Responsibility Sharing and the Rights of Refugees: The Case of Israel

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Responsibility Sharing and the Rights of Refugees: The Case of Israel
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This paper aims at examining the Israeli refugee law and practice through the lens of responsibility sharing. We will offer a critical analysis of the implementation of the Israeli asylum regime, showing the impact this regime has on responsibility sharing. We will also analyze the discourse on the issue of responsibility sharing, however limited in scope it is. This discussion emerges from an awareness of the fact that Israel is in a unique geopolitical situation, due to its proximity to Africa and being the only economically-stable democracy in the region. Israel is also embroiled in an ongoing conflict with its neighbors. However, when we essentialize these geopolitical considerations, we see that Israel is in fact in a similar situation to that of many other developed countries. Many countries, just like Israel, fear their democratic regimes and boosting economies might attract immigrants of different sorts, are troubled by security and global “terrorism-related” concerns, and attempt to minimize their share of global responsibility and contain refugees to the Global South. In this sense, the case of Israel is an interesting test case from which we can generalize conclusions on the attitudes and policies of Western countries about responsibility sharing.

We will begin our discussion of responsibility sharing with a general discussion of its moral foundation, in an attempt to explain the philosophical basis of the argument that responsibility for the refugees of the world should be shared. As we will elaborate, there are different philosophical justifications for sharing responsibility rather than allocating it arbitrarily. Following this discussion, we will present the current international law norms on responsibility sharing and show that they are relatively few, general, and ineffective. We will also discuss the practices that states have adapted to share responsibility, give a few examples of some ad hoc models that have been developed, and evaluate their success. We will then move on to examine the Israeli context of responsibility sharing, looking at both discourse and policies to understand Israel’s position fully. We will conclude with suggestions as to how responsibility sharing could be administered better, with the help of the court.

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Introduction

Since 2005, a relatively large number of asylum seekers entered Israel mostly through its Egyptian border. While Israel has been a signatory to the Convention Relating to the Status of Refugees\textsuperscript{1} for many decades, the Israeli asylum system started functioning only in 2002\textsuperscript{2}. Most of the asylum seekers were coming from relatively close by African countries; namely, Sudan, Eritrea, and Ivory Coast\textsuperscript{3}. The vast majority of asylum seekers have crossed one or more such state on their way to Israel. In other words, since 2005, Israel started shouldering the burden of the refugee problems of the turbulences in the region in which it is located.

The way Israel deals with asylum seekers should be understood and evaluated in light of its general immigration regime. Israel is a self-proclaimed Jewish and democratic state, whose immigration and citizenship regime is based on a Jewish/other distinction. Israel has corresponding \textit{jus sanguinis} citizenship norms, which display a significant preference for Jews and their relatives and descendents in the acquisition of citizenship. In other words, Israel’s immigration policy essentially almost exclusively provides for the immigration of Jews and their relatives to Israel\textsuperscript{4}, except for migration for employment, which is heavily governed and restricted by a guest-worker program\textsuperscript{5}. On the other hand, different policies allow for the relatively easy annulment of the status of Palestinian residents\textsuperscript{6} and almost categorically deny any possibility of immigration to Palestinians and citizens of several other Arab countries\textsuperscript{7}.

\begin{thebibliography}{9}
\bibitem{1} 189 U.N.T.S. 150, \textit{entered into force} April 22, 1954 [hereinafter Refugee Convention].
\bibitem{2} For an overview of the Israeli asylum system in its formative stage, see \textsc{Anat Ben-Dor \& Rami Adut}, \textit{Israel: A Safe Haven? Problems in the Treatment Offered by the State of Israel to Refugees and Asylum Seekers: Report and Position Paper} (2003).
\bibitem{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. \textit{See} email from Michal Alford to Adv. Anat Ben-Dor (Jan. 14, 2009) (on file with authors).
\bibitem{4} Law of Return, 5710-1950, Passed by the Knesset on the 20th of Tammuz, 5710 (July 5, 1950) and published in \textit{Sefer HaChukkim} No. 51 of the 21st of Tammuz, 5710 (July 5, 1950) at 159; the Bill and an Explanatory Note were published in Hatz'aot 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 \textit{Sefer HaChukkim} No. 95 of the 13th of Nisan, 5712 (April 8, 1952) at 146; the Bill was published in \textit{Hatz'aot Chok} No. 93 of the 22nd of Cheshvan, 5712 (Nov. 21, 1951) at 22.
\bibitem{5} On the migration for employment in Israel, \textit{see}, e.g., \textsc{Sarah S. Willen}, \textit{Transnational Migration to Israel in Global Comparative Context} (2007).
\bibitem{6} \textit{See}, e.g., art. 11 of the Nationality Law, \textit{supra} note 4.
\bibitem{7} 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 \textit{Reshumot} (June 4, 2003). \textit{See also Adalah—The Legal Center for Arab Minority Rights in Israel and others v Minister of...}
The recently developed asylum system in Israel seems to follow, to a large extent, the same logic of Israel’s citizenship and immigration norms. Throughout the years, Israel has demonstrated a general reluctance to grant refugees protection. This is evident from the statistical information on acceptance rates.\(^8\) Israel resorted to complementary protection mechanisms such as (formal or informal) temporary protection.\(^9\) Additionally, Israel refuses to accept Palestinian refugees since it has adopted a narrow reading of Article 1(D) of the Refugee Convention,\(^10\) according to which all Palestinians are ineligible to be granted asylum (forcing Palestinians to either stay in the Palestinian territories or to seek asylum in other countries, mostly the neighboring Egypt, Lebanon or Jordan).\(^11\) The asylum procedures include a broadly interpreted category of enemy nationals, including all nationals of Arab and Muslim states who are, much like the Palestinians, excluded from the asylum process.\(^12\) While most asylum seekers are subject to the risk of detention upon their undocumented entry to Israel, asylum seekers who 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 effective judicial review.\(^13\) Also noteworthy is the fact that on several occasions Israel has applied a “hot-return” policy, the legality of which is currently being challenged before the High Court of Justice,\(^14\) according to which Israel deports persons who recently entered the country.

\(^8\) 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 term “temporary protection” is used in the Israeli context in the same manner in which it is used in the European and American context, to describe situations in which no individual refugee status determination procedures takes place, but rather asylum seekers are granted protection based solely on their nationality. Whereas the U.S. and European States grant, as a general rule, permanent status to persons who have been found to be refugees through an individual process of refugee status determination, in Israel both individual and group recognition lead only to eligibility to a temporary status.

\(^9\) 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 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 Hatza’ot Chok No. 161 of 5713 at 172. See also the Petition and State Response in 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).

\(^10\) 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).

\(^11\) Regulations Regarding the Treatment of Asylum Seekers in Israel, 2001, art. 6 (on file with author) [hereinafter the Regulations].

\(^12\) 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
through its southern border back to Egypt (despite increasing concerns about the lack of substantive protection offered in Egypt).\textsuperscript{15} Finally, asylum seekers have been, to a large extent, excluded from the Israeli welfare state, and a large number of them have also been prohibited from staying or working within the urban centers of Israel.\textsuperscript{16}

In other words, and as I have extensively explained elsewhere,\textsuperscript{17} Israel’s asylum regime has followed the logic of its immigration regime, seeking to promote the country’s security and demographic interests, that is, maintaining the Jewish character of the state, and attempting to frame itself as a less-attractive destination for refugees, almost irrespective of responsibility-sharing concerns.\textsuperscript{18}

This paper aims at examining the Israeli case through the lens of responsibility sharing. We will offer a critical analysis of the implementation of the Israeli asylum regime, showing the impact this regime has on responsibility sharing. We will also analyze the discourse on the issue of responsibility sharing, however limited in scope it is. For many reasons, there has not yet been a comprehensive discussion, whether in Israel or elsewhere in the region, on responsibility sharing. Nevertheless, we believe that responsibility sharing is one of the pillars of refugee protection in general, and, more specifically, we believe that it is a key concept according to which the asylum regime should be organized.

This discussion emerges from an awareness of the fact that Israel is in a unique geopolitical situation. Having a relatively long land border with Africa, Israel is a destination to which many African refugees can walk. Being the only democracy in the region and having a strong economy (both in absolute and relative terms) might make Israel a preferred destination. Additionally, Israel is situated between several Muslim and Arab states, some of which are labeled as enemy states to Israel, which might raise (genuine or fabricated) security issues. 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.\textsuperscript{19} However, when we essentialize these geopolitical considerations, we see that Israel is in fact in a similar situation to that of many other developed countries. Many countries, just like Israel, fear

\textsuperscript{15} See below, section four.

\textsuperscript{16} On the geographic restrictions, see the petition in African Refugee Development Center v. The Ministry of Interior, HCJ 5616/09 and the state’s preliminary response to the petition (on file with authors). Recently, the geographical restrictions were lifted due to massive public pressure and the complaints of the suburban municipalities that they had to shoulder a disproportionate share of the burden. Nonetheless, the government has announced that it reserves the right to re-impose the restrictions whenever they deem necessary.

\textsuperscript{17} Tally Kritzman-Amir, \textit{Otherness as the Underlying Principle of Israel’s Asylum Policy} (forthcoming).

\textsuperscript{18} In several discussions with government officials, the idea that Israel should prevent a “pull factor” by toughening its asylum norms was mentioned.

their democratic regimes and boosting economies might attract immigrants of different sorts, are troubled by security and global “terrorism-related” concerns, and attempt to minimize their share of global responsibility and contain refugees to the Global South.\(^{20}\)

In this sense, the case of Israel is an interesting test case from which we can generalize conclusions on the attitudes and policies of Western countries about responsibility sharing.

We will begin our discussion of responsibility sharing with a general discussion of its moral foundation, in an attempt to explain the philosophical basis of the argument that responsibility for the refugees of the world should be shared. As we will elaborate, there are different philosophical justifications for sharing responsibility rather than allocating it arbitrarily. Following this discussion, we will present the current international law norms on responsibility sharing and show that they are relatively few, general, and ineffective. We will also discuss the practices that states have adapted to share responsibility, give a few examples of some ad hoc models that have been developed, and evaluate their success. We will then move on to examine the Israeli context of responsibility sharing, looking at both discourse and policies to understand Israel’s position fully. We will conclude with suggestions as to how responsibility sharing could be administered better, with the help of the court.

1. On the Morality and Reality of Responsibility Sharing

The immigration of refugees imposes a responsibility on host societies. States receiving refugees must expend resources to process their asylum requests and ensure their assimilation and protection by providing the refugees with housing, jobs, an education, and so on.\(^{21}\)

Usually, there is no particular moral justification as to why one specific state and not another should bear the externality of the refugees from State X. Refugees’ movements are uneven throughout the world for morally arbitrary reasons. Refugees tend to flee to states that are located close to their countries of origin; they often manage to get to places where there is an existing community of refugees from their nationality in order to make their assimilation easier; they prefer to go to places where their national language is spoken; they are unable to afford airfare; and so on.\(^{22}\)

As a result of these morally arbitrary reasons, most refugees immigrate to poor and unstable neighboring countries,\(^{23}\) imposing an additional burden on their politics and economies.\(^{24}\)

For


\(^{23}\) However, this situation could change in the future as globalization is spreading and it gets easier and cheaper to move from one place to another.

example, crises in Africa, Asia, and Latin America have resulted in a mass influx of immigrants from one poor country in turmoil to another poor country in turmoil. Most of the refugees from Sudan, Eritrea, Ivory Coast, and the other nationalities of origin of the refugees in Israel end up in Chad, Ethiopia, Egypt, Libya, and other poor African countries, rather than making it to the more wealthy, Western countries. The result is that the least politically and economically capable countries are forced to provide for the neediest immigrants and to share the greatest part of the responsibility. This phenomenon is coupled with the trend of Western countries toughening their immigration and asylum laws.

The arbitrary nature of the distribution of responsibility and the consequences it entails raise moral concerns. Additionally, assuming a shared responsibility for refugee migration would be beneficial to world order and global security and help states better plan their immigration policies. Finally, this planning would benefit refugees, who could rely on a more organized and substantial system of protection. Since we have already discussed the morality of responsibility sharing extensively elsewhere, we will only briefly mention the different moral considerations in this article.

The need for responsibility sharing in the context of refugee migration is endorsed by a number of theoretical schools. Feminist theorists of international law adopting the ethics of care approach would perceive the responsibility-sharing debate in the context of refugees to be erroneous in that it maintains an “us” versus “them” distinction, rather than holding a more relational approach and looking at the responsibilities of all states. Such theorists argue for a “softer” perception of states as units for the redistribution of wealth. In fact, they would claim that this discussion distances countries that receive immigrants, the North, from the immigrants’ countries of origin, the South, without acknowledging the North’s complicity in the environmental, economic, and political

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27 Cook, id.


31 On the ethics of care approach, see, e.g. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

destabilization of the South.\textsuperscript{33} The responsibility, they would argue, need not be divided among states in a mathematical manner using harsh criteria, but rather should be shared by states in a more generous and flexible fashion.

Alternatively, according to the utilitarianist school of thought, utility is likely to increase if states cooperate\textsuperscript{34} with each other to share responsibility for the protection of refugees. In other words, cooperation could lead to a responsibility-sharing regime under which responsibility for each refugee would be borne by the state whose utility declines the least as a result.\textsuperscript{35} Generally speaking, due to the principle of diminishing marginal utility, utility will, in fact, accumulate under a fairer regime of responsibility sharing in refugee protection.\textsuperscript{36} This is also, as Joseph Carens puts it, because “the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.”\textsuperscript{37} Thus, utilitarianism seems to support responsibility sharing in the context of refugee protection.

The most complex analysis of responsibility sharing in the context of refugees is offered by distributive justice theoreticians. One interesting approach is that of “cosmopolitan egalitarianism.” Cosmopolitan egalitarianists suggest that John Rawls’s principles of justice\textsuperscript{38} should be applied internationally,\textsuperscript{39} arguing that since nationality is

\begin{footnotesize}
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\item James L. Hudson, The Philosophy of Immigration, 8 J. LIBERTARIAN STUDIES 51, 52-53 (1986).
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a morally arbitrary trait and therefore should remain behind “the veil of ignorance,” states have the same compelling duty towards noncitizens as they have towards their own citizens. If, unlike Rawls seems to imply, states are not perceived as “self-contained,” then there is support for thinking of an international original position, where the principles of justice apply. Therefore, according to Rawls’s principles of justice, in the international sphere, wealth should be distributed to maximize the benefits for the least well-off persons and states. Some of scholars of this school also make the case for open borders and cosmopolitan egalitarianism. The implications of this on a responsibility-sharing regime are that the regime should work to the advantage of the least prosperous countries and the least prosperous refugees.

A different take on responsibility sharing is offered by Miller, who, while calling this a problem of “remedial responsibility,” argues that agents should be held remedially responsible for situations when, and to the extent, that they were responsible for bringing those situations about . . . [W]e look to the past to see how the deprivation and suffering that concern us arose, and as we establish that, we are then able to assign remedial responsibility.

Miller believes that the moral responsibility, rather than merely the causal responsibility, of the agent answerable for the deprivation and suffering should affect the assignment of

(Thomas W. Pogge ed., 2001). Other philosophers support the above-mentioned conclusion that there is no justification for applying standards of justice in the global sphere given the absence of global governance. Nevertheless, much like Rawls, they maintain that this should not be interpreted as supporting “ethical egoism,” and they do support offering some form of humanitarian assistance (whether provided by governments or by international NGOs) to minimize global poverty, regardless of questions of our conception of justice. See Thomas Nagel, The Problem of Global Justice, 33 PHIL. & PUB. AFF. 113, 118-119, 128, 132 (2005). See also Michael Blake, Distributive Justice, State Coercion, and Autonomy, 30 PHIL. & PUB. AFF. 257 (2002); Stephen Macedo, What Self-Governing Peoples Owe to One Another: Universalism, Diversity and The Law of Peoples, 72 FORDHAM L. REV. 1721 (2004).

Timothy King, Immigration from Developing Countries: Some Ethical Issues, 93 ETHICS 525, 527 (1983).


Compare this with the idea of insurance introduced by RONALD DWORKIN, SOVEREIGN VIRTUE 331-340 (2000).at 331-340. Dworkin discusses the possibility of insurance as a substitute for welfare policies, although his discussion is entirely unconnected to immigration. The decision to take out insurance is made without awareness of the actual risk to one’s employment, only with respect to one’s fears and willingness to take risks. The idea of insurance can be applied at the international level – each country will decide how willing it is to face the risk of a mass influx of immigrants, but it will not know whether there is any chance of this risk actualizing. Japan, which values its social homogeneity, likely will be willing to pay more to insure itself against migrants. Israel, which values its Jewish character, might do the same. Other countries might not. For other discussions on the concept of insurance in the context of responsibility-sharing see, e.g. Thielemann, supra note 35.

The rationales behind the principle of remedial responsibility are somewhat similar to those of tort law. David Miller, Distributing Responsibilities, 9(4) J. OF POL. PHIL. 453, 455 (2001).
remedial responsibility. For example, a specific state should assist refugees if its policies contributed to their situation, either by acting affirmatively or by refraining from taking positive action.

Furthermore, Miller maintains that remedial responsibility should be assigned to a specific agent based on its superior capacity to end a morally concerning situation. Miller would therefore argue that in the context of refugee policy, the most appropriate state to bear the responsibility of assisting refugees is the one that has the best capacity to do so. Miller suggests applying this principle only after identifying those agents that have a special responsibility for causing refugee flight.

Miller also mentions the communitarian principle, under which agents feel a greater sense of responsibility towards those with whom they share communal ties as compared to those with whom they do not. However, Miller recognizes that this principle cannot be used for all responsibility-distribution purposes because there may be circumstances where no specific agent has communal ties with the victim population and there may be occasions in which an agent with no communal ties is the only one in a position to assist. Additionally, this principle does not help to determine which state within a community is in the best position to be held responsible. So, in many circumstances, the communitarian principle may prove to be not very useful.

In sum, it seems that there are numerous moral grounds on which responsibility sharing can be based. These considerations should be taken into account in any evaluation of the international legal scheme for responsibility sharing or in any analysis of the actions of different countries – Israel included - with respect to responsibility sharing.

2. Responsibility Sharing under Current International Law

Despite the many moral considerations according to which the arbitrary division of responsibility seems problematic, the current international framework of refugee law sets no guidelines, at least not explicitly and not in the form of “hard international law norms.” Consequently, responsibility is allocated between states quite arbitrarily, by an

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45 Miller explains that moral responsibility is a concept that is sometimes narrower and sometimes broader than causal responsibility. See id. at 457.
46 Often it is difficult to draw the line as to what constitutes moral responsibility. See id. at 457-459.
47 Id. at 460-461.
48 Id. at 460-462.
49 Id. at 462.
50 Id.
51 Id. at 462-464.
52 Id. at 463.
53 Unlike international “hard law,” “soft law” is a body of standards, commitments, joint statements, resolutions, and declarations that are not considered binding international law but set agreed guidelines or statements of common positions and may serve, in some cases, as the basis for a gradual formation of customary international law or treaty provisions. ANTONIO CASSESE, INTERNATIONAL LAW 196-197 (2nd ed., 2005). Some scholars do not accept this binary division of international norms into “soft” and “hard” law and argue that the “softness” of international law should be viewed as a continuum. Classification, according to some views, is not based solely
amorphous principle some call “accidents of geography.” While the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees provide both the substantive criteria for determining the beneficiaries of refugee protection and the minimal measures of protection that must be afforded to them, these instruments do not address the question of who must provide such protection and the associated rights. While international law is certainly no stranger to the general idea that protection should take some form of sharing between states, this principle is framed in a loose, highly generalized, and non-binding manner.

To start with, the fourth paragraph of the preamble to the Refugee Convention contains the passage: “considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation (emphasis added).” This statement, however, merely reflects a recognition of a certain state of affairs. Not only does the preamble not set specific rules as to how to allocate the duty to protect, but it is so vague that it does not even offer any substance to the loose notion of “cooperation.” Cooperation in international relations may take many forms, from consultation, sharing of information, or financial assistance to allowing the resettlement of refugees in wealthier countries. The preamble offers no clue as to which of these the framers of the Refugee Convention had in mind.

While the Refugee Convention fails to introduce the concept of responsibility sharing in explicit terms, numerous other “soft law” instruments overtly address this principle. The main source in which the principle of burden or responsibility sharing is mentioned is the Conclusions of UNHCR’s Executive Committee (EXCOM).

Examining the EXCOM conclusions reveals that since 1990 there has not been one single annual session in which EXCOM has not repeated the principle of burden sharing.

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on the degree to which they are binding, but also on the degree of delegation of authority and the degree of precision they entail. See, e.g. Kenneth W. Abbot & Duncan Snidal, Hard and Soft Law in International Governance, 54 International Organization 421, 423-424 (2000).


55 Refugee Convention, supra note 1, art. 1(A).

56 Id. at arts. 2-34.

57 Id. at preamble, fourth paragraph (emphasis added).

58 In order to understand the significance of the EXCOM conclusions, it is essential to understand EXCOM’s role. EXCOM was established by the UN Economic and Social Council in accordance with article 4 of the Statute of the Office of the United Nations High Commissioner for Refugees (UN Doc. A/RES/428(V), Dec. 14, 1950) and General Assembly Resolution 1166 (XII) of Nov. 26, 1957. EXCOM is composed of representatives of signatory states (currently 76 states) that show interest in and devotion to solving the problem of refugees and assumes the function of advising the High Commissioner. While its conclusions do not reflect binding law, the wide membership in it, as well as the fact that conclusions are adopted by it unanimously, gives its conclusions a special status as a source of interpretation of international refugee law. See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 112-113 (2005); UNHCR, Executive Committee Membership, available at http://www.unhcr.org/excom/40111aab4.html.
Numerous EXCOM conclusions speak of “international solidarity” and the need to create effective arrangements that would promote the principle of burden sharing.\footnote{To mention only the most recent of the 31 EXCOM conclusions that address the issue of burden and responsibility sharing, see Conclusion no. 102 (LVI), 2005, para. (k) & (l); Conclusion no. 104, 2005, preamble & para. (r); Conclusion no. 105 (LVII), 2006, preamble and para. (l); Conclusion no. 107 (LVIII), 2007, preamble & para. (g)(vii); Conclusion no. 108 (LIX), 2008, para. (j) & (m).}

Likewise, the United Nations General Assembly has acknowledged the commitment to responsibility sharing in several of its resolutions. One of the latest resolutions on this issue was adopted by the UN General Assembly in January 2008, emphasizing “the importance of active international solidarity and burden- and responsibility-sharing”\footnote{UN General Assembly Resolution no. 62/124, January 24, 2008, UN Doc. A/RES/62/124, para. 6.} and urging states “in a spirit of international solidarity and burden- and responsibility-sharing, to cooperate and to mobilize resources with a view to enhancing the capacity of and reducing the heavy burden borne by host countries, in particular those that have received large numbers of refugees and asylum-seekers.”\footnote{Id. at para. 27.} In another recent resolution that the UN General Assembly adopted in January 2006, it reaffirms “international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and burden- and responsibility-sharing among all States.”\footnote{UN General Assembly Resolution no. 60/128 Assistance to Refugees, Returnees and Displaced Persons in Africa, UN Doc. A/RES/60/128, para. 12 (Jan. 24, 2006).} Numerous additional UN General Assembly resolutions repeat these principles.\footnote{To mention just a small sample of UN General Assembly resolutions expressing the principle of burden sharing in several manners, see UN General Assembly Resolutions no. 57/187, 6 February 2003, UN Doc. A/RES/57/187, para. 9; no. 55/2 United Nations Millennium Declaration, 18 September 2000, UN Doc. A/RES/55/2, para. 26; no. 55/74, 12 February 2001, UN Doc. A/RES/55/74, para. 9 & 25; no. 52/103, 12 December 1997, UN Doc. A/RES/52/103, para. 6 & 17; no. 46/106, UN Doc. A/RES/46/106, 16 December 1991, preamble and paras. 9, 17 & 18; no. 34/60, 29 November 1979, UN Doc. A/RES/34/60, para. 2 & 4. See also the Declaration on Territorial Asylum, General Assembly Resolution no. 2312 (XXII) of 14 December 1967, UN Doc. A/6716.}

It should be noted that the “softness” of these international law instruments is multi-faceted – in addition to their non-treaty and non-binding character, they lack, as does the preamble to the Refugee Convention, the preciseness that would allow them to be implemented in concrete situations. All EXCOM conclusions and UN General Assembly resolutions on this issue generally “recall,” “mention,” “notice,” “reaffirm,” “emphasize,” or “stress” (or other similar verbs) the general idea of responsibility sharing, but do not give any substance to the notion. Repeating a concept, which is framed in general terms, may be a good place to begin when attempting to encourage the internalization of a novel idea by the international community. However, after over 50 years of a general discourse of responsibility sharing, it could be expected that EXCOM would go beyond these general terms. It seems that the bottom line of EXCOM discussions on responsibility sharing consistently results in the same conclusion – states

\footnote{Id. at para. 27.}
should talk; more discussion and negotiation is needed; more cooperation is needed in order to achieve cooperation.

It may be added that the UNHCR has principally acknowledged the need to create a comprehensive framework, which would address in legal terms issues of responsibility sharing. An initiative, which was announced in September 2002 and was named the “Convention Plus Initiative,” strived to create international binding agreements concerning responsibility sharing. However, three years later, the initiative was terminated without reaching its goals.\textsuperscript{64}

While international law on the global level has not gone, so far, beyond loose notions of responsibility sharing, European states have created in the past two decades certain rules of responsibility allocation amongst themselves and in relation to third-party states. Responsibility-allocation principles in Europe were initiated as a result of the 1985 \textit{Schengen Agreement} on the abolition of internal borders,\textsuperscript{65} which led to a demand concerning migration controls between those states whose internal borders were abolished and was followed by various implementing instruments.\textsuperscript{66} These instruments first took the form of international agreements,\textsuperscript{67} and later European Union measures,\textsuperscript{68} which resulted in a series of relatively clear principles regarding the allocation of responsibility over refugees and asylum seekers present in the European Union, as well as guidelines for the return of asylum seekers to “safe third countries.”\textsuperscript{69}

We should stress that while the European system sets clear rules on the allocation of responsibility, it cannot be defined as a system of responsibility sharing. The stated purpose of the European system is hardly the creation of a balance of efforts between European states or between them and third states, but rather its purpose is merely to act as a means of controlling the movement of refugees due to the diminishing significance of national borders. The system it creates is based on the morally arbitrary concept of responsibility allocation to the first state of arrival. As such, the system hardly leads to the sharing of responsibility, but rather to the shifting of burdens from “Old Europe,” the Western and Northern European states, to the states of Eastern and Southern Europe (which are typically the states of first arrival), and from these states to non-European

\textsuperscript{64} For a thorough survey of the initiative and an analysis of the reasons for its failure, see Marjoleine Zieck, \textit{Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited}, 21(3) International Journal of Refugee Law 387 (2009).
\textsuperscript{67} Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1995, OJ [1997] C254/1-12 (also known as the Dublin Convention).
\textsuperscript{68} Council Regulation 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an asylum application lodged in one of the Member States by a Third-Country National, OJ [2003] L50/1-10 (also known as the Dublin Regulation or Dublin II).
The only EU instrument that may truly be seen as striving to advance the goal of an equitable sharing of responsibility is the 2001 Temporary Protection Directive, which purports to facilitate the “transfer” of refugees in cases of overburdened states. Nevertheless, this directive applies only in the relatively rare occasions of mass influx into European states, it does not create substantive and enforceable rules on responsibility allocation, and it has never been acted upon so far.

A recent interesting development concerning responsibility sharing, which goes beyond mere rules of allocation, is the issuance of a communication by the European Commission in September 2009 that introduces the Joint EU Resettlement Programme. This program, once it becomes operational, is meant to serve as a basis for coordination between European states regarding resettlement of refugees present in non-European states and for a common setting of resettlement priorities. However, this mechanism, even once put into place, will not oblige states to receive refugees and will leave the decision of whether or not to absorb refugees to the discretion of each Member State.

In conclusion, international law at its present stage, be it on the global level or on the regional level, contains no clear and legally binding guidelines for responsibility sharing. While the idea of responsibility sharing is embedded in several of the modern instruments of international refugee law, its level of abstractness, non-binding form, and limited scope, leave the concept of an equitable distribution of responsibility unrealized.

3. Responsibility Sharing in Practice

Under the current international regime, all state practices that express the principle of responsibility sharing are voluntary and considered to be a matter of “charity,” not obligation. Resettlement in small numbers on an ad hoc basis takes place

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72 It may be added that in the limited context of mass influx, several decisions by EU institutions encouraging responsibility sharing have been adopted over the years. See, e.g. Council Decision of 4 March 1996 on an alert and emergency procedure for burden sharing with regard to the admission and residence of displaced persons on a temporary basis, OJ [1999] C63/10-11, Article 4; Council Resolution of 25 September 1995 on burden sharing with regard to the admission and residence of displaced persons on a temporary basis, OJ [1995] C262/1, Preamble & Article 4. However, Sidorenko notes that both decisions were not implemented even in the Kosovo crisis in 1999. OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM: BACKGROUND, CURRENT STATE OF AFFAIRS, FUTURE DIRECTION 109 (2007).

constantly, as one form of responsibility sharing. Each year, a small number of states accept a certain quota of refugees for resettlement. These schemes, as positive as they are, encompass only a small percentage of refugees in need of a lasting solution. In 2008, for instance, 88,000 refugees, less than one percent of the world’s refugees, were resettled.\(^74\) Such sporadic, decentralized, sometimes almost random forms of resettlement in a world of mass displacement appear to be more a matter of symbolic generosity that can hardly be counted towards the true alleviation of the burden from states unable to provide effective protection. In a way, these forms of resettlement even risk providing justifications for the current state of affairs by creating the illusion that responsibility sharing actually exists.

To contrast the decentralized manner in which resettlement now takes place, it is useful to examine the resettlement scheme of Indo-Chinese refugees from the 1970s to the 1990s. This scheme, which may be considered an example in which concentrated action was taken by a group of states, reflects the possible conceptualization of refugee crises as coming under the common responsibility of states that are not necessarily directly affected by the flight of refugees. Such schemes, however, are quite rare.

The practices of Indo-Chinese refugee resettlement are quite unique in the sense that they reveal an experiment in concerted effort to address a refugee crisis through coordinated action of the international community that goes beyond symbolic gestures. It therefore allows us to examine the viability of such international efforts and evaluate what forms of cooperation may take place in the future in other contexts. Due to the uniqueness of this plan of action, we shall address it in a relatively extensive manner.

Following the fall of Saigon in 1975, a steadily increasing number of Indo-Chinese refugees arrived in Southeast Asian countries of asylum. The refugees reached an alarmingly large number in 1978.\(^75\) As a response to the increasing burden, many of these states simply pushed the refugees back to sea.\(^76\)

In 1979, the UN General Secretary initiated a conference in which 65 states participated, which led to an agreement that designated Southeast Asian countries as states of first asylum and third states, mostly Western ones, as those responsible for providing durable solutions.\(^77\) That same year, Vietnam and the UNHCR signed a memorandum establishing the Orderly Departure Plan (ODP), allowing the legal emigration of Vietnamese for what was defined in the memorandum as “humanitarian reasons.”\(^78\) Intended to reduce the number of clandestine and dangerous departures by sea and to reduce the number of asylum seekers arriving at Southeastern states, in its first 10 years the plan facilitated the departure of some 160,000 persons to Western countries.

\(^77\) See Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the UN at Geneva on 20 and 21 July 1979, UN Doc. A/34/627.
However, by the end of the 1980s, when the number of asylum seekers was again on the rise,\textsuperscript{79} exceeding the resettlement offers by Western States, Southeast Asian countries once again returned to their policies of pushing asylum seekers back to sea.\textsuperscript{80} This led to the formation of the Comprehensive Plan of Action (CPA) in 1989.

In the CPA, participating governments committed to several measures that were meant to be applied in a coordinated manner, including the shift to individual (rather than group-based) protection and the deterrence of emigration outside the ODP program. Although no criteria for the allocation of responsibility were decided upon, the developed states, which were parties to the CPA, took it upon themselves to resettle in their territories all asylum seekers who were determined to be eligible for asylum under the criteria of the Refugee Convention.

Assessments of the CPA vary significantly.\textsuperscript{81} We believe that the CPA could be seen as an imperfect model for a wider form of burden sharing as a legal norm. Its most basic elements are compelling; namely, the creation of a scheme that involves the cooperation of governments in a structure of interdependency that requires all parts to fulfill their commitments in order to pursue their self-interests. However, it should be kept in mind that the principles of the CPA can only be referred to as a starting point in any future sharing scheme, mainly for reasons not noted by the above-mentioned critics. Beyond its generalized principles, the CPA does not present a roadmap for those interested in wider forms of responsibility sharing. The CPA introduced clear rules on the allocation of responsibility between two groups of states: first, temporary protection and refugee status determination in the territory of states of first arrival; and second, resettlement and permanent asylum in the territory of developed States. However, the CPA did not address the other extremely difficult questions that will arise in a truly

\textsuperscript{79} The increasing number of refugees fleeing Vietnam is explained mainly by the suspension of the ODP in 1987, continuing policies of discrimination in Vietnam, and the deteriorating economic conditions there. Bronée, \textit{supra} note 75 at 536.

\textsuperscript{80} Helton, \textit{supra} note 76 at 113-115

\textsuperscript{81} Some pronounce the CPA a successful scheme of burden sharing. \textit{See} Schuck, \textit{supra} note 25 at 254-260. Others condemn it. \textit{See} James C. Hathaway, \textit{Labeling the “Boat People”: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees}, \textit{15 HUMAN RIGHTS QUARTERLY} 686 (1993). Hathaway argues that the major flaw in the CPA was the refusal of Western states to resettle most of the refugees due to the false assumption that they are “economic migrants.” He also condemns the fact that the CPA adopted repatriation as a major strategy and even stated that it aspired to eventually make it the only form of solution stands. Hathaway argues that while the CPA indeed brought about a sharing of the responsibility faced by the Southeast Asian states of first asylum, that sharing was conditional – only if the total burden were reduced dramatically would Western states agree to accept responsibility. \textit{Id.} at 688-200. Others do not share this assessment of the CPA. Towle, for instance, believes that it should be considered a rather successful experiment in burden sharing. Towle believes it succeeded in creating cooperation between countries of origin, first asylum, and resettlement. Moreover, Towle argues that it creates interdependency between the actions of all three kinds of states when each group knows that the failure of one of the pillars of the program will bring about the collapse of all its parts. Additionally, Towle addresses the fact that it did succeed in achieving one of its major goals – the curtailing of “push backs” of arriving asylum seekers to sea. Richard Towle, \textit{Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: an Instrument of International Burden-Sharing?} \textit{18 INT’L J. OF REFUGEE L.} 538, 562 (2006).
comprehensive scheme that attempts to deal with responsibility sharing other than in an *ad hoc* manner. Specifically, the CPA does not address the question of determining allocation principles between resettling states. Such a model leaves a wide gap in which renegotiation must constantly take place and, despite its practicability in the context of the CPA and perhaps in other specific emergency situations where a willingness to resettle refugees may be found, such constant renegotiation leaves an opening for disagreements that may result in the collapse of a sharing regime. These partial arrangements, which drew much criticism, are not based on legal standards or a strong tradition of cooperation and responsibility sharing among states. Therefore, they cannot simply be applied to other refugee situations, including the one in Israel.

4. Responsibility Sharing and the Israeli Context

Now that we have explained the (lack of) international law framework on responsibility sharing and the different practices around the world, let us turn to the Israeli context of responsibility sharing. We will attempt to explain the discourse on responsibility sharing, as it can be understood from various statements of high ranked officials before the Parliament, courts, and press. We will also describe a few different Israeli policies regarding asylum seekers, and the impact of these policies on responsibility sharing.

The official Israeli discourse relating to responsibility sharing may explain, at least in part, some of the Israeli policies, which will be examined later. This discourse, as we will show through a few indicative examples, is characterized by: a lack of reference to Israel’s international law obligations towards refugees; merely a vague reference to the moral obligation of Israel to those refugees; a general reluctance to share any of the responsibilities and burdens that refugee protection may entail; a belief that other states (either developed or developing ones) should bear responsibility for the refugees present in Israel; disinformation about the magnitude of the phenomenon of asylum seeking; and disregard of the responsibility taken by other countries in the region.

The highest ranking official who addressed the issue of responsibility sharing (most likely unaware of the fact that he was touching on this issue) was Prime Minister Ehud Olmert in a discussion that took place in the Israeli Parliament in October 2007.\(^{82}\)

The prime minister started by labeling all 5,000 asylum seekers who entered Israel in 2006 to 2007 as “economic migrants,” except for the 498 Darfurian refugees then present in Israel, although the vast majority of these refugees did not undergo status determination to refute or confirm this claim.\(^{83}\) Prime Minister Olmert then went on to describe an oral agreement between himself and Egyptian President Hosni Mubarak, in which President Mubarak guaranteed not to deport persons returned by Israel to countries where their safety might be compromised.\(^{84}\) Next, the prime minister elaborated on plans to raise funds all over the world in cooperation with other countries in order to establish camps for asylum seekers outside the territory of Israel.\(^{85}\)

\(^{82}\) Knesset Plenum Protocol, October 17 2007.

\(^{83}\) Knesset Plenum Protocol, October 17 2007 at 45.

\(^{84}\) Id. at 47.

\(^{85}\) Id. at 49-50.
responsibility for protection, the prime minister, after addressing all asylum seekers as “economic migrants” again, stated that

…the idea that we have a humanitarian duty to take care of every person who infiltrates Israel is an exaggeration – not only a wild one but also an irresponsible one. I can imagine, and so can each one of you, those who will stand here in five years and will say how irresponsible and reckless we were when we created a problem of tens of thousands of persons with children and family members, with the entire humanitarian distresses that will be created as a result, that have nothing to do with us. What do they have to do with us?86

In March 2008, according to media reports, Olmert referred to the arrival of asylum seekers as a “tsunami that must be stopped at any price.”87 At the same meeting, the prime minister scolded the Ministry of Foreign Affairs for its failure to find African states willing to absorb asylum seekers who reached Israel.88

Another expression of the position with regards to responsibility sharing taken by the Israeli government was brought before the Israeli Parliament by Minister of Interior Roni Bar’on in May 2006, a time at which only a few hundred asylum seekers had entered Israel through the Egyptian border.89 Yet even this early on, the “fear of numbers,” that is, the fear that the burden of refugees on Israel would be overwhelming, was present in the discourse and led to disinformation about the actual numbers of refugees. Nonetheless, the minister of interior stated that,

[i]t is true that the war, the cruel hard civil war in Darfur in Sudan, is a problem which is difficult to observe, especially to a people as us. But we must look at the numbers. … The problem is that today there are three million Sudanese refugees wandering around in Egypt. … Dozens of them, perhaps almost hundreds, have already infiltrated Israel, and their number is increasing, the phenomenon is not stopping. Some of them even applied for asylum in Israel. The UN’s attempts to find a third country for the resettlement of Sudanese asylum seekers are limited. The UN cannot properly deal with this issue, and if we do not stop it at the border or by creating a situation in which the infiltrators will not want to put themselves in, we are inviting a flood…90

Describing Israeli policy with regards to denying access to asylum seekers, the minister of interior went on to describe the burden-shifting games played by Israel and Egypt at the border: “The problem is that there is no cooperation by Egypt. You know, there are even instances when we try to push them [asylum seekers] back, and they [the Egyptians] push them back to our side. It is a game of hand wrestling at the border, on the refugee.”91

86 Id. at 46.
87 Ruti Sinai & Barak Ravid, The PM ordered that infiltrators be returned to Egypt immediately after their capture, HAARETZ, Mar. 24, 2008 (Hebrew).
88 Id.
90 Id. p. 96-97.
91 Id. at 98.
As we examine the discourse on responsibility sharing, we can identify contradictions embedded in the statements of officials. While Israeli officials do not go so far as to claim that refugees should simply be returned to persecution in their countries of origin (thus acknowledging that some state or states must assume responsibility for their protection), it appears that they make an unexplained (and unfounded in international law or moral theory) distinction between those states whose role is to bear the burden and responsibility for refugees and those states who should not bear such responsibility – such as Israel. As the speeches given by the prime minister and the ministry of interior in the parliament illustrate, Israeli officials simply invoke what they perceive to be Israel’s self interest as the reason why Israel should not take upon itself part of the responsibility for refugees. While such reasoning is obviously a convincing political tool with regards to internal public opinion, it hardly deals with questions concerning the allocation of responsibility to a third state rather than to Israel, as other states may invoke similar considerations pertaining to their self-interest.

Similarly, an up-close look at Israel’s policies shows us that some operate with the underlying assumption of responsibility of the first countries of origin, whereas others reflect indifference to responsibility-sharing considerations, and a third kind includes policies that consider responsibility-sharing considerations to some extent.

First, let us examine the policies that assume that responsibility lies with the first country of asylum. A clear example of such a policy is the “Hot Return Policy.” According to this policy, Israel returns to Egypt asylum seekers who penetrated through the Israel-Egyptian border, as long as they are intercepted shortly after their entry into Israel nearby the border. While it is unclear how many asylum seekers have been returned to Egypt under the “Hot Return Policy,” recent reports of the state to the Supreme Court mention that over 200 refugees have been returned to Egypt from Israel in this manner. While there are no empirical findings on this matter, it is possible to assume that through this policy Israel does not only impose the burden of protecting the returned asylum seekers on Egypt, but it also deters other refugees from crossing the Egyptian border into Israel. The legality of this policy was challenged before the Supreme Court in a petition that is still pending. In its statements to the Supreme Court, the state argued that the policy does not violate the duty of non-refoulement, since Israel is not returning the asylum seekers to their countries of asylum, and since Egypt is a safe third country. In fact, in a recent response to a petition to the Supreme Court, the state argued that,

Even with respect to the small minority of those infiltrating the border who are eligible for asylum [...], international law clearly states that the first ‘safe’ country of asylum for them is Egypt – in which many of them started the process of applying for refugee status – and it is Egypt which is obligated to absorb them and to grant them temporary or permanent

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93 HCJ 7302/07 Hotline for Migrant Workers et al. v. GOI, Response of the respondents to petitioners’ request for an interim order, 17 September 2009, para. 22 (Hebrew).
94 HCJ 7302/07 Hotline for Migrant Workers et al. v. GOI.
We would like to suggest a threefold response to these arguments. First, it seems that Egypt may not be considered a safe third country, given the recent refoulement of asylum seekers; the lack of a fully functioning independent asylum system; the general lack of commitment to international human rights; the frequent reports on discrimination and detention of asylum seekers; the rising number of shooting incidents of refugees near the Israeli-Egyptian border; and the lack of access of refugees to social and economic rights.

Second, we fail to find a reason (whether within the arguments of the state or elsewhere in legal norms or moral arguments) to attribute weight to issues such as proximity to the border or duration of stay. Under international law, a state has a duty to respect the human rights of people who are under its effective control. As such, Israel has a duty of non-refoulement towards everyone within its territory, irrespectively where and when they are found within this territory as well as persons at the border who seek to enter the country. It seems unclear whether Israel has indeed refrained from refouling persons to Egypt, since its procedure of interviewing asylum seekers who are penetrating the border is insufficient to verify whether a person does or does not have a well-founded fear of being persecuted in Egypt. Additionally, it seems that the safe third country

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95 HCJ 7302/07, Response of the respondents, 17 September 2009, supra note 92, para. 67.
96 On the refoulement of asylum seekers by Egypt, see UNHCR Global Report 2008, 96 (June 2009).
99 Human Rights Watch, supra note 97, 61-72.
100 For one of the most recent of such incidents, see Amnesty International, Four Migrant Shot Dead by Egyptian Forces Close to Israel Border, 10 September 2009, available at http://www.amnesty.org/en/news-and-updates/four-migrants-shot-dead-egyptian-forces-close-israel-border-20090910.
101 Katarzyna Grabska, Marginalization in Urban Spaces of the Global South: Urban Refugees in Cairo, 19(3) JOURNAL OF REFUGEE STUDIES 287.
102 On the implications of this on refugees see, e.g., Hathaway, supra note 58, 166-167.
104 The Israeli military has issued written instructions with regard to questioning “infiltrators” who are caught near its border with Egypt before returning them to Egypt. These instructions are supposedly intended to determine whether returning a person to Egypt would place her in danger. However, these instructions lack the most fundamental guarantees, which are at the heart of any procedure intended to determine whether a person is a refugee or not. The questioning of such “infiltrators” is done immediately after such persons are captured, they last only a few minutes, they lack the depth, professionalism, and knowledge required from persons performing refugee status determination procedures, they are performed by soldiers, and there is no possibility of challenging the decision made by the military in the field. These instructions were first introduced in IDF Permanent Operational Order no. 1/3.000 “Coordinated Immediate Return Procedure”
agreement between Egypt and Israel, to the extent it exists, is an unofficial, unwritten, oral agreement between low-level army officers, and lacks any guarantees.\textsuperscript{105}

Last and most importantly, we believe that adhering to a strict safe third country agreement fails to consider the broader responsibility-sharing considerations that we mentioned above. Generally speaking, as Agnes Hurwitz argues, we believe that “safe third country practices challenge the very foundation of the international refugee regime, which is based on a collective endeavor and commitment to protect refugees[...].\textsuperscript{106} We support Hurwitz’s assertion that “safe third country practices increase the risk of violations of the obligations of a state towards refugees and have a negative impact on interstate relations. By allowing states to dismiss an asylum claim on the grounds that another state could be responsible, safe third country practices raise the risk of refoulement and violations of other international obligations and curtail the fundamental rights of individuals to seek asylum from persecution.”\textsuperscript{107} This is also true in the Israeli context. Israel, in Miller’s terms, has a far better capacity to protect asylum seekers than Egypt given its democratic nature, affluent economy, and human rights tradition. From a feminist perspective, as well as from a distributive justice and a utilitarian perspective, responsibility for asylum seekers should be shared in a manner that imposes a greater burden on Israel, rather than on Egypt.

Other policies Israel implements with respect to asylum seekers reflect indifference to responsibility-sharing considerations. Among these we would like to mention two policies – the exclusion of Palestinian asylum seekers and the exclusion of enemy nationals. As mentioned above, Israel interprets the Refugee Convention as excluding Palestinians from the category of refugees, since, as potential benefactors of the assistance of UNRWA, they are “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.”\textsuperscript{108} Thus, Israel excludes an unknown number of Palestinian asylum seekers, most of whom are persecuted due to their sexual orientation\textsuperscript{109} or due to their suspected assistance to the State of Israel.\textsuperscript{110}

In addition, according to section 6 of the Israeli internal regulations on the treatment of asylum seekers in Israel, 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

\textsuperscript{105} It should be added that on Aug. 11, 2007, shortly after the Israeli prime minister announced the existence of such an agreement, the Egyptian Ministry of Interior issued an announcement denying its existence.

\textsuperscript{106} AGNES HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 5 (2009).

\textsuperscript{107} Id. at 6.

\textsuperscript{108} Refugee Convention, supra note 1 at art. 1D.

\textsuperscript{109} Kagan & Ben-Dor, supra note 11.

\textsuperscript{110} Israel does offer protection to persons who actually collaborated with the Israeli intelligence apparatuses, taking into consideration the risk to their lives in the Palestinian territories and the threat they pose to the Israel public. See, e.g. Anonymous Party v. The Prime Minister, HCJ 6899/07; Anonymous Party v. The Israeli Police, HCJ 4857/07.
posses such status. [...] 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".\textsuperscript{111}

Once again, these two policies result in imposing the burden of protecting refugees, some of whom come to Israel as their first country of asylum, on neighboring countries (given that typically people lack the resources to travel to find asylum outside their immediate area). The policies also deter Palestinians and enemy nationals from arriving in Israel.

The legality of the latter policy of exclusion of Palestinians is currently being challenged before the Supreme Court in a pending petition.\textsuperscript{112} Similarly, a policy concerning the detention of “enemy nationals” with no judicial review was challenged at the Supreme Court.\textsuperscript{113} Here, the main argument of the state was that these policies were justified for security reasons. However, to the best of our knowledge, the state has yet to present information that links asylum seekers to security threats. It seems that, to a certain extent, the Refugee Convention allows the exclusion of refugees on an individual basis,\textsuperscript{114} rather than on the basis of blanket presumptions having to do with their nationality. In fact, the Refugee Convention prohibits any discrimination of refugees, including discrimination on account of their country of origin.\textsuperscript{115}

Once again, we believe this policy is inconsistent with the above-mentioned moral considerations according to which responsibility should be shared. In addition, to the extent that Israel believes that the first state of asylum has the primary responsibility towards the refugees seeking asylum in it, it should see itself as carrying the same obligation to refugees who come to it as a country of first asylum, regardless of their nationality.

To some extent, other policies Israel undertakes that demonstrate similar indifference to responsibility-sharing considerations are policies of unwillingness to provide social and economic rights to asylum seekers and detaining asylum seekers upon entry. These two policies result in a greater burden on other countries that provide more comprehensive protection to refugees and deter refugees from coming to Israel.

\textsuperscript{111} It should be noted that in the 1990s and in the early years of the 2000s, UNHCR indeed assisted in the resettlement of refugees who were considered by Israel to be “enemy nationals.” At the time, this group consisted mainly of Iraqi refugees. However, as the number of Sudanese asylum seekers increased, resettlement from Israel was practically halted, and hardly takes place anymore. In response to a plea from the Hotline for Migrant Workers regarding resettlement, UNHCR responded that the resettlement of minor refugees may take a long while, since “States are not standing in line to dismiss Israel from its obligations” (letter from Miki Bavli, Head of UNHCR Israel to Adv. Yonatan Berman, 21 February 2007, on file with authors).

\textsuperscript{112} On the exclusion of Palestinian Asylum seekers, see \textit{Itzik Avneri v. The Minister of Interior}, HCJ 4487/09 (petition on file with authors). On the exclusion of enemy nationals, see HCJ 3270/06 Anonymous Party v. Head of the Operations Division, IDF.

\textsuperscript{113} \textit{John Does v. The Head of the Operations Unit in the IDF}, HCJ 3208/06 4. This petition focused on the policy of prolonged detention of Sudanese asylum seekers with no judicial review. After over two years of litigation over this issue, the state has agreed abstain from applying the detention mechanisms that prevented detainees from being brought to judicial review.

\textsuperscript{114} Refugee Convention, \textit{supra} note 1 at art. 33(2).

\textsuperscript{115} \textit{Id.} at art. 3.
Finally, we were occasionally able to identify policies within Israel’s asylum regime that do consider responsibility sharing to some extent, albeit in an insufficient manner. One such case is the decision to include and grant temporary status to 600 refugees from Darfur, Sudan. After having received hundreds of asylum seekers from Darfur, and following some international pressure, Israel decided to grant temporary residency to a finite number of them, clarifying that it sees this decision as a way of contributing to the responsibility-sharing efforts of the civilized states. However, it is unclear why Israel concluded that its share of the responsibility solely amounts to granting protection to 600 Darfurians.

In order to grasp the proportion of refugees accepted by Israel in relation to the phenomenon, we shall take a look at some of the figures concerning Sudanese refugees around the globe. The total number of Sudanese persons that UNHCR considers to be “persons of concern to UNHCR” (a category that includes refugees, persons in refugee-like situations, internally displaced persons, asylum seekers whose application is pending, and other sub-categories) was 1,749,536 at the end of 2008. The states that hosted the highest number of Sudanese refugees at the end of 2008 were Chad (267,966), Egypt (10,146), Ethiopia (25,913), Kenya (28,496), and Uganda (56,883). The disproportional share of responsibility taken by Israel through its granting status to 600 Darfuran refugees can also be exemplified by examining the responsibilities taken by other states in the region. African countries host, in total, 2,498,300 refugees and persons in refugee-like situations. When internally displaced persons, asylum seekers, returned refugees, and stateless persons are added, African countries reach the number of 10,731,600 persons under their responsibility. At the same time, Asian countries host 6,300,800 refugees and persons in refugee-like situations, and a total of 13,725,600 persons when the other sub-categories are added. The responsibility taken by Israel is also negligible when compared to the share of refugees and such its immediate neighbors host – Egypt hosts 112,605 such persons; Jordan hosts 501,099; Syria hosts 1,407,949; and Lebanon hosts 50,943. Israel’s willingness to grant status to 600 refugees, believing that this will allow it to rid itself of all other responsibilities to asylum seekers in its territory, pales in relation to these figures.

Revealing another expression of the same attitude with regards to responsibility sharing and the proportion of responsibility Israel believes it should shoulder, Globes, the Israeli leading business newspaper, published in June 2008 a news article entitled “Olmert [then Prime Minister] and Livni [then Minister of Foreign Affairs] Authorize: Israel will Propose African Countries Payments Per Head for 10,000 Refugees.” The

118 Id. at Statistical Annex no. 5.
119 Id. at Statistical Annex no. 22.
120 Id.
121 Id. at Statistical Annex no. 1.
article revealed that the government of Israel has concluded that supplying the 10,000 asylum seekers who were then present in Israeli territory with all their protection needs would be too costly and therefore offered several states, including Kenya, Ethiopia, Uganda, Ivory Coast, and Benin, payments of $1,000 to $1,500 for each asylum seeker these countries would be willing to accept into their territories.

These policies seem to reflect the conflicting stance Israel takes regarding its position in relation to other countries in terms of responsibility sharing. On the one hand, as indicated by the prime minister’s plan to pay off African states in return for their acceptance of asylum seekers, the state of Israel sees itself as belonging to the exclusive club of developed states that should receive a relatively low number of refugees and strives to perpetuate the current state of affairs, in which developing countries carry responsibility for the vast majority of asylum seekers, while developed countries receive no more than a symbolic token of responsibility. On the other hand, as reflected by the minister of interior’s speech in the Knesset, the Israeli Parliament, Israel believes that UNHCR should make efforts to promote the resettlement of asylum seekers from its territory to the territories of other developed states. It seems that Israel places itself in a unique position in the world of responsibility allocation. It expresses two different and necessarily conflicting standards – when it comes to its relations with less developed states, it believes that they, as the neighboring states of refugee-generating countries, should bear responsibility and believes that is is entitled to shift the burden to such developing states. However, when it comes to its relations with UNHCR and other developed states, the state of Israel believes that it is placed in a position similar to that of other states in the region, and thus deserves consideration by developed states, which should accept for resettlement refugees who are in Israel. Thus, the meaning of Israeli officials’ attitudes is that the State of Israel is entitled both to shift its burden back to developing states and at the same time require developed states to share whatever burden is left.

**Conclusion**

The refugee problem is a worldwide phenomenon, which demands the cooperation and participation of all states. As we have shown in Sections 2 and 3 of this article, despite the lack of legal norms to ensure that states do, in fact, contribute to the solution of refugee crises, it is possible to identify attempts (and on occasion – even partially successful attempts) by states to join forces and share responsibility in order to ease the burden on other states. In addition, as described in Section 1, it seems morally essential to share the responsibility for the world’s refugees.

In examining the Israeli case, we see a general reluctance to share responsibility on the part of the Israeli government. The discourse on the refugee problem in Israel is uninformed, and often misinformed. An inspection of high-ranking officials shows that they see the refugees as a burden and a threat to Israel. Some of the Israeli policies on asylum exhibit an unwillingness to assume the responsibility of the first country of asylum, that is, Egypt, whereas other policies simply overlook responsibility-sharing considerations altogether, even when Israel is the first country of asylum. A third kind of policy takes responsibility sharing into consideration, but fails to do so in a sufficient way. We explained all these policies in Section 4.
We do not wish to argue that Israel is solely responsible for the refugees of its region, and naturally other countries, including Western developed countries should share this responsibility as well. The fact that these countries’ share of the burden is relatively small does not excuse Israel’s refusal to share more of the responsibility and increase the responsibility of its neighboring developed countries.

Israel is likely to receive more asylum seekers from neighboring countries and other countries in the region. However, in light of the particularly tense relationship between the states in the Middle East region and the lack of ability to reach a compromise on other fronts, a responsibility-sharing agreement between these countries seems unfeasible. Given the attitude of Israeli officials as reflected in several statements, it seems that there is no real interest in reaching a responsibility-sharing agreement with other countries in the region, to the extent that such an agreement requires Israel to make a proportionate contribution to the solution of the refugee problem (despite an interest in reaching an agreement with states that would relieve the burden from Israel). Therefore, we do not anticipate a political or diplomatic solution in the foreseeable future.

In these circumstances, and despite the lack of a comprehensive infrastructure for responsibility sharing, we believe that the courts can play a significant role in applying responsibility-sharing considerations as it evaluates the legality of the different policies that comprise the Israeli asylum system. Different aspects of these policies are challenged before the Supreme Court or the Administrative Court, giving the courts an opportunity to conduct judicial review over these matters. As the court have done in previous immigration cases, they are capable of considering the broader context of the phenomenon as they analyze the legality, reasonability, and proportionality of different policies. In doing so, the courts would be able to understand whether a certain policy meets the minimal threshold of responsibility-sharing considerations.

This conclusion relies both on the activist nature of the Israeli courts and on international experience. The Israeli courts have proven over the years to take an activist stand in the protection of human rights, including in issues of immigrant rights. Internationally, courts have unified the standards of the asylum systems of their states by conducting comparative research on other the decisions of the courts of other states, thus preventing one state from imposing too much responsibility on the others. This cooperation by the courts reaches its peak within the framework of the International Association of Refugee Law Judges (IARLJ), which seeks to harmonize asylum systems.

123 See, e.g., CA 11196/02 Michael Frudenthal v. The State of Israel. In that case the Court dealt with a trafficking case in light of the global problem of trafficking, referring to international law instruments which were not signed or ratified by Israel. See also HCJ 4542/02 Kav Laoved V. The Government of Israel, ILDC 354 (IL 2002), in which the Israeli Supreme Court weighed into its considerations of Israel’s immigration policy general information about migration patterns, costs and risks.


While we do not believe that the courts should or could initiate a responsibility-sharing scheme for Israel and other countries in the world, we do believe that they are capable of creating the necessary incentives for the Israeli government to engage in responsibility sharing and thus improve the chances that the Israeli asylum system will be more just.