Israel - A Safe Haven?

Problems in the Treatment Offered by the State of Israel to Refugees and Asylum Seekers

Report and Position Paper

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Writing and research: Anat Ben-Dor and Rami Adut

Editing: Anat Ben-Dor

Research assistants on foreign law: Michael Geigel and Alice Cohen

Translation from Hebrew: Dr. Rahel Rimon

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Graphics & Design: Gafrouri Dafdefet 03-5620470, dafdefet@bezeqint.net

Cover Pictures

Ethiopian and Eritrean Refugees on hunger strike. Photographer: Wondwossen Hailu, one of the refugees. In August 2002 approximately 20 Ethiopian and Eritrean refugees held a sit-in and went on hunger strike. After waiting for nearly two years they were recognized as ‘convention refugees’ by the UN High Commissioner for Refugees. However, the Minister of Interior, Eli Yishai, and the civil servants of his office delayed in every possible way the confirmation of their status and rights. After 23 days in unbearable heat and after receiving a guarantee that their matters would be addressed and discussed thoroughly by the Advisory Committee, the refugees stopped the strike. See annex C.

Former Prime Minister Menachem Begin visits Vietnamese refugees absorbed into Israel by his orders in 1980. Photographer: Herman Chanania, Governmental Press Office. The Vietnamese refugees were not considered ‘convention refugees’ and were absorbed as result of a special Government decision. They received special medical insurance, “pocket money”, and accommodation arrangements in Israel. All of them eventually received residency status and some were integrated into Israeli society. See Chapter 1, Section B.

Kurds on a bus back to Lebanon. Photographer: Yaron Kaminski. The picture presents one of the Kurdish groups that crossed the Israel-Lebanon border in 2001 and asked for political asylum. In this case they were rapidly deported, without having their request examined by anyone, including the UN High Commissioner for Refugees. The picture is courtesy of Ha’aretz daily newspaper and the photographer. See also Chapter 1, Section B.

Former Prime Minister Benjamin Netanyahu greets Albanian Refugees received in Israel, 1999. Photographer: Moshe Milner, Governmental Press Office. According to the press these refugees received only temporary tourist visas and were not absorbed like the Vietnamese refugees in 1980. See also Chapter 1, Section B.

Albanian refugee from the war in the Balkans. Arrived in Israel in 1999. Photographer: Moshe Milner, Governmental Press Office. These people were not considered ‘convention refugees’, and were received as a result of an exceptional Government decision. According to the press these refugees received only temporary tourist visas and were not absorbed like the Vietnamese refugees in 1980. See also Chapter 1, Section B.

Southern Lebanon Army (SLA) members and their families cluster around the Israel-Lebanon border, following Israeli withdrawal from southern Lebanon, 2000. Photographer: Moshe Milner, Governmental Press Office. SLA members are not considered ‘convention refugees’. They still encounter tremendous difficulties in their daily life in Israel. See also Chapter 1, Section B.

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ABSTRACT

In the year 2001, while the world celebrated the fiftieth anniversary of the signing of the 1951 Convention Relating to the Status of Refugees (hereinafter: "the Refugee Convention") the State of Israel took its first, hesitant steps towards the full implementation of the Convention. Contrary to its declared ethos, the State of Israel had done very little over the years to protect persons being persecuted by reason of their race, religion, nationality, membership of a particular social group or political opinion.

Protection of asylum seekers is obligatory not only from a legal point of view, by virtue of Israel's accession to the Refugee Convention, it is also a supreme moral duty. The history of the Jewish people, so many of whom have suffered persecution and sought refuge in a variety of countries, requires that today Israel refrain from showing indifference and abstain from shutting its gates before the persecuted.

This position paper has been written at the initiative of the association of Physicians for Human Rights - Israel (hereinafter: "PHR-Israel"). Last year numerous asylum seekers attended PHR-Israel's clinic seeking medical treatment - their stories and tribulations (which are not solely health-related), revealed deep human distress and violations of their basic human rights. These stories motivated PHR-Israel and the "Public Interest Law Resource Center" operating in the Law Faculty of Tel Aviv University (hereinafter: "PILRC"), to write this position paper. The discussion will focus on two main issues:

A. Procedures for regulating the treatment of asylum seekers in Israel.

B. Protection of the social rights of asylum seekers in the interim period between the filing of their applications for asylum and the decision on their applications.

The discussion is conducted in the context of three primary legal sources: the Refugee Convention and documents published in pursuance thereof, binding principles of human rights law and administrative law in Israel.

The right to asylum is a basic human right entrenched in Article 14 of the Universal Declaration of Human Rights of 1948 and it is tightly linked to the right to life recognized in the Israeli Basic Law: Human Dignity and Liberty of 1992. The importance of the rights lying on the balance,

dictates the nature of the processes that the State of Israel must follow when dealing with applications for asylum.

In the beginning of 2002, the State of Israel began operating an experimental procedure under what are known as: "*Regulations Regarding the Treatment of Asylum Seekers in Israel*" (hereinafter: "the Directive"). This internal directive is intended to lay the foundation for an Israeli system which will receive applications for refugee status filed in Israel and decide them in accordance with the principles of the Refugee Convention.

In the year since the Directive has taken effect, difficulties have been discovered in regulating the status of asylum seekers and refugees:

1. The Advisory Committee did not meet routinely during 2002. The decisions that it made were either not implemented or the implementation was greatly delayed. At the end of the year, the Chairperson resigned his office.

2. Asylum seekers do not receive an appropriate interim status during the period in which they wait for a determination of their applications. They do not receive social benefits (including medical services) and are not allowed to work, a situation that leads them to abject poverty.

3. The Ministry of the Interior refused to grant refugee status to a group of refugees who were recognized by the UNHCR in Geneva at the end of 2001 (after several years of waiting for a decision on their applications). These refugees were subjected to an additional lengthy process, at the end of which, their status as refugees was reaffirmed. Despite this decision, the Ministry of the Interior refrained from granting them formal status. Following a petition filed by PILRC and PHR-Israel on behalf of these refugees at the beginning of 2003, all were granted temporary residency.

4. Refugees who were recognized in the past, and have been accorded temporary residence, found themselves without legal status due to the Ministry's delay in processing their application for the renewal of their status. This left them without medical insurance and at risk of losing their jobs.

The principle recommendations relating to the Israeli regulations for treating asylum seekers follow - (the full list of recommendations is attached in the Conclusion):

1. *Entrenching the principle of non-refoulement*: it is necessary to entrench the basic principle of the Convention in the Directive to the effect that a person may not be returned or deported to a place in which his life or freedom are at risk. This principle must be brought to the attention of border control officials and army personnel in order to prevent cases where persons who have reached Israel's borders are returned or deported to a place in which they may be in danger.

2. *Publication*: to date the Directive has not been made public. It is recommended that it be published effectively, by targeting the relevant community, as from that community's point of view lack of knowledge of its rights is equivalent to not having any rights. The information provided to asylum seekers must include explanations regarding their obligations, rights, guidelines concerning the nature of the process and the various requirements which must be met. Publication will serve an additional important goal of exposing the Directive and the manner of its implementation to public scrutiny.

3. *Providing protection during the interim period prior to a decision being made:* a person awaiting a decision on his application for asylum is entitled to protection and basic living conditions which will safeguard his human dignity. As part of this, access to medical services must be guaranteed.

4. *Establishing a timetable for handling applications:* until now applications have taken two years or more to be decided. An effort must be made to reduce this waiting time and establish a defined timetable for every stage of the handling of the application.

5. *According a right of appeal to an independent judicial body:* in this position paper it is argued that the Directive as it currently stands does not enable an appeal to be made to an independent judicial or quasi-judicial body. This omission is particularly evident in view of the fact that the screening process is carried out by representatives of the various government offices and not by independent professionals.

The position paper briefly reviews the economic and social benefits provided to asylum seekers in three countries: Germany, England and Greece. The review reveals that, unlike the State of Israel, these countries regard themselves as obliged to provide minimum benefits to asylum seekers - either by issuing work permits or by providing a subsistence

allowance; access to medical treatment is guaranteed; arrangements for providing housing exist (at least for needy asylum seekers) and the minor children of asylum seekers are entitled to participate in the educational system.

The position paper was sent to the following ministries: the Ministry of the Interior, the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry of Defense and to the Israeli Correspondent of the United Nations High Commissioner for Refugees. No response was received.

"The passport is the most precious asset belonging to man. It was also not generated in so simple a manner as man. A man may be created in any place in the hastiest fashion and without logical cause – but a passport never so. Thus, it is also acknowledged when it is good – whereas a man may be exceedingly good, yet he will not be acknowledged."

Berthold Brecht,
Conversations Among Exiles

"It is natural for us to grant you asylum in our country, for it is our Jewish-Humanistic tradition."

Menachem Begin
former Israeli prime-minister[1]

Introduction

In the year 2001, while the world celebrated the fiftieth anniversary of the signing of the 1951 Convention Relating to the Status of Refugees (hereinafter: "the Refugee Convention") the State of Israel took its first, hesitant steps towards the full implementation of the Convention. Notwithstanding that the State of Israel had been among the twenty-six states the representatives of which participated in the drafting of the Convention, had signed and ratified the Convention in 1951, and is a member of its institutions, the State of Israel has done very little over the years in order to meet its obligations as a Member State.

Protection of asylum seekers is not only obligatory from a legal point of view, by virtue of Israel's accession to the Refugee Convention, it is also a supreme moral duty. The history of the Jewish people, so many of whom have suffered persecution seeking refuge in diverse countries, requires that Israel today refrain from showing indifference and abstain from shutting its gates before the persecuted. As stated in *Exodus*: "for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt" (*Ex*: 23:9), from

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1 Begin's speech upon issuing the order to grant asylum to the Vietnamese "boat people". Ha'aretz daily newspaper 6/27/77. See Chapter 1, Section b.

which we derive the commandment: “but the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt” (*Lev*: 19:34). As a state which aspires to be a member possessing equal rights within the family of nations, the State of Israel must also bear the burdens ensuing from such membership, including the provision of assistance to persons persecuted on grounds of race, religion, nationality, membership of a particular social group or political opinion.

Over the years the State of Israel failed to establish procedures for the determination of refugee status and the UN High Commissioner for Refugees did so in its place. This state of affairs has recently changed. In the beginning of 2001 the Minister of the Interior authorized an internal directive – *Regulations Regarding the Treatment of Asylum Seekers in Israel* – (“the Directive”) which was formulated by an interdepartmental team headed by Mr. Mani Mazoz, Adv., Deputy Attorney General, in association and cooperation with the UN High Commissioner for Refugees (hereinafter: “the UNHCR”) and its Israeli correspondent. Acting in accordance with this directive, in 2002, the State of Israel began, for the first time, to hear and decide applications for asylum filed within its territory. The Directive is attached to this position paper as “Annex A”.

This position paper has been written at the initiative of the association of Physicians for Human Rights - Israel (hereinafter: “PHR-Israel”). Last year numerous asylum seekers attended PHR-Israel clinic seeking medical treatment - their stories and tribulations (which are not solely health-related), revealed deep human distress and violations of their basic human rights. These stories motivated PHR-Israel and the “Public Interest Law Resource Center” operating in the Law Faculty of Tel Aviv University (hereinafter: “PILRC”), to write this position paper. The discussion will focus on two main issues:

A. Procedures for regulating the treatment of asylum seekers in Israel.

B. Protection of the social rights of asylum seekers in the interim period between the filing of their applications for asylum and the making of the decision on their applications.

The discussion is conducted in the context of three primary legal sources: the Refugee Convention, the Protocol to the Convention and its authorized interpretation; binding principles of human rights law and public administrative law in Israel.

The purpose of this position paper is, primarily, to contribute to the creation of Israeli refugee law, formulation of which has begun at the initiative of the UNHCR and various government offices, and to open the issues to public debate. In our opinion, such a debate will contribute to the formulation of procedures which will comply with the requirements of the Refugee Convention and the needs of asylum seekers as well as meet the interest of the State of Israel in maintaining a fair and efficient system for screening applications.

Alongside the legal analysis, an effort will be made to present the human face of the asylum seekers in Israel: who they are, their origins, the reality of their living conditions in Israel, the difficulties which they encounter and their needs which have to be satisfied.

Chapter One: The Refugee Convention

A. General Background

The Refugee Convention was formulated against the background of the traumas of the Second World War in Europe. Its purpose was to guarantee that a person being persecuted by reason of his race, religion, nationality, membership of a particular social group or political opinion, and who could not obtain the protection of his country of nationality (or who was unwilling to avail himself of such protection by reason of that country's persecution of him) could find asylum in another state.[2]

The vista which guided the drafters of the Convention was the situation in Europe at the time of the drafting of the Convention, *i.e.*, the problem of refugees from Nazi tyranny and those who had escaped from the Communist bloc.[3] The forecast was that within a number of years the problem of refugees, generated by the Second World War, would be overcome and there would no longer be a need for the Convention and its institutions.

In 1967 a Protocol was appended to the Convention which removed the restriction on the date which had been established in the Refugee Convention, so that states which acceded to the Protocol undertook to deal with applications for refugee status in consequence of events irrespective of the date of their occurrence.

The Convention deals with a number of issues; the principle issues are briefly described below:

Definition of a "refugee"

The Convention is not based on a collective definition of place of origin or ethnic group, but on an individual definition of flight by reason of persecution. Not every one who is a "refugee" in the literal sense

[2] The asylum which must be granted to a refugee is temporary - until the disappearance of the danger from which he has fled, or until he has voluntarily established himself in the country of asylum or in a safe third country.

[3] It is possible to learn of the limited vision which guided the drafters of the Convention in the 1950s, from the restriction on the application of the Convention to persons persecuted exclusively in consequence of events which had taken place before 1st January, 1951. Further, states were given the opportunity to declare that their undertakings would be confined to events which had taken place in Europe.

of the term will be recognized as a refugee under the Convention. The Convention provides as follows:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who: owing to… well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[4]

The Convention establishes three categories of persons, who, notwithstanding that they meet the definition of "refugee", will not be accorded the protection of the Convention:

A. Persons who receive protection or assistance from other organs or agencies of the United Nations.

B. Persons who receive from the country in which they have taken residence most of the rights accorded to citizens of that country.

C. Persons who are not entitled to international protection, because they have committed a crime against peace, a war crime, or a crime against humanity; or because they have committed a serious non-political crime prior to being admitted to the country of refuge; or because they have been guilty of acts contrary to the purposes and principles of the United Nations.

A person ceases to be a refugee in circumstances where he no longer needs international protection, for example, where he has voluntarily availed himself of the protection of the country of his nationality, or has voluntarily re-acquired his nationality, or has acquired a new nationality and enjoys the protection of the country of his new nationality, *etc*.

The rights and obligations of refugees

The most significant right accruing to a refugee, in consequence of recognition of that status, is the right to international protection. A state will not expel a refugee from its territory save on grounds of national security or public order and only in pursuance of a decision reached in accordance with due process of law (Article 32).

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[4] Article 1(A)(2) of the Refugee Convention.

The Convention sets out a list of minimum rights (which may be added to by any state) which the Member State must accord to the refugees present within its territory. In respect of a number of matters, the Convention provides that the refugee will enjoy the same rights as those enjoyed by nationals of the state of refuge, including freedom to practice his religion and freedom as regards the religious education of his children (Article 4); the right of access to the courts (Article 16); the right to elementary education (Article 22) and public relief and assistance (Article 23). In relation to other matters refugees must be treated in a manner which is no less favourable than the manner in which aliens lawfully sojourning in the state of refuge are customarily treated: acquisition of property and activities in relation thereto (Article 13), the right of association (Article 15), the right to work (Article 17) and more.

A refugee is required to abide by the laws and regulations as well as the measures taken for the maintenance of public order of the state of refuge (Article 2).

Non-Refoulement

Article 33(1) of the Convention establishes the principle which lies at the heart of the Convention, that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". This principle exceeds the scope of the Convention and today forms part of customary international law.[5]

There are two exceptions to the principle of non-refoulement, and these are set out in Article 33(2), namely, where there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is present, or, where, having been convicted by a final judgment of a particularly serious crime, he constitutes a danger to the community of that country. The two exceptions must be applied in a manner proportional to the anticipated threat to the asylum seeker or refugee should he be returned to the place where he is in danger.[6]

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[5] Borchelt G., "The Safe Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards", 33 *Columbia Human Rights Law Review* 473, 478-490.

[6] Goodwin-Gill G. S. *The Refugee in International Law*, 2nd edition, Clarendon Press, 1996, p. 140.

The principle is expanded and strengthened by Article 3(1) of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984, to which Israel has acceded. Article 3(1) provides:

"No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

Goodwin-Gill, one of the outstanding scholars on refugee law, has asserted that over the years the expanded interpretation of the principle of non-refoulement has been accepted, so that today it is acknowledged that the principle applies from the moment the asylum seeker presents himself for admission into the country, i.e., the principle also embraces the non-return of a person who has arrived at the frontier.[7] For the purpose of the application of the principle the manner in which the person has entered the country is immaterial (lawfully or unlawfully), the principle applies to refugees and to asylum seekers alike.[8]

The application of the principle of non-refoulement is not limited solely to the prohibition on returning a person to his country of *nationality*. It applies to any place in which he faces a threat to his life or freedom (this interpretation has also been accepted, as is explained below, by the Supreme Court of Israel). Today it is accepted that the principle provides protection against deporting a person to a third country that does not respect the principle of non-refoulement and may return that person to a place where his life is threatened.[9]

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7 *Supra*, at p. 124.

8 *Supra*, at p. 137.

9 *Supra,* p. 120, fn 16. Thus, for example, the resolution of the Committee of Ministers of the Member States of the Council of Europe Responsible for Immigration, decided that when determining which of the states would be responsible for the determination of refugee status, it was necessary to guarantee that the transfer of the asylum seeker to a third country would be carried out only if that country undertook to provide effective protection against non-refoulement. Ministers of the Member States of the European Communities responsible for Immigration, Resolution on a harmonized approach to questions concerning host third countries, London, 30 Nov - 1 Dec, 1992. SN 4822/92 WGI 1282 AS 146.
The House of Lords in England has held that this rule also applies where a third country might return an asylum seeker to his own country by reason of giving a different interpretation to the provisions of the Convention. *See*: *Regina v. Secretary of State For The Home Department, Ex Parte Adan* (2000), *www.parliament.the-stationary-office.co.uk.*

The UN High Commissioner for Refugees (UNHCR)

The UNHCR was established in 1950 as an apolitical humanitarian organization intended to protect refugees and assist them to re-establish their lives in normal surroundings. In the beginning, the mandate of the UNHCR was limited to three years in which it was supposed to handle the 1.2 million refugees in Europe who had been left homeless in the aftermath of the Second World War. When it became apparent that every year various crises around the world were continuing to cause thousands of people to become refugees, the mandate of the UNHCR was extended for additional periods of five years.

In the resolution which established the UNHCR, the UN General Assembly decided that the function of the UNHCR would be to provide international protection, under the auspices of the UN, to refugees falling within the mandate of the UNHCR (a definition very close to the definition of the Convention and the Protocol). The UNHCR was empowered to promote international conventions and agreements for the protection of refugees and supervise their implementation.

As global problems developed so too the mandate of the UNHCR expanded, and it was empowered to supply humanitarian aid, exceeding the scope of the Convention, to persons finding themselves in crises similar to those of refugees – primarily to persons fleeing war but still present within their own country (internally displaced persons).

The budget of the UNHCR (mainly from voluntary donations by states) amounts to 800 million dollars. Each year the UNHCR reports to the UN General Assembly about its activities through the Economic and Social Council. The programs of the UNHCR and directives concerning its activities are approved by an Executive Committee – EXCOM, which meets annually in Geneva. Among the 57 Member States of this Committee is the State of Israel.[10] From time to time EXCOM deals with various issues such as procedures for the determination of refugee status and the principle of non-refoulement. Notwithstanding that its conclusions do not have binding force, they reflect international agreement on the various issues (decisions are reached by consensus), and comprise an agreed and practical interpretation of the Convention, which fleshes out the missing details of the Convention and Protocol.

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[10] In order to be elected as a member of the Committee, a state must be a member of the United Nations or one of its specialist agencies, be elected by the Economic and Social Council of the UN (ECOSOC) and have a demonstrated interest in and devotion to the solution of the refugee problem.

The Convention versus current reality

The optimistic hope of the drafters of the Convention to the effect that it would be possible to resolve the problem of refugees within a number of years has been disappointed. On the 50th anniversary of the Convention the UNHCR continues to handle about 21.8 million refugees around the world.[11] In the year 2000 alone, crises, wars and violence around the world caused millions of people to flee their homes.[12] In that year, 465,884 applications for asylum were submitted to eleven Western countries (Austria, Belgium, Canada, Denmark, France, Germany, Holland, Sweden, Switzerland, Great Britain and the United States).[13] Only a few of the applicants will be recognized as refugees under the Convention.[14]

The Refugee Convention indeed sets a humanitarian challenge to the Member States – today, most of the refugees arriving in Western countries come from developing states, integrating them socially into the absorbing country is not simple, many lack the education or skills needed for the economy of the absorbing country and they are perceived as persons likely

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[11] As noted, these numbers also refer to those who are not refugees according to the Convention - and also include people who have been uprooted from their homes because of hunger, war, domestic conflicts, *etc*. *See* the web site of the UNHCR: http://www.unhcr.ch.

[12] The US Committee for Refugees, for example, reports on: 250,000 internal refugees in Afghanistan, 172,000 fled to Pakistan; 300,000 citizens were uprooted in Angola following civil war; 150,000 Burundi citizens fled from civil war and the atrocities committed during the course of the fighting; 266,000 Columbians left Columbia because of political violence (only 7,800 of them requested asylum in other countries); in Congo - Kinshasa a million citizens fled from war and atrocities; 750,000 Eritreans fled from border wars with Ethiopia; 60,000 Guineans left their homes because of attacks from Sierra Leone; *etc*. - US Committee for Refugees, *World Refugee Survey 2001,* P. 1.

[13] *Id.,* at p. 12. Even today, after having taken steps to minimize the number of asylum seekers coming to its borders, about a quarter of the above applications were submitted in Germany (in 1992 about half the applications submitted in the eleven countries listed above, were filed in Germany).

[14] In the 2001 report which reviews the trends in asylum decisions in 38 industrialized countries, the UNHCR estimated that the rate of recognition of refugees in those countries stood in the year 2000 at 12% (of the total number of applications decided in that year). It should be noted that in another 9% of cases it was decided to grant other humanitarian protection. These figures are only slightly lower percentage-wise than the figures for 1999. In the Member States of the European Community the rate of recognition is lower: 8% were recognized as refugees under the Convention and 11% were given other protection. There are great variations between countries: there are those in which the rate of recognition is double the average (Canada - 49%, Turkey - 48%) and there are those in which it is less than half the average (Austria - 5%, Ireland - 5%). *See*: UNHCR, *Trends in Asylum Decisions in 38 Countries, 1999-2000*, http://www.unhcr.ch.

to become a burden on the country's welfare system.[15] In some of the countries receiving refugees, xenophobia has developed, directed at asylum seekers and refugees.[16] In countries which do not absorb immigrants, the Refugee Convention is perceived as an alternative means of immigration, as, notwithstanding that the refuge offered by the absorbing country is supposed to be temporary, in practice the more time elapses the more difficult it is to sever the ties formed between the refugee and the country of refuge.[17] The large numbers of asylum seekers who have arrived in the industrial countries in the last two decades has imposed a heavy burden on the mechanisms for recognizing refugees. The decisions on the applications take long periods of time and the cost of maintaining the mechanisms are very high from the point of view of the receiving countries.

These and other reasons have fueled the trend prevailing over the last fifteen years in Western countries to reduce the number of refugees arriving at their borders. Germany clearly exemplifies this trend: for many years it was the country absorbing the greatest number of refugees compared to other European countries. In 1993 Germany began to limit the number of refugees allowed into the country.[18] A range of measures including the

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15 Schuster L. "A Comparative Analysis of the Asylum Policy of Seven European Governments", *Journal of Refugee Studies*, Vol. 13, No. 1, 2000, p. 118, 122. The author points out that various countries employ arguments relating to the cost of the asylum systems and grant of social benefits to asylum seekers whose applications are dishonest, as an excuse for hardening their policies. In her view, the data does not support this argument: the number of asylum seekers in recent years in England and Germany has not decreased, notwithstanding the reduction in social benefits granted to asylum seekers.

16 *Supra*, at p. 128. At the same time, it has been argued that the measures implemented by the authorities when dealing with asylum seekers (for example, prohibiting them from working and making them dependent upon the welfare system) and the positions taken by various parties within the public debate, contribute significantly to creating an atmosphere of hate and intolerance towards asylum seekers.

17 Hathaway J. C., "Can International Refugee Law be made Relevant Again?" in Hathaway J. C (ed.) *Reconceiving International Refugee Law*, Nartinus Nijhoff Publishers, 1997, p. 17-18.

18 Fullerton M. "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection", 36 *Texas International Law Journal* (2001) 231, 232-233. This was carried out by amending the Basic Law so that the right to asylum which had previously been one of the broadest in the world, to the effect that "persons persecuted for political reasons would be entitled to asylum", was significantly restricted. Notwithstanding that the overall principle set out in Article 16(a)(1) was preserved, subsections were added which reduce the possibility of being admitted to Germany by introducing the principle of the safe third country, the creation of a list of countries which are presumed to be free of persecution and the authorization of the adoption of fast track procedures in cases where the applications are manifestly unfounded.

introduction of a more stringent policy for granting visas to foreigners, adopting the principle of a “safe third country”[19] and introducing “fast track procedures”[20] for dealing with applications which are manifestly unfounded, have led to a significant reduction in the number of asylum seekers in Germany, but also to a fear that the system of protection given to refugees will be substantially impaired.[21] This trend may be seen in all the member countries of the European Union, which have shifted since the end of the 1980s towards “harmonization of policy and procedures for admitting asylum seekers”, with a series of bilateral agreements and the creation of directives which will bind the Member States.[22] These processes also have an influence on countries which are not members of the European Union.

B. The State of Israel and the Convention

By signing the Refugee Convention and Protocol, the State of Israel took upon itself obligations on the international plane. Without an Israeli statute which will adopt the Convention or entrench its principles in our law, the Convention does not comprise an enforceable legal document

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19 The rule of the "safe third country" states that a refugee who comes to Germany via a state which has signed the Refugee Convention or the European Convention on Human Rights, which Parliament has declared is a safe third country, will be returned to that country in order for it to hear his application to be recognized as a refugee. This rule is anchored in the Dublin Convention, referred to in fn 22 below.

20 "Fast track procedures" are operated when the application for recognition as a refugee is based on flight from an emergency situation or a war, or when it entails inherent contradictions or contradicts well-known facts.

21 Fullerton, fn 18 *supra*, expresses the fear that in the light of the central function fulfilled by Germany in Europe in relation to the admission of refugees, other European countries will follow its example and will adopt the same restrictive measures.

22 Examples of agreements: the Schengen Accord which was made in order to cancel the border controls between the Member States, by adopting a uniform policy regarding the issue of visas and harmonization of immigration and enforcement policies. One of the chapters deals with the handling of applications for asylum. Its purpose is to ensure that applications for asylum will be submitted in only one of the Member States and that they will be determined according to objective criteria (so that the applicant for asylum cannot shop for the place most convenient to him); an additional agreement is the Dublin Convention, made in order to spell out and (in the long term) replace the above chapter. The primary principle which it establishes is that the first state through which the asylum seeker passes is the one responsible for handling the application, save if there are circumstances which justify deviating from this rule. An example of a directive: the European Union Directive of 2001 regarding the Provision of Temporary Protection (Council Directive 2001/55/ec). Currently two provisions are being considered in relation to minimum standards for asylum procedures and the admission of asylum seekers.

which enables an individual to claim his rights under it in an Israeli court. This does not mean that the Convention lacks any effect in Israel. By signing the Convention, the State of Israel disclosed an intention to abide by it. Accordingly, a court in Israel, which interprets legislation, will always prefer an interpretation which accords with the provisions of the Convention.[23]

Who are the refugees who arrive in Israel?

In the history of the State of Israel's treatment of asylum seekers there have been cases of humanitarian gestures alongside instances of infringement of the Convention (the most serious of these led to the death of two asylum seekers). Following is a partial list:

- In 1977, an Israeli cargo ship picked up several dozen Vietnamese refugees from a boat in the open sea. The State of Israel offered these people refuge. According to the then Prime Minister of Israel, Menachem Begin, it was "natural for us to offer you refuge in our country, as this is our humane-Jewish tradition".[24] In 1999, 66 members of the group were still living in Israel.[25] This group was part of a larger group of Vietnamese refugees which Israel admitted in that period.

- In 1979, Prime Minister Begin ordered the admission of 100 of the Vietnamese boat people (some were Chinese in origin) who had escaped from the Communist regime and had been rescued by a Thai ship.[26]

- In 1992, 12 members of the Mujahadeen al-Halek organization (an organization hostile to Israel) crossed the border. They were imprisoned for about one and a half years and only following a petition to the High Court of Justice (HC 2651/92) did Israel agree to release them on restrictive conditions and find them temporary refuge abroad.[27]

- In 1993, a group of 100 refugees arrived in Israel from Bosnia at the invitation of the government of Israel. They were given permanent

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[23] A. Barak, *Interpretation in Law*, Vol. 2, "Statutory Interpretation", Nevo Press, 2nd ed., 1994, at p. 576.
[24] Item in the *Ha'aretz* newspaper, dated 27.6.1977.
[25] Item in the *Yedioth Aharonot* newspaper, dated 8.4.1999.
[26] Item in the *Yedioth Aharonot* newspaper, dated 8.4.1999.
[27] Information taken from the files of Adv. Zvi Rish.
[28] Item in the *Yedioth Aharonot* newspaper, dated 14.4.1999.

residence. At the end of the 1990s, about 30 remained in Israel.[28]

- *In 1994, Israel deported to Jordan 2 Sudanese Christians who had entered Israel from Jordan – Joseph Tomba and Nelson Mbau. Jordan extradited these men to Sudan where they were executed.*[29]

- In 1995, the High Court of Justice gave judgment in the case of Al Tai'i,[30] in relation to about 30 nationals of hostile countries, most of them Iraqis, who had crossed the border into Israel on different dates, and who had been detained for lengthy periods of time on the basis of deportation orders. The court presumed that the state had power to deport the petitioners (notwithstanding that the UNHCR had recognized them as refugees),[31] but held that they could not be held in detention for unreasonable periods of time. In consequence of the judgment, 24 of the detainees were released on restrictive conditions. By the year 2002, most had left for refuge abroad.[32]

- In 1999, 112 Albanian Muslim refugees arrived in Israel at the invitation of the government of Israel. They received six months tourist visas and a certain amount of economic assistance.[33]

- In May 2000, following the withdrawal of Israel from Lebanon, members of the South Lebanese Army and their families gathered at the border and were allowed to enter Israel (according to reports of the UNHCR – 5,895 persons were admitted). During that same year, about 1,500 returned to Lebanon, about 400 were found

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29 This case was confirmed by a number of sources including Adv. Zvi Rish, Mr. Michael Bavly, the High Commissioner for Refugees as well as the article by Y. Sarna in the newspaper *Yedioth Aharonot* dated 18.8.1995. As mentioned, the return of a person to a state which in turn may return him to a place where his life or freedom are threatened may contravene the principle of non-refoulement. Thus, for example, the British House of Lords overturned a decision to return to Kenya a Ugandan asylum seeker whose application for asylum had been rejected. The House of Lords held that the Secretary of State had not given due weight to a number of cases in which Kenyan authorities had returned refugees from Uganda to the Ugandan authorities - *In Re Musisi* [1987] 2 WLR 606.

30 HC 4702/94 *Al-Tai'i et al v. Minister of the Interior et al*, 49(3) P.D. 843.

31 Justice Barak held that there was no dispute as to this issue between the parties (at p. 848). At the same time, the principle which might have been inferred from this, *i.e.*, that the provisions of the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714 - 1954 superceded the provisions of the Refugee Convention, was unacceptable to the petitioners. In dismissing their application for a Further Hearing, Justice Barak explained that this had not been the ratio of the court, *see* FH-HC 5974/95 *Al-Tai'i et al v. Minister of the Interior*, Tak-Al 96 (1) 536.

32 According to the files of Adv. Rish.

33 Item in the *Ma'ariv* newspaper, dated 12.4.1999.

solutions in the form of resettlement in other countries, and the remainder (approximately 4,000) remained in Israel and continue to be handled by the various government offices.

- In March 2001, a group of 19 Kurds entered Israel via the Lebanese border. Shortly afterwards they were returned to Lebanon with the assistance of UNIFIL. The Israeli Correspondent of the UNHCR was asked by the military authorities to assist in examining their status, and according to his findings, the members of the group had already applied to the UNHCR in Beirut to be recognized as refugees and their applications had been rejected. The UNHCR authorized their return to Lebanon.[34]

- In August 2001, an additional group entered Israel from Lebanon. This group consisted of several dozen Kurdish men, women and children. On the same day they were expelled to Lebanon. Apparently this time the deportation was carried out without the knowledge of the Israeli Correspondent of the UNHCR.[35]

- In January 2002, newspaper reports mentioned three refugees, two from Sudan and one from Iran, who had been held for a number of months in Ma'asiyahu Prison. In February 2002, the two refugees from Sudan were released on restrictive conditions to a Kibbutz whilst awaiting a country of refuge which would admit them. Later such a country was found, and they together with the Iranian refugee left Israel.[36]

A review of the information held by the UNHCR reveals that the number of asylum seekers arriving in Israel is not high. The annual report for the year 2000 shows that the number of files pending at the beginning of the year was 286. During the course of the year 253 additional applications were submitted. During the course of the year 8 applicants were recognized as refugees under the Convention, 102 were found another solution, 23 were rejected, 71 files were closed for various

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[34] PHR-Israel wrote to the Minister of Defence for clarification of the regulations for treating asylum seekers crossing the border into Israel (if any exist). On 27.2.2002, the Minister of Defence responded that the activities of the security authorities in relation to infiltrators are carried out in cooperation with "the relevant bodies". In his letter he did not specify if regulations exist in relation to this matter and what they provide.

[35] A letter by PHR-Israel in relation to this incident has not yet been replied to by the Minister of Defence.

[36] Item in the *Ha'aretz* newspaper, dated 9.1.2002, information concerning the release of the refugees from Sudan was provided by the UNHCR.

reasons (the person waived his application, did not appear, the application on its face was not credible, *etc*.). At the end of the year 334 applications were still pending. The asylum seekers come from two main regions: the majority from African countries (principally Ethiopia and Eritrea but also from Sudan, Congo, Liberia, Ghana, Somalia, *etc*.) and a few from Europe (Yugoslavia, Russia, Ukraine, *etc*.).

The events leading the asylum seekers to come to Israel vary from person to person and from one country of origin to another. Below we shall briefly describe the story of "A", an asylum seeker from an African country. The story is set out as it was related to PHR-Israel staff:

> "In my country I was an employee of a welfare organization and I was also a political activist. When I was in university I met friends of my own age and we set up a group. You know – in Africa, students can be an important force politically. In the end I was thrown out of the university. I continued to learn alone. This gave me strength to cope with our living conditions and not to be afraid to open my mouth and speak. When *perestroika* began in Russia, they began to ease a little of the political pressure on us. We were the first to found a party for the youth in our country. That was in 1991.
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> I had an important job in the party: I was responsible for public relations. I enjoyed speaking and I spoke well. I was also credible because I did not lie like other politicians. I lived among the people. The elections arrived and we did well and succeeded in the elections for the district. We started working harder and to open branches prior to the elections to the presidency. That is when the bad period started.
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> In the elections to the presidency the two other candidates united against us and won. The candidate who won started distributing weapons to the people. Everyone started creating different militias. I tried to persuade people – at least in our district – not to take weapons and not to send children to the militias. I already knew where this would lead. In my work I traveled around other countries: in Angola, Liberia, Sierra-Leone, and I saw how the situation had deteriorated into civil war.
>
> In 1992 after the elections, we prepared a large demonstration in the capital city in favour of peace and social progress. The police advised us to refrain from the demonstration, but in the end sent a number of policemen as security. When we reached the square, near the offices of the Red Cross, a red car suddenly appeared, with

a number of militiamen, and they began shooting into the crowd. Three persons were killed and eight injured. The police did not do anything. I lay down on the ground. I understood then that my days were numbered but I felt that I could not remain silent. I had to go out to the public and testify to what I had seen. I even identified the people who had been in the car and I wrote down its number. Two-three years went by, and then the situation again began to become unstable.

One day three people came to my house and told me that they were police officers and wanted to investigate the events at the demonstration. I told them everything that I had seen and did not suspect anything. Two days later they returned with another eight policemen and arrested me by force in front of my family (my extended family and young daughter. At that time I already was not with my wife who could not withstand the pressure under which I was living). My little daughter began crying and one of the "policemen" pushed her with his foot and she fell. They cuffed me and put a black hood on my head. Since then – to this day, I have not seen my family and not my little daughter. Today she must be 14 years old.

They took me to the basement of the house of one of the commanders, and I began to understand that this was not the police but one of the militias. I was in that basement for about two weeks; perhaps longer. I do not remember exactly. They shot me in the leg and cut me on my lower back with a knife. They wanted to humiliate me and wanted me to tell them exactly what I had seen in the demonstration. It was important for them to humiliate me, because I was so sophisticated, educated. During these two weeks they brought a political colleague of mine and told me that I would see how they would execute him and the same would also be done to me. I had to watch them as they beat him. I was naked all the time. Anyone could come in and do what he wanted with me or watch me. They told me: you are going to die anyway but we want to torture you, so that you will die very slowly. They treated me like dirt, without food and without water. I even tried to drink my own urine. There was one who was my particular torturer. I was like his woman.

I became half-dead. I came from an educated family. I myself was educated. I had never gone hungry nor had I ever done hard labour. My father was a big man, with property and houses. Suddenly everything fell apart. They told me that they wanted to exchange me

for their friends who were in prison, but I was in the opposition. Why would the police want to exchange me? One day they came to me and told me that there was no point, it was impossible to exchange me. They would simply kill me, and were only waiting for orders.

They sent me someone who said that he was a doctor. He said that he would look after me because I was sick. He laid me down on the bed and then left and left the door open. I don't know why. Perhaps he thought that I could not move or perhaps he wanted to let me escape. I succeeded in getting up and found an open window – it was an ordinary house. I jumped and escaped. I returned to my home and it was completely abandoned. No one was left. I took only my documents and money and fled to my nephew who was a policeman. He hid me because we were sure that I would be killed if I was found. Forged documents were prepared for me and he drove me in his car to the airport. From there I flew to a nearby country.

In the new country I found work. I began to get settled. I wanted to start a new life. I even bought a flat and married a young woman whom I met there. She knew almost nothing about my history. But on occasion I would remember what had happened to me. Everything would become black. My brain would become muddled. I went to a psychologist and began treatment.

People from all over Africa were invited to an event in my place of work; people from my country also came. When my previous boss came he was very surprised to see me, because everyone there had thought that I was dead. This only made things difficult for me and led to my being fired. Now again I started being afraid. The country in which I lived is a big country with a great deal of corruption and crime. I sold my flat and looked for a way to escape again. I took my original passport and looked for an embassy. By chance, really by chance, I came to the Embassy of Israel and asked for a visa. I received a visa. I arrived in Israel in 1997 – and my wife joined me later."

Determination of refugee status in Israel prior to 2002 and the living conditions of asylum seekers in Israel

The fact that until now Israel did not implement the Convention did not prevent the screening of refugees in Israel. This process was conducted by the Correspondent of the UNHCR in Israel, who worked in cooperation with the main office in Geneva which decided the applications. On average, the waiting period for a decision took two years.

During the period in which the asylum seeker waited for a decision on his application he was not granted legal status in Israel (the UNHCR issued a document to the asylum seekers confirming that they were under his protection and awaiting a decision. In general, this document prevented the detention of the asylum seeker for being unlawfully within the country). Likewise, the asylum seekers were not entitled to any social rights. This situation led to severe personal problems: the majority of asylum seekers arrive in Israel without property or money and they have no relatives or acquaintances in the country. In such conditions they have no choice but to work illegally for a living at temporary jobs. Most of the asylum seekers known to PHR-Israel have no medical insurance despite the fact that many of them suffer from various health problems (some of which are connected to the hardships and torture they have suffered). Thus, for example, “A”, whose story is related above, told of what happened after he was arrested in Israel on suspicion that the visa in his possession was forged:

> “It was very very difficult for me in prison. At night I saw black faces like those of my torturers. This took me back. I began behaving strangely, to talk to myself. Suddenly I returned to the most severe torture, to the sexual torture, to the pain and the blood, to the staged executions. I actually saw the face of my torturer and I felt how he strangled me with an electric cable. The doctor in the prison spoke to me like with every one else – for one minute – and then said that he did not have time and gave me a sedative. But another prison guard and also the staff of the UNHCR understood that there was a special problem here.
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> When I was released, I was in a bad way. My wife also found it difficult with me. She is very young and did not know of such things. She left home and went to friends. I would wake up at night with flashbacks and would be certain that I was back in prison. I thought that I was beginning to go mad. The UN directed me to a center which assists victims of sexual attack. There I met Sharon who helped me a lot. He took me to a volunteer psychiatrist of PHR-Israel who examined me and began treating me with drugs. I began to improve but it is still difficult for me.”

When an asylum seeker was recognized as a refugee, the State of Israel generally granted him temporary residence for a period of one year, extending it from time to time.

Possibly, one of the reasons why the implementation of the Convention was delayed until now was the fear felt by the State of Israel that applying the Convention would open the door to the return of Palestinian refugees

to its territory. This issue requires detailed study, which exceeds the scope of this discussion, and accordingly we shall refer to it in a general manner only.

Palestinian refugees and the Convention

There is a dispute regarding the extent to which Palestinian refugees may acquire protection under the Convention,[37] in view of Article 1D of the Convention which provides as follows:

"This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

In 1951, when the Convention was signed, there were two agencies of the United Nations which provided relief to defined populations. Today only one remains – UNRWA – The United Nations Relief and Works Agency for Palestine Refugees in the Near East. According to the interpretation adopted by the UNHCR, in countries in which UNRWA operates (Jordan, Lebanon, Syria and the territories occupied by Israel), the Palestinian refugees will not be entitled to be included within the framework of the Convention. At the same time, a Palestinian refugee located outside the areas of operation of UNWRA may be entitled to the status of refugee under the Convention, and generally it will be enough if he proves that the reasons, which initially entitled him to the assistance of UNWRA, still exist.[38] Various Western countries did not incorporate within their statutes a provision similar to that contained in Article 1D of

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[37] Takkenberg L. *Status of Palestinian Refugees in International Law*, Clarendon Press (1998), p. 90.

[38] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva 1992, §143. It should be pointed out that Takkenberg rejects this approach - in his view, every person who falls within the UNWRA mandate is excluded by the first paragraph of Article 1D without connection to the question whether in practice he receives aid or whether he is present in a country in which UNWRA operates.

[39] Fn 37 *supra* at pp. 101-103. The scholar Imseis states that other states of Western Europe demanded that the Palestinian refugees prove that they are not listed by UNWRA or are no longer present in an area in which it operates. In Canada a difficulty arose in view of the fact that the Palestinian refugees are stateless - it was argued that as they did not have the right to enter the country in which they

the Convention, and granted the status of refugee to Palestinian refugees arriving in their territory (among these countries were – Canada, Austria, Australia, Switzerland and England).[39]

The scope of application of Article 1D is an issue which exceeds the scope of this discussion. At the same time, we should point out that it would be right to leave open the possibility of granting protection to Palestinians being persecuted on a personal basis, for one of the reasons set out in the Convention, so long as it is not dependent on the Israeli-Palestinian conflict.[40] Likewise, consideration should be given to the possibility of granting refuge, outside the framework of the Convention, on humanitarian grounds.

Citizens of enemy and hostile states

The fact that Israel still remains in a state of war with some of the countries bordering it, is also a factor which has reduced Israel's willingness to deal with applications for refuge submitted by citizens of enemy states. A citizen of an enemy state, who crosses the border into the State of Israel, may pose or be seen to pose a security danger from the point of view of the State of Israel. On the other hand, an asylum seeker, who is a citizen of an enemy state, may be a person fleeing from persecution by his state for one of the reasons set out in the Convention. Accordingly, a person who has expressed a desire for refuge must be given the opportunity to access the asylum process under the Convention while neutralizing the security danger. Today, this is done by arresting persons who cross the border and screening their applications while they are incarcerated. This arrangement raises difficulties as the period of incarceration is often protracted. Moreover, persons accused of constituting a security threat cannot contradict this claim, since the relevant information - if it exists - is

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generally lived, they could not assert against it that it was persecuting them. The Federal Supreme Court rejected this argument. *See* Ardi Imseis, "Statelessness and Convention Refugee Determination: an examination of the Palestinian experience at the Immigration & Refugee Board of Canada", *University of British Columbia law Review*, (1997) vol. 31, p. 317.

[40] Thus, for example, in the past PHR-Israel received applications from people who had fled to Israel from the Palestinian Authority by reason of persecution on grounds of their sexual preferences - such cases are currently not being handled by the UN High Commissioner for Refugees (or by any other body) and the applicants remain in distress and in real fear of their lives and safety. A similar position was expressed by Takkenberg, *supra* fn 37, at p. 116, to the effect that Article 1D need not prevent the provision of protection to a Palestinian refugee who is persecuted in a state in which he found refuge on one of the grounds set out in the Convention.

classified and closed to the accused and to his or her representatives. We should point out that Clause 6 of the Directive provides that in all cases an examination will be conducted of the possibility of releasing such persons on bail and indeed a number of asylum seekers have been released, with the assistance of the UNHCR, on various conditions. However, some asylum seekers were incarcerated for many months even though some of them were not citizens of enemy countries, but, rather, had passed through enemy countries prior to their arrival in Israel. It should be noted that in the Al-Tai'i case, mentioned above, the High Court of Justice held that a refugee, the citizen of an enemy state, should not be held in detention for unreasonably long periods of time. The right of the individual to liberty has to be balanced against the security needs of the public. Inter alia, the authorities have to weigh the existence of alternative options to detention.[41] If it is found that the applicant is indeed a refugee, Israel reserves the right not to absorb him in Israel.[42] Accordingly, an effort will be made - with the assistance of the UNHCR - to find a third country which will agree to provide him with refuge.

The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714 - 1954, which was enacted in the 1950s by reason of the very concrete fear of infiltration into the country, confers far-reaching powers on the state, the implementation of which may prove injurious to asylum seekers who are citizens of enemy states or hostile states, or who - prior to their entry into Israel - passed through these countries. The Law does not consider the motives of the person for crossing the border and entering Israel. Any person who has entered Israel knowingly and unlawfully and who is a national or citizen of Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or Yemen, or is a resident or visitor in one of those countries - is defined as an "infiltrator". The Law establishes a presumption that a person who has entered Israel without an entry permit or who is present in Israel unlawfully, is an infiltrator. The Law enables the establishment of Tribunals for the Prevention of Infiltration, in which judges will preside who are military officers (but who do not necessarily possess legal

[41] *See* the High Court decision in *Al-Tai'i*, fn 30 *supra* at p. 851. In that case one of the petitioners sat in prison for three years and the others one year, as the authorities believed that they posed a security danger and no state could be found to which they could be deported. The release of 24 of the detainees following the judgment, and the release of another 6 detainees in 1999, rebutted this claim, at least as far as these detainees were concerned.

[42] It should be pointed out that it is not clear whether this reservation may be reconciled with the Convention. Thus, for example, Article 3 of the Convention prohibits discrimination between refugees under the Convention on the basis of their country of origin.

knowledge) and enables the tribunal to deviate from the rules of evidence. The penalties for infiltration are severe - and may reach imprisonment for five years.

In practice, as may be seen from the above discussion, no uniform practice is employed in relation to persons who cross the border and apply for asylum. Some have been held for periods of two or three years in prison, others have been released from prison on various conditions, while others have not been allowed to enter Israel at all and were returned to the place from which they came (in possible breach of the principle of non-refoulement).

C. Conclusion

Constructing a system for determining refugee status in Israel naturally needs to take into account the experience which has been gathered abroad, while adapting it to the various conditions prevailing in Israel. The number of asylum seekers in Israel has never come close to the vast numbers of asylum seekers seeking refuge in Western countries which are consequently now implementing a policy restricting the admission of refugees. A possible reason for the small number of asylum seekers in Israel over the years may be the lack of an institutionalized system for admitting refugees, the existence of which has been made public knowledge (and if this is the case, the operation of such a system now may lead to a certain growth in the number of applications for asylum). At the same time, it should be acknowledged that the geopolitical location and situation of Israel significantly reduce the ability to enter the country overland. Likewise, the visa policy, which in recent years has become more stringent, does not enable the citizens of many countries, from which asylum seekers originate, to enter Israel.

The challenge which today faces the State of Israel, and which is not contingent upon the number of applications filed within its territory currently or which may be filed in the future, is the establishment of a fair and efficient screening system, which meets the demands of the Convention and respects the rights and dignity of asylum seekers and refugees. The discussion in the following section is devoted to this issue.

Chapter Two: Procedures for Determining Refugee Status

As noted, the Convention defines who is a refugee, but it does not determine the procedures which a Member State must adopt in order to establish whether a particular person is a refugee. At the same time, a number of fundamental principles may be derived from the Convention, as well as from other conventions regarding human rights. The starting point is that the right to apply for asylum is a basic human right, which is anchored in Article 14 of the Universal Declaration of Human Rights of 1948.[43] Alongside this is the right of a person not to be returned to a place in which his life or his freedom will be threatened, or to a place in which he may be subject to torture.[44] The latter two rights are closely bound to the right to life, which is entrenched in the International Covenant on Civil and Political Rights of 1966 (of which Israel is a member) as well as in Basic Law: Human Dignity and Liberty. The importance of the rights which are at stake, dictates the nature of the proceedings which the state must adopt, in the event that an application for asylum is submitted to it, or when a person claims that his life would be at risk if he were to be returned to his country of origin. These proceedings must meet basic standards of due process, *i.e.,* the decision must be made on the basis of sound evidence, after hearing the arguments of the applicant and it must take into account relevant considerations. The decision must be reasoned and the applicant must be given the opportunity to appeal it.

"Regulations regarding the treatment of asylum seekers"

The State of Israel has not yet enacted legislation or regulations in relation to the screening of refugees. At the beginning of 2001, the Minister of the Interior has authorized an internal directive known as "*Regulations regarding the treatment of asylum seekers in Israel*" ("the Directive") which was formulated by an inter-departmental team headed by Adv. Mani Mazoz, the Deputy Attorney-General, in association and cooperation with the UNHCR. Our comments below are based on a perusal of a copy of the Directive which was given to us, at our request, by Adv. Mazoz.

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[43] Article 14(1) of the Universal Declaration of Human Rights - 1948, provides as follows: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

[44] Article 3(1) of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, which was quoted in the first chapter.

The Directive provides for the following process:

1. **Submission of an application:** This shall be made to the Israeli Correspondent of the UNHCR. This office shall conduct a preliminary screening and will decide whether the application warrants further investigation. A UNHCR representative trained for this purpose will conduct a thorough interview with the applicant. An applicant who has passed the initial investigation process is protected from deportation during the period of the investigation of the application. Subject to certain limitations, the applicant shall be entitled to a temporary permit to enable his stay in Israel.[45]

2. **Gathering information:** the UNHCR will transfer the information concerning the applicant to the Ministry of the Interior. The material shall be sent to the relevant government ministries for comments and additional information. The UNHCR representative will complete the information gathering by approaching the UNHCR in Geneva.

3. **Additional interview with the applicant:** the interview will be conducted before the director of the population registry bureau of the area in which the asylum seeker is resident, on the basis of the material gathered.

4. **Hearing by the Advisory Committee:** the Advisory Committee comprises representatives of the Ministry of the Interior, the Ministry of Justice and the Ministry of Foreign Affairs. A retired judge or a senior advocate who is not a civil servant will chair the Advisory Committee. The Committee will conduct its hearings on the basis of all the material gathered as well as on the basis of the Convention, the ensuing documents and Israeli law, and thereafter will formulate its recommendations.

5. **Approval by the Minister:** the recommendations of the Committee together with all the collected information and the main arguments raised during the hearing will be presented to the Minister. The Minister will decide the application.

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45 Apparently, these restrictions refer to the period which elapses from the date of the applicant's entry into Israel until the submission of his application for recognition of his status as a refugee. The longer the period of time which elapses, the less likely it will be that the applicant will obtain a work permit. It should be noted that so long as no effective publication is made of the existence of this Directive and its contents, such a system which holds the applicant at fault for being tardy in filing his application must be considered improper.

6. **Grant of asylum:** an applicant whose application has been approved will receive an appropriate permit to enable him to remain in Israel until he can return to his country of citizenship.

7. **Reconsideration:** an applicant whose application has been rejected may apply to the Advisory Committee for reconsideration of the decision if there has been a change of circumstances or if he claims that new facts have come into his possession. The applicant may petition the Minister if he has reservations concerning the work of the Advisory Committee.

This chapter reviews the provisions of the Directive against the background of the principles which can be derived from the Convention, the experience of other countries in implementing the Convention (in "Annex B", as an example, we have set out a concise description of the regulations for handling asylum applications in Germany and in Greece), the recommendations of international human rights organizations which have expertise in this field, and Israeli administrative law. In the light of all these principles, recommendations are made for making certain amendments and incorporating them within the Directive. It should be noted that some of the principles, which are recommended below, are acceptable to the UNHCR and guide its activities. Nonetheless, it is recommended that they be made part of the written Directive in accordance with which the Israeli refugee screening process will operate in future.

Basic protection

1. Adopting the principle of non-refoulement

As noted, the most basic and important protection to which asylum seekers and refugees are entitled is the protection against being returned to a place in which their life or liberty is threatened. The principle of non-refoulement was already recognized in the decisions of the Israeli Supreme Court 30 years ago,[46] and the Court has reiterated it many times: "a person may not be deported from Israel to a place in which his life or liberty are threatened. Every governmental power – including the power to deport under the Entry into Israel Law – must be implemented on the basis of the recognition of 'the value of a human being, the sanctity of his life and his freedom'…. (Section 1 of Basic Law: Human Dignity and Liberty)".[47] It would be right to ensure that this principle is entrenched in the directives of the Ministry of the Interior in general

[46] HC 17/71 *Marar v. Minister of Defence*, 25(1) P.D. 141.
[47] HC 4702/94 *Al-Tai'i*, fn 30 *supra* at p. 848.

and in the Directive in particular, in order to ensure that officials at all levels become aware of it.

It is recommended that the principle of non-refoulement be adopted in the general directives of the Ministry of the Interior, as well as in the Directive.

General comments

2. Non-publication of the Directive

The preparations for the formulation of the Directive were not published, the response of the public or the human rights organizations was not sought, and even after the Directive was completed – it was not widely publicized. Since the Directive is in the nature of internal guidelines, which bind the authority, and in view of its ramifications for the human rights of the applicants – it must be brought to the public's attention.[48] Moreover, many of the applicants whom we interviewed pointed out that a period of time (sometimes long) had elapsed between the time they had arrived in Israel and until they learned of the possibility of applying for recognition as refugees. This is not a proper state of affairs – there must be effective publication which is directed at the relevant communities[49] - as from their point of view, the absence of such knowledge regarding the right to apply is equivalent to the absence of such a right.

It is recommended that the existence of the "Regulations regarding the treatment of asylum seekers in Israel" be published in a variety of languages and in such a manner as to bring them to the attention of potential asylum seekers. Likewise, it is recommended that proper scrutiny procedures be put in place in relation to the work of the Committee. At the end of the first year of operation, it is recommended that the conclusions drawn from the work of the Committee be published, as well as that the general public and human rights organizations be asked to participate in the enactment of the final regulations.

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[48] HC 5537/91 *Ephrati v. Ostfeld*, 46(3) P.D. 501.

[49] HC 1477/96 *Nimrodtakes Ltd. v. Ministry of Trade and Industry*, 53(5) P.D. 193, 201. Failure to publish is particularly aggravating in the light of the stance of the Ministry of the Interior that every asylum seeker must pay a fine in respect of the period in which he was unlawfully present in Israel. One may assume that had the State of Israel brought it to the attention of potential asylum seekers that it is possible to apply for asylum in Israel in accordance with the Convention, many of the asylum seekers would have applied much sooner and avoided paying the high fines.

3. *Absence of regulations for the treatment of asylum seekers at the borders and at entry points into Israel*

As noted above, PHR-Israel failed to receive a substantive response to letters addressed to the Ministry of Defence requesting information regarding the regulations applicable to cases of persons reaching or crossing the border into Israel. The only answer received was the general statement that the Ministry of Defence coordinates its activities with all the relevant bodies. As mentioned, in at least one case which occurred last year, an immediate deportation was carried out of Kurds who had arrived at the border fence with Lebanon and claimed to be asylum seekers. The above case raises the fear that there are no regulations and that if any do exist they fail to meet the requirements of the Convention.

Moreover, it should be pointed out that in recent years the Ministry of the Interior has been engaging in far more stringent control of the entry points into Israel. Preventing the entry of persons, and requiring them to return to their country of origin, has become a common sight.[50] We do not know if among the people who were returned are any who claimed that they were seeking asylum (it is worth adding that not every person knows to use the precise legal term - 'seeking asylum') and if so – whether they were given the opportunity of submitting an application.

In order to prevent infringement of the basic rule of non-refoulement, it is necessary to instruct those who supervise the entry of persons into Israel (whether at official border crossings or on patrols along the border fence) in relation to the requirements of the Convention.[51] The police and the soldiers must be able to identify the case of a refugee – even if the latter does not know to use the correct legal term.[52] At the least, steps must be taken to ensure that every doubtful case will be transferred for

[50] These people are termed "entry refuseniks". Generally, these are people who have arrived without travel documents or appropriate visas, or who though possessing travel documents or appropriate visas raise the suspicion of the border control officials that they are really migrant workers.

[51] This principle has also been set out in the recommendations of EXCOM, which are quoted in para. 192 of the UNHCR *Guide to the Convention*, *supra* fn 38.

[52] Thus, for example, Ireland equips its immigration officers at the border crossings with written instructions which draw their attention to the definition of a "refugee" under the Convention and to the prohibition on returning refugees. The immigration officers have been instructed that a person need not use the word "refugee" or "asylum" in order to be an asylum seeker. Likewise, the regulations provide that in every case where a person refuses to leave the country, his deportation will be delayed until his case has been examined, and in particular until an examination is conducted as to whether he is an asylum seeker - www.irlgov.ie/justice/publications/asylum/asypol2.htm.

determination by the competent authority, and the deportation of the applicant will be delayed until the appropriate decision is made.

It is recommended that clear regulations be established and brought to the attention of all the officials responsible for border controls and defence of the borders at sea and on land. The regulations must elucidate the provisions of the Convention, and in particular the absolute prohibition on returning a person who claims that his life or liberty is threatened in the country from which he came. The regulations must provide procedures for notifying the competent authority (including UNHCR) of the arrival of the asylum seeker and procedures for delaying deportation of the asylum seeker until his claims have been investigated.

4. Absence of a timetable

The absence of a binding timetable in relation to every stage of the process is a significant flaw in the Directive. Establishing a timetable is necessary both from the point of view of the asylum seekers, for whom it is not good to remain holding this status for a long period of time, and from the point of view of the State of Israel, which is required to take care of the applicants until a decision is reached. Appropriate timetables must be established for the period from the submission of the application to the interview being conducted; from the interview to the time when the Advisory Committee makes its recommendations; from the time of receiving the recommendations until the Minister makes his decision, and for the period of time until the filing of an appeal and a decision therein.

A binding timetable must be established which will put time limits upon the process and various stages of handling asylum applications.

Effective access to the asylum process

5. Information about the process

EXCOM (the international committee which manages Convention issues) provides that the asylum seeker must be given appropriate instructions, in a language understood by him, regarding the procedures for handling asylum applications. The asylum seeker must also be allowed to apply to the UNHCR.

6. Interpretation

An interpreter must be placed at the disposal of the asylum seeker. The organization ECRE[53] adds that the interpreter must be independent

and neutral; he must take into account not only the difficulties of the language but also difficulties which ensue from inter-cultural differences (this principle is currently maintained by the Israel UNHCR but should be entrenched in the directive).

Appropriate guidance must be given to the asylum seeker regarding the steps which he must take. He must also be given all the services needed to submit his application, including suitable a interpreter.

7. Submitting the application and the 'preliminary screening'

One of the principles which EXCOM marked out was that there should be one authority, the identity of which is clear and known, to which the applications should be submitted. The Directive provides that the initial application of the asylum seeker in Israel should be addressed to the UNHCR. Clause 1C of the Directive empowers the UNHCR representative to carry out an "initial investigation" of the applicant and decide whether to pass the application for further consideration. The Directive does not define the factors which should guide the "initial investigation" and does not clarify what should happen to an applicant whose application is rejected by the UNHCR representative. No right of appeal is established, and prima facie the applicant is "thrown out of the process".[54] According to information provided by the Israeli correspondent of the UNHCR, Mr. Michael Bavly, the initial investigation is technical in nature and is only

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[53] The European Council on Refugees and Exiles (ECRE), "*Guidelines on Fair and Efficient Procedures for Determining Refugee Status*", 1999. Http://www.ecre.org/positions/guide.doc, §63, 81-86. ECRE is a European umbrella organization for voluntary organizations which specialize in refugee issues. Currently, it has a membership comprising 72 voluntary organizations from 28 countries. The organization deals with the development of policies, research, lobbying, legal analysis, provision of services to member organizations and liaison between various organizations. In its policy paper, the organization states that an efficient system of determining refugee status is dependent on suitable institutional support, the existence of precise and credible information and continuous training of staff, and that if the appropriate budget is allocated to the issue, it is possible to maintain an efficient system which does not compromise on procedural fairness.

[54] It may be argued that such an applicant may make use of Clause 4 of the Directive which refers to "reconsideration": "An applicant whose application has been rejected may apply to the Advisory Committee for reconsideration if there has been a change of circumstances relevant to the decision in his case, including the discovery of relevant new facts or documents. Should the applicant have procedural objections with respect to the work of the Advisory Committee in his case, he may petition the Minister of the Interior in this regard." However, this provision is not definitive and, in any event, as will be explained below, it refers to "change of circumstances" and not to objections to the decision on its merits.

designed to exclude those cases which manifestly fall outside the confines of the Convention (for example, when the applicant declares that he wishes the status of refugee because he wishes to emigrate to Canada).

It is necessary to define the factors which justify the "preliminary screening" and prevent the applicant from accessing the asylum process. It would be right to enable the applicant to appeal to a quasi-judicial body against a decision not to allow him to access the asylum process.

8. Absence of formal obstacles

The organization ECRE states that access to the asylum procedure should not be restricted by various procedural obstacles, such as the requirement that the application be submitted within a defined period of time, or that it may only be submitted at the border of a country or that the application must be drafted in a certain way, or that the applicant should have identity documents or travel documents.[55] (This principle is maintained by the Israeli UNHCR but should be entrenched in the directives).

Access to the asylum procedure should not be restricted by procedural requirements such as the requirement that the applicant have valid identity documents or travel documents.

9. Provision of an appropriate residence permit for the duration of the hearing of the application

According to the experience that has been accumulated to date, the hearing of the application takes about two years. During this period, the asylum seeker is entitled to protection which includes, *inter alia,* making sure that he does not reach starvation point and that his health will not be threatened by failure to have access to medical treatment. This right to protection is derived from refugee law. Thus, for example, in the debate which was held before a parliamentary committee in England on the issue of subsistence allowances for asylum seekers, the UNHCR stated its opinion that failure to provide basic social benefits to asylum seekers was in fact "constructive refoulement", as asylum seekers living in abject poverty, might in their desperation decide to return to the conditions of persecution from which they had fled.[56] Another source of the right to

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55 ECRE, *supra* note 53, at paras. 17, 20, 21.

56 Quoted in the decision of Justice Simon Brown in: *R v. Sec. of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*, [1996] 4 All ER 385, 398.

receive minimum basic human conditions is found in the right to dignity, which is entrenched in Basic Law: Human Dignity and Liberty, and in international conventions to which Israel has acceded (such as the Covenant on Economic, Social and Cultural Rights).

The UNHCR has reached an arrangement with the Ministry of the Interior whereby a work permit will be granted, on certain conditions, to asylum seekers who have successfully passed the initial investigation of UNHCR. Beyond this there has been no recognition of the need to provide any other service, such as medical insurance. It should be noted that even the promise to provide a work permit during the waiting period is not implemented in practice: the Ministry of the Interior requires the asylum seeker to pay high fines amounting to thousands of shekels, in respect of the period in which he was unlawfully present in Israel, as a precondition to the grant of the work permit.[57] There have been a few cases in which the Ministry of the Interior has waived the fines or deferred payment, however, in the majority of cases the asylum seekers have been left without a work permit. In two cases, the Ministry of the Interior took advantage of the application for a work permit in order to demand that the asylum seeker immediately leave the country (a demand that infringes the principle of non-refoulement).

The story of "Y": "I worked in a hotel in Eilat, and I even paid taxes and received a regular salary for 4 years. Four years ago I was in Eilat. One day I started bleeding from my nose. I went to Kupat Holim [public health clinic].[58] In the health clinic they did blood tests and discovered very high sugar levels. I was hospitalized for about 10 days. I was diagnosed as having diabetes. I was given drugs and insulin injections. Since then, I have been taking 60 units of insulin in the morning and 40 units in the evening. In the beginning I bought a device which measures sugar, but after a year it broke down. Since then I occasionally check it at a friend's place.

After they discovered the disease, I continued working but fewer hours each day – I do not have strength and the work is difficult. I was a waiter, a stockroom boy and even a 'polish-

57 PHR-Israel and PILRC protested against the legality of this precondition in a letter to the legal department of the Ministry of the Interior on 9 January 2002; this letter has not been answered.

58 There is a special arrangement in Eilat whereby hotel workers receive insurance in Kupat Holim Clalit [public Health Clinic] in Yosephtal Hospital, even if they do not have permits.

man' (polishing utensils). After two years I could not work so much. They told me that I did not have a work permit and fired me. I left and returned to work in a different hotel. There again they fired me. I moved to Jerusalem and to Tel Aviv. Today, I do not have regular work. Now I work very little, here and there, in a restaurant washing dishes, cleaning. It is difficult for me to work.

One day, in October 2001, I did not feel well in the bus in Tel Aviv, I fell in the central bus station. An African told me that medical aid could be obtained in the PHR-Israel clinic. When I got up I discovered that I had been robbed. In the PHR-Israel clinic they saw that I am chronically sick and must continue to take insulin and they gave me a drugs prescription

For a week I did not go to buy insulin because I did not have any money. Friends helped me and I bought one portion which is sufficient for me for three days and costs NIS 85. I received a paper from the UNHCR. They could not help me from a medical point of view, but gave me NIS 500 for drugs. Each time, the money for insulin runs out and I do not know from where to obtain more money for medicine. I was told in the UNHCR to go to the Ministry of the Interior and ask for a work permit.

I went to the Ministry of the Interior in the Shalom Tower and asked for a visa to work. The official told me that it is not possible to obtain a work permit unless I pay a fine for six years of being unlawfully in Israel – something like NIS 3000 or 4000. I told him that I don't have any money at all, and that every penny I obtain I need for medicine.

I look for work all the time. I went to Ben-Yehuda Street, to Bnei Brak, Ramat Gan. Any work: waiter, dish washer. But they say to me that without a work permit they will not let me work there. So now I also can't get any money to buy medicine. I know that without medicine I will die. What can I do?"

Story of "V":

"I started having problems with my kidneys. I came to the clinic of Physicians for Human Rights and they sent me to a volunteer doctor. I was examined and they found that I have a stone. I was told to have an ultrasound but I did not have money and I could not pay for all

the expensive tests: CT, ultrasound, IVP. For some of them I went to East Jerusalem in order to save money. It was recommended that I undergo an operation and I was warned that I might lose the kidney but I did not do it because I did not have money for the operation. I knew the danger but I had no choice. I still had not received any reply from the UNHCR. I have already been waiting for more than two years. Once, after the doctor told me that I must undergo an operation, I turned to the UN to help me but they said that they could only help a little and it was not enough for an operation.

Three months ago I again began having pains in my kidney. I came to PHR-Israel and made tests. The doctor in the hospital said that I must have an operation as quickly as possible. That was in January 2002. I am still waiting for the PHR-Israel clinic to solve my problem. After all the reductions PHR-Israel has obtained for me, the operation will still cost NIS 4,500. I do not know how to get hold of the money. I am working now but suffer from pains.

After I was told by the UN that I can obtain a work permit from the Ministry of the Interior I went there in the hope of getting a permit, but I was told that I have to pay for all the time I have been here. I did not have money, so I went away."

It is essential to provide protection for the asylum seeker during the period he is awaiting a decision. The purpose of this protection: to ensure basic living conditions in dignity, including access to medical services.

10. Applicants having special needs

When a woman accompanies her husband she is entitled to be processed separately in respect of her status as a refugee.[59] Children are also entitled to separate processing. The *Handbook* sets out the presumption that a person of the age of 16 is sufficiently mature to understand and express a well-founded fear of persecution. At the same time, it is proposed that in every case a professional assessment be obtained regarding the development and capacity of the minor.[60] The interviewer must be sensitive to the mental or emotional difficulties of the applicant, which may interfere with the proper examination of the application. In such a case it is appropriate to terminate the interview and seek professional medical assistance. If the applicant was the victim of torture, he should be referred to a doctor who specializes in the field. There must be

59 Crawley H., *Refugee and Gender - Law and Process*, Jordans 2001, p. 200-201.
60 UNHCR *Handbook*, *supra* note 38, paras. 213, 214.

sensitivity to identifying persecution which entails gender or sexual abuse. In such cases sensitivity must also be shown to inter-cultural differences which are connected to gender roles. The applicant must be allowed to be interviewed by an official of the same gender, be given notification of this right, as well as be interviewed outside the presence of other family members. (This principle is maintained today but should be explicitly entrenched in the directive).

The screening process must be sensitive to applicants having special needs – women (in certain cases in which the persecution has gender-based characteristics), children and persons who have suffered trauma.

Substantive principles in the hearing of asylum applications

11. Definition of "refugee" for the purpose of the Directive

The Directive focuses on procedure – it does not contain provisions in relation to substance. This is a worrying deficiency as, *prima facie,* the substantive test is missing for carrying out the process of screening refugees.[61] The omission is met, to some extent, by Clause 7 of the Directive which provides that the treatment of requests for asylum will be carried out in accordance with the Convention and its Protocol and will be aided by the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. Notwithstanding these provisions, it would be desirable to define who is a refugee for the purpose of the Directive. Such a definition would clarify the law for the asylum seekers, the officials in the government offices dealing with the asylum seekers and the public as a whole.

It is recommended that a clause be added to the Directive which will define who is a "refugee". The provisions of this clause must, of course, be compatible with the provisions of Article 1(A)(2) of the Convention.

12. The nature of the process for determining refugee status

The UNHCR states in its *Handbook* that the definition of a "refugee" has a subjective aspect (the applicant's fear of persecution) and an objective

[61] In other countries it is customary to enact the definition of the term "refugee" for the purpose of determining the status of a person and his right to asylum. Thus, for example, the new Canadian Act which entered into force in June 2002 (Immigration and Refugee Protection Act) adopts the Convention definition for the purpose of Canadian law in Section 96 of the Act.

aspect (the fear must be a well-founded one). The nature of the process is derived from this definition. A proper process entails empathy and confidence. The interviewer must obtain the confidence of the applicant, hear his entire story, and understand his position and feelings towards it. The precondition for this, of course, is complete immunity in respect of the declarations of the applicant.[62]

ECRE recommends that the process not be performed in an adversarial manner, but rather through cooperation. The examiner must assist the asylum seeker to present his application, instruct him as to the importance of adducing all the relevant information, as well as in relation to his right to assistance from non-governmental organizations or to obtain legal advice.[63] Likewise, the examiner must show the applicant and his representative the material which was collected by the competent authority (save if it is possible to justify privilege). If declarations are made which are unclear or contradictory, the asylum seeker must be given the opportunity to clarify them. The examiner must weigh the possibility that there is an explanation for the contradictions (for example, because the asylum seeker is afraid), and enable a second interview to be held in which the applicant will be able to express himself freely.[64]

13. Burden of proof

The UNHCR states in its *Handbook* that notwithstanding that the burden of proof lies on the asylum seeker, the inherent difficulty of his position must be taken into consideration: life shows that asylum seekers arrive with few possessions and documents. The asylum seeker must not be required to provide corroborative evidence in support of his application. The absence of documents or the existence of forged documents should not influence the credibility of the application and does not compel a decision that the application is unfounded on its face.[65] An asylum seeker must never be referred to the embassy of his country of origin and that embassy should not be approached for the purpose of verifying details which the asylum seeker has supplied.[66] The examiner must also carry out independent research and attempt to find the necessary proof. There are cases in which it is difficult to verify the claims, however, if the description given by the applicant seems credible, and in the absence of good reasons for acting otherwise, he must be allowed to enjoy the benefit of the doubt.

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[62] UNHCR *Handbook, supra* note 38 at para. 200.
[63] ECRE, *supra* note 53 at paras. 54, 62.
[64] UNHCR *Handbook, supra* note 38 at para. 199.
[65] *Supra* at paras. 196, 203, 204.
[66] ECRE *supra* note 53 at para. 100.

It is sufficient for the applicant to prove reasonable fear of persecution.[67] (The Israeli UNHCR reports that this principle is maintained by it and by the advisory committee, but it should be entrenched in the directive).

In cases in which it is not possible to fully verify the facts but a favourable impression is obtained of the credibility of the applicant, the applicant must be allowed to enjoy the benefit of the doubt.

Procedural principles in the hearing of asylum applications

14. Provision of legal advice

The Directive contains no reference to the asylum seeker's need for legal advice prior to submitting his application for asylum. The Directive confers discretion upon the Advisory Committee to allow representatives of non-governmental organizations to participate in its open sessions in appropriate cases (Clause 2(e) of the Directive). There is no doubt that it is very worth while to expose the proceedings to human rights organizations, however, this cannot be the same as receiving particular legal advice. Such legal advice can be valuable, not only for the asylum seeker, but also for the deciding authority – as it will guarantee that the application will meet the requirements of the Convention and will contain all the relevant information and details. This will make a contribution to the efficiency of the hearing and will save valuable time.

Many countries enable asylum seekers to obtain legal advice or be represented. Thus, for example, Ireland enables the asylum seeker to obtain legal advice when submitting his application, and he is entitled to bring a representative with him to the interview. Nonetheless, the representative is prohibited from answering questions in stead of the asylum seeker. At the end of the interview the representative is given the opportunity to make comments. The asylum seeker and/or his representative are entitled to respond in writing in connection with the interview for up to five days following the date of the interview.[68] Canada recognizes the right to legal representation (or representation by someone who is not a lawyer).[69] England does not recognize the right to representation but in practice enables legal representation during all the stages of the process and refers asylum seekers to lawyers or organizations which specialize in providing legal advice to asylum seekers and do so without payment.[70]

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67 UNHCR *Handbook, supra* note 38 at para. 42.

68 *www.irlgov.ie/justice/publications/asylum/asypol2.htm*.

69 Immigration and Refugee Board, *Convention Refugee Determination*, www.irb.gc.ca.

70 http://194.203.40.90/default.asp?pageid=1178 - United Kingdom Immigration and Nationality Directorate site. An asylum seeker may receive legal aid, which is funded by the state, through the Community Legal Services - *http://www.legalservices.gov.uk/leaflets/cls/asylum-edited-8.htm.*

It is recommended that the right of an asylum seeker to obtain legal advice be recognized and in necessary cases that an attorney even be appointed for him through the legal aid bureaus.

15. Interview with the director of the population registry bureau

The Directive provides that the director of the population registry bureau of the place where the applicant is resident will conduct an interview and hearing for the applicant for asylum (Clause 3(d) of the Directive). This clause is not implemented. Hence, in effect the asylum seekers are only interviewed by the staff of the Israeli Correspondent of the UNHCR. Imposing this task on the relevant director of the population registry bureau must be accompanied by the appropriate training. In the absence of such training it is feared that the bureau directors, who are used to dealing with migrant workers, will not recognize the distinction between such cases and the case of the asylum seeker before them.

It is worth adding that a number of refugees, who applied to the Ministry of the Interior in order to regulate their status, reported inappropriate conduct on the part of government officials and insulting comments which referred to the colour of their skin. Naturally, such conduct on the part of public officials is improper and should be eradicated.

It is recommended that training and qualification be given to a limited number of population registry bureau directors (men and women[71]) who will conduct the interviews with the asylum seekers. Within the framework of this training they will learn the requirements of the Convention, techniques for interviewing the asylum seekers and how to identify cases which require special handling. Likewise, meaningful steps must be taken against employees who display improper conduct towards persons applying to the bureaus.

16. Composition of the Advisory Committee

There is no doubt that an effort has been made to guarantee that the decision will be made by senior administrative staff (this is clear from the individual composition of the Advisory Committee). Possibly, this decision is indeed the right one – in order to mark the way forward for the system which will operate in the future. At the same time, consideration should be given to the price which has to be paid today:

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[71] As noted, ECRE emphasizes that the asylum seeker must be allowed to be interviewed by a person of the same gender. The interviewer must be sensitive to cases in which there was sexual abuse or where the persecution was connected to gender. FN 53 *supra*, para. 96.

A. *Absence of expertise on the matter:* it is precisely because the Advisory Committee is composed of persons who hold central positions in their offices (for example, an attorney from the department which deals with petitions to the High Court of Justice, or the Head of the Visas and Aliens Department in the Ministry of the Interior), that we fear that these persons will not be able to free themselves and devote the necessary time and attention to studying and becoming expert on the issues. It should be noted that the UNHCR recognized the need for training and all the members of the Advisory Committee participated in seminars, in Israel and abroad, on these issues.

B. *Absence of independence of the members of the Advisory Committee*: the members of the Advisory Committee, except the Chairperson, who is a jurist who is not in the employ of the civil service, are representatives of government offices. The process as a whole places great emphasis on the stance of the respective government offices. In the absence of proper assimilation of the principles of the Refugee Convention in each and every location we fear that the decisions which will ultimately be made will be based on the general considerations of the offices (for example, the desire to reduce the number of aliens living in Israel or to protect the diplomatic interests of the State of Israel) and not on the primary consideration which should guide the decision (protection of someone who has been persecuted for one of the reasons set out in the Convention).

   It is recommended that a representative of the public (for example, a representative of the volunteer organizations or a member of the Committee for Human Rights of the Israel Bar Association) be made a member of the Committee. Such a step would ensure that an additional check is made on the factors taken into account by the Committee and would also promote the transparency of its hearings and decisions for the public.

C. *Absence of a direct impression of the Applicant on the decision-maker:* as mentioned before, the definition of a "refugee" has an objective dimension and a subjective dimension. The decision regarding the credibility of the applicant, and regarding the manner in which he perceives the events which caused him to flee from his country, are essential elements in the decision-making process. The Directive creates an undesirable split between those who hear the applicant (the UNHCR staff or the director of the local

population registry bureau) and the body which in practice decides the application (the Advisory Committee).[72]

The work of the Committee in the coming year will show if there are grounds for these fears. In the event that it becomes apparent that the mechanism which has been chosen is not the best, it will become necessary to choose a different process.

At the time of the release of this position paper it appears that some of the problems indicated above, have indeed occurred. Thus, for example, the Advisory Committee did not convene regularly in 2002. The implementation of some of the Advisory Committee's decisions was greatly delayed, and some were not implemented. At the end of the year, the Chairperson resigned.

This state of affairs is, perhaps, part of the "birth pains" of the new Directive, but it is causing significant delays in the hearing of asylum applications of persons awaiting the decision of the Committee and violates their rights.

It is recommended that a representative of the public be made a member of the Committee. Likewise, it is necessary to convene the Committee regularly, as any delay only increases the work load and delays the process which is in any event lengthy.

17. Obligation to give reasons

The Directive lacks a provision which requires reasons to be given for the decisions. The Committee does not give reasoned decisions, even when the application for refugee status is denied. In the absence of reasons, an asylum seeker cannot know why his application has been rejected, and he certainly cannot appeal against it in a substantive manner. If the State of Israel wishes to develop a consistent and fair system for dealing with applications, it is important for reasons to be given even when the decision is an affirmative one.

A decision recognizing the status of refugee or concerning refusal to recognize the applicant as a refugee must be reasoned – both in

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[72] One may conceive of an even more complex case, in which the representative of the UNHCR obtains a favourable impression of the credibility of the applicant, whereas the director of the population registry bureau determines that he is not credible.

relation to the factual findings and in relation to the legal aspects. A negative decision must be accompanied by a notification of the right to file an appeal, the period of time for filing an appeal and the conditions for filing it.

18. Right of appeal

The Directive does not confer a real right of appeal. Clause 4 provides as follows:

> "An applicant whose application has been rejected may apply to the Advisory Committee for reconsideration if there has been a change of circumstances relevant to the decision in his case, including the discovery of relevant new facts or documents. Should the applicant have procedural objections with respect to the work of the Advisory Committee in his case, he may petition the Minister of the Interior in this regard."

The right to apply for reconsideration is not an appeal – it is only made possible if there has been a change of circumstances. Even the final part of the clause, which enables a petition to be made to the Minister, does not vest a general right of appeal in relation to the content of the decision but is limited to the procedure which was adopted during the hearing before the Advisory Committee. Moreover:

A. The Directive does not provide that the recommendation of the Committee be brought to the knowledge of the asylum seeker, and that he be given the opportunity to appeal against it prior to the Minister reaching his decision (on the contrary, it seems that this recommendation forms part of the internal procedures conducted by the authority prior to reaching a decision).

B. After the Minister approves the decision of the Advisory Committee, the decision is transformed into an act of the Minister.[73] As such, the possibility of protesting against it, or against elements of it, before the same instance (the Minister) cannot be a substitute for an appeal.

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[73] The language of the Directive is not clear on this matter. The term "Advisory Committee" (in Clause 2) is designed to indicate that the competent body which makes the decision is the Minister and not the Committee. On the other hand, Clauses 3(f) and (g) refer to "approval" by the Minister of the decision of the Advisory Committee.

C. Absence of an independent appeals instance: recognition of a person as a refugee requires legal and factual decisions to be made. In view of the fact that the composition of the first instance (the Advisory Committee and the Minister) is based almost entirely on representatives of the executive authority, who act as representatives of their offices, it would have been right to ensure that at least the hearing on the appeal would be conducted by an autonomous body – having a judicial nature.[74]

It is recommended that there be a right of appeal to an independent and autonomous judicial body. The right of appeal must include reference both to the substantive decision and to possible flaws in the process. There must be a provision that filing an appeal delays the expulsion of the appellant (as without such a delay, the right of appeal will become meaningless).

Providing asylum to recognized refugees

Clause 3(g) of the Directive provides that an applicant whose application has been approved by the Minister of the Interior will receive the appropriate permit to enable him to remain in Israel, pending a change of circumstances in his country of citizenship which would enable his return, or until the cancellation of the said permit. The appropriate permit to remain is temporary residence, as it enables its holder to work in Israel and to receive medical treatment. This status is granted for a period of one to two years. When the permit expires, the refugee has to apply for its extension. In a few cases handled by PILRC, the renewal of the permit was delayed for many months, thus adversely affecting the ability of the refugees to make a living and maintain medical insurance.

A person who has been recognized as a refugee is entitled to temporary residence for a reasonable period of time; a situation should not be allowed to develop whereby a recognized refugee is left without a legal status in Israel; the applications of refugees who have already been recognized in accordance with the arrangements which applied prior to the coming into force of the Directive should not be made subject to re-examination; the examination regarding renewal of temporary residence permits must be carried out within a reasonable time period and prior to the permits becoming invalid.

[74] It should be noted that it is possible to subject the Minister's decision to review by the High Court of Justice or the Administrative Court. At the same time, review by the Courts does not fulfill all the functions of an appeals instance and focuses on an examination of the activities of the authority under the rules of administrative law.

Providing asylum on humanitarian grounds

As previously mentioned, from time to time the State of Israel would absorb refugees on humanitarian grounds, outside the framework of the Convention. Provision of humanitarian asylum to persons falling outside the framework of the Convention is accepted in many Western countries. Thus, for example, the Aliens Act of Sweden enables residence to be granted on humanitarian grounds. Embraced by this law are persons coming from countries or regions in which severe breaches of human rights are carried out, persons who must not be returned to their countries of origin for medical reasons or because of other critical personal or family circumstances, as well as persons the processing of whose applications has taken so long that in the interim period they have become fully integrated in Sweden (for example, someone who has established a stable relationship with a Swedish citizen).[75] In Britain, the Home Office has discretion to allow individuals or groups to remain in the country ("exceptional leave to remain"), the residence permit is valid for four years and thereafter it is possible to apply for a permanent residence permit.[76] The rights which are granted to persons who received a residence permit on humanitarian grounds in England and Sweden are very similar to the rights to which a refugee is entitled under the Convention in these countries.[77] For additional examples of countries which grant asylum on humanitarian grounds, see "Annex B" below, in relation to the discussion on Germany and Greece.

Empowering the Advisory Committee to weigh and make recommendations to the Minister regarding the provision of asylum on humanitarian grounds will make the proceedings more efficient and cost-effective, as the Committee in any event ascertains and discusses the personal circumstances of the applicant, thereby enabling it to issue its recommendations. Thus, the asylum seeker, whose special personal circumstances justify it, will not have to apply to the Minister of the Interior to be re-processed and obtain asylum on humanitarian grounds, after his original application for asylum on Convention grounds has been rejected.

Preparing the (administrative and statutory) infrastructure for the refugee screening process

There are a number of issues for which finding a solution is a long-term task but which should nonetheless be considered even at this stage. These

[75] Lambert Helene, *Seeking Asylum - Comparative Law and Practice in Selected European Countries*, Martinus Nijhoff Publishers, 1995, p. 132.

[76] "Claiming Asylum - Your Right if you are a Refugee", *www.legalservices.gov.uk.*

[77] Lambert, *supra* note 75, at pp. 138-139.

issues are listed below:

19. Entrenching the Directive in statute and allocating the necessary funds for its implementation

It follows from the provisions of the Convention that the Member States must engage in primary and secondary legislation for the purpose of implementing the Convention.[78] The Directive indeed anticipates future legislation: Clause 8 provides that the Directive will be operated on a trial basis for one year, at the conclusion of which "sympathetic consideration" will be given to the adoption of the Directive in primary or secondary legislation. It should be noted that the Directive does not bear a date and in view of the delays and difficulties in implementing it (as explained below) – it is impossible to know when the trial year will begin and when it will end.

With the approval of the Directive, the Minister of the Interior undertook to allocate the necessary budget for the operation of the status determination process. At the time of the publication of this position paper, no such budget was approved and the UNHCR continues to bear various expenses (such as salaries to proffesional interpreters and interviewers). The establishment of an Israeli mechanism for status determination will necessitate a sound budgetory foundation.

In the majority of Western countries, the issue of applications for political asylum has indeed been regulated by primary legislation, and on occasion even by the constitution of the particular country. A number of examples follow: in the United States, the issue is regulated by the Refugee Act of 1980, in England by the Immigration and Asylum Act of 1996, in France there is a constitutional right to asylum by virtue of the Preamble to the Constitution of 1946, which deals with persons who have been persecuted by virtue of their activities on behalf of freedom, as well as a statutory right to asylum which conforms with the provisions of the Convention.[79] In Germany the right to asylum is established in the Constitution of 1949, and its details are regulated in statute.[80] In Canada, a new law has entered into force – the Immigration and Refugee Protection Act.

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[78] *See* Article 36 of the Convention, which requires the Member States to notify the UN Secretary General of the statutes and regulations which have been promulgated.

[79] Constitution of 27 October 1946 (Foreword), Law No. 52-983 of 25 July 1952 relating to the right to asylum.

[80] On the restriction of the fundamental right to asylum in 1993, see footnote 18 supra. The Asylum Procedure Act details the arrangements relating to the submission of applications, hearings, *etc.*

20. Training personnel to handle applications

There is no doubt that by continuing to be involved in the refugee screening process, the Israeli Correspondent of the UNHCR is providing an essential service to the State of Israel. The UNHCR is an independent autonomous body, whose primary and unequivocal commitment is to fulfilling the requirements of the Convention. It's staff have collected vast experience and knowledge in relation to the handling of these issues. They act out of deep personal dedication and commitment and they have experience in interviewing techniques as well as a knowledge of what is happening in the countries of origin of the various asylum seekers. At the same time, there is a risk that the inclusion of the UNHCR in the determination procedure might lessen its ability to advocate on behalf of refugees. It should be noted that in the long term, all the screening processes would be carried out by the State of Israel. This requires the state to prepare and generate the necessary resources, including: training officials who will specialize in the Convention and relevant laws and regulations, as well as the fundamental principles of human rights. Training must include interview techniques, knowledge of the special conditions of asylum seekers and training in identifying special cases.[81]

21. Assembling a data base of conditions in various countries

As noted, a decision on an application for recognition of refugee status requires an examination of the subjective facets of the applicant (performed during the interview) and the objective facets (performed on the basis of information gathered about events occurring in the country of origin of the asylum seeker). In the latter field too, the State of Israel currently relies on the UNHCR. It is recommended that work be commenced to assemble a data base regarding the conditions prevailing in the various countries from which asylum seekers come to seek asylum in Israel. This data base must be placed at the disposal of the decision-makers of all ranks, in order to improve the decision-making process. An example of such a data base may be found in the computerized data system of the German Federal Office for Recognizing Foreign Refugees – ASYLIS. The system includes information concerning the condition of countries, collected from a variety of sources (the German Foreign Ministry, research institutes and universities, non governmental organizations, journalists, *etc*.). Additionally, the data bank allows access to be gained to all the legal processes in all the instances in Germany in relation to asylum seekers and refugees.[82]

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[81] In relation to the enlistment of suitable professionals and their training, *see* - Martin S. & Schoenholtz A. "Asylum in practice: successes, failures and the challenges ahead" (2000) 14 *Georgetown Immigration Law Journal* 589, 594-590.

[82] *Http://www.bafl.bund.de/*.

Conclusion

As explained, the Directive provides merely the first step in the process of anchoring the refugee screening procedures in legislation. The experience gathered during the implementation of these procedures will undoubtedly make a contribution to shaping them. The above discussion suggests that there is a need for the participation of the general public and human rights organizations in the process of formulating the refugee law of Israel.[83] The discussion shows that the current Directive contains flaws and omissions which should be rectified at this early stage; throughout the discussion, principles were recommended which may assist in formulating the amended Directive. The monitoring of the implementation of the Directive during the first year of its implementation showed that many of the problems we anticipated have, indeed, materialized. An example of the bureaucratic problems that arise is described in Annex C: "Israel's Handling of a Group of Ethiopian and Eritrean Refugees – A Case Study". The following chapter will be devoted to further consideration of an issue which was raised in this chapter, namely, the economic and social rights of asylum seekers during the period in which they await a decision on their applications.

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[83] For the advantages of allowing the public to participate, *see* M. Galfi, "Promulgating administrative regulations in Israel by way of negotiation", 14 *Legal Research*, at pp. 57, 59-62, as well as the directives of the Attorney General, *Secondary Legislation: Regulations and Directives*, 60.012 (1985), Directive 13.2, "Consultation with interested bodies otherwise than by virtue of law".

Chapter Three: Social and Economic Benefits Whilst Awaiting Determination of Applications for Asylum: A Comparative Glance

The process of examining an application for refugee status generally takes a long period of time (until now the process took about two years on average). As noted, refugees generally arrive impoverished and often without any travel documents or identifying documents. There are some who have been traumatized and scarred (mentally and physically) by the persecution which they have suffered. They have no knowledge of the conditions and language of the country in which they have arrived. There is no doubt that this is a very vulnerable group which requires the help of the country and its protection.

As already explained, the Convention does not deal with the manner of processing a refugee, or with the period from the submission of the application to recognition of the applicant's status as a refugee. Nonetheless, the purpose of the Convention (protection of refugees as such) obliges a Member State to provide protection, including during the period in which the asylum seeker is engaged in the process of having his application for recognition of his refugee status processed. This protection is not exhausted by protection against being deported or returned to the place where his safety is threatened, rather, as argued above, it includes protection of the dignity and basic living conditions of the asylum seeker. The duty to confer protection as aforesaid is drawn, *inter alia,* from the International Covenant on Economic, Social and Cultural Rights, of which Israel is a member, as well as Basic Law: Human Dignity and Liberty. Section 4 of the Basic Law provides: "Every person has the right to protection of his life, his person and his dignity." In this connection, the President of the Supreme Court of Israel has held that "the dignity of a person includes, as we have seen, protection of minimal human existence (see HC 161/94 *Etri v. State of Israel* [unpublished]). A person who lives in the street and has no housing, is a person whose dignity as a human being has been violated; a person who is hungry for bread, is a person whose dignity as a human being has been violated; a person who has no access to elementary medical treatment is a person whose dignity as a human being has been violated; a person who is forced to live in degrading material conditions is a person whose dignity as a human being has been violated."[84]

[84] Application for Leave to Appeal 4905/98 *Gamzu v. Ishayu*, 55(3) P.D. 360 at 375-376.

The British Court of Appeal has held that the right of a person to apply for asylum cannot be impaired by not granting him basic social rights. In the case of *R. v. Secretary of State for Social Security*[85] the appellants attacked regulations which precluded certain asylum seekers from obtaining social benefits.[86] The Court invalidated the regulations by a majority opinion, and held that in practice they restricted the right to asylum provided by law and accordingly were *ultra vires*; as Lord Justice Simon Brown explained:

"Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution".[87]

In order not to confine ourselves to a theoretical discussion concerning the economic benefits and rights which have to be supplied to asylum seekers during the period whilst they are awaiting a decision on their application, we have chosen to consider the situation prevailing in three Western countries: Germany, England and Greece. Germany was chosen in the light of the many years experience which it has gathered in this field, England – because it is a country which has a legal tradition which is similar to that of Israel, and Greece – as a country which only in recent years has begun to develop an asylum system and which has fairly limited resources compared to the countries which absorb the majority of asylum seekers. A perusal of the report issued by the Danish Refugee Council concerning *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*[88] reveals that the basket of social rights provided to refugees and asylum seekers in the above three countries, is not unusual in the general Western landscape.

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85 *R* v. *Sec of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*, [1996] 4 All ER 385.

86 Prior to this regulation, any asylum seeker who was not entitled to supplementary income benefits could receive, as a matter of urgent relief, a benefit equaling up to 90% of the supplementary income benefit. The regulations of 1996 provided that a person who had not filed an application for asylum upon entering England or whose application had been rejected and was awaiting a decision on his appeal was not entitled to urgent assistance. The reason for the regulations, presented by the government, was the need to deter asylum seekers whose applications were not sincere.

87 *R* v. *Sec of State for Social Security*, *supra* note 85, p.402.

88 Danish Refugee Council*, Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, Copenhagen, 2000. http://www.flygtning.dk/publikationer/rapporter/legalandsocial/indh/index.php

1. Health

Germany: Upon the arrival of a refugee to a "reception center", he undergoes a medical examination. During the first 36 months, the right to health services is limited to cases of serious or painful illnesses.[89] This broad definition also covers chronic illnesses, which cause pain. The German courts have held that the expenses of a person applying for the status of refugee in respect of psychotherapy will be borne by the government.[90] The law provides that preventive medicine (tests and immunization) will be financed by the government.

After staying 36 months in Germany, the applicant for refugee status is entitled to the same medical services as are accorded to a German citizen.

Greece: There is no mandatory medical examination upon arrival (a medical examination is required prior to receiving a work permit). In accordance with a Presidential Order issued in 1999, asylum seekers are entitled to free medical services and to hospitalization. The Aliens Act, as amended in 1996, also provides that all asylum seekers, refugees and persons whose stay in Greece has been permitted on humanitarian grounds, are entitled to free access to government hospitals for the purpose of hospitalization, medical tests and receipt of drugs.

England: Asylum seekers and their children are entitled to receive free medical services in accordance with the regulations of the National Health System. Asylum seekers are provided services by general practitioners in their places of residence. An asylum seeker may register with any physician he chooses. The asylum seeker is entitled to an interpreter, who is arranged for by the physician through the local health authorities. Asylum seekers who are supported by NASS can receive additional services, in accordance with NHS rules, including prescriptions, dental care, eye tests, vouchers for the purchase of spectacles and payment of travel fares to hospitals. All these services are provided free of charge.[91] Some of the asylum

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89 Implementing this definition causes difficulties: prior to receiving medical services, the asylum seeker must obtain a guarantee of payment of the cost of the service. The difficulty arises from the fact that the official generally cannot decide whether the medical service requested falls within the definition of the law - as the definition combines legal and medical factors. When the request is rejected, the asylum seeker generally does not have the resources (financial or mental) to seek legal aid in respect of that rejection.

90 OVG Lueneburg 4 M 3552/99, VG Berlin 8 A 366/97.

91 These services are provided automatically to persons being supported by NASS for six months. After this period, the asylum seeker is required to renew his application for a waiver of fees for these services. An asylum seeker who is not supported by NASS may also apply for a waiver of fees.

seekers are also entitled to free drugs.[92] Volunteer organizations in London offer psychological help to asylum seekers who have been the victims of torture.[93]

2. The right to work

[The right to work is intertwined with the issue of subsistence allowances – as countries which prohibit work generally grant subsistence allowances and *vice versa*].

Germany: Today, asylum seekers are not entitled to work (in the past there was a right to work). If a person is recognized as a refugee, and an appeal is made against this decision, he is entitled to work until a determination has been made on the appeal.

Greece: According to the Presidential Order of 1998 (Order 189/1999) an asylum seeker may apply for a temporary work permit, which remains valid so long as his application for refugee status is under review (on condition that he is not staying in the Laviron absorption center). Generally, the work permit is valid in respect of all types of work. In practice, asylum seekers find it difficult to obtain legal work which will provide them with social security, so that often the work permit is sought in order to enable the asylum seekers to work independently, as street peddlers.

England: During the first six months following the submission of an application for refugee status, the asylum seeker is not entitled to work. During this period obstacles are placed in his path even if he wishes to engage in volunteer work (thus, for example, he is prohibited from receiving food expenses). After these six months, there is a right to receive a work permit. An asylum seeker, who has a work permit, may seek assistance from the employment services. If he is unemployed, he is entitled to participate in government run professional training courses.

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[92] If the applicants are 60 years old or more; children under the age of 16 or between 16-18 and who are full time students; pregnant women; women who have given birth, for one year from the date of childbirth; or asylum seekers who suffer from certain medical problems.

[93] One of the prominent organizations in the field is the Medical Foundation. *See* the website of the organization: *www.torturecare.org.uk.*

3. Subsistence allowances

Germany: A 1993 law concerning the provision of social benefits to asylum seekers, grants various rights to asylum seekers. Amendments to the law which were enacted in 1997 and in 1998 significantly restrict the rights of asylum seekers during the first 36 months of their stay in Germany.

An asylum seeker is entitled to a monthly allowance. The monthly allowance stands at DM 80 (41 Euro) for the living expenses of a person aged 14 or over. The allowance for youths under the age of 14 is DM 40 (20.5 Euro). Recently, Germany shifted to the direct supply of services and products (food, housing, heating, clothing, medical services, personal hygiene products, and household equipment) for fear that the monthly allowance would be used by the asylum seekers to pay smugglers who had brought them into the country rather than for their living requirements.

After 36 months, the applicant for refugee status is entitled to the same welfare benefits as is a German citizen by virtue of the German National Insurance Law.

Greece: Generally, the country does not supply subsistence allowances to asylum seekers (rather, as noted above, it grants them a work permit). It is possible to obtain special assistance in exceptional cases, for example, in the case of unaccompanied minors. Non governmental organizations (Greek Council for Refugees, Social Work Foundation) grant subsistence allowances to asylum seekers, refugees and to persons who have been allowed to stay on humanitarian grounds, when these are people who have special needs, including: one-parent families, the elderly who have no living allowances, the sick, families having four or more children, people who have been tortured and who are not capable of working and women at risk.

England: Starting in April 2000, responsibility for providing social benefits to asylum seekers was transferred to a new department within the Home Office – the National Asylum Support Service (NASS) (contrary to the previous position, asylum seekers are no longer supported by the National Welfare System). Under the new arrangement, not every asylum seeker is entitled to support, only an asylum seeker who it appears will become destitute within 14 days is so entitled. The threshold income is 200-230 Pounds Sterling for a single adult. A person who has income exceeding this figure will not be entitled to assistance. NASS support is

provided via the voucher scheme.[94] Every adult is entitled to support at the rate of 70% of the income support of an English citizen and every child is entitled to a benefit at the rate of 100% of the benefit generally awarded to children. An adult over the age of 25 is entitled to weekly support of 36.54 Pounds Sterling (of which 10 Pounds Sterling may be obtained in cash); a couple may receive support in the sum of 57.37 Pounds Sterling; a one-parent family receives support in the sum of 36.54 Pounds Sterling.[95]

4. Housing

Germany: Asylum seekers are directed to 'reception centers' throughout Germany, which are managed by the various states (of the Federal Republic) on the basis of a quota system. An asylum seeker is obliged to live in the reception center and he is prohibited from leaving the administrative region in which the reception center is located (his movements are not restricted within the region). The reception centers are prepared to accommodate 300 or more asylum seekers. They supply meals and in emergencies also clothes. Voluntary organizations, which assist the asylum seekers, have from time to time expressed worries in relation to the conditions prevailing in some of the reception centers, which may have a detrimental influence, in particular upon those who have undergone traumatic events.

The asylum seekers are supposed to stay in the reception centers for three months, and thereafter to move to "asylum centers". The asylum seekers have very little influence concerning the place to which they are directed.

The conditions in the asylum centers differ from state to state (minimum conditions are determined on a regional basis, but they are not enforced in every place).

Greece: Under the Aliens Act, as amended in 1996, the state is responsible for establishing and maintaining temporary absorption centers

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[94] Currently, the Home Office is examining the implementation of the voucher scheme. In a position paper which was submitted in response to a request made by the Home Office to organizations dealing with refugees, 50 organizations sharply attacked the scheme and argued that it had proved to be a dismal failure. According to these organizations, the scheme undermines the standing of the asylum seekers in the eyes of the British public and fails to meet the basic living needs of the asylum seekers. Oxfam, "Token Gestures - the effects of the voucher scheme on asylum seekers and organizations in the UK", December 2000, http://www.oxfam.org.uk/policy/papers/vouchers/.

[95] The figures are set out in the NASS website: *http://www.ind.homeoffice.gov.uk/default.asp?PageId=91*.

for asylum seekers. At the same time, until May 2000, no such centers had been established. One center which was established south of Athens – Laviron – can accommodate 300 people, and today is used for cases in which there is an urgent need for shelter (asylum seekers who suffer from psychological problems, unaccompanied minors, the elderly, one-parent families, families having many children, and persons with special needs). Non governmental organizations have offered their assistance on this matter: the Greek Red Cross maintains an absorption center and other organizations grant rent assistance for a short period of time following arrival in Greece.

England: NASS supplies housing solutions to those asylum seekers who cannot find another solution, but it is not mandatory to seek its services. NASS policy is to disperse asylum seekers to areas far from London and from south-east England (the "dispersal policy"). Sharp criticism has been voiced against the dispersal policy by NGOs which have argued that the families of asylum seekers have been split up, people have been sent to regions in which there is xenophobia and where they may be attacked, the vouchers – the primary means of subsistence of the asylum seekers – do not reach them on time, *etc*.[96]

5. Education, professional training, language studies

Germany: The children of asylum seekers are not subject to compulsory education, although in the majority of states they are entitled to study in the schools. In practice, implementation of the right often depends on the good will, the size and the financial and human resources of the local schools.

The state does not grant a right to learn the German language; however, volunteer organizations hold language courses in some of the asylum centers.

Greece: Every child in Greece has the right to study in every educational institution. The children of asylum seekers are given high priority in admission to kindergartens, as the welfare services regard them as a community at risk. The majority of children of asylum seekers of elementary school age study at school. Language obstacles and lack of financial support lead the majority of youths of high school age to prefer to look for work. Children who need additional lessons in Greek may study during the afternoon hours in inter-cultural centers. The cost of their

[96] Birmingham Race Action Partnership (BRAP), "Shattered Homelands: Scattered Dreams - A research report exploring the current debates around asylum seekers and refugees in Birmingham", June 2001, *www. Iarp.org.uk/shattered.htm*.

studies is borne by a volunteer organization (GCR).

England: The children of asylum seekers are entitled to compulsory education (from the age of 5 up to the age of 16). The local educational authorities are responsible for finding the child a place in a school located in his place of residence. The government allocates a special budget to the various local authorities for the purpose of absorbing the children of asylum seekers. Additionally, the schools may apply for a special budget to be allocated to students learning English as a second language (the Ethnic Minority Achievement Grant). The Ministry of Education and Employment has estimated that in 2000/2001 a budget of 500 Pounds Sterling was allocated to every school for the education of a child of an asylum seeker.

The children of asylum seekers, who are under the age of 5, are entitled to various educational services. Youths between the ages of 16-19 may learn in college. The various colleges have different policies regarding the payment of fees by asylum seekers, and some allow studies free of charge.

Interim conclusion

The above discussion shows that, contrary to the policy of other Western countries, the State of Israel does not grant basic economic and social rights to asylum seekers during the period in which they are awaiting a determination of their applications. As noted, the waiting period is not short and may extend for two years (!). The possibility of obtaining a work permit has been restricted by such harsh conditions that in practice it does not exist for the majority of asylum seekers. The sole right which is properly granted is the right of children of asylum seekers to education within the framework of the Compulsory Education Law, 5709 - 1949. Children of asylum seekers, like children of Migrant Workers, may register for the special arrangement which allows them to receive health insurance.

The situation whereby asylum seekers suffer from medical problems, which are not treated, and live in a state of destitution and economic distress, is not compatible with the spirit of the Convention or with the provisions of Basic Law: Human Dignity and Liberty.

Conclusion

The State of Israel today is at a watershed in so far as concerns fulfilling its obligations under the Refugee Convention: on one hand, in the last two years, the State of Israel has made significant progress; on the other hand, one may see difficulties today which threaten not only to negate the achievements which have already been attained but also to push Israel into a situation which is worse than that which prevailed prior to the adoption of the Directive.

Behind the legal principles, the regulations and procedures are the lives and tribulations of men, women and children, who traveled through torturous paths to the State of Israel, in the belief that they would find a safe haven there. Their life in Israel – unable to support themselves, without access to health services and in a state of impoverishment – is far-removed from expressing the ethos of the State of Israel, as a democratic state, sensitive to the distress of persecuted persons, mandated by the suffering and persecution ridden history of the Jewish people.

We hope that in selecting which one of the possible routes it will pursue, the State of Israel will decide in favour of fulfilling obligations which it undertook as a member of the family of nations, the path of creating fair, efficient and humanitarian procedures for screening refugees and protecting asylum seekers. This position paper has pointed to various defects in the Directive which require rectification, and principally to the absence of regulations for dealing with asylum seekers who arrive at the borders, the absence of provisions for ensuring the protection of asylum seekers during the period they await a determination of their applications, the absence of timetables for the handling of applications and the absence of a real right of appeal. The discussion pointed to the initial problems which have appeared following the commencement of the implementation of the Directive and to the problems faced by asylum seekers and refugees in Israel today. We hope that this position paper will contribute to the process of formulating such procedures and call upon the government to engage in consultations with the human rights organizations, to study the issues and their implementation, ahead of the enactment of legislation.

List of Recommendations

1. Adopting the principle of non-refoulement

It is recommended that the principle of non-refoulement be adopted in the general guidelines of the Ministry of the Interior, as well as in the Directive.

2. Publication of the Directive

It is recommended that the existence of the "*Regulations regarding the treatment of asylum seekers in Israel*" be published in a variety of languages and in such a manner as to bring them to the attention of potential asylum seekers.

3. Transparency in the work of the Advisory Committee

It is recommended that proper scrutiny procedures be put in place in relation to the work of the Advisory Committee. At the conclusion of the first year of operation, it is recommended that the conclusions drawn from the work of the Committee be published.

4. Regulations for the treatment of asylum seekers at the borders and at entry points into Israel

It is recommended that clear regulations be established and brought to the attention of all the officials responsible for border controls and defence of the state borders (at sea and on land). The regulations must elucidate the provisions of the Convention, and in particular the absolute prohibition on returning a person who claims that his life or liberty is threatened in the country from which he came. The regulations must provide procedures for notifying the competent authority (including UNHCR) of the arrival of the asylum seeker and procedures for delaying deportation of the asylum seeker until his claims have been investigated.

5. Timetables

A binding timetable must be established which will put time limits upon the entire process and the various stages of handling asylum applications.

6. Information about the process

An asylum seeker is entitled to receive detailed information regarding the asylum process, the conditions which he must meet and his rights during the period he is awaiting a decision on his application. This information must be given in a language understood by him.

7. Interpretation

An asylum seeker is entitled to obtain all the services needed to submit his application, including an independent and neutral interpreter.

8. Immunity

It is recommended that provision be made that all information which is provided by an asylum seeker in support of his application for asylum, will be used solely for the purpose of deciding his application.

9. "Preliminary screening" of asylum applications

It is necessary to define the factors which justify the "preliminary screening" and prevent the applicant from accessing the asylum process. It would be right to enable the applicant to appeal to a quasi-judicial body against a decision not to allow him to access the asylum process.

10. Absence of formal obstacles

Access to the application for asylum process should not be restricted by procedural requirements such as the requirement that the applicant should have valid identity documents or travel documents.

11. Provision of an appropriate residence permit for the duration of the hearing on the application

It is essential to provide protection for the asylum seeker during the period he is awaiting a decision. The purpose of this protection is to ensure basic living conditions in dignity, including access to medical services.

12. Applicants with special needs

The screening process must be sensitive to applicants with special needs – women (in certain cases in which the persecution has gender-based characteristics), children and persons who have suffered trauma.

13. Definition of "refugee" for the purpose of the Directive

It is recommended that a clause be added to the Directive which will define who is a "refugee". The provisions of this clause must, of course, be compatible with the provisions of Article 1(A)(2) of the Convention.

14. The nature of the process for determining refugee status

It is recommended that provision be made to the effect that the process

for determining refugee status will not bear an adversarial character, but rather the examining officials must offer the asylum seeker assistance in clarifying the details of his application and in adducing support for his contentions.

15. Burden of proof

It is recommended that it be provided that in cases in which it is not possible to fully verify the facts but a favourable impression is obtained of the credibility of the applicant, the applicant will be allowed to enjoy the benefit of the doubt.

16. Provision of legal advice

It is recommended that the right of an asylum seeker to obtain legal advice be recognized and that in necessary cases an attorney even be appointed for him through the legal aid bureaus.

17. Training of personnel to handle applications

The employees of the Ministry of the Interior who come into contact with asylum seekers must be trained in relation to the requirements of the Convention. It is recommended that population registry bureau directors, who are responsible for conducting the interviews with the asylum seekers, be given specific training for this task. Consideration must be given to the training of bureau directors for the job, and to the possibility of allowing female asylum seekers to be interviewed by a woman. Within the framework of this training the officials must learn the requirements of the Convention, techniques for interviewing asylum seekers and how to identify cases which require special handling.

18. The Advisory Committee

It is recommended that a representative of the public be made a member of the Advisory Committee. It is necessary to convene the Committee regularly, as any delay only increases the work load and delays the process which is in any event lengthy.

19. Obligation to give reasons

A decision recognizing the status of refugee or concerning refusal to recognize the applicant as a refugee must be reasoned – both in relation to the factual findings and in relation to the legal aspects. A negative decision must be accompanied by a notification of the right to file an appeal, the period of time for filing an appeal and the conditions for filing it.

20. Right of appeal

It is recommended that there be a right of appeal to an independent and autonomous judicial body. The right of appeal must include reference both to the substantive decision and to possible flaws in the process. There must be a provision that filing an appeal delays the expulsion of the appellant (as without such a delay, the right of appeal will become meaningless).

21. Providing asylum to recognized refugees

A person who has been recognized as a refugee is entitled to temporary residence for a reasonable period of time as this status enables its holder to obtain the basic rights needed to live in Israel and also provides a certain level of security. A situation should not be allowed to develop whereby a recognized refugee is left without a legal status in Israel. The examination regarding renewal of temporary residence from time to time must be carried out within a reasonable time period and prior to the expiry of the permit.

22. Providing asylum on humanitarian grounds

It is recommended that the Advisory Committee also be empowered to weigh and make recommendations regarding the provision of asylum on humanitarian grounds in special circumstances in relation to applicants whose applications for refugee status have been rejected.

23. Adopting the Directive in statute and allocating the necessary budget

In the future the principles of the Convention should be adopted in statute. It is recommended that the public and human rights organizations be asked to participate in discussions ahead of the enactment of the regulations for determining refugee status. The determination system must be allocated the necessary budget for its operation.

24. Assembling a data base of conditions in various countries

It is recommended that work be commenced to assemble a data base regarding the conditions prevailing in the various countries from which asylum seekers come to seek asylum in Israel, and in relation to relevant legislation and case law in other countries.

ANNEX A

Re: Regulations Regarding the Treatment of Asylum Seekers in Israel

1. **Initial investigation:-**

(a) The initial application by a person seeking asylum in Israel (hereinafter, "the applicant"), shall be made to the office of the Correspondent for Israel for UNHCR (hereinafter, "the UNHCR representative"). The UNHCR representative will conduct a preliminary screening and examination by way of a thorough interview, an initial check with the Ministry of the Interior regarding information in its possession regarding the applicant, to the extent that such information is available, and a request for information from the UNHCR. Concurrent with the commencement of these regulations, the possibility of involving a representative of the Ministry of the Interior or the Advisory Committee in this initial investigation will be considered. The UNHCR representative will clarify to the applicant that the information in his case will be transferred to Israeli authorities so that his application may be processed.

(b) In the event that the applicant is being held in detention at the time of his application, the initial investigation will be conducted at the place of detention.

(c) Following the initial investigation, the UNHCR representative will determine whether the application warrants examination and determination by the relevant Israeli authorities. An applicant who has passed the initial investigation process described above will, as a general rule and unless otherwise required due to special reasons, be granted, by the Ministry of the Interior, a temporary permit to enable his stay in Israel until a final decision has been made with respect to his application.

2. **Advisory Committee:-**

(a) An advisory committee to the Minister of the Interior will be established to process applications for asylum.

(b) A public figure – retired judge or senior advocate who is not a civil servant - will head the Advisory Committee. Its members will be representatives of the Ministry of the Interior (representative and secretary of the committee), Ministry of Justice and Ministry of Foreign Affairs.

(c) The UNHCR representative will be invited to attend and participate in the open session of the Committee's meeting. The Advisory Committee may also conduct meetings without the presence of the UNHCR representative for reasons connected to the subject of the meeting, such as classified security information.

(d) Other relevant government representatives (for example, police, IDF and ISA), will be invited to attend meetings where necessary.

(e) The Advisory Committee may, in appropriate circumstances, allow representatives of NGOs to be present during its open sessions, as it deems fit.

3. Decision:-

(a) Information and details gathered from the applicant and from other sources by the UNHCR representative will be transferred to the Ministry of the Interior.

(b) Material regarding the applicant will be sent to the government ministries with representatives in the Advisory Committee, and to other relevant governmental bodies, for comments, additional information and in order to receive their position regarding the application.

(c) The UNHCR representative will also complete his investigation of the application, where necessary, with UNHCR headquarters in Geneva.

(d) On the basis of the information collected, the applicant will be invited to an interview and hearing before the director of the relevant population registry bureau who may be assisted, where necessary, by other population registry officials.

(e) At this stage, following the completion of the investigation, the application will be brought before the Advisory Committee. The information received throughout the stages outlined above will be presented to the Advisory Committee by one of its members ("rapporteur"). The Advisory Committee will formulate a recommendation on the basis of the information brought before it.

(f) The recommendation of the Advisory Committee will be presented for the approval of the Minister of the Interior, together with all the collected information, and the arguments and positions that were raised in the Committee meetings.

(g) An applicant whose application has been approved by the Minister of the Interior will receive the appropriate permit to enable him to remain in Israel, pending a change of circumstances in his country of citizenship which would enable his return, or until the cancellation of the said permit.

4. **Reconsideration:-**

An applicant whose application has been rejected may apply to the Advisory Committee for reconsideration if there has been a change of circumstances relevant to the decision in his case, including the discovery of relevant new facts or documents. Should the applicant have procedural objections with respect to the work of the Advisory Committee in his case, he may petition the Minister of the Interior in this regard.

5. **Jurisdiction to determine "refugee" status:-**

The authority and responsibility for determining the status of "refugee" with respect to an applicant situated within the territory of the State of Israel, rests exclusively with the Government of Israel, in accordance with the law and these regulations. The UNHCR will accept, as a general rule, the decision of the State of Israel in this regard and will not issue documents recognizing the refugee status of applicants present in Israel.

6. **Subjects of enemy or hostile states:-**

The State of Israel reserves the right, not to absorb into Israel, or to grant a permit to enable the stay in Israel, of subjects of enemy or hostile states – as determined from time to time by the relevant authorities, and for as long as such states possess that status. The issue of the release of such persons on bail will be examined on a case-by-case basis, in accordance with the prevailing circumstances, and security considerations.

Israel appreciates the UNHCR's position according to which UNHCR will make every effort to find a country of resettlement for such refugees, pending a comprehensive political settlement in the region.

7. **Convention relating to the Status of Refugees:-**

The treatment of requests for asylum, detailed above, will be conducted in accordance with Israeli law and in consideration of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. The Advisory Committee will be aided by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

8. **Legislation**

At the conclusion of a one year trial period in implementing these regulations, and subject to the conclusions reached, sympathetic consideration will be given to the adoption of these regulations, in whole or part, in legislation – either primary or secondary – including provisions regarding a special permit for asylum seekers to be issued after an application has received final approval, as mentioned above. This permit would enable the applicant to remain in Israel pending a change in circumstances in the country of citizenship that would enable return.

9. These regulations, and the budget associated with it, have been approved by the Minister of the Interior.

ANNEX B

In this document, a short description will be given of the procedures for screening refugees in Greece and Germany. It should be emphasized that the purpose of the discussion is not to present the procedures in these countries as a model of desirable proceedings which Israel should adopt. As the scholars, whose comments are integrated into the discussion, have pointed out, the refugee screening procedures in both countries today suffer from various problems and defects. Thus, for example, the Greek refugee screening process is at the beginning of its life, and Greek scholars have criticized it as being a very basic process compared to those operated in Western Europe. Germany, on the other hand, is in the midst of a reactive process. After forty years in which it was the leading country in Europe in dealing with asylum seekers and absorbing refugees, the number of asylum seekers in Germany, at the beginning of the 1990s, reached half a million a year (!). This fact led Germany to adopt a range of stringent measures which, as will be described below, may lead to an infringement of its obligations under the Convention.

These problems join the difficulty inherent in every attempt to draw a comparative analysis of states which possess different geopolitical, demographic, political, economic and legal conditions. The discussion is intended, therefore, to expand our understanding and to examine not only the desirable solutions adopted by each country but also those mistakes and measures which should be avoided.

GREECE

General background

The geopolitical location of Greece makes it one of the important gateways into Europe. Notwithstanding this, Greece was very tardy in establishing mechanisms for absorbing refugees. In 1981, when it became a full member of the European Union, Greece tried to follow the political-legal developments in Western Europe. At the same time the scholar Sitaropoulos has stated that the Greek asylum process is one of the most basic in Western Europe.[97]

The majority of asylum seekers in Greece arrive from Turkey, Iran and other Mediterranean countries. The Kurds are the most prominent ethnic group among the refugees.

Following are the figures regarding the number of applications submitted in Greece between the years 1992-2001:[98]

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
No. of applications	1,850	810	1,300	1,310	1,640	4,380	2,950	1,530	3,090	5,500

The rate of recognition of refugees stood at about 11% in 2001. The numbers of those who were permitted to stay in Greece on humanitarian grounds in 2001 was identical to the number of persons recognized as refugees in the same year (147).[99]

The legal basis:

Greece signed the Refugee Convention and the Protocol to the Convention and incorporated them in internal legislation (Legislative Decree 3989/1959, Compulsory Act No. 389/1968). The Aliens Act of 1991 (Act No. 1975/1991 – Entry, Exit, Stay, Work, Deportation of Aliens, Procedures for the Recognition of Alien Refugees and Other Provisions)

[97] Sitaropoulos N, "Modern Greek Asylum Policy and Practice in the Context of the Relevant European Developments", 13 *Journal of Refugee Studies,* (2002), pp. 105, 106, 114.

[98] www.unhcr.ch - Number of asylum applications submitted in 30 industrialized countries, 1992 - 2001.

[99] *Supra.* Individual asylum applications and refugee status determination by country of asylum and level in the procedure, 2001.

as amended in 1996 provides that within a year of the publication of its provisions, presidential orders will be promulgated in reliance on the recommendations of the Ministers of Foreign Affairs, Public Order, Health and Welfare, Labour and Social Security, respectively, in relation to a range of issues. These issues include: procedures for screening applications for refugee status, for granting asylum, for withdrawing recognition of the status of refugee, cooperation with the UNHCR, the operation of temporary hostels, provision of economic and medical assistance to asylum seekers and refugees, grant of work permits to asylum seekers and refugees, and more. Following this legislation, a number of presidential orders were promulgated including Presidential Order No. 189/1998 which deals with the grant of work permits and the employment of asylum seekers and refugees and Presidential Order No. 61/1999 which deals with procedures for handling asylum applications.

Greece has also ratified the Dublin Convention by statute (Act No. 1991/1996) as well as the Schengen Accord.

Definition of "refugee"

The definition of a "refugee" in Greek law conforms to the definition provided in the Convention.

Submission of an application for asylum

It is possible to submit the application at the border crossing upon arrival in Greece. In the event that a person has arrived unlawfully in Greece – he may apply at the nearest police station, or, if he has been arrested by the police as an illegal alien – he may give notice of his application upon being arrested.[100] The application must be submitted personally by the asylum seeker and it embraces the members of his family who are with him and are under his protection[101] (Clause 1(3) of the Presidential Order 61/1999). A minor aged between 14-16, who is not accompanied by his parents, may submit an application, if, in the opinion of the interviewer, he is sufficiently mature mentally to understand its significance. A minor will be appointed a temporary legal guardian until his application is determined.

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[100] Ministry of Foreign Affairs, Ministry of Labour and Social Insurance, International Organization for Migration, Greek Council for Refugees, *Guide for Migrants and Refugees - Entry, Residence, Exit, Naturalization,* January 2001, p. 5.

[101] Persons deemed to be family members are the husband/wife of the applicant, the minor children of each of them, their parents and adult children who suffer from a physical or mental impairment which does not enable them to submit separate applications.

Identifying documents

An asylum seeker is required to present documents which testify to his identity, the identity of his family members, the relationship between them, their place of origin and place of birth. Submitting official documents is not a precondition for recognizing refugee status (Clause 5 of the Presidential Order 61/1999).

Provision of information to the asylum seeker

The competent authority is obliged to provide the asylum seeker with information in a language understood by him. The information is published in a special pamphlet issued by the Ministry of Public Order. The pamphlet describes the process for applying for recognition of refugee status and the rights and duties of the applicant, and emphasizes the need for cooperation with the authorities. The pamphlet includes information about voluntary organizations which assist asylum seekers in Greece, including the UNHCR. If such a pamphlet is not available or if there is no pamphlet in the language of the applicant, or if he cannot read, the competent authority will provide the information orally, with the assistance of an interpreter (Clause 6 of the Presidential Order 61/1999).

Notification to UNHCR

The Ministry of Public Order must notify the representative of UNHCR in Greece of the submission of an application for asylum within five days of its submission. The asylum seeker can withdraw his application at any time. Notice of withdrawal must also be given to the UNHCR.

Preliminary examination of the application

According to the Presidential Order, the competent authorities for examining the application are: the Aliens Administration which operates within the Ministry of Public Order, the security departments in the airports and the security departments in the police. The timetable for examining an application is three months (save in cases where the asylum seeker is being held in the airport and his application is examined on the same day under the fast track procedure). The Order emphasizes that the administrative and police staff which examine the applications must be specially trained and serve in offices which have been assigned to this function (Clause 2(2) of the Presidential Order 61/1999).

The interview

The examination of the application is performed by means of an interview which is conducted with the asylum seeker with the assistance of an interpreter (the Ministry of Public Order bears the cost of the

translation for the duration of the process). In the interview, the asylum seeker is required to verify the details which he stated in his application for asylum and to provide full details regarding his identity, the reason he does not have identity or travel documents, the precise route he followed until he reached Greece and the reasons he was forced to leave his country of nationality or place of permanent residence. The interview is conducted by a police officer, who has been trained for this function, in cooperation (if possible) with a civilian official who has been trained for this.

Prior to the interview, sufficient time is given to the asylum seeker, if he so wishes, to prepare his application and consult with an attorney who will assist him with the process. The amount of time needed for these preparations is determined by the authority, which must formally notify the asylum seeker of the date of the interview and the name of the examining official. The interview is conducted in a room which allows privacy. All the information concerning the application is deemed to be "sensitive information" and is the subject of statutory privilege.

If the application being examined has been submitted by a woman who finds it difficult to present her application because of her traumatic experiences or because of her cultural background, the interview must be conducted by a female interviewer who has been trained for this, with the assistance of a female interpreter (Clause 2(3) of the said Presidential Order). If, prior to the interview, the asylum seeker claims that he was tortured, or if he has real evidence of this, he is referred to an expert in the treatment of victims of torture, who gives an opinion regarding the evidence of the torture suffered by the applicant.

Documentation of the identity of the applicant

At the commencement of the process, the authorities take the photograph and fingerprints of the applicant and all members of his family aged 14 and over. The photographs and fingerprints are used solely for the decision making process in relation to the application for asylum. This fact must be notified to the applicant.

The concluding report

The interviewer's report at the conclusion of the interview includes the statements of the asylum seeker. The interviewer reads the report to the asylum seeker and ensures, by means of the interpreter, that the applicant understands its contents. The report is signed by the asylum seeker, the interpreter, the interviewer and his assistant.

Next the interviewer adds to the report his opinion concerning the consistency and credibility of the statements and concerning the question whether the conditions listed in Article 1A of the Convention regarding the definition of a refugee have been met. Every matter in doubt is decided in favour of the asylum seeker. The interviewer also gives his opinion as to whether the application should be examined via the fast track procedure (except in cases where the asylum seeker is being held in an airport when, in any event, the application is examined on the fast track). During the course of the examination of the application the interviewers will take into account the *Handbook* of the UNHCR as well as the rules of the European Union regarding harmonization of the term "refugee" under the Convention (Clause 2(6) of the said Presidential Order).

The asylum seeker receives a certificate (without payment), which is valid for six months and which may be renewed from time to time until final determination of the application. Family members also receive a certificate upon identical conditions. Upon receiving the final determination, the asylum seeker is required to return the certificate.

An asylum seeker who has a certificate of an asylum seeker is entitled to receive all the welfare benefits listed in Section 24 of the Act (including housing and medical treatment), as well as in the sections guaranteeing free education for minor children.

Housing during the interim period prior to a determination

An asylum seeker is required to continue to live in the place declared by him or the place in which accommodation for him was arranged, for the duration of the process. If he leaves his place of residence arbitrarily, the process is stopped and the Secretary General of the Ministry of Public Order brings the matter for decision. The Secretary General can declare that the asylum seeker is deemed to be a person whose place of residence is unknown. If within three months of the date of the declaration the asylum seeker returns, presents himself to the authorities and brings evidence that *force majeure* caused him to leave his home, the above declaration will be revoked. In both cases, notification is given to the UNHCR of the decision.

Decision on the application

The interviewer's report is submitted to his supervisors. They give their opinion on his recommendations and present the report with all the accompanying materials to the Ministry of Public Order. An official from

the Department of State Security in the Ministry of Public Order receives the materials and formulates a recommendation. He must make an effort to locate all relevant information and he may apply, *inter alia*, to other authorities, the UNHCR or other organizations. The official may conduct an additional interview with the asylum seeker to complete or clarify details.

The final decision as to whether to recognize the asylum seeker as a refugee is made by the Secretary General of the Ministry of Public Order on the basis of all the above material.

Granting refugee status

If the application for refugee status is accepted, the asylum seeker and his family receive a refugee identity card, without payment. Based on this identity card, the refugee obtains a residence permit which is valid for five years and may be extended from time to time for identical periods of time (except if the status of refugee is revoked on the basis of Article 1C of the Convention or a decision is made to deport the refugee on the basis of Article 32 of the Convention).

Appeal

If a negative decision is made, it is notified to the applicant together with reasons for the rejection and notice of the fact that the applicant may appeal against it within 30 days before the Minister of Public Order. The official must make this notification to the applicant orally, in a language understood by him, and state in writing that such notice has been given. The applicant may not be deported from the country before a decision is given on the appeal.

Advisory Committee on the appeal

The Minister must decide the appeal within 90 days from the date of its submission. The decision of the Minister is made following consultation with a committee comprised of six members, namely, the legal advisor of the Ministry of Public Order (chairman), the legal advisor of the Foreign Ministry, a senior official of the Foreign Service, a senior police officer and a representative of the Legal Bar of Athens. The chairman of the committee notifies the committee members of meetings at least five days prior to the meeting convening in order to give them time to learn the details of the cases which will be discussed by the committee. The committee convenes in offices allocated for that purpose by the Ministry of Public Order and receives secretarial and translation services from officials especially assigned to this function. The committee notifies the appellant

ahead of the date of the hearing of his appeal of the date and of his right to be personally present as well as his right to be accompanied by an attorney. The applicant has the right to present his arguments (with the assistance of an interpreter), to supply clarifications and submit additional evidence.

The decision of the Minister on the appeal is notified to the asylum seeker. If the decision is to uphold the appeal, the asylum seeker will receive a refugee certificate and consequently a residence permit. If the appeal is rejected, the appellant will be notified of his obligation to leave Greece within a period of time which is determined or of the grant of a residence permit on humanitarian grounds.

All the above decisions are notified to the UNHCR.

Fast track proceedings

Fast track proceedings for determining some of the asylum applications is an innovation which has been included in an amendment to the Aliens Act of 1996. Section 25 of the Act provides for two types of cases in which fast track proceedings will be applied to an investigation of the application:

1. When the application for asylum is submitted upon the asylum seeker's arrival at the airport or sea port.
2. When: (a) the application is manifestly unfounded, or is dishonest or is submitted in order to improperly exploit the procedures for granting asylum; (b) the applicant arrived from a safe third country.[102]

When the application is submitted in the entry port, the applicant is held in a "waiting zone" for the duration of the examination of his application, for a period which shall not exceed 15 days. The waiting zone is defined as a zone which extends from the point of disembarkation (from the airplane or ship) to passport control. The UNHCR is guaranteed access to the waiting zone. The law empowers the authorities to designate other places which can receive asylum seekers awaiting a decision.

An application which is submitted in the port of arrival is decided on the very same day (Clause 2(2) of the Presidential Order). Skordas

[102] Criticism has been directed at the law by reason of the fact that it does not define a "safe third country" and does not provide that the decision concerning the list of safe third countries precede the individual decision on each application. *See*: Skordas A., "The New Refugee Legislation in Greece", 1999 *International Journal of Refugee Law*, No. 4, at p. 678, 690.

criticizes this provision which does not take into account the circumstances of the asylum seeker's arrival or the fact that he is likely to be tired and confused.[103] The head of the Department of Police, Safety and Public Order in the Ministry of Public Order, who examines the application, decides whether it indeed falls within the class of cases which are subject to fast track proceedings as a matter of statute. If he decides that these conditions have not been met – the application is referred for regular processing.

With regard to an application which is not submitted at the port of arrival but which is subject to fast track processing, the periods of time for filing an appeal to the Secretary General of the Ministry of Public Order are as follows: the appeal must be filed within 10 days of the date of notification of the decision. The decision on the appeal must be given within 30 days, following the recommendation of the Advisory Committee referred to above. If the fast track process ensues from the submission of the application at the entry port, these periods are cut in half. In such a case, the applicant will be permitted to enter Greece for the period of the appeal without formal requirements. Skordas points out that, in contrast to the provisions concerning the hearing on the appeal in regular proceedings, the Presidential Order does not mandate reasons to be given for the decision rejecting the appeal in fast track proceedings. At the same time, he is of the opinion that such a duty exists by virtue of the provisions of the Greek Constitution concerning the right to due process, as well as by virtue of public administration rules.[104]

Re-hearing of the application

The usual rule is that an application which has been heard and decided will not be reheard unless the Secretary General of the Ministry of Public Order determines that the applicant possesses new and decisive evidence, which had it been known at the time of the original hearing could have tilted the scales in favour of recognizing the refugee status of the applicant. The possibility of re-hearing an application is not recognized in relation to decisions which were made within the framework of fast track proceedings.

Revocation of a decision recognizing refugee status

This is possible if the conditions provided in Articles 32 and 33 of the Convention have been met.

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[103] *Id.*, at pp. 685-686. The author refers to a judgment of the German Constitutional Court which held that when setting the date of the interview consideration must be given to the physical and mental condition of the asylum seeker.

[104] *Id.*, at pp. 690-691.

Family reunions

A person recognized as a refugee is entitled to apply for an entry permit and residence permit for his family members (family members for this purpose are spouses, the unmarried minor children of one of the spouses, his or her parents, provided that these family members lived with the applicant and were supported by him prior to arriving in Greece). The Order sets out a list of additional conditions, including, for example, that the family members must live together with the refugee, that the refugee prove that he is capable of supporting them (at least to the level of an unskilled worker), that the presence of the family members in Greece does not endanger public peace or safety, *etc*.

Regimes of special protection

Greek law recognizes three scenarios where special protection may be granted:[105]

1. Grant of a residence permit on humanitarian grounds – awarded by the Minister of Public Order in special cases, to an applicant for refugee status whose application has been rejected. Among the factors which will weigh in favour of granting a permit are: the inability to return or deport the alien to his country of nationality or to the country in which he lived previously because of reasons of *force majeure*;[106] it is feared that if he is returned as aforesaid, he will be exposed to torture or to degrading or inhumane treatment. The residence permit is granted for a year and also embraces family members. An extension may be requested.

2. Temporary protection – the Ministers of Defence, Foreign Affairs, Economics, Health and Welfare, Labour and National Security, are empowered to decide upon a regime of special protection for a defined group of aliens which has fled to Greek territory because of reasons of *force majeure*. The decision will set out the conditions of protection, including the provision of medical treatment and the supply of immediate living necessities.

3. Residence permits in extraordinary circumstances – the law which deals with the Department of Internal Affairs of the Greek police, creates a third procedure for granting temporary residence to aliens in special circumstances. The Minister of Public Order is entitled to grant the permit on humanitarian grounds, on grounds

[105] *Id*., at pp. 694-697.

[106] According to Skordas, such *force majeure* may comprise serious health considerations relating to the applicant or one of his family members, international boycott which interferes with transport between the countries and an armed civil conflict which has led to severe infringements of human rights, *id.*, at p. 695.

of public interest or on grounds of *force majeure* which prevent the return of the alien to his country of nationality. The permit is granted for one year, following consultation with the Committee.

GERMANY[107]

General background

The right to political asylum of persons who have been persecuted on political grounds was enacted in the German Constitution in 1949, as one of the lessons which was learned from the Second World War. For many years, Germany's policy of political asylum was one of the most liberal in Europe. In the years 1985-2000, Germany, alone, received about 50% of the applications for asylum submitted in Europe.[108] The fast growth in the number of applications for asylum between the years 1987 (57,000 asylum seekers) and 1992 (438,000 asylum seekers) led Germany in 1993 to adopt a constitutional amendment which radically restricted the right to asylum. Constitutional amendments led to a significant reduction of about 82% in the number of applications for asylum submitted in Germany (in the year 2000, 78,500 applications were submitted).[109] In a judgment delivered on 14.5.1996, the German Federal Court upheld the constitutionality of these amendments.

The majority of asylum seekers in Germany in 1999 were from the former Federal Republic of Yugoslavia (Serbia and Montenegro), the second largest group came from Turkey and thereafter from Iraq, Afghanistan, Iran, Azerbaijan, Vietnam, Armenia, Syria and the Russian Federation.[110]

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[107] We wish to thank Mr. Michael Geigel, a law student in the University of Munich, who spent last summer in Israel as a paralegal in the Public Interest law Resource Center at the Law Faculty of Tel Aviv University. Mr. Geigel devoted much effort to researching the legal situation in Germany and his contribution to the study of the subject was decisive.

[108] Fullerton M., "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection", 36 (2000) *Texas International Law Journal* 231, 233 fn. 4.

[109] Figures of the German Federal Ministry for Recognizing Foreign Refugees: www.bafl.bund.de

[110] These trends also exist today, as is shown by the figures for June 2002. In that month 5,664 applications for asylum were submitted. The countries from which the asylum seekers primarily came were Turkey (13.01%), Iraq (12.82%) and former Yugoslavia (9%). It should be pointed out that the new legislation has also changed the human composition of the refugees arriving in Germany. Countries such as Bulgaria, Romania and Ghana have been included in the list of "safe countries of origin" and therefore the number of asylum seekers coming from these places has dropped significantly. *Id.*

The rate of recognition of refugees in Germany gradually decreased from 9% in 1987 to 3% in 1999. At the same time, one must add to these figures, for example, in 1999 – 4.5% of the applicants, who received protection against deportation by virtue of Section 51(1) of the Aliens Act, as well as additional refugees who were recognized following appeals to the courts.[111]

As mentioned in the position paper, Germany provides an interesting case study, as during the years it developed complex structures for dealing with and determining applications for asylum as well as for supplying services and social benefits to asylum seekers. Moreover, a great deal of case law developed on this subject. At the same time, one must be aware of the profound changes which have affected the German structures for absorbing refugees since 1993, which in the words of Prof. Maryellen Fullerton amount to a "rewriting" of the Constitution. Prof. Fullerton who has researched the legal changes in Germany and their practical repercussions, has come to the conclusion that:

"The new German approach to asylum poses a thoroughgoing and fundamental threat to the institution of refugee protection. It exacts great human and legal costs. It affects an entire region. If other EU countries follow the German example, Europe will fail the test regarding the system of refugee protection."[112]

The legal basis

Article 16 of the German Constitution which was adopted in 1949 against the background of the trauma of the Second World War, entrenched one of the most liberal rights to asylum (in comparison both to the Convention and to other countries) by providing in Article 16(2) as follows: "Persons persecuted on political grounds shall have the right to asylum". In 1993, the Article was amended and restrictions were added to it which were designed to prevent the acceptance of certain applications (asylum seekers who arrive via a "safe third country", asylum seekers who originate from a "safe country") as well as to enable the accelerated handling of applications which are manifestly unfounded.

Germany has acceded to the Convention and the Protocol. The provisions of Section 51(1) of the Aliens Act follow the Convention and

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[111] The Federal Ministry of the Interior, Policy and Law concerning Foreigners in Germany, 2000, *http//www.bmi.bund.de/download/5301/download.pdf* p.88.

[112] FN 108 *supra*, at p. 235.

state that an alien will not be deported from Germany to a place in which his life or freedom may be threatened for reasons connected to his race, religion, nationality, membership of a certain social group or political beliefs. The procedures for determining refugee status are established by statute – the Asylum Procedure Act. Germany has also acceded to the Dublin Convention and the Schengen Accord.

Definition of refugee

The German constitutional right to asylum is regarded as a particularly broad right in that it grants a personal right of asylum to a person persecuted on political grounds. The protection granted by the German Aliens Act, as noted, corresponds to the definition of "refugee" in the Convention, *i.e.*, one who is persecuted on grounds of race, religion, nationality, membership of a particular social group or political belief. At the same time, Germany interprets the term "persecution" in a restrictive manner, so as to apply only to persecution carried out by a state.

Filing the application for asylum

Restrictions on the ability to come to Germany[113]

Germany has gradually augmented the list of countries the citizens of which require visas in order to visit Germany. The list includes all the countries which "generate" refugees (in this connection Germany has harmonized with the European Union which has formulated an agreed list of about 100 countries the citizens of which must obtain a visa). A citizen of Sierra Leone who seeks a visa to Germany in his country of origin, because of the fact that his life is at risk, will almost certainly be refused. An additional measure is the imposition of high fines on carriers (airlines, shipping lines, train companies, *etc*.) which bring a person to Germany who does not hold an entry permit or residence permit.

Filing an application upon arrival at the border check point

Prior to 1993, an alien who arrived at the German border could file an application there for asylum. The 1993 amendment to the Constitution provides that a person who has arrived from a "safe third country" cannot file an application for political asylum in Germany, instead he will be returned to the country from which he came in order to file his application there. Safe third countries are defined as countries which have acceded to the Refugee Convention and the European Convention on Human Rights,

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[113] *Supra*, at pp. 240-242.

and Parliament has declared them to be safe. All the countries surrounding Germany have been declared to be safe countries – so that anyone arriving overland will be returned to the place from which he came (even if he was transported in a locked truck which did not stop anywhere). There is a practical difficulty in implementing the principle – other countries refuse to admit the asylum seeker in the absence of proof that he came from their territory and accordingly an incentive has been created for asylum seekers to destroy all evidence of the route they have traveled in order to reach Germany. Prof. Fullerton argues that a decision to return a person to the country from which he came, at the border crossing, without there being any possibility of attacking the decision (either administratively or judicially) creates an opening for infringement of the fundamental principle of non-refoulement.[114] Even those who come by air, but whose airplanes have made a stop to refuel in a safe country – will be returned to that country. Accelerated airport procedures have been adopted in the airports which apply to persons who have arrived from a safe third country, or whose country of origin is safe or who do not hold valid travel documents. Thus, for example, a person who does not hold valid travel documents will be interviewed on the same day by the border police and afterwards by officials of the Federal Office for the Recognition of Foreign Refugees. A decision on his application for asylum will be given within two days (during this time he is held at the airport), an appeal may be submitted to an administrative court within three days. The decision of the court is delivered within two weeks, and throughout this time the asylum seeker will continue to be held at the airport.

Submission of an application within Germany

When an application for asylum is filed within Germany (the applicant has entered on the basis of a valid visa or illegally), the applicant is directed to the closest "reception center". In the reception center he is photographed and his fingerprints taken.[115] Afterwards it is decided in which reception

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114 *Id*., at pp. 245-254, the author also criticizes the underlying assumptions of the system, to the effect that the asylum seeker can make an application for asylum to the countries through which he traveled on his way to Germany. According to her, in some of the countries bordering Germany, such as Poland and Czechoslovakia, the legal and administrative frameworks are not available which are needed in order to ensure the proper treatment of asylum seekers. She cites testimony to the effect that asylum seekers who have been transported from Germany to Poland have indeed been prevented from making applications for asylum. Further, some of the neighbouring countries have return agreements with third countries, which may not be safe countries for the asylum seekers.

115 In order to prevent a situation in which an asylum seeker whose application has been rejected may file a new application using a new identity. *See* the website of the Federal Office for the Recognition of Foreign Refugees - *http://www.balf.bund.de/*

center he will stay – the allocation is made on the basis of objective factors, with the object of distributing the burden of asylum seekers in an equal manner between the various states of the German Federation (the asylum seeker does not have any influence on the place to which he is sent). After arriving at the reception center, the asylum seeker may file his application for asylum in one of the offices of the Federal Office for the Recognition of Foreign Refugees close to the reception center. The asylum seeker receives a temporary residence permit and housing.[116]

Examination of the application

Following the submission of the formal application, the applicant is interviewed by an official, known as the Deciding Officer, in the Federal Office for the Recognition of Foreign Refugees. The interview is generally conducted within four days of the arrival of the asylum seeker in the reception center. Prof. Fullerton has criticized the fact that this period of time is so short, as, in her view, it does not provide asylum seekers with enough time to prepare, seek advice and present evidence (such as, for example, medical and psychological opinions) supporting his claim that he has been persecuted.[117]

The law requires the government to provide an interpreter when necessary (the asylum seeker may use an interpreter of his own choice but in such a case he will bear the ensuing cost). The law permits an asylum seeker to bring his own attorney in addition to a representative of the UNHCR, although in the large majority of cases the hearing takes place in the presence of the asylum seeker and the interpreter alone (the hearing is not public).

In the interview the asylum seeker is asked to give details of the reasons for his having been persecuted, to present the facts connected to the application and any evidence supporting it. The official writes a report on the basis of the statement of the asylum seeker, the report is translated into the applicant’s language and signed by him, a copy of the report is provided to him at the conclusion of the interview.

The Deciding Officer receives special training from the Office in the following areas: the law and the regulations concerning asylum seekers, the conditions in the countries of origin from which the asylum seekers come, interviewing techniques and sensitivity towards the situation of

[116] The freedom of movement of the applicant is restricted - he is obliged to live in the reception center and is prohibited from leaving the administrative area in which the reception center is located without a special permit.

[117] FN 108 *supra*, at pp. 259-260.

the asylum seeker. A group of officials has been especially trained to conduct interviews with applicants who have suffered persecution based on sex, applicants who are unaccompanied minors and victims of torture and trauma. This group has been given psychological training as well as a support team of psychologists.

In addition to the interview with the applicant, the Deciding Officer researches the circumstances of the application, the conditions in the country of origin, *etc*. For the purpose of this research he may obtain the assistance of the information center (*Informationszetrum Asyl*) of the Federal Office for the Recognition of Foreign Refugees; some of the information is located in computerized databases.

The Deciding Officer enjoys independence and autonomy. Like a judge, he is solely subject to the law when deciding whether to accept or reject an application for recognition of refugee status. If all the procedural conditions have been properly met, the only persons who may appeal against his decision are the asylum seeker and the Commissioner of Asylum Matters.[118] The decision is generally given within a short period of time – sometimes on the same day. The reasons are given shortly afterwards. The decision is written in German and the asylum seeker is not provided with translation services in order to understand it. Prof. Fullerton criticizes this and argues that the absence of an understanding of the reasons why his application has been rejected impairs the right of the asylum seeker to appeal against that decision.

The decision

The decision may fall into one of four categories:

A. The asylum seeker is recognized as a victim of political persecution who is entitled to asylum on the basis of Article 16a of the Basic Law. The applicant receives a residence permit which is unlimited in time. The refugee has rights similar to those of a German citizen in a range of areas – legal, social and economic. He also enjoys various benefits which are intended to ease his integration in Germany (for example, receipt of supplementary income benefits during the period in which he learns German).[119]

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[118] The Federal Commissioner of Asylum Matters represents the interests of the public and is subordinate to the Federal Ministry of the Interior. His objective is to promote uniformity in the judgments concerning asylum seekers (as the Deciding Officers are independent as are the courts). The Commissioner is entitled to appeal against decisions as well as to participate in hearings in the Federal Office and in the Administrative Courts.

[119] The Federal Ministry of the Interior, *supra* note 111, at p. 81.

B. The asylum seeker is not entitled to asylum, but he is entitled to protection against refoulement, as it is feared that he may be persecuted – for one of the reasons listed in the Convention – if he is returned to his country of origin; this is on the basis of Section 51(1) of the Aliens Act (which deals with protection against deportation).[120] In such a case, the applicant will receive a temporary residence permit, which may be renewed from time to time. Following residence in Germany for eight years, the applicant may receive a permanent residence permit.

C. The applicant does not receive any of the protections mentioned above, but there are humanitarian reasons for not deporting him - Section 53 of the Aliens Act refers to the European Convention on Human Rights and Fundamental Freedoms of 1950 – if it is feared that the alien will be subject to torture or a death sentence, to inhuman or degrading treatment or to a serious danger to life or limb, he may not be returned. In such a case, an order will be issued delaying his deportation ("*Duldung*" – tolerated residence). The order is not a stay or residence permit but merely delays the deportation.[121]

B. The applicant is not recognized as a refugee and no other right is recognized to stay in Germany. The asylum seeker is required to leave Germany within a month. If he fails to do so voluntarily, he is subject to deportation.

Appeal

In Germany there is a right of appeal within two weeks of the date of notification of the decision. The appeal is submitted to the Administrative Court (*Verwaltungsgericht*). Submission of the appeal delays the deportation of the appellant (until otherwise decided by the Court). A further appeal may be submitted, upon leave being given, to the High Administrative Court (*Oberverwaltungsgericht*, *OVG*). It is possible to appeal again, with leave, in cases having fundamental importance, to the Federal Administrative Court (*Bundesverwaltungsgerich*, *BverwG*). If the appeal raises constitutional questions it may be submitted to the Supreme

[120] Germany adopts a restrictive interpretation of the Convention to the effect that entitlement to political asylum (category "A" above) only applies when the persecution is carried out by a state. In cases where the persecuting entity is not the state, or a person proves that he has met the conditions of the Convention, but the presumption is that he passed through a safe third country, he will be granted the "lesser asylum" in accordance with category "B" above.

[121] In the past, this status was given to the majority of refugees from former Yugoslavia.

Court (*Bundesverfassungsgericht*). The submission of an appeal to the highest instance does not suspend the deportation although in practice appellants are usually not deported.

An appellant lacking means may obtain legal assistance at the expense of the state (in this connection the ordinary German rule applies whereby legal aid is provided if there is a prospect of succeeding in the proceedings).

According to the information of the Federal Office for the Recognition of Foreign Refugees, about 80% of the asylum seekers whose applications have been rejected, take advantage of the right to appeal.

Family reunification

A person who has been granted the status of refugee by virtue of Section 16A of the Basic Law is entitled to family reunification with his spouse and with his unmarried minor children. There is discretion to allow family reunification with additional family members, but this is on condition that the refugee can prove that he is able to support them. Persons who have been granted refugee status on the basis of Section 51(1) of the Aliens Act are also entitled to family reunification, provided that they can prove that they are able to support their family members financially.

Fast track procedures

The Act of 1993 provides for fast track procedures for dealing with applications which are manifestly unfounded, which are defined as applications based on flight from war or from emergency situations, or which contain inherent contradictions or which contradict well-known facts. A person whose application is defined as manifestly unfounded is entitled to appeal to the Administrative Court within seven days. The submission of an appeal does not delay the deportation. In order to delay the deportation, a special application must be made to the Court. The Court will give its decision regarding postponement of the deportation within seven days. If the deportation is not delayed – this concludes the hearing. It is not possible to appeal against this decision. If the Court decides that the application is not manifestly unfounded, it will delay the deportation and hear the application on the merits at a later date. The majority of applicants whose applications have been rejected as being manifestly unfounded do not file an appeal. Prof. Fullerton believes that this is because of the complexity of the appeal procedures and the low likelihood of success.[122]

[122] FN 108 *supra*, at p. 255.

Regimes of special protection

A. By virtue of Section 33 of the German Aliens Act, it is possible to admit a defined group of aliens on humanitarian grounds. Quotas have been set for the admission of refugees from areas of crisis. According to the figures of the German Ministry of the Interior, over the years, Germany has admitted about 42,000 refugees within this framework, primarily Jews from the former Soviet Union and Vietnamese boat people.

B. Section 32A of the Aliens Act enables temporary protection status (TPS) to be granted to persons from states involved in civil war or similar crises. Germany enables these refugees to stay in its territory temporarily, without giving them access to asylum procedures. During the period in which they stay in Germany, these people are entitled to social benefits which are identical to those granted to asylum seekers. This section was first applied in 1999 in order to absorb 15,000 refugees who had fled from Kosovo.[123] In 1996 about 345,000 refugees coming from war regions were staying in Germany, about 25,000 of these left Germany during 1997 and 1998.[124]

   It should be pointed out that the temporary protection regime is today a subject of controversy, as on one hand, it comprises a temporary means of protecting a large number of refugees, while on the other hand, it bars them from obtaining the status of refugee under the Convention.

[123] The Federal Ministry of the Interior, *supra* note 111, at p. 81.
[124] *Id.,* at p. 97.

ANNEX C

Israel's Handling of a Group of Ethiopian and Eritrean Refugees - A Case Study

1996-2000: The refugees submit requests for asylum in the office of the Israeli correspondent of the UNHCR in Jerusalem. The applications are individual and the applicants do not know each other (all together they form a group of about 40 men, women and children). They are not granted any social rights or working permits and are asked to wait for the determination of their status by the UNHCR office in Geneva.

July-December 2001: In anticipation of the new Israeli procedure regarding the treatment of asylum seekers in Israel, the Geneva office of the UNHCR completes its discussions on all pending cases. After a long period of waiting (in some cases – five years, and in others – a year and a half), the asylum seekers are informed that they have been recognized as refugees. They are then instructed to go to the Ministry of the Interior to receive temporary residency.

January - May 2002: The refugees present the papers affirming their status at the Ministry of the Interior, but do not receive temporary residency. Although they visit the offices of the Ministry regularly, they do not receive the promised status and no reasons are given.

June 2002: The refugees seek legal aid from the Public Interest Law Resource Center (PILRC). Their lawyers, together with Physicians for Human Rights (PHR-Israel) and Amnesty International - Israel, write to the ministers of the interior, justice and foreign affairs demanding the refugees be given temporary residency immediately. The letters emphasize the fact that the refugees do not receive basic social rights and do not have access to medical services.

July 2002: An attorney from the legal department of the Ministry of the Interior answers that the delay in granting the temporary residency stems from the establishment of the new

NSGB (known as ‘the Refugee Committee’), and that all applications will be examined thoroughly. Despite the demands made by the refugees’ attorneys, she refuses to commit to a timetable for this examination.

August 2002: On August 12th. The refugees announce a hunger strike in front of the offices of the Israeli correspondent of the UNHCR in Jerusalem. For the next 23 days they refuse to leave. The scorching August heat, and the difficult conditions cause a few of the demonstrators to collapse. PHR-Israel volunteer doctors give the demonstrators first aid.

As a response to the strike the chairperson of the Refugee Committee announces that the committee will re-examine the status of the refugees at its next meeting, scheduled for the beginning of September.

September 3rd, 2002: The Refugee Committee recommends to the Minister of Interior to recognize the refugees as such, and to grant them temporary residency.

October 6th, 2002: Because the Minister of Interior delays his decision, the refugees submit a pre-petition to the State Attorney office, stating that they will petition the court if the decision is not made shortly.

October 29th, 2002: The Minister of Interior approves the recommendation of the Refugee Committee. Some of the refugees are granted temporary residency for 2 years and some for 1 year.

November 2002: The refugees are informed that their status has been approved and that they have received temporary residency. They visit the local offices of the Population Registry and an A/5 visa is stamped in their passports (A/5 is a temporary residency visa), they do not receive identity cards.

During the next few days the refugees find out that the stamp in their passports is not a valid visa, since the Ministry of Interior failed to inform other State authorities on the issuance of the visa. Their attempts to receive social benefits from the Social Security Office are turned down – so in effect, their situation does not change.

Some of the refugees are asked to pay thousands of shekels for the period of time that elapsed from their entry to Israel until the submission of their applications for refugee status, during which they have had no legal status in Israel. Although they claim that they cannot pay, the condition remains, and they do not receive the visa.

December 23rd, 2002: Another pre-petition is served to the State Attorney's office claiming that the demand to pay the fines for the illegal overstay is not grounded in the law. In addition it is claimed that the State cannot refuse to grant refugee status to a person who cannot afford the fines.

January 12th, 2003: PHR-Israel and 10 of the refugees petition the Jerusalem Administrative Court claming that the Ministry is delaying their cases and that this delay offends their basic rights. The Court orders the Ministry to answer the petition within 45 days and clarifies that it expects the Ministry to solve the problem within this period of time

During the next month the refugees are summoned to the Interior Ministry, payment of the fines is wavered, and they receive identity cards.

February 16th, 2003: The last of the refugees receive his identity card. For the first time the refugees are granted basic social rights (some of them - seven years after they have submitted their application for refugee status in Israel).