

# On the Morality and Legality of Borders: Border Policies and Asylum Seekers<sup>1</sup>

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## INTRODUCTION

In this Article, we examine the way in which states treat—and should treat—asylum seekers seeking to enter the country undocumented. This question is relevant to many countries having to deal, on the one hand, with their international law commitments, including their obligations under the 1951 Convention Relating to the Status of Refugees,<sup>4</sup> and wishing to maintain sovereignty over their borders, on the other hand. There are many examples of state practices that aim to mitigate this tension, including Australia’s plan, recently rejected, to ship asylum seekers to Malaysia and instead take in recognized refugees.<sup>5</sup> Another example is that of the “Safe Third Country” agreement between the United States and Canada, according to which each of the two countries is allowed to return refugee claimants to the other country (the “direct back” policy).<sup>6</sup> A recent decision dealing with specific cases of returnees viewed this practice as a breach of the American Declaration of Human Rights.<sup>7</sup> Finally, in February 2012, the European Court of Human Rights declared illegal the Italian “push-back” policy of intercepting asylum seekers (mostly originating from Eritrea and Somalia) on the high seas and sending them back to Libya, in

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4. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

5. Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011] HCA 32 (Austl.).

6. John Doe et al. v. Canada, Case 12.586, Inter-Am. Comm’n H.R., Report No. 24/11, OEA/Ser.L/V/II.141, doc. 29 ¶ 2 (2011).

7. *Id.* ¶ 128. It should also be mentioned that earlier, in 2008, the Supreme Court of Canada did not grant leave in a case challenging the Canada-United States Safe Third Country Agreement, thus upholding a previous Federal Court of Appeal decision, which allowed the Canadian Cabinet to designate a country as safe. *See Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] F.C. 229, para. 105 (Can.).

accordance with a bilateral agreement between the two countries.<sup>8</sup> We examine this question both in general terms and by looking into a specific case of Israel's border policies. Israel is a particularly relevant test case because it is witnessing an increase in the number of asylum seekers attempting to enter through its southern border.<sup>9</sup> In addition, government discussions seem to be leading towards the creation of a physical barrier along the Israeli-Egyptian border<sup>10</sup> and have resulted in the implementation of the policy, which we discuss in detail below, of asylum seekers being "returned" to Egypt.<sup>11</sup>

This issue is illustrated by what occurred on the Israeli-Egyptian border on the night of August 18, 2007, when Israel "returned" to Egypt a group of forty-eight persons who had crossed its border with Egypt without documentation the previous day.<sup>12</sup> Led by smugglers, this group was one of many that walked the well-travelled route through the Sinai desert and across the Egyptian-Israeli border, a long land border that at the time had no physical barriers. In addition to being used by asylum seekers, this route is also used to smuggle trafficking victims, drugs, arms, migrant workers, and other people. On this occasion, however, the group included families with children, and over forty of its members were Sudanese.<sup>13</sup> It is impossible to know whether those individuals would have applied for asylum had they had the chance to do so, but it is known that significant numbers of

8. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, paras. 9, 13, 40 (Eur. Ct. H.R., Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

9. For official statistics on arrivals of "infiltrators," see The Population and Immigration Authority, *Data on Foreigners in Israel*, <http://www.piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/%D7%A1%D7%99%D7%9B%D7%95%D7%9D%20%D7%A9%D7%A0%D7%AA%D7%99%202011.pdf> (last visited Sept. 27, 2012).

10. Ben Lynfield, *Israel Orders New Fence to Keep Out African Migrants*, THE INDEPENDENT (Jan. 12, 2010), <http://www.independent.co.uk/news/world/middle-east/israel-orders-new-fence-to-keep-out-african-migrants-1864827.html>. On March 30, the attorney for the state declared at the High Court of Justice that the barrier had already been planned and the budget allocated and that it would be erected by the end of 2012. Oral Hearing, HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense [2011] (on file with authors). According to the press, the barrier has already begun to be erected and the construction workers hired for this project include asylum seekers. See Dana Weiler-Polak, *African Refugees Hired to Build Fence to Keep Migrants Out of Israel*, HAARETZ (Mar. 10, 2011), <http://www.haaretz.com/print-edition/news/african-refugees-hired-to-build-fence-to-keep-migrants-out-of-israel-1.348212>. At the time of writing, large parts of the fence were already built. Oral Argument, HCJ 6582/12 "We Are Refugees" v. State of Israel [2012].

11. Because the barrier has not yet been fully erected, our focus in this article is on the return policy. However, most of our legal and moral arguments also apply to the erecting of the wall. See *infra* Part III.

12. Refugee Rights Forum, *Asylum Seekers and Refugees in Israel: February 2009 Update* (2009), <http://www.acri.org.il/pdf/refugees0209en.pdf>.

13. *Behind the Headlines: Israel and the Darfur Refugees*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, <http://ocha-gwapps1.unog.ch/rw/rwb.nsf/db900sid/LSGZ-76CDCW?OpenDocument> (last visited Apr. 3, 2010). Three Eritrean asylum seekers who objected to the return were eventually allowed to stay in Israel. See Response of the State's Attorney, *The Treatment of Infiltrators from the Egyptian Border, in Relation to HCJ 7964/05, HCJ 7964/05 Hotline for Migrant Workers v. Minister of the Interior* [2007] (on file with authors). See also HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense, para. 3 [2011].

Sudanese who entered Israel on other occasions sought asylum.<sup>14</sup> For the sake of this discussion, we will refer to them as “asylum seekers,” despite the possibility that some of those entering through the Egyptian border would not have sought asylum even if they had been given the opportunity to do so. This choice of terminology reflects our belief that, without clear evidence to the contrary, it should be assumed that these people were, in fact, seeking asylum.<sup>15</sup> These individuals were returned to Egypt without any opportunity to protest against their return. In addition, during their short stay in Israel, they were not able to access the asylum process, courts or tribunals, human rights organizations, or the United Nations High Commissioner for Refugees (UNHCR).<sup>16</sup> After these individuals arrived back in Egypt, neither the Israeli government officials nor the UNHCR were able to ascertain their whereabouts and, according to some reports, most of them were held in detention and a few were forcefully deported to Sudan.<sup>17</sup> While this incident was not Israel’s first return of potential asylum seekers,<sup>18</sup> it was significant because of the large number of people involved. Consequently, it triggered a petition by several human rights organizations to the High Court of Justice.<sup>19</sup> The focus of this petition was on the policy under which this return was carried out, known as the “hot return” or “coordinated return” procedure.<sup>20</sup> Although in this Article we focus mainly on Israeli behavior towards asylum seekers at the Egyptian border, which today consists of the “hot return” policy and procedures, our examination may be relevant to possible future Israeli policies, such as the erection of a physical barrier, as well as to the policies of other countries.

We begin in Part I by discussing whether states have a moral duty towards asylum seekers wishing to enter their borders. We argue that there is

14. Holly Buchanan, *Escape from Darfur: Why Israel Needs to Adopt a Comprehensive Domestic Refugee Law*, 11 CHAP. L. REV. 601, 603 (2008).

15. The distinction between migrants and asylum seekers will be discussed in more detail below in Part II.1. For general statistical information on refugees and persons in refugee-like situations, see email from Michael Alford to Adv. Anat Ben-Dor (Jan. 14, 2009) (on file with authors). It should be noted that Sudanese nationals receive group-based protection in Israel, which is not contingent on their ability to prove that there is personal risk to them.

16. Original Petition para. 1, HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense [2011] [hereinafter HCJ 7302/07 Original Petition] (on file with authors).

17. *Egypt: Investigate Forcible Return of Refugees to Sudan*, HUMAN RIGHTS WATCH (May 30, 2008), <http://www.hrw.org/en/news/2008/05/29/egypt-investigate-forcible-return-refugees-sudan>.

18. Several reports in the media indicate that on at least three occasions between 2004 and August 2007, a number of asylum seekers who entered Israel through the Egyptian and Syrian borders were returned to these countries. For example, according to reports from the media and several human rights organizations, “hot returns” were conducted in April 2007. See HCJ 7302/07 Original Petition, *supra* note 16, paras. 22–29, 49–81.

19. *Id.*

20. In this article, we will use the shorter term “hot return” for convenience. While this term was used by the UNHCR and NGOs, in contrast to the Israeli government’s term “coordinated return,” our choice of terminology does not reflect a tendency to side with any party. Details of the “hot return” procedure had not been made public at the time these returns were executed and so its contents are unclear. The description of its assumed content derives from the government decision made on March 1, 2006. Minutes of Government Meeting 2, para. 3 (Mar. 16, 2006) (on file with authors).

indeed such a duty and discuss its source. From this duty, we believe, derives a moral duty to apply fair procedures at the border. In Part II, we turn to a legal discussion, explaining the legal norms imposing obligations on states with regard to asylum seekers at their borders. We explain that the principle of non-rejection at the border derives from the prohibition on *refoulement*, and in some cases also applies to returns to third countries. We also argue that rejection at the border is permissible only if backed by a substantive examination of a person's asylum application, and if that person has been provided with the opportunity to appeal the rejection. Our legal analysis is based on norms of international (more specifically, human rights) law. The decision to focus on the European Convention on Human Rights ("ECHR") was not made because that Convention is more relevant than other international law, but because the European Court of Human Rights has developed the most extensive case law on the issues at hand. In Part III, we describe in detail the policy and the elaborate procedures that have been developed under the Israeli "hot return" policy. This includes an assessment of the Israeli procedure in light of the conclusions of Parts I and II. We will also discuss the ruling of the Israeli High Court of Justice on this case<sup>21</sup> and the occurrences that followed it. We conclude by suggesting that fair procedures must be applied at the border in the light of the moral and legal considerations discussed in this Article.

#### I. ON THE MORALITY OF NON-REJECTION AT THE BORDER

Border policies should be examined, we believe, against two benchmarks: morality and law. In this Part, we ask the more general question: is it fair that a country rejects asylum seekers at the border? In other words, does a country have a moral duty to refugees wishing to enter?

This question can be broken down into two questions: firstly, do states have a moral duty of care or a responsibility towards asylum seekers before these people enter the territory belonging to these states (or the territory they effectively control) and while they are still at their border? A negative answer to this question will mean that states are not obliged to refrain from rejecting asylum seekers at their borders. A positive answer assumes that states' legal and moral obligations towards refugees start at—or even slightly before—the border. Secondly, do these obligations include a duty to apply fair procedures to determine whether a person is indeed an asylum seeker?

In our opinion, the answer to the second question is contingent on our answer to the first question. If we believe that states have a duty to refrain from rejecting refugees at the border, then we must also believe that the

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21. HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense [2011].

exercise of this duty must be non-discriminatory, non-arbitrary, and fair.<sup>22</sup> This conclusion stems from the notion that every duty that the state has should be fulfilled in accordance with those basic norms. We will therefore focus our discussion on the first question. Even if we assume that states are allowed to reject asylum seekers at the border, we would still argue that states must use fair procedures when deciding whether to use that power.

Determining whether a state has a duty towards persons at the border is particularly challenging when we take into account the fact that states do not voluntarily enter into a relationship with such persons; rather, these relationships are imposed on states that did not explicitly and voluntarily accept such a duty.<sup>23</sup> Therefore, arguing that states have a special duty towards asylum seekers at their border distances us from a voluntaristic view of state duties. Arguing that states have a duty towards persons at their border also reflects a belief that territoriality, at least in its narrow sense (as in the territory within the borders), is significant in determining whether a state has a duty towards a person or whether a person has a right against a state.

There are a number of potential sources of a state's duty to asylum seekers at its border, three of which we will discuss here.

*A. Duty of non-rejection at the border as a derivative duty of the right to asylum*

First, let us examine the argument according to which the duty of non-rejection stems from the right to seek asylum.<sup>24</sup> This argument presupposes that individuals have a right to flee persecution and torture. We will not seek to justify this presumption extensively here. We merely point out that this presumption is based on the moral notion that people should not be subjected to cruelty. If, therefore, people are subjected to serious forms of cruelty in their own country that they are unable to stop, they must have a right to escape it.<sup>25</sup> Our argument here is that if people have the right to seek asylum and protection from torture, so, too, do states have a correlative duty to refrain from subjecting people to regimes where their lives and liberty may be endangered, or where they may be subjected to torture. This right and this duty would both be meaningless if every state such people can reach hermetically closes its borders or systematically rejects them at

22. This conclusion is not only a moral one, but also derives from the fundamentals of administrative law and the concept of natural justice. *See, e.g.*, H. W. R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 3–5 (8th ed. 2000); MARK ARONSON, BRUCE DYER & MATTHEW GROVES, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 1 (3rd ed. 2001).

23. Samuel Scheffler, *Relationships and Responsibilities*, 26 *PHIL. & PUB. AFFAIRS* 189, 191 (1997).

24. In international legal instruments, the relevant human right was phrased in terms of a right to seek asylum, rather than a right to get asylum, which is harder to impose towards any specific state. *See, e.g.*, Louis Henkin, *Refugees and Their Human Rights*, 18 *FORDHAM INT'L L.J.* 1079, 1079 (1994).

25. There are countless justifications for the moral value of asylum. *See generally* W. GUNTHER PLAUT, *ASYLUM: A MORAL DILEMMA* (1995).

the point of entry. Our argument relies on a purposive interpretation<sup>26</sup> of the right to seek asylum and protection from torture. In light of the purpose of these rights, this argument views as immaterial the distinction between people who enter the territory of the state (such as potential asylum seekers subjected to return agreements and practices) and people who are about to enter that territory (such as potential asylum seekers whose entrance to a country is prevented by a physical barrier).<sup>27</sup>

It should be noted, however, that while the right to seek asylum in certain conditions imposes duties on states to prevent and refrain from *refoulement*, this right does not impose these duties on any specific state.<sup>28</sup> In other words, while the realization of the right to be protected from *refoulement* depends on the ability to be protected by *some* state, it does not require the cooperation of any *particular* state. Therefore, in order for this to be a right against a specific state, we have to allocate responsibility in accordance with some morally significant criteria.<sup>29</sup> In practice, irrespective of any moral considerations, the duty of non-*refoulement* is typically imposed on countries that are in a position to help the refugee: those in immediate contact with her or those who are in the best position to assist her (typically those in whose territory the refugees are currently located or neighboring countries).<sup>30</sup> It seems obvious that a state that asylum seekers are able to reach has a stronger duty towards them because this is a state in which their right to seek asylum can be materialized. To the extent that this results in a disproportionately heavy burden on a particular state, such a burden can subsequently be relieved through the application of responsibility-sharing mechanisms.<sup>31</sup>

The right to seek asylum is a right that requires the cooperation of a potential state of asylum. A similar argument about the non-specific allocation of a duty can be made with respect to other rights where realization requires the cooperation of another party. For example, it cannot be claimed that a man does not enjoy the right to marry merely because the person he

26. According to the purposive interpretation approach, all legal interpretation must start by establishing a range of semantic meanings for a given text, from which the legal meaning is then drawn. The text's "purpose" is the criterion for establishing which of the semantic meanings yields the legal meaning. For more on purposive interpretation, and the benefits of this method of interpretation over others, see AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 83–96 (Sari Bashi trans., 2007).

27. See Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257, 259 (1992).

28. Tally Kritzman-Amir, *Not in My Back Yard: On the Morality of Responsibility Sharing in International Law*, 34 BROOKLYN J. INT'L L. 355, 359–60 (2009).

29. A full discussion of states' moral duty to refrain from rejection at the border should therefore also include discussion of the morality of the ways states share their responsibilities to refugees. Such a discussion falls outside the scope of this article. For discussion of this topic, see generally Kritzman-Amir, *supra* note 28; Gregor Noll, *Risky Games? A Theoretical Approach to Burden Sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236 (2003); Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 J. REFUGEE STUD. 396 (1998); Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

30. Tally Kritzman-Amir & Yonatan Berman, *Responsibility Sharing and the Rights of Refugees: The Case of Israel*, 41 GEO. WASH. INT'L L. REV. 619, 623–24 (2011).

31. See Suhrke, *supra* note 29, at 398.

chooses to marry does not wish to marry him (or nobody wants to marry him). In contrast, we would argue that a person could claim that his rights to asylum and protection from torture are not being realized if all states reject him at the border.<sup>32</sup> That difference relates to the different nature of the rights. The right to marry is relative, and subject to the right of others to refuse to marry for whatever reason they choose, whereas the right to seek asylum is not limited in the same way and is not subject to the right of states arbitrarily to refuse to allow the possibility to seek asylum. This is because, as Veit Bader says:

The recognition of the right to refuge and asylum presupposes that state sovereignty and self-determination have to yield in cases of “well-founded fear of being persecuted” or, in another language, that the basic right or need to security is strong enough to outweigh other rights and competing ethicopolitical, prudential, and realist arguments.<sup>33</sup>

The right of every person to be protected trumps competing rights and interests, including state sovereignty, in a way that other rights do not.

To sum up, according to this argument, the duty of non-rejection at the border correlates with and derives from the right to seek asylum, a right that will not materialize if asylum seekers are rejected at the border.

*B. Duty of non-rejection at the border in relation to the manner in which states should apply their coercive power*

Secondly, the duty to refrain from rejection at the border is closely connected to the fact that states apply coercive power at the border. Michael Walzer, whose thoughts on the matter are particularly interesting because they stem from a communitarian presumption, takes this position.<sup>34</sup> Walzer implicitly references the duty of non-rejection at the border in his short discussion of refugees, highlighting the dilemma of limiting the scope of protection for refugees to those who are physically present, rather than offering it to persons in their countries of origin or elsewhere who might also be in need of such protection (“Why mark off the lucky or the aggressive, who have somehow managed to make their way across our borders, from all the others?”).<sup>35</sup> While he admits to having no morally compelling justification for refraining from offering protection to persons still in their countries of origin, he gives two relevant explanations for the duty to grant protection to persons who are physically present: “because its denial would re-

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32. Cf. SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 32–36 (2004) (analyzing related Kantian arguments).

33. Veit Bader, *The Ethics of Immigration*, 12 *CONSTELLATIONS* 331, 340 (2005).

34. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY* 31–32, 51 (1983).

35. *Id.* at 51.

quire us to use force against helpless and desperate people, and because the numbers likely to be involved, except in unusual cases, are small and the people easily absorbed.”<sup>36</sup> These two considerations are also typically (though not always) true in situations involving non-rejection at the border. Rejection of refugees at the border requires the state’s coercive power to be used against helpless and desperate people, and the numbers of people reaching the border to seek asylum are usually relatively low.<sup>37</sup>

Walzer’s argument, therefore, is not based on territoriality as a source of the duty towards refugees, but rather on the fact that the state’s authority should be exercised (even if ex-territorially) with respect,<sup>38</sup> and therefore with compassion and in accordance with moral standards. Benhabib shares this conclusion to some extent, pointing to the fact that immigrants have some rights regardless of their status and, of more relevance to our present context, regardless of their location.<sup>39</sup> These rights derive from the contact they have with the state and its people (i.e., those acting on behalf of the state, human rights activists, and other individuals).<sup>40</sup> These rights include the right to challenge their deportation.<sup>41</sup> The same logic could apply to rejection at the border. Much like Walzer, Benhabib deduces that the use of power over aliens should be respectful of these connections and of the rights these individuals have.<sup>42</sup>

Both Walzer and Benhabib do not elaborate in great detail on the substantive content of these rights—in other words, which acts in which circumstances of rejection at the border would constitute a violation of a migrant’s rights.<sup>43</sup>

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36. *Id.*

37. Refugees, asylum seekers, and persons in refugee-like situations made up 8.8% of migrants globally in 2000 and only 7.6% in 2010. *Facts & Figures*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en> (last visited Sept. 29, 2012).

38. It should, however, be noted that the basis for this duty is the state’s power or authority, rather than the mere interaction with asylum seekers. *Cf.* Scheffler, *supra* note 23, at 189.

39. BENHABIB, *supra* note 32, at 125–26.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Cf.* BENHABIB, *supra* note 32, at 138. Here, Benhabib suggests a model for determining whether immigrants may become members of a state, which could be applied, *mutatis mutandis*, to their non-rejection at the border:

If you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to each of us equally.

*Id.*

C. *Duty of non-rejection at the border as a derivative of the lack of moral justification of borders*

Lastly, another explanation for the duty of non-rejection at the border could be the rejection of the morality of borders from a cosmopolitan perspective.

The roots of cosmopolitan egalitarianism can be traced back to the writings of John Rawls, who argues that just social institutions are formed in an “original position” characterized by the fact that their decisions are made in “a fair procedure so that any principles agreed to will be just.”<sup>44</sup> According to Rawls, parties should be situated behind “the veil of ignorance,” unaware of their own traits, yet aware of the basic characteristics of society and culture, so that they would be informed enough, yet not biased by self-interest, when deciding which option is more just.<sup>45</sup> Rawls claims that these conditions will guarantee just resolutions as they screen out all the morally arbitrary elements from the decision-making process, and he explains which principles of justice will prevail.<sup>46</sup>

This notion of justice, if applied internationally,<sup>47</sup> can serve as the basis for claiming that because nationality is a morally arbitrary trait, states have the same compelling duty towards non-citizens as they have towards their own citizens. This theoretical paradigm can also serve as the basis for a claim for open borders and cosmopolitan egalitarianism. According to some cosmopolitan scholars, Rawls’ perception of states as “self-contained” is wrong.<sup>48</sup> States interact in many significant ways, especially through economics and commerce. If states are not perceived as “self-contained,” there is some justification for believing in an international, Rawlsian, original

44. JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1972).

45. *Id.*

46. When choosing between alternatives in the original position, parties that are behind the veil of ignorance are expected to apply the “maximum rule for choice under uncertainty.” In other words, parties will “adopt the alternative the worst outcome of which is superior to the worst outcome of others.” *Id.* at 152. In this “original position” put forth by Rawls, two principles of justice are bound to be constituted. The first position is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” *Id.* at 60. The second position is that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” *Id.*

47. *Id.* at 457. If we carefully examine Rawls’ position, we can see that he applies the above-mentioned principles only within the framework of the nation, and refrains from applying them internationally. Rawls does not see a need for overcoming arbitrary disadvantages and inequalities only in the context of a society. In his view, the two principles of justice are contingent on an ongoing scheme of social cooperation. They apply in “a self-contained national community,” meaning in national communities which are territorially defined by borders and essentially self-sufficient. *See, e.g.*, Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFFAIRS* 113 (2005); Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity and the Law of Peoples*, 72 *FORDHAM L. REV.* 1721 (2004); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *PHIL. & PUB. AFFAIRS* 257 (2002).

48. *See, e.g.*, Thomas W. Pogge, *The Law of Peoples: The Incoherence Between Rawls’s Theories of Justice*, 72 *FORDHAM L. REV.* 1739, 1744 (2004); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 108–09 (2002).

position. From this derives a claim that national boundaries have no moral significance, that everyone should be included in the hypothetical original position—behind the veil of ignorance—and their nationality should be disregarded.<sup>49</sup>

If we accept the cosmopolitan presumption that borders have no moral significance, we cannot attribute any importance to the question of where rejection takes place, and should believe that refugees should be protected irrespective of whether they have physically crossed the border.<sup>50</sup> This conclusion is supported by the notion that human rights are universal and that every person is entitled to their enjoyment.<sup>51</sup> It is also affirmed by the natural law tradition according to which rights arise through recognition of a person's inherent dignity.<sup>52</sup>

#### D. *Summing up*

There are several justifications for the argument that states have a moral duty to assist refugees at their borders. *Firstly*, this duty corresponds with the right to asylum, and without it the right to asylum would effectively be meaningless. *Secondly*, if a state *refoules* asylum seekers who arrive at its border, this would be an abuse of the state's coercive power. *Thirdly*, states have this duty because borders are morally arbitrary and therefore meaningless for determining states' duties toward refugees.

## II. ON THE LEGALITY OF NON-REJECTION AT THE BORDER

Having presented the moral arguments supporting non-rejection at the border, let us now examine how these arguments correspond to duties in international law. We will discuss these international law questions in a comparative manner and also examine how they should be applied in the Israeli test case.

### A. *Non-refoulement and (potential) asylum seekers*

We mentioned above that one moral justification of a duty of non-rejection at the border is the belief that this duty derives from the right to seek

49. See, e.g., Simon Caney, *International Distributive Justice*, 49 POL. STUD. 974, 974–76 (2001).

50. There might be justification for distinguishing the scope of our duty towards a person with whom we have some contact from that towards a person with whom we have no contact, but this issue falls outside the scope of the current discussion and is irrelevant in this context.

51. Bente Puntervold Bo, *Immigration Control, Law and Morality: Visa Policies Towards Visitors and Asylum Seekers—An Evaluation of the Norwegian Visa Policies Within a Legal and Moral Frame of Reference*, 404–05 (unpublished thesis, Oslo Univ. Coll.).

52. Ann Dummett, *Natural Law and Transnational Migration*, in FREE MOVEMENT—ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 169, 172, 177 (Brian Barry & Robert E. Goodin eds., 1992). For an interesting angle on the nationalist critique, see BENHABIB, *supra* note 32, at 110–14.

asylum.<sup>53</sup> How does this translate into a legal duty? The most important legal duty imposed on states in relation to the right to seek asylum is the duty of non-*refoulement*.<sup>54</sup> The first issue to be addressed, therefore, is when the prohibition of *refoulement* applies. Does it apply only to those whom the authorities have *recognized* as refugees? This position initially seems plausible, as Article 33 of the Refugee Convention prohibits the return of persons to a country where they have a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group—in other words, it prohibits the return of refugees.<sup>55</sup> Claiming, however, that the prohibition of *refoulement* applies only to recognized refugees would make that prohibition ineffective. It would allow a state to return to the country of origin a person who would have been recognized as a refugee if his or her asylum application had been examined. Such an action would be a misuse of the state's coercive power.<sup>56</sup> For this reason, there is consensus, both in international doctrine and in international state practice, that the prohibition of *refoulement* applies regardless of whether people have been formally recognized as refugees.<sup>57</sup> Recognition as a refugee does not make a person a refugee, but instead declares her to be one.<sup>58</sup> Consequently, people who invoke the prohibition of *refoulement* are protected against return until further notice; we will address the words “until further notice” later on.

However, part of the problem in present-day asylum practice is that states return people who would have applied for asylum if they had been given the chance to do so. The group of persons returned in this way is mixed; although not all returned migrants would have applied for asylum, some certainly would have done so. Are these people, or some of them, protected by the prohibition of *refoulement*? One of the ideas behind rejection at the border is to prevent migrants from accessing the asylum system. For example, on the basis of our experience with migrants who entered Israel, groups of intercepted migrants are likely to include a considerable number of persons who would submit an asylum application if they were given the chance to do so, although some of them are in fact migrant workers or victims of trafficking. The same is true for the migrants who enter

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53. See *supra* Part I.A.

54. Refugee Convention, *supra* note 4, art. 33.

55. *Id.*

56. See *supra* Part I.B.

57. CORNELIS WOLFRAM WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 47–48 (Kate Elliott ed., 2009); GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 51, 244 (2007); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 278 (2005); Elihu Lauterpacht & David Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW—UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 116–18 (2003); ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 340 (Vol. I 1966).

58. U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 28, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter UNHCR Handbook].

Australia and whose relocation to Malaysia is considered: most of them come from refugee-producing countries such as Afghanistan.<sup>59</sup> This was also true for those who were “pushed back” from Italy to Libya after their interception on the high seas: the majority of them were from Somalia and Eritrea.<sup>60</sup> A crucial question, therefore, is whether a state is free to reject an undocumented migrant without inquiring whether she wants to invoke the prohibition of *refoulement*, or whether, instead, such a rejection would render the right to asylum—and the prohibition of *refoulement*—meaningless.<sup>61</sup> Or, formulated differently, when should certain behavior or statements of migrants be interpreted as possible appeals for non-*refoulement*?

This issue reaches the essence of the prohibition of *refoulement*. Applying very strict requirements to decide whether a migrant is appealing for non-*refoulement* may make the principle devoid of any effect. A migrant cannot reasonably be required, for instance, to refer to a particular international legal instrument, such as the Refugee Convention<sup>62</sup> or the International Covenant on Civil and Political Rights.<sup>63</sup> It should be sufficient for a migrant to refer to risks related to asylum issues, such as risks to life, freedom, safety, and the like. In addition, if the migrant is from a country known to produce refugees (which, in the Israeli context, may include particularly Somalia, Eritrea, or Sudan), the state often assumes (or should assume) that the person wants to invoke the principle of non-*refoulement*.

The European Court of Human Rights has addressed this issue in its *Hirsi Jamaa* judgment, which concerns the interception of Eritrean and Somali migrants on the high seas and their subsequent return to Libya.<sup>64</sup> The Italian government argued that the migrants had not described the risks they faced in Libya and had not asked for asylum.<sup>65</sup> In response, the court noted that the applicants, whose version of the facts was corroborated by witness statements, disputed this account. But then, significantly, it continued:

In any event, the [c]ourt considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return . . . . Having regard to the circumstances of the

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59. See Plaintiff M70/2011 v. Minister for Immigration and Citizenship, [2011] HCA 32 (Austl.) ¶ 3; Liz Gooch, *Australia and Malaysia Sign a Refugee Swap Deal*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/2011/07/26/world/asia/26malaysia.html>.

60. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, paras. 9, 13, 40 (Eur. Ct. H.R., Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

61. See *supra* Part I.A.

62. Refugee Convention, *supra* note 4.

63. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

64. *Hirsi Jamaa*, App. No. 27765/09 at paras. 9–14.

65. *Id.* para. 132.

case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3.<sup>66</sup>

Therefore, if a state wants to reject a migrant at the border and the migrant can be presumed to disagree with the return, an effective and purposive interpretation of the prohibition of *refoulement* requires that state to inquire as to why the person does not want to be returned. For many reasons, ranging from his or her past trauma to communication difficulties or inability to produce supporting evidence, the asylum seeker should not be expected to initiate a statement on this matter. A state therefore cannot satisfactorily meet the requirements of non-*refoulement* without making such an inquiry. The migrant's responses must be assessed carefully in order to establish whether she may be considered to be appealing for non-*refoulement*. It is hard to lay down general rules for that assessment, as any such rules will inherently be contextual. But if the principle of non-*refoulement* is to be effective, the assessment must be liberal. It should be kept in mind that this assessment is not about the substance of the claim in any sense, but about whether the migrant wants to submit a claim. A person who is to be refused entry should be given the opportunity to claim asylum.

But what if a state refrains from putting in place a system for assessing carefully whether candidates for rejection want to claim asylum? A state may claim, for example, that it is certain the persons to be returned do not want to claim asylum, but that they may do so if the idea is suggested to them by border guards' explicit questioning to this effect. In the Israeli "hot return" procedure, intercepted individuals are not specifically asked whether they wish to seek asylum.<sup>67</sup> The only way to uphold the effectiveness of the prohibition of *refoulement* is to maintain that rejecting all these migrants violates Article 33 of the Refugee Convention. Allowing states to ignore potential asylum applications undermines the essence of the prohibition of *refoulement*. For this reason, the European Court of Human Rights has consistently held that returning a person who wants to claim asylum without a proper assessment of that claim is in itself at variance with the prohibition of *refoulement*.<sup>68</sup>

To sum up on this point: people who claim asylum cannot be returned until further notice.<sup>69</sup> The same goes for people who want to apply for asylum, but have not been given the chance to do so. State practices that involve returning groups of migrants, some of whom may well wish to

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66. *Id.* para. 133 (citations omitted).

67. See *infra* notes 195–96 and accompanying text.

68. See *Z.N.S. v. Turkey*, App. No. 21896/08, para. 47 (Eur. Ct. H.R., Jan. 19, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96773>; *Jabari v. Turkey*, App. No. 40035/98, para. 40 (Eur. Ct. H.R., Jul. 11, 2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58900>; see also *K.R.S. v. United Kingdom*, App. No. 32733/08, 16 (Eur. Ct. H.R., Dec. 2, 2008), available at <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-90500>.

69. Cf. WOUTERS, *supra* note 57, at 48–56, 137–38.

claim asylum, pose a problem for upholding the non-*refoulement* principle. Allowing such practices undermines the effectiveness of the prohibition of *refoulement*. For an effective and purposive interpretation of the prohibition, states *choosing* to put in place policies preventing a group of persons from being able to claim asylum must treat this group as a whole as if it were protected by the prohibition of *refoulement*. States are free to allow migrants to express whether they want to apply for asylum, thus limiting the number of people to whom they have international legal obligations. If, however, a state does not provide this opportunity, the result cannot be that this state is able to circumvent the obligation of non-*refoulement*; rather, for the time being, the state has this obligation towards the *entire* group prevented from invoking it.<sup>70</sup> These conclusions correspond to some of the above moral considerations, specifically because any other interpretation would render the right to asylum meaningless and constitute a misuse of the state's coercive power. Obviously, allowing individuals to submit asylum applications if they wish is the better option as this allows those not claiming asylum to be returned.<sup>71</sup>

For similar reasons, whether potential asylum seekers are apprehended just after or just before crossing the border is irrelevant. Once potential asylum seekers establish contact with the authorities of a state, that state is able to exercise authority over them. It is the physical possibility to provide admission to an asylum procedure that creates the responsibility under international law.<sup>72</sup> When authorities exercise “*de facto* continued and uninterrupted control” over potential asylum seekers, the asylum seekers are within their jurisdiction during that period.<sup>73</sup>

### B. *Non-refoulement and third countries*

A second issue is whether returning migrants to a neighboring country that is not their country of origin can be contrary to the prohibition of *refoulement*. Such returns can be problematic for two reasons. Firstly, the potential asylum seeker may face a risk of persecution or torture in the third country itself. In other words, it may be that the return to the third country constitutes *direct refoulement*.<sup>74</sup> However, potential asylum seekers may also be treated properly in the third country but claim that the third country

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70. However, in *Sale v. Haitian Centers Council*, the U.S. Supreme Court found that the interception of Haitian migrants outside U.S. territory does not constitute a violation of Article 33 of the 1951 Refugee Convention. 509 U.S. 155, 179–83 (1993). The issue was one of territorial scope, not whether people who are prevented from invoking the prohibition of *refoulement* can be protected by it.

71. For the Human Rights Committee's views on the obligation to allow migrants to apply for asylum, even where large numbers of people are arriving, see WOUTERS, *supra* note 57, at 411.

72. For an extensive overview of case law and doctrine, see MAARTEN DEN HEIJER, *EUROPE AND EXTRATERRITORIAL ASYLUM* 118–35 (2012).

73. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, paras. 79–81 (Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

74. See *infra* Part II.B.1.

may return them to their country of origin, where they do face persecution or torture. In that case, return to the third country may constitute *indirect refoulement*.<sup>75</sup>

### 1. *Direct refoulement*

If an individual is returned to a third country where she faces persecution, torture, or inhuman treatment, her return to that third country constitutes a violation of the same provisions of international law on which asylum law is based in general: the Refugee Convention,<sup>76</sup> Article 3 of the Convention Against Torture,<sup>77</sup> and Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”).<sup>78</sup> This notion was recently applied by the European Court of Human Rights in its *M.S.S. v. Belgium and Greece* judgment.<sup>79</sup> The court had previously found in two individual instances that Greece subjected asylum seekers to inhuman treatment during detention.<sup>80</sup> In its *M.S.S.* judgment, the court ruled that Belgium had violated the prohibition of direct *refoulement* by knowingly exposing complainant M.S.S. to detention conditions contrary to Article 3 of the ECHR, the content of which is very similar to that of Article 7 of the ICCPR.<sup>81</sup> In the *Hirsi Jamaa* judgment discussed above, the court observed:

[T]he existence [in Libya] of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention . . . . Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted

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75. See *infra* Part II.B.2.

76. Refugee Convention, *supra* note 4, art. 33.

77. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

78. ICCPR, *supra* note 63, art. 7.

79. *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (Eur. Ct. H.R., Jan. 21, 2011), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

80. *S.D. v. Greece*, App. No. 53541/07 (Eur. Ct. H.R., Jun. 11, 2009), *available at* <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-93036>; *A.A. v. Greece*, App. No. 12186/08 (Eur. Ct. H.R., Jul. 22, 2010), *available at* <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-100015>.

81. *M.S.S.*, App. No. 30696/09, at para. 367. The Court also found the living conditions in Greece contrary to Article 3. However, in reaching this conclusion, it relied extensively on Greece's obligations under European Union law. Therefore, the Court's reasoning cannot be relied on for countries to which EU law does not apply.

on the high seas, the [c]ontracting [s]tates' responsibility continues . . . .<sup>82</sup>

The court described the situation of irregular migrants in Libya, saying that they ran the risk of being returned to their countries of origin at any time and, when they remained in Libya, the risk of precarious living conditions, social marginalization, isolation, and vulnerability to xenophobia and racist acts.<sup>83</sup> It therefore concluded that at the time of the removal, the Italian authorities knew or should have known that the removed migrants would not be protected in Libya.<sup>84</sup>

From the court's case law, we can conclude that the doctrinal issues raised by direct *refoulement* to third countries are no different from those relating to direct *refoulement* to countries of origin.

## 2. Indirect refoulement

The issue of indirect *refoulement* is also closely related to the two moral considerations discussed in the previous section. The starting point is that the country at whose border asylum seekers present themselves is typically in the best position to assist them. Therefore, this country's ability to return asylum seekers to third countries is subject to limitations in the form of the non-*refoulement* principle. In other words, the state is allowed to return asylum seekers to third countries as long as it applies its coercive power morally. Generally speaking, the return of asylum seekers to a third country can be in conformity with the prohibition of *refoulement*, even if the status of the asylum seeker has not been determined, providing it has been established that the third country will provide protection if necessary.<sup>85</sup> So while returning asylum seekers—even if their status has not been determined—to a third country is not necessarily prohibited, the prohibition on returning refugees to their country of origin “in any manner whatsoever” implies a prohibition on returning them to a third country where they will not be protected against *refoulement*.<sup>86</sup>

The European Court of Human Rights addressed the issue in two admissibility decisions, as well as in a recent judgment, concerning situations in which both the sending and the receiving countries were members of the Council of Europe (hence parties to the ECHR) as well as the European Union. In an admissibility decision from 2000, the European Court of Human Rights dealt with the removal of a Sri Lankan asylum seeker from

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82. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, paras. 128–29 (Eur. Ct. H.R., Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

83. *Id.* para. 125.

84. *Id.* para. 131.

85. For a general view, see HEMME BATTJES, *EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW* 494–519 (2006).

86. WOUTERS, *supra* note 57, at 140–47, 320–23, 407. See also LAUTERPACHT & BETHLEHEM, *supra* note 57, at 122; HATHAWAY, *supra* note 57, at 327–35; GOODWIN-GILL & MCADAM, *supra* note 57, at 252.

the United Kingdom to Germany.<sup>87</sup> Having concluded that the applicant's removal to Germany was "one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk" of treatment contrary to Article 3 of the ECHR, the court provided general rules on the responsibility under Article 3 of states removing people to third countries.<sup>88</sup> According to the court, the indirect removal to an intermediary country, which in this case was also a party to the ECHR, does not affect the responsibility of the removing state to ensure that the applicant is not exposed to treatment contrary to Article 3 as a result of his expulsion.<sup>89</sup> The removing country cannot automatically rely on arrangements under European law.<sup>90</sup>

Where [s]tates establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if [c]ontracting [s]tates were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>91</sup>

When applying this standard to the case at hand, the court stated that its "primary concern [was] whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka."<sup>92</sup> After a detailed evaluation of the effects of German asylum law for this particular case, the court concluded that it had not been established that there was a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the ECHR.<sup>93</sup> Therefore, the United Kingdom was permitted to remove the applicant to Germany.<sup>94</sup>

In a 2008 admissibility decision, the court found the application inadmissible (and thus allowed the return of an asylum seeker by the United Kingdom to Greece without status determination) for two reasons.<sup>95</sup> Firstly, it noted that the third country, Greece, was not at the relevant moment removing people to the country of origin concerned (Iran), while the European harmonization of asylum law gave rise to the presumption that Greece could recommence doing so only if that action would be in

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87. T.I. v. United Kingdom, App. No. 43844/98, 2 (Eur. Ct. H.R., Mar. 7, 2000), available at <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-5105>.

88. *Id.* at 15.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 16.

93. *Id.* at 16–18.

94. *Id.*

95. K.R.S. v. United Kingdom, App. No. 32733/08, 18 (Eur. Ct. H.R., Dec. 2, 2008), available at <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-90500>.

conformity with its obligations under European law.<sup>96</sup> Secondly, the court noted that the asylum seeker, who was relying on the European Court of Human Rights procedure vis-à-vis the United Kingdom, would still be permitted to make a complaint against Greece from its territory if Greece later decided to deport him to Iran in violation of Article 3 of the ECHR.<sup>97</sup> A request for a Rule 39 indication (that is, a request by the court not to remove the applicant to Iran until it had dealt with the application) would provide effective protection.<sup>98</sup> Removal by the United Kingdom would therefore not definitively deprive the applicant of the opportunity to address the court:

On that account, the applicant's complaints under Articles 3 and 13 of the [European] Convention [on Human Rights] arising out of his possible expulsion to Iran should be the subject of a Rule 39 application lodged with the [c]ourt against Greece following his return there, and not against the United Kingdom.<sup>99</sup>

On January 21, 2011, the Grand Chamber of the European Court of Human Rights handed down its judgment in the case of *M.S.S. v. Belgium and Greece*, mentioned above.<sup>100</sup> M.S.S., an Afghan asylum seeker, had been returned by Belgium to Greece because Greece was the country responsible for handling his asylum claim according to EU law.<sup>101</sup> The court held that Greece had subjected M.S.S. to degrading treatment in the form of detention conditions as well as unacceptable living conditions upon his release from detention.<sup>102</sup> It also held that Greece had violated M.S.S.'s right to an effective remedy because the deficient Greek asylum procedure entailed a risk of his being returned to Afghanistan without a serious examination of the merits of his asylum claim and without access to an effective remedy.<sup>103</sup> In addition, the court held that through removal to Greece, Belgium had violated the prohibition of *refoulement* by exposing M.S.S. to the risks arising from the inadequate Greek asylum system and to degrading treatment (in violation of Article 3) in Greece due to the unacceptable detention and living conditions; the court also held that Belgium violated his right to an effective remedy because the procedure against his removal to Greece did not contain sufficient guarantees.<sup>104</sup> With this holding, the court confirmed its decisions in the cases of *T.I. v. United Kingdom* and *K.R.S v. United King-*

96. *Id.* at 17.

97. *See id.* at 17–18.

98. *Id.* at 18.

99. *Id.*

100. *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (Eur. Ct. H.R., Jan. 21, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

101. *Id.* paras. 9–17.

102. *Id.* paras. 220–64.

103. *Id.* paras. 265–332.

104. *Id.* paras. 333–61.

dom discussed above.<sup>105</sup> It reformulated its position in such a way that two principles emerge:

- When a state removes an asylum seeker to a third state, the removing state must make sure that the third country's asylum procedure affords sufficient guarantees to prevent an asylum seeker from being removed, directly or indirectly, to his country of origin without an evaluation of the risks he faces from the standpoint of Article 3 of the ECHR (i.e., the right not to be subjected to inhuman treatment, which includes non-*refoulement*);<sup>106</sup>
- In the absence of evidence to the contrary, it must be assumed that the third state complies with its obligations under international law.<sup>107</sup>

The court then addressed the question whether Belgium should have regarded as rebutted the presumption that the Greek authorities would respect their international law obligations in asylum matters.<sup>108</sup> Belgium argued that M.S.S. had not specified his objections to being removed to Greece in his procedure in Belgium.<sup>109</sup> The court ruled, however, that there were numerous reports on the deficiencies of the Greek asylum procedure and the practice of direct or indirect *refoulement* on an individual or collective basis.<sup>110</sup> Based on this information, it concluded that the Belgian authorities knew about the general situation in Greece and that the applicant should not be expected to bear the entire burden of proof.<sup>111</sup> Greece's assurances that it would abide by its international law obligations were considered insufficient as these merely referred, in general terms, to the applicable legislation, which Greece clearly was not applying correctly.<sup>112</sup> The court dismissed the possibility of lodging a complaint with the European Court of Human Rights against Greece because the obstacles facing asylum seekers in Greece were such that applications to the Court were illusory.<sup>113</sup> The court concluded that the Belgian authorities knew or ought to have known that there was no guarantee that the Greek authorities would seriously examine M.S.S.'s asylum application.<sup>114</sup> The court rejected the Belgian argument that M.S.S. had not established that the general problems in the

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105. *Id.* paras. 342–43.

106. *Id.* para. 342.

107. *Id.* para. 343. Greece had also incorporated its international obligations into its domestic law.

*Id.*

108. *Id.* para. 345.

109. *Id.* para. 346.

110. *Id.* para. 347.

111. *Id.* para. 352.

112. *Id.* paras. 353–54.

113. *Id.* para. 357.

114. *Id.* para. 358.

Greek asylum system would materialize in his individual situation.<sup>115</sup> Given the information available on the Greek asylum system, it was the Belgian authorities' responsibility

not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice . . . . Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.<sup>116</sup>

We can see that, in the European context, the court works with a rebuttable presumption that states will abide by the obligations they hold under international and European law.<sup>117</sup> However, if there are indications that states have violated human rights law, the presumption no longer applies. In such cases, states have argued that diplomatic assurances from the country to which the individual is to be removed may serve to justify removal.<sup>118</sup> But judgments concerning removal to countries of origin show that mere diplomatic assurances may not be sufficient to absolve a removing state from its legal responsibilities.<sup>119</sup> In another instance, the court held that:

[T]he existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.<sup>120</sup>

It further held that diplomatic assurances must always be assessed to determine whether they provide “in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treat-

115. *Id.* para. 359.

116. *Id.*

117. See BATTJES, *supra* note 85, at 409–18; NILS COLEMAN, EUROPEAN READMISSION POLICY: THIRD COUNTRY INTERESTS AND REFUGEE RIGHTS 275–82 (2009).

118. See, e.g., *M.S.S.*, App. No. 30696/09 at para. 354.

119. See, e.g., *id.* para. 354.

120. Saadi v. Italy, App. No. 37201/06, para. 147 (Eur. Ct. H.R., Feb. 28, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>. Cf. *Ismoilov v. Russia*, App. No. 2947/06, para. 127 (Eur. Ct. H.R., Apr. 24, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86086>; *Ryabikin v. Russia*, App. No. 8320/04, para. 119 (Eur. Ct. H.R., Jun. 19, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87132>; *Muminov v. Russia*, App. No. 42502/06, para. 97 (Eur. Ct. H.R., Dec. 11, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101558>; *Kaboulov v. Ukraine*, App. No. 41015/04, paras. 108, 113 (Eur. Ct. H.R., Nov. 19, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95771>; *Daoudi v. France*, App. No. 19576/08, para. 64 (Eur. Ct. H.R., Dec. 3, 2009), available at <http://echr.coe.int/sites/eng/pages/search.aspx?i=001-90014>.

ment prohibited by the Convention.”<sup>121</sup> They may be insufficient if there are doubts as to whether the official who issued them was competent to do so; a few official sentences denying the existence of torture provide insufficient guarantee if there exist widespread reports of it in that country; and hesitating to cooperate with human rights organizations is a factor weighing against finding diplomatic assurances sufficient.<sup>122</sup> This approach was confirmed by the court in the context of third countries in its *M.S.S.* judgment.<sup>123</sup>

In two of its judgments, the court addressed the safe third country issue with respect to non-European states. In a case concerning Turkey’s removal of Iranian asylum seekers to Iraq, the court repeated that “the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling [c]ontracting [s]tate to ensure that he or she is not, as a result of its decision to expel, exposed” to inhumane treatment.<sup>124</sup> It referred to reports that some refugees drowned when they were forced to return to Iraq by swimming after the border denied them entry,<sup>125</sup> and to reports demonstrating “a strong possibility of removal of persons perceived to be affiliated with [the dissident political party] from Iraq to Iran.”<sup>126</sup> It concluded that there was no legal framework in Iraq providing adequate safeguards against, *inter alia*, removal to Iran, and held that removal to Iraq would be a violation of the prohibition of *refoulement*.<sup>127</sup> The court’s reasoning suggests that it may require an agreement by the third country to take the individual back. Should this be the case, it is also unclear whether a general agreement to this effect would suffice, or whether the third country would need to agree to take back a specific individual.

In the *Hirsi Jamaa* judgment, the court also had to address the possibility of indirect *refoulement*, i.e., the risk that by returning migrants to Libya, Italy exposed them to the risk of being repatriated to Eritrea and Somalia. The Italian authorities had intercepted migrants on the high seas and brought them back to Libya. In two broadly-worded paragraphs, the court ruled that removal to a third country requires the removing state to ensure

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121. *Saadi*, App. No. 37201/06 at para. 148.

122. See, e.g., *Ismoilov*, App. No. 2947/06 at para. 127; *Ryabikin*, App. No. 8320/04 at para. 119; *O. v. Italy*, App. No. 37257/06, paras. 42–43 (Eur. Ct. H.R., Mar. 24, 2009). For more details on diplomatic assurances, see U.N. High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection* (Aug. 2006), available at <http://www.unhcr.org/refworld/docid/44dc81164.html>; Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *15th General Report on the CPT’s Activities*, ¶¶ 38–42 (Sep. 22, 2005), available at <http://www.cpt.coe.int/en/annual/rep-15.htm>; WOUTERS, *supra* note 57. Cf. *John Doe et al. v. Canada*, Case 12.586, Inter-Am. Comm’n H.R., Report No. 24/11, OEA/Ser.L/V/II.141, doc. 29 ¶ 95 (2011) (stating that no assurances were gained in the Canada-United States agreement).

123. *M.S.S.*, App. No. 30696/09 at para. 354.

124. *Abdolkhani & Karimnia v. Turkey*, App. No. 30471/08, para. 88 (Eur. Ct. H.R., Sep. 22, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94127>.

125. *Id.* para. 85.

126. *Id.* para. 87.

127. *Id.* para. 89.

that the third country has sufficient guarantees in place to prevent migrants being returned to their countries of origin in violation of the prohibition of *refoulement*:

It is a matter for the [s]tate carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. The [c]ourt observes that that obligation is all the more important when, as in the instant case, the intermediary country is not a [s]tate party to the Convention . . . . In the instant case, the [c]ourt's task is not to rule on the violation of the Convention in the event of repatriation of the applicants, but to ascertain whether there were sufficient guarantees that the parties concerned would not be arbitrarily returned to their countries of origin, where they had an arguable claim that their repatriation would breach Article 3 of the Convention.<sup>128</sup>

The court observed that the general information on Eritrea and Somalia indicated that the situation in those countries posed serious and widespread threats to security, and found that on the basis of that fact alone, the applicants had an arguable claim that repatriation would constitute *refoulement*.<sup>129</sup> Libya has not signed the Refugee Convention and there is no asylum procedure in Libya; there is a UNHCR office in Tripoli, but it was not recognized by the government and refugee status granted by UNHCR did not guarantee any kind of protection in Libya.<sup>130</sup> The court concluded that:

[W]hen the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.<sup>131</sup>

The Committee Against Torture has dealt with returns to third countries in two individual cases.<sup>132</sup> In *Korban v. Sweden*, it first assessed whether deportation of the applicant to his country of origin, Iraq, would constitute a violation of Article 3 of the Convention Against Torture, which explicitly

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128. Hirsi Jamaa and Others v. Italy, App. No. 27765/09, paras. 147–48 (Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

129. *Id.* paras. 149–52.

130. *Id.* paras. 130, 153–54.

131. *Id.* para. 156.

132. See WOUTERS, *supra* note 57, at 508–10.

prohibits *refoulement*.<sup>133</sup> Having found that it would, the Committee assessed whether Sweden's removal of the applicant to a third country, Jordan, would be permissible.<sup>134</sup> It found that in Jordan, Iraqi refugees such as Korban were "not entirely protected from being deported to Iraq."<sup>135</sup> This conclusion was based in part upon a UNHCR report indicating two cases of forced expulsion to Iraq that occurred in 1997.<sup>136</sup> In a second case, the Committee found that removal to the country of origin would not constitute a violation of Article 3 of the Convention Against Torture; hence, removal to a third country was also unproblematic.<sup>137</sup> Two aspects of the Committee's position deserve attention. First, it employed a methodology different from that of the European Court of Human Rights, as it first decided whether removal to the country of origin would be compatible with the Convention, and only after that addressed the question of removal to an intermediary country. Secondly, in the one case in which it dealt with the substance of the issue, it applied a low threshold for finding deportation to be in violation of the Convention ("not entirely protected" from return to the country of origin).<sup>138</sup>

In 2011, the High Court of Australia ruled that asylum seekers could not be returned to Malaysia prior to status determination, invalidating a July 2011 Australian-Malaysian agreement to this effect.<sup>139</sup> According to the court, asylum seekers could only be returned to a third country in accordance with Australian law, "informed by the core obligation of non-*refoulement* which is a key protection assumed by Australia under the Refugee Convention";<sup>140</sup> if refugee protection were a part of the receiving country's "international obligations or relevant domestic law";<sup>141</sup> and if it had been established that the receiving country "adheres to those of its international obligations, constitutional guarantees and domestic statutes which are relevant to the criteria."<sup>142</sup> These criteria were not fulfilled because Malaysia:

first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum

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133. Comm. Against Torture, *Avedes Hamayak Korban v. Sweden*, Views of the Committee Against Torture Under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 3.1–3.2, 6.2, CAT/C/21/D/088/1997 (Nov. 16, 1998).

134. *Id.* ¶¶ 4.6–4.12.

135. *Id.* ¶ 4.10.

136. *Id.* ¶ 4.8.

137. Comm. Against Torture, *Z.T. v. Australia*, Decisions of the Committee Against Torture Under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 6.5, CAT/C/31/D/142/2000 (Nov. 19, 2003).

138. *Avedes Hamayak Korban v. Sweden*, ¶ 4.10.

139. Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011] HCA 32 ¶ 258.

140. *Id.* ¶ 66.

141. *Id.*

142. *Id.* ¶ 67. The court also established that a legal obligation of the third country to provide the necessary recognition and protection of refugees is a minimum requirement to make return of asylum seekers without status determination there compatible with the Refugee Convention. *Id.* ¶ 245.

seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments . . . . The Minister's conclusions that persons seeking asylum have access to UNHCR procedures for assessing their need for protection and that neither persons seeking asylum nor persons who are given refugee status are ill-treated pending determination of their refugee status or repatriation or resettlement<sup>143</sup> did not form a sufficient basis for making the declaration.<sup>144</sup>

In short, Malaysia was considered not to be a safe third country because its legal order did not contain any obligation to determine refugee status and protect refugees, nor did it uphold its obligations in practice.<sup>145</sup>

To sum up so far: if states choose not to decide whether people who have invoked the prohibition of *refoulement* are protected by that prohibition, they must act as if they are protected. This implies that people who invoke the prohibition of *refoulement* can be returned to a third country if it can be assumed that they will be protected against *refoulement* there. If the third country is not a party to the relevant international treaties and conventions, it is hard to see how that country can be presumed to be "safe." If it is a party to such treaties and conventions, it is a significant factor weighing into whether asylum seekers can be returned there. However, there are two important provisos. First, if "reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to"<sup>146</sup> the relevant international law provisions, the country in question cannot be considered "safe."<sup>147</sup> Another formulation of the same principle holds that removal of an asylum seeker cannot take place if the removing country "kn[ows] or ought to [know] that [there is] no guarantee that his asylum application would be seriously examined" in the third country.<sup>148</sup> Second, even in the absence of such reports, a person who invokes the prohibition of *refoulement* must always be able to rebut the presumption that the third country is safe. In other words, individuals must always have the opportu-

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143. This is more than can be said about Egypt, where there is evidence that asylum seekers are actively mistreated. See HOTLINE FOR MIGRANT WORKERS, BRIEFING: ASYLUM SEEKERS AND REFUGEES IN ISRAEL 2–3 (2012), available at [http://www.hotline.org.il/english/pdf/Briefing\\_refugees052012.pdf](http://www.hotline.org.il/english/pdf/Briefing_refugees052012.pdf) (describing "torture camps" where refugees are held in the Sinai desert); Human Rights Watch, Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel 61–72 (2008), available at <http://www.hrw.org/sites/default/files/reports/egypt1108webwcover.pdf> (describing treatment of asylum seekers detained by Egyptian authorities).

144. *Plaintiff M70/2011*, HCA 32 ¶¶ 135, 249.

145. *Id.* ¶ 254.

146. *Saadi v. Italy*, App. No. 37201/06, para. 147 (Eur. Ct. H.R., Feb. 28, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>.

147. *Id.*

148. *M.S.S. v. Belgium and Greece*, App. No. 30696/09, para. 358 (Eur. Ct. H.R., Jan. 21, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

nity to argue that although the third country may be “safe” in general, it is not so in their individual case. As to the criterion to be applied in such circumstances, international case law offers little guidance. The application of liberal criteria, such as those used by the Committee Against Torture (“not entirely protected”) or the European Court of Human Rights (“adequate safeguards” and “sufficient guarantees”), is indicated in light of the nature of the prohibition of *refoulement* and by the wording of Article 33, paragraph 1, of the Refugee Convention (“in any manner whatsoever”).<sup>149</sup>

### C. *Non-refoulement and the examination of asylum applications*

The case law cited in the preceding sections indicates that all migrants must be given a realistic opportunity to submit an asylum claim and that this claim must be examined on an individual basis. The possibility of removal to a third country can be relevant for the outcome of the examination, but it cannot do away with the obligation for an examination. Removal without a serious (rigorous, in the terms of the European Court of Human Rights) examination of the asylum claim is itself contrary to the prohibition on *refoulement*.<sup>150</sup> Such a removal renders the right to asylum meaningless and is an abuse of the state’s coercive power.<sup>151</sup> This is also the case in a situation of mass influx, because there are no normative grounds on which one can argue that the nature of the rights and duties involved change merely because of the practical difficulties that their fulfillment entails. In other words, migrants must be given a real opportunity to invoke the prohibition of *refoulement* and, if they do so, this will block their removal until a proper individual examination of the substance of their claim has been carried out.<sup>152</sup>

Are there criteria for the substance of this examination? There are numerous UNHCR positions on this topic.<sup>153</sup> The European Court of Human Rights has held that the examination cannot be limited to an automatic and mechanical application of domestic procedural rules: applicants must be aware of the fact that they may be “returned” or “pushed back” should they not substantiate a claim against their removal.<sup>154</sup> Applicants must have a realistic opportunity to prove their claim; procedural rules must ensure full effect is given to Article 3.<sup>155</sup> The Human Rights Committee is of

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149. *See id.* paras. 55–56.

150. *Z.N.S. v. Turkey*, App. No. 21896/08, para. 47 (Eur. Ct. H.R., Jan. 19, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96773>; *Jabari v. Turkey*, App. No. 40035/98, para. 40 (Eur. Ct. H.R., Jul. 11, 2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58900>.

151. *See supra* Parts I.A–I.B.

152. Lauterpacht & Bethlehem, *supra* note 57, at 118.

153. *See* WOUTERS, *supra* note 57, at 164–73.

154. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, paras. 203–07 (Feb. 23, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>.

155. *Jabari*, App. No. 40035/98 at paras. 48–50.

the opinion that asylum seekers should have access to early and free legal aid and interpreters.<sup>156</sup> It has also insisted on special procedures for female asylum seekers and for minors.<sup>157</sup> In its observations on the situation in states that are party to the Convention Against Torture, the Committee Against Torture has insisted on the importance of formal, individual hearings;<sup>158</sup> the possibility to gather evidence (detention of applicants hinders this, and this should be factored into the assessment of a claim); the transparent, impartial and adversarial nature of the assessment; the independence of the decision maker; and free interpreting services for claimants and adequate training for decision makers.<sup>159</sup>

There are, in summary, no precise rules in international law for the examination of asylum claims. Instead there are standards, which can be summarized as providing every individual with adequate safeguards against removal in violation of the prohibition of *refoulement*. This standard can only be given definite form in the domestic legal system of individual states, and states have great freedom in how they do this. The obvious question often arising is whether a state is giving shape to this standard, or whether—on the contrary—it is trying to do away with the guarantee provided for by the standard.

#### D. *Non-refoulement and ability to appeal to a court*

An asylum seeker's ability to appeal a decision for his return seems crucial. Without a right to appeal, the state may apply its coercive power arbitrarily since this application will not be critically examined. This may render the right to asylum meaningless. A court is the most appropriate institution to review a decision to return a person because courts are typically independent and most suitable to pursue human rights claims of under-represented, marginalized populations, while other institutions are more inclined to apply political majoritarian considerations. Appeal procedures themselves are not covered by the Refugee Convention.<sup>160</sup> They are, however, covered by Article 13 of the ECHR, which guarantees an effective remedy to everyone with an arguable claim that one or more of their rights guaranteed by the Convention has been violated by a state party.<sup>161</sup> The European Court of Human Rights has indicated that, in asylum cases, the

156. WOUTERS, *supra* note 57, at 411, and the HRC Observations referred to there.

157. *Id.*

158. *See id.* at 514–15.

159. For an overview, see *id.* and the sources referred to there.

160. *But see id.* at 164; Thomas Spijkerboer, *Higher Judicial Remedies for Asylum Seekers—An International Legal Perspective*, in *ASYLUM LAW: FIRST INTERNATIONAL JUDICIAL CONFERENCE 217* (International Association of Refugee Law Judges ed., 1995); PIETER BOELES, *FAIR IMMIGRATION PROCEDURES IN EUROPE 71–74* (1997) (maintaining that Article 16, para. 1 of the Refugee Convention is applicable).

161. On this provision, see generally Thomas Spijkerboer, *Subsidiarity and “Arguability”*: *The European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases*, *INT’L J. REFUGEE L.* 21, 48–74 (2009).

right to an effective remedy carries four practical consequences for national practice. First, the appeals procedure must allow for the fact that:

it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if . . . such evidence must be obtained from the country from which [the asylum seeker] has fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.<sup>162</sup>

The appeals procedure cannot be restricted to formalities, and must deal with the substance of the claim, as far as possible taking into account current information.<sup>163</sup> Second, it is up to the applicant to “adduce evidence capable of proving” that her removal would be contrary to the prohibition of *refoulement*.<sup>164</sup> This criterion does not actually require the applicant to establish that removal would constitute *refoulement*. Once the applicant has established an arguable claim that this would be so, it is up to the state concerned to “dispel any doubts about it.”<sup>165</sup> Third, courts must subject the denial of asylum to full review, not restricted to a rationality test. The court should not limit itself to considering whether the authorities could reasonably conclude that the applicant’s removal would not violate the prohibition of *refoulement*, but should address the issue of whether removal would in fact violate that prohibition.<sup>166</sup> Fourth, appeals must have automatic suspensive effect in order to prevent an asylum seeker from being removed pending an appeal that she ultimately wins.<sup>167</sup>

Article 2, paragraph 3 of the International Covenant on Civil and Political Rights also provides for the right to an effective remedy, which applies in the case of “a decision to expel to an arguable risk of torture,”<sup>168</sup> even if an asylum application has been declared inadmissible or manifestly ill-founded.<sup>169</sup> Equally, a remedy is effective only if it has suspensive effect.<sup>170</sup>

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162. See *Bahaddar v. The Netherlands*, App. No. 25894/94, para. 45 (May 24, 1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58136>.

163. *Id.*

164. See *Saadi v. Italy*, App. No. 37201/06, para. 129 (Feb. 28, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>.

165. See *id.*; *NA. v. United Kingdom*, App. No. 25904/07, para. 111 (July 17, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87458>.

166. See *Spijkerboer*, *supra* note 161, at 63–69.

167. *Čonka v. Belgium*, App. No. 51564/99, paras. 82–83 (Feb. 2, 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60026>; *Gebremedhin v. France*, App. No. 25389/05, para. 58 (Apr. 26, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80333>; *Affaire Sultani c. France*, App. No. 45223/05, para. 50 (Sep. 20, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82337>; *NA*, App. No. 25904/07 at para. 90.

168. Human Rights Comm., *Alzery v. Sweden*, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 11.8, CCPR/C/88/D/1416/2005 (Nov. 10, 2006) [hereinafter HRC *Alzery Views*].

169. See *WOUTERS*, *supra* note 57, at 413–14 and the sources quoted there.

### E. *Summing up*

The following five conclusions can be drawn from international law as interpreted by supervisory bodies. First, migrants must be given a real opportunity to apply for asylum when they are apprehended at the border. This is because the state to which asylum seekers present themselves is usually in the best position to assist them, and because otherwise the right to asylum would be almost meaningless. The fact that an applicant has not yet been allowed to enter the state in question is immaterial. The crucial issue is whether the state in question exercises effective authority over the individual concerned; the mere fact that it may undertake to return her is sufficient to show that it has exercised such authority. Second, once an application has been made and until it is examined, removal of the applicant to another country (including to a “safe” third country or a “safe” country of origin) must be suspended as a matter of law. Third, any application must be subjected to a substantive examination by competent state authorities. Fourth, in the event of the application being denied, the applicant must have a right to appeal to a court or an independent, court-like entity, which can scrutinize the denial of asylum in substance. This right exists regardless of the grounds for refusal—notably also in cases where the denial of asylum is based on some version of a “safe” country principle. Fifth, this appeal must suspend the removal of the applicant. Without a substantive examination of applications and a right to appeal, there would be a misuse of the state’s coercive power.

### III. “HOT RETURN” POLICY AND PROCEDURES

Following the general discussion of the moral and legal principles guiding the discussion of rejection—and non-rejection—at the border, let us look at the Israeli context, and specifically at the “hot return” policy.

The political background to the “hot return” policy was an oral agreement between former Israeli Prime Minister Ehud Olmert and his Egyptian counterpart,<sup>171</sup> former President Hosni Mubarak (an agreement which was later denied by Egyptian officials).<sup>172</sup> The policy was created in order to deter the growing number of asylum seekers entering Israel through the Egyptian border and as a way for Israel to maintain sovereign control over

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170. HRC Alzery Views, *supra* note 168, ¶ 11.8; WOUTERS, *supra* note 57, at 413–14 and the sources quoted there.

171. HCJ 7302/07 Original Petition, *supra* note 16, para. 31. See also *Egyptian Efforts to Combat Trespassing Across the International Borders with Israel*, ARAB REPUBLIC OF EGYPT MINISTRY OF FOREIGN AFFAIRS 1 (AUG. 11, 2007), <http://www.mfa.gov.eg/English/Ministry/News/Pages/NewsDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=4543900f-fd9b-446e-9c1f-ae66ae726eb5>.

172. HCJ 7302/07 Original Petition, *supra* note 16, para. 32. It would seem that even if such an agreement existed, this oral agreement would no longer hold because both Olmert and Mubarak are no longer in office.

its southern border.<sup>173</sup> Essentially, Egypt was asked to invest further efforts in preventing infiltration through its border with Israel, while the Israeli army was allowed to “return” to Egypt asylum seekers caught within the first twenty-four hours after their entry and within fifty kilometers of the Egyptian border.<sup>174</sup> The ability to “return” was subsequently expanded to allow “returns” of persons within a “reasonable time” of their apprehension at the border.<sup>175</sup>

Initially, at the time the petition was filed, implementation of this policy was somewhat problematic. Before being “returned” to Egypt, asylum seekers were registered and briefly questioned by untrained border patrol soldiers, who were not convinced that there would be a danger to the asylum seekers’ lives if they were “returned” to Egypt.<sup>176</sup> Deportation orders were not issued, reflecting the Israeli legal position that although the asylum seekers were physically present on Israeli territory, their “returns” were not deportations as such, but instead constituted an act of rejection at the border.

As the petition was still pending before the Israeli Supreme Court, a more elaborate procedure, entitled “Immediate Coordinated Return Procedure,” was established.<sup>177</sup> This procedure was subsequently amended and improved.<sup>178</sup> We will now describe the procedure in some detail, and will later examine it against the norms of international law, as well as suggesting some possible improvements.

Under the procedure, a group of persons caught at the border has to be separated for investigation purposes in order to disable communication be-

173. See, e.g., The State’s Complementing Response to the Petition, ¶¶ 19–20, 26–27 (2007).

174. *Id.*

175. The Treatment of Illegal Infiltrators to the Israeli Territory from Egypt’s Border, Order Number 1/3.000, 2009, app. A § 3 [hereinafter Amended Procedure] (on file with authors).

176. Although a comprehensive discussion of the treatment of asylum seekers in Egypt falls outside the scope of this article, it should be mentioned that there are reasons to doubt whether Egypt is a safe country of asylum for many of them. Several reports indicate the use of torture and prolonged, inhumane harsh detention conditions. See e.g., *supra* note 143; Richard Grindell, *A Study of Refugees’ Experiences in Detention in Egypt* (June 30, 2006), <http://idc.rfbf.com.au/egypt-report-detention-conditions>. In addition, Egypt has forcefully returned asylum seekers to their country of origin on several occasions. See, e.g., *Egypt: Stop Deporting Eritrean Asylum Seekers*, HUMAN RIGHTS WATCH (Jan. 8, 2009), <http://www.hrw.org/news/2009/01/08/egypt-stop-deporting-eritrean-asylum-seekers>. Discrimination, violence, and arbitrary administrative sanctions have also been documented. See, e.g., HCJ 7302/07 Original Petition, *supra* note 16, para. 169. Previous attempts by other countries to return asylum seekers to Egypt ended in tragic results, and were found by courts and United Nations Committees to be a violation of the prohibition of torture. See, e.g., HRC Alzery Views, *supra* note 168; Mahjoub v. Minister of Citizenship and Immigration, [2006] IMM-98-06, FC 1503 (Can.); Youssef v. Home Office, [2004] EWHC 1884 (Q.B.) (U.K.). Finally, it should be mentioned that on several occasions Egypt shot asylum seekers attempting to cross the border to Israel. See, e.g., AMNESTY INTERNATIONAL, EGYPT: DEADLY JOURNEYS THROUGH THE DESERT (2008), <http://www.amnesty.org/en/library/info/MDE12/015/2008/en>.

177. Order Number 1/3.000, 2007 [hereinafter Immediate Return Procedure] (on file with authors).

178. Amended Procedure, *supra* note 175.

tween them.<sup>179</sup> Then, they must be searched for weapons and identifying documents.<sup>180</sup> Their entry is to be photographed and documented in writing.<sup>181</sup> Each of them is to be questioned separately,<sup>182</sup> using an interrogation form,<sup>183</sup> by a trained person<sup>184</sup> with a basic ability to speak a language that the person being questioned speaks (English or Arabic) or with the assistance of an interpreter.<sup>185</sup> The questioning should normally be conducted at the border location where the individual was found, unless it is not possible to do so.<sup>186</sup> According to the questioning form, all persons must be asked to state their full name, age, gender, country of origin, place of residence, ethnic background, religion, and language proficiency.<sup>187</sup> The questioning form instructs the interviewer to check the documents of each person, including passports, refugee or protection cards, and UNHCR letters, as well as to list their personal belongings.<sup>188</sup> The interviewer is required to list the countries through which the person travelled on the way to Israel,<sup>189</sup> and to find out whether the person arrived with any family members.<sup>190</sup> The entrant is allowed to declare anything she wishes to the

179. Children will not be separated from their parents or the adult who brought them into Israel. Immediate Return Procedure, *supra* note 177, app. A § 1.a.1; Amended Procedure, *supra* note 175, § 8.a.1.

180. Women will be searched by female soldiers or policewomen, to the extent possible. Immediate Return Procedure, *supra* note 177, app. A § 1.a.2; Amended Procedure, *supra* note 175, § 8.a.2.

181. Each person should be photographed by the border, if possible. In addition, the area of entry should also be photographed, as well as each person's personal belongings. A list of each person's documents should be made. Immediate Return Procedure, *supra* note 177, app. A § 2; Amended Procedure, *supra* note 175, § 11.

182. Minors will be questioned individually if possible and, if not, the adult with whom they entered Israel will be questioned. Immediate Return Procedure, *supra* note 177, app. A § 4.c; Amended Procedure, *supra* note 175, § 7.c.

183. Immediate Return Procedure, *supra* note 177, app. C; Amended Procedure, *supra* note 175, app. C.

184. While the Immediate Return Procedure does not explain the nature of the training, the amended procedure mentions that training sessions should be held every four months and should include explanations on the authority of the soldiers and the "hot return" procedure, background information on the infiltration into Israel, tips on questioning, and dealing with the apprehended persons. Only soldiers who are annually trained are qualified to conduct the questioning. Similar but separate training must be provided to officers authorized to issue removal orders. Amended Procedure, *supra* note 175, § 14.

185. Immediate Return Procedure, *supra* note 177, app. A §§ 1.b.1, 1.b.4, 4.b; Amended Procedure, *supra* note 175, § 7.b. The procedure does not clarify what will be done with those who are not sufficiently fluent in English or Arabic, and who speak languages for which it is going to be difficult for soldiers to find interpreters. This is despite the fact that many of those caught at the border are Tigrinya-speaking Eritreans, Amharic-speaking Ethiopians, or French-speaking Ivorians or Congolese.

186. If it is not possible to conduct the questioning there, it should take place in assigned army bases. Amended Procedure, *supra* note 175, § 7.a.

187. Immediate Return Procedure, *supra* note 177, app. C; Amended Procedure, *supra* note 175, app. C.

188. *Id.*

189. Before the procedure was amended, the questioning included questions about the length of stay in each country, what the person did there, and whether he or she was detained in Egypt. See Immediate Return Procedure, *supra* note 177, app. C.

190. Before the procedure was amended, the questioning included questions on the person's family members in his or her country of origin or in Egypt. *Id.*

interviewer who, based on the information provided through the above procedural requirements, has to assess the reasons that led the person to come to Israel.<sup>191</sup> The possible reasons mentioned in the form include security/terrorism purposes, criminal purposes, migration for employment, or other.<sup>192</sup> Asylum is not one of the reasons mentioned in the form, and presumably falls in the category “other.” The interviewer can add concluding remarks and comments to the form.<sup>193</sup>

Following questioning, all entrants must be transferred to a military facility in the region,<sup>194</sup> where they will be given food, water, shelter, and basic medical care.<sup>195</sup> Within three hours, their apprehension should be reported,<sup>196</sup> and a temporary removal order issued.<sup>197</sup> The information gathered during the questioning will be transferred to the “authorized entity,” which will, in turn, examine them and determine whether some or all of the persons can be “returned” to Egypt,<sup>198</sup> or whether they should be transferred to the civilian immigration authorities.<sup>199</sup> This determination will be

191. Amended Procedure, *supra* note 175, app. C.

192. *Id.*

193. *Id.*

194. Immediate Return Procedure, *supra* note 177, app. A § 1.a.3; Amended Procedure, *supra* note 175, § 7.a.

195. Immediate Return Procedure, *supra* note 177, app. A § 1.a.4. According to the amended procedure, food, water, shelter, and basic medical care should be provided as soon as the person is apprehended. Amended Procedure, *supra* note 175, § 8.a.3. The amended procedure also instructs that the conditions of detention should be adequate. For example, apprehended persons should have access to an adequate number of toilets; they should be given beds or sleeping bags if held for more than twenty-four hours; women should be held separately from men, and minors should be held with the adult who accompanied them; persons should not be handcuffed, unless required for security reasons, and they should be hospitalized if necessary. Amended Procedure, *supra* note 175, §§ 9–10.

196. The report includes basic information on: the number and identifying information of the individuals apprehended; a description of the event; a list of any weapons, belongings, and documents found on the persons caught; any relevant intelligence information; where the individuals are currently being held; and their intended destinations. The report should also include any written report documenting the apprehension. All this information is stored in a special database. Immediate Return Procedure, *supra* note 177, app. A §§ 1.b.6, 1.b.7, 3, 8.c. For further reporting instructions, see Amended Procedure, *supra* note 175, §§ 7.f, 8.b.5, 8.b.6, 12.

197. If a large group is caught, the temporary removal order may be issued within six hours. According to the immediate return procedure, a permanent removal order will be issued after twenty-four hours. Immediate Return Procedure, *supra* note 177, §§ 1.b.7, 1.b.8, 8.a. Under the amended procedure, a “primary removal order,” valid for twenty-four hours, will provide the legal basis for detaining an apprehended person, after which a “temporary removal order,” valid for ten days, will be issued. A permanent removal order, which will not expire, may be issued afterwards. Amended Procedure, *supra* note 175, §§ 3.7–3.10, 5, 8.c.

198. According to the amended procedure, a person is not to be returned to Egypt if his or her country of origin is listed in the list of countries to which a person may be directly deported. It is unclear which countries are on this list, and what the term “country of origin” means. Amended Procedure, *supra* note 175, app. A § 2.g.

199. Amended Procedure, *supra* note 175, § 13 (regarding the procedure for transferring a person to the civilian immigration authorities). In the immediate return procedure, it is not completely clear who this “authorized entity” is. See Immediate Return Procedure, *supra* note 177, §§ 4.d, 6. However, the amended procedure clarifies that this “authorized entity” is the brigade commander, the operation flank officer of the southern command, or the operation officer of the southern command. Amended Procedure, *supra* note 175, § 3.c.

based on whether the authorized entity believes there to be a concrete danger to the person in Egypt.<sup>200</sup> If such a danger is believed to exist, the command's legal advisor should be consulted on whether it is possible to "return" the person to Egypt.<sup>201</sup> If the person has sought asylum in circumstances meeting the policy's definition of a risk to her life, persecution in Egypt, or persecution in her country of origin, the Ministry of Foreign Affairs will examine that person's treatment.<sup>202</sup> In order to make this determination, the authorized entity will consider the individual's personal information and circumstances, the circumstances of her entry into Israel, her status in Egypt, and the possibility of coordination with the Egyptian authorities.<sup>203</sup> If an "immediate coordinated return" takes place, it should be reported to all relevant units.<sup>204</sup>

This vague procedure does not seem to take into consideration several factors that are assessed and considered during asylum interviews, including (but not limited to): the need to explain to the interviewee the purpose of the interview and that it may be the person's only opportunity to argue against being "returned" to Egypt; the physiological and psychological state of the interviewee; cultural gaps between the interviewee and the interviewer; language difficulties arising because some of the soldiers speak only basic English and some Arabic, whereas the interviewees may speak languages for which interpreters are hard to find; and the need for interviewers' expertise in refugee law and possession of interviewing skills.<sup>205</sup> It is impossible to establish whether the procedure is carried out in a manner consistent with international law because its implementation by the army is not transparent and not subject to judicial review, UNHCR supervision or monitoring by any civilian entity.<sup>206</sup> This procedure has therefore been

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200. Amended Procedure, *supra* note 175, app. A § 2.f. Under the immediate return procedure, the authorized entity must make its decision based on whether it believes that a person's life or liberty would be at risk in Egypt. The immediate return procedure clarifies that the possibility of being prosecuted in Egypt for a criminal offence or for the infiltration into Israel is not, in itself, considered a reason to refrain from "returning" a person to Egypt. Immediate Return Procedure, *supra* note 177, § 5.a.1. According to the questioning form, the authorized entity also has to provide brief reasons for this determination. Immediate Return Procedure, *supra* note 177, app. C.

201. Amended Procedure, *supra* note 175, app. A § 2.f.

202. *Id.* § 7.e.

203. Immediate Return Procedure, *supra* note 177, app. A § 5.b; Amended Procedure, *supra* note 175, app. A § 2.5.

204. Immediate Return Procedure, *supra* note 177, app. A § 8.b.

205. In *The State's Update*, para. 6 (2008) (on file with authors), the State informed the Court that a training programme was being planned and would cover four subjects: the relevant international and domestic legal norms; the authority of the soldiers; the procedure (including how it should be applied to vulnerable persons) and the political, social and economic situation in Africa, with a special emphasis on asylum seekers' countries of origin. According to the State's reports, a couple of training sessions were indeed held in September and November 2008, and only trained soldiers were allowed to question asylum seekers. See *The State's Complementing Response to the Petition*, *supra* note 173, paras. 12–19. As mentioned above, the amended procedure further elaborated on the training in Section 14. Amended Procedure, *supra* note 175, § 14.

206. HCJ 7302/07 *The Hotline for Migrant Workers v. The Minister of Defense* [2011], para. 3.

heavily criticized by the UNHCR office in Israel,<sup>207</sup> as well as by refugee law scholars<sup>208</sup> and human rights organizations.<sup>209</sup>

After the procedure was set, Israel “returned” asylum seekers to Egypt on several occasions, with or without the pre-removal questioning required by the procedure.<sup>210</sup> The number of “returnees” seems to have been relatively small in comparison to the numbers seeking to enter Israel.<sup>211</sup> This was mostly due to the fact that, as Israel admitted, there was cooperation with the Egyptian counterparts at only one section of the border, whereas at the other sections cooperation was not achieved, thus making it impossible to return persons entering through these sections of the border.<sup>212</sup> Recently, the state declared in court that it was not currently carrying out “returns” because, due to the recent instability in Egypt, there was no coordination with the Egyptian army.<sup>213</sup>

Israeli human rights organizations gathered information on the experience of several people who, after being “returned” by Israel to Egypt, man-

207. Letter from William Tall, UNHCR Representative, to Ms. Simona Halperin, Ministry of Foreign Affairs, *UNHCR Comments on the Respondents Response to the (Third) Additional Application for an Order Nisi and Interim Injunction* (Nov. 26, 2009) (on file with authors).

208. Brief of Amicus Curiae, Andrew I. Schoenholtz, HCJ 7302/02 *The Hotline for Migrant Workers v. The Minister of Defense* [2011] (on file with authors).

209. *See, e.g.*, HCJ 7302/07 Original Petition, *supra* note 16.

210. Recent information shows that the procedure was not implemented and that only basic information, such as name and country of origin, was gathered before persons were “returned.” *See* Petitioners’ Request to Submit Documents and Legal Sources, HCJ 7302/07 *The Hotline for Migrant Workers v. The Minister of Defense* [2011] (on file with authors).

211. Information on “returns” occurring after August 2007 is partial, contradictory, and lacking. Two Egyptian nationals were also returned to Egypt on an unknown date. *See* The State’s Update, *supra* note 205, para. 7. According to an Egyptian refugee aid organization (AMERA), at least twenty-seven Eritreans were returned to Egypt in July 2008, but this report was never confirmed by the state. *See* Letter from Adv. Anat Ben Dor to the State’s Attorneys, *Request for Immediate Intervention to Prevent the Deportation of Eritrean Asylum Seekers, Who Were Deported From Israel to Egypt, Back to Their Country, and Refraining From Further Returns to Egypt* (Feb. 17, 2009) (on file with authors). Four other “returns” of 91 persons took place between 23 and 29 August 2008. *See* Affidavit of Brigadier General Yoel Strick (2008) (according to which the return of those persons was not in accordance with the procedures and was a mistake) (on file with authors). According to reports by soldiers who served on the border during their reserve duty, several groups of asylum seekers were “returned” to Egypt in June 2009. These reports indicate that some of the returned asylum seekers entered Israel a few days prior to their being “returned” and were neither questioned nor registered. On one occasion, the soldiers were also asked to push asylum seekers across the border into Egypt, to act as if the asylum seekers had just tried to enter Israel and then to signal to the Egyptians that they had prevented a penetration of the border. *See* Affidavit of Avi Avrahami (2009) (on file with authors). Later, the state declared that out of the hundreds of people who cross Israel’s borders, only a few tens are “returned” after their return has been coordinated and they have been questioned. *See* Response of the Respondents, According to the Honorable Court Decision from August 4, 2009, para. 8 (2009) [hereinafter Response of the Respondents] (on file with authors). During a court hearing, the state declared that 217 persons had been “returned” to Egypt. *See* Protocol of the Hearing Conducted on 13 December 2009, HCJ 7302/02 *The Hotline for Migrant Workers v. The Minister of Defense* [2011]. Finally, in a response to a parliamentary question, the Deputy Minister of Defense declared that forty-eight persons had been returned in 2007, 256 in 2008, 261 in 2009, and 136 in 2010. *Direct Parliamentary Question 823: Regarding the Immediate Coordinated Return of Infiltrators who Crossed the Border* (2010) (statement of Deputy Minister of Defense) (on file with authors).

212. *See* Response of the Respondents, *supra* note 211, para. 7.

213. Oral hearing, HCJ 7302/07 *Hotline for Migrant Workers*, *supra* note 10.

aged to find their way back into Israel.<sup>214</sup> Some of them stated that they were not transferred to the Egyptians in a coordinated manner, but instead were just pushed back under the border fence.<sup>215</sup> Others meanwhile reported that they had been beaten, tortured, and molested by the Egyptian soldiers upon their “return.”<sup>216</sup> Additional reports indicate that detained asylum seekers suffered harsh conditions in Egyptian prisons.<sup>217</sup> Even more concerning are reports of systematic kidnapping of asylum seekers in the Sinai peninsula near the Israeli-Egyptian border by human traffickers in an attempt to extort possessions and money from them and their families.<sup>218</sup>

On July 7, 2011, after four years of deliberation, the Israeli High Court of Justice reached a decision on the petition challenging the “hot return” policy.<sup>219</sup> The court relied on the state’s declaration according to which “hot returns” were currently not carried out, given the political instability in Egypt, and following the resignation of former president Mubarak.<sup>220</sup> This declaration, according to the court, proved that the petition has become theoretical, and because the court does not usually decide on theoretical petitions, the case was dismissed.<sup>221</sup> The court commented in its decision that the vague understanding between Israel and Egypt upon which the “hot returns” were based led to legal difficulties.<sup>222</sup> The court also mentioned that the situation in the Sinai Peninsula and the risks it entails to immigrants and to the State of Israel are also a concern.<sup>223</sup> The future completion of a fence, the court believed, would change that to some degree.<sup>224</sup> In the decision, the court assumed that should the “hot return” policy ever be implemented in the future, it will be done in a manner that conforms to international legal standards and after guarantees are established to secure the well-being of the returnees.<sup>225</sup>

Despite Israel’s declaration that it does not carry out “hot returns,” only a few short weeks after court delivered its decision, various human rights organizations received reports of “returns” being carried out. Currently, the military police are investigating the issue.<sup>226</sup> In addition, the press reported that Israel prevented entry of asylum seekers from Eritrea and Sudan who were caught in the border region between Egypt and Israel, between two

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214. Petitioners’ Request to Submit Documents and Legal Sources, HCJ 7302/07 The Hotline for Migrant Workers, *supra* note 210, paras. 12–21.

215. *Id.* paras. 12, 15, 17.

216. *Id.* paras. 13, 18.

217. *Id.* paras. 19–21.

218. *Id.* paras. 22–24, 27.

219. HCJ 7302/07 Hotline for Migrant Workers, para. 12.

220. *Id.*

221. *Id.* paras. 12, 14.

222. *Id.* para. 12.

223. *Id.*

224. *Id.*

225. *Id.*

226. Letter from Adoram Rigler, Chief Military Prosecutor’s office, *Re: Your Complaints Regarding the Execution of “Hot Returns” to Egypt* (Aug. 24, 2011) (on file with authors).

sets of barbed wire, on Israeli soil.<sup>227</sup> According to one report, on at least one of those occasions, the military commanders in the field ordered that the asylum seekers receive small amounts of water and refused to provide food or to allow access to activists who wanted to provide medical care.<sup>228</sup> Unconfirmed reports also indicated that the week-long stay of a group of asylum seekers in the Sinai desert, exposed to the burning summer heat, led to the miscarriage of one asylum seeker's baby between the two fences.<sup>229</sup> In a hearing on a challenge to the legality of preventing persons caught between the fences from entering Israel, the attorney for the state argued that Israel does not consider itself obligated to check their reasons for arrival. The state's position was that these people should have applied for asylum in Egypt. At the time of writing, few details are available on the state's policy toward people entering through the border fence, but it seems that some were allowed to enter Israel, whereas others were returned to Egypt.<sup>230</sup> It should be noted that people were returned to Egypt as a petition was pending before the High Court of Justice, prior to a ruling on the matter.<sup>231</sup> Finally, there are reports of military operations carried out by Israel on Egyptian soil that attempt to find asylum seekers before they reach the Israeli border.<sup>232</sup> Despite the fact that these recent occurrences exemplify a different operational method than the formal return procedure, it seems that from legal and moral perspectives, they symbolize an exercise of "hot returns" of asylum seekers close to their entry to Israel. Therefore, it seems that in reality "hot returns" are more than a theoretical matter.

The court refused to examine the "hot return" policy on its merits, and did not lay down clear guidelines under which the policy could officially be reinstated<sup>233</sup> or under which we could examine the more recent "return" methods. Let us take a closer look at the legality and morality of the "hot returns." If we examine the "hot return" procedure in light of the above moral considerations, we can see that it does not conform to those moral requirements. First, rejection at the border clearly eliminates many asylum seekers' right to seek asylum. For example, Egyptian nationals who enter

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227. Gili Cohen, *Israel Grants Entry To 3 African Migrants Trapped On Border; Other 18 Sent To Egypt*, HAARETZ ONLINE (Sep. 6, 2012), <http://www.haaretz.com/news/diplomacy-defense/israel-grants-entry-to-3-african-migrants-trapped-on-border-other-18-sent-to-egypt.premium-1.463256>.

228. Haggai Matar, *Eritrean Asylum Seekers Trapped On Israel-Egypt Border For 7th Straight Day*, 972 MAGAZINE (Sept. 5, 2012), <http://972mag.com/eritrean-asylum-seekers-trapped-on-israel-egypt-border-for-7th-straight-day/55182/>. *But see* Cohen, *supra* note 227 (reporting that asylum seekers did receive food and water).

229. Matar, *supra* note 228.

230. Cohen, *supra* note 227.

231. *Israel's High Court Delays Decision On African Migrants Trapped On Border*, HAARETZ ONLINE (Sep. 6, 2012), <http://www.haaretz.com/news/national/israel-s-high-court-delays-decision-on-african-migrants-trapped-on-border.premium-1.463214>.

232. Letter from Sagiv Lichtman, Legal Advisor to the Southern Command, to Adv. Anat Ben Dor and Adv. Asaf Weitzen, *Your Petition Regarding Information on Recent Execution of Coordinated Returns of Infiltrators* (Jul. 25, 2012) (on file with authors).

233. HCJ 7302/07 *The Hotline for Migrant Workers v. The Minister of Defense* [2011], para. 12.

Israel are deprived of the opportunity to seek asylum, but these nationals constitute a small minority of the total number of asylum seekers entering Israel. As for others who cross into Israel through Egypt, their right to seek asylum is compromised by their being rejected at the border only to the extent that this right is not granted in Egypt.

Second, the procedure as it is constitutes a use of force against helpless persons. The persons in question are helpless both because of their potential persecution in their countries of origin and because of what they have experienced or are likely to experience in Egypt. Furthermore, the procedure may actually constitute an arbitrary use of force, either because it is not implemented or because it is applied in such a problematic manner.

Third, applying the cosmopolitan, open-border logic to the Israeli case could lead to the derivation of a duty to refrain from rejection at the border. However, despite its theoretical appeal, the cosmopolitan reasoning seems too remote from current perceptions of states and sovereignty to be adequately convincing.

When assessing whether the Israeli border procedure is in conformity with the international law-based requirements identified in the previous section, we can see problems on all four points. To begin with, there is insufficient opportunity to apply for asylum. In the “return” conducted after the petition, the asylum seekers did not undergo any questioning whatsoever, so they cannot be regarded as having been provided the opportunity to apply for asylum. But even with respect to those who were questioned, the list of questions to be asked to migrants intercepted at or near the border does not include explicit questions about asylum.<sup>234</sup> Without an explicit question to this effect, there is no guarantee that migrants wanting to ask for asylum will be able to formulate their claim. The lack of interpreters at the border also implies a substantial risk that the interviewing soldier will not be able to identify an asylum claim. In addition, there appears to be a risk of potential asylum seekers being returned to Egypt without a substantive examination of their claim. This also means that there is no guarantee whatsoever that the return of the potential asylum seekers will not constitute either direct *refoulement* (because of the detention conditions to which returnees have been subjected in Egypt) or indirect *refoulement* (because of the possibility that Egypt will deport returnees to their country of origin). The non-suspension of the “return” is closely related to an additional major problem in the Israeli border procedure: the substance of the examination. Even if we assume that an asylum claim has been identified as such, its assessment takes place (a) on the basis of an interview by someone who is under- or completely unqualified, and possibly not able to communicate with the asylum seeker because of language problems, while (b) the decision on removal will usually be made by a military superior who is

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234. See *supra* notes 181–83 and accompanying text.

equally unqualified to make asylum decisions and who has no access to information on the country of origin, no background in international or Israeli asylum law and insufficient time to subject an asylum claim to a serious examination. The deficient nature of the examination implies the risk of asylum seekers being returned without proper examination of their claim. Finally, any suggestion of legal remedy against an unlawful decision to return is illusory. Therefore, the Israeli border procedure is contrary to international legal norms on every point.

#### CONCLUSION

In this paper, we have discussed the moral and legal considerations preventing countries from rejecting potential asylum seekers at their borders. As the Israeli High Court of Justice mentions in its decision on the “hot return” petition,<sup>235</sup> many Western countries are facing an influx of undocumented migrants, many of whom want to enter the country clandestinely and apply for asylum. The “hot return” policy implies a systematic violation of asylum norms of both moral and legal natures. Therefore, and despite the lack of willingness of the High Court of Justice to make a clear decision on this matter, we believe that for many reasons Israel’s moral and legal obligations towards asylum seekers cannot be avoided by transfer to Egypt, as discussed above. Similarly, only if many procedural and substantive conditions are fulfilled can Australia and European countries expect to be allowed by courts to transfer or “return” persons to third countries, despite having made agreements and arrangements to do so.<sup>236</sup>

We also believe that moral and legal responsibilities cannot be fenced off, even if, as the Israeli High Court of Justice seems to believe, fences change the circumstances and safety of the border. Erecting a fence will not solve the problem for at least two reasons. First of all, people can get through fences, as we know not only from the border between Egypt and Israel, as well as the Gaza strip, but also from other borders, such as the U.S.-Mexico border.<sup>237</sup> Secondly, the above argument applies equally to migrants at the border, such as those applying for asylum at the fence. In addition, a fence is most likely to lead to riskier behavior among migrants (including asylum seekers), ultimately resulting in a higher death toll.<sup>238</sup> Erecting a physical barrier will simply create moral and legal issues of its own.<sup>239</sup>

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235. HCJ 7302/07 *The Hotline for Migrant Workers v. The Minister of Defense* [2011], para. 13.

236. *See supra* Part II.

237. *See, e.g.,* MARIA JIMENEZ, *HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER* 21–23 (2009), available at <https://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf>.

238. *See id.*

239. *See generally* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 *POP. & DEV. R.* 661, 685 (2004); JOSEPH NEVINS, *OPERATION GATE-*

