Absorption Centres throughout the country, with the help of the Jewish Agency. These centres help new Jewish immigrants to integrate in Israeli society, providing extensive economic and social assistance, in housing, education (including the instruction of Hebrew) and professional placement.

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<sup>267</sup> Bartram, (1998), pp. 306-307.

<sup>268</sup> The issue is further addressed later in this paper. For additional reflection on the nexus between Palestinian Workers and Migrant Labours in Israel see also Bartram, "Foreign Workers, Refugees and Prospects for an Israeli-Palestinian Agreement" (2000).

<sup>269</sup> Segev (2007a) and Shapira (2012), pp. 309-310.

<sup>270</sup> Shapira (2012), pg. 309. Cohen attributes the arrival of circa 200,000 Jewish immigrants from Western countries in the post 1967 years to the territorial and ideological consequences of the war. Cohen, "From Land of Refuge to the Land of Choice" (Heb. 2002), pg. 46.

Some non-Jewish refugees, such as the Vietnamese “Boat-People” in the end of the 1970’s, were taken care of by the Absorption Centres<sup>271</sup>. In recent years many absorptions centres have had only partial occupancy due to dwindling rates of *Aliyah*. In response to the hardships of African asylum seekers in Israel, different speakers have proposed to use the absorption centres to host the migrants<sup>272</sup>. The authorities have not adopted this proposal as the Ministry of Absorption’s activity is intended exclusively for Jewish immigrants and their families.

## UNHCR IN ISRAEL

In 1976 the UNHCR opened an Honorary Correspondent’s office in Jerusalem, headed by Zena Harman, an ex Israeli parliament member, ex diplomat at the UN and former head Chairwoman of UNICEF<sup>273</sup>. Harman remained in her capacity as UNHCR representative to Israel until 1999. According to Sharon Harel, a senior Israeli UNHCR officer, during Harman’s term UNHCR Israel dealt with a very small amount of asylum

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<sup>271</sup> Ben Dor and Adut (2003) and Herzog (2003).

<sup>272</sup> Candidate for TA municipality, provocative Ramat Aviv proposals, Rights organizations?

In a report to EuroMeSCo (the Euro-Mediterranean Study Commission), Bruno Oliveira suggested that “Israel’s long tradition in absorbing immigrants could feed into European efforts to build a much-needed effective policy in what regards migration movements through its southern border”. See Martins, Bruno Oliveira, “Undocumented migrants, asylum seekers and refugees in Israel” (2009) EuroMeSCo Paper 81; available at:

[http://www.euromesco.net/index.php?option=com\\_content&task=view&id=1162&Itemid=48&lang=en](http://www.euromesco.net/index.php?option=com_content&task=view&id=1162&Itemid=48&lang=en)

<sup>273</sup> Harman was born in England and graduated from the London School of Economics. Her public activity began in social welfare, child-care and *Aliyah* of youth from Europe, mostly Holocaust survivors. She joined the Israeli delegation to the UN in 1951 and continued on working for the Foreign Office throughout the 1950’s. In 1959 she was appointed head of the National Center for Demography, which was supposed to encourage Jewish population growth in Israel (see Segev, 1967 (2007), pg. 558). Harman was also elected Chair of the Board of UNICEF and as the organization’s representative she accepted the Nobel Peace Prize given to UNICEF in 1965. Between 1969 and 1975 she was a Knesset member of the Alignment party. See Harel, “Israel’s Asylum System” (2014), pg. 10, Zena Harman’s page on the Knesset site:

[http://www.knesset.gov.il/mk/eng/mk\\_eng.asp?mk\\_individual\\_id\\_t=389](http://www.knesset.gov.il/mk/eng/mk_eng.asp?mk_individual_id_t=389) (visited 15.7.2017) and at the Jewish Woman Archive <http://jwa.org/encyclopedia/article/harman-zena>

requests, between dozens to several hundreds<sup>274</sup> approving Refugee Status in about 60–70 cases, mainly of Ethiopians<sup>275</sup>. All requests were processed exclusively by the Jerusalem office, which conducted the preliminary interview and research with the applicants and then passed to the head office in Geneva the material together with a recommendation. UNHCR head office would then re-evaluate the request and transmit back to the local office its final decision. If the recommendation were positive the Israeli government would grant the asylum seeker refugee status. Harel calls this “an exclusively run by UNHCR” model<sup>276</sup>. The whole procedure would take up to two years and included 95 applications processed or pending between 1976-1979, 236 during the 1980’s and 755 throughout the 1990’s<sup>277</sup>.

The fact that the UNHCR representative in Israel was a well respected Israeli figure with intimate acquaintance and connections to the local establishment, helped ensure close coordination between the state and UNHCR on local matters<sup>278</sup>. Furthermore, due to the small numbers of asylum seekers in Israel, there was probably very little reason for friction between the government and the UN body.

In 1999 Harman was replaced by Michael Bavly, another ex-senior Israeli diplomat, who remained in office until 2008. In 2000-2001 Bavly initiated the transfer of the authority for final decision from the UNHCR’s Geneva office directly to the State of Israel. In 2002 this change took place instituting a “Hybrid model” in which the UNHCR would receive the requests for asylum and conduct an individual preliminary processing in order to evaluate whether a request is well founded and the applicant is eligible for protection under the 1951 Refugee Convention and international customary law. The UNHCR would then pass on (only the requests which satisfy these terms) to an Israeli inter-ministerial

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<sup>274</sup> Harel (2014), pg. 10 and 19. In my research I was able to find very little written information on the early years of UNHCR’s activity in Israel. Harel’s article is the only to address the issue coherently, providing some exclusive data on the matter.

<sup>275</sup> Afeef (2009), pg. 7: from UNHCR, 2007a

<sup>276</sup> For an explanation of the three models: “UNHCR exclusive model”, “Hybrid model” and “Autonomous model” see Harel (2014), pp. 8-9.

<sup>277</sup> The numbers given are accumulative, not definite, meaning that each year the applications counted are all those which were processed, including those who were counted the previous year but were still pending. Harel (2014), pg. 19 and Ben Dor and Adut (2003), pp. 20-23.

<sup>278</sup> Afeef (2009), pg. 18.

committee, known as the National Status Granting Body (NSGB)<sup>279</sup>. The committee would re-examine the request with regard to both Israeli and international law, as well as any objection made by Israeli authorities. Finally, the committee would deliver its recommendation to the Minister of Interior, who has the ultimate authority to grant or deny refugee status in Israel<sup>280</sup>.

Karin Afeef, a Norwegian researcher familiar with global asylum procedures, claims this combined procedure is unique to Israel:

“This unique “hybrid solution” in which UNHCR and the government work together on processing asylum applications, represents an institutional arrangement that is particular to Israel. To the author’s knowledge, such arrangements are not found in any other country.”<sup>281</sup>

By filtering out requests that were deemed unfounded or inadmissible the UNHCR still retained decisional authority, which it preferred to transfer to Israel. In 2005 the procedure was therefore amended and all requests, considered admissible or not, were passed to the committee together with UNHCR evaluation. It was the committee from then after to decide and notify whether a request was to be rejected beforehand or passed on to the Minister of Interior for final verdict<sup>282</sup>.

In 2008-2009 the UNHCR helped train local Israeli personal to conduct the Refugee Status Determination (RSD) procedure independently, at the request of the state. In July 2009 Israel took over the entire responsibility over the asylum application process by creating its own RSD unit, which replaced the UNHCR in receiving and evaluating asylum requests. Ipso facto, Israel shifted to an “Autonomous Model” of asylum management<sup>283</sup>.

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<sup>279</sup> In the updated version of the “Procedure for Handling Political Asylum Seekers in Israel” from 2011, the NSGB is referred to as ‘an advisory committee on refugees to the Interior Minister’ or in short, “The Committee”. See, State of Israel, PIBA, “Procedure for Handling Political Asylum Seekers in Israel” (2011), procedure number 5.2.0012, effective as of 2.1.2011, pg. 1.

<sup>280</sup> See the State of Israel, Ministry of Justice, “Procedure for Handling Political Asylum Seekers in Israel” (2001), Final Version, available at Ben-Dor & Adut (2003), appendix 1. As well as Harel (2014), pp.10-11, Ben-Dor & Adut (2003) pp. 27-28 and Afeef (2009), pg. 18-19 for a complete review of UNHCR’s role from the 1990’s onwards.

<sup>281</sup> Afeef (2009), pg. 18.

<sup>282</sup> Harel (2014), pp. 12-13.

<sup>283</sup> Harel (2014).

## THE 1977 TURNOVER AND THE VIETNAMESE “BOAT PEOPLE”

In 1977 the political system in Israel went through a dramatic change. For the first time in the state’s history, the Israeli Labour lost the elections to the right wing *Likud* party. For 29 years Israel was practically a mono-party democracy, with *Mapai* (“the Workers’ Party of the Land of Israel”) enjoying hegemony over the government, the central and powerful labour union (*HaHistadrut*) and most of the state’s apparatus. The ballot’s outcome represented major transformations in Israeli society and the internal balance of power, with popular vote overcoming the sway of the elites. The maturation of the *Ashkenazi-Mizrahi* rift was central to the change, together with the after-shock ripples of the 1973 *Yom Kipur* (October) war.

Menahem Begin, the head of the *Likud* and a former Jewish resistance fighter, became Prime Minister. The government’s first decision in office was to grant asylum to sixty-six Vietnamese “Boat-People” who were rescued at sea by an Israeli commercial ship<sup>284</sup>. The small group was fleeing the oppression of Vietnam’s communist regime, which had conquered South Vietnam in 1975. Within the broader context of the Indochina Refugee Crisis, forced migration from Vietnam begun in 1975 and developed into an international emergency by 1978-1979, with hundreds of thousands of Vietnamese leaving the country on boats to seek asylum. The group in question was adrift in a fishing boat with scarce supplies. Their distress signals were ignored by other international vessels until the captain of the Israeli ship “*Yuvall*” brought them aboard<sup>285</sup>. Consequently, the Israeli government decided to bring the refugees to Israel and offer them shelter. This was the first time Israel had accepted non-Jewish and non-Palestinian refugees. The decision was made by the government in response of an unexpected situation, but was endorsed warmly by the Parliament. Some Knesset members proposed to bring more refugees from Vietnam (the crisis there worsened with time), emphasizing Israel’s special commitment to refugees and asylum. The government eventually accepted some several hundred Vietnamese refugees between 1977 and 1979<sup>286</sup>.

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<sup>284</sup> Segev, *The Seventh Million* (Heb., 1991), pg. 372.

<sup>285</sup> Herzog (2003), pp. 32-33 and (2009a), pg. 193 and Gordis, Daniel, *Menachem Begin: The Battle for Israel’s Soul* (2014), ch. 11.

<sup>286</sup> Gordis, Daniel, *Ibid.* and Herzog (2003), pp. 32-33 and (2009a), pg. 193. See also Duki Dror’s documentary film *The Journey of Vaan Nguyen* (2005).

Begin, and other Israeli politicians at the time, linked Israel's noble humanitarian gesture to Jewish morality and the Jewish experience before and after the Holocaust<sup>287</sup>. When receiving compliments for his humane deed from President Carter at the White House Begin described his government's decision to help the Vietnamese refugees as "natural", stemming from the vivid memory of past Jewish suffering. He recalled the *St. Lewis*, a famous ship carrying about nine hundred Jewish German refugees seeking asylum in Cuba, the U.S and Canada in 1939. The ship and the people onboard were forbidden to set ashore and were forced to turn back to Germany where "The majority of them went to the gas chambers". Begin continued:

"We have never forgotten the lot of our people, persecuted, humiliated, ultimately physically destroyed. And therefore, it was natural that my first act as Prime Minister was to give those people a haven in the Land of Israel."

Interestingly, the last phrase on the subject introduced a curious notion: "Mr. President, we shall now have Hebrews speaking Vietnamese in our country." <sup>288</sup> Admittedly, the first group of Vietnamese was brought to Ofakim, a small development town in the Negev, where they received housing in the local Absorption centre. From all the Vietnamese refugees Israel accepted between 1977 and 1979, some left the country eventually while others were naturalized as Israeli citizens<sup>289</sup>.

Daniel Gordis believes the moral connection between Jewish history and the obligation to show compassion to others in the present was part of Begin's worldview<sup>290</sup>. Tom Segev contradicts this benevolent prospective and accuses Begin of being the "Great

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<sup>287</sup> Herzog (2003), pp. 32-33, 66-67, 80-82 and Herzog (2009a).

<sup>288</sup> Begin, Menachem, "Remarks by Prime Minister Begin on the White House lawn, 19 July 1977". Available at the Israeli Ministry of Foreign Affairs' (MFA) official site:

<http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1977-1979/16%20Remarks%20by%20President%20Carter%20and%20Prime%20Minister> (retrieved 16.3.2014).

For the original citation from white house protocol see:

<http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=473457> (visited 16.9.2017).

<sup>289</sup> Gordis, Ibid. (2014).

<sup>290</sup> "It was, for Begin, an instinctive act that required little deliberation", Gordis, Ibid. (2014).



Populariser” of the Holocaust. According to Segev, Begin used the Boat People affair to improve Israel’s moral image in the world by emphasizing the striking contradiction between Israel’s actions and the world’s conduct during the Holocaust<sup>291</sup>.

It is important to note that Israel did not recognize the refugees by force of the treaty, but rather decided to accept them under a special, ad-hoc decision. Ben Herzog describes the Israeli rationale behind the decision as “Glocal”, fusing universal and local principles together. Herzog examined all of the Knesset’s discussions in all the five different occasions in which Israeli governments decided to bring Non Jewish (and Non Palestinian) refugees to Israel<sup>292</sup>. He found that the Israeli establishment ‘translated’ the universal notion of humanitarianism into local “interpretive packages” in order to justify and explain the acceptance of non-Jewish refugees.<sup>293</sup> According to Herzog, in all five cases the decision was made by the government, with no practical intervention by the Knesset<sup>294</sup>. Thus, his research does not analyse the actual reasons for which the Israeli governments welcomed refugees but rather the perception of these acts by the Israeli elected representatives. The five cases were not presented as binding precedents but instead as one-time symbolic gestures, which are not part of a regulated asylum policy. Nor did they suggest that Israel could contribute substantially in resolving global refugee crises<sup>295</sup>.

Finally, Herzog’s research shows two underlying rationales in the way Israeli parliament members perceived and justified the granting of asylum. The first is that the often-presumed binary relationship between global-humanitarian and local-national logics was in fact complementary and mutually reinforcing. Herzog claims that the concept of

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<sup>291</sup> Segev, *The Seventh Million* (Heb. edition), pg. 371-376.

<sup>292</sup> The five cases are: the Vietnamese “Boat People” in 1977 and 1979, Bosnian refugees in 1992, Albanian Kosovos in 1999 and South Lebanese refugees in 2000. All cases are discussed later in this paper.

<sup>293</sup> The main interpretive packages Herzog identified were: Jewish ethics, the Holocaust, Israel’s international status and internal political issues. Herzog (2003) and (2009a).

<sup>294</sup> The last case, of the South Lebanese refugees, is exceptional in many ways, first and foremost for the fact that they were physically on Israel’s border, asking to let them in. The government was the one to decide to allow them entrance but the Knesset did oversee their eventual treatment by the state. Herzog (2003), pg. 55-57 and 59-61.

<sup>295</sup> Herzog (2003), pg. 52-61.

‘refugees’, as persons who temporarily do not enjoy the protection of their own country, is rooted in a world order based on nation-states:

“the humanitarian logic is in fact based on the national order, and does not attempt to replace it. The political meaning of the term ‘refugee’ is an endless transcription of the national logic, and thus cannot be cosmopolitan.”<sup>296</sup>

Thus, the by debating about the refugees the Knesset Members’ strengthened their Zionist belief in the absolute need for Israel to exist as a Jewish state, for that is the only possible way to ensure the existence of the Jewish people.

The second rationale stems from the first. In dealing with non-Jewish refugees, the Knesset’s discussions emphasized Jewish refugeedom of the past, primarily the Holocaust, while excluding almost completely Palestinian refugeedom. Recognition of Israeli responsibility for the Palestinian refugees is perceived to undermine Israel’s viability as a Jewish state. Therefore:

“The data show that accepting refugees in Israel is possible only when it is justified as Zionist humanitarianism, which is disconnected from the discussion on the Palestinian refugees. [...Thus] The discourse on the ‘humanitarian refugees’ is a mechanism of denial – which does not mean erasure, but rather a practice of double exclusion of the Palestinian refugees.”<sup>297</sup>

## **WIDER HISTORICAL CONTEXT: ECONOMIC CHANGE AND THE PEACE WITH EGYPT (1979)**

The political change in Israel also initiated an economic shift from a centralised and state run social-democratic economic system to a more capitalistic and privatized one<sup>298</sup>.

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<sup>296</sup> Herzog (2009a), pg. 185 at the centre. For further reflection in this direction see Arendt’s “Right for rights”, in Arendt *ibid.* (1973).

<sup>297</sup> Herzog (2009), pg. 201, centre.

<sup>298</sup> See the State of Israel, Ministry of Finance, International Affairs Department, “The Israeli Economy: Fundamentals, Characteristics and Historic Overview” (2011).

[http://www.financeisrael.mof.gov.il/financeisrael/docs/en/the\\_israeli\\_economy.pdf](http://www.financeisrael.mof.gov.il/financeisrael/docs/en/the_israeli_economy.pdf)

An imperative for capitalistic and neo-liberal growth, the dependence on cheap labour deepened. Until the beginning of the 1990's this need was chiefly satisfied by Palestinian workers from the Territories.

The new government's most important accomplishment was the peace treaty signed with Egypt in Washington on the 26.3.1979, based on the Camp David agreements signed in September 1978<sup>299</sup>. In exchange for peace Israel restored the Sinai Peninsula to Egypt in 1982, uprooting settlements it built there since the Six Days War. An important part of the agreement regarded the demilitarization, putting stern restrictions on Egyptian military presence in the Peninsula<sup>300</sup>. Since 1982 the Sinai has been under Egyptian sovereignty, although effective control over the vast desert has fluctuated, especially in recent years, also for the scarce military forces deployed in it<sup>301</sup>. Historically, the Sinai has always been a gateway between Israel and Egypt and, more broadly, between Asia and Africa. Ancient trading ways transformed into smuggling routes with the institution of political borders, passing anything from guns to people, mainly from Africa into Israel. As Israel grew richer from the 1980's and onwards, smuggling intensified creating a complex and cruel market around it, which involved international organized crime. In the 1990's and beginning of the 2000's, there was sturdy trafficking of women, mostly from Eastern Europe, destined for prostitution. Israel eventually managed to curb this phenomenon, which was then replaced with trafficking of African migrants and asylum seekers. Most trafficked migrants were from Central-East Africa, i.e. Sudan, South-Sudan, Ethiopia and Eritrea. Israel's prosperity, liberal-democratic and stable regime and Western affiliation were among the major pull factors<sup>302</sup>. In 2009 a new 'industry' was added to voluntary migration.

Some several thousand people, mostly Eritrean asylum seekers, were kidnapped from Eastern Africa and transported to hidden camps inside Sinai. The hostages would be freed only after elevated sums of ransom were sent for their rescue from family members

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<sup>299</sup> Morris (2001), pp. 477-493.

<sup>300</sup> See, Israeli Ministry of Foreign Affairs, *The Camp David Accords (1978)*, available at: <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/camp%20david%20accords.aspx> (Retrieved 19.3.2014).

<sup>301</sup> See TEEPA & Tilburg University report at: [http://www.eepa.be/wcm/dmdocuments/publications/report\\_Human\\_Trafficking\\_in\\_the\\_Sinai\\_2\\_0120927.pdf](http://www.eepa.be/wcm/dmdocuments/publications/report_Human_Trafficking_in_the_Sinai_2_0120927.pdf) (visited 17.9.2017).

<sup>302</sup> Afeef (2009) and Kritzman-Amir and Kemp (2008).

and the Eritrean communities in exile. The average period of captivity was several months and included brutal torture, rape and murder. Reports have brought evidence that an illegal organ trade has developed around the Sinai hostage camps as well<sup>303</sup>.

As a response to soaring numbers of migrants entering from Sinai in 2010-2012 Israel built a fence along the 240 km of its border with Egypt. Consequently, unauthorised migration from Sinai to Israel came to an almost complete halt<sup>304</sup>.

## **JEWISH IMMIGRATION FROM ETHIOPIA AND THE QUESTION OF THE *FALASH MURA***

In 1973, Ethiopian Jewry, also known as Beta Israel<sup>305</sup> was recognized by the then *Sephardi* Chief Rabbi Ovadia Yosef as descendants of the Tribe of Dan and therefore eligible to immigrate to Israel under the Law of Return<sup>306</sup>. Following the overthrow of Haile Selassie in 1974 Mengistu Haile Mariam assumed power and instated a revolutionary-communist government, considered hostile to Ethiopian Jews. Almost 6500 Ethiopian Jews immigrated to Israel in the following years leading to 1984. Begin's government began actively providing for Jewish immigration from Ethiopia in 1977, in conjunction to secrete military aid Israel supplied to Ethiopia's revolutionary regime. Due to growing perils in Ethiopia, thousands of members of Beta Israel commenced migrating to Sudan, where they sought shelter in makeshift refugee camps. It is estimated that up to 4,000 Jews died either trying to reach Sudan or in the camps there. In 1984 the situation in the camps

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<sup>303</sup> See Rachel Humphris, UNHCR, "Refugees and the Rashaida: human smuggling and trafficking from Eritrea to Sudan and Egypt" (2013) and Maria Rabinovitch, Knesset Research Centre, "Activity of the State of Israel's Actions in the Fight Against Human Trafficking: the Treatment of Women Trafficking" (2013).

<sup>304</sup> See State of Israel, PIBA, "Statistics of Foreigners in Israel 2012-13". This explanation is widely accepted and repeatedly stated by officials and academics. Although it is extremely probable that the fence played a major role in the plummet of trafficking and migration, I was unable to find concrete research on the matter. Therefore, the exact contribution of the fence to the dropping numbers of unauthorised entrances remains unclear.

<sup>305</sup> For the history of the Jewish communities in Ethiopia, and a thorough review of the central issues regarding their immigration to Israel, see Michael Corinaldi, *Ethiopian Jewry: Identity and Tradition* (Heb., 2005) or *Jewish Identity: The Case of Ethiopian Jewry* (Jerusalem: Magnes Press, Hebrew University, 1998).

<sup>306</sup> Corinaldi (2005), pp. 179-187 and Fred Lazin "Israel and Ethiopian Jewish immigrants." *Society* 39.4 (2002), pg. 55.

precipitously deteriorated and the Israeli government decided to take action, relying on the support of the U.S. Between 21 November 1984 and June 1985 the Israeli government brought some 8000 Ethiopian Jews from Sudan to Israel in a covert airlift called Operation Moses, which was coordinated with the CIA, Sudanese officials and local mercenaries<sup>307</sup>. At the same period, secret migration via land from Ethiopia to Sudan and from there to Israel in various ways continued, bringing all together 14,000 Jewish immigrants to Israel between 1981-1985. Again, military support and training was traded for the possibility to bring Ethiopian Jews to Israel. In 1991 the civil war in Ethiopia brought the anti-government rebels to seize the capital, Addis-Ababa. In light of the volatile situation and the risks it presented, a second airlift, called Operation Solomon, was initiated. As part of an intricate plan, which included secret political agreements, bribes and covert operations, the Israeli Air Force flew about 14,000 Jews from Ethiopia to Israel in 36-hour between May 24 and May 26, 1991<sup>308</sup>.

The success of the airlift operations reaffirmed Israel's strong commitment to save Jewish refugees from anywhere in the world and bring them to their homeland. It is a good manifestation of Israel's logic of asylum, which adheres to the logic of immigration. As Herzog explains:

“Ideologically and institutionally, the state of Israel has always been, not an immigrant state, but an *Aliyah* [...] state that encourages only Jewish immigration.”<sup>309</sup> These words could be easily used for describing the basis of Israel's asylum regime as well. The question of the *Falash Mura*, descendents of the Beta Israel community who left Judaism sometime in the past centuries (mostly in the 19th century), underscores the quandary. Since the 1980's many of these people have asked to immigrate to Israel, most of them in relation to the harsh conditions they face in Ethiopia, also for their Jewish ancestry. Israeli governments were first reluctant to allow the *Falash Mura* to immigrate to Israel, unless they were entitled to do so under the Law of Return, as up to third generation relatives of Jews. After growing demand from the leaders of Beta Israel and public debate, in 2003 the government passed resolution 2948, which gives those who are descendants from Jewish mother's lineage the right to emigrate to Israel under the Israeli Entry to Israel Law and to obtain citizenship

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<sup>307</sup> Lazin, *ibid.* (2002). Other sources indicate 6500 as the number of Jewish refugees arriving via air.

<sup>308</sup> Corinaldi (2005), pp. 188-190 and Lazin (2002), pg. 55-56.

<sup>309</sup> Herzog (2009a) pg. 192, and Kemp and Rajzman (2000).

only if they completed an Orthodox conversion to Judaism<sup>310</sup>.

Nevertheless, the absorption of Ethiopian Jews is relevant in some aspects to the treatment non-Jewish African asylum seekers received in the country in recent years. Jews from Ethiopia suffered from a substantial gap in education, culture, professional training and lifestyle, between what they were accustomed to and what Israeli reality presented. Furthermore, there have been many examples and complaints of a patronising and discriminative absorption policy by the Israeli establishment reserved for Ethiopian Jews. The comparison with the way Jews from the former U.S.S.R were integrated underlines the criticism. Manifestations of racism and acts of segregation have been a constant part of the experience of Ethiopian Jews in Israel as well<sup>311</sup>.

### **WIDER HISTORICAL CONTEXT: WAR IN LEBANON (1982-1984)**

The ‘First War of Lebanon’ (*Milhemet Levanon Harishona*) is triggered by constant clashes with the Palestinian guerrilla bases in Southern Lebanon. Approved as a limited military operation to secure an area of maximum 40 km from the Israeli border, the war brought the IDF to the outskirts of Beirut<sup>312</sup>. By this stage, the war had become Israel’s most controversial war, both at home and abroad. The constant friction between Lebanese militia groups culminated with the massacre of Palestinian refugees in the *Sabra* and *Sbatila* camps. Although the perpetrators were Christian *Fallanga* militiamen, Israel was held widely responsible for allowing the massacre to take place. For the first time in Israeli history, mass public protests accused the government and the army of immoral conduct. As a result of public pressure the government was forced to appoint a National Commission of Inquiry, headed by the President of the Supreme Court, to investigate the events related to the massacre<sup>313</sup>.

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<sup>310</sup> See more at Mey-Ami, the Knesset’s Research Centre, “Increasing the rate of *Aliyah* of the *Falash Mura* to Israel” (2005), presented to the Knesset’s Committee for *Aliyah*, Absorption and the Diaspora.

<sup>311</sup> See, e.g. Kimmerling Baruch. *Immigrants, Settlers, Natives: Israel Between Plurality of Cultures and Cultural Wars* (Heb., 2004).

<sup>312</sup> For the entire evolution of the war see Morris (2001), pp. 494-560. Shapira? Article?

<sup>313</sup> Israeli online national archives:

<http://www.archives.gov.il/ArchiveGov/pirsumyginzach/HistoricalPublications/KahanCommission/> (last visited 18.7.2017)

Israeli forces left Lebanon only in 1984, but retained control over the Southern part, which became a security buffer zone. It was named the “Security Zone” and became the main arena of conflict between Israel and varied Lebanese guerrilla and terrorist organizations. Israel’s main ally in the area was the South Lebanon Army (SLA), a Christian affiliated militia that broke away from the Lebanese Army in the late 1970’s. Israel finally withdrew from South Lebanon back to its international border in 2000, under Prime Minister Barak. The South Lebanese Refugee crisis (discussed later), in which Israel accepted some 5000 refugees, took place in the context of the IDF’s hasty withdrawal.

### **FIRST INTIFADAH (1987-1991/1993)<sup>314</sup>**

After twenty years of Israeli control, the Palestinian population in Gaza and the West Bank opened a large-scale popular uprising, called *Intifadah* (literally “Shaking Off”<sup>315</sup>). It began with a local incident in a Gaza refugee camp but quickly escalated and spread out to all of the Territories. The causes for the *Intifadah* are at issue. Some referred to it as the Palestinians’ “war of independence from Israel”<sup>316</sup>. Morris describes it as:

“[...] a political struggle, though it started as a mass protest against unbearable economic conditions, which in turn were largely a result of political realities... The main energizing force of the *Intifadah* was the frustration of the national aspirations of the 650,000 inhabitants of the Gaza strip, 900,000 of the West Bank, and 130,000 of East Jerusalem, who wanted to live in a Palestinian state and not as stateless inhabitants under a brutal, foreign military occupation.”<sup>317</sup>

Anita Shapira identifies in changing economic prospects the leading causes of the Intifada. She narrates the post-1967 years as a period of economic growth for Palestinians in the Territories, stimulated by Israel’s lenient occupation policies and Palestinian access to both the Israeli and Jordanian markets. Palestinian labour in Israel was one of the main factors of the economic boost, with tens of thousands of Palestinian workers commuting

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<sup>314</sup> Shapira (2012), pp. 411-422 and Morris (2001), pp. 561-610.

<sup>315</sup> See the online Merriam-webster dictionary at: <http://www.merriam-webster.com/dictionary/intifada> (visited 19.9.2017)

<sup>316</sup> Shalev, *The Intifada, Causes and Effects*. (Heb. 1990), pp. 19-20. Cited by Morris (2001) on page 561.

<sup>317</sup> Morris (2001), pg. 561-562.

to Israel every day to find occupation. Combined with improved infrastructure and a better health care system, the economic development brought to higher Palestinian standards of living and relative prosperity. Things gradually changed when as a result of Israeli economic difficulties the labour market came to a stall. Furthermore, ebbing global oil prices in the first half of the 1980's diminished capital arriving from Palestinian migrant workers in the Persian Gulf. "Thus a situation was created combining population growth [...] with reduced income and employment", foreordaining upheaval<sup>318</sup>.

The *Intifadah* was a watershed in the relationship between Israel and the Palestinians. It radicalized the political scene in both camps and moved the Palestinian problem to the centre of international attention<sup>319</sup>. It also drastically intensified the everyday confrontation of the army with Palestinian population in violent circumstances<sup>320</sup>. Most Israelis who were not affiliated with the settlers' movement began to systematically avoid entering the Territories to stay out of harm's way. Palestinian workers ceased from coming to work in Israel, for protest at first and eventually because of Israeli restrictions<sup>321</sup>. Gradually, Israeli governments came to the conclusion that separation between the two sides of the 'Green Line'<sup>322</sup> was inevitable.

By 1991 *Intifadah* of the masses wore down, and transmuted in increasing terrorist attacks within Israel carried out mostly by single perpetrators. In 1993 the uprising came to what is considered an official end with the signing of the Oslo accords between Israel and the PLO<sup>323</sup>. The Palestinians were given autonomy in certain areas. Israeli society shut itself more and more to the Territories and the fate of the Palestinians. Efforts were made to disentangle the two markets, although Palestinian economy remained highly dependant on Israel. As of 1993 the number of Palestinians working in Israel was severely reduced

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<sup>318</sup> Shapira (2012), pg. 411. Shapira's account of declining numbers of Palestinians working in Israel in the mid 1980's does not correspond with other research done more specifically on the subject, which sees a more or less steady growth of Palestinian workers in Israel between 1980 and 1987. See Bartram, "Foreign Workers in Israel: History and Theory" (1998), pg. 307.

<sup>319</sup> Morris (2001), pp. 595-602.

<sup>320</sup> For criticism of the IDF conduct in the *Intifadah* see, e.g., Morris (2001), pp. 589-593.

<sup>321</sup> Shapira (2012), pp. 411-422.

<sup>322</sup> The border between Israel and the Territories created at the 1949 Rhodes cease-fire agreements with Jordan and Egypt.

<sup>323</sup> Morris (2001), pp. 594-595.



for security restrictions and as a result the government looked elsewhere to supply the growing need of cheap labour<sup>324</sup>.

## **END OF THE COLD WAR, CHANGES IN ISRAEL'S GEO-POLITICAL STATUS AND RUSSIAN MASS IMMIGRATION (LATE 1980'S INTO THE 1990'S)**

The disintegration of the USSR and the communist block changed the balance of power in the Middle East. The United States became the single world power and the dominant international force in the Middle East. As a result Israel's geo-politic situation altered significantly, emphasizing even more its military superiority in respect to most of its enemies. American dominance in the region had far reaching economic effects, which in Israel were translated in increased international investments, new access to world markets, accelerated privatization and economic prosperity. As part of Glasnost restrictions on Jewish emigration from Russia and other Eastern European countries were lifted. Consequently, mass immigration of Jews began, predominantly to the U.S, Germany and Israel, with the later taking in the greater number.

Between 1989-1999 circa one million people immigrated to Israel and resided in it under the Law of Return<sup>325</sup>. The vast majority were from the former U.S.S.R (FSU) and other Eastern European ex-communist countries (especially Romania)<sup>326</sup>. Among these immigrants were many non-Jews. Most of these non-Jews were either relatives of Jews, which are legally recognized by the LOR up to three generations of kinship or marriage, or people who arrived under false pretence. The exact number of non-Jews who became part of Israeli society in this period is considered sensitive and officially vague<sup>327</sup>, but

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<sup>324</sup> Bartram (1998), 313-317 and Afeef (2009), pp.4-5,

<sup>325</sup> This number does not include migrant workers know as "Foreign Workers", which will be discussed later.

<sup>326</sup> State of Israel, Central Bureau of Statistics (CBS), "Statistical Abstract of Israel 2013" (2013), ch. 4.2, pp. 234-235 and Goldscheider (2002), pp. 48-56.

<sup>327</sup> Lustick, "Israel as a non-Arab state: The political implications of mass immigration of non-Jews" (1999), pp. 417-423. See also, as an example, two papers of the Knesset's Research Centre on demographic data of *Aliyah* and general society in Israel, which discuss generously the importance of immigration from the FSU but omit from the data any reference to the non-Jewish component of this immigration. See, Davidovitch, "Demographic Data on the Population in Israel – research review" (2011) and Fidelman, Central Issues in *Aliyah*, Absorption and the Diaspora" (2013).

estimations mean around one third of all immigrants from the FSU, adding up to roughly 250,000 people<sup>328</sup>.

Ian Lustick, in his article entitled “Israel as a non-Arab state: The political implications of mass immigration of non-Jews” from 1999, focuses his attention on the non-Jewish component of the mass immigration of the 1990’s. In the article he wonders how it was possible that Israeli governments allowed such a substantial non-Jewish population (about 5% of the state’s population at the time) to come to Israel, in striking contradiction to the traditional ethos of purely Jewish *Aliyah*. Lustick’s answer is plainly disclosed in the article’s title. He contextualises his analysis in the circumstances of the time, placing the question of the Territories and the *Intifadah* at the heart of his argumentation:

“Since demography was and always had been the single most important argument in the discursive arsenal of the anti-annexationist camp, the immigration from the FSU figured crucially in this fight over the state's future. With Jewish emigration from Israel at historically high levels in the 1980s and immigration rates relatively low, with Jewish rates of natural increase diminishing and Arab rates remaining at considerably higher levels, with Arab out-migration greatly reduced by the effects of the 1991 Gulf War, and with calls for large scale "transfer" of the Arab population fading from respectable political discussion, an Arab majority within the administrative and political jurisdiction of Israel appeared imminent. Polls showed the hitherto undecided middle of the Israeli Jewish spectrum, which had gravitated until then toward options of "deciding not to decide" and "maintaining the status quo," moving strongly toward a willingness to cede substantial portions of the territories to Palestinian rule - anything to achieve separation between Jews and Arabs and preserve Jewish predominance within the State of Israel. For the annexationist right, therefore, the flood of "Jewish" immigrants from the FSU (and from Ethiopia as well), and the much touted image of a million or more arrivals

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<sup>328</sup> Rajjman and Kemp, "The new immigration to Israel: Becoming a de facto immigration state in the 1990s" (2009), pg. 227 and Cohen, (Heb., 2002) pg. 48-49. For a thorough debate regarding the different estimations and the implications of this phenomenon, see Lustick (1999).

within a short period of time, was a godsend.”<sup>329</sup>

To illustrate this view Lustick brings the words of the right-wing Prime Minister at the time, Yitzhak Shamir:

“Just when many among us were saying that time is working against us, time has brought us this *Aliyah* and has solved everything. In five years, we won't even be able to recognize the country ... The Arabs around us are in a state of disarray and panic ... They are shrouded by a feeling of defeat, because they see the *Intifadah* doesn't help ... they cannot stop the natural streaming of the Jewish people to their homeland.”<sup>330</sup>

Lustick focuses on the political right and religious parties' acceptance of the phenomenon, perhaps giving for granted that the traditional left-wing Zionism will have a natural inclination to welcome *Ashkenazi*, well educated and most importantly, European “new Israelis”. He concludes his explanation with:

“Thus, in the late 1980s and early 1990s, the legal, political, and ideological framework of many of those who might have been expected to object vigorously to the mass influx of gentiles into the country, led them instead not only to accept it but to encourage it. According to a popular saying of the time, the key fact about the immigrants from the FSU that ensured support for their arrival from many Israeli Jews was that they were “neither Arab nor Oriental [meaning *Mizrachi* Jews].”<sup>331</sup>

Discussion over the ‘Jewishness’ of mass immigration in the 1990’s helps accentuate the fringes of the Israeli establishment’s willing to accept non-Israelis into the Israeli state and society. As we saw hitherto, the Jewish identity of the individual, and of the state, has been the paramount consideration in determining Israel’s attitude towards non-citizens wishing to enter and reside in the country. Yet, the immigration waves from Eastern Europe, the FSU and Ethiopia from the 1980’s and onwards show us how precarious is

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<sup>329</sup> Lustick (1999), pp. 425-426.

<sup>330</sup> Lustick (1999), pg. 426 citing from the Jerusalem Post. 15 January 1990.

<sup>331</sup> Lustick (1999), pg. 428.

the definition of an immigrant's Jewish identity. As we saw earlier, the interpretations and amendments to the Law of Return attempted to resolve this problem from a legal-bureaucratic point of view, adjusting the religious definition to the state's national interests. Relying on these legal adjustments, Israeli governments widened the opportunity of non-Jews to come to Israel. When compelled to cope with large groups of African asylum seekers in more recent years, Israeli governments went to considerable lengths in order to prevent this type of migration and repudiate those who have already entered. A natural, although provocative, question arises from comparing the fate of non-Jewish immigrants of the 1990's to the African migrants seeking asylum 20 years later (or, for that matter, most migrant workers in Israel). I presented this question to some of the interviewees for this paper. None had a decisively clear answer. Right-wing and national-religious interviewees tended to identify as 'problematic' the arrival and presence of non-Jews although they were not inclined to compare it to African non-Jewish migration. Some Human-Rights activists argued that the relatively successful integration of the non-Jewish integration proves that asylum seekers should be accepted and possibly naturalised. One interviewee, the former head of a HR organization and currently the head of an Israeli Political Science department, argued that to the Israeli establishment the non-Jewish European immigrants (and to some extent the Ethiopian *Falashmura*) seem potentially more integrable into Israeli Jewish society, while the African asylum seekers are perceived as closer to the Arab/Muslim world, and therefore present a threat to Israel's desired identity<sup>332</sup>. If we accept the logic of this explanation than we can draw a line between Israel's oscillating definitions of "who is a Jew", to the state's altering attitudes towards different groups of non-Jews who wish to immigrate to it.

Facilitating the arrival and providing for the absorption of the immigrants was a national project in which the Israeli governments invested considerable resources and efforts<sup>333</sup>. Each immigrant under the LOR received generous financial aid, tax reductions as well as assistance with housing, job-placement, and free professional and language training. As mentioned earlier, since the beginning of the 1980 "...Israeli economy became increasingly decentralized and economic policy had become more liberal. This trend has

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<sup>332</sup> Interview with Dani filc, Director of the Department of Politics and Government at the Ben-Gurion University in the Negev, conducted 10.10.2013.

<sup>333</sup> Beenstock and Fisher, "The Macroeconomic Effects of Immigration: Israel in the 1990s" (1997).

also extended to immigrant absorption. Whereas in the past the government undertook direct responsibility for immigrant absorption... by providing housing and work, now the immigrants are [were] left to fend for themselves with the help of cash grants and housing subsidies, as well as free vocational and language training. The Ministry of Finance estimates these benefits at 170,000 shekels [roughly 57,000\$] per head in 1995 prices.”<sup>334</sup>

A major issue in the absorption endeavour was the housing market, which was short on supply in front of soaring demands. The government actively stepped in providing temporary housing solutions to newcomers and by offering extensive subsidies and guarantees to contractors in order to boost construction<sup>335</sup>. Augmenting numbers of construction workers were needed, contrasting with security risks in importing large numbers of Palestinian day-workers. This gap, in the context of the period, changed Israel’s foreign population to this day.

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<sup>334</sup> Beenstock and Fisher (1997), pg. 334.

<sup>335</sup> Beenstock and Fisher (1997), pg. 335.

## CHAPTER IV

### ISRAEL OPENS UP TO LABOUR AND ASYLUM MIGRATION (1990's)

#### MIGRANT WORKERS IN ISRAEL<sup>336</sup>

In response to fierce pressures from different economic sectors, in 1991 Israeli governments began importing increasing numbers of 'foreign workers' to replace Palestinian cheap labour. Migrant workers came mostly from Romania (primarily for construction), Thailand (agriculture) and the Philippines (domestic services). By 1996 the government declared to have given about 104,000 work permits to these immigrants, although apparently not all vacancies were successfully filled. Adding to these legal workers there were between 50,000-100,000 illegal workers from a wide variety of countries in Africa, South America, Eastern Europe, the Middle East and Eastern Asia<sup>337</sup>. Among the legal and illegal workers there were potential (or 'dormant') asylum seekers who did not apply for protection, at least not until 2002. Two main reasons have been given to this phenomenon. First, Israel did not have a highly developed or well-publicized asylum system at the time, resulting in little awareness of the forced migrants of the opportunity to request refugee status<sup>338</sup>. Second, the Israeli authorities displayed considerable tolerance towards migrant and undocumented workers during the 1990s and this reduced the need for seeking other legal status. Thus, many forced migrants sojourned in the country on work visas or as undocumented workers<sup>339</sup>.

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<sup>336</sup> For a closer analysis of labour migration to Israel since the 1990's see: Rajjman and Kemp, "The new immigration to Israel: Becoming a de facto immigration state in the 1990s" (2009), Bartram, "Foreign Workers in Israel: History and Theory" (1998), And Willen (ed.) *Transnational migration to Israel in global comparative context* (2007).

<sup>337</sup> Bartram (1998), pp. 313-314.

<sup>338</sup> Ben-Dor & Adut (2003).

<sup>339</sup> Afeef (2009), pg. 5. The situation changed in 2002 when the government went on a large scale operation to reduce the number of illegal migrants in Israel, deporting tens of thousands of people between 2002-2005.

By 2002 the number of authorized and unauthorised ‘foreign workers’ in Israel was estimated in 238,000<sup>340</sup>. This meant that the percentage of labour migrants out of the general population in Israel was higher than most Western countries<sup>341</sup>. Alarmed by the growing population of non-Jewish foreigners in Israel, Sharon’s government decided to suppress the number of labour migrants and began a large-scale deportation campaign that lasted until 2005. It was in this context that an immigration authority, within the Ministry of Interior, was instituted. To execute enforcement and deportations, an Immigration Police was formed as well<sup>342</sup>.

The estimations of the number of expelled migrants between 2002-2005 vary between 50,000 to over 200,000<sup>343</sup>. UNHCR explained the surge in asylum requests in 2003 as a result of the fear of migrants to be deported<sup>344</sup>. It would be highly interesting to examine the possible connection between the 2002-2005 deportations to the arrival of African asylum-seeking migrants from 2005 and onwards through the lens of Israeli labour market needs, particularly in the hotel industry, where many of the African migrants were absorbed.

Like in Western European countries, which began importing migrant labourers in the 1970’s, the Israeli government also had hoped these ‘foreign workers’ would come, work and eventually (better sooner than later) return to their home countries. They were then to be replaced by other newly recruited co-patriots, creating an on-going cycle of circular migration, which presumably was supposed to benefit both Israel and the workers’ countries of origin. This is the rationale of Israel’s policy towards imported labour till

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<sup>340</sup> Klein Zeevi, Knesset Research Centre, “Foreign Workers in Israel: Current State” (2003), presented to the parliamentary commission for “The Review of the Problem of Foreign Workers”. See also Harel (2014), pg. 12.

<sup>341</sup> The figure includes Palestinian workers from the Territories as well. See Cohen (2002 Heb), pg. 49 and Adriana Kemp, Rebeca Raijman, *Migrants and Workers: the Political Economy of Labor Migration in Israel* (Heb., 2008), pg. 10.

<sup>342</sup> Kemp & Raijman (2008), pp. 10-11.

<sup>343</sup> Between 2002-2005, 136,000 were deported by the Immigration Authority. See Feibish, Knesset Research Centre, “the Activity of the Immigration Authority” (2005). A UNHCR paper states circa 50,000 deported in this period. See Afeef (2009) citing Willen (2007), introduction. According to a high official in the Ministry of Internal Affairs, over 80,000 were deported in 2002 alone and many more until 2005 (Oral interview conducted in October 2013).

<sup>344</sup> “... from 2002 to 2003, asylum applications registered by UNHCR Israel increased almost fivefold: from 283 new applications in 2002 to 1,389 new applications in 2003 (UNHCR, 2009a)”. Afeef (2009), pg. 5. See also Harel (2014) pg. 12.

today<sup>345</sup>. Some parliament members warned already in 1991 that as in Europe, the ‘foreign workers’ would most probably end up settling in the country, creating another non-Jewish group demanding recognition in addition to the Arab one<sup>346</sup>. By importing a large scale, non-Jewish, labour migration Israel became embedded “in a much broader set of political and economic processes associated with the globalization of labour markets.”<sup>347</sup> Among these processes were regional and global asylum migrations. “Thus, the development of asylum in Israel cannot be fully understood without taking into account the broader context of labour migration to the country.”<sup>348</sup>

Indeed, the overlapping and possible juxtaposition between labour migration and asylum migration, especially from Eastern Africa, became a dominant factor in Israel’s asylum and immigration policies since 2008-9. The stern anti-infiltration policy of the Israeli governments in recent years was conceived on the basis of a distinction between asylum seekers and labour migrants, arguing that one person cannot be both<sup>349</sup>. Defining the sweeping majority of African migrants in Israel as “work migrants” and therefore not “asylum seekers” enables the government to pursue an active policy of deterrence and alienation in order to prevent their arrival to Israel and remove those who are already in the country. In contemporary studies and international discourse, however, there is growing prevalence to comprehend labour migration and asylum migration as closely intertwined phenomena, on many levels<sup>350</sup>. The convergence of persons in seek of protection with other migrants is also known as “mix-flows”.<sup>351</sup>

The binary equation labour/asylum migration is at the core of present-day public debate in Israel over asylum seekers. Israel is not an exception here but rather a special exemplar of the wide spread difficulty to dichotomically classify migrants because 90% of the African migrants in Israel are from Eritrea and Sudan. While migration from these

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<sup>345</sup> See, e.g., Gavison, Mezila (2013).

<sup>346</sup> Bartam (1998), pg. 311).

<sup>347</sup> Willen (2007), Introduction, pg.2 cited in Afeef, pg. 5.

<sup>348</sup> Afeef, pp. 4-5.

<sup>349</sup> See, e.g., The State of Israel, Ministry Justice, Government bill “amendment to Infiltration law – Prohibition on Money transfer out of Israel” in The State’s official Gazette. This argument has been expressed by most of the government officials and politicians who support a hard line against infiltration I have interviewed.

<sup>350</sup> See UNHCR, “Refugee protection and mixed migration: A 10-point plan of action” (2007).

<sup>351</sup> Afeef, pp. 5-6.



countries to Israel is largely affected by considerations of livelihood, the international community currently considers both Eritrea and Sudan high-risk countries of origin and hence their citizens “non-deportable”, a stance that is shared by Israeli courts. Israeli government officials have been inconsistent on this matter, altering terminology and public declarations to fit policy objectives. Currently, no Eritrean or Sudanese citizen can be forcibly deported to their countries<sup>352</sup>.

## **ISRAEL’S CONSTITUTION, THE BASIC LAWS AND JUDICIAL REVIEW (1992)**

Israel does not have to this day a constitution, despite the fact that the Declaration of Independence had ordered the constituent assembly to prepare one by 1.10.1948<sup>353</sup>. But early discussions indicated it would be highly difficult to reach widespread agreement over the articulation into law of core issues, such as the purpose of the state, its identity and definition, its fundamental values and its long term vision<sup>354</sup>. In 1950, after two years of discussions in the Knesset, the special committee in charge of the matter adopted what became to be known as the “Harari proposal”. Named after MK Yizhar Harari, the proposal affirmed:

“... the First Knesset assigns to the Constitution, Law and Justice Committee the preparation of a proposed constitution for the state. The constitution will be made up of chapters, each of which will constitute a separate basic law. The chapters will

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<sup>352</sup> The government’s stance is that Sudanese citizens should not enjoy non-Refoulement in Israel as Sudan is an enemy country, but practically they are not deported because the lack of diplomatic relations with Israel make deportation impossible. See HCJ 7146/12 Adam and others v. The Knesset and others (Heb. pp. 6-10), Nathan, Knesset Research Centre, “Handling and Treatment of Illegal Migrants and Asylum Seekers Crossing from Egypt by the State of Israel” (Heb. 2011) and Ben-Nun (2017) pp.210-215. An exception to this tendency were about 3000 Sudanese citizens from independent South Sudan who were deported en masse in 2012 after South Sudan was considered a safe country. See administrative plea (ע"ת) 53765-0312 Assaf vs. Minister of Interior (Heb. 7.6.12).

<sup>353</sup> The Knesset, “The Constitution”, in the official Knesset site:

[http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_hoka.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm) (retrieved on 22.3.2014)

<sup>354</sup> For an analysis of the debate over the constitution and the inability to reach agreement on the core issues see Orit Rozin, “Forming a Collective Identity: The Debate over the Proposed Constitution, 1948–1950” (2007).

be brought to the Knesset, as the Committee completes its work, and all the chapters together will constitute the constitution of the state."<sup>355</sup>

The gradual creation of a constitution by the legislation of separate Basic Laws is still in course today. There are currently 15 Basic Laws, the last of which was passed in March 2014. The Basic Laws deal with several fundamental state issues such as the formation and role of the principal institutions, the relations between the different state's authorities (Parliament, Government, President, judicial system, etc) and basic civil and human rights<sup>356</sup>. After all the basic laws will be enacted, they will be completed with an appropriate introduction and several general rulings, and become the constitution of the State of Israel<sup>357</sup>. There is no programmed deadline for the completion of the Basic Laws and thus the inauguration of an Israeli constitution is still pending.

The first Basic Law was Basic Law: the Knesset (1958), which defines the formation, structure, functions and other administrations of the Israeli Parliament<sup>358</sup>. An amendment to this law from 1985 was the first to introduce explicitly into legislation the notion that the State of Israel was a Jewish and democratic state<sup>359</sup>.

In 1989 *Likud* Minister of Justice Dan Meridor proposed to the "National Unity" government<sup>360</sup> a bill entitled: Basic Law: the Fundamental Rights of Man (Hebrew: *Hok Yesod: Zhiuot Hayesod Shel Ha'adam*). The bill intended to incorporate for the first time into Israeli legislation the basic Human Rights for life, dignity, liberty, freedom of speech,

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<sup>355</sup> The Knesset, "The Constitution", in the official Knesset site:

[http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_hoka.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm) (retrieved on 22.3.2014)

<sup>356</sup> For a summary of all the Basic Laws and their full text, in Hebrew and English, see "The Existing Basic Laws: Summary" at: [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod2.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm) (visited 22.9.2017)

<sup>357</sup> The Knesset, "The Basic Laws", in the official Knesset site:

[http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_hoka.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm) (retrieved on 22.3.2014)

<sup>358</sup> See: Basic Law: The Knesset (1958). It is interesting to note that the law does not define the powers of the Knesset.

<sup>359</sup> The amendment was designed to exclude from the election to the Parliament political parties which oppose Israel's Jewish and democratic nature or incite Racism: "A candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism." See Basic Law: The Knesset (Amendment No. 9)\* Amendment of section 7°.

<sup>360</sup> Following the 1988 elections a grand coalition government was created by the *Likud*, which included the Alignment (*Hamaarach*) as its senior partner together with right wing and religious parties as well.

property and others. For various political setbacks and difficulty to achieve unanimous support in the coalition, the bill eventually was altered, split into two, and passed separately in 1992 as Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty<sup>361</sup>. An amendment from 1994 to both laws states:

“Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.”<sup>362</sup> The stated purpose of the Basic Law: Human Dignity and Liberty is “to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”<sup>363</sup>

While both laws are protected from changes by means of emergency regulation, only the Basic Law: Freedom of Occupation requires an absolute majority in the Knesset in order to amend or repeal it. The two Basic Laws presented together a significant change in the Israeli juridical system as they introduced for the first time the notion of restrictions to the Parliament’s legislation, which opened the way for the development of Judicial Review over Primary Legislation. The basis for Judicial Review is set in the “*Violation of Rights*” clause, also known as the “Limitation Paragraph”, which appears in both Basic Laws:

“There shall be no violation of rights [or of “freedom of occupation”] except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law.”<sup>364</sup>

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<sup>361</sup> “The Existing Basic Laws: Summary”, see above note 286. For the arduous story of the formation and legislation of these two Basic Laws see: Rubinstein, “The Story of the Basic Laws” (2012). The laws were passed by the 12<sup>th</sup> Knesset, which was still dominated by the right wing-religious coalition.

<sup>362</sup> See the “purpose” clause at the beginning of Basic Law: Freedom of Occupation (1994) and Basic Law: Human Dignity and Liberty (1992).

<sup>363</sup> Basic Law: Human Dignity and Liberty (1992) clause 1, “Purpose”.

<sup>364</sup> Basic Law: Freedom of Occupation (1994) clause 4 and Basic Law: Human Dignity and Liberty (1992) clause 8, amended in 1994.

The legislation of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty fortified the legal status of Human Rights in Israel. Through the Limitation Paragraph, it also revised the relationship and balance of power between the government, the Knesset and the Supreme Court, in favour of the later, especially in its function as the High Court of Justice<sup>365</sup>. Therefore, the two Basic Laws of 1992 have been referred to as the opening act of a “Judicial Revolution” in which the Supreme Court has become a major influence on the shaping of government policy and the parliament’s law making<sup>366</sup>.

Since the mid 1990’s, and in light of the Judicial Revolution, appeals to the HCJ have become a pivotal tool for Israeli Human Rights organizations in their confrontation with the establishment<sup>367</sup>. A major example from the realm of Israel’s asylum regime are the nullifications and limitations by the HCJ of the main clause in the government’s amendments to the Infiltration Law, after they were passed in the Knesset in 2011 and 2013. Explicitly enacting Judicial Review, the judges declared that the detention periods and conditions for infiltrators decreed in clause 30a of the amendment violated the basic right for liberty as defined in the Basic Law: Human Dignity and Liberty, and were not commensurate with the Limitation Paragraph of the Basic Law.<sup>368</sup> After the first annulment the government formulated and passed in the parliament a new amendment, which was supposed to respect the judges’ criticism over the old one. On 22.9.2014 the HCJ annulled for the second time the amendment, a precedence in the Israeli legal system and relations

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<sup>365</sup> See, e.g., the critical account given by Robert Bork in *Coercing Virtue: The Worldwide Rule of Judges*, ch. 3, pp. 111-134. Bork argues that: “The Israeli Supreme Court is making itself the dominant institution in the nation, an authority no other court in the world has achieved.” Bork, *Ibid.* pg. 111. For a wider view of the juxtaposition between law and culture in the context of a major power struggle within Israeli society between Western liberal and Jewish religious values, see Mautner, *Law and the Culture of Israel* (2011).

<sup>366</sup> The interpretation the HCJ gave to the Limitation Paragraph initiated the Judicial Review and has been the protagonist of major debate in Israeli jurisprudence and politics. Quintessential to the creation and development of the Judicial Review was the former President of the Supreme Court Aharon Barak. While Barak enjoyed extensive authority and support in the judicial system, he was also criticised for his judicial activism by scholars, politicians and fellow justices.

<sup>367</sup> For an in depth analysis of the role the courts play in the formation of Israel’s asylum regime, see Kritzman-Amir (2013) and Ben-Nun (2017) pp. 165-218.

<sup>368</sup> See HCJ 7146/12.

between the High Court and the Knesset<sup>369</sup>. A third version of the amendment was then re-enacted by the government and this time passed the judicial review with some limitations<sup>370</sup>.

## **SPORADIC ARRIVAL OF ASYLUM-SEEKERS INTO ISRAEL IN THE 1990'S**

Throughout the 1990's some several dozens of people crossed the Israeli borders without authorization. Those we know about were caught and detained. Most of them arrived through Jordan, where some had previously requested refugee status at the UNHCR's offices. After their capture, the state imprisoned them for lengthy periods<sup>371</sup>. Some were suspected of taking part in terrorist organizations and therefore were questioned in prison, presumably with the use of physical pressure or torture<sup>372</sup>. The information available on these cases is limited and most probably does not cover all the people who entered Israel seeking asylum, with or without possessing the required credentials, during the 1990's or previously.

In 1992 twelve members of an Islamic organization<sup>373</sup> crossed the Israeli border. They were caught and arrested. They appealed to the HCJ against their prolonged detention with no perspective of deportation or release<sup>374</sup>. Following the appeal the state agreed to release them on restrictive terms and facilitate their resettlement elsewhere<sup>375</sup>.

Between October 1992 and May 1994 some 30 citizens of enemy countries, mostly from Iraq, crossed the Jordanian border. Some were caught in Israel proper, some in the Territories. They were held in prison until 1995<sup>376</sup>. Those caught in Israel were detained under the Entry to Israel Law (5712/1952), while those who were apprehended in the

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<sup>369</sup> HCJ 8425/13. For an extensive analysis of the petitions, state responses and verdicts on the two amendments see Ben-Nun (2017) pp. 165-218.

<sup>370</sup> HCJ 8665/14.

<sup>371</sup> See HCJ 4702/94 and HCJ 4702/94 Al-Taj v. Interior Minister PD 49 (3) 846, 848.

<sup>372</sup> The state later agreed to compensate several of these people for the presumed torture, following a demand for damages presented through a lawsuit to the Israeli court. See *DNA* 441/12, para. (3).

<sup>373</sup> They were probably members of the Mojahedin-e-Khalq ("The People's Mojahedin of Iran"), an Iranian

leftist organization opposing the Revolutionary regime. See Ben Dor & Adut (2003), pg. 18.

<sup>374</sup> HCJ 2651/92.

<sup>375</sup> Ben Dor & Adut (2003), pg.18.

<sup>376</sup> Ben Dor & Adut, *ibid*.

Territories were held under the Prevention of Infiltration (Offences and Jurisdiction) Law (5714/1954). They appealed to the HCJ against their prolonged incarcerations, together with a third group of enemy nationals who were seized by Israel at sea, trailed for security offences and awaited deportation in prison, after serving their sentence. Those who entered on their own asked to be recognized as refugees under the Refugee Convention and therefore released until a solution for their resettlement would be found by the state and the UNHCR. The group who was apprehended at sea asked to be released from prison until their deportation. The court recognised the right of all the petitioners not to be deported to any country where their lives or freedom would be in jeopardy, under the Non-Refoulement principle of the Refugee Convention. The court also recognized the right of the state to not grant refuge to citizens of enemy states and keep them in custody for security reasons for a reasonable time, until a solution to their situation would be found. The court ruled that the time past in prison by the petitioners, varying from one to three years, was not reasonable and ordered the state to immediately find a proper destination for deportation or release the majority of the petitioners<sup>377</sup>. Hence, 24 of the petitioners were released shortly after the verdict was given under restrictive measures. The remaining six were kept in prison as the court accepted the state's claim that they posed a potential threat to national security. The state finally released them in 1998 after two more petitions were filed in their name to the HCJ. By 2002 the majority of the persons in question were deported, or resettled with the help of the UNHCR in other countries<sup>378</sup>.

In 1994, *Nelson Nebio and Joseph Tomba*, two Christian Sudanese nationals were deported back to Jordan, after they entered Israel with no authorization. Officially Sudan is an enemy of Israel and its laws prohibit Sudanese citizens to enter Israel. According to reports confirmed by the Israeli UNHCR office, after their deportation to Jordan Nebio and Tomba were extradited to Sudan, where they were sentenced to death and executed<sup>379</sup>.

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<sup>377</sup> HCJ 4702/94 (including in it HCJ 5190/94 and HCJ 5448/94).

<sup>378</sup> See *DNA* 441/12, para. (3) and Ben Dor & Adut (2003), pp. 18-19.

<sup>379</sup> Ben Dor & Adut (2003), pp. 18 and University of Pennsylvania, African Studies centre, Sudan News & Views, Issue No 5, 16.2.1995 available at: <http://www.africa.upenn.edu/Newsletters/SNV5.htm> (visited 23.9.2017)

In 2001 two small groups of Kurdish families entered Israel from Lebanon and requested to stay. They were returned immediately to Lebanon, with partial UNHCR knowledge of the matter<sup>380</sup>.

## **THE BOSNIAN REFUGEES (1993)**

The war and atrocities, which ravaged Bosnia since 1992, provoked ample discussions in the Israel parliament. Suggestions were made to condemn Serbia and cut off diplomatic relations with it and to send aid to the civil population in Bosnia. Israel's first participant in the UN's peacekeeping forces was sent to Bosnia and representatives of the Knesset were supposed to visit the area, but eventually this did not materialize<sup>381</sup>. American Jewish relief organizations and the Israeli government sent aid to the small Jewish community in Bosnia and airlifted several thousands of them to Israel during the war. In February 1993 Rabin's government decided to bring about 100 Muslim Bosnian refugees to Israel and grant them temporary asylum, until the war was over<sup>382</sup>. On 17.2.1993 Yossi Sarid, the Minister for the Environment at the time and a veteran supporter of Human Rights in Israel welcomed some 84 refugees who arrived by plane<sup>383</sup>. The group, made mostly of families, was absorbed in Kibbutz Bet-Oren near Haifa. By 1995 most of the Bosnian refugees left Israel, either back to Bosnia or to reunite with family members in other parts of Europe<sup>384</sup>.

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<sup>380</sup> Ben Dor & Adut (2003), pg. 19.

<sup>381</sup> Herzog (2003), pp. 33-34 and 53-54.

<sup>382</sup> Herzog emphasises that with coherence to the other five cases in which Israel brought groups of non-Jewish refugees by its own initiative, the decision was made by the government, and not by the Parliament, as a one-time, ad-hoc gesture. See Herzog (2003), pg. 53.

<sup>383</sup> Seemingly, the decision was made following the initiative of Minister Sarid. See Herzog (2009a), pg. 193 (citing Markowitz, "Living in limbo: Bosnian Muslim refugees in Israel" (1996). and interview with Yossi Sarid (November 2013). If this were the case, it goes to show the weight personal actions of key figures in the Israeli establishment have in the shaping of Israeli humanitarian gestures. Another interviewee, a cognoscente of international refugee affairs, claimed that the group was a descendent of Bosnian Muslims who saved Jews in the WWII and demanded Israel to save them to pay back the moral debt.

<sup>384</sup> Markowitz (1996). Markowitz followed the experience of the Bosnian families in the Kibbutz for about a year and concluded that their "limbo state", originating in the temporary nature of the asylum given to them, was actually beneficial to their sense of identity and stability.

## KOSOVO REFUGEES 1999

In 1999 war erupted again in the Balkans, as the Albanian ethnic minority demanded self-determination from Serbian rule. The Serbian response was harsh and the outcome was Europe's most violent ethnic conflict since WWII. Following reports of mass murders, large-scale systematic rape and deportations, Serbia was accused of ethnic cleansing. The international community mobilized for a humanitarian, and eventually military, intervention. Israel participated in the international efforts with humanitarian aid, including on site field hospitals, which were sent to area. Furthermore, in its last days in office Netanyahu's *Likud* government decided to offer asylum to about 100 refugees. On 12.4.1999, on the eve of Israel's official Holocaust commemoration day, 112 Albanian refugees landed in the Ben-Gurion airport<sup>385</sup>. The refugees received temporary tourist visas and some socio-economic aid<sup>386</sup>.

## INTRODUCING TEMPORARY GROUP PROTECTION (TGP)

In 1999, at the request of the UNHCR Israel granted Temporary Protection status to citizens of Sierra Leone, Ivory Coast, Liberia and Congo<sup>387</sup>. Temporary Protection, occasionally referred to as Group Protection, is an international legal-humanitarian mechanism installed to aid and protect certain groups or categories of people seeking refuge, usually in volatile situations. The nature of Temporary Protection differs between different countries and situations. It is primarily used under two types of circumstances: the first is critical mass flight of people from a certain area or country, which prevents host countries to individually conduct a full Refugee Status Determination (RSD) process. The other is when people migrate in refugee-like circumstances but do not qualify for recognition as refugees under the Refugee Convention<sup>388</sup>. There is no one accepted definition for Temporary Protection. The UNHCR has offered these possible definitions in cases of mass flight:

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<sup>385</sup> Herzog (2003), pp. 34-35 and 54-55 and Herzog (2009a), pg. 193.

<sup>386</sup> Ben Dor & Adut (2003), pg. 19.

<sup>387</sup> Afeef (2009), pg. 7.

<sup>388</sup> Kritzman-Amir (2012), pg. 101. People can find themselves in a convergence of the two situations as well.



“... a means, in situations of mass outflow, for providing refuge to groups or categories of people recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determination.”<sup>389</sup>

Or:

“... best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx. Its value in ensuring protection from refoulement and basic minimum treatment in accordance with human rights without overburdening individual status determination procedures has been demonstrated.”<sup>390</sup>

For other situations the UNHCR proposes the following broad description:

“Outside the context of mass influx, temporary protection has also been flagged as a possible response to other situations, such as to persons fleeing or unable to return to their countries of origin owing to war, generalized violence and other humanitarian crises or threats to their lives. It may also be applicable in situations that are fluid or transitional, for example at the beginning of a conflict or in the post-conflict context; or in situations necessitating humanitarian evacuation, maritime protection/rescue at sea, and responses to natural disasters or other emergency situations.”<sup>391</sup>

Israel’s compliance with the UNHCR’s request gave way to the development of a Temporary Protection (TP) regime in the country<sup>392</sup>. For most of the initial groups, TP ended after a few years. For Sierra Leoneans, it ended in 2006; for Liberians in March 2007; for most Ivorians, in December 2008 while some Ivorians originating from certain areas were allowed to stay until 2012<sup>393</sup>. Congolese asylum seekers still enjoy TP today. In more recent years Israel has extended Temporary Protection to the citizens of Togo, Eritrea,

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<sup>389</sup> UNHCR, “Roundtable on Temporary Protection, 19-20 July 2012, at the International Institute of Humanitarian Law, San Remo, Italy; Discussion Paper”. Available at: <http://www.unhcr.org/506d85849.html> (retrieved 24.3.2014).

<sup>390</sup> UNHCR, *ibid.*

<sup>391</sup> UNHCR, *ibid.* (2012).

<sup>392</sup> Afeef (2009), pg.18.

<sup>393</sup> Harel (2014), pg.14 and Afeef (2009), pg. 7 citing Martins (2006).

Sudan, South Sudan<sup>394</sup> and Burma, although the authorities' position on the matter was often unclear and contradicting.

The issue of Temporary Protection has not been regulated and therefore there is no official procedure for the granting or removal of TP<sup>395</sup>. Hence, some of these groups may be regarded as receiving de-facto TP as a result of the fact that the Israeli government and courts recognise that their right for non-Refoulement makes them “un-deportable” for the time being. Such is the case for 90% of the asylum seekers in Israel, i.e. Eritreans (roughly 60%) and Sudanese (circa 30%). Until circa 2010 officials regarded these groups as recipients of TP, but afterwards the terminology has changed and in most official declarations they are referred to as “un-deportable” infiltrators. Basing her findings on court verdicts (mostly of the Administrative Court) Kritzman-Amir summarises:

“Currently, temporary group protection is granted to citizens of the Democratic Republic of Congo, and was given in the past to citizens of Ivory Coast, Liberia, Sierra Leone, and Togo, as well as those originating from South Sudan. Informally, temporary group protection is also currently being granted to citizens of Eritrea, Burma, and Sudan.”<sup>396</sup>

## **FIRST BUDS OF ASYLUM REGULATION**

The Attorney General's excludes automatic implementation of the Prevention of Infiltration Law on Sudanese unauthorised migrants.

As described earlier, individuals entering Israel without permission were treated either by the Entry to Israel Law (5712/1952) or by the Prevention of Infiltration (Offences and Jurisdiction) Law (5714/1954)<sup>397</sup> depending on various factors such as their nationality, the

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<sup>394</sup> Protection for South-Sudanese nationals ended in 2011, when South Sudan became an independent state and recognised by Israel. In 31.1.2012 PIBA announced that all South Sudanese must leave the country in 60 days and by the spring of 2012 Some 3,000 South-Sudanese nationals were deported (almost all of those present in Israel). The order to leave the country and the eventual deportation were enacted over a short period of time, unlike earlier cases, in which recipients of TP which has ended were given a longer period of time to prepare for their repatriation. See Nathan, Knesset Research Centre, “Termination of Group Protection to Asylum seekers from South Sudan” (2012).

<sup>395</sup> Nathan (2012), paragraph (1).

<sup>396</sup> Kritzman-Amir (2012), pg. 102, end of first paragraph.

<sup>397</sup> See Sporadic arrival of asylum-seekers into Israel in the 1990's section earlier in this paper.

place through which they entered or where they were caught. While under the Entry law the maximum duration a person could be held in prison until deportation was 60 days<sup>398</sup>, most migrants originating from Arab countries who were hostile to Israel were detained under the Prevention of Infiltration law for much longer periods of time. In March 2000, due to an increase in the number of unauthorised migrants entering Israel from Egypt, most of them Sudanese, including asylum seekers, the Attorney General Eliakim Rubinstein ordered the IDF to question each person entering from Sinai to determine if they pose a security threat and not regard them automatically as “Infiltrators”. If they were not found to pose such a threat, then they were to be treated under the Entry Law. According to the inquiry of Israel’s State Comptroller and Ombudsman from 2007, Rubinstein’s order was not implemented until 2007, due to contradicting views between the army and the secret service whether or not the migrants’ presented such a risk. Only in 2007, when the number of migrants entering from Sinai rapidly soared, did the government issue clear instructions to all the state bodies involved to implement the Attorney General’s order<sup>399</sup>.

## **SOUTH LEBANESE REFUGEES IN ISRAEL (2000)**<sup>400</sup>

In May 2000 Israel ended its 18 years of military control over the southern part of Lebanon. Since the end of the First Israeli-Lebanese War, Israel’s “Security Zone” became the central fighting zone between the IDF and Palestinian and Lebanese militant groups, primarily *Hizbullah*. An average of 30 Israeli soldiers per year were killed and many more

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<sup>398</sup> The State Comptroller and Ombudsman, Annual Report 58b (2007, Heb.), pg. 109 referring to Entry to Israel Law (5712/1952), chapter 4, paragraph 13A.

<sup>399</sup> The State Comptroller and Ombudsman (2007), pp. 110-115. The army regarded the Sudanese migrants as innocuous and suggested to liberate them while the General Security Service insisted on keeping them in prison. As a result of this disagreement, the army kept most of the Sudanese men in prison while liberating the women and children. The army repeatedly requested the government to settle the matter and order civilian authorities (the Israel Prison Service and the Ministry of Interior) to take responsibility over the migrants.

<sup>400</sup> For an efficient synthesis of Israel’s initial treatment of the SLA people, see Zolfan, The Knesset – Research and Information Centre, “The status of SLA people” (Heb. 2001). Background document produced for the Internal Affairs and Environment Committee. For an analysis of the symbolic economy of refugeedom and citizenship in the case of the SLA refugees, see Herzog, “The road to Israeli citizenship: the case of the South Lebanese Army (SLA)” (2009b).

injured in this period. In 1999 Prime Minister Barak's campaign promise was that within a year of his entry to office Israel will withdraw from Southern Lebanon. The hope was that this would be part of an Israeli-Syrian peace agreement, which will give Israel security guarantees also in Lebanon, where Syria held considerable sway. However, the peace negotiations with Syria failed in early 2000 and Barak's government decided to withdraw from Lebanon without any agreement or guarantees. Although his self-proclaimed "deadline" was set to July 2000, the IDF hastily retreated his forces from Southern Lebanon in May 2000, parallel to the disintegration of its main ally in the area, the South Lebanese Army (SLA). Fearing retribution from the hands of *Hizbullah*, anti-Israeli mobs or the Lebanese government, some 6,500 people affiliated with the SLA brusquely left their homes and headed to the Israeli border, desperately asking for asylum<sup>401</sup>. Israel had expected a few hundred SLA officials would have to come to Israel as a result of the withdrawal, and had previously negotiated with Germany that it would accept some others. Yet, the sight of thousands of Lebanese refugees amassing at the Israeli border stations came as a harsh surprise to the Israeli establishment. It constituted an extremely embarrassing image to the government for it showed the hastiness of the Israeli retreat and the high cost its allies in Lebanon had to pay for Israeli policy. The refugees were allowed to enter and eventually as much as 8,000 came in the next few months. In the end, about 1,500 refugees returned to Lebanon the following year, Roughly 400 were resettled in third countries (mostly Germany) and 4,000 were legally integrated in Israel, receiving financial and social aid, permanent residential status and the possibility of full naturalization, all similar to what is given to Jewish immigrants<sup>402</sup>. Indeed, although the South-Lebanese refugees were accepted on account of their humanitarian strife, their status, both legally and within the political discourse, was not that of regular refugees. Nor was the state's willingness to welcome them linked to Israel's international obligations under Refugee Law.

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<sup>401</sup> Morris, *Righteous Victims* (2001), pp. 654-657. Herzog indicates 5,966 as the number of refugees who entered Israel in May 2000, with about 80% of them SLA soldiers and their families, and 20% other South-Lebanese refugees. See Herzog (2009b), pg. 576. (citing Zolfan (2001) . Ben Dor & Adut (2003) report that the number given by the UNHCR was 5,895 (pg. 19).

<sup>402</sup> Ben Dor & Adut (2003), pg. 19, Herzog (2003), pg. 36, and *The Law for the Fighters of the South-Lebanese Army and their Families 5774/2004*. By 2010 there were about 2,500 left in Israel from the original group. See Agmon, Knesset Research Centre, "Funding Designated for the people of the ex-South Lebanese Army" (2010).

Instead, they were granted haven and full naturalization rights because of their military alliance with Israel and the state's responsibility for them and their refugeedom. It was seen as a moral debt Israel owed the people of the SLA for they had fought alongside Israeli soldiers for more than two decades in order to protect the country's northern border<sup>403</sup>.

Ben Herzog closely examined the function of the SLA's refugeedom in their absorption in Israel. His analysis exposes an important juxtaposition between the motivations to grant asylum and the constructions that are used to justify the action. He claims that the motivation behind accepting the SLA soldiers and their families was:

“...intimately connected to their military alliance with Israel. [...] In Jewish-Israeli public opinion, and in particular for those who spent time as soldiers with the SLA during their service in South Lebanon, the SLA troops had forged an alliance with the State of Israel, spurred on by a sense of identification and shared destiny.” Therefore, the “[...] SLA refugees were granted asylum in Israel mainly as remuneration for their service to the Zionist project.”

Nevertheless, Herzog argues that the introduction of thousands of Lebanese Arabs into the Jewish state was in contradiction to the Israeli national ethos<sup>404</sup>. Initially, in order to overcome the ethno-national barrier and justify the absorption of the SLA asylum seekers, the “[...] elites in Israel, whether the government, the media or the army, enlisted the image of the refugee in order to prepare the Israeli public to accept the SLA and their families.”<sup>405</sup>

Yet identifying them as refugees presented a hindrance of its own, because:

“In the Israeli-Jewish collective memory the notion of refugees is associated with Palestinian refugees. Therefore, ideologically, as long as the SLA were viewed as Arab refugees, they could not be fully assimilated. Only when the refugee image was removed and replaced with the neutral signifier of SLA people, could the Jewish

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<sup>403</sup> Herzog (2009b), pp. 578-579. Revealing in this context is the active role the security apparatus played in their absorption, and the voluntary groups created by ex-veterans in order to assist the SLA people in Israel. See Herzog (2003), pg. 36 and 60.

<sup>404</sup> Herzog calls them the “hegemonic ideals of the country”. Herzog (2009b), pg. 576.

<sup>405</sup> Herzog, *ibid.* centre.

state begin to naturalize the SLA”.<sup>406</sup>.

By analysing the SLA case, Herzog illustrates how:

“Rather than an essential description of a social situation, the notion of refugees is a symbolic signifier added and removed in line with its political resonance”<sup>407</sup>.

The case of the South-Lebanese refugees remains an exception in Israeli history of asylum. They were clearly not regarded as regular, individual ‘Convention Refugees’, as they received a far more generous treatment and a stern Israeli commitment to guarantee their safety<sup>408</sup>. Furthermore the circumstances of their arrival and the motivations for their acceptance were quite different than those of the previous four cases in which Israel “imported” groups of refugees from Vietnam and ex-Yugoslavia. The South Lebanese presented themselves at the Israeli border and requested asylum as a direct consequence of Israeli policy in Lebanon. Therefore, Israel had unique political and moral motivations to take them in.

That said, the story of the SLA refugees<sup>409</sup> is an important occurrence in the evolution of Israel’s asylum regime. While it does not necessarily strengthen Israel’s commitment to other asylum seekers, it does institute a precedent in which the State of Israel granted asylum and full rights, and eventually absorbed, several thousands of non-Jewish refugees. As Herzog’s analysis of the SLA case elucidates, the differentiation between motivation and justification is important for the comprehension of the development of Israel’s asylum regime.

## **THE PROCEDURE OF TREATMENT OF ASYLUM SEEKERS IN ISRAEL (2001)**

In 2000 the UNHCR’s representative in Israel, Michael Bavly, approached Deputy Attorney General Meni Mazuz in request to regulate the treatment given to asylum seekers. Mazuz, who later became the Attorney General, was responsible at the time for the

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<sup>406</sup> Herzog, *ibid.*

<sup>407</sup> Herzog (2009b), pg. 575.

<sup>408</sup> See, e.g., Agmon, the Knesset’s Research Centre (2010).

<sup>409</sup> And those “other 20%” which joined them in their flight.

population and internal affairs in the Attorney General's office. In view of Bavly's request and due to the growing numbers of migrants crossing the border from Egypt, Mazuz initiated an inter-ministerial administrative effort to create a standard procedure for the processing of asylum requests in Israel<sup>410</sup>. The procedure was approved by the Minister of Interior Haim Ramon in January 2001 and became the binding reference for Israeli authorities in matters of asylum ever since<sup>411</sup>. The procedure instituted a 'Hybrid Model' in which the Israeli authorities relied on UNHCR RSD process and final recommendations, which were then examined by an inter-ministerial committee and finally approved by the Minister of Interior<sup>412</sup>. Thus began the official codification of Israel's asylum regime.

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<sup>410</sup> Harel (2014), pp. 9-10. This account of the creation of the Procedure was confirmed by Meni Mazoz via an email sent to the author on 30.3.2014.

<sup>411</sup> For the procedure and its analysis see Ben Dor & Adut (2003), pg. 10 and pp. 27-45. The procedure has been updated several times and revised in 2011. The current version in effect is from 26.2.2017.

It can be found in hebrew on PIBA's web site:

[https://www.gov.il/BlobFolder/policy/handling\\_political\\_asylum\\_seekers\\_in\\_israel/he/5.2.0012\\_heb.pdf](https://www.gov.il/BlobFolder/policy/handling_political_asylum_seekers_in_israel/he/5.2.0012_heb.pdf) (Last visited 1.10.2017)

<sup>412</sup> See more at the UNHCR section of this paper.

## CHAPTER V

### ISRAEL'S CONTEMPORARY ASYLUM REGIME (2001-2017)

Historical periodisations are subjective constructs rather than reality. One of the underlying reasonings of this research is that Israel's asylum regime, like most regimes, is a continuum in which each state of affairs in a specific point in time is related to what came before it. For this reason, the previous chapters were structured in chronological order, while containing thematical 'time leaps' to later stages in the IAR's development, to show the intertwined relations between past and present. That said, and without contradicting the logic of continuity, one can very reasonably claim that the time frame in which the current IAR has taken its form, i.e. between 2001 and 2017, produced many developments which differentiate it from what came before it. The central ones are:

1. The increasing numbers of unauthorised asylum seeking migrants in Israel.
2. Growing public interest, both for and against the migrants.
3. The politicisation of the issue of unauthorised and asylum seeking migration.
4. The eventual creation of an independent Israeli asylum system including RSD and a miscellany of responses by the different state apparatuses to the array of challenges and needs asylum migration generates.
5. The development of an active and motivated civil society coalition to aid the migrants and challenge anti-immigration policies.
6. The deterioration of the controversy over unauthorised migration between the government and parliament on one side and the pro-migrant's coalition and the Supreme Court on the other and the ensuing constitutional crises.

I will address these developments in this chapter. It is worthwhile to recognise them and understand the uniqueness of the period while always bearing in mind its relations to the past. Another important difference regards the study and the development of knowledge on asylum in Israel. As explained in the literature review in the opening chapter of this dissertation, the overwhelming majority of the research focuses on the latest developments, i.e. from 2001 and even more so from 2005 and onwards. The reasons for



this seem obvious: before 2001 there was much less asylum regime to talk about and there was less awareness and interest in the subject. Another reason is that very few historians have taken up the issue of non-Jewish asylum immigration in Israel, and therefore a more historical, continuous approach to its study has not been developed<sup>413</sup>.

Therefore, due to the distinctive ontological and epistemological nature of the period 2001-2017, a different approach to it seems necessary. I am referring here to the effort to weave together chronology and theme-focused analysis. The chronological structure used thus far linked together the basic components and origins of the IAR from the early days of statehood to the very recent past. It served to unravel and emphasise the IAR's evolution through time. Because the contemporary period is so abundant in events, developments and contrasting views, and because most of the works published focus on specific aspects of the asylum regime, the final part of this dissertation attempts to offer a broader, more comprehensive interpretative framework.

It first proposes several chronological stages from 2001 to 2017 while elaborating on the main developments that characterise the periods. The distinctions between periods and between themes at times seem unnatural. This is a result of the artificial quality of linearity requested by the essay form of this research, as opposed to reality's complex net of direct and indirect relations in the parallel and simultaneous evolution of the various components of an asylum regime. In order to discern some major conclusions from the analytical process, the chapter concludes by venturing to expose the main forces that have shaped the evolution of the IAR and analysing the interplays between them.

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<sup>413</sup> The most notable exceptions are Gilad Ben-Nun, Galia Zabar, Ben Herzog and Rotem Giladi.

## CHRONOLOGICAL STAGES IN THE LATEST DEVELOPMENTS OF THE IAR 2001-2017

### LIMBO (2001 – 2007)

In the early 2000's the number of unauthorised migrants and asylum requests in Israel grew considerably for two main reasons: the first was the government's policy and actions to reduce the number of foreign workers in Israel after a decade of massive import and lenient control of incoming labour migration. As explained earlier the change of policy included large scale deportations of immigrants who over-stayed their visas. The fear of deportations caused some migrants, mostly from Africa and South-America, to file asylum requests to the UNHCR in hope for protection. The increase can be seen in the following table<sup>414</sup>. Note that in 2003 the deportation operations by the newly established Immigration Police reached their peak, corresponding chronologically to the sharp increase of asylum requests.

Year	Requests for Asylum	Refugee status granted
2000	165	10
2001	393	18
2002	283	36
2003	1389	13
2004	922	12
2005	909	11
2006	1348	6
2007 (until 1.9.2007)	2968	3

The second reason was growing infiltration of migrants through the Egyptian border. The end of the 1990's and early 2000's saw the development of a prosperous industry of smuggling, including human trafficking of mostly Eastern European women

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<sup>414</sup> Israel's State Comptroller Report 58b 2007 pg. 105.

designated for prostitution, through Sinai into Israel. Once the smuggling routes were already developed, a slowly increasing number of migrants used them to arrive. There is no clear data on the exact numbers or origins of these migrants, but it was probably not more than a few hundreds per year. Ethiopians were the most salient group of migrants who filed requests of asylum to the UNHCR office in Tel Aviv at the time.

In 2005 a group of Sudanese migrants crossed the Sinai desert to Israel after the Egyptian police cracked-down on a three-month long sit-in of Sudanese and Eritrean asylum seekers in front of the UNHCR offices in Cairo. Most of the Sudanese were Darfurians fleeing from Genocide<sup>415</sup>. After the first group came others followed and by 2006-7 there were hundreds of Sudanese and some first Eritreans arriving, most of them after several years in Egypt in precarious circumstances. As in many other crises, the first to come were the ones with most agency, either socially, politically or economically. Many of the first Darfurians were leaders of local groups and associations that were individually persecuted for political reasons. As the route became established and better known, the profile of the migrants became more diverse and eventually included also women and minors fleeing the war and violence in several regions of Sudan<sup>416</sup>.

At the time, there was no clear coordinated or official policy to deal with the arrival of unauthorised migrants through the Egyptian border. Eritrean and Sudanese migrants (and some others from African countries as Liberia and Ivory Coast) received formal or de facto Temporary Group Protection (TGP) through a UNHCR based mechanism recognized by Israeli authorities. Most migrants were seized at the border by the army without resistance, interrogated and given urgent medical assistance when needed, detained when possible (depending on the limited capacity of detention facilities).

Most often all were eventually released, with little or no official status. They then had to turn to the UNHCR to receive a “Protection Letter” which stated that they were asylum seekers in the process of RSD or under TGP. With the letter in hand they could apply for a temporary short term visa<sup>417</sup>.

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<sup>415</sup> See Sabar & Tsurkov (2015) pg. 5, Kritzman-Amir (2015) introduction and Afeef (2009) pp. 8-9.

<sup>416</sup> Interviews conducted between 2014 and 2017 for this research with members of the Sudanese and Darfurian communities in Tel-Aviv and Jerusalem, on file with the author.

<sup>417</sup> Either the Temporary Resident visa 1B which grants the right to work or the “un-deportable alien” visa type (5)(A)2 (Heb. (5)(8)2) which gives no rights other than to be present in Israel awaiting for deportation to be possible. See Harel (in Kritzman-Amir ed. 2015) pp. 57-58.

## CONTRADICTIONS (2007-2010)

With growing numbers of unauthorised migrants mostly concentrated in Tel-Aviv and a few other cities, public and state attention to the challenges connected with asylum migration increased. Veteran and new local NGO's and aid organizations tried to assist the migrants while resistance to their presence grew both on local and the political national level. The government and other state bodies gradually began to address some of the most urgent issues in what Yonathan Paz has described as "ordered disorder"<sup>418</sup>. In 2005, the government decided to devise a comprehensive immigration policy for Israel, including asylum, and promote legislation on the matter<sup>419</sup>. An ad-hoc expert's committee was established to consult the government in 2005 and filed its recommendations in a preliminary report in February 2006 to the Minister of Justice Zipi Livni<sup>420</sup>. At the time, the report remained just a suggestion without realisation. It later became the basis for a private legislative bill proposed by Avi Dichter of Livni's ruling party Kadima, but never reached a final vote in the Knesset. The State Comptroller carried out an official investigation on the state's handling of asylum seekers and asylum requests in 2007 revealing a chaotic array of responses and policies, at times in contradiction with one another<sup>421</sup>. A good example of contradicting positions and policies of state bodies was the consideration of Sudanese citizens as enemy nationals and therefore a security threat. As early as 2000 and again in 2006, after an inter-ministerial consultation, the Attorney General office ordered not to regard all Sudanese citizens automatically as security threats and instructed the army to carry out individual assessments for each migrant caught at the border. However, due to contrasting stands of the army and the internal Security Service (Shin-Bet) on the issue, and a lack of clarity on who's responsibility was it to conduct the assessments, eventually most Sudanese men were automatically detained while women and children were released<sup>422</sup>.

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<sup>418</sup> Paz (2011).

<sup>419</sup> Government Decision 3805 from 26.6.2005.

<sup>420</sup> "The Consulting Committee for the review of an Immigration Policy for the State of Israel", interim report. Available in Hebrew at: <http://amnonrubinstein.com/למדינת-ישראל/הוועדה-המיעצת-לבחינת-מדיניות-הגירה-למדינת-ישראל.html> (visited 30.10.17)

<sup>421</sup> Israel's State Comptroller Report 58b 2007 pp. 100-101 and throughout the report.

<sup>422</sup> Israel's State Comptroller Report 58b 2007 pp. 110-113.

In 2007 Olmert's government granted 500 Darfurians permanent residence status<sup>423</sup> while trying to obtain Egypt's agreement to accept back migrants captured on the border and close migration routes in the Sinai<sup>424</sup>. In 2008, the government proposed a new Law for the Prevention of Infiltration, which was initially passed in the Knesset but eventually withdrawn before its final approval because of an effective and fierce public campaign against its harshness<sup>425</sup>. 2008 also introduced forceful immediate deportation of migrants caught on the border back to Egypt (known internationally as "Push-Backs" and named in Israel "Hot>Returns") and the "Hedera-Gedera" regulation, which prohibited unauthorised migrants to stay in the central part of Israel. Both policies were highly controversial and did not last. The "Hot Returns" procedure was cancelled by the government in front of a pending petition to the HCJ<sup>426</sup>. The Hedera-Gedera regulation was finally deemed inefficient and cancelled by the Minister of Interior Yishay in July 2009. In that same month the Administration of Border Crossings, Population and Immigration Authority (PIBA)<sup>427</sup> was created and began to operate as an independent organ inside the Ministry of Internal Affairs. PIBA is responsible for all foreigners in Israel, including unauthorised migrants and asylum seekers. With the inauguration of PIBA its own RSD unit began to work as well. It was established with the aid and instruction of the UNHCR and as of 1.7.2009 has operated separately from the UN agency<sup>428</sup>.

## **ANTI-MIGRATION EMERGENCY MEASURES (2010-2013)**

The average number of migrants arriving through the open Egyptian border surpassed 1000 a month in 2010 and remained that way until mid 2012<sup>429</sup>. The tolerance

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<sup>423</sup> Afeef (2009), pg. 13.

<sup>424</sup> A secretive oral agreement presumably on these issues was reached in Sharm el Sheikh between PM Olmert and president Hosni Mubarak. HCJ 7302/07 pp. 3-5 and Ben-Nun (2017) pg. 211.

<sup>425</sup> See the bill proposal early in this paper and more in Ben-Nun (2017) pp. 97-105.

<sup>426</sup> See HCJ 7302/07 pg. 9 para 11.

<sup>427</sup> Based on Government Decision 3434 of 13.4.2008, Government Secretariat digital archive (in Heb.): <http://www.pmo.gov.il/Secretary/GovDecisions/2008/Pages/des3434.aspx> (visited 30.9.17)

<sup>428</sup> Harel (in Kritzman-Amir ed. 2015), pg. 73.

<sup>429</sup> State of Israel, The Administration of Border Crossings, Population and Immigration (PIBA, in Hebrew). "Foreigners' data in Israel, 2/2017, July 2017", pg. 4.

threshold of Israeli society seemed to have been crossed. Without any political motivation to integrate the migrants, state services fell short of managing and treating them in most public aspects<sup>430</sup>. Growing difficulties, mostly in the overpopulated neighbourhoods in which the migrants were concentrated, led to resentment and unrest. The change of power that took place in 2009 ushered in a new centre-right Netanyahu government which affected the public sphere and the dominant discourse. The government described infiltration as a national security threat and associated it to the fear that if uncontrolled immigration will continue, Jews will become a minority in their own country. A comprehensive policy designed to put an end to infiltration and remove the unauthorized African migrants was created and gradually enacted<sup>431</sup>. Its two main pillars were the construction of a border fence to prevent unauthorized crossings; and the exercise of pressure on the un-deportable migrants by detention and other means to encourage or coerce them into leaving. Right wing politicians, including the Minister of Internal Affairs, directed political and public attention to the problems linked to the arrival and presence of non-Jewish African migrants. The deteriorating situation, mostly in the underprivileged southern neighbourhoods of Tel-Aviv, produced bottom-up pressure and top-down politicisation which encouraged feelings of insecurity and threat. The anti-migrants campaign led by neighbourhood-based organizations and right-wing politicians reached its peak in the spring of 2012 with ardent demonstrations and heated public polemics. Prejudice, propaganda and manipulation invoked harsh anti-migrant manifestations, including some violent incidents<sup>432</sup>. At the same time, as part of operation “Returning Home”, state authorities deported about 2500 migrants from South-Sudan as their TGP ended when South Sudan gained its independence a year earlier. The migrants’ deportation

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<sup>430</sup> See Israel’s State Comptroller Report 64C from 2014 and Anteby-Yemini “Between Exclusion and Containment: African Asylum Seekers in Israel’s Urban Space” in Kritzman-Amir (2015) pp. 227-251. An important exception is to be found in the education system that has preserved a “child first” approach that admitted most migrant children to the regular school system regardless of their parents’ legal status or origin. Some opposition was made by local municipalities, as in Eilat and Arad, but overall the tendency of inclusion was maintained. See interview with officials at the Ministry of Education, on file, October 2015.

<sup>431</sup> For a summary of the government’s policy decisions up to 2011 see Government Resolution 3936 of 11.12.2011 and Natan, “Government decision 3936 – curbing illegal infiltration to Israel”. Knesset Research and Information Center, 19.12.2011, (in Heb. Jerusalem, 2011c).

<sup>432</sup> Ben-Nun (2017) pp. 135-164.

was deemed legal (not violating Non-Refoulement) by the court, based on the Ministry of Internal Affairs declared intention to individually assess the risk of Non-Refoulement for each migrant and the Foreign Office's evaluation that South Sudan was not dangerous as a whole to all its citizens<sup>433</sup>.

In 9.1.2012 the Knesset approved the government's 3<sup>rd</sup> amendment to the Prevention of Infiltration law, the first primary legislation to specifically address contemporary asylum migration to Israel. The amendment defined those who entered Israel illegally through an unauthorised border passage as infiltrators who should be deported. For those who refused to leave, the amendment ordered a minimum three years and possibly indefinite detention period, until their deportation would become possible. The new amendment replaced the short detention policy that was based on the Entry To Israel Law (1952) but was enforced arbitrarily and inconsistently hitherto. However, even with the new legal instrument at the disposal of the detention policy there was not nearly enough room in the detention facilities to hold the approximately 50,000 unauthorised migrants present in Israel at the time<sup>434</sup>. A massive Open Detention Facility for over 10,000 migrants was planned and ordered by the government but was not constructed until the end of 2013.

The first goal of the government's policy was achieved in December 2012 as most of the security fence along the Egyptian border was built and inaugurated officially in January 2013<sup>435</sup>. Even before its completion, the number of arrivals of new migrants dropped dramatically leading to an annual total of 119 in 2013 compared to 10,497 in 2012.

## **CONSTITUTIONAL CRISES (2013-2015)**

On 16.9.2013 the Israeli High Court of Justice ruled unanimously that the major component of the 3<sup>rd</sup> amendment to the Prevention of Infiltration law, i.e. the arbitrary

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<sup>433</sup> Jerusalem District Court, Administrative Plea 53765-03-12 from 7.6.2012.

<sup>434</sup> According to the UNHCR its concerned population in Israel in 2012 was 54,218. See UNHCR Global Trends Report 2012 (published 6.2013) pg.39. Natan estimates about 45,000 in the end of 2011 based on government data. See Natan (2011c) pg. 6.

<sup>435</sup> See the Prime Minister's Office, official publication:

<http://www.pmo.gov.il/MediaCenter/Speeches/Pages/speechgader020112.aspx> (last visited 1.10.2017). The last 20 km of the fence in its Southern part were completed in the end of 2013.

detention of infiltrators for a prolonged or indefinite time, violates the Basic Law: Human Dignity and Liberty (1992). The judges examined the Infiltration law in light of the Basic Law's order that "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."<sup>436</sup> Israeli jurisprudence attributes constitutional standing to the Basic Law and holds that the "values of the state of Israel" are those declared upon in the Declaration of Independence and the other Basic Laws which define Israel as a Jewish and democratic state. The justices determined that the government's amendment disproportionately violated the migrants' human dignity and freedom. In the local political and public context, the court's decision was seen as another step in the struggle over the definition and interpretation of Israel's core values.

In a context in which Israeli public discourse has increasingly come to see the Jewish and the democratic aspects of the state as standing in conflict, the high court is often portrayed as the promoter of the state's liberal-democratic character, while the government and Knesset are depicted as representing its Jewish national identity<sup>437</sup>. In reaction to the court's decision, members of the governing coalition proposed an amendment to the Basic Law: Human Dignity and Liberty which would enable an absolute majority of the Knesset (61 MKs), to override judicial review and re-enact a law that had been annulled by the High Court<sup>438</sup>. The government did not follow through with the proposed change to the Basic Law but instead quickly prepared and passed a 4<sup>th</sup> amendment to the Prevention of Infiltration law on 10.12.2013. The new amendment limited the detention of infiltrators in a closed prison to one year and ordered those who refuse to leave Israel to be moved to what was termed an open facility that was built especially for this purpose and named

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<sup>436</sup> Basic Law: Human Dignity and Liberty (1992), para. 8.

<sup>437</sup> See Ben-Nun (2017) pp. 165-210, and Barak (1996, 1997). For contrasting opinions in this debate see, e.g., Sheftel & Eldad, "Israel under the Supreme Court rule. Indictment: e Supreme Court against Israeli democracy" (Im Tirzu think tank, 2014, Heb): <https://imti.org.il/wp-content/uploads/2015/05/בגז-שלטון-תחת-תחת-שלטון-בגז> (visited 1.10.2017), Fucks & Kremnitzer "Basic Law: Legislation – A Lethal Blow to the Supreme Court" (The Israel Democracy Institute, 2012, Heb.): <https://en.idi.org.il/articles/10280> (visited 1.10.17) and Zimuki, "The state against Bagatz" (2017, Heb.): <https://www.yediot.co.il/articles/0,7340,L-5016913,00.html> (visited. 1.10.17).

<https://yuvalyoaz.com/2014/10/23/החוק-לביטול-דה-פקטו-של-חוק-יסוד-כבוד-הא/>

<sup>438</sup> Law Bill 944/19/ 1P, Knesset archives internal number 542486.



“Holot” (“Sands” in Hebrew). Holot began operating just three days after the new amendment was passed. It was planned to host 10,000 people but had an initial capacity of only 1,500. The pro-migrant coalition immediately filed another petition against the new amendment. In its verdict from 22.9.2014, with a majority of 6 against 3, the HCJ annulled the Knesset’s new amendment, for the same reasons as the first annulment<sup>439</sup>. In reaction, senior coalition members decided to promote the bill that would limit the High Court’s authority over prime legislation<sup>440</sup>. The contention over the Prevention of Infiltration Law between the HCJ and the Government-Knesset had matured into fierce political pressure to change the balance of power between the state’s three branches. An open constitutional crisis was on its way.

The question of the High Court’s authority to annul the Knesset’s legislation had been contested on many different occasions before. But the fact that it was the issue of unauthorized/asylum seeking migration to ignite the clash so acutely emphasizes the centrality of the issue of asylum migration in today’s public and political discourse. Moreover, it reveals how the debate over asylum entails major dilemmas regarding the very nature and values of the nation-state. It is important to recall here that by 2013 very few migrants infiltrated into Israel. For the government, the heart of the issue passed from stemming new arrivals to projecting a harsh unwelcoming message towards the estimated 50,000 migrants already present. Senior government officials, including ministers and PM Netanyahu, stated that the goal was now to convince the migrants to leave Israel of their own will.

It is worth reflecting on the reasons why a relatively small number of migrants and asylum seekers (representing roughly 0.6% of the population) might provoke such harsh reactions and vehement opposition, and even upset the equilibrium between the organs of the state. This “sensitivity” is not merely Israeli. It is clearly seen in the European crisis over asylum migration, which more than any other problem has threatened the unity of the EU project. One can also ask the same question in relation to the importance of the issue of refugees in Donald Trump’s campaign and presidency. The Israeli government’s explanation is that Israel is the only developed Western country to have a land border with

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<sup>439</sup> HCJ 7385/13- 8425/13 pp. 237-238.

<sup>440</sup> Ben-Nun (2017) pp. 217-218.

Africa and that if it were to become a favourite destination for destitute African migrants then millions would come and spell the end of the Zionist dream, i.e. the existence of a Jewish nation-state. This explanation has been generally accepted by the courts and has not been unambiguously rejected by the pro-migrant organizations. However, it does not explain the similar larger Western phenomena. It also does not sufficiently explain the efforts in marginalizing and pushing away the Eritreans and Sudanese already present in the country once the border fence has been built and the number of new arrivals has dropped to fewer than one hundred a year. The authorities' stand is that the fence alone cannot stop migrants from arriving, only a combination of the physical obstacle and an unwelcoming environment inside the country can demotivate people from poorer and unstable countries from venturing to arrive. I will return to examine these quandaries in the concluding part of the work.

By 2013-4 Israeli public attention to the issues of asylum and infiltration had subsided. With infiltration through Sinai almost stopped, there was no more justification for the sense of imminent threat and urgency, and as a result the matter lost its ability to attract attention as a major political story.<sup>441</sup> However, the tension between migrants and local residents in the over-populated neighbourhoods where the migrants were concentrated continued and perhaps even deteriorated. Reflecting a desire for enhanced agency, both groups formed organisations and initiated activities to promote their interests. Not as strong and well-organised as the NGO's pro-migrants' coalition, these organisations still have had an important impact on subsequent developments in the legal, media and political struggles. The migrants' associations did so by assisting and sustaining the migrants in their everyday survival and eventually their ability to stay and withstand the difficulties and pressures to leave. The anti-migrants' organisations continued to lobby the government, parliament and the judiciary to reduce the presence of the migrants in their neighbourhoods. In doing so they have been instrumental in keeping political attention on the matter even as public attention dwindled.

On 9.12.2014 the government passed in the Knesset the fifth amendment to the anti-infiltration law. The new amendment was named "The Law for the Prevention of

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<sup>441</sup> Ben-Nun (2017) pp. 160-161.

Infiltration and for the Promotion of Departure of Infiltrators from Israel – 2014”, thus stating clearly its objectives. It introduced a three months detention period for new infiltrators and a twenty-month long detention at the open centre for those already in the country. It also reduced the daily call at the open centre to one instead of three in the previous amendment<sup>442</sup>. In its verdict in the consequent petition, the HCJ refrained from a third annulment of the same prime legislation and approved the amendment’s constitutionality. It did however deem unjustified the twenty-month detention period and ordered the Knesset to set a new shorter period. In the meantime, the court stipulated that the migrants could be detained for no longer than one year in the open facility<sup>443</sup>.

Confronted with the Knesset’s insistence on supporting the government’s stern policy, this ruling served to alleviate the constitutional crisis, at least for some time<sup>444</sup>.

## **VOLUNTARY / INVOLUNTARY DEPARTURES (2015-2017)**

One of the central points of objection in the petition against the 5<sup>th</sup> amendment regarded the second aim of the law: the promotion of departure of infiltrators from Israel. The plaintiffs argued that because the migrants in question enjoy the protection of Non-Refoulement, it is wrong for the state to pressure them to leave the country in a way that might endanger them. Specifically, it was claimed that the main objective of the prolonged detention period in the open facility was exactly this: to “break” the migrant’s spirit so that they would be convinced to sign their own voluntary departure to their country or to a third country. This aim, the plaintiffs claimed, was unworthy under the definitions of the Basic Law: Human Dignity and Liberty (1992) and therefore unconstitutional<sup>445</sup>. The court affirmed the plaintiffs’ stand that the state is not allowed to pressure migrants to leave the

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<sup>442</sup> In HCJ 7385/13- 8425/13 the judges criticized the three daily calls, in the morning, afternoon and evening, seeing them as measure to prevent from the migrants to leave the facility and therefore rendering vain its ‘open’ character. Another central criticism to the ‘openness’ of Holot was that it was located in a remote desert location near the Egyptian border and therefore cut off from any place the migrants would want to go to. The practice of setting migrants’ detention or hospitality centers in the periphery and away from public attention is common in many countries. See more at UNHCR Detention For Asylum Seekers report (2014) and \_\_\_\_\_ -

<sup>443</sup> HCJ 8665/14 (given 11.8.2015).

<sup>444</sup> Relevant to the general political context of the Court’s decision is the fact that the law was passed by a new parliament elected in 2014 and dominated by a right-wing coalition.

<sup>445</sup> HCJ 8665/14 para. 16.

country to any place that would not be safe for them (including a third-country that might deport them to an unsafe place) for that would undermine the principal of Non-Refoulement. However, the High Court refused to deem the law unconstitutional, based on the state attorney Gisin's response that in no way the migrants' in the open facility would be pressured to leave the country and that "breaking their spirit" is not among the objects of the law. In its answer, the state representative explained that its policy of "promoting departure" is not a form of "exercising pressure" on the migrants. The court accepted this distinction, and while it rejected pressure as unlawful, it allowed the policy of promoting departure.

After the opening of Holot in the end of 2013, promoting departure became a concrete and prime component of the government's policy. Without deportation or voluntary departure, the Open Facility on its own could not have had a significant impact given that it could hold only fewer than ten percent of the infiltrators present in Israel. Departure was promoted in two different ways:

1. Voluntary departure to a safe third country with which the government has reached an agreement which would guarantee the safety and rights of the departing migrants. The state has insisted that the confidential nature of these agreements is such that neither their details nor even the very identity of the third country may be revealed. From other sources we know the countries in question are Ruanda or Uganda. After reviewing the agreements, the High Court approved their legality and accepted the state's demand for secrecy. The government pays for the travel expenses and offers a one-time encouragement grant of 3500\$ for each parting migrant<sup>446</sup>. The extent to which this is truly voluntarily has been legally contested by the migrants and the NGO's<sup>447</sup>. Their petition was first rejected by the district court and was then

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<sup>446</sup> See the PIBA "Procedure for departure to Third-Countries from the Sojourn Facility Holot", procedure number 10.9.003 (from 12.7.2015) and Supreme Court Administrative Petition Appeal (מ"ע"מ) 8101/15 ( In Heb. given 28.8.2017) para 4. The exact sum of the grant mentioned in APA 8101/15 is 3500\$, but different sums have been mentioned by different sources (NGO reports, News articles, etc.).

<sup>447</sup> For more on the Third-Country agreements and the debate over voluntary departure see Ben-Nun (2017) pp. 206-215.

brought before the Supreme Court<sup>448</sup>. The state’s stand, which was approved by the court, was that it has a right to forcefully deport migrants receiving protection of Non-Refoulement to a safe third-country, but that the current secret agreements preclude such coerced deportation. Therefore, on 28.8.2017 the court partially accepted and partially rejected the plea. It stated that the state may deport the migrants to the two designated third countries, but that under the current situation due the nature of the agreements, the departure must be voluntary. The court specified that it is unlawful to detain migrants or coerce them in any way if they refuse to depart. It did permit a maximum sixty-day period of detention for unauthorised migrants that refuse to leave, as ordered in the Law of Entry (1952)<sup>449</sup>.

2. Resettlement through the UNHCR in another, usually developed, country. This could happen either on a personal basis, for family reunification for example, or through a special humanitarian scheme prepared by the UN agency. Sweden, Canada and Germany have accepted in recent years several hundreds of asylum seekers from Israel.

Below are the numbers of migrants who have left under the voluntary return plan in recent years<sup>450</sup>:

<b>Country of Origin</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017 (until 30.6.17)</b>

<sup>448</sup> The judges of the Supreme Court are the same judges of the High Court of Justice, but serving in a different function. The Supreme Court is the third and final degree of appeal while the HCJ gives direct access to any citizen or organisation that wishes to appeal against the state’s actions, policy or legislation. It is in this capacity that the HCJ mostly exercises its Judicial Review authority.

<sup>449</sup> Para 31, 124-127, Supreme Court APA 8101/15. The reason the verdict refers to the detention period ordered in the Law of Entry (1952) and not in the Law for the Prevention of Infiltration (2016) is that in its answer to the court the state chose to rely on the first and not on the later for its policy in the matter.

<sup>450</sup> “Foreigners’ data in Israel, 4/2016, 2016 Summary” and “Foreigners’ data in Israel, 2/2017, July 2017”, PIBA, available in Hebrew at: 2016:[https://www.gov.il/BlobFolder/generalpage/foreign\\_workers\\_stats/he/foreigners\\_in\\_Israel\\_data\\_2016\\_0.pdf](https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_Israel_data_2016_0.pdf)- 2017:[https://www.gov.il/BlobFolder/generalpage/foreign\\_workers\\_stats/he/foreign\\_workers\\_stats\\_q2\\_2017\\_1.pdf](https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf) (visited 10.10.2017)

Eritrea	1691	2480	2629	1832
Sudan	4112	600	390	132
Other African countries	611	301	227	117
<b>Total</b>	<b>6414</b>	<b>3381</b>	<b>3246</b>	<b>2081</b>

We can see by these numbers that according to official data the trend of departure continues in an average rate of above 4000 people per year. It is hard to predict for how long this trend will continue and whether it will increase or decrease. Eritrean and Sudanese informants both in Israel and abroad have said that those who leave either have some alternative solution (even if partial or risky) or are utterly despaired. The ones in between, who do not have anywhere else to go to and are still able to lead a life in Israel, prefer to stay. Government sources have hinted that the goal is to bring the infiltrators' presence in Israel to a minimum, not necessarily to drive them away to the last one. What is this "minimum" they were reluctant to say<sup>451</sup>.

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<sup>451</sup> This information comes out of 3 semi-structured interviews, on file with the author, and other informal conversations with migrants, state officials and NGO members.

## CONCLUSIONS

This work set out to accomplish three goals. The first was to create an historical account of the major events and developments in the evolution of Israel's asylum regime from 1948 to 2017. The second was to problematise this evolution and the way it has determined the current asylum regime. The third was to explore the interplay between the IAR's evolution and the national collective identity in the Israeli nation-state.

To achieve the first goal, I have identified and analysed those elements in the history of the state of Israel that I hold most relevant to the evolution of the asylum regime. As always in historical research the distinction between what is relevant and what is not is inevitably a product of interpretation. Since there was no existing comprehensive treatment of the research subject from a historical point of view<sup>452</sup>, the choices I made necessarily represent my own subjective exegesis of Israeli history.

The result is the historical account presented in the previous pages. Naturally, one can contest and criticise the selection made as well as the analysis constructed upon it. That will be most welcomed, as it may serve as grounds for further research and interpretation, by others or by myself in the future. After conducting the research and writing this dissertation, I think such work is needed in order to effectively conduct the ongoing debate over Israel's contemporary asylum regime.

As for the second goal of the study, I have tried to expose and analyse the interconnections between the historical perspective and the current state of affairs through most of the themes addressed in this paper. First and foremost to this end is the definition of the Israeli polity as a Jewish and democratic Nation-State. This brings us directly to the third goal of the research. Israel's foundational commitment to serve as the home of the Jewish people is the basis of its immigration regime. The state and its governments have proven time and time again that national priority is given to Jewish immigration while there is an underlying unwillingness to absorb non-Jews in the country.

Asylum regime is interrelated to the broader immigration regime. Israel's history of Jewish asylum is a clear proof to that: different governments have invested far-reaching

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<sup>452</sup> As mentioned earlier, Ben-Nun's book (2017) is a partial exception, mostly for the period 2005-2016.

efforts to save Jews in distress by bringing them *back home*. Although absorption of Jewish immigrants and refugees has never been an easy task for the state, and calls for the restriction of Jewish immigration have been voiced occasionally, they were consistently overwhelmed by the Zionist commitment to the ingathering of the Jewish diaspora. In the 1950's the Jewish population more than doubled through immigration. Since the 1980's the state enabled the arrival of Ethiopian Jewry despite the major cultural and socio-economical gaps between them and the local society.

In the 1990's Israel opened its gates to more than one million Russian immigrants, which represented circa 20% of the country's population. Many of them were not Jewish according to the Halacha (Jewish law) but considered by decision makers assimilable in some way into the Jewish majority<sup>453</sup>. In this way the state not only fulfilled its *raison d'être* but also guaranteed Jewish, or Jewish related, demographic superiority over the Arab minority. According to traditional Zionist perceptions, without Jewish immigration there would have been no way to sustain Israel as a Jewish country. Furthermore, the definition of the state as both Jewish and democratic is considered unattainable unless Jewish majority will always be guaranteed.

The result of this omnipresent conception is the opposition to Non-Jewish immigration, including asylum migration. In the context of the demographic rivalry with the Palestinians, there is a common fear that immigration might lead to a non-Jewish majority, which would be able to annul the Jewish character of the state, together with its democracy. This explains the motivation of the establishment to prevent the arrival and integration of non-Jewish asylum seekers, along with any other foreigner. However, Israel's liberal-democratic order evokes commitments to human rights and international law, which enforce limits to the ability of the government and parliament to pursue their objectives.

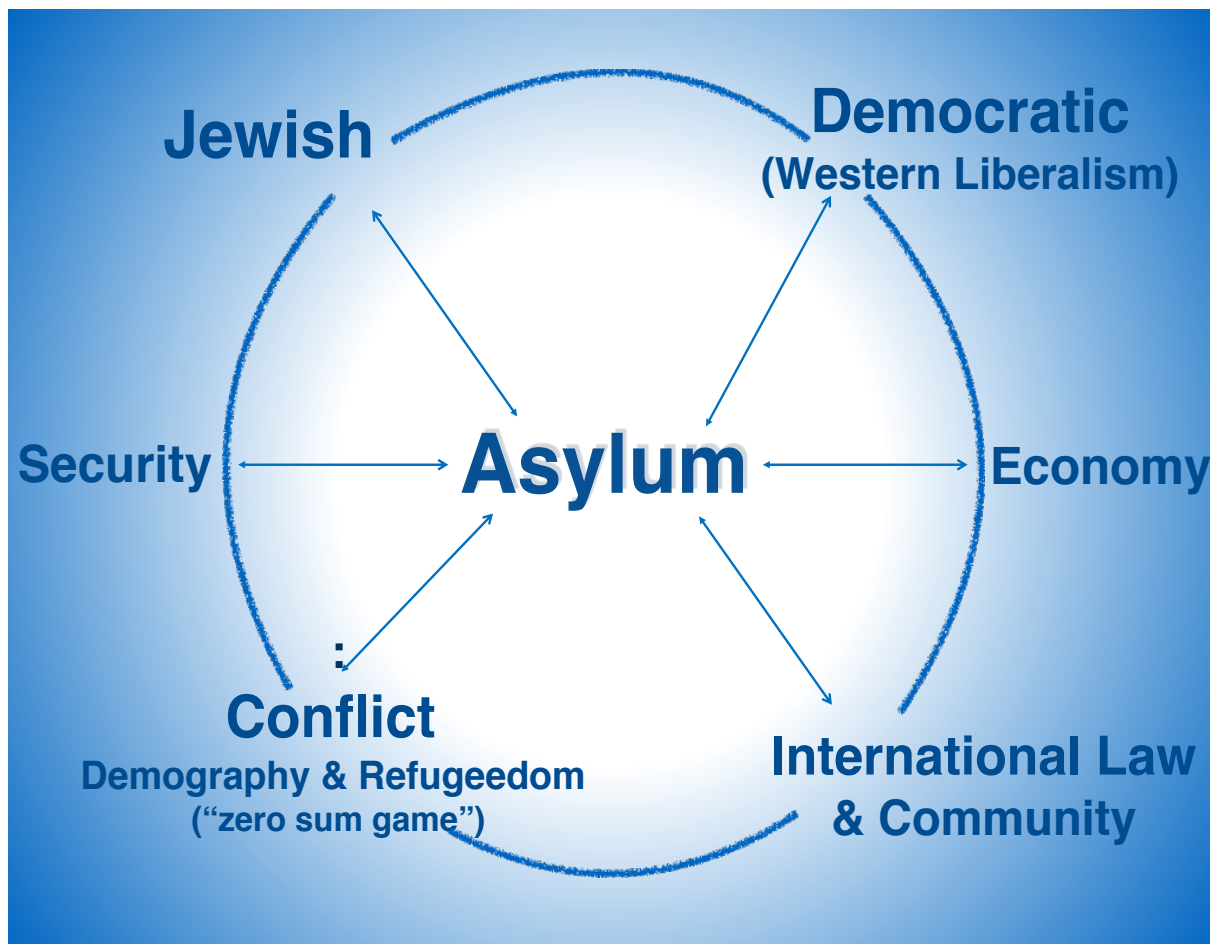
In this context, the Jewish and democratic components of the state's identity counter balance each other. To these two central pillars we should add Israel's ambivalent relationship with the international community and international law, its growing shift to a liberal-capitalist developed economy and the conflict with the Arab world, in which demography and the persistence of Palestinian refugeedom are predominant. Based on the

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<sup>453</sup> Interview with Yossi Sarid, Minister of Environment in Rabin's government at the time. On file with the author.



findings of this research, the above mentioned pivotal factors have delineated the political, legal and cultural space in which Israel's asylum regime has evolved, from its emergence to current day. We can represent graphically this conceptual space as such:



*Pivotal factors which have determined the evolution of the IAR:*

1. Jewish national identity: Israel being the Jewish nation-state.
2. The liberal-democratic principles and character of the state.
3. Israel's relations to International law and institutions within the context of its membership in the Western international community.
4. The ongoing conflict between Jews and Palestinians over land and self-determination. Within it, essential are demography and conceptions of refugeedom, i.e. who has the Right of Return to the land of Israel/Palestine.
5. The predominant role security and securitisation hold in Israel.

6. Liberal-capitalist developed economy which attracts migration due to its wealth and dependence on cheap labour.

These pivotal factors share complex reciprocal relations. The tensions and balances between them determine the boundaries of the conceptual space and the position of the IAR within it. Understanding them as dominant forces pushing and pulling the asylum regime in different directions contextualises the nuances of the IAR's evolution. The historical prospective of process and evolution adds to these dynamics a temporal dimension. This allows us to situate the graphic model on a timeline, transforming it from 2D to 3D:



Accordingly, major events, laws, government decisions and external forces have been able to push or pull the regime in different directions, but always in reference to the different pillars of the space-frame. For example, limitations on the access to asylum of non-Jewish migrants which are meant to preserve the Jewish character of the state clearly push the regime to the upper left part of the space. The use of the Anti-infiltration law, originally created to stop Palestinian infiltration, and then adapted to prevent African irregular migrants to enter the country is linked to the bottom left part of the frame. The HCJ's reviews of the law pull the IAR back towards the right part. As in physics, usually, each movement to one side augments the resistance from the other. It is also possible that

at a certain point the IAR can exit these conceptual boundaries, but then the opposite pull would intensify considerably. An example to this was the sporadic use of deportations of potential asylum seekers and the Pushbacks (known in Israel as “Hot Returns”) on the Egyptian border which were both suspended due to judicial criticism<sup>454</sup> and thus ‘returned’ to within the space-frame.

Some of the historical developments incorporated in this paper contradict the underlying motivation to keep non-Jews out and import Jews in. The main two examples are the long-lasting control over a large Palestinian population in the Territories and the Israeli market’s dependence on non-Jewish workers, which brought to the importation of hundreds of thousands of labour-migrants to Israel. When examining these phenomena in light of the policies toward asylum seekers and asylum migration, quandaries are unearthed; are economic incentives more powerful than the fear to jeopardise national identity? Why permit the arrival of ‘foreign workers’ from all over the world instead of allowing African asylum migrants to fill the need for cheap labour? In what way have the persisting security threats and the conflict with the Palestinians conditioned Israel’s readiness to offer asylum? Has the long-lasting military control over Palestinian civil population radiated to other spheres in which the state apparatus deals with non-Jewish groups? What are the costs Israel pays for its devotion to exclusionary policies? Is it possible to imagine an inclusive Jewish national identity, starting with asylum seekers who share a common and tragic fate with Jewish history through their refugeedom? Or does the essence of Israel as the Jewish asylum state exclude the possibility to become a safe-haven for others?

The work presented hitherto has introduced conceptual rudiments to most of these questions. Their thorough exploration needs further research and reflection and therefore lies beyond the scope of this dissertation. Having said that, positioning the evolution of the IAR within the time-space frame demarcated by the pivotal factors enables a more encompassing analysis and understanding of the processes at work. When we ask why things as complex as the asylum regime have developed the way they did we cannot expect simplistic answers. Even a multifaceted answer which includes just an array of pivotal factors similar to those addressed earlier will always be partial. Reality is just too

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<sup>454</sup> See, e.g. HCJ 5190/94 El-Taj vs. the Minister of Internal Affairs (1995), and [HCJ 7302/07](#) (verdict given on 7.7.2011).

complicated. It is true that any logical attempt to decipher reality's infinite interconnectedness brings with it a reduction process into words, terms and concepts. It is the nature of the process of thought and cognitive comprehension. As far as I know, we have not found a way to circumvent this yet. What we can do is try to develop new and ever more inclusive ways of learning and researching that refine our ability to grasp reality's complexities. The time-space framework proposal seeks to provide a tool to this end. Most, if not all, other explanations to the nature of the IAR can fit within it. Ben-Nun's conflict between universalism and exceptionalism, Kritzamn-Amir's otherness, Paz's ordered disorder, Kalir's fearism, Sabar & Tsurkov's analysis of Israeli anti-asylum policies, Perry's emphasis on security and demography and Ziegler's focus on constitutional implications are all either represented by (or related to) one of the pivotal factors or could introduce additional factors to the frame. The basic structure of the time-space framework allows a potentially infinite elaboration of more and more factors and the dynamics between them. This helps us remember that there probably is no one overarching explanation but a suspended net of forces which has woven over time the IAR into its contemporary state. This would probably be true to other asylum regimes and perhaps even to other phenomena in history and social sciences we wish to understand.

The Israeli case study can show us how a detailed historical study reveals the identity and function of the central forces at work in the evolution of an asylum regime. The central forces (or pivotal factors) and the dynamics between them are relevant to other case studies. The reciprocal relations and tensions between nation, liberal-democracy, security, economy and international law, would probably be present in most evolutions of asylum regimes, at least in the Western world. Globalisation, together with anti-globalisation movements, should be added to the equation. As a phenomenon, it gives transnational migration its broader historical context. As an ideology or logic, it represents a pivotal, and controversial, component in the contemporary world order. In Israel, I see globalisation as connecting the economic factor to the international community, as well as facilitating the arrival of African migrants through Egypt.

As Globalisation, Geopolitics is also important here. Each country has its own geopolitical context which affects the incoming asylum migration to it and at the same time interrelates with most, or all, of its internal central factors. Turkey's asylum regime during the Iraqi and Syrian civil wars has had close links with its strategic status in its region and

in its relations to Europe. Internally, the acceptance of close to three million Syrian refugees was justified by the religious Sunni kinship while playing an intricate role in the convoluted network of interests between local and neighbouring ethnic and political groups and parties.

Australia's special position has determined the type of asylum migration arriving to it and to a certain extent, its responses to it. The country's past and present as a liberal immigration country has had contradicting impacts over the evolution of its asylum regime and the fierce debates around it.

These are just two simplified examples to indicate what we might expect in other scenarios. When we add the Globalisation and geopolitical aspects to our framework we may illustrate it as this:



Religion plays an important role in many contexts as well. In Italy, catholic cultural values and mentalities underlie the discourse about asylum and set the boundaries of what is perceived as legitimate and what is not. Especially in recent years the catholic church has

intervened directly in the matters of asylum, on many levels: from influencing the media and public opinion, to putting pressure on local politicians, to activating a national network of aid initiatives to the migrants. Observing the Israeli and the Italian cases side by side helps reveal at least two interesting considerations. First, if we try to implement the tension between nation and liberal-democracy to the Italian case, we must position Catholicism somewhere in between. While it is a central part of the Italian collective identity, its relations to Italian nationalism are very complex. In its universal worldview it contradicts the particularistic tendencies within nationalism. Therefore, while Catholicism is at odds with many aspects of liberalism, on the matter of asylum they have much in common, holding human life and liberty above other considerations. This could be an initial explanation for Italy's active policy of salvage operations in the Mediterranean in recent years. The fact that this policy came after the push-back's scheme of the Benghazi agreement is a manifestation that different forces have influenced the Italian asylum regime in its evolution to its current state.

Out of the Italian-Israeli observation another conundrum arises: the apparent lack of religion in the Israeli case. Of course, Jewish national identity is intertwined with Judaism. Furthermore, Zionism's exceptionalist tendencies are rooted in Jewish history and Halacha. However, main stream religious leaders, parties and institutions have taken little or no part in the debate over asylum for non-Jews inside Israel. This is in stark difference to Jewish organisations in the diaspora. There are exceptions to this tendency, such as ex Minister of Internal Affairs and Shas leader Eli Yishay and a handful of other right wing politicians or activists which were instrumental in the anti-infiltration campaigns. But because these do not represent main stream religious Jews in Israel, and because their opposition was more nationalistic or xenophobic than religious, I see them as the exception that highlights the general rule.

Beyond shared factors, each case study introduces its own unique features which add to the basic structure of the time-space frame. In Israel, this could be seen by the predicaments of Jewish history, or by the conflict with the Palestinians. Both are omnipresent and relate to most other factors. In Germany, it is World War II, the Holocaust and their consequences. One cannot ignore the burden and lessons of German collective memory when exploring its asylum regime since 1945. The Federal Republic has the most consistently generous asylum system in Europe, in which the open gates policy

for Syrians in 2015 was the latest manifestation. Attempting to explain these facts without reference to Germany's specific recent history would be futile. This does not mean of course that the Holocaust or the division of East and West Germany can clarify alone asylum in Germany. As all other factors, they too are cast in the net and must be understood through their interrelations with the other components.

I hope that based on these concluding remarks the generous reader may appreciate the relevance of the Israeli case study as well as the contribution of the historical method and the time-space framework for the investigation of any asylum regime, including the global one.

I thank the readers for their time and thoughts.

Rome – Sde Boker, October 2017.

## BIBLIOGRAPHY

### GENERAL CONTEXT:

- AGAMBEN, G. *We Refugees*, trans. Roche, Michael. Symposium 49(3): 114-119 (1995a)  
*Homo Sacer: Sovereign Power and Bare Life*, trans. Heller-Roazen, Daniel. (Stanford: Stanford University Press: 1995b)
- ANDERSON, B. *Imagined communities: reflections on the origin and spread of nationalism*. (Tantor Media, Incorporated, 2012 [1983]).
- ARENDT, H. *The Origins of Totalitarianism*, New Edition. (New York: Harcourt, Brace, Jovanovich, 1973 [1951]).  
“We Refugees”, in Jerome Kohn and Ron H. Feldman (eds.), *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, (New York, Grove Press: 1978 [1943], pp. 55-66).
- BAUMAN, ZYGMUNT. *Modernity and the Holocaust*. (Cornell University Press, [1986] 1989).  
*Modernity and Ambivalence* (Cornell University Press, 1991).  
*Strangers at Our Doors* (Polity Press, 2016).
- BALIBAR, E. *Cittadinanza*. (Torino: Bollati Boringhieri, 2012).
- BATTJES, H. *European Asylum Law and International Law* (Leiden, 2006).
- BENHABIB, S. *The Rights of Others. Aliens, Residents and Citizens*. (Cambridge: Press Syndacate, 2004).
- BOSWELL, C. “European Values and the Asylum Crisis,” *International Affairs*, 76(3), pp. 537-557 (2000).
- BORK, ROBERT H. *Coercing virtue: the worldwide rule of judges*. (Vintage Canada: 2010).



- BRUBAKER, ROGERS. "*Migration, membership, and the modern nation-state: Internal and external dimensions of the politics of belonging.*" *Journal of Interdisciplinary History* 41.1 (2010): 61-78.
- Ethnicity without groups* (Harvard University Press: 2004).
- BRUBAKER, R. & FREDERICK C., "*Beyond "identity"*." *Theory and society* 29.1 (2000): 1-47.
- BYRNE, R. AND OTHERS (eds.). *The Refugee Law Reader*, 5<sup>th</sup> Edition. (Budapest-Dublin: 2008).
- CASTLES, STEPHEN, DE HAAS, HEIN AND MILLER MARK J. *The Age of Migration. International Population Movements in the Modern World.* (Fifth Edition, Guilford Press, 2013).
- CHABOD, F. *L'idea di Nazione.* (Roma-Bari: Gius. La Terza & Figli, 1961).
- CHIMNI, B.S. *International refugee law: a Reader* (SAGE: 2000).
- DAL LAGO, ALESSANDRO. *Lo Straniero e il Nemico. Materiali per l'Etnografia Contemporanea* (Costa & Nolan, 1998).
- GATRELL, P. *The Making of the Modern Refugee* (Oxford University Press: 2013).
- GELLNER, E. *Nations and Nationalism.* (Cornell University Press, 1983).
- GOODWIN-GILL, G. *The Refugee in International Law.* 2<sup>nd</sup> Edition. (New York: Oxford University Press: 2007).
- HATHAWAY, JAMES C. *The Law of Refugee Status.* 2<sup>nd</sup>. Edition. (Cambridge University Press: 2014 [1991]).
- The Rights of Refugees under International Law*, Canada: Butterworths Law: 2005.

*The Evolution of Refugee Law 1920-1950*, International and Comparative Law Quarterly, 33, pp. 348-380 (1984).

HOBBSAWM, ERIC J. *Nations and nationalism since 1780: Programme, myth, reality*. (Cambridge University Press, 2012).

HOBBSAWM, ERIC J., AND DAVID J. KERTZER. *Ethnicity and nationalism in Europe today*. Anthropology Today, pp. 3-8 (1992).

KYMLICKA, W. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford University Press, 1995).

MILLER, DAVID. *Strangers in our midst* (Harvard University Press: 2016).

REUS-SMIT, C. *Individual Rights and the Making of the International System* (Cambridge University Press, 2013).

SIMMEL, GEORG. *The stranger*. *The Sociology of Georg Simmel*, 402 (1950), pg. 408.

SMITH, A. *Nations and nationalism in a global era*. (John Wiley & Sons, 2013 [1995]).

*The nation in history: historiographical debates about ethnicity and nationalism*. (UPNE, 2000).

SEN, A. *Identity and violence: The illusion of destiny*. (Penguin Books India, 2007).

TAKKENBERG, ALEX. *The status of Palestinian refugees in international law* (Oxford University Press, 1998).

TILLY, C. *Citizenship, identity and social history*. International Review of Social History, 40, pp. 1-18 (1995).

*Stories, identities, and political change*. (Rowman & Littlefield Publishers, 2002).

UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. (UNHCR: December 2011) HCR/1P/4/ENG/REV.3.

VAN HEAR, N., BRUBAKER, R. AND BESSA, T. *Managing mobility for human development: The growing salience of mixed migration*. Human Development Research Paper (HDRP) Series, Vol. 20, No. 2009.

ZIMMERMANN, A. (ed.). *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press: 2011)

ZOLBERG, A. *The Formation of New States as a Refugee-Generating Process*. Annals of the American Academy of Political and Social Science, Vol. 467: “The Global Refugee Problem: U. S. and World Response”, pp. 24-38, (May 1983).

ZOLBERG, A., SUHRKE, A., AGUAYO, A. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989).

## ISRAEL:

AFEEF, KARIN FATHIMATH. *A promised land for refugees? Asylum and migration in Israel*. NEW Issues in refugee research, Research Paper No. 183, Policy Development and Evaluation Service (UNHCR: December 2009).

ALMOG, SHMUEL, JEHUDA REINHARZ, AND ANITA SHAPIRA. *Zionism and religion*. No. 30. (UPNE, 1998).

AVINERI, SHLOMO. *The making of modern Zionism: The intellectual origins of the Jewish state* (Hachette UK, 2017).

AVINERI, SHLOMO, ORGAD, LIAV AND RUBINSTEIN AMNON, Mezila Centre. *Managing Global Migration: A Strategy for Immigration Policy in Israel*, Position paper (Hebrew, 2010).

BARAK, AHARON. *The judge in a democracy*. (Princeton University Press: 2009).

*Unconstitutional constitutional amendments*. Israel Law Review, 44 (2011), pp. 321-341.

*Human rights in Israel*. Israel Law Review, 39 (2006), pg. 12.

*Judge on Judging: The Role of a Supreme Court in a Democracy A*. Harvard Law Review, 116 (2002), pg. 19.

*Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law, The*. Israel Law Review, 31 (1997), pg. 3.

BARAK-EREZ, DAPHNE. *Judicial review of politics: the Israeli case*. Journal of Law and Society 29.4 (2002), pp. 611-631.

BEN DOR, ANAT AND ADOUT RAMI. *The State of Israel, Safe Haven? Problems in the State of Israel's handling of Refugees and Asylum Seekers*, Physicians for Human Rights Report and position paper (Hebrew, May 2003).

BEN-NUN, GILAD. *Seeking Asylum in Israel: Refugees and Migration Law* (I.B. Tauris: 2017).

*The Israeli Roots of Article 3 and Article 6.* Journal of Refugee Studies, Vol. 27, Issue 1, pp. 101-125 (2013).

COHEN, YINON. "From Haven To Heaven. Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration" (2002: p. 36).

*The Demographic Success of Zionism* (HEB)/הצלחה הדמוגרפית של הציונות. *Israeli Sociology*/.355-362 :2 חוברת 2007, סוציולוגיה ישראלית,

CORINALDI, MICHAEL. *Jewish Identity: The Case of Ethiopian Jewry* (Jerusalem: Magnes Press, Hebrew University, 1998).

BERMAN, YONATHAN. *Until Our Hearts Are Completely Hardened: Asylum Procedures in Israel*, Hotline for Refugees and Migrants in Israel position paper (Tel Aviv: 2012).

GANS, CHAIM. *A just Zionism: On the morality of the Jewish state* (Oxford University Press: 2008).

*The limits of nationalism* (Cambridge University Press: 2003).

GAVISON, RUTH. *The Jewish state: principal justification and desired character* (in Hebrew: "Hamedina hayehudit: hazdaka ekronit udmuta harezuya.", Azure (Tchelet), 13 (2002).

*The Jewish state: A justification, New Essays on Zionism* (2006): 3-36.

*The Law of Return at Sixty Years - History, Ideology, Justification*, The Mitzilah Center, 2010: <https://ruthgavison.files.wordpress.com/2015/10/the-law-of-return-at-sixty-years-history-ideology-justification.pdf> (visited 10.9.17).

GAVISON, RUTH AND ELRAN, MEIR (Eds.). *Unauthorized Immigration as a Challenge to Israel*, Mezila Centre, summary of a convention held in September 2012, Memo 128, (Hebrew, June 2013).

- GELBER, YOAV. *Palestine, 1948: War, escape and the emergence of the Palestinian refugee problem*. (ISBS: 2006).
- GILADI, ROTEM. *A 'Historical Commitment'? Identity and Ideology in Israel's Attitude to the Refugee Convention 1951–4*, *The International History Review* 37.4 (2015): 745-767.
- HABIBY, EMILE. "The Secret Life of Saeed, the Ill-Fated Pessoptimist, trans." *Salma Khadra Jayyusi and Trevor Le Gassick* (London and New York: Readers International, 1985 [1974]).
- HAREL, SHARON. *Israel's asylum system: the transfer process of asylum applications from the UNHCR to the state of Israel*, at Krizman-Amir (ed.).  
*Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli Asylum Policy* (Hebrew, Van-Leer and Hakibbutz Hameuchad, 2015 pp. 43–87).
- HERZOG BEN. Unpublished Master's thesis *Between Nationalism and Humanitarianism: the glocal discourse on refugees* (Hebrew, 2003).  
*Between nationalism and humanitarianism: the glocal discourse on refugees*, *Nations and Nationalism*, 15 (2), 185–205 (2009a).  
*The road to Israeli citizenship: the case of the South Lebanese Army (SLA)*, *Citizenship Studies*, 13: 6, 575 — 592 (2009b).
- HOFNUNG MENACHEM. "Policy Making by No Decisions: Palestinian Informers at the High Court of Justice" in Jonathan Simon, Hadar Aviram, Rosann Greenspan (eds), *The Legal Process and the Promise of Justice: Studies Inspired by the Work of Malcolm Feeley*. Cambridge, Cambridge University Press (forthcoming, 2017).
- GROSS, AEYAL. *The Politics of LGBT rights in Israel and beyond: nationality, normativity, and Queer Politics*. *Colum. Hum. Rts. L. Rev.* 46 (2014), pg. 81.
- JOPPKE & ROSENHEK. *Contesting ethnic immigration: Germany and Israel*. *European Journal of Sociology*, Volume 43, Issue 03, pp. 301-335 (December 2002).

- KALIR, BARAK. *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): 580-598.
- KAGAN, MICHAEL. *Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East* (2007). Scholarly Works. Paper 635. Available at <http://scholars.law.unlv.edu/facpub/635> (visited 25.10.2017)
- KAGAN, MICHAEL, ANAT BEN-DOR, AND AELAD CAHANA. *Nowhere to run: Gay Palestinian asylum-seekers in Israel*. Tel Aviv University, Faculty of Law, Public Interest Law Program, 2008. Available at [https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media\\_server/Law/NowheretoRun,%20Michael%20Kagan%20%26%20Anat%20Ben-Dor%20\(2008\).pdf](https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media_server/Law/NowheretoRun,%20Michael%20Kagan%20%26%20Anat%20Ben-Dor%20(2008).pdf) (visited 30.10.2017)
- KEMP, ADRIANA & KRITZMAN-AMIR, TALLY. *Refugees and Asylum Seekers in Israel: Between the Administrative Procedure and the Civil Society*. Law, Society and Culture [Mishpat Hevra Ve'Tarbut], (Hebrew: 2008).
- Kirschenbaum, Eliran. *Israel, Refugees and Collective Identity*, e-International Relations (July, 2013) available at: <http://www.e-ir.info/2013/07/25/israel-refugees-and-collective-identity/> (visited 30.10.2017)
- KHALIDI, WALID. *Plan Dalet: The Zionist masterplan for the conquest of Palestine, 1948*. Middle East Forum, 1961.
- KRITZMAN-AMIR, TALLY. KRITZMAN-AMIR (ed.). *Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli Asylum Policy* (Hebrew, Van-Leer and Hakibbutz Hameuchad: 2015).
- Otherness as the underlying principal in Israel's asylum regime*. *Israel Law Review*, Vol. 42(3), pp. 603-627, (2010).

*Privatization and Delegation of State Authority in Asylum Systems*. Law and Ethics of Human rights (2011).

*Refugees and Asylum Seekers in the State of Israel*. Israel Journal of foreign Affairs, VI: 3, pp. 97-111, (2012).

*The Role of the Courts in the Shaping of Israel's Asylum Regime*, Ma'asei Mishpat, Vol. 5, (Tel Aviv: TAU, Hebrew, 2013).

KRITZMAN-AMIR, TALLY & SPIJKERBOER, THOMAS. *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*. Harvard Human Rights Journal, Vol. 26 (2013).

LAZIN, FRED A. "Israel and Ethiopian Jewish immigrants." *Society* 39.4 (2002), pg. 55.

NATAN, GILAD. *Handling and Treatment of Illegal Migrants and Asylum Seekers Crossing from Egypt by the State of Israel*. Knesset Research and Information Center, January 25, 2011, (Hebrew, Jerusalem, 2011a).

*Israel SOPEMI (OECD) Report, Immigration in Israel 2010-2011*. The Knesset Research and Information Center (Jerusalem, 2011b).

*Government decision 3936 – curbing illegal infiltration to Israel*. Knesset Research and Information Center, 19.12.2011, (in Heb. Jerusalem, 2011c).

MANN, ITAMAR. *Refugees*. Mafteach, 1, pp. 147-178 (Hebrew, 2010).

MAUTNER, MENACHEM. *Law and the Culture of Israel*. (OUP Oxford: 2011).

NATAN, GILAD. *Handling and Treatment of Illegal Migrants and Asylum Seekers Crossing from Egypt by the State of Israel*. Knesset Research and Information Center, January 25, 2011, (Hebrew, Jerusalem, 2011a).

*Israel SOPEMI (OECD) Report, Immigration in Israel 2010-2011*. The Knesset Research and Information Center (Jerusalem, 2011b).

*Government decision 3936 – curbing illegal infiltration to Israel*. Knesset Research and Information Center, 19.12.2011, (in Heb. Jerusalem, 2011c).



- MORRIS, BENNY. *Righteous victims: a history of the Zionist-Arab conflict, 1881-1998*. (Vintage: 2011).
- The birth of the Palestinian refugee problem revisited*. Vol. 18. Cambridge University Press, 2004.
- Politics by other means*. New Republic, 17 (2004).
- PAPPE, ILAN. *The ethnic cleansing of Palestine*. (Oxford, Oneworld: 2007).
- PAZ, YONATHAN. *Ordered disorder: African asylum seekers in Israel and discursive challenges to an emerging refugee regime*. (UNHCR, 2011).
- RABINOVITCH, MARIA. *Activity of the State of Israel's Actions in the Fight Against Human Trafficking: the Treatment of Women Trafficking*. Knesset Research Centre (Jerusalem, 2013).
- RAIJMAN, REBECA, AND SEMYONOV, MOSHE. *The meaning of citizenship, perception of threat and entitlement to rights: Majority attitudes towards minorities in Israel*. Journal of Ethnic and Migration Studies, 36,1, pp. 87-106 (2009).
- RUBINSTEIN, AMNON. *The Story of the Basic Laws*, (In Hebrew: Sipuram Shel Hukei-Hayesod), Law and Man (Hebrew: *Mishpat Ve-Adam*), pp. 79-109 (September 2012).
- RUBINSTEIN, AMNON & MEDINA, BARAK. *The Constitutional Law in the State of Israel* (Hebrew), 6<sup>th</sup> Edition. (Tel Aviv: Shoken, 2006).
- RUBINSTEIN, AMNON & YAKOBSON, ALEXANDER. *Israel and the Family of Nations: The Jewish Nation-State and Human rights*. (Routledge, 2009).
- SABAR, GALIA. *Israel and the 'Holy Land': The Religio-Political Discourse of Rights among African Migrant Labourers and African Asylum Seekers, 1990-2008*. African Diaspora 3 (2010), pp. 43-76.

- SABAR, GALIA & TSURKOV, ELIZABETH. *Israel's Policies toward Asylum-Seekers: 2002-2014*, IAI working papers 15 | 20 - MAY 2015, Rome.
- SAPIR, BARAK-EREZ, BARAK (eds.). *Israeli Constitutional Law in the Making* (Oxford: Hart, 2014).
- SHAPIRA, ANITA. *Israel: a history*. (UPNE: 2012).  
*Visions in Conflict* (Hebrew: ההליכה על קו האופק, Am Oved, 1989).
- SHLAIM, AVI. *The iron wall: Israel and the Arab world*. (WW Norton & Company: 2001).
- SMOOHA, SAMMY. *The model of ethnic democracy: Israel as a Jewish and democratic state*. Nations and Nationalism, 8(4), pp. 475–503 (2002).  
*The mass immigrations to Israel: A comparison of the failure of the Mizṛabi immigrants of the 1950s with the success of the Russian immigrants of the 1990s*. Journal of Israeli History: Politics, Society, Culture, 27:1, pp. 1-27 (2008).
- Soffer, Arnon (ed.), *Refugees or Work Immigrants from African Countries* (Hebrew) Haifa: National Security College Research Center and the Haikin Chair for Geostrategic Studies at the University of Haifa (2009).
- TEVETH, SHABTAI. *Charging Israel with original sin*. Commentary, 88.3 (1989): pg. 24.  
*The Palestine Arab refugee problem and its origins*. Middle Eastern Studies, 26.2 (1990), pp. 214-249.  
*The evolution of "transfer" in Zionist thinking*. Vol. 107. Moshe Dayan Center for Middle Eastern and African Studies (Shiloah Institute, Tel Aviv University: 1989).
- VITAL, DAVID. *Zionism as revolution? Zionism as rebellion?* Modern Judaism 18.3 (1998), pp. 205-215.

WEILL, RIVKA. *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*. Hastings Constitutional Law Quarterly, Vol. 39, No. 2, 2011 (April 17, 2011).

WILLEN, SARAH S., *Perspectives on labour migration in Israel*. Revue européenne des migrations internationales (on line), vol. 19 - n°3 (2003).

*Transnational migration to Israel in global comparative context* (Lexington Books, 2007)

ZERTAL, IDIT. *Israel's Holocaust and the Politics of Nationhood* (Cambridge University Press: 2005).

ZIEGLER, RUVI. *Second Strike and you are (finally) out? The Quashing of the Prevention of Infiltration Law (Amendment no. 4)*, European Society of International Law Migration & Refugee Law Interest Group Blog (29 September 2014).

*The Prevention of Infiltration (Amendment no. 4) Bill: A malevolent response to the Israeli Supreme Court judgment*, European Society of International Law Migration & Refugee Law Interest Group Blog (4 December 2013).

*Quashing Legislation Mandating Lengthy Detention of Asylum-Seekers: A Resolute Yet Cautious Israeli Supreme Court Judgment*, European Society of International Law Migration & Refugee Law Interest Group Blog (22 September 2013).

*Trapped between the Fences*, Oxford Human Rights Hub Blog (6 September 2012).

*No asylum for "Infiltrators": the legal predicament of Eritrean and Sudanese nationals in Israel*. Journal of Immigration, Asylum and Nationality Law, 29, 2 (2015).

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