

HOTLINE for REFUGEES and MIGRANTS



No Safe Haven

**Israeli asylum policy as applied
to Eritrean and Sudanese citizens**

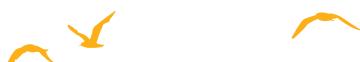
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About the Hotline for Refugees and Migrants:

The Hotline for Refugees and Migrants is a nonpartisan nonprofit organization which aims to protect and promote the human rights of migrant workers and refugees and prevent human trafficking in Israel. We are committed to eradicating the exploitation of migrants, ensuring they receive respectful and fair treatment, and formulating government policy to this end. We seek to lend our voice to those who are not heard in the public sphere and build a just, equal, and democratic Israeli society. The organization acts by providing information, counsel, and legal representation to migrants, educating the Israeli public, and promoting legislation and public policy.

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Introduction

This report examines the treatment of asylum seekers from Sudan and Eritrea. It builds upon a previous report published by the Hotline for Refugees and Migrants (then known as the Hotline for Migrant Workers), titled Until our Hearts are Completely Hardened, in which we examined, at length, Israel's asylum procedures and their shortcomings.¹

The issues we examined in Until our Hearts are Completely Hardened affect all asylum seekers in Israel, including those from Sudan and Eritrea. Problems with translation, failures to convey information about the procedures, flawed research regarding the conditions in the asylum seekers' countries of origin, focus on peripheral details in asylum interviews to identify imagined contradictions in the asylum seekers' stories, and a systemic culture of mistrust were all discussed at length in that report. Interviews with the attorneys representing asylum seekers and recent asylum interview protocols indicate similar findings today still, two and a half years after Until our Hearts are Completely Hardened was published.

Given the great similarity between these issues and those described at length in the previous report, the present report will not repeat that discussion. Instead we focus on the specific issues pertaining to asylum seekers from Sudan and Eritrea.

The asylum seekers from Sudan and Eritrea constitute an overwhelming majority of asylum seekers in Israel, and those the authorities call "infiltrators." Yet until 2012, these two groups were not permitted to submit asylum applications. Only in 2013 did authorities begin examining the applications of asylum seekers from Sudan and Eritrea, and then only of those who were imprisoned.² Although the State of Israel does not act to remove them from the country, recognizing the danger they face in their countries of origin, over the years the authorities have enacted a policy, continuing still, designed mainly to deter additional asylum seekers from coming to Israel, and to encourage those already in the country to leave. Even though these are groups which receive asylum at very high rates

¹ Hotline for Migrant Workers, Until our Hearts are Completely Hardened: Asylum Procedures in Israel (Mar. 2012) (hereinafter: Until our Hearts are Completely Hardened), <http://hotline.org.il/wp-content/uploads/202505247-Until-Our-Hearts-Are-Completely-Hardened-Asylum-Procedures-in-Israel.pdf>

² State Comptroller, Annual Report 64C, p. 69 (May 13, 2014), <http://www.mevaker.gov.il/he/Reports/Pages/248.aspx> ("As a general rule and other than in exceptional cases, until the end of 2013 the Authority did not begin processing the applications submitted by residents of Eritrea and the Republic of Sudan who were not held in detention facilities").

in other countries, in Israel not a single Sudanese asylum seeker has been recognized as a refugee to date, and only three Eritrean asylum seekers have received this recognition.

In this report, we will address the policy applied to this population, as well as the shortcomings of the legal interpretation the State gives the Convention relating to the Status of Refugees, as well as other flaws leading to the sweeping denial of refugee claims made by asylum seekers from these two countries.



Israel's Asylum System

Our report [Until our Hearts are Completely Hardened](#) described the Israeli asylum system at length; presently we will review it more succinctly.

The State of Israel is signatory to the international 1951 Convention relating to the Status of Refugees³ (hereinafter "Refugee Convention") and the 1967 Protocol relating to the Status of Refugees⁴ and has ratified both, but has not yet anchored their provisions in local legislation. Nonetheless, state officials have stated many times in legal proceedings that Israel fulfills the provisions of the Convention.⁵ The obligation under Israeli law to maintain the provisions of the Convention is due to the "presumption of conformity." According to this presumption, absent any explicit contradiction between Israeli law and the state's international undertakings, Israeli legislation must be interpreted in such a manner as to uphold the provisions of international law.⁶ Beyond the requirements of the Refugee Convention, the State of Israel recognizes that it may not deport a person to a place where their life or liberty are endangered, even if they do not meet the conditions of the Refugee Convention. This is pursuant to Israeli law,⁷ customary

³ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force Apr. 22, 1951.

⁴ Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

⁵ See, for instance, Administrative Appeal 8675/11 *Tedessa v. Refugee Status Determination Unit*, Justice Vogelman, para. 8 (May 14, 2012).

⁶ See, for instance, Criminal Appeal 131/67 *Kamiar v. State of Israel*, IsrSc 22(2) 85, 112 (1968). This presumption applies also to administrative discretion (HCJ 4542/02 *Kav La'Oved v. Government of Israel*, IsrSc 51(1) 346 (2006), Justice Levi, para. 37). For example, the Ministry of Interior has discretionary authority to deport a person who is staying in Israel without authorization (art. 13(a), Entrance to Israel Law, 5712-1952 (hereinafter: Entry into Israel Law); even though the article uses the language "shall be removed", the Supreme Court construed this article as granting the Minister of Interior discretionary power to decide whether or not to deport a person staying in Israel without authorization: Administrative Appeal 4614/06 *State of Israel v. Oren*, IsrSc 51(1) 211 (2006), Justice Beinish, para. 14). However, the law does not elaborate the considerations for applying this discretion and does not stipulate that the fact that a person is a refugee is not such a consideration. In this case the Minister of Interior must apply his or her discretion with regard to deportation in a manner that does not conflict with art. 33(1) of the Refugee Convention, which prohibits the deportation of a refugee to a place where he faces danger. Similarly, if art. 2 of the Entrance to Israel Law grants the Minister of Interior discretion to grant working permits but does not elaborate the considerations that must be taken into account, the Minister of Interior must use his or her discretion in a manner that does not conflict with the duty to allow refugees to work under certain conditions, in accordance with art. 17(1) of the Convention relating to the Status of Refugees.

⁷ HCJ 4702/94 *Al-Tai v. Minister of Interior*, IsrSC 49(3) 843, 847-48 (1995).

international law,⁸ and the International Covenant on Civil and Political Rights.⁹ It also recognizes the prohibition of expelling a person to a place where they might be tortured, pursuant to the Convention against Torture.¹⁰

Until 2001, asylum applications in Israel were examined by a small Israel-based UNHCR delegation.¹¹ In 2001, new regulations came into effect, creating a "hybrid" system, in which asylum requests were still examined by the UNHCR yet final decisions were made by the Ministry of the Interior. According to these regulations, asylum seekers submitted their applications to the UNHCR, which examined their cases and made recommendations. The UNHCR recommendations were then subject to discussion in a committee tasked with compiling an opinion, then submitted to the Minister of the Interior or the General Director of the Immigration Authority.¹²

Starting in 2008, the responsibility for examining asylum requests in Israel was gradually shifted from the UNHCR to rest entirely with the Ministry of the Interior. Since July 2009, asylum applications are submitted directly to, and processed entirely by, the Ministry of the Interior.

⁸ See Civil Appeal 9656/08 State of Israel v. Saidi, Justice Hayut, para. 27 (Dec. 15, 2011); see also Elihu Lauterpacht & Daniel Bethlehem, *The scope and content of the principle of non-refoulement, in Refugee Protection in International Law* 109 (Feller, Türk & Nicholson eds, 2003).

⁹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (hereinafter: ICCPR).

On the interpretation of the ICCPR as entailing the principle of non-refoulement see T. v. Australia, U.N. Doc. CCP/C/61/D/706/1996 (1997), para. 8;

UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992), para. 9.

The position, according to which the ICCPR anchors the principle of non-refoulement also in relation to persons whose life is danger, even if they do not meet the conditions set out in the Refugee Convention, was adopted by the Israeli Ministry of Foreign Affairs. See Pini Avivi, Deputy Director, Ministry of Foreign Affairs, "Removal of the 'non-deportation' policy in relation to unauthorized migrants from South Sudan" (letter to Amnon Ben Ami, Head of the Population, Immigration and Border Authority, May 13, 2012), para. 57.

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, entered into force June 26, 1987.

¹¹ Sharon Harel, *Israel's Asylum System: The Transition Process of Asylum Adjudication from UNHCR to the State of Israel in Lewisky-Asmara: Social and Legal Aspects of the Israeli Asylum Policy* 43, 55 (Tally Kritzman-Amir ed. forthcoming 2014).

¹² For a review of the Israeli asylum system until 2008 see Tally Kritzman & Adriana Kemp, *The Constitution of a Refugee Regime in Israel: Between State and Civil Society in Empowerment in Law* (Mimi Eisenstadt & Guy Mindlak eds. 2008). For more on the development of asylum procedures in Israel see Yonatan Berman, *Detention of Refugees and Asylum Seekers in Israel in Lewisky-Asmara: Social and Legal Aspects of the Israeli Asylum Policy* 147 (Tally Kritzman-Amir ed, forthcoming 2014) (hereinafter: Berman 2014).

The current regulations on the handling of asylum seekers came into effect in January 2011.¹³ At the end of the registration and identification proceedings, or after a "basic interview," the Ministry of the Interior may now dismiss the asylum application out of hand.¹⁴

Asylum seekers whose applications are not dismissed out of hand after the "basic interview" are entitled, according to the regulations, to a residency permit based on Section 2(a)(5) of the 1952 Entry into Israel Law.¹⁵ These asylum seekers then undergo a "comprehensive interview," after which the Ministry of the Interior compiles an opinion.¹⁶ Based on this opinion, the Advisory Committee for Refugees decides in a plenary discussion whether to recommend to the General Director of the Population and Immigration Authority or the Minister of the Interior that the asylum application be accepted or denied. Alternatively, the recommendation can be made by the Chair of the Committee alone in a summary proceeding.¹⁷

An asylum seeker whose application was dismissed after a summary proceeding or after a plenary discussion of the Committee may file a request to reconsider the decision "if there has been a change in the circumstances pertaining to the matter, including the coming into light of new documents and findings."¹⁸ Asylum seekers recognized as refugees are supposed to receive, pursuant on the procedure, a residency permit (a temporary visa of type a/5).¹⁹

Refugee recognition rates in Israel are very low.²⁰ In 2013, 6 asylum seekers

¹³ Procedure for Handling Political Asylum Seekers in Israel (Jan. 2, 2014), <http://www.piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf>.

¹⁴ Id. art. 3-4.

¹⁵ Id. art. 5a. The Entrance to Israel Law defines such a permit as a "temporary visiting permit granted to a person staying in Israel without permit against whom a removal order has been issued – until his removal from Israel."

¹⁶ Id. art 5.

¹⁷ Id. art. 6-7.

¹⁸ Id. art. 9A(1).

¹⁹ Id. art. 7F. For a more detailed account of the system's structure and the proceedings stipulated in the procedure see Until our Hearts are Completely Hardened, *supra* note 1.

²⁰ As a report by the Knesset's Research and Information Center shows, the recognition rates of refugees in Israel are low in comparison to other "western" countries. This is true whether we look at the percentage of recognized refugees, the absolute number of recognized refugees, the number of asylum seekers with relation to the state's territory size and their number in relation to the general population. See Knesset Research and Information Center, *The Policy towards Asylum Seekers in the European Union and Some of its Central States* (Nov 21, 2013), <https://www.knesset.gov.il/mmm/data/pdf/m03308.pdf>.

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were recognized as refugees and 491 applications were denied.²¹ This makes for a recognition rate of 1.2 per cent. In 2012, 6 asylum seekers were recognized as refugees and 1,131 applications were denied (a recognition rate of 0.57 per cent).²² In 2011, 8 asylum seekers were recognized as refugees and 4,279 applications were denied (a recognition rate of 0.19 per cent).²³ These are extremely low recognition rates in comparison with those in other "western" countries, which generally range between 10 and 50 percent.²⁴

²¹ Mali Davidian, Freedom of Information Law Supervisor, Population, Immigration and Border Authority, Response to Adv. Aelad Cahana (Oct. 27, 2014).

²² Mali Davidian, Freedom of Information Law Supervisor, Population, Immigration and Border Authority, Responses to Adv. Aelad Cahana (Oct. 16, 2013 & Oct. 17, 2013).

²³ Id.

²⁴ For the worldwide refugee recognition rates of in 2013 see: UNHCR, Global Trends 2013, Annexes, Table 10 (June 2014), <http://www.unhcr.org/globaltrends/2013-GlobalTrends-annex-tables.zip>. For data regarding previous years and the legal significance of the low recognition rate in Israel see: Until our Hearts are Completely Hardened, *supra* note 1, at 35-36.

Asylum Seekers from Sudan and Eritrea – Basic Data

According to data from the Ministry of the Interior (MOI), at the end of September 2014, there were 8,852 Sudanese nationals and 34,475 Eritrean nationals in Israel.²⁵ This marks a decrease in the number of citizens of these countries in Israel, after, according to MOI data, 2014 saw 4,005 Sudanese nationals and 1,214 Eritrean nationals "voluntarily leaving,"²⁶ in addition to the 1,687 Sudanese nationals and 268 Eritrean nationals who left the country during 2013.²⁷

There is a great deal of information on the widespread human rights abuses in both countries. For brevity, we simply reproduce the Israeli Supreme Court's description of the situation in these countries:

"Ever since it was recognized as an independent state, Eritrea has held no democratic elections. The President, who presides also as Prime Minister and Supreme Military Commander, has held these offices ever since that time. Eritrea's National Assembly comprises only one party (PDFJ). In Eritrea, according to UN reports, the regime perpetrates consistent and widespread human rights abuses. These include executions without trial; a shoot-to-kill policy against those who try to leave the country; citizens disappearing and being arrested without their families being informed; arbitrary arrests and imprisonment; extensive use of physical and psychological torture during interrogations by police, military and security forces; inhumane conditions of imprisonment; compulsory military service for long and indefinite periods, during which cruel punishments are used, even leading to suicide; disregard for civil rights such as freedom of expression, freedom of assembly, freedom of organization, freedom of religion, and freedom of movement; discrimination against women and sexual violence; violations of children's rights, including child conscription; and more..."

Sudan is a country afflicted by draughts and starvation, which for

²⁵ Population, Immigration and Border Authority, Foreigners in Israel - version 3/2014, Table A.2 (Oct. 2014), <http://piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/564899cce.pdf>.

²⁶ Id. Table A.3.

²⁷ Population, Immigration and Border Authority, Foreigners in Israel - 2013 Summary, Table A.3 (Jan. 2014), <http://piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/563343n80.pdf>.

years has suffered military coups and a harsh, ongoing civil war. In the wake of the war, millions have been forced to leave their homes, suffered hunger and malnourishment, with severely impaired health and education services. Apart from the civil war between the North and the South, an additional rebellion broke out in the Darfur region in West Sudan in 2003. To suppress the rebellion, the government has provided arms for militias fighting against the rebels. This conflict, which has become an ethnic conflict, includes mass rape and slaughter, and some consider it a case of genocide. ... In mid 2011 there were reports of indiscriminate bombardment against combatants and civilians alike; attacks against civilians by all sides of the conflict, including the Sudanese military; and a lack of government protection for civilians. There are widespread reports of physical and sexual violence against women, although there have also been reports of a certain improvement in the government and police's treatment of this issue. Also widespread in Sudan is the conscription and arming of children, though efforts are now underway to eradicate this practice. Human rights abuses in Sudan further include arbitrary arrests and imprisonment, and torture of detainees, who are furthermore held under deficient conditions ..."²⁸

As we will see in Section IV, Sudanese and Eritrean nationals in Israel are subject to a policy sometimes called "temporary protection" and sometimes "non-removal," recognizing the danger they face in their countries of origin and the impossibility of sending them back to these countries. But while recognizing this, the State of Israel has been implementing, for almost a decade now, various measures to make these same people's lives harder yet and to encourage them to leave.

We cannot address here in detail all of the measures taken throughout the years.²⁹ We note briefly that at first, from 2005 to 2008, there was a policy of indefinite imprisonment of Sudanese nationals, who were presented as a security risk.³⁰ Then, in 2007, Israel implemented a policy of indefinitely detaining Eritrean nationals.³¹ Afterwards, there was a policy of releasing Eritrean nationals to work in agriculture, subject to a "binding arrangement," offering ample opportunity for

²⁸ HCJ 7146/12 Adam v. the Knesset, Justice Arbel, para. 6 (Sept. 16, 2013) (hereinafter: Matter of Adam).

²⁹ For the different aspects of this policy over the years see Berman 2014, *supra* note 12.

³⁰ Berman 2014, *supra* note 12. On the detention of Sudanese nationals as "enemy nationals" see also State Comptroller, Annual Report 58B 109-14 (May 20, 2008), .

³¹ Berman 2014, *supra* note 12.

their economic and physical exploitation.³² Later, the third amendment to the Anti-Infiltration Law was enacted,³³ leading to the administrative detention of some 2,000 asylum seekers, who were to be imprisoned for a minimum period of three years. After this amendment was overturned by the Supreme Court,³⁴ the fourth amendment was enacted,³⁵ creating the Holot immigration detention facility, a so-called "open" facility. This amendment too was ultimately overturned by the Supreme Court;³⁶ the Supreme Court found that Holot's characteristics were too similar to a prison and that it was used to unconstitutionally deny asylum seekers' freedom. As this report is being published, the Ministry of the Interior and the Ministry of Justice are working on a new amendment to this law, intended to circumvent the ruling and legislatively re-legitimize the Holot facility.³⁷

In addition Sudanese and Eritrean nationals who are not imprisoned receive "Conditional Release Visa", that does not allow them to work or have access to welfare or medical services. The licenses they receive based on Section 2(a)(5) of the Entry into Israel Law, does not provide the right to work,³⁸ but at the same time, the Ministry of the Interior has declared that as a matter of policy, the ban on employing asylum seekers is not being enforced, and employers will not be fined or prosecuted for employing asylum seekers.³⁹ This policy keeps this population at the margins of the law, with no security or basic rights, and also leads to their clustering in marginalized areas, creating concentrations of asylum seekers in

³² Refugee Rights Forum, Detention of Refugees and Asylum Seekers 13 (June 2008), <http://hotline.org.il/publication/forumdetentionofrefugeesjune2008>.

³³ Prevention of Infiltration Law (Offenses and Adjudication) (Amendment No. 3 and Temporary Order), 5762-2012.

³⁴ Matter of Adam, *supra* note 28.

³⁵ Prevention of Infiltration Law (Offenses and Adjudication) (Amendment No. 4 and Temporary Order), 5764-2013.

³⁶ HCJ 7385/12 Eitan - Israeli Immigration Policy v. Government of Israel (Sept. 22, 2014).

³⁷ See The Knesset, 19th Session, Internal Affairs and Environment Committee, Protocol No. 384, p. 8 (Oct. 6, 2014) ("Gideon Saar: ... For this reason we absolutely agree to take into consideration some of the Supreme Court's comments about the facility but not all of them, and there are some comments which I think are incorrect, but under no circumstances – and I am expressing my own opinion here – can we close Holot, and not only because the State has invested a lot in it, but also because it is essential for dealing with infiltration"). See also The Knesset, 19th Session, Internal Affairs and Environment Committee, Protocol No. 385, p.3 (Oct. 27, 2014).

³⁸ See *supra* note 15.

³⁹ HCJ 6312/10 Kav La'Oved v. the Government (Jan. 16, 2011). For a critique of this policy see Yuval Livnat, Refugees, Employers, and "Practical Solutions" in the High Court of Justice: Following HCJ 6312/10 Kav La'Oved v. the Government, 3 Mishpatim Online 23 (2011).

places where marginalized Israeli populations live.⁴⁰

⁴⁰ The Supreme Court has also criticized this policy. See Administrative Appeal 8908/11 Assefo v. Ministry of Interior, Justice Hayut (Jul. 17, 2012) (hereinafter: Matter of Assefo); Matter of Adam, supra note 28, Justice Hayut, para. 1 (“For instance, there is no clear arrangement, neither in law nor in regulations, concerning the critical question pertaining to the right of tens of thousands of infiltrators to work in Israel. The solution the State found – which was detailed in its response to a petition regarding this issue – is not to grant work permits but at the same time not to enforce the prohibition on employing infiltrators... Such ad-hoc solutions cannot replace a clear policy...”).



IV

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Asylum Policy and "Temporary Protection" for Eritrean Nationals

In recent years, the state of Israel has applied a certain policy to Eritrean nationals, a policy which the state has given various, changing names. Not only has the policy's name changed, the way the state presents it has changed as well. Only one point is beyond controversy – for a number of years now, Israel has not been deporting Eritrean nationals to their country.

As the state presents its policy, Eritrean nationals have never been prevented from submitting asylum applications. According to the state, as claimed by its political and legal representatives today, all Eritrean nationals were able to submit applications for asylum at any point, but their applications were not examined. This is because in any case, whether an application would have been denied or accepted, deportation procedures would not be carried out in practice. As the state presents things, although there was nothing preventing Eritrean nationals from filing applications for asylum, most of them chose not to file such an application.⁴¹

But the way this matter is presented contradicts the experience of thousands of asylum seekers, the attorneys representing them, and human rights organizations in Israel. Until 2013, Eritrean nationals who went to the Population Authority's Infiltrator and Asylum Seeker Department only received an identification interview in accordance with the guidelines for processing asylum seekers. Even if they voiced claims about dangers facing them in their home country, and even if they argued they were refugees and therefore entitled to recognition, a comprehensive interview was not held. In practice, they were kept out of the asylum system. Even cases where asylum seekers' representatives turned to the Ministry of the Interior to demand permission to file an asylum application were denied by the MOI for years. In 2009, in response to an appeal by the Hotline for Migrant Workers (now the Hotline for Refugees and Migrants) demanding that Sudanese and Eritrean nationals be allowed to submit applications for asylum, the Director of the RSD Unit responded:

"At this stage, the RSD Unit does not handle foreign subjects whose citizenship is Eritrean or Sudanese, I would like to note that these

⁴¹ See, for instance, statement of the Minister of Interior in the Internal Affairs and Environment Committee, Protocol No. 263, p. 7 (Mar. 26, 2014).

subjects are nonetheless entitled to temporary protection.”⁴²

Similar responses were received over the years regarding individual cases in which the unit was asked to allow Eritrean and Sudanese nationals to submit applications for asylum.⁴³

But at a certain point, the Ministry of the Interior began claiming in judicial proceedings that there is nothing preventing Sudanese and Eritrean nationals from submitting applications for asylum, and indeed that there never was anything preventing them from doing so. In 2011, Judge Avraham Yaakov of the Central District Court, who had presided over hundreds of appeals of Sudanese and Eritrean nationals, addressed the declaration made by the Ministry of the Interior on numerous occasions that citizens of these two countries could not apply for asylum. He also pointed out that the MOI claim that nothing had ever prevented this was factually incorrect and contradicted previous statements in judicial proceedings:

“In the addendum I requested from both parties, the respondent’s representative noted that nothing prevents those subject to the non-removal policy from submitting individual applications for political asylum pursuant to the Refugee Convention. However, practice shows otherwise: At the Israeli border, people from these countries are briefly interviewed, stating the name of the state they are subject to. If they are subjects of the aforementioned states, their handling as refugees stops, and they are given the status of individuals subject to the non-removal policy. In effect, the respondent does not allow these people to make their claims, and directs them to the non-removal policy’s special track. This matter arose many times in previous proceedings and the respondent agreed at the time that this was indeed the situation. Therefore, the argument raised in the addendum by the respondent’s representative is factually incorrect, and I find that it should not have been raised when the respondent has stated many times before that the opposite is the case.

...

I emphasize again, all those who enjoy said non-removal policy are not

⁴² Haim Efraim, Director of the RSD Unit, response to Hotline for Migrant Workers (Dec. 10, 2009).

⁴³ “The unit attends to all asylum seekers in Israel other than the Sudanese and Eritreans, who are eligible for temporary protection” (Hadar Weiss, RSD Unit, response to Adv. Osnat Lifshitz (Jun. 10, 2010)).

allowed today to file applications as stated.”⁴⁴

What has also changed is the name the Ministry of the Interior uses for the policy applying to Eritrean nationals. As mentioned above, RSD Unit personnel has called the policy “temporary protection” in official documents.⁴⁵ The General Director of the Population Authority has noted in an official letter that “some 90 per cent of the infiltrators are Sudanese and Eritrean nationals. These citizens reside in Israel at this stage under temporary protection – we make this detail clear in all media and all places to remove any doubt.”⁴⁶ In a statement to the HCJ as well, the state clarified that “people in refugee-like situations, who make up an overwhelming majority of the group, are infiltrators originally from Sudan and Eritrea, who have been given *temporary collective protection from removal to their countries of origin*, due to the special status of these countries, as defined by the High Commissioner.”⁴⁷ The Ministry of the Interior has used this term regarding Sudanese and Eritrean nationals in many dozens of proceedings in the courts.⁴⁸ But at a certain stage, the MOI decided to stop using this term. At the same time, the MOI also began denying there had ever been a policy of “temporary protection,”⁴⁹ probably due to the understanding that the rights it afforded fell significantly short of those provided in other countries to those subject to a policy

⁴⁴ Administrative Petition (Central District) 57162-01-11 Assefo v. Minister of Interior, para. 4 & 7 (Nov. 2, 2011). This ruling was appealed in the Supreme Court, which rejected the appeal. Even though the Ministry of the Interior did not appeal the District Court’s ruling, in its submission to the Supreme Court the representatives of the State argued that Eritrean nationals can, and always could, apply for asylum. The Supreme Court did not discuss this question, but did mention that the possibility to file an asylum application was opened only after the District’s Court ruling (“However, in accordance with the policy concerning Eritrean nationals, even if the appellant would have individually applied for asylum (before he petitioned the District Court and this option became available to him) – the application would not have been processed.” Supreme Court’s ruling in Matter of Assefo, *supra* note 40, para. 15).

⁴⁵ Supra notes 42-43.

⁴⁶ Amnon Ben Ami, Head of the Population, Border and Immigration Authority, Response to Adv. Oded Feller, Hanny Ben Israel and Yonatan Berman (Jan. 2, 2011).

⁴⁷ HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense, Respondents’ Preliminary Response (Sept. 17, 2009), signed by Adv. Yochi Genessin & Gilad Shirman.

⁴⁸ Administrative Petition (Central District) 31808-03-10 Hijab v. Ministry of Interior, Preliminary Response, para. 41 (Apr. 18, 2010) (“As mentioned in the petition, since asylum seekers who have been identified as Sudanese or Eritreans receive ‘temporary group protection’ anyway, their asylum claims will not be examined. What sense does it make to examine the asylum application of a person who receives group protection?”). For other proceedings in which the Ministry of the Interior declared that a policy titled “temporary protection” applies to Sudanese and Eritrean nationals, see, for instance, Administrative Appeal (Central District) 35858-06-10 Seiko v. Minister of Interior (July 13, 2010).

⁴⁹ See the State’s position as described in Matter of Assefo, *supra* note 40.

called "temporary protection," and out of concern that continuing to use this term or admitting it had been used before might justify demands for certain rights.

The term the MOI uses today regarding the Eritrean nationals residing in Israel is "a temporary non-removal policy." Despite the terminological change, the MOI consistently clarifies that this is not a policy conducted "ex gratia," but rather a policy conducted due to the State's undertaking to uphold the principal of *non-refoulement* pursuant to international and Israeli law.⁵⁰

⁵⁰ The position presented on this matter in Court by the State also changed over time. In Matter of Adam (supra note 28, para. 28) Justice Vogelman mentioned that in Matter of Assefo (supra note 40), the State submitted that the non-refoulement policy, which applies to Eritrean nationals, is a humanitarian measure, not a legal obligation. However, Justice Vogelman also mentions that in later proceedings concerning the constitutionality of the Prevention of Infiltration Law, the State submitted that this policy expresses by domestic and international legal obligations.

See also HCJ 7146/12 Adam v. the Knesset, Response of Respondents 2-4, para. 39 (May 13, 2013) ("The State of Israel makes occasionally general decisions not to remove the subjects of certain countries at a certain time and given certain circumstances to certain countries, in accordance with the non-refoulement principle. ...Accordingly, at this time, Israel applies a policy of temporary non-refoulement of Eritreans to Eritrea.")

Asylum Policy and "Temporary Protection" for Sudanese Nationals

The change in both terminology and rationale presented by the Ministry of the Interior regarding the policy implemented vis-à-vis Sudanese nationals is even more significant.

As described above, the MOI also called the policy for Sudanese nationals "temporary protection" for years, and they too were prevented from filing applications for asylum.⁵¹ As with Eritrean nationals, the MOI has stopped using this term for the status Sudanese nationals fall under and has begun denying there ever was a "temporary protection" policy. But contrary to the MOI's statements regarding Eritrean nationals, in the case of Sudanese nationals the MOI denies the applicability of the non-refoulement principle in the present and the past. This denial, however, does not match the practice the MOI applied to them since Sudanese nationals began arriving in Israel in 2005 until recent years.

The State of Israel recognized that whereas Israel is defined as an "enemy state" by Sudan, Sudanese citizens who had entered Israel faced danger of arrest, torture, and even execution if they were to return to their country of origin. For this reason, Israel avoided deporting Sudanese nationals, even if by the state's own consideration they do not meet the requirements of the Convention relating to the Status of Refugees. At the same time, the Ministry of the Interior prevented Sudanese citizens from submitting applications for asylum in Israel.⁵²

As noted in the previous chapter, the state declared before the courts on dozens of occasions that the same policy applied to Sudanese and Eritrean nationals alike. Moreover, when the state was required to clarify its policy regarding Sudanese nationals, the policy rationales were emphasized explicitly, and in dozens of judicial proceedings the state's letters of appeal featured the following explanation: "The non-removal policy, preventing the return of Sudanese subjects

⁵¹ See supra notes 42, 43, & 46.

⁵² Administrative Appeal (Central District) 57162-01-11 (supra note 44). See also UNHCR, Letter by William Tall, UNHCR Representative in Israel, to Adv. Yonatan Berman (Oct. 2, 2012) ("Statements to the effect that Sudanese in Israel are not refugees are not factually or legally correct. Sudanese in Israel have been denied access to individual refugee status determination, which at present is conducted by the Immigration, Population, and Border Authority within the Ministry of Interior. Until recently, it has been the Ministry of Interior's practice to issue a <conditional release> visa to Sudanese nationals after an identification verification interview. Sudanese nationals who were allowed access to Israeli territory were detained upon arrival and after completion of the above mentioned process of identification were released and provided a temporary status in Israel.")

who infiltrated Israel to their country of origin, results from that fact that Israel and Sudan are in a state of hostility, so that a Sudanese subject who has entered Israel cannot return to their country, claiming to fear for their life.”⁵³

These things were said in the media by senior officials as well. So, for example, in a 2012 interview, answering the question why Sudanese and Eritrean nationals were not deported, Harel Locker, Director General of the Prime Minister’s Office, responded:

”Of sixty-two thousand infiltrators, first of all the majority is from North Sudan and Eritrea. Infiltrators cannot be deported removed [sic] to these countries, because they face mortal danger there, and Israel is signatory to international treaties, and two conditions are required for deportation: that the state agrees to take them in, and that they do not face mortal danger there.”⁵⁴

The policy the state has called “temporary protection” was implemented for years for all Sudanese nationals, but in 2012 the Republic of the Sudan split into two states, and an independent state was founded in South Sudan. After this state was founded, the “temporary protection” policy was removed from those originating in South Sudan,⁵⁵ while the policy continued to apply to Sudanese nationals from the areas which remained in the hands of the Republic of the Sudan (“North Sudan”).

⁵³ Administrative Petition (Central District) 31808-03-10 Hijab v. Ministry of Interior, Complementary Response, para. 5 (Apr. 19, 2010).

⁵⁴ Keren Neubach, “Seder Yom”, Reshet Beit, Radio Interview with Harel Locker (May 28, 2012, 08:17, Transcription: Ifat Media Analysis).

⁵⁵ See Administrative Petition (Jerusalem District) 53765-03-12 ASSAF – Aid Organization for Refugees and Asylum Seekers in Israel v. Minister of Interior (June 7, 2012). In this ruling the Court denied a petition filed by human rights organizations, in which the Court was asked to postpone the removal of the “temporary protection” policy, which applied to residents of South Sudan, until further stabilization in the country. Following the dismissal of the petition 1,158 South Sudanese nationals left Israel or were deported. For additional information on the deportation of South Sudanese refugees see: African Refugee Development Center & Hotline for Migrant Workers, Do Not Sent Us Back (Dec. 2012), <http://hotline.org.il/publication>.

Shortly thereafter, the situation in South Sudan deteriorated and civil war erupted. Many of the people deported from Israel following the Ministry of Interior’s decision and the court ruling, which confirmed it, were displaced again. Some were killed in battle, some died of disease and some escaped the country. For a description of the current situation in South Sudan see UN Security Council, Report of the Secretary General on South Sudan to the UN Security Council. UN Doc. S/2014/708 (30 Sept., 2014). For a description of the situation in South Sudan during the period after the removal of South Sudanese from Israel see also Amnesty International, Nowhere Safe: Civilians under Attack in South Sudan (May 2014), <http://www.amnesty.org/en/library/asset/AFR65/003/2014/en/3f5822f7-8594-4a64-a6c8-3ece02be1eca/afr650032014en.pdf>.

But at some point in 2013 the state began denying that there ever had been a "temporary protection" policy for Sudanese nationals, denying further that their non-removal was for normative reasons resulting from the non-refoulement principle. The new argument is that the only thing preventing the deportation of Sudanese nationals was the absence of diplomatic relations between the two countries. So, for example, during the proceedings regarding the constitutionality of the Anti-Infiltration Law, after the policy towards Eritrean nationals had been explained,⁵⁶ the State Attorney noted:

"Matters are different with regard to the Republic of the Sudan. ... As to the Republic of the Sudan (North Sudan), we clarify and emphasize that it is not a recognition of Sudan as a crisis state that leads us to avoid deportation to this country. The state of Israel avoids direct deportation to North Sudan primarily due to the practical difficulty of such deportation, due to the lack of diplomatic relations between the two states, and moreover the lack of contact with the authorities in North Sudan."⁵⁷

Gone is the name "temporary protection" or "temporary non-removal policy" used by the Israeli authorities for years with regard to Sudanese nationals. Gone also are the statements by the authorities that the deportation to Sudan was avoided due to the human rights situation there, or due to the danger facing those deported in light of their stay in Israel. All that remains now is an argument as to the practical impossibility of deporting Sudanese nationals due to the lack of diplomatic relations.

In responding to an appeal in which the Ministry of Justice was asked to clarify whether there had been a change in policy towards Sudanese nationals, the Deputy Attorney General noted:

"Even if in different letters of appeal at different times, submitted in hundreds of proceedings conducted in the courts in recent years, or in other documents, the terminology or wording regarding the state's approach to subjects of North Sudan was not fully clarified, no judicial conclusions may be drawn about changes to the state's approach."⁵⁸

In other words, the Ministry of Justice clarified that the Ministry of the Interior's

⁵⁶ See quote from State's response concerning the policy that applies for Eritrean national, *supra* note 50.

⁵⁷ *Id.* para. 40.

⁵⁸ Dina Zilber, Deputy Attorney General, Letter to Adv. Yonatan Berman & Oded Feller (Apr. 11, 2013).

statements in hundreds of legal proceedings, including proceedings before the Supreme Court, statements signed by senior State Attorney officials and backed by affidavits from senior Population Authority officials, did not represent the actual situation. The statements about avoiding deportation to the Sudan due to the dangers faced there were, according to the Ministry of Justice, a failure to "fully clarifying" an entirely different rationale – the lack of diplomatic relations. Since the state has also denied changing its policy towards Sudanese nationals, the Ministry of Justice response underscores that there is not today, nor has there ever been a "temporary protection" policy or a "non-removal" policy applying to Sudanese nationals.

It is difficult to accept this explanation, which ignores, as mentioned above, explicit statements on hundreds of occasions regarding the danger facing Sudanese nationals if they are deported to their country of origin. The Supreme Court, in proceedings regarding the constitutionality of the Anti-Infiltration Law, also found it difficult to accept the claim that there had been no change in the policy towards Sudanese nationals. Even though the Supreme Court was presented with all of the documents detailed above, including the state's denial that there was or ever had been such a policy for Sudanese nationals, the Supreme Court noted:

"In the past, Sudanese nationals who came to Israel were also recognized as eligible for 'temporary protection', thereby postponing their deportation from Israel, and providing them with residency permits."⁵⁹

This statement contradicts, of course, the state's version, according to which there never was a policy of "temporary protection" or "non-removal" for Sudanese nationals, and according to which the policy towards this population was never changed, but apparently the court could find no other way to reconcile the direct contradiction between the state's position and the many documents stating the existence of this policy, as well as the rationale for avoiding deporting Sudanese nationals relating to the situation in that country.

⁵⁹ Matter of Adam, supra note 28, Justice Arbel, para. 10.

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VI

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Submission of Asylum Applications by Sudanese and Eritrean Nationals

The policy limiting the possibility of asylum applications for Sudanese and Eritrean nationals in Israel changed only in 2013, eight months after Israel began implementing the third amendment to the Anti-Infiltration Law. According to the third amendment, those defined as "infiltrators" could be held for a period of three years and more in administrative detention. Among the criteria for extraordinary release from detention the amendment stipulated that the Ministry of the Interior could release anyone who submitted an asylum application - if after three months the processing of the application had not begun, or if after nine months the application had not been decided.⁶⁰ As early as during the legislative proceedings for the third amendment, a representative of the Ministry of Justice guaranteed that all detainees from Eritrea and Sudan would undergo asylum procedures once detention under the Anti-Infiltration Law would come into effect.⁶¹ But despite this commitment, only many months after the amendment came into effect did the examination of asylum applications begin.

Contrary to the undertaking made in the Knesset, RSD (Refugee Status Determination) proceedings were not conducted for all Sudanese and Eritrean nationals when detention under the third amendment to the Anti-Infiltration Law began in June 2012. In order to undergo RSD proceedings, detainees were required to fill out request forms. But for many months the detainees did not know this, and these forms were not provided in the wings of the Saharonim and Ktzi'ot prisons where they were held. Even those who claimed that they faced danger in their country of origin in the hearings held on their matter, before the Border Control officer at the Ministry of the Interior or in proceedings at the Custody Hearings Court (the organ that conducts quasi-judicial review of detention orders,) and even those who stated unequivocally before one of these organs that they ask to be recognized as refugees, were not considered to have submitted an application for asylum as long as they did not fill out a form as required, even though for many months these forms were not provided in the detention facilities. Individual appeals by the Hotline for Refugees and Migrants in the name of 320 detainees who asked to submit asylum applications remained unanswered. Only in early

⁶⁰ Article 30A(c)(1)-(2).

⁶¹ The Knesset, 18th Session, Internal Affairs and Environment Committee, Protocol No. 436, p. 3 (Aug. 10, 2011) ("Avital Stenberg: ... This bill is not intended for refugees, and therefore we will conduct a refugee status determination process to all the infiltrators, including Sudanese and Eritreans. Accordingly there are two exceptions to detention in article 30A(a)(5) and (6).")

2013 did the Immigration Authority begin responding to the Hotline's appeals and the detainees were asked to fill out the forms, (which still were not available in the detention facilities). In the same vein, for many months no information was given at the detention facilities detailing how asylum requests were to be submitted or even regarding the very possibility of submitting an asylum request.⁶² In addition, once the third amendment came into force the Prison Service began to obstruct prison visits by Hotline representatives. Thus, several months passed until Hotline staff could convey information about the possibility to submit asylum applications to the detainees.⁶³

Only in February 2013, over half a year after asylum seekers were first detained under the Anti-Infiltration Law, did the MOI begin allowing detained asylum seekers to receive forms and to submit applications for asylum. Even then, the forms could only be filled out in English, despite the fact that many of the detainees do not speak English and many more still cannot read and write in this language.⁶⁴

In February 2013 the UNHCR addressed the ongoing problems with submitting applications in the detention facilities:

"UNHCR's detention monitoring in Israel has observed with serious concern that detained asylum seekers are not provided adequate information regarding their right to seek asylum and do not have their asylum claims systematically reviewed, while access to legal and other support is neither regularly available nor adequately described to detainees. For example, in our observation there is no clear information systematically provided to refugees and asylum seekers in detention

⁶² Asaf Weitzen, Hotline for Migrant Workers, Letter to Amnon Ben Ami, Head of the Population, Immigration and Border Authority (Jan. 6, 2013). The District Court also recognized the obstacles to filing asylum applications in the "Saharonim" detention facility (Administrative Petition (Beer-Sheva District) 46175-03-13 Ploni v. Ministry of Interior (Apr. 15, 2013). In December 2012, after over 6 months in which asylum seekers were held in detention in accordance with Amendment No. 3 to the Prevention of Infiltration Law, the detention tribunal in "Saharonim" stipulated that "as far as the tribunal is aware there is no mechanism which details the manner in which Eritrean nationals, who enjoy temporary group protection and are held in detention, can file an application for asylum." This quote is taken from Hotline for Refugees and Migrants, Detention Tribunals, p. 39 (Jan. 2014), <http://hotline.org.il/wp-content/uploads/web.pdf>.

⁶³ For additional information on the Ministry of Interior's attempts to prevent the submission of asylum applications see Human Rights Watch, Israel: Detained Asylum Seekers Pressured to Leave (13 Mar. 2013), <http://www.hrw.org/news/2013/03/13/israel-detained-asylum-seekers-pressured-leave>.

⁶⁴ Testimonies of detained asylum seekers concerning this issue were recorded in affidavits that were attached to HCJ 7146/12 Adam v. the Knesset, Petitioners' Response (May 26, 2013).

on the asylum procedure and how to access it. This has hindered individuals to present their asylum claims in a timely manner and may impact on the timing of the review of their claims, thereby increasing the length of time in detention.”⁶⁵

Ultimately, over 1,400 asylum seekers detained pursuant to the third amendment to the Anti-Infiltration Law submitted applications for asylum,⁶⁶ but as mentioned above, only after many months of detention, in which they were denied access to the asylum system.

⁶⁵ William Tall, Representative, UNHCR Tel Aviv, Memorandum (February 5, 2013).

⁶⁶ Adv. Yochi Gennesin et. al., HCJ 7146/12 – additional details, para. E (May 22, 2013).

VII

Decisions on Asylum Applications

1. Avoiding Decisions on Asylum Applications of Detainees at the Holot Facility

Although Sudanese and Eritrean nationals have been able to submit applications for asylum since 2013, in practice only the applications of detained asylum seekers have been examined. It is indeed desirable to prioritize the applications of those held in custody, but only the asylum applications of Sudanese and Eritrean nationals held in immigration detention are examined at all. The Hotline for Refugees and Migrants is not aware of a single asylum seeker from Sudan or Eritrea who is not imprisoned and has received an asylum decision.

While both of the overturned amendments to the Anti-Infiltration Law stipulated that there would be cause to release an asylum seeker nine or six months after submitting the application if no decision had been received,⁶⁷ there is no similar stipulation of consequences for avoiding examination of asylum applications of Holot detainees, therefore (supposedly) the Ministry of the Interior may protract the examination of their applications indefinitely.⁶⁸

2. The Sweeping Denial of Eritrean Nationals' Asylum Applications

In view of the stipulation of Paragraph 30a(c)(2) of the third amendment to the Anti-Infiltration Law, by which a failure to issue an asylum decision within six months gives cause to release from custody, the MOI began in mid-2013 to make decisions regarding asylum seekers from Eritrea and denying almost all of them.

Most asylum applications by Eritrean nationals are based on their flight from Eritrea without a permit while at an age for forced conscription. According to the information available about Eritrea, an Eritrean citizen who left the country without a permit while of conscription age (18–50) is considered a political dissident by

⁶⁷ Article 30A(c)(2), Prevention of Infiltration Law as amended in Amendment No.3 and article 30A(b)(6) as amended in amendment No. 4.

⁶⁸ This statement is merely “supposed,” as an asylum seeker who is held in the “Holot” facility while there is no progress (or reasonable progress) in processing his asylum application, may claim that his continued detention is unreasonable.

the regime and often faces imprisonment under inhumane conditions, torture and even mortal danger.⁶⁹ It must be noted that not in every case where a person leaves a country and faces punishment for avoiding military service do they meet the conditions of the Refugee Convention. But in the case of Eritrea this situation is different in at least three ways when compared to military conscription and the punishment for avoiding it in countries like Israel.

First, the nature and duration of military service are different. Eritrean citizens of the ages 18-50 are conscripted for indeterminate periods of time for military or national service.⁷⁰ Many states have defined the military and national service in Eritrea as forced labor, and the UN Rapporteur on Eritrea found that the forced conscription and its nature in Eritrea constitute a violation of the Covenant on Civil and Political Rights.⁷¹ Conscripts do not know when they will be discharged, whether they will ever be discharged, and disciplinary violations are answered with extreme corporal punishment.⁷² Second, the government conceives of the military as a tool for social and political control.⁷³ Therefore, those who leave the country without a permit and do not serve in the army are seen as political or ideological dissidents, regardless of the motive behind their actions.⁷⁴ Thirdly, as aforementioned, the harsh punishment for deserters (reflecting the conception that these are political dissidents) includes imprisonment under inhumane conditions, torture, and executions, and constitutes a violation of international

⁶⁹ UNHCR, Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Eritrea, HCR/EG/ERT/11/01, p. 11 (2011), https://www.ecoi.net/file_upload/90_1303373613_unhcr-eri20110420-guidelines.pdf (hereinafter: UNHCR Eritrea Guidelines 2011); Connection e.V, Eritrea: Desertion and Asylum 2-8 (Dec. 2010).

On the measures taken against Eritreans who desert military service or leave the country without authorization, see US Department of State, Country Reports on Human Rights Practices for 2013: Eritrea, p. 3 (Apr. 2014), <http://www.state.gov/documents/organization/220321.pdf> (hereinafter: State Department Report: Eritrea 2014).

⁷⁰ Human Rights Watch, Service for Life: State Repression and Indefinite Conscription in Eritrea (2009), http://www.hrw.org/sites/default/files/reports/eritrea0409webwcover_0.pdf.
See also State Department Report: Eritrea 2014, supra note 69, p. 23.

⁷¹ Report of the Special Rapporteur on the situation of human rights in Eritrea, Sheila B. Keetharuth, UN Human Rights Council, UN. Doc. A/HRC/26/45 (13 May, 2014), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_45_ENG.DOC.

⁷² UNHCR Eritrea Guidelines 2011, supra note 69, p. 11.

⁷³ Nicole Hirit & Abdulkader S. Mohammad, Dreams don't come true in Eritrea: anomie and family disintegration due to the structural militarisation of society, 51 Journal of Modern African Studies 139 (2013).

⁷⁴ Id. at 155; UNHCR Eritrea Guidelines 2011, supra note 69, at 14-15; Human Rights Watch, supra note 70, at 27.

law in itself.⁷⁵

Because those who leave the country without a permit at legal conscription age are seen as dissidents, the fate awaiting those who are returned to that country constitutes persecution for imputed political opinion.⁷⁶ When the reason for persecution is examined for purposes of the Refugee Convention, the relevant question is not whether the persecuted person truly possesses the given characteristic which leads to their persecution. Rather, the reason for persecution is examined from the perspective of the persecutor. Therefore, when the government attributes political or ideological dissent to a person because they escaped the country, and therefore imprisons, tortures, or kills them, that person meets the conditions of the Convention relating to the Status of Refugees, even if they do not actually hold the political opinion attributed to them.⁷⁷

One of the arguments occasionally raised regarding the Eritrean nationals in Israel is that they are not refugees because they did not face danger of death, arrest, or torture before leaving their country. But the question relevant to the Refugee Convention is what will happen to a person in the future if they are deported to their country, not what happened to them in the past.⁷⁸ Past events serve, at most, as an indication from which one may sometimes learn more about what may yet happen. Throughout history, many people have received political asylum under similar circumstances, even if they faced no danger before leaving their country. So, for example, in the Cold War period, those who left the USSR or East Germany received asylum in Western countries, as it was recognized that leaving their countries in itself made them traitors in the eyes of their governments and would lead to a severe violation of their basic rights if they were returned to their countries. Similarly, North Korean nationals today who manage to escape the

⁷⁵ Supra note 69.

⁷⁶ Id. at 14, footnote 103. In the UK, for instance, Eritreans of military service age or approaching that age and who left Eritrea illegally before undertaking or completing national service, are considered to be persecuted based on imputed political opinion. UK Home Office, Operational Guidance Note: Eritrea, OGN v 14.1 (re-issued Nov. 2014), para. 3.12.19. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375878/Eritrea_OGN_February_2014_re-issue_November_2014_.pdf.

⁷⁷ Administrative Appeal 1440/03 Chima v. Ministry of Interior, Justice Meltzer, para. 26 (Aug. 7, 2013). See also Aguilera-Cota v. INS, 914 F.2d 1375 (1990), 1379-1380; Canada v. Ward [1993] 2 S.C.R. 689, 747; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] O.J. L304/12, 17, Article 10.2.

⁷⁸ James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 79-80 (2nd ed. 2014) (hereinafter: Hathaway & Foster). See also Administrative Appeal 4922/12 Plonim v. Ministry of Interior, Justice Danziger, para. 16 (July 7, 2013).

country are recognized as refugees, even if the only cause for asylum they have is leaving the country without permit.⁷⁹

The fact that the government of Eritrea attributes political dissent to those of conscription age who leave the country without permit has led to the extremely high recognition rates of Eritrean nationals as refugees around the world. In 2012, the global recognition rate of Eritrean nationals as refugees was 81.9 per cent (and 89.3 per cent when adding those recognized as eligible for complementary protection);⁸⁰ in 2011 – 74 per cent (and 85.4 per cent when adding those eligible for complementary protection);⁸¹ and in 2010 – 75.7 per cent (and 87.1 per cent including complementary protection).⁸² However, in Israel the refugee recognition rate for Eritreans is nearly null, due to Israel's refusal to recognize illegally leaving Eritrea at conscription age as a foundation for asylum.⁸³

Although most Eritrean nationals in Israel meet the criteria by which citizens of that country are recognized as refugees all over the world (i.e., leaving the country without permit at age of forced conscription), the Israeli Ministry of the Interior holds that the danger they face for this reason does not suffice to meet the requirements of the Convention relating to the Status of Refugees. The MOI notifies asylum seekers from Eritrea about the denial of their applications with

⁷⁹ See Hathaway & Foster, *supra* note 78, at 77 («Under this long-standing doctrine, if the sanction for illicit travel abroad is so severe that it effectively undermines the fundamental human right to leave and to return to one's country, and the country of origin treats departure or stay abroad as an implied political opinion of disloyalty or defiance, the criteria for refugee definition is satisfied» (footnotes omitted).

⁸⁰ UNHCR Global Trends 2012, Annexes (June 2013), Table 11, <http://www.unhcr.org/52a723f89.html>.

⁸¹ UNHCR Global Trends 2011, Annexes (June 2012), Table 11, <http://www.unhcr.org/51628f589.html>.

⁸² UNHCR Global Trends 2010, Annexes (June 2011), Table 11, <http://www.unhcr.org/4ef9c7269.html>.

⁸³ We do not have data regarding the number of Eritreans who were recognized as refugees in Israel. As mentioned above, until recently Eritreans could not file for asylum altogether and only in mid-2013 the Ministry of Interior begun making decision on asylum applications filed by Eritreans. The State's representative declared in Court in June 2013 that at that time only three asylum applications filed by Eritreans were decided and rejected (HCJ 7146/12 Adam v. the Knesset, Hearing Protocol, p. 11. lines 25-32 (June 1, 2013)). In this hearing the State declared that it does not recognize persecution based on imputed political opinion, which stems from departure from the country or from military desertion, as falling under the Refugee Convention (Id.). Since that time the Hotline for Refugees and Migrants came across hundreds of Eritrean asylum seekers whose asylum applications were rejected and only two who were recognized as refugees. The latest data we have is based on information presented by the State to the Court in March 2014. At that time, the State submitted that 444 asylum applications were filed by Eritrean nationals, and only two of them were approved (HCJ 8425/13 Gabralsi v. the Knesset, Respondents' Response, para. 15 (Mar. 11, 2014)), less than half a per cent of the applicants.

boilerplate text, always including the following wording:

"By decision of the Minister of Interior, evasion of army service or deserting of army duties in and of themselves, or with no connection to any of the grounds listed in the Refugee Convention, are not enough to establish grounds for political persecution in accordance with the Convention, a request founded solely on draft dodging or desertion from the Eritrean army do no [sic] constitute a foundation for refugee status."⁸⁴

Although asylum applications by citizens of Eritrea based on this foundation are all denied, the MOI announces with each such decision that due to the "non-removal" policy, they will not be deported. Every rejection letter features the following paragraph as well:

"It should be noted that, given the temporary policy of non-refoulement granted to Eritreans in Israel, due to the current situation in Eritrea, asylum seekers whose requests are rejected will not be returned to their country as long as the policy of nonrefoulement stands."⁸⁵

All of this indicates that Israel recognizes the danger facing those who would be deported to Eritrea, and therefore avoids deporting them, but refuses to recognize that the cause for danger brings them under the purview of the Convention relating to the Status of Refugees. It avoids deporting them, as aforementioned, but at the same time refuses to give them any status, holding them in detention facilities and in the "open" Holot Facility, avoids giving them working permits in Israel and actively works to encourage them to leave to a place where the state itself admits they face danger.

3. The Sweeping Denial of Sudanese Nationals' Asylum Applications

As aforementioned, Sudanese citizens were also denied access to the asylum system until early 2013, when submitting asylum applications at the Saharonim Detention Facility was effectively made possible.

Let us begin with data. To date, decisions have been made regarding hundreds

⁸⁴ Population, Immigration and Border Authority, letter to Mr. A.A. (Mar. 3, 2014). For more on the Ministry of Interior's legal position on this matter and its conflict with the Refugee Convention see: Human Rights Watch, *Make their Lives Miserable: Israel's Coercion of Eritrean and Sudanese Asylum Seekers to Leave Israel* 68-72 (Sept. 2014), http://www.hrw.org/sites/default/files/reports/israel0914_ForUpload_0.pdf.

⁸⁵ Id.

of applications by Sudanese nationals, of which not a single application was accepted.⁸⁶ This contrasts with high refugee recognition rates for Sudanese nationals around the world. In 2012, the global refugee recognition rate for Sudanese citizens was 68.2 per cent (and 71.8 per cent when adding those recognized as eligible for complementary protection),⁸⁷ in 2011 – 71.4 per cent (and 74.4 per cent when adding complementary protection)⁸⁸; and in 2010 – 42.1 per cent (and 45.4 per cent including complementary protection).⁸⁹

Many of the Sudanese asylum seekers who entered Israel in recent years are former residents of the Darfur region, persecuted by the Sudanese government and its collaborators (the Janjaweed gangs) for their ethnic affiliation. These people are victims of genocide, who have lived through the worst. Due to this persecution, the International Criminal Court (ICC) released an international arrest warrant on the accusation of genocide against Sudanese President Omar al-Bashir, along with warrants for senior Sudanese regime officials. Other groups of asylum seekers come from different regions in the Sudan (such as the Nuba Mountains and the Kordofan region). These regions are under attack from the Sudanese regime, which has acted in the past decades to violently repress anything that appears to it as a potential rebellion – including aerial bombardment, destruction of villages, and hundreds of thousands of arrests. Others flee the Sudan because of their persecution for a certain religious or ethnic background.⁹⁰

As opposed to the asylum applications of Eritrean nationals, which are all denied with the same legal explanation, the asylum applications of Sudanese nationals are denied for various kinds of stated reasons. No clearly different kind of explanation can be indicated than the typical explanations used to deny asylum applications in general. The methods and explanations used to deny applications for asylum listed in [Until our Hearts are Completely Hardened](#) – alleged unreliability based on imaginary contradictions, difficulty recalling minuscule details, or contradictions in peripheral details which do not relate to the heart of the asylum application,

⁸⁶ The most recent official data we have was presented by the State to the Supreme Court in March 2014. At that time, 505 decisions concerning asylum applications filed by Sudanese nationals were made, all of them rejected (HCJ 8425/13 Gabralsasi v. the Knesset, Respondents' Response, para. 15 (Mar. 11, 2014)). Since that time the Hotline for Migrants and Refugees has come across dozens of Sudanese asylum seekers whose asylum applications were rejected, and did not encounter one single Sudanese asylum seeker who was recognized as a refugee.

⁸⁷ Supra note 80.

⁸⁸ Supra note 81.

⁸⁹ Supra note 82.

⁹⁰ For an up-to-date description of human rights violations in Sudan see US Department of State, Country Reports on Human Rights Practices for 2013: Sudan (Apr. 2014), <http://www.state.gov/documents/organization/220376.pdf>.

and poor research regarding the conditions in the country of origin – are used also to deny the asylum applications of Sudanese nationals.

An important point to note is that to date, to the best of our knowledge, not a single asylum application by a resident of the Darfur region has been denied. As aforementioned, the ongoing crisis in Darfur has been raging for years and recognized by many countries as genocide, and asylum seekers from this region are recognized worldwide as refugees on an almost sweeping basis.⁹¹ Israel too, although avoiding individual examination, recognized in 2007 that all Darfuris who entered Israel until that date should be given temporary residency.⁹² At this point it is clear that the Ministry of the Interior prefers to avoid making any decisions on the asylum applications of Darfuris and leaves them unanswered instead.

Since the Holot Facility was opened, 4,005 asylum seekers from the Sudan have left the country as part of the "voluntary return" program, to the Sudan, Uganda, or Rwanda.⁹³ The Immigration Authority avoids noting how many of them escaped the genocide in Darfur, but Hotline staff's familiarity with the detainees indicate that many of those leaving are Darfuris whose applications were left unanswered.

⁹¹ In a decision in which the UK Asylum and Immigration Tribunal gave country guidance on Sudan, it concluded that all non-Arab Darfuris have well-founded fear of persecution in Darfur and do not have a relocation option within Sudan. AA (Non Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056.

This guidance was adopted by the UK immigration authorities. See UK Home Office, Operational Guidance Note: Sudan, OGN v 17.0, para. 3.9.12 (Aug. 2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310188/Sudan_operational_guidance_2012.pdf.

⁹² In mid-2007 the Israeli Prime Minister decided to grant A/5 permits (temporary residency) to about 500 Darfuris who were in Israel at that time. These permits were given to those who entered Israel prior to the time of the decision and were recognized by UNHCR as coming from Darfur. The permits were granted without conducting an individual assessment as to whether the recipients meet the Refugee Convention criteria. This decision was not adopted in a government resolution or in written guidelines. The permits granted at that time to Darfur residents entail the right to work in Israel and the same social rights granted to permanent residents and citizens of Israel. This permit type is the same one granted to recognized refugees. The Ministry of Foreign Affairs announced at that time on its website that the State of Israel has decided to grant "refuge" to 500 Darfuris. Israel Ministry of Foreign Affairs, Behind the Headlines: Israel's Position on the Crisis in Darfur (23 Aug. 2007), <http://www.mfa.gov.il/mfa/foreignpolicy/issues/pages/israel%20position%20on%20crisis%20in%20darfur%2023-aug-2007.aspx>.

⁹³ Foreigners in Israel – version 03/2014, supra note 25, table 2.A.



VII

Recommendations

In light of the shortcomings we addressed in this report, the Hotline for Refugees and Migrants recommends the following measures:

The Ministry of the Interior must define, in clear regulations, the legal status of Eritrean and Sudanese nationals subject to the "temporary protection" policy, "non-removal," or any other name the MOI chooses. These regulations must amend the obscurity surrounding both the reasons the deportation of these groups is prevented and the rights afforded to them. The regulations must also clarify unambiguously the right of those subject to such a policy to submit applications for asylum.

In light of the longstanding policy by which Eritrean and Sudanese nationals were prevented from submitting applications for asylum, and in view of the confusion rampant in the asylum seeker communities regarding this matter, the Ministry of the Interior must clarify, in writing, to each person presenting themselves at the MOI to renew their residency license, that they have the possibility of filing an application for asylum, and explain to them the legal meaning of the policy applying to them, the legal meaning of submitting an application, and the procedure for filing such an application.

The MOI must apply criteria in line with international law with regard to examining the applications of Eritrean and Sudanese nationals. As part of this, the MOI must recognize that leaving Eritrea without a permit at age of forced conscription or deserting the Eritrean military constitute grounds for asylum in accordance with the Refugee Convention, so long as no fundamental change has taken place in the situation in that country. The MOI must furthermore examine the asylum applications of Sudanese nationals according to international law, while recognizing *sur place* grounds in appropriate cases and considering all relevant factors in that country.

The MOI must examine the requests of those held in detention facilities and those held in the "open" facility as swiftly as possible. In addition, the MOI must immediately release all those who submitted asylum requests which were not decided within a short period of time.



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