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“Otherness” as the Underlying Principle in Israel’s Asylum Regime

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"OTHERNESS" AS THE UNDERLYING PRINCIPLE IN ISRAEL’S ASYLUM REGIME

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ABSTRACT

This paper aims to be one of the first thorough descriptions of the developing asylum system in the State of Israel. The argument presented in this paper is that, despite the inherent moral and doctrinal differences between asylum and immigration regimes, the Israeli asylum system is essentially an extension of Israel’s immigration and citizenship regime, as it excludes the non-Jewish refugees and frames the refugee as the “other.”

I begin this paper with a description of the Israeli immigration and citizenship regime. I show how the Israeli regime favors and includes Jews, and discriminates and excludes non-Jews, with the exclusion reaching its height when it comes to Palestinians and enemy nationals. I move on to describe the difference between the immigration regime and the asylum regime. These two regimes operate under different assumptions and different sets of values. Therefore, it is reasonable to assume that they would be significantly different from each other. I then describe the Israeli asylum system. As I describe the Israeli asylum regime, I attempt to show how it resembles the Israeli immigration and citizenship regime and follows its logic to a large extent. I also explain how, under the asylum regime, the refugee is portrayed as the “other,” with Palestinian and Arab asylum seekers being the most extreme embodiment of “otherness.”

INTRODUCTION

Since 2005, Israel has experienced a mass influx of asylum seekers entering mostly through its Egyptian border. While Israel has been a signatory to the Convention Relating to the Status of Refugees† for many decades, the new Israeli asylum system

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† 189 U.N.T.S. 150, entered into force April 22, 1954 [hereinafter “the Refugee Convention”].
started functioning only in 2002. Soon thereafter, it was encumbered by a large, rapidly changing number of asylum seekers, growing from a few dozen to a few thousand. Most of the asylum seekers were coming from relatively close by African countries; namely, Sudan, Eritrea, and Ivory Coast. Many of these asylum seekers are nationals of Arab countries, which have what can be described as a tense relationship with Israel, at best. The vast majority of asylum seekers have crossed one or more such state on their way to Israel.

Israel is in a unique geopolitical and normative situation. Normatively, Israel is a self-proclaimed Jewish and democratic state. Geopolitically, Israel is situated between several Muslim and Arab states, some of which are enemy states to Israel, and it is the only liberal democracy in the region. Israel is also embroiled in an ongoing conflict with the Palestinians, and it has a large but marginalized, disempowered, and discriminated against Palestinian minority within its borders.

All of these factors have impacted Israel’s immigration and citizenship regime. The result is that the Israeli immigration and citizenship regime determines who to exclude and who to include roughly on the basis of a Jewish/other distinction. Israel has a unique jus sanguinis citizenship regime, which displays a significant preference for Jews and their relatives and descendents in the acquisition of citizenship. Israel’s regime

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3 According to recent statistical reports provided by the UNHCR, over 16,000 asylum seekers registered in Israel by the end of 2008. About 4,900 of these asylum seekers were Eritrean nationals, about 4,400 were Sudanese, and approximately 1,700 were originally from Ivory Coast. See email from Michal Alford to Adv. Anat Ben-Dor (Jan. 14, 2009) (on file with author).

correlates to an immigration policy that essentially almost exclusively provides for the immigration of Jews and their relatives to Israel, except for migration for employment, which is heavily governed and restricted by a guest-worker program. On the other hand, different policies allow for the relatively easy annulment of the status of Palestinian residents and citizens and almost categorically deny any possibility of immigration to Palestinians and citizens of several other Arab countries.

The recently developed asylum system in Israel seems to follow, to a large extent, the same logic. Israel has adopted a narrow reading of Article 1(D) of the Refugee Convention, according to which all Palestinians are ineligible to be granted asylum, as potential recipients of UNRWA assistance. The asylum procedures include a broadly interpreted category of enemy nationals, who are excluded from the asylum process, and includes all nationals of Arab and Muslim states. While most asylum seekers are subject to the risk of detention upon their undocumented entry to Israel, asylum seekers who

Law of Return, 5710-1950, Passed by the Knesset on the 20th of Tammuz, 5710 (July 5, 1950) and published in Sefer HaChukkim No. 51 of the 21st of Tammuz, 5710 (July 5, 1950) at 159; the Bill and an Explanatory Note were published in Hatza’ot Chok No. 48 of the 12th of Tammuz, 5710 (June 27, 1950) at 189; Nationality Law, 5712-1952, Passed by the Knesset on the 6th of Nisan, 5712 (April 1, 1952) and published in Sefer HaChukkim No. 95 of the 13th of Nisan, 5712 (April 8, 1952) at 146; the Bill was published in Hatza’ot Chok No. 93 of the 22nd of Cheshvan, 5712 (Nov. 21, 1951) at 22.

On the migration for employment in Israel, see, e.g., SARAH S. WILLEN, TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT (2007).

See, e.g., art. 11 of the Nationality Law, supra note 5.

Nationality and Entry into Israel (Temporary Order) Law, 5763-2003, Passed by the Knesset on July 31, 2003; the Bill and an Explanatory Note were published in Reshumot (June 4, 2003). See also Adalah—The Legal Center for Arab Minority Rights in Israel and others v Minister of Interior and others and five joined cases, Original petition to the High Court of Justice, HCJ 7052/03; ILDC 393 (IL 2006).

Refugee Convention, supra note 1.

Article 1(D) specifies that “[t]his 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.” See also MICHAEL KAGAN & ANAT BEN-DOR, NOWHERE TO RUN: GAY PALESTINIAN ASYLUM-SEEKERS IN ISRAEL (2008), http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/NowheretoRun.pdf (last visited Feb. 18, 2009); LEX TEKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW (1998).

Regulations Regarding the Treatment of Asylum Seekers in Israel, 2001, art. 6 (on file with author) [hereinafter the Regulations].
enter Israel after crossing an Arab country – and in particular those who are nationals of such a country – are to be detained under emergency legislation without judicial review.\textsuperscript{12}

I will argue that these similarities between the asylum regime and the immigration and citizenship regime exist despite the numerous reasons in favor of distinguishing between the different policies. Asylum regimes should be governed by the Refugee Convention and by international humanitarian moralist principles, whereas immigration regimes should be governed by the principle of state sovereignty.

Nevertheless, in Israel, the asylum, citizenship, and immigration policies are mainly intended to exclude the “other” – the non-Jewish asylum seeker, and especially the Palestinian, the Arab, or the Muslim refugee, regardless of the circumstances that brought them to Israel. Their being is captured in a narrow sense and reduced to one overtly dominating characteristic – the national “otherness,” in a manner that does not allow the “other” to be perceived as an individual, to be identified with, to be heard, or to enjoy empathy. It is against this otherness that, allegedly, the Israeli and Jewish identity are sustained and developed. Viewing the asylum seekers as “others” constitutes the collective as the anti-force and as the unit in which resources should be redistributed. Together, the asylum, immigration, and citizenship policies sustain and enhance the existing social order, excluding or marginalizing asylum seekers (and in particular those who are Palestinian, Arab, or Muslim) and leaving them, at best, the opportunity to take

\textsuperscript{12} See Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, Passed by the Knesset on the 17th of Av, 5714 (Aug. 16, 1954) and published in \textit{Sefer Ha-Chukkim} No. 16, of the 27th of Av, 5714 (Aug. 26, 1954) at 160; the Bill and an Explanatory Note were published in \textit{Hatza’ot Chok} No. 161 of 5713 at 172. See also the Petition and State Response in \textit{Anonymous Petitioners v. The Head of the Israeli Defence Forces Operations and others}, HCJ 3208/06 4 (copies of the petition, court decisions, updates, and responses are on file with author).
part in the Israeli society through participation in the work market in low-skilled, often undocumented, jobs.

The concept of the “other” or “otherness” is fundamental to different disciplines, including psychology, philosophy, and sociology. This concept has been interpreted and given different meanings by different scholars, with each of them emphasizing and expanding on a particular angle. Indeed, the perception of immigrants as “others,” based on real or imagined differences in physical appearance, culture, norms, values, or membership, has been a basis on which ethno-cultural positions were formed. According to these differences, exclusionary decisions were made and exclusionary measures applied.\(^\text{13}\) The “other” is, as a result of her “otherness” and her exclusion, a hybrid being, since she is physically present but not a member.\(^\text{14}\) The “we-ness,” the national identity, values, status, and so on, is constituted, reinforced, or reshaped against and with reference to the “otherness” of the “other,” and the “other” challenges the “self.”\(^\text{15}\) A dichotomy of “us” and “them”\(^\text{16}\) shapes class relations and notions of belonging, and “they” are often associated with perceptions of risks,\(^\text{17}\) threats,\(^\text{18}\) and chaos.\(^\text{19}\)

I will apply some ideas from the robust discussion of this term to the current context, in order to explain and characterize the perception of refugees in Israeli society.

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\(^{16}\) This dichotomy has been critiqued in the feminist critique of international law. See, e.g., Ann Tickner, GENDER IN INTERNATIONAL RELATIONS 64-65 (1992); Saskia Sassen, *Is This the Way To Go? – Handling Immigration in a Global Era*, 4 STAN. AGORA 1 (2003).

\(^{17}\) See, e.g., Penninx, supra note 13; Zygmund Bauman, MODERNITY AND THE HOLOCAUST 52 ff. (1989).

\(^{18}\) Zygmund Bauman, POSTMODERNITY AND ITS DISCONTENT 17 (1997).

\(^{19}\) Modernity and Ambivalence, *supra* note 14 at 15.
In Part I of this paper, I will elaborate on the Israeli immigration and citizenship regime. I will show how this regime favors and includes Jews, and discriminates and excludes non-Jews, with exclusion reaching its height when it comes to Palestinians and enemy nationals. In Part II, I will describe the difference between the immigration regime and the asylum regime. These two regimes operate under different assumptions and different sets of values. Therefore, it is reasonable to assume that they would be significantly different from each other. In Part III, I will describe the Israeli asylum system. As I describe the Israeli asylum regime, I will attempt to show how it resembles the immigration and citizenship regime and follows its logic to a large extent. I will also explain how, under the asylum regime, the refugee is portrayed as the “other,” with Palestinian and Arab asylum seekers being the most extreme embodiment of “otherness.”

I. THE ISRAELI IMMIGRATION AND CITIZENSHIP REGIME: ADVANTAGED JEWISH DESCENDENTS, DISADVANTAGED PALESTINIANS

It is important to understand Israel’s asylum regime in light of its immigration and citizenship norms. In short, these norms can be categorized as benefitting Jews and extremely disadvantaging and excluding Arabs and Palestinians. The purpose of those norms is to strengthen the Jewish “we-ness,” and to form a collective Israeli nationhood, against the threats posed by the “other” – the non-Jewish and, in particular, the Arab and Palestinian.  

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The fundamental component of Israel’s immigration laws is the Law of Return,\(^{21}\) the general premise of which is that “Every Jew has the right to come to this country as an olleh [an ascender, Jewish new comer – t.k.a.].”\(^{22}\) This notion corresponds to the nature of Israel as a Jewish and democratic state, as proclaimed in its declaration of independence\(^{23}\) and in Israel’s basic laws,\(^{24}\) which translates into an effort to maintain a Jewish majority.\(^{25}\) According to both early and current discussions of the Israeli parliament\(^{26}\) and courts\(^{27}\) and policy debates,\(^{28}\) this legislation defines Israel as an “Aliyah” state – a state of Jewish return – rather than an immigration state. The scope of the category of those who are eligible for a right of return was debated in the court,\(^{29}\) but eventually the 1970 amendment to the Law of Return determined the right to include a broad category of descendents of Jews and their family members.\(^{30}\) Inadvertently through this amendment, tens of thousands of persons who are not considered Jewish under Jewish law or according to their own self-definition may immigrate to Israel. According to some studies, these individuals serve as a “demographic counter-force” to the

\(^{21}\) Supra note 5.

\(^{22}\) Id. at art. 1.


\(^{24}\) See, e.g., art. 1 of the Basic Law: Human Dignity and Liberty, according to which “[t]he purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” Passed by the Knesset on the 12th of Adar Bet, 5752 (March 17, 1992) and published in Sefer HaChukkim No. 1391 of the 20th of Adar Bet, 5752 (March 25, 1992); the Bill and an Explanatory Note were published in Hatzot Chok No. 2086 of 5752 at 60, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Feb. 18, 2009).

\(^{25}\) On the connection between being an Israeli state and maintaining a Jewish majority in Israel, see the Interim Report of the Advisory Committee on Israel’s Immigration Policy, submitted Feb. 7, 2006 at 3-6 [in Hebrew] (copy on file with author). This committee was appointed by the former minister of interior and headed by Prof. Amnon Rubinstein.

\(^{26}\) See e.g., the discussion following the second and third vote on the Law of Return in the Israeli Parliament, 6th of Elul, 5712 (Aug. 27, 1952), 12 Divrey Haknesset 3167.

\(^{27}\) See e.g., Nikolay Frida v. The Ministry of Interior, Adm.App. 1644/05 [in Hebrew].

\(^{28}\) See supra note 25.

\(^{29}\) Rufaićen v. The Minister of Interior, HCJ 72/62, PD 16 2428; Kendel v. The Minister of Interior, HCJ 56/68, PD 23(2) 477.

\(^{30}\) Law of Return, supra note 5 at arts. 4a and 4b.
Palestinian minority in Israel. This is especially true given the Israeli refusal to recognize the right of return of Palestinian refugees. The morality of the Law of Return has been discussed in numerous scholarly debates, and since this issue falls beyond the scope of this paper, I will not elaborate on it now. It should be noted, however, that irrespective of the view we hold on the morality of the Law of Return, under the Israeli immigration regime, non-Jews do not hold a right to immigrate to Israel, and their entry to the state is restricted through the Entry to Israel Law. Most non-Jewish immigrants can only come to Israel as temporary migrant workers, who are essentially excluded from the Israeli welfare state and are commonly marginalized and often exploited. More specifically, the ability of Palestinians and Arabs to immigrate, even just temporarily, to Israel, has been restricted by recent legislation, upheld by a slim majority in the Supreme Court.

Under the corresponding naturalization norms, the Nationality Law, citizenship is granted automatically to those who immigrate to Israel under the Law of Return. Non-

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31 Lustick, supra note 20 at 101.
33 See e.g., Chaim Ganz, Nationalist Priorities and Restrictions in Immigration: The Case of Israel, 2(1) LAW AND ETHICS OF HUMAN RIGHTS (2008), http://www.bepress.com/cgi/viewcontent.cgi?article=1024&context=lehr (last visited Feb. 28, 2009).
34 Entry into Israel Law, 5712-1952, Passed by the Knesset on the 5th of Elul, 5712 (Aug. 26, 1952) and published in Sefer Ha-Chukkim No. 111 of the 15th of Elul, 5712 (Sept. 5, 1952) at 354; the Bill and an Explanatory Note were published in Hatza’ot Chok No. 106 of the 1st of Adar, 5712 (Feb. 27, 1952) at 134, http://www.geocities.com/savepalestinenow/israellaws/fulltext/entryintoisraellaw.htm (last visited Feb. 28, 2009).
35 On the migration for employment in Israel, see, e.g. Willen, supra note 6.
36 Migrant workers are eligible for some – though not all – social security benefits. Children of migrant workers are eligible for partially state-sponsored health care (though they are excluded from the national health care system) and can attend the public school system.
37 On the structural exploitative scheme of employment of migrant workers, see Kav La’oved Association v. Israel and others, Original petition to the High Court of Justice, HCJ 4542/02; ILDC 382 (IL 2006).
38 Supra note 5.
returnees have a limited ability to acquire citizenship.\textsuperscript{39} For many years, the ability of non-Jews who were residing in Israel prior its independence and their descendents to acquire citizenship was restricted,\textsuperscript{40} since those who fled Israel during the 1948 war\textsuperscript{41} were ineligible for citizenship. The ability of stateless persons to acquire citizenship in Israel,\textsuperscript{42} as per Israel’s commitment under international law,\textsuperscript{43} was very limited in the Nationality Law itself and almost theoretical since regulations on acquisition of citizenship for stateless persons were never set, despite a court’s order on the matter.\textsuperscript{44} Naturalization efforts encounter difficulties, because despite the efforts of courts to facilitate naturalization,\textsuperscript{45} the process is governed by constantly changing, non-transparent,\textsuperscript{46} and excluding regulations.\textsuperscript{47} Perhaps most importantly, as mentioned above, the possibility of naturalization for Palestinians and Arabs has been almost completely blocked by recent legislation, but for rare and exceptional circumstances.\textsuperscript{48}

Finally, it should also be mentioned that Palestinians are more likely to lose their citizenship status, since one of the grounds on which citizenship may be revoked is

\textsuperscript{39} Supra note 3 at arts. 2.
\textsuperscript{40} Supra note 3 at arts. 3 and 3a.
\textsuperscript{41} The question of whether the Palestinians fled Israel voluntarily or whether they were forced to leave by the State of Israel has been well-debated by historians and falls beyond the scope of this paper. See BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 (1989).
\textsuperscript{42} Supra note 3, Article 4a.
\textsuperscript{43} Israel is a party to the 1961 Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, entered into force Dec. 13, 1975.
\textsuperscript{44} In Elkasayev v. The Minister of Interior Affairs, AdmApp (Tel Aviv) 2887/05 (Jan. 29, 2007), the court ordered the Ministry of Interior to enact regulations on the process through which stateless persons can acquire citizenship in Israel.
\textsuperscript{45} On the courts’ attempts to simplify and shorten the naturalization process for family members of citizens, see Stamka v. The Minister of Interior, HCl 3648/97; Oren v. The Minister of Interior. Adm.App. 4614/05. See also Rozenberg v. The Minister of Interior, Adm.Pet. 2790/04.
\textsuperscript{46} The Association for Civil Rights in Israel v. The Ministry of Interior, Adm.Pet. 530/07.
\textsuperscript{48} Supra note 8. The existence of such rare and exceptional circumstances is supposed to be considered by a committee. It remains unclear whether this committee does, in fact, convene and make such decisions.
entering into enemy countries or acquiring citizenship in one of those countries, in which many of the Palestinian citizens of Israel have family ties or other affiliations.\textsuperscript{49} Calls for broadening the authority to revoke the citizenship of Palestinians are often heard within the judicial process or the public debate,\textsuperscript{50} and the few rare occasions on which citizenship has been revoked involved Palestinian citizens.\textsuperscript{51} It should also be noted that a significant number of non-Jews do not have citizenship status, but rather hold an inferior residency status, which they can easily lose if they relocate, even temporarily, to another country\textsuperscript{52} and which carries only limited rights and partial participation in the Israeli welfare state.

In other words, Israel’s immigration and citizenship regime privilege the Jew or her relative and offers them immediate inclusion, status, and full participation in the welfare state. The non-Jew is generally excluded or offered a limited and difficult ability to be included. The most limited opportunity to immigrate and acquire status is offered to Palestinians. These regimes fulfill the self-proclaimed nature – and maybe even the raison d’être – of Israel as a Jewish-democratic state. Under this structure, the “other” – the non-Jew, whose embodiment is the Palestinian or Arab – cannot possibly be included, but in exceptional circumstances or while being marginalized, excluded, or exploited in

\textsuperscript{49} \textit{Supra} note 5 at art. 11.

\textsuperscript{50} \textit{See, e.g., Israel Law Center v. The Chair Person of The Knesset}, HCJ 2934/07; \textit{Haled Abu Arfe v. The Minister of Interior}, HCJ 7803/06.


\textsuperscript{52} \textit{See, e.g., Hatem Siaj v. The Minister of Interior}, Adm.Pet. (Jerusalem) 384/07 (regarding the loss of residency of a person who left Israel to study abroad); \textit{Omri v. The Minister of Interior}, Adm.Pet. (Jerusalem) 247/07 (regarding the loss of residency of a person who left Israel to live with a spouse in his country of citizenship and wanted to regain his residency following the divorce).
the employment market. It is against the exclusion of the “other” that the Jewish “self” is formed and sustained.\textsuperscript{53}

III. BETWEEN THE IMMIGRATION AND CITIZENSHIP REGIME AND THE ASYLUM REGIME

It is interesting to compare Israel’s immigration and citizenship regime with the asylum regime, since the underlying logic of these two systems is supposed to be so fundamentally different. The reason for the distinction is that while immigration is restricted by the principle of state sovereignty, asylum is governed by international law obligations.

With respect to immigration, as sovereign entities, states are currently perceived to be entitled to decide who to include and who to exclude from their territories, with international law restrictions playing a minimal role in the decision-making process. The sovereign power of states also enables them to close their borders and to banish undesired intruders. Typically, states allow immigration when, and to the extent that, it meets the self-interests of their nations. In fact, states are perceived to have the right – and perhaps even the duty – to do just that. This is the reason immigration issues are debated in the political arena and are often determinative of election results. In the case of Israel, the self-interest of the state in maintaining a certain identity and demographic balance shapes these decisions.

While immigration policy is governed by the principle of sovereignty, refugee law is an exception that is governed by international law obligations. The Refugee

\textsuperscript{53}See supra note 15.
Convention provides that states should make a reciprocal commitment to protect refugees. The Refugee Convention defines the legal category of “refugee,” explaining that refugees are believed to be different from “ordinary” immigrants, and as such more deserving of international protection. A refugee is defined in the Refugee Convention, essentially, as a 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.” With respect to this person, the state owes a duty to refrain from returning her to any other country where her life or liberty is in danger. As well, the state owes an additional duty to guarantee the refugee’s other civil and socio-economic rights. In the Israeli context, it should therefore be noted that Israel is bound by international law in its treatment of refugees.

In other words, while states are free to make decisions on who to exclude, who to include, and what degree of membership should be granted within the immigration context, in the asylum context states are limited in their ability to make such determinations by international law. This formal difference stems from a moral difference between immigrants and refugees. While immigrants choose to leave their countries of origin and can also choose to return to them, refugees leave their countries as a result of

54 Refugee Convention, supra note 1.
55 Id. at art. 1(A)(2).
56 Id. at art. 33.
57 See, e.g., id. at art. 4 (freedom of religion); art. 13-15 (property rights); art. 17-19 (employment rights); art. 2-23 (welfare and education rights); etc.
58 This perception is often a bit unclear, since decisions to immigrate often can be categorized as difficult choices at best. On the distinction between coerced choices and difficult choices in immigration, see, e.g., Harry Beran, What is the Basis for Political Authority?, 66 MONIST 479, 497-498 (1983). Beran makes this distinction in a different context; namely, discussing whether an individual’s choice to immigrate or to refrain from immigrating could and should be understood as an implied consent to the social contract. Similarly, David Hume commented that many do not have the choice to immigrate as they have been
extreme necessity, are unable or unwilling to expose themselves to their states’ protection, and need surrogate protection from the countries in which they seek asylum.

Accordingly, and to the extent that we suppose that states follow their moral and international law obligations, we would expect states to be more generous, including, and open towards refugees. We would not expect “otherness” to prevail in the context of asylum regimes as much as it does in the context of immigration and citizenship regime.

III. THE ISRAELI ASYLUM REGIME: CONSTRUING THE REFUGEE AS THE “OTHER”

How does Israel’s asylum regime compare with Israel’s immigration and citizenship regime in its treatment of the non-Jew, and in particular, the Arab or Palestinian?

Israel was one of the framing states of the Refugee Convention and had a serious interest in seeing that it materialized, especially because it was perceived to be potentially

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59 On the concept of necessity in immigration, see NIRAj NATHWANI, RETHINKING REFUGEE LAW 27-28 (2003).
60 Refugee Convention, supra note 1 at arts. 1(A)(2) and 1(C), which refers to a person “who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.” This exception to the cessation of status was originally intended to apply to Holocaust refugees, but it was recently purposively interpreted by the UNHCR to “cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence.” UNHCR “Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the ‘Ceased Circumstances’ Clauses),” (2003) 6 (ss. 20-21).
helpful to the Jewish refugees of the Second World War.\textsuperscript{62} In this context, one may expect a high degree of moral responsibility towards asylum seekers, coupled with a strong sense of empathy and an ability to identify with the world’s victims of persecution.

Given the blanket protection that the Law of Return provides to all Jewish immigrants – refugees and non-refugees – the Refugee Convention was never applied within Israel with respect to Jewish refugees.\textsuperscript{63} Therefore, the Israeli asylum regime is essentially designated for non-Jews, those who would be labeled as the “other” under the immigration and citizenship regime. However, the vast difference between the morality of refugee protection under the asylum regime and the ordinary rules of immigration under the immigration and citizenship regime may lead us to expect that the non-Jewish refugee would be included in Israeli society. Nevertheless, as I will demonstrate below, several components of the architecture of the Israeli asylum regime assume or re-emphasize the “otherness” of the refugee.

\textit{a. Lawlessness, Temporariness, and Exclusion of the “Other”}

Despite Israel’s historical commitment to the Refugee Convention, and its signing in 1951 and ratification in 1954 by Israel, very little has been done to implement the Refugee Convention in Israel. In spite of recent sporadic attempts, Israel has yet to incorporate the Refugee Convention into domestic law\textsuperscript{64} and has just recently, in 2002, established a clear procedure for screening asylum seekers, in the form of a set of


\footnotesize{\textsuperscript{63} See Law of Return, \textit{supra} note 5.}

\footnotesize{\textsuperscript{64} A number of attempts to legislate the Refugee Rights Law failed during the last few years. These attempts were led by Knesset members Dov Hanin and Ofir Pinnes and included a partial and lacking protection of refugee rights. Due to the lack of willingness of other parliament members to support these bills, they were never enacted.}
Under Israel’s dualist legal system, the failure to incorporate the Refugee Convention into Israeli domestic law means that it is not a legally binding document that could serve as a basis for individuals to make claims in Israeli domestic courts.

Under Israel’s regulations, a recognized refugee, of which there are only a few dozen in Israel, is granted temporary residency status. It is important to note that there is no designated refugee status, but rather refugees are granted a “generic” status that is given to other temporary stayers or persons in the process of naturalization in Israel.

When status is concerned, the uniqueness of the circumstances that led to its being

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65 Regulations, *supra* note 11. It should be noted that although these norms have been referred to as regulations in the literature, they are, in fact, internal procedures – that is, of inferior normative power than regulations. I will refer to them as regulations, despite the inaccuracy, for the sake of consistency. Under the current refugee regime, which was established under the administrative procedure in 2001 by an inter-governmental committee, Israel is not fully involved in the status determination process. Instead, since 2002, the initial screening of asylum applications is completed by the UNHCR representative to Israel, who makes a recommendation on each case and delivers it to an inter-ministerial committee called the National Status Granting Body (NSGB). This committee, which includes representatives from the Ministries of Justice, Foreign Affairs, and Interior, in turn makes a recommendation to the Minister of Interior, who has the authority to grant the request and give status to the asylum seeker. This process lasts a few months – and in some cases, years – during which time the asylum seeker is given a letter from the UNHCR that gives her protection from removal and deportation and, in some cases, also permission to work. The prolonged RSD process was described in the latest State’s Comptroller and Ombudsman’s report. See http://www.mevaker.gov.il/serve/showHtml.asp?bookid=514&id=57&frompage=111&contentid=9582&parentcid=9581&bctype=1&startpage=1&direction=1&sw=1024&hw=698&cn=2020%20במבקשי%20מקלט%20מדיני%20בישראל (last visited Sept. 23, 2008) [in Hebrew]. The above-mentioned status determination process has many procedural flaws. Notably, asylees do not have a right to be represented by an attorney before the UNHCR or the committee. In addition, the possibility to appeal a decision is very limited, because the reasons for rejecting an asylum request are either not given to asylees or are only briefly stated. Appeals are heard by the same persons in the UNHCR correspondent office who made the original decision. Finally, many asylum seekers don’t know about the asylum procedure, due to the fact that it was never published; etc.

66 This does not mean that the Refugee Convention does not have any legal meaning in Israel. The regulations refer to the Refugee Convention. Israeli Courts, as they interpret legislation, will always prefer to interpret it in a way that conforms to the Refugee Convention, rather than interpreting it in a way that contradicts the Refugee Convention, due to a “conformity presumption.” On this presumption, see, e.g., *Shienbien v. The Government’s Legal Council*, CrimApp 6182/98, PD 53(1) 625 (1999); *Amsterdam v. The Minister of Finance*, HCJ 279/51, PD 6 945, 966 (1952) [in Hebrew].


68 See Regulations, *supra* note 11, art. 3(D) and the current Procedure on the Treatment of Asylum Seekers in Israel, and of Persons who were Recognized as Deserving of Asylum by the Minister of Interior, art. C(3), available at: http://www.moin.gov.il/Apps/PubWebSite/publications.nsf/All/A5C1B2D4AD341823422570AD004311F4/$FILE/Publications.2.0012.pdf?OpenElement [in Hebrew] (last visited Feb. 28, 2009).
While granting permanent status is not a requirement of the Refugee Convention, it is common in many countries to naturalize refugees over time. A side-effect of the temporary status is that refugees are unable to fully participate in Israeli society, politics, and the welfare state. Also, the inability to obtain permanency prevents refugees from finding a much needed sense of stability in their lives.

More importantly, the application of the existing regulations is often suspended, as the Refugee Status Determination (RSD) process is not conducted with respect to most asylum seekers, with persons from specific countries of nationality not being granted access to the Israeli asylum system. Essentially, nationals of countries of origin from which a large number of asylum seekers come are not being processed through the RSD

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69 While this could potentially be a positive step that prevents discrimination, it also prevents affirmative action, such as the taking into consideration of the special trauma, hardship, and physical difficulties the refugees have gone through.

70 There are no legal barriers to the minister of interior naturalizing a refugee, but the minister has never exercised his discretion to do so.

71 On the connection between citizenship, refugee status, and rights, see HANNA ARENDT, THE ORIGINS OF TOTALITARIANISM, 292-293 (1973).

72 Compare with the policy in the United States, defined in the Immigration and Nationality Act, arts. 209(b) and 316(a) (determining naturalization of refugees to permanent residents and then to citizens in the United States); and with Council Directive 2003/109/EC of Nov. 25, 2003 concerning the status of third-country nationals who are long-term residents.

73 All asylum seekers in Israeli are eligible to receive emergency health care. Moreover, if they receive a work permit and are employed, they are entitled to private health insurance, which is paid for by their employers, and some social security benefits. Children of asylum seekers are eligible for discounted and partially state-sponsored private health insurance and are allowed to join the education system. Many asylum seekers are not granted a formal work permit, either until the completion of the initial status of their Refugee Status Determination or at all, and support themselves by seeking undocumented employment or by depending on charity. Recognized refugees receive the same rights as temporary residents, and as such are included in the national health insurance system and eligible for more social security benefits. It seems that the case of social and economic rights of asylum seekers and refugees reflects the general situation of social and economic rights in Israel, which are uncodified and, due to lack of consensus on their scope, not specifically included in Israel’s basic rights. See also Arendt, supra note 71 at 292-293.

74 See “Refugees and Asylum Seekers in Israel: Between the Administrative Procedure and the Civil Society” (with Dr. Adriana Kemp), Law, Society and Culture (Mishpat Hevra Ve’Tarbut), 2008 [in Hebrew].
system. I will expand on this below, as I refer to the group protection extended to those persons.

The result of not being able to acquire official recognition as a refugee is that refugees are exposed to frequently changing policies and do not enjoy a stable, formal status. Most of the refugees are left exposed, in legal limbo, though they apply for status and hope to undergo RSD. In an effort to give them some protection from detention and deportation, the UNHCR has developed an elaborate system of quasi-official protection papers that are handed out to asylum seekers. Those papers are often – though not always – respected as proof of a person’s need for UNHCR protection, and only occasionally do mass detentions and anecdotal deportations of persons with UNHCR protection papers occur. In addition, these quasi-official papers do not grant participation in the Israeli welfare state, nor do they allow documented employment. Being caught in this state of legal limbo, and having to make ends meet, refugees are therefore pushed to find undocumented employment.

As can be inferred from the description above, the presence of refugees in Israel is chaotic. They are physically present in Israel, but legally absent, to a large extent, as they lack formal status and welfare rights, in most cases.

b. Group-Based Protection and the Impersonal “Other”

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76 See below, section B.
77 There are at least four types of “protection papers,” each entailing a different scope of protection. For example, according to a fragile understanding with the Ministry of Labor and Industry, persons with one type of “protection paper” are employable. On this protection paper system and its disadvantages, see Letter from Adv. Yonatan Berman, Hotline for Migrant Workers, to Michael Bavli, Head of the UNHCR office in Jerusalem, “Detention of Asylum Seekers who approached the UNHCR,” (March 4, 2008) and Michael Bavli’s response (March 6, 2008).
78 On Chaos and otherness, see supra note 17.
79 Interestingly, and perhaps surprisingly, Zygmund Bauman made a similar distinction with respect to Jews in Europe prior to the Holocaust. See supra note 17.
As mentioned above, most asylum seekers are not processed through the RSD system. Instead they are granted a group-based and often informal temporary protection.

Group-based informal temporary protection was granted even in the earlier days prior to the formation of the Israeli asylum system. But even after the asylum system was established, Israel continued to extend group-based protection. Nationals of a few countries, such as Ivory Coast, Liberia, Democratic Republic of Congo, Sierra Leone, and Togo have received temporary protection following a government decision labeling their countries of origin as “countries in crisis.” Nationals of other countries, such as Eritrea and Myanmar have received informal temporary protection, since Israel’s diplomatic interests have prevented declaring that these countries are “in crisis.” In effect, despite their exclusion under the asylum regulations, the protection from deportation extended to Sudanese refugees may be perceived as a thin form of de facto temporary protection. The nature and scope of the protection varies between different nationalities.

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83 See Tally Kritzman, Paper presented to the Association for Israel Studies 23rd Annual Conference “Israel as an Immigrant Society: Between the Melting Pot and Multiculturalism”: Israel as a State of Temporary Asylum (June 11-13, 2007) (on file with author).
The tendency to provide temporary protection rather than the kind of protection the Refugee Convention requires is common in many countries today. Temporary protection provides protection to persons who may not have received protection otherwise, as they do not fall under the definition of “refugee.” Nevertheless, temporary protection is critiqued since it grants essentially fewer rights to all of those protected (some of whom could have received a broader set of rights had they had access to the RSD system, rather than to the temporary protection system). Additional critique points to the fact that whereas there must be clear standards for the termination of the protection of refugees, there are no such standards for the termination of temporary protection. Therefore, while Israel grants temporary protection, at the same time it also prevents persons from certain countries of origin from having access to the rights that they would enjoy had they been recognized as refugees and ensures that their protection is easy to terminate.

In addition to ensuring the complex inclusion/exclusion situation of protected persons, granting temporary protection also allows states to avoid dealing with individual persons, since they are dealt with as members of their group of nationality. Individuals do not need to tell their stories and establish a well-founded fear of persecution; rather, they oftentimes just need to prove their nationality. Their unique needs, traits, personalities, circumstances, and fear of persecution are not factored in to determine the scope of their protection and inclusion in the welfare state. The refugees are not perceived as relatable or as persons with whom one can identify. They are not perceived in their entirety, but

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86 *Id.* at 291 ff.
87 Refugee Convention, *supra* note 1 at art. 1(C).
88 Fitzpatrick, *supra* note 85 at 300 ff.
rather their existence is narrowed down to a single identity-dimension: their nationality. It is this identity-dimension that determines their status and rights, sustains their “otherness,” and prevents them from ever being perceived as anything but the “other.” This corresponds to the literature on the concept of “master status,” a term referring to the classification of people into specific social categories based on a single social label, which ultimately delimits their social mobility and ascribes traits, rights, and values to them.89

Perhaps as a result, the group-based perception of refugees also prevents seeing their value as potentially contributing members of society. Instead, emphasis is put on the burdens involved in the protection of these groups of refugees.90 The perception of refugees as masses has led to terming their arrival a “tsunami.”91 Information, and sometimes misinformation, about quantities and numbers is often used. The motivation behind the arrival of refugees to Israel is questioned and suspected, and they are often called “work infiltrators.” In a sense, this resembles the victim-plaintiff distinction Lyotard stretches in the differend situation.92 Asylum seekers are unable to present the wrongs that were done to them; they are silenced and disallowed from speaking since they are not given access to the RSD process; they are not believed since their unheard

89 Everett C. Hughes, Dilemmas and Contradictions of Status, 50 American Journal of Sociology, 353 (1945).
91 See, e.g., Roni Sofer, Olmert: We must curb infiltrations from Egypt, Mar. 23, 2008, available at http://www.ynetnews.com/articles/0,7340,L-3522476,00.html (last visited Feb. 28, 2009) (“This is a tsunami that can only get worse,’ said Olmert. ‘We must do everything we can to stop it.’ Olmert was reportedly furious by the fact that the problem has yet to be curbed: ‘Israel has taken a tough stand with the Palestinian, stopping any of their citizens form entering Israel, and yet thousands have crossed over (to Israel) in a matter of months.’”)
92 Jean Francois Lyotard, The Differend: Phrases in Dispute (1988)
testimonies are perceived to be, a priori, fictitious and to cover a reality of economic destitution.  

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c.  

**Detention, Restriction of Freedom of Movement, and Exclusion from Predominant Public Loci** 

Upon entry to Israel, the majority of asylum seekers are detained as per their undocumented entry,\[94\] often in harsh conditions.\[95\] Detentions are carried out under the Entry to Israel Law\[96\] for most asylum seekers and under the Prevention of Infiltration Law\[97\] for asylum seekers who are “enemy nationals,”\[98\] that is, under the general immigration laws. This is done, despite the exemption from criminal liability for illegal entry granted in the Refugee Convention to refugees who present themselves before the authorities without delay.\[99\] Detaining asylum seekers also contradicts the UNHCR guidelines on detention, according to which “detention should only be resorted to in cases of necessity” and should “not be automatic, nor should it be unduly prolonged.”\[100\] In other words, the special circumstances of asylum seekers, including the necessity that led them to enter Israel in an undocumented manner, their past trauma, and their legal rights under the Refugee Convention, are not considered at their moment of entry, and they are treated with the same suspicion as other undocumented immigrants. It is often the case

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\[93\] *Ibid.*

\[94\] Asylum seekers are not detained if the detention centers are at their full occupancy or if they manage to evade the army border control forces. Typically, though, asylum seekers await border control soldiers and do not attempt to infiltrate without being noticed. On occasion, when detention facilities were full, asylum seekers are taken by the soldiers to one of the major cities in the south of Israel and left there. See BRUNO OLIVEIRA MARTINS, UNDOCUMENTED MIGRANTS, ASYLUM SEEKERS AND REFUGEES IN ISRAEL 13 (2009).


\[96\] *Entry into Israel Law, supra note 34.*

\[97\] See Prevention of Infiltration (Offences and Jurisdiction) Law, *supra note 12.*

\[98\] See *infra, s. d.*

\[99\] *Refugee Convention, supra note 1 at art. 31.*

that it takes months, sometimes even years, for asylum seekers to be released from detention.

The freedom of movement of the asylum seeker is not only restricted by means of detention. It is also limited by different restrictions that are incorporated in the documents provided to asylum seekers. Since the summer of 2008, official visa-like papers have been distributed to asylum seekers upon their release from detention, according to which they are not allowed to reside, work, or be physically present within the greater Tel Aviv area. The greater Tel Aviv area is where employment is most likely to be found, where most of the humanitarian and human rights organizations that offer assistance to refugees operate, and also where the majority of the Israeli population lives and where cultural, commercial, and financial life is concentrated. These restrictions also disrupt the ability of refugee communities to exist. As these visa-like papers were distributed, no special consideration was given to the particular constraints or circumstances of individuals, forcing many individuals to quit their long sought-after jobs, children to drop out of schools, ill individuals to discontinue medical treatment, residents in rented apartments to break their contracts, and so on.

Whether intentionally or unintentionally, the freedom of movement restrictions render refugees marginalized and excluded, and allowed presence only in the periphery, away from the public eye. Also, these restrictions reflect the notion that refugees need to be curbed, restrained, and contained even after their release from detention.

d. The Enemy National and Palestinian Refugee as the Embodiment of the “Other”

The most “other” of them all is the refugee whose country of origin is an enemy country or the Palestinian refugee.

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101 Martins, supra note 94.
Historically, since even before the formation of its asylum system, Israel has had to deal with a number of asylum seekers from enemy nations, such as Iran, Iraq, Syria, Lebanon, and, most recently, the large number of persons fleeing the civil war in Sudan. Additionally, some Palestinians seek asylum in Israel. All of this is mostly due to the geographical proximity of Israel and its enemy countries: Israel is surrounded by enemy countries. In most cases, these asylum seekers have a rather strong *sur place* claim: the mere fact that a person from any of these countries entered Israel and spent some time there is often in itself a reason for that person to suffer from a well-founded fear of being persecuted if returned to their home countries.

However, Israel refrains from granting refugee status to these asylum seekers or from processing their requests through the RSD process. Before the asylum regulations were enacted, most of the relatively few enemy national asylum seekers received ad hoc UNHCR assistance and were resettled to other countries. However, since the enactment of the asylum regulations in 2002, enemy nationals have been categorized and excluded as a group. The legal basis for this can be found in Article 6 of the Israeli asylum regulations, which reads,

> 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

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102 Some difficulties with obtaining refugee status were documented with regard to Egyptian asylum seekers, despite the fact that Israel and Egypt have a peace agreement.
103 On Iraqi asylum seekers in Israel, see Al-Tai’i et al v. Minister of the Interior et al, HCJ 4702/94, 49(3) P.D. 843.
104 “A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘sur place.’” UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* at para. 94 (1992); Hathaway, *supra* note 61 at 41-42.
106 Regulations, *supra* note 11.
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 settlement in the region.

The exclusion of Palestinian asylum seekers is due both to the above-mentioned Article 6 and to a narrow interpretation of the Refugee Convention’s Article 1D, which excludes refugees who receive assistance from UN agencies other than UNHCR. Since some Palestinians receive UNRWA assistance, both the Israeli government and UNHCR interpret this article as excluding Palestinians from meeting the definition of “refugee” under the Refugee Convention.107

There are two reasons for the reluctance of Israel to allow these asylum seekers to obtain status in Israel. First, there is a security reason. The state argues that there is a general presumption of dangerousness that enemy nationals might be involved in terrorism or other types of hostile behavior. Since the state is unable to gather information about the asylum seekers, it therefore resorts to a presumption that they all pose a danger to security as a basis for this policy.108 This presumption follows the logic behind Israeli immigration norms, in particular the logic behind the Nationality and Entry into Israel (Temporary Order) Law,109 which, as mentioned above, virtually categorically denies any possibility of Palestinian migration and naturalization in Israel due to a presumption of dangerousness. It should be noted, however, that the logic behind the Refugee Convention is very different in the sense that it does not allow discrimination on

107 For an analysis of Article 1D of the Refugee Convention, see Lewis Saideman, Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return, 44 VA. J. INT’L L. (2004) 829, 859 ff. See also Kagan & Ben-Dor, supra note 10; Tekkenberg, supra note 10.

108 Article 33(d) of the state’s response to petitions HCT 3208/06, 3270/06, 3271/06, and 3272/06 in Anonymous Petitioners v. The Head of the Israeli Defence Forces Operations and others, supra note 12.

109 Supra note 8.
the basis of nationality,\textsuperscript{110} and it allows the exclusion of refugees solely on the basis of the individual danger they pose.\textsuperscript{111} In this sense, the perceived “otherness” of those refugees coincides with a perceived (or maybe even imagined) “risk.”

In a sense, as Kemp and Goldin confer from Lupton’s arguments on “risk” and “otherness,”\textsuperscript{112} what is perceived to be a “risk” is perceived as such because of its “other” – and what is perceived to be the “other” is perceived as such because of its risk. Refugees are perceived as the “enemy other” not necessarily because of any intrinsic flaw within them, but rather because of their being outsiders to the statist legal order and different from the state’s nationals.\textsuperscript{113} It should be mentioned that this presumption of the dangerousness of “enemy nationals” has never been lifted, despite the prolonged presence of many asylum seekers, none of whom has ever been suspected of involvement in security-related matters. The presumption has been somewhat relaxed, as enemy national asylum seekers have been released from detention over the course of time.

Second, Israeli officials have made remarks that if asylum seekers are given status in Israel, then more will be motivated to come to Israel. This reasoning has been applied with respect to all asylum seekers, but it has had special force in relation to enemy national asylum seekers, because their immigration imposes security-related costs and their countries of origin are undemocratic and oppressive. Therefore, there is a reason to assume many enemy nation asylum seekers would be inclined to try to leave their countries of origin. This reasoning also has special force with respect to enemy nationals.

\textsuperscript{110} \textit{Refugee Convention}, \textit{supra} note 1 at art. 3.
\textsuperscript{111} \textit{Id.} at art. 1(F).
who are *sur place* refugees, who become such upon their entry into Israel. According to these officials, granting status to asylum seekers and refugees will be a “pull factor,” encouraging additional migration to Israel. There is a concern, according to those officials, that increased immigration would impose a burden on Israel’s economy and negatively affect its efforts maintain its Jewish majority and its Jewish identity. Again, this concern follows the logic of the immigration and citizenship regime, especially the logic behind the Law of Return\(^\text{115}\) and the refusal to recognize a right of return of Palestinian refugees.\(^\text{116}\) All this despite the fact that the Refugee Convention does not allow for the balancing of commitments to refugees against demographic considerations.

The physical presence of the enemy national is almost unchallenged. Generally, Israel refrains from forcefully returning these asylum seekers to their countries of origin.\(^\text{117}\) Also, although initially Israel tried to resettle enemy nationals in safe third countries, it is currently unable and unwilling to do so, given the scope of the phenomenon and a lack of desire to encourage further immigration from these countries by institutionalizing resettlement solutions.\(^\text{118}\)

However, despite the obvious and rather stable physical presence of enemy national refugees in Israel, their legal and social presence is compromised,\(^\text{119}\) both as a result of their perceived otherness and as a reinforcement of it. A series of obstacles

\(^{114}\) *Supra* note 104.

\(^{115}\) *Supra* note 5.

\(^{116}\) *Supra* note 24.

\(^{117}\) On a number of occasions, Israel did, in fact, deport persons to Egypt, which later deported them to their countries of nationality. *See* Refugee Rights Forum, *IDF keeps on expelling Asylum seekers to Egypt despite Egypt's Declarations to the media that they will be deported to their homelands*, http://www.hotline.org.il/english/news/2008/Hotline090308.htm (last visited Feb. 28, 2009). This policy is currently challenged in a petition that is pending before the Supreme Court in *The Hotline for Migrant Workers v. The Minister of Defense*, HCJ 7302/07.

\(^{118}\) This was mentioned by the honorary senior officer of the UNHCR, Mr. Michael Bavli, in his talk with the Refugee Rights Clinic, Mar. 20, 2007.

prevents enemy nationals from integrating into Israeli society. First, because enemy nationals are governed by the above-mentioned legal norms, their asylum applications are not processed, and they are unable to receive protection based on their individual fear of being persecuted. As a result, most enemy nationals are left in legal limbo, finding undocumented employment or being employed through informal arrangements between governments and employers.

Second, enemy nationals are treated as a group, not as individuals. This is apparent since they are viewed through the prism of a generalized presumption of dangerousness. Since a list of enemy countries for the purpose of these regulations has never been formed, it seems that the decision of who is “the enemy” is dependent, in large, on the question of who is asking for asylum. In other words, rather than being perceived as nationals of particular countries, they are viewed as the “enemy other.” The only case of enemy nationals receiving a meaningful form of protection in Israel is a finite group of approximately 600 refugees from Darfur, which received a group-based form of protection, outside the scope of the Refugee Convention. It is this group view of enemy national asylum seekers that prevents the realization that there is no information linking individual asylum seekers to terrorism or other security threats – as it must have been realized by the authorities who granted status to the 600 Darfurians without any security screening. Moreover, this group view does not allow room for people to identify with the asylum seekers’ fear of persecution or harsh feelings towards their governments (which are the enemies of Israel). Finally, this group view does not

122 Id.
allow for the feeling of any empathy for the 601st Darfurian, whose need for protection is in no way lesser than the need of those who came to Israel before him.

Third, enemy nationals are typically detained as infiltrators under the Prevention of Infiltration Law, a piece of emergency legislation allegedly applied mostly to enemy nationals. Asylum seekers who are nationals of non-enemy countries are detained under a different law, or, at most, detained under the infiltration law only for a short period of time, before having their detention reframed under a different law. While detention under the emergency legislation is not subject to judicial review, quasi-judicial review was implemented following a habeas corpus petition to the Israeli Supreme Court. This has led in the past to conditional releases of enemy nationals from detention (most typically to employers who employed them in an undocumented manner or under some informal understanding with government officials).

Thus, as mentioned above, the enemy national asylum seeker is the most disadvantaged immigrant, as is the Palestinian and Arab immigrant to Israel. Enough attention has not been devoted to the differences between the two groups in the circumstances of their immigration or the norms that govern their rights.

CONCLUSION

123 See Prevention of Infiltration (Offences and Jurisdiction) Law, supra note 12.
124 Entry into Israel Law, supra note 34.
125 Recently, the detention of enemy nationals is being regulated under the Entry into Israel Law after the first ten days of detention. See Anonymous Petitioners v. The Head of the Israeli Defence Forces Operations and others, supra note 12 (interim decision delivered by the court on Oct. 7, 2008).
128 See Letter from the UNHCR office in Tel Aviv, supra note 121.
Israel’s asylum system is still evolving, and it seems to use Israel’s immigration and citizenship system as its main normative reference point rather than international refugee law.\textsuperscript{129} The result is a massive exclusion of asylum seekers, who are not rendered physically absent, but rather they are rendered absent from the legal order and social life and denied political visibility. While this phenomenon is not uncommon in today’s world, which suffers from “compassion fatigue,”\textsuperscript{130} diluted protection, and adherence to national self-interest, the Israeli example is exceptional for a number of reasons. It is exceptional since it is delayed and came into being only decades after the rest of the democratic developed countries developed their asylum systems. It is also exceptional because it is rooted in challenging geo-political conditions and because it works against the background of a very unique immigration law.

As the Israeli asylum system becomes more elaborate, it is constantly challenged by civil society. Future research should follow the asylum system as it develops past this embryonic stage to see whether it maintains the logic of the immigration and citizenship regime and continues to portray the refugee as the “other” – or whether it detaches itself from immigration law and establishes a logic of its own, grounded in international law.

\textsuperscript{129} When using the term “refugee law,” I refer to the Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 8791, \textit{entered into force} October 4, 1967, several regional instruments, and other “soft law” norms that developed later, such as UNHCR handbook and guidelines, which are a semi-authoritative source of interpretation of the other refugee law norms.\textsuperscript{130} Maryellen Fullerton, \textit{The International and National Protection of Refugees, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE} 245, 247 (Hurst Hannum ed., 4\textsuperscript{th} ed. 2004).