הפורום לזכויות פליטים
المنتدى لحقوق اللاجئين
Refugees' Rights Forum

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Policy Paper:
The Principle of Non-Refoulement
Of a Person to a Place in Which He Is Expected to Suffer danger to life, liberty, persecution or torture

Executive Summary

This policy document is the product of a protracted work process by the eight main organizations involved in the subject of asylum seekers in Israel.
The document:

- Clarifies the meaning of the prohibition against the refoulement of a person to a place in which he can be expected to suffer danger to life, liberty, persecution or torture.

- Reviews the legal status of this principle and the position of the Israeli court on this matter.

- Presents the various arguments that have been presented recently in Israeli discourse: The argument that the State of Israel is entitled to expel asylum seekers who enter Israel from Egypt, since these are not in fact asylum seekers but rather "labor infiltrators" and, accordingly, they are not entitled to the procedures established in the Refugee Convention; the argument that the growing number of persons arriving to Israel's border means that a hard-line stance must be adopted in order to deter others; and so forth.

- Describes the diverse ways in which the principle is sometimes violated, including detailed examples.

- Highlights the disastrous consequences of the violation of the principle in one case in which such return was preformed and presents the organizations' recommendations for fulfilling the principle of the prohibition against

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refoulement. These recommendations include, principally, a careful examination by trained professionals of an asylum application submitted in the State of Israel or at the border. In the absence of proper asylum procedures, the organizations argue that there is a danger that Israel will deport refugees to a place where they will face danger.

The principle in the international convention: The prohibition against the expulsion or return (refoulement) of a person to a place in which he is expected to suffer persecution forms the cornerstone of the protection of refugees. This principle is formalized in Article 33 of the Refugees Convention and has long been considered a binding principle in international customary law. The significance of this is that even countries that are not party to the convention must respect this principle.

The principle in the Israeli court: The Supreme Court of the State of Israel has established that the principle of non-refoulement applies in Israel under the **Basic Law: Human Dignity and Liberty**, which guarantees the basic right to life. State representatives have repeatedly declared in court the commitment of the State of Israel to honor this principle. However, despite the declared commitment, the State of Israel has to date failed to establish the mechanisms and enact the procedures required to ensure that persons it expels from its territory will not be sent to a place where they might face danger. Worse still, since the significant increase in the number of persons crossing the Israeli border without permission, Israel has begun to seek legal excuses and justifications for removing those who enter the country or for preventing their entry. This occurs without proper procedures ensuring the protection of the rights of the removed persons to life and to protection against torture and cruel, inhuman, or degrading treatment or punishment.

The attached document debates these important questions, and describes of the expulsion to Egypt in August 2007 of forty eight asylum seekers shortly after they crossed the border. The fate of the removed refugees, which is still unknown, constitutes a warning sign against the adoption of rash actions that ignore international law and the need for proper asylum procedures. The paper also presents the case of Adam, a refugee from Darfur who was expelled from Israel to Egypt in September 2004 in violation of the principle. Thanks only to his own resourcefulness, Adam managed to avoid expulsion to Sudan, where it may be assumed that he would have faced serious danger.

The Principle of Non-Refoulement

During the period following the establishment of the State of Israel, the new state and numerous Jewish organizations were actively involved in drafting the 1951 International Convention Relating to the Status of Refugees. Israel was one of the first countries to join the convention. Later, in 1967, Israel also joined the protocol to the convention, and it is a member of the executive committee (EXCOM) of the United Nations High Commissioner for Refugees (UNHCR). Despite this, however, Israel has not to date enacted its own refugee law, and only at the beginning of 2002 was a system established to absorb refugees. During the period 2002-2006, an average of one thousand requests for asylum were submitted in Israel each year. Since 2007 there has been a significant increase in the number of requests submitted in Israel. According to figures from the Population Administration, the number of people entering Israel in 2007 alone was 5,300, many of whom applied for asylum in the country.

The substantial increase in the number of asylum seekers arriving in Israel has led to a tightening of official policies on the issue. At a government meeting in February 2008, the prime minister proposed that "the instructions for opening fire be amended so that it will be easier to shoot at infiltrators." Opposing the proposal, the defense minister argued that "infiltrators" should be returned to Sinai after their capture.[1] If realized in practice, these proposals are liable to endanger human life and cause the violation of one of the basic principles of the Refugees Convention. The objectives of this policy document are to clarify the requirements of international law; to identify actions liable to lead to its violation; and to propose steps to be taken if Israel intends to meet its obligations toward persons arriving on its borders.

The cornerstone for the protection of refugees is the principle of non-refoulement – the prohibition of the expulsion or return (for the sake of brevity, the terms "non-refoulement" and "prohibition of expulsion" will be used in this document) of a person to a place in which he[2] is expected to suffer persecution. Article 33 of the convention establishes as follows:

> 1. *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
> 2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*
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> *Article 33 of the 1951 International Convention Regarding the Status of Refugees, Convention Documents 65, Vol. 3, p. 5.*

The most immediate, urgent, and basic need of any refugee is to reach a place in which he will be protected from persecution. A historical example that illustrates the vital need to grant entry and basic protection is the case of the St. Louis, an ocean liner that left the port of Hamburg, Germany in May 1939 carrying 907 Jewish passengers. After the passengers' entry visas for Cuba were cancelled, all the nations of Latin America refused to permit the refugees to enter. The United States also refused to allow the ship to enter, and even sent a warship to

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[1] Barak Ravid, "Barak Opposes Olmert's Proposal to Liberalize Instructions for Opening Fire on Infiltrators," Ha'aretz 25 February 2008. At a discussion held during a government meeting in March, the prime minister ordered that "reasonable force be used to prevent infiltration into Israel." He referred to the phenomenon as "a tsunami of infiltrators." Report on Ynet, 23 March 2008.

[2] The masculine form is used in this report for the sake of brevity and ease of reading; the reference is equally to men and women..

ensure that the refugee ship remained at a sufficient distance from the coast to prevent the passengers swimming ashore. Canada also argued that the refugees were not its problem. The ship was eventually forced to return to Europe, where many of the passengers were later killed.

The principle of non-refoulement is intended to ensure that persons fleeing persecution will not be returned to their persecutors. The practical importance of this principle is not confined merely to the prohibition of the active expulsion of a refugee to a place of danger. Additional legal consequences of this principle include: The prohibition against turning back refugees who arrive at the borders of the country; the obligation to examine properly requests for asylum and to ensure that applicants enjoy proper procedures for the examination of requests for asylum; and the obligation to enable asylum seekers to remain within the state pending completion of the clarification of their request for asylum. We shall discuss these aspects as they are encountered at present in the context of asylum seekers arriving in Israel.

The Legal Foundation for the Principle of Non-Refoulement

The clearest and most direct basis for the principle of non-refoulement can be found in Article 33 of the Refugees Convention. However, additional legal sources also address and significantly expand this principle. These provisions do not focus specifically on refugees, but prohibit the removal, expulsion, or extradition or any person to a place in which he is liable to face torture or cruel, inhuman, and humiliating treatment and punishment.[3] The central provision for this purpose appears in Article 3 of the Convention against Torture and Cruel, Inhuman or Humiliating Treatment or Punishment, to which Israel is also party. This article establishes:

> *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*.
> 1984 Convention against Torture and Cruel, Inhuman or Humiliating Treatment or Punishment, Convention Documents 1039, Vol. 31, p. 249.

No restriction is imposed on this provision; accordingly, the return of a person to a place in which he may be exposed to torture is absolutely prohibited.

The importance attached to this principle means that it long ceased to be part of convention law and became part of international customary law.[4] This is due to the large number of international conventions that formalize the principle;[5] the fact that over 169 states have signed conventions that formalize the principle in one format or another;[6] the fact that over 80 states have included it in their domestic law;[7] the interpretation of the principle formulated by

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[3] Provisions prohibiting the exposure of a person to torture may be found in Article 7 of the 1966 International Covenant on Civil and Political Rights and in Article 3 of the European Convention on Human Rights. These articles have been interpreted as including a prohibition against placing a person in danger of torture through his expulsion, extradition, or return to another country. For an interpretation of the International Covenant on Civil and Political Rights, see: CCPR General Comment No. 20, para. 9, 10/3/92 found at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969cl12563ed004c8ae5?Opendocument. For an interpretation of the European Convention on Civil Rights, see: Chahal v United Kingdom, 108 ILR 385, at para. 75.

[4] Encyclopedia of Public International Law (Max Planck Institute for Comparative Public Law and International Law, Amsterdam, New York, 1985), vol. 8, p. 456.

[5] In addition to the four conventions mentioned above, other examples include: The 1967 Declaration on Territorial Asylum; The 1969 Organization of African Unity (OAU) Convention; the 1969 American Convention on Human Rights; and the 1957 European Convention on Extradition.

[6] Lauterplacht E. and Bethlehem D., "The Scope and Content of the Principle of *Non-Refoulement*: Opinion, 2003, p. 93. Found at: http://www.unhcr.org/publ/PUBL/419c75ce4.pdf.

[7] Ibid., p. 148.

the UN High Commissioner for Refugees; and from resolutions that have been repeatedly ratified by the General Assembly of the United Nations.[8] The significance of the status of the principle as part of international customary law is that even states that have not signed any of the conventions formalizing the principle are obliged to honor it.

The principle of non-refoulement is binding in Israel on the basis of Israel's membership of the above-mentioned conventions, under the strength of international customary law, and in accordance with the basic right to life as established in the Basic Law: Human Dignity and Liberty. In *Al-Tai*, President Aharon Barak established that:

> *"A person is not to be expelled from Israel to place in which he faces danger to his life or liberty. Any governmental authority – including the authority of expulsion in accordance with the Entry to Israel Law – must be exercised on the basis of the recognition of "the value of the human being, the sanctity of human life, and the principle that all persons are free" (Article 1 of the Basic Law: Human Dignity and Liberty). This is the great principle of non-refoulement, according to which a person is not to be expelled to a place in which his life or liberty will be in danger. This principle is formalized in Article 33 of the Refugees Convention. It forms part of the domestic legislation of many countries that adopt the provisions of the convention but regulate the matter separately. It is a general principle that is not restricted solely to 'refugees.' It applies in Israel to any governmental authority relating to the expulsion of a person from Israel."*
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> *HCJ 4702/94 Al-Tai et al. v Interior Minister, Piskei Din 49(3) 843,848.*

Who Is Obliged to Honor the Principle?

According to Article 33 of the Refugees Convention, each state that is party to the convention must honor the principle. The importance of this article is such that it may not be conditioned by a state party.[9] In addition to the state itself, all agents acting on behalf of the state are also bound to honor the principle. The obligation is imposed on the state in any place in which it operates. This applies when the state's soldiers or police officers are operating on the border, or when border inspectors are operating at border and entry crossings into Israel, and even when they are operating outside the borders of the state (such as in areas subject to the effective control of the state, or with regard to persons subject to its effective control).

Is Israel's Declarative Commitment to the Principle Adequate?

The official position of the State of Israel as presented to the courts on several opportunities is that it is committed to the principle of non-refoulement and does not expel persons to a place in which they can be expected to face danger.

Despite this, Israel has not established the necessary mechanisms to ensure that persons are not expelled to a place of danger. More gravely, since the increase in the number of people crossing the border without authorization, Israel has begun to seek legal excuses and justifications that will enable it to remove persons who enter its territory or prevent their entry without protecting the rights of the removed persons to life, liberty, and protection from

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[8] For example, see: The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany, 1994. Found at: http://www.unhcr.org/publ/PUBL/437b6db64.html.

[9] This is established in Article 42(1) of the convention, which includes the article in the list of articles that may not be conditioned.

torture and cruel, inhuman, or humiliating treatment or punishment. The following four examples illustrate the problematic direction developments in Israel are taking:

- In September 2004, Israel returned to Egypt eleven asylum seekers from Sudan. Israel relied on a promise secured through the mediation of the UN Commissioner for Refugees that the asylum seekers would not be harmed and would not be expelled from Egypt to Sudan. In practice these promises were broken; the asylum seekers were arrested in Egypt, suffered maltreatment, and seven of them were almost expelled to Sudan.

- In November 2004, a young woman from Syria crossed the border into Israel. According to the media, the reason for her entry into Israel was "family and psychological problems and violence at the hands of her father." The IDF declined to enable the woman to meet with representatives of the UN High Commissioner for Refugees, the body in Israel responsible for clarifying requests for asylum; instead, it returned the woman to Syria after a brief security interrogation.

- In April 2007, IDF soldiers expelled a group of six asylum seekers it had detained within Israeli territory. The asylum seekers were deported by force and under the threat of firearms. The soldiers pushed the asylum seekers into Egypt through a hole in the border fence, despite the fact that the asylum seekers claimed that this would endanger their lives and demanded protection.

- In August 2004, forty-eight asylum seekers were expelled from Israel, including eighteen minors, shortly after they entered the country. The expulsion was undertaken in accordance with the "hot return" policy approved by the attorney-general, who argued that a person who entered Israeli territory without permission may be removed, provided he is captured soon after the infiltration and the return is preformed "within a measure of proximity to the time and place of seizure." Israel also based its actions on agreements reached by word of mouth between Prime Minister Olmert and Egyptian President Mubarak in accordance with which Egypt ostensibly promised that returned persons would not be harmed. Since their return to Egypt, the detainees have been held in detention and incommunicado, to the best knowledge of human rights organizations. The representatives of the UN High Commissioner for Refugees in Egypt have not been granted access to the detainees, some of whom have probably been expelled from Egypt to Sudan.[10]

Several arguments that have been presented recently by Israeli policy makers are liable to endanger human life and place Israel in a situation in which it will be in violation of the principle of non-refoulement. For example, it has been argued that those entering Israel are not asylum seekers and, accordingly, there is no need to apply asylum procedures in their case; that Israel is fully entitled to prevent people crossing its borders; that people who entered via Egypt may be returned to that country without any procedure, since Egypt is also a signatory to the convention; that it is impossible to implement screening processes due to the large number of people arriving in Israel; and so forth.

[10] Letter from Human Rights Watch dated 21 December 2007, submitted to the Supreme Court as part of the litigation in HCJ 7302/07 Hotline for Migrant Workers v Defense Minister; an article published in the Herald Tribune on 26 February 2006 quoted a senior official in the Egyptian Foreign Ministry who, responding to questions from reporters about the fate of the deportees, stated that twenty of them "had asked to leave Egypt" (http://www.iht.com/printfriendly.php?id=10434911).

Testimony of Adam, a member of the Fur people of Darfur, 8 June 2007, in Egypt:

I escaped from Egypt to Israel in June 2007 with some other friends from Darfur. We were eleven refugees and we were imprisoned at Ketsi'ot in the Negev. A commander in Ketsi'ot Prison told us that we were going to be returned to Egypt. He gave us all kinds of papers that he said would protect us against being deported to Sudan. He allowed us to use the telephone. I telephoned the UN High Commissioner for Refugees in Tel Aviv. They told me that the United Nations in Geneva had decided that there was no way to prevent us being returned to Egypt, and that the UN High Commissioner for Refugees in Egypt would help us when we got there.

While we were in Ketsi'ot Prison we heard that three Sudanese guys had been expelled to Egypt about two weeks earlier; we knew their names. Later we learned that their families still have no idea what happened to them or where they are.

When we got to Rafah they split us up and interrogated each of us separately for many hours. They asked us lots of questions about Israel. In the next cell I could hear the interrogators beating Yusuf, who hardly knew any Arabic. After the interrogation they transferred us all to Mogama prison. We asked to see a representative from the UN High Commissioner for Refugees. Every day they told us that a representative from the Commissioner would be coming to see us, but they never arrived. Four of us were released, so that there were seven of us left.

After about two weeks they told us that they were transferring us to Aswan and that it had been decided to expel us to Sudan. We were very scared. When they came to take us we lay on the floor and refused to move. A large number of policemen came and started to beat and kick us. They even gave some of us electric shocks. There was a big commotion and eventually they overpowered us and forced us into a truck. At the end of the journey a large group of soldiers took us off the truck and put us on a train to Aswan. In Aswan they took us to the consular representative of Sudan in order to give us documents for our expulsion to Sudan. Because they had hardly given us any food in prison, I bribed one of the guards to buy us some food and telephone call cards. I telephoned a Sudanese friend who lives in Cairo and asked him to help. I guess he must have done something. They did not expel us immediately but put us in prison in Aswan.

After about six weeks in the Egyptian prison, during which time they hardly gave us any food and we were subjected to severe violence, a representative of the UN High Commissioner for Refugees came to see us. A few days later we were released. When we left prison, they gave each of an "emergency travel document" issued by the Sudanese consulate in Egypt. On the reverse side of the document there was an instruction to transfer us to the Sudanese security forces if we arrived.

After our release I learned that the friend in Cairo I had called from prison in Aswan had contacted the UNHCR and they had managed to stop us being deported to Sudan at the last moment.

After I was released from prison some Sudanese who looked suspicious to me followed me and tried to engage me in conversation. I gave them a false name and escaped. I called the UNHCR and requested refugee status, but they hung up on me. My asylum seeker document is no longer valid but I am afraid to go to the UNHCR office in Cairo. One of my friends went to there to renew his card but they took it from him and he was left without any protection.

The Obligation to Examine Every Request for Asylum

The Refugees Convention defines a "refugee" as a person who is outside his own country (or, in the case of a stateless person, outside his permanent place of residence) and regarding whom there is substantiated concern that he will face persecution on the grounds of race, religion, nationality, affiliation to a particular social group, or political opinion if he returns to his country. An "asylum seeker" is a person who requests protection.[11] The decision as to whether an individual is a refugee entitled to protection is a complex professional process that combines an in-depth factual clarification and the application of the legal definition. The determination that an individual is a refugee is usually considered a declarative act relating to that individual's status; it is not the declaration that makes the person a refugee, but rather the occurrences he has experienced or is liable to experience if his is returned to his country. One of the ramifications of this is that even if the procedures for determining the status of asylum seekers have not been undertaken or have not been completed, it is reasonable to assume that they potentially include refugees.

The Israeli prime minister and various government officials have recently claimed that those seeking asylum in Israel are not "true" asylum seekers, but rather labor migrants motivated by the desire to improve their quality of life. Accordingly, the argument continues, there is no need to examine their requests, since the Refugees Convention and the mechanisms it establishes were not intended for such cases. An approach that seeks to exempt the state from the obligation to examine each request for asylum on an individual basis is contrary to international law and may lead to the returning of refugees to a place of danger, violating the principle of non-refoulement.

Proposed Law 381 – Prevention of Infiltration, 5768-2008

On 19 May 2008, the Knesset approved at its First Reading a law proposed by the government to prevent infiltration. If adopted, the proposed law will lead to the violation of the basic principles of Israeli law and the violation of the provisions of international conventions to which the State of Israel is a signatory.

Our comments here will be confined to those aspects of the proposed law that relate to the violation of the principle of the non-refoulement of asylum seekers to a place in which they can be expected to face danger:

The proposal seeks to formalize in legislation the "hot return" procedure for the return to Egypt of persons who cross the border into Israel."***If an empowered officer determines that the infiltrator entered Israel recently, he may order that he be returned immediately to the country or region from which he infiltrated to Israel, provided that such retur shall be preformed within 72 hours from the time the police officer or soldier had reasonable grounds to suspect that the individual had infiltrated Israel***"[12] This article constitutes a gross violation of the principle of non-refoulement and may cause the return of genuine asylum seekers to danger. Although the principle of non-refoulement is mentioned in the explanatory comments to the proposed bill, it is not included as part of the bill. Neither does this article make any reference to the Convention against Torture.

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[11] Asylum seekers may be unfamiliar with the professional terminology or the Refugees Convention. Accordingly, their expression of concern at the consequences of being returned to their country is sufficient to oblige the authorities to examine whether they constitute refugees. Particular alertness is required in some cases when asylum seekers are unable to express their concern at the consequences of return. This applies, for example, in the case of unaccompanied children, people who have suffered trauma, or people who refrain from exposing their situation to the authorities due to their fear of authority or their cultural conditioning.

[12] Ibid., Article 11(A).

In addition the proposal establishes that:
"***An infiltrator shall be expelled from Israel as soon as possible***"[13] – the proposed law does not mention any restrictions to the applicability of this provision regarding asylum seekers, persons who may be protected in accordance with the Convention Against Torture,[14] victims of trafficking, unaccompanied children or others.

"***If a detention order is granted against an infiltrator, he shall be provided in writing or orally, insofar as possible in a language he understands, information regarding his rights in accordance with this law…***"[15] – the proposed law does not **require** the provision of written information regarding the rights of the detainee. Asylum seekers who are detained are liable to be expelled without being aware that they may contact the UNHCR to request asylum and without knowing how to present such a request.
"***A police officer or soldier who has brought a person to a place of custody… shall, as soon as possible, prepare a report detailing the facts forming the basis for the suspicion that the said person infiltrated Israel… as well as the actions taken in the matter of the person… Before preparing the said report, the police officer or soldier shall enable the person to make claims regarding their holding in custody and the possibility of their expulsion, and the claims made as stated shall be detailed in the report***."[16] – The empowered officer shall decide both on detention and on the expulsion of the asylum seeker on the basis of the facts included in the report prepared in the field by the police officer or soldier. This process authorizes an IDF officer who has not personally interviewed the asylum seeker, to order his deportation or his detention. Moreover, the IDF officer lacks the necessary knowledge necessary for the determination of asylum claims. While the bill allows extremely limited quasi-judicial review over detention decisions, the bill does not include a review mechanism over expulsion decisions. There is little chance that the deportee would be able to independently petition a Court.

"Every Refugee Is Initially an Asylum Seeker"

The right to seek asylum from persecution is recognized as a basic right enjoyed by all humans.[17] The UN High Commissioner for Refugees establishes as follows:

> *"Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.*[18]

A familiar phenomenon around the world is the submission of requests for asylum by people who do not meet the definitions in the Refugees Convention. Even before the significant increase in the number of asylum seekers reaching Israel, only a small number of the applicants were recognized as refugees. Nevertheless, the rule is simple and unequivocal: The state is obliged to examine each application properly; to decline to do so is liable to endanger human life. Any asylum seeker is entitled to a full personal interview with an official trained

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13 Government Proposed Law 381, 25 Adar II 5768, 1 April 2008, Article 6(A).
14 The 1984 Convention Against Torture and Cruel, Inhuman or Humiliating Treatment or Punishment, Convention Documents 1039, Vol. 31, p. 249.
15 Ibid., Article 8(D).
16 Ibid., Article 9(C).
17 Article 14(1) of the Universal Declaration of Human Rights.
18 UNHCR, "Note on International Protection," UN Doc. A/Ac.96/815 (1993), at para. 11.

for this purpose. The procedure must meet basic standards of fairness, and a person whose application is rejected is entitled to appeal against the decision to an empowered authority.[19]

Rejection of Asylum Applications on the Border of the State

At a discussion held in the office of the attorney-general on 1 June 2006, the attorney-general expressed his opinion that the expulsion of a person seized within Israeli territory, close to the time and place at which the person crossed the border, "does not constitute expulsion, but rather the prevention of entry." Accordingly, the attorney-general argued, there is no impediment to expelling such a person from Israel without any legal proceeding."[20]

This approach is contrary to international law, which establishes that the prohibition of non-refoulement also applies on the borders of the state. If states were permitted to reject asylum seekers in such a manner, the Refugees Convention would soon be rendered irrelevant. The Executive Committee of the United Nations High Commissioner for Refugees established, in a guiding decision issued in 1977, that it:

> *"Reaffirms the fundamental importance of the observance of the principle of non-refoulement- both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."*[21]

Professor James Hathaway of Michigan University in the USA, one of the leading authorities in the world on refugee law, summarized the practical ramifications of the principle of non-refoulement in his book The Rights of Refugees under International Law:

> *As an obligation "couched in negative terms" it constrains, but does not fundamentally challenge, the usual prerogative of states to regulate the entry into their territory of non-citizens. State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted. This is so even if the refugee has not previously been recognized as a refugee by any other country. But where there is a real risk that rejection will expose the refugee 'in any manner whatsoever" to the risk of being persecuted for a Convention ground, Art. 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk*[22]

The incident in which forty-eight asylum seekers were expelled by Israel immediately after entering the country provoked profound shock in the international human rights community and among Jewish communities around the world. Shortly thereafter, five Israeli human rights organizations submitted a petition to the High Court of Justice asking the court to rule that detained asylum seekers are not to be expelled from Israel immediately after their arrival

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[19] These rules apply even in extreme cases in which requests are submitted that are prima facie intended to abuse the procedure or are clearly unfounded. On this aspect, see the guidelines of the United Nations High Commissioner for Refugees: UNHCR, EXCOM Conclusion No. 30 (XXXIV) – 1983 – The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.

[20] Minutes of the discussion at the office of the attorney general, dated 16 March 2006, were submitted to the High Court of Justice as Appendix A/4 in the petition in HCJ 7302/07, which attacked the "hot return" procedure mentioned in the minutes.

[21] UNHCR, EXCOM Conclusion, Non-Refoulement, (No. 6 (XXVIII) – 1977).

[22] Hathaway, James C., "The Rights of Refugees under International Law", Cambridge University Press, 2005., p. 301.

without an individual examination of their asylum applications.[23] Following the submission of the petition, the High Court of Justice rejected the position of the attorney-general that asylum seekers may be expelled without the implementation of proceedings, and required the state to prepare a procedure allowing for the execution of "an appropriate preliminary clarification as to whether the person is an asylum seeker claiming recognition as a refugee or an infiltrator not seeking refuge as a refugee."[24]

In response to the court's instruction, the state submitted the "Immediate Coordinated Return Procedure," which is currently the subject of a legal dispute. The main feature of the procedure is that IDF soldiers and Border Guard police officers are empowered to undertake the "personal questioning" of asylum seekers they detain immediately after crossing the border. The new procedure emphasizes that the questioning must be undertaken by the detail that seizes the asylum seeker, as far as possible in the field, and not later than three hours after seizure. Soldiers have been equipped with a list of basic questions and, the state claims, have been trained for their function so that they can "communicate on a basic level" with asylum seekers in English and Arabic, "which are spoken by most of the asylum seekers." It is extremely irregular to charge soldiers with the sensitive and complex task of identifying asylum seekers. The identification of asylum seekers requires profound professional training; even experts would find it difficult to perform the task in the conditions dictated by the procedure. The result is liable to be that the State of Israel will send people to a place of danger and, as the result of a defective procedure, violate the principle of non-refoulement.

Attempt to Transfer/Return Asylum Seekers to Other Countries

The vast majority of asylum seekers who arrive in Israel enter via the border between Israel and Egypt. Some asylum seekers spent a brief period in Egypt (a few days), while others spent several years in the country. Some requested asylum in Egypt, which is also a signatory to the Refugees Convention. Some have been recognized as refugees, some filed applications and were rejected, while the applications of others were pending at the time at which they crossed the border into Israel. The asylum seekers state various reasons explaining their decision to cross the border into Israel. These include the fear that Egypt will fail to provide protection and might expel them to their country of origin;[25] discrimination and racism at the hands of the Egyptian authorities and the local population; repeated harassment and arrest; an inability to make a livelihood; lack of access to health and education services; and the desire to be united with relatives already in Israel.

The fact that the asylum seekers arrived in Israel from Egypt led Israel to argue that Egypt is responsible for affording them protection. In addition, Israel continues to attempt to return asylum seekers to Egypt. It is important to note that Israel's argument is not based on the Refugee Convention, which does not include any provisions obliging a refugee to submit an application in the first country to which he flees, or in any specific country. A practical policy has developed, particularly in Europe and reinforced by regional or international agreements,

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[23] HCJ 7302/07 Hotline for Migrant Workers v Defense Minister. It should be noted that in a letter dated 23 September 2007 sent to the State Prosecutor's Office, the UN High Commissioner for Refugees stated its opinion that the expulsion of asylum seekers without any inspection procedures is liable to endanger their lives.

[24] Interim Decision in HCJ 7302/07, 24 September 2007.

[25] This concern was particularly prevalent among asylum seekers who arrived in Israel at the beginning of 2006, after Egyptian soldiers and police officers used considerable violence to disperse a demonstration in the center of Cairo by thousands of Sudanese refugees. Approximately 30 demonstrators were killed and hundreds were detained, eroding the asylum seekers' sense of security and leading to an increase in the number of asylum seekers crossing the border into Israel. For a description of these events and the reality facing asylum seekers in Egypt, see: Azzam F. (ed.), "A Tragedy of Failures and False Expectations – Report on the Events Surrounding the Three-Month Sit-In and Forced Removal of Sudanese Refugees in Cairo, September-December 2005," The American University in Cairo, June 2006, found at:
http://www.aucegypt.edu/ResearchatAUC/rc/fmrs/reports/Documents/Report_Edited_v.pdf.

with the goal of determining which country will be "responsible" for examining the asylum request. These agreements, some of which have also been formalized in domestic legislation, employ various concepts whose interpretation may vary from country to country. In most cases, the meaning of the terms employed is as follows:[26]

> "First state of asylum" – a state in which the asylum seeker secured any protection.
> "Safe third state" – a state through which the asylum seeker passed, which is generally considered a safe state, and where the asylum seeker should have requested protection.

A condition for the validity of any such arrangement is that asylum seekers are not be left without protection. Even if it is permitted to return asylum seekers from one country to another, in certain conditions, it must be ensured in any case that the asylum seeker will be permitted to enter the destination country and will enjoy the fair determination of his asylum request. Israel has no re-admission agreement with Egypt (the validity of the "understandings" between Prime Minister Olmert and President Mubarak will be discussed below), and the procedure for regulating the processing of asylum seekers in Israel does not include any provision restricting the right of a person to request asylum in Israel on the basis of their presence, passage, or submission of an asylum request in a third country. In this situation, it is highly doubtful whether Israel could execute a unilateral act of expulsion through the retroactive amendment of the law. In any case, the principle of non-refoulement mandates the utmost caution whenever return or expulsion to a third country is being considered, as established by President Barak:

> *"Israel cannot free itself of responsibility by ensuring that a country to which a person is to be expelled will not harm him. Israel must continue to ensure that the said country will not expel the expelled person to another country that is liable to harm him. Accordingly, expulsion to a third country must be accompanied by the possibility of relying that the said country will not expel the expelled person to a country in which his life or liberty will be endangered."*[27]

It is not sufficient for Israel to ensure that the country to which it is expelling the asylum seeker will not expel him to a third country; it must be verified in each individual case that the country to which the asylum seeker is being expelled will allow him access to fair asylum proceedings;[28] that the country will permit the asylum seeker to remain in its territory; that the person involved will not be subject to persecution in the first state of asylum; and that he will enjoy treatment consonant with accepted international standards in the destination country.[29]

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[26] Professor Stephen Legomsky, lecturer in international law at Washington University, claims that, in practice, there is no substantive distinction between the two concepts mentioned here. Since "protection" may take various forms, the difference between a situation in which a person received or might have received protection is one of degree rather than essence. See: Legomsky S.H. "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," UNCHR, PPLA/2003/01 found at: http://www.unhcr.org/protect/PROTECTION/3e6cc63e4.pdf.

[27] HCJ Al-Tai, note 8 above, at pp. 849-850.

[28] Thus, for example, the British House of Lords prohibited the returning of asylum seekers to France and Germany who claimed that they were subject to persecution by private bodies; the reason is that in both countries, persecution by a non-governmental agent is not recognized for the purpose of providing protection in accordance with the Refugees Convention: R v Secretary of State for the Home Department, ex parte Adan and Aitseguer, [2001] 2 WLR 143.

[29] See Decision No. 58 of the Consultative Committee of the UN High Commissioner for Refugees: EXCOM, No. 58 (XL) Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection. Regarding the return of asylum seekers to a third state see: EXCOM, Note on International Protection, 7 July 1999, A/AC.96/914, para. 19, found at: http://www.unhcr.org/excom/EXCOM/3ae68d98b.pdf.

The return of forty-eight asylum seekers from Israel to Egypt in August 2007 was not consonant with these requirements, and proves how dangerous indiscriminate return without examination is liable to be. The forty-eight asylum seekers returned to Egypt by Israel were imprisoned for many months in Egypt without access to the UN High Commission for Refugees, attorneys, or human rights organizations. Moreover, according to various reports, twenty of them were expelled from Egypt to Sudan. If this is indeed the case, Israel endangered their lives in violation of the principle of non-refoulement.

Relying on Diplomatic Assurances in Israel and Internationally

At a legal hearing following the illegal return of asylum seekers to Egypt, prosecutors for the state justified its actions by claiming that these were preceded by "understandings by word of mouth" between Prime Minister Olmert and President Mubarak, in accordance with which the asylum seekers to be returned to Egypt would not be deported to Sudan and would not be harmed. The representatives for the state informed the court that the state has refrained from undertaking further expulsions of asylum seekers to Egypt, since "no appropriate assurances" exist regarding the wellbeing of the expelled persons. However, they insisted that the state is entitled to undertake further expulsions as and when it is of the opinion that it holds appropriate assurances from Egypt.

The practice of "diplomatic assurances" as a basis for the return or expulsion of asylum seekers and others has been the subject of trenchant criticism in recent years. In a detailed report, Human Rights Watch warned against the use of diplomatic assurances as a fig leaf cloaking the exposure of individuals to danger, torture, and inhuman treatment and punishment.[30] The report argues that it is wrong to rely on unenforceable assurances which, in most cases, are received from countries with a problematic record in terms of the protection of human rights. The diverse mechanisms for "control" included in such return agreements have also failed. An example of this came in 2001, when Sweden returned two asylum seekers from Egypt to their country. There was a clear danger that the two asylum seekers would be exposed to torture, and accordingly Sweden requested an explicit and written assurance from Egypt that they would not be tortured. Among other provisions, the agreement established that the Swedish ambassador in Egypt would visit the two from time to time to assess their condition. It later emerged that the two asylum seekers were imprisoned and suffered severe torture before the ambassador visited them. The United Nations committee that supervises the Convention against Torture and the UN Human Rights Committee established that Sweden had violated its undertakings in accordance with the convention by expelling the two asylum seekers to Egypt without securing appropriate guarantees and without establishing an appropriate mechanism for enforcing Egypt's undertakings.[31] It should be emphasized that Egypt persistently denied that it had tortured the two asylum seekers, and refused to cooperate with Sweden's demand to investigate the circumstances of the incident. Courts in Canada and England refused to permit the expulsion of persons to Egypt on the basis of "diplomatic assurances" and guarantees that they would not be tortured.[32]

To date, Israel has returned asylum seekers to Egypt on at least two occasions. In both cases assurances were received that the expelled persons would not be harmed; in both cases these assurances were broken. This cumulative experience is sufficient to show that the authorities should not rely on vague assurances given by word of mouth where the conditions, details of

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30 HRW, Still at Risk – Diplomatic Assurances No Safeguard Against Torture, April 2005, found at: http://hrw.org/reports/2005/eca0405/index.htm.

31 The decision of the supervisory committee for the Convention Against Torture: UN Committee Against Torture, Decision: Agiza v Sweden, CAT/C/34/D/233/2003. The decision of the Human Rights Committee: UN Human Rights Committee, Decision: Alzery v Sweden, CCPR/C/88/D/1416/2005.

32 *Mohammad Zeki Mahjoub v Minister of Citizenship and Immigration*, IMM-98-06, 2006 FC 1503; *Youssef v Home Office*, Case no. HQ03X03052, 2004 EWHC 1884 (QB).

implementation, and external inspection of compliance are all unclear. It is also worth noting that in both cases the UN High Commissioner for Refugees in Egypt was supposed to supervise the fate of the returned asylum seekers. In the first case in 2004, the UNHCR office managed at the last minute to prevent expulsion to Sudan. In the case in 2007, the UNHCR office was not permitted to meet the expelled asylum seekers for months after they arrived in Egypt or to prevent the deportation of approximately twenty of them to Sudan.

Asylum Seekers from a "Safe Country"

Even when the asylum seekers comes from a country that is usually considered "safe," and where conditions of persecution leading to refugee status are unknown, the state is not exempt from processing requests. Professor James Hathaway commented on this situation in his book:

> *- Sadly, even countries considered model democracies and defenders of human rights have generated - at some times, and in some circumstances - persons who are in fact Convention refugees-* [33]

Insofar as rules are established relating to "safe countries of origin" (and the Israeli procedure does not include any such rules), these do not imply the closing of the door to applicants. This definition has rather the status of a refutable assumption that must be addressed and disproved by the asylum seeker.

Declaration of Certain Areas as "Extra-Territorial"

The opinion of the attorney general that the expulsion of a person seized close to the border, and soon after crossing the border, constitutes "the prevention of their entry" is reminiscent of a legal fiction whereby various countries attempted to declare certain areas (such as the entry halls in airports) to be "extra-territorial" zones that were ostensibly not part of the territory of the state. This claim is naturally completely [specious?]. The forty-eight asylum seekers expelled from Israel were held overnight at a military base inside Israeli territory and were expelled by IDF soldiers. In these circumstances, Israel cannot renege on its responsibility for their fate. Similarly, the European Court of Human Rights rejected a claim by France that a certain area in an airport constituted an "international zone" regarding which it holds control but in which it does not bear the obligation of protection.[34]

Prohibition against Expulsion in the Context of Large-Scale Population Movements

A further claim raised recently is that the large number of asylum seekers arriving in Israel (5,300 asylum seekers in 2007 alone) prevents the possibility of ensuring proper procedures. It is difficult to accept this argument when it is presented by the state, which over many years failed to establish an asylum system and relied on the services of the Israeli office of the UN High Commissioner for Refugees. Since 2006, an increase has been seen in the number of asylum seekers arriving in Israel. Despite this, virtually nothing has been done to adapt the Israeli systems to the growing scale of the phenomenon. Now, too, the state is failing to take real steps to examine the requests of asylum seekers; as noted above, it prefers to declare that they are all "labor migrants" or "labor infiltrators" and hence should be expelled.

It should be noted that even in situations marked by the mass influx of asylum situations (a situation that does not yet apply in the case of Israel), the principle of non-refoulement

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33 Hathaway, note 23 above, p. 334

34 Amuur v France, 1996 ECHR 25.

continues to apply.[35] These situations are sudden emergencies in which entire populations are displaced, for example as the result of civil war. During the crisis in Yugoslavia, and later in Kosovo, in the early 1990s, the policy adopted by the European countries was to permit refugees to enter their territory as an emergency measure to protect their lives and provide temporary protection, until such time as they could safely return to their homes. Temporary protection can be an effective practical measure both for the asylum seeker and the state in situations when it is impossible to implement individual procedures to establish status. However, experience shows that temporary protection can sometimes become permanent, with the result that refugees as defined in the convention do not receive the full range of rights to which they are entitled. Accordingly, those involved should be allowed access to refugee proceedings as soon as the emergency subsides. Another means for coping with the mass influx of asylum seekers is to request assistance from the international community on the basis of the principle of burden sharing.

Fair Asylum Proceedings

Concern at the potential violation of the principle of non-refoulement may also arise when the asylum proceedings of a given country are inadequate and fail to meet the function of identifying persons who face persecution if returned to their country of origin.[36] A separate policy paper will examine the quality of asylum proceedings, and accordingly we shall not discuss this aspect here.

One aspect that deserves mention here, however, is the situation faced by asylum seekers waiting for a decision on their status. When states make the asylum seeker's stay difficult and bothersome, suspicion may arise that they are attempting to violate the principle of non-refoulement under the guise of "voluntary departure." This may be the case, for example, if the state fails to provide asylum seekers with food, accommodation, and health services; if they are subject to repeated arrests intended to undermine their sense of security; and if they are forced to sign travel documents in preparation for being returned to their country. Such measures may cumulatively force asylum seekers to make an impossible choice between returning home to face persecution or attempting to survive in inhuman conditions in the hope that they will be able to complete the asylum proceedings successfully.

The Exclusion of Persons from the Applicability of the Principle

Article 33(1) permits the expulsion of a person who constitutes a "danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." This provision grants permission, in certain circumstances, to expel a person to a place in which he may face persecution. Accordingly, the level of proof required before exercising this authority is

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[35] Lauterplacht and Bethlehem, note 6 above, pp. 119-121. By contrast, Hathaway claims that in situations of movements of people on the level of mass influx liable to endanger the absorbing country and injure its security, a certain unwritten reservation may be argued to apply to the principle. This reservation may be applied only in the most extreme circumstances, and on a temporary basis (for as long as international assistance is not forthcoming). It must be applied in good faith (for example, Hathaway rejects the course adopted by Thailand, which refused to accept offers of assistance from the UN High Commissioner for Refugees and forced Vietnamese refugees back into the sea, claiming that it could not cope with the numbers arriving in Thailand).

[36] Two examples described by Professor Hathaway (note 23 above, p. 287) are the rejection of asylum seekers arriving in Austria following brief questioning by border police that focused on identifying the route the asylum seeker had taken rather than the circumstances that led them to flee their country. In South Africa, officials without appropriate training also participated in removing asylum seekers. Even when asylum systems include control mechanisms, errors may still occur. This was the case in Britain in 2002, when asylum seekers affiliated with the opposition in Zimbabwe were removed on the basis of outdated information regarding the conditions in that country, and despite warnings that the political situation in Zimbabwe had deteriorated.

particularly high. The appeals court in New Zealand ruled that in order to establish the presence of "reasonable grounds" for considering that an individual constitutes a danger to the country of asylum, the state may not act in an arbitrary or capricious manner, but must examine the question as to whether a future danger exists. The conclusion of the examination must be supported by facts.[37]

In this context, a danger to "national security" is usually regarded as the tangible possibility that genuine direct or indirect damage will be caused to the most basic interests of the country of asylum; this might include a violent attack against its territory or citizens, or the destruction of its democratic institutions.[38] The expulsion of asylum seekers in accordance with this exclusion cause cannot be based on concern for the state's international relations; concern at possible damage to property or economic interests; or the desire to deter future asylum seekers from coming to the state.

The definition of an individual as dangerous solely on the basis of his membership of a particular group will not constitute legal grounds for removing him from the country of asylum. Article 33(2) of the convention requires an *individual* examination based on fair proceedings determining a causal connection between the asylum seeker and the danger to the country of asylum allegedly created by his presence.
Similarly, a person who has been convicted by a final judgment of a particularly serious crime may be expelled only if he constitutes a danger to the security of the public in the country of asylum. However extensive, a criminal record in itself is not sufficient for this purpose.

37 Attorney General v Zaoui, Dec. No. Ca20/04 (NZ CA, Sept. 30, 2004).
38 Note 1 above, p. 346.

Conclusion and Recommendations

As is apparent from the discussion above, the declaration by the state that it is committed to protecting the principle of non-refoulement is not enough. There are complex legal and practical actions which may lead directly or indirectly to a person being returned to a place of danger. Awareness of the issue and attention to such situations in procedures and in field operations are vital in order to ensure the protection of the principle of non-refoulement and prevent refugees being returned to a place of danger. On the basis of our discussion, the following is a brief summary of recommendations:

- Asylum seekers are not to be expelled or returned without a proper determination of their request for asylum;

- Even when a person does not meet the definitions in the Refugees Convention, he is not to be expelled or returned without ensuring that the expulsion will not endanger his life or expose him to torture.

- Proper asylum procedures are to be implemented regarding both requests submitted within the territory of the state and requests submitted on the border of the state.[39]
- A state may not rely on assurances of the wellbeing of expelled persons given by states concerning which there is substantiated information of the use of torture.

- If agreements for the return of asylum seekers are made with other states, these must refer individually to each returned person and must ensure that the state to which the asylum seeker is to be returned will allow him access to fair asylum proceedings and will permit him to remain within its territory. It must be ensured that the person involved will not be exposed to persecution in the destination country; and that the destination country will treat him in a manner consonant with accepted international standards.

- If return is implemented, a mechanism must be maintained to monitor the wellbeing of the individual following his return and to provide channels through which he may make redress in the event that his rights are violated.

[39] A separate policy paper is being prepared on the subject of proper asylum proceedings. For the purpose of the present discussion, it is sufficient to detail the basic principles requiring that a single professional authority be empowered to coordinate the processing of asylum requests (and that its personnel be trained for this function); each asylum seeker is entitled to a personal interview; an asylum seeker is entitled to assistance in submitting his request (explanation of the nature of the proceeding, the services of an interpreter, and the right to contact the UN High Commissioner for Refugees); and the right to appeal against a decision to reject the request.

The "Refugees' Rights Forum" consists of the eight Human Rights Organizations active in promoting the rights of refugees and asylum seekers in Israel, as well as implementing activities on their behalf. The aim of the group is to work together to find strategies for dealing with changing realities on the ground and on the governmental level. The Forum was established with the assistance of the ***New Israel Fund*** in order to develop in-depth policy papers which relate to all aspects of refugee protection and rights, including long terms solutions. The Forum's objective is to achieve legislation which addresses the legal and moral obligations that Israel has committed to by signing the International Refugees Convention. These obligations are based on the values of democracy and human rights.

The Association for Civil Rights in Israel (ACRI) is Israel's oldest and largest human rights organization, and is dedicated to protect the entire spectrum of human rights of all people in Israel, the occupied territories, and all places that human rights are violated by the Israeli authorities. ACRI advances human rights through a wide range of legal, public outreach and educational activities.

The Hotline for Migrant Workers is a non governmental, not for profit association, dedicated to protecting the rights of migrant workers and refugees and eliminating human trafficking in Israel. Our activities include providing information, offering consultation services and legal representation, heightening public awareness, and promoting public policy that eliminates modern slavery in Israel.

Physicians for Human Rights-Israel (PHR-IL), established in 1988, is committed to ensuring human rights, and the right to health in particular, for all individuals living in Israel and the Occupied Palestinian Territories. PHR-Israel promotes the equal right to health through advocacy work, legal action, lobby work, awareness raising and publications. In addition PHR-Israel provides medical aid through volunteer clinics.

The Refugee Right Clinic is a legal aid and advocacy program devoted solely to refugees. Situated at the Tel Aviv University Buchmann faculty of Law, the Clinic is devoted to the teaching, researching and practicing of refugee law. Operating since October 2003, the Clinic provides free legal aid to dozens of asylum seekers and refugees every year in a variety of issues. In addition, the Clinic advocates the implementation of a fair asylum policy in Israel.

Amnesty International is an international organization aimed at preventing human rights abuses. ***Amnesty Israel*** is active in ensuring the rights of asylum seekers and refugees in Israel by campaigning on the public, parliamentary and governmental levels. The organization works to educate the public and decision makers in Israel in order to make them stand up to their obligations.

ASSAF – Aid Organization for refugees and asylum seekers was founded in the beginning of 2007 in order to fill a gap in psychosocial assistance to refugees and asylum seekers in Israel. ASSAF provides emergency humanitarian assistance, psychosocial assistance and community empowerment.

The African Refugee Development Center (ARDC) founded in 2004, is a registered non-profit organization established to assist, support and empower the African refugees and asylum seekers in Israel and to promote a humane and fair Israeli asylum policy. *ARDC* represents refugee communities from close to ten countries from East, Central and West Africa. *ARDC* divides its work between humanitarian and direct service provision, individual casework, advocacy and work to enhance community building among refugees.

Kav LaOved (Worker's Hotline) is a nonprofit non governmental organization committed to protecting the rights of disadvantaged workers employed in Israel and by Israelis in the Occupied Territories, including Palestinians, migrant workers, subcontracted workers and new immigrants. Kav LaOved is committed to principles of democracy, equality and international law concerning human and social rights.