On The Morality and Legality of Borders: Border Policies and Asylum Seekers

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ABSTRACT
The article examines the way in which states treat– and should treat – asylum seekers seeking to enter the country in an undocumented manner. Part I of the paper discusses in general terms whether states have a moral duty towards asylum seekers wishing to enter their borders. We argue that there is indeed such a duty, and discuss the source of this duty. From this duty, we believe, derives a moral duty to apply fair procedures at the border. Part II explains the legal norms imposing such a duty on states toward asylum seekers at their borders. We explain that the principle of non-rejection at the border derives from the prohibition on refoulement, and in some cases applies also to returns to third countries. We also argue that rejection at the border is only permissible if backed by a substantive examination of a person’s asylum application, and if that person has been provided with the opportunity to appeal against the rejection decision. Our legal analysis is based on norms of international (more specifically, human rights) law. Part III describes in detail a test case of the border policy of Israel, implemented on asylum seekers entering through the Egyptian border, and the elaborate procedures that have been developed under this policy. This includes an assessment of the Israeli procedure in the light of the conclusions of parts I and II. We will also discuss the ruling of the Israeli High Court of Justice on this case, and the occurrences that followed it. We conclude by suggesting that fair procedures must be applied at the border in the light of the moral and legal considerations.

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INTRODUCTION

In this article we examine the way in which the states treat – and should treat – asylum seekers seeking to enter the country in an undocumented manner. This question is relevant to many countries having to deal, on the one hand, with their international law commitments, including their obligations under the 1951 Convention Relating to the Status of Refugees,\(^4\) and, on the other hand, wishing to maintain sovereignty over their borders. It is possible to think of many examples to state practices which aim to mitigate this tension, including the recently ruled-out plan of Australia to ship asylum seekers to Malaysia, and take in lieu recognized refugees.\(^5\) Another example is that of the “Safe Third Country” agreement between United States and Canada, according to which each of the two countries is allowed to return refugee claimants to the other country (the “direct back” policy). A recent decision dealing with specific cases of returnees viewed this practice as a breach of the American Declaration of Human Rights.\(^6\) We examine this question both in general terms and by looking into a specific case of Israel’s border policies. Israel is a particularly relevant test case, since it is witnessing an increase in the number of asylum seekers attempting to enter through its southern border. In addition, government discussions seem to be leading towards the creation of a physical barrier along the Israeli-


\(^6\) The Inter-American Commission on Human Rights, Report No 24/11 Case 12.586 John Doe et al. v. Canada (Approved by the Commission at its session No 1862, held March 23, 2011). It should also be mentioned that earlier, in 2009, the Supreme Court of Canada did not grant leave in a Case challenging the Canada-United States Safe Third Country Agreement, thus upholding a previous Federal Court of Appeal decision, which allowed the Canadian Cabinet to designate a country as safe. See: Her Majesty the Queen v. Canadian Council for Refugees et al., 2008 FCA 229.
Egyptian border, and have resulted in the implementation of the policy, which we discuss in detail below, of asylum seekers being ‘returned’ to Egypt.

This issue is illustrated by what occurred on the Israeli-Egyptian border on the night of 18 August 2007, when Israel ‘returned’ to Egypt a group of 48 persons who had the previous day crossed its border with Egypt in an undocumented manner. This group was one of many who walked, led by smugglers, the well-travelled route through the Sinai desert and across the Egyptian-Israeli border, a long land border that currently has no physical barriers. In addition to being used by asylum seekers, this route is also used to smuggle victims of trafficking, drugs, arms, migrant workers and other people. On this occasion, however, the group included families with children, and over forty of its members were Sudanese. It is impossible to know whether those individuals would have applied for asylum had they had the chance to do so, but it is known that all the Sudanese who entered Israel sought asylum. For the sake of this discussion, we will refer to them as “asylum seekers”, despite the possibility that some of those entering through the Egyptian border would not have sought asylum even if they had been given the opportunity to do so. This choice of terminology reflects our belief that, without clear evidence to the contrary, it should be assumed that these people were, in fact, seeking asylum. These individuals were returned to Egypt without any opportunity to protest against their return. In addition, during their short stay in Israel, they were not able to access the asylum process, courts or tribunals, human rights organizations or the UNHCR. After the people arrived back in Egypt,

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


10 The distinction between migrants and asylum seekers will be discussed in more detail below in part II.1. For general statistical information on refugees and persons in refugee-like situations, see e-mail from Michal Alford to Adv. Anat Ben-Dor, 14 January 2009 [on file with authors]. It should be noted that Sudanese nationals receive group-based protection in Israel, which is not contingent on their ability to prove that there is personal risk to them.
neither the Israeli government officials nor the UNHCR were able to ascertain their whereabouts and, according to some reports, most of them were held in detention and a few were forcefully deported to Sudan.\footnote{Human Rights Watch “Egypt: Investigate Forcible Return of Refugees to Sudan” 30 May 2008, \url{http://www.hrw.org/en/news/2008/05/29/egypt-investigate-forcible-return-refugees-sudan} (last visited 3 April 2010).} While this was not the first return of potential asylum seekers,\footnote{Several reports in the media indicate that, on at least three occasions before August 2007, a number of asylum seekers who entered Israel through the Egyptian and Syrian borders were returned to these countries from 2004 onwards. According to reports received by several human rights organizations and according to media reports, ‘hot returns’ were conducted in, for example, April 2007. See the original petition in HCJ 7302/07 \textit{The Hotline for Migrant Workers v. The Minister of Defence} paras 22-29 and 49-81 [on file with authors].} it was significant because of the large number of people involved and consequently triggered a petition by several human rights organizations to the High Court of Justice.\footnote{HCJ 7302/07 \textit{The Hotline for Migrant Workers v. The Minister of Defence}, submitted 28 August 2008 [on file with authors].} The focus of this petition was on the policy under which this return was carried out. In other words, the ‘hot return’ or ‘coordinated return’ procedure.\footnote{In this article we will use the shorter term ‘hot return’ for reasons of convenience. While this term was used by the UNHCR and the NGOs, and the Israeli government used the term ‘coordinated return’, our choice of terminology does not reflect a tendency to side with any party. Details of the ‘hot return’ procedure had not been published at the time of these returns being executed, and so its contents are unclear. The description of its assumed content derives from the government decision made on 1 March 2006 (according to the minutes of the government meeting published on 16 March 2006, page 2, para. 3) [on file with authors].} Although in this article we focus mainly on the Israeli behaviour towards asylum seekers at the Egyptian border, which today consists of the ‘hot return’ policy and procedures, our examination may, however, be of relevance to possible policies in the future, such as the erecting of a physical barrier, as well as to other countries.

We begin in \textit{part I} by discussing whether states have a moral duty towards asylum seekers wishing to enter their borders. We argue that there is indeed such a duty, and discuss the source of this duty. From this duty, we believe, derives a moral duty to apply fair procedures at the border. In \textit{part II}, we turn to a legal discussion, explaining the legal norms imposing such a duty on states toward asylum seekers at their borders. We explain that the principle of non-rejection at the border derives from the prohibition on refoulement, and in some cases applies also to returns to third countries. We also argue that rejection at the border is only permissible if backed by a substantive examination of a person’s asylum application, and if that person has been provided with the opportunity to appeal against the rejection decision. Our legal analysis is based on norms of international (more specifically, human rights) law. The focus on the European Convention on Human Rights is not because that Convention is more relevant than other international law, but because the European Court of Human Rights has developed the
most extensive case law on the issues at hand. In *part III* we describe in detail the policy and the elaborate procedures that have been developed under the Israeli ‘hot return’ policy. This includes an assessment of the Israeli procedure in the light of the conclusions of *parts I* and *II*. We will also discuss the ruling of the Israeli High Court of Justice on this case,¹⁵ and the occurrences that followed it. Finally, we conclude by suggesting that fair procedures must be applied at the border in the light of the moral and legal considerations.

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

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

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

In our opinion, the answer to the second question is contingent on our answer to the first question. If we believe that states have a duty to refrain from rejecting refugees at the border, then we must also believe that this duty needs to be exercised in a non-discriminatory, non-arbitrary and fair manner.¹⁶ This conclusion stems from the notion that every duty that the state has should be fulfilled in accordance with those basic norms. We will therefore focus our discussion on the first question. Even, however, if we accept that states are allowed to reject asylum seekers at the border, we may still think that while a state may refrain in some instances

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¹⁵ HCJ 7302/07 *The Hotline for Migrant Workers v. The Minister of Defence* (July 7, 2011).

¹⁶ This conclusion is not only a moral one, but also derives from the fundamentals of administrative law and the concept of natural justice. See, for example, H.W.R Wade and C.F. Forsyth, *Administrative Law*, p. 463 ff. (*7th* Edition, Oxford University Press, 1995).
from rejecting asylum seekers at its border, fair procedures should nevertheless apply to asylum seekers in instances where the state does not refrain from such rejection.

The question of whether a state has a duty towards persons at the border is particularly challenging when we take into account the fact that states do not voluntarily enter into a relationship with such persons, but rather these relationships are imposed on them, and they did not explicitly and voluntarily accept such a duty.\(^{17}\) Therefore, arguing that states have a special duty towards asylum seekers at their border distances us from a voluntaristic view of state duties. Arguing that states have a duty towards persons at their border also reflects a belief that territoriality, at least in its narrow sense (as in the territory within the borders), is significant in determining whether a state has a duty towards a person or whether a person has a right against a state.

There are a number of potential sources of a state’s duty towards asylum seekers at its border, and we will discuss three of these sources here.

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

   First let us examine the argument according to which the duty of non-rejection stems from the right to seek asylum. This argument presupposes that individuals have a right to flee persecution and torture. We will not seek to justify this presumption extensively here. We merely point out that this presumption is based on the widely shared moral notion that people should not be subjected to cruelty. If, therefore, people are subjected to serious forms of cruelty and are unable to put an end to it in their own country, they must have a right to escape from this cruelty.\(^{18}\) Our argument here is that if people have the right to seek asylum and protection from torture, so, too, do states have a correlative duty to refrain from subjecting people to regimes where their lives and liberty may be endangered, or where they may be subjected to torture. This right and this duty would both be meaningless if all the states such people can reach hermetically close their borders or reject them at the border. Our argument relies on a purposive interpretation of the right to seek asylum and to protection from torture and, in the light of the purpose of these rights, views as immaterial the distinction between people who enter the territory of the state

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(such as potential asylum seekers subjected to return agreements and practices) and people who are about to enter that territory (such as potential asylum seekers whose entrance to a country is prevented by a physical barrier). 19

It should be noted, however, that while the right to seek asylum in certain conditions imposes duties on states to prevent and refrain from refoulement, this right does not impose the duty on any specific state. In other words, while the realization of the right to be protected from refoulement depends on the ability to be protected by some state, it does not require the cooperation of any particular state. Therefore, in order for this to be a right against a specific state, we have to allocate responsibility in accordance with some morally significant criteria. 20 In practice, irrespective of any moral considerations, the duty of non-refoulement is typically imposed on countries that are in a position to help the refugee. In other words, those in immediate contact with the refugee or those who are in the best position to assist him or her (typically those in whose territory the refugees are currently located or neighbouring countries).

It seems obvious that a state that asylum seekers are able to reach has a stronger duty towards them since this is a state in which their right to seek asylum can be materialized. To the extent that this results in a disproportionally heavy burden on a particular state, such a burden can subsequently be relieved through the application of responsibility-sharing mechanisms. 21

The right to seek asylum is a right that requires the cooperation of a potential state of asylum. A similar argument about the non-specific allocation of the duty can be made with respect to other rights where realization requires the cooperation of another party. For example, it cannot be claimed that a man does not enjoy the right to marry merely because the person he chooses to marry does not wish to marry him. However, although a person cannot argue that his right to marry is not being realized because nobody will agree to marry him, we would argue that a person can claim that his right to asylum and protection from torture is not being realized if all

21 Ibid.
That difference relates to the different nature of the rights. The right to marry is relative, and subject to the right of others to refuse to marry for whatever reason they choose, whereas the right to seek asylum is not limited in the same way and is not subject to the right of states arbitrarily to refuse to allow the possibility to seek asylum. This is because, as Veit Bader says, “[t]he recognition of the right to refuge and asylum presupposes that state sovereignty and self-determination have to yield in cases of ‘well-founded fear of being persecuted’ or, in another language, that the basic right or need to security is strong enough to outweigh other rights and competing ethicopolitical, prudential, and realist arguments.”

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

2. Duty of non-rejection at the border in relation to the manner in which states should apply their coercive powers

Secondly, the duty to refrain from rejection at the border is closely connected to the fact that states apply coercive power at the border. This position is taken by Michael Walzer, whose thoughts on the matter are particularly interesting since they stem from a communitarian presumption. Walzer implicitly discusses the duty of non-rejection at the border in his short discussion of refugees and points to the dilemma of limiting the scope of protection for refugees to those who are physically present, rather than offering it to persons in their countries of origin or elsewhere who might also be in need of such protection (“Why mark off the lucky or the aggressive, who somehow managed to make their way across our borders, from all others?”).

While he admits to having no morally compelling justification for refraining from offering protection to persons still in their countries of origin, he gives two relevant explanations for the duty to grant protection to persons who are physically present: “because its denial would require us to use force against helpless and desperate people, and because the numbers likely to be involved, except in unusual cases, are small and the people are easily absorbed.” These two considerations are also typically (though not always) valid in situations involving non-rejection

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25 Walzer, ibid.
at the border. Rejection of refugees at the border requires the state’s coercive power to be used against helpless and desperate people, and the numbers of people reaching the border to seek asylum are, typically, relatively low.

Walzer’s argument, therefore, is not based on territoriality as a source of the duty towards refugees, but rather on the fact that the state’s power or authority should be exercised (even if ex-territorially) with respect,26 and therefore with compassion and in accordance with moral standards. Benhabib shares this conclusion27 to some extent, pointing to the fact that immigrants have some rights regardless of their status and, of more relevance to our present context, regardless of their location. These rights derive from the contact they have with the state and its people (i.e. those acting on behalf of the state, human rights activists and other individuals). These rights include the right to challenge their deportation. The same logic could apply in our context in respect of rejection at the border. Much like Walzer, Benhabib deduces that the use of power over aliens should be respectful of these connections and of the rights these people have.

Both Walzer and Benhabib do not elaborate in any great detail on the substantive content of these rights. In other words, which acts in which circumstances of rejection at the border would constitute a violation of a migrant’s rights.28

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

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

The roots of cosmopolitan egalitarianism can be traced back to the writings of John Rawls, who argues that just social institutions are formed in an original position characterized by the fact that their decisions are made in “a fair procedure so that any principles agreed to will be

26 It should, however, be noted that the basis is the power or the authority, rather than the mere interaction with the asylum seekers. Cf: Samuel Scheffler, Relationships and Responsibilities 26 (3) Philosophy and Public Affairs, p. 189 (1997).
28 Cf: Seyla Benhabib, The Rights of Others: Aliens, Residents and Citizens (Cambridge University Press, 2004), p. 138. Here, Benhabib suggests a model for determining whether immigrants may become members of a state, which could be applied, mutatis mutandis, to their non-rejection at the border. “If you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to each of us equally.”
According to Rawls, parties should be situated behind “the veil of ignorance,” unaware of their own traits, yet aware of the basic characteristics of society and culture, so that they would be informed enough, yet not biased by self-interest, when deciding which option is more just. Rawls claims that these conditions will guarantee just resolutions as they screen out all the morally arbitrary elements from the decision-making process, and he explains which principles of justice will prevail.\(^{30}\)

This notion of justice, if applied internationally,\(^ {31}\) can serve as the basis for claiming that since nationality is a morally arbitrary trait, states have the same compelling duty towards non-citizens as they have towards their own citizens. This theoretical paradigm can also serve as the basis for a claim for open borders and cosmopolitan egalitarianism. According to some cosmopolitan scholars, Rawls’ perception of states as “self-contained” is wrong.\(^ {32}\) States interact in the most significant ways, especially in terms of economy and commerce. If states are not perceived as “self-contained,” there is some justification for believing in an international, Rawlsian, original position. From this derives a claim that national boundaries have no moral significance, and that everyone should be included in the hypothetical original position – behind the veil of ignorance – and their nationality should be disregarded.\(^ {33}\)

If we accept the cosmopolitan presumption that borders have no moral significance, we cannot attribute any importance to the question of where rejection takes place, and should

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\(^{30}\) When choosing between alternatives in the original position, parties that are behind the veil of ignorance are expected to apply the “maximin rule for choice under uncertainty.” In other words, parties will “adopt the alternative the worst outcome of which is superior to the worst outcome of others.” *Ibid.* p. 152 ff. In this original position put forth by Rawls, two principles of justice are bound to be constituted. The first position is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” The second position is that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” *Ibid.* p. 60 ff.

\(^{31}\) Rawls, *A Theory of Justice*, p. 457 ff (1972). If we carefully examine Rawls’ position, we can see that he applies the above-mentioned principles only within the framework of the nation, and refrains from applying them internationally. Rawls does not see a need for overcoming arbitrary disadvantages and inequalities only in the context of a society. In his view, the two principles of justice are contingent on an ongoing scheme of social cooperation. They apply in “a self-contained national community,” meaning in national communities which are territorially defined by borders and essentially self-sufficient. See, for example, Nagel, *The Problem of Global Justice*, 33 Philosophy and Public Affairs, p. 113 (2005); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 Philosophy and Public Affairs, p. 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).


\(^{33}\) See, for example, Simon Caney, *International Distributive Justice*, 49 Political Studies pp. 974 and 975-976 (2001).
believe that refugees should be protected irrespective of whether they have physically crossed the border. This conclusion is supported by the notion of the universal nature of human rights as something that every person is entitled to enjoy, and it is also reaffirmed by the natural law tradition, according to which rights arise through recognition of the inherent dignity of a person.

4. Summing up

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

II. On the Legality of Non-Rejection at the Border

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

1. Non-refoulement and (potential) asylum seekers

We mentioned above that a moral justification of a duty of non-rejection at the border could be the belief that this duty derives from the right to seek asylum. How does this translate

34 There might be justification for distinguishing the scope of our duty towards a person with whom we have some contact from that towards a person with whom we have no contact, but this issue falls outside the scope of this current discussion and is irrelevant to this context.
35 BENTE PUNTEVOLD BO, IMMIGRATION CONTROL, LAW AND MORALITY: VISA POLICIES TOWARDS VISITORS AND ASYLUM SEEKERS – AN EVALUATION OF THE NORWEGIAN VISA POLICIES WITHIN A LEGAL AND MORAL FRAME OF REFERENCE (thesis written under the supervision of Prof. Thomas Pogge), 404-5.
37 See part 1.1.
into a legal duty? The most important legal duty imposed on states in respect of the right to seek asylum is the duty of non-refoulement. The first issue to be addressed, therefore, is when the prohibition of refoulement applies. Does it only apply to those whom the authorities have recognised as refugees? At first sight, that seems plausible as Article 33 of the Refugee Convention prohibits the return of persons to a country where they have a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group – in other words, it prohibits the return of refugees. Claiming, however, that the prohibition of refoulement applies only to recognised refugees would make that prohibition ineffective. It would allow a state to return to the country of origin a person who would have been recognised as a refugee if his or her asylum application had been examined. This would also be regarded as a misuse of the state’s coercive power.\(^\text{38}\) For this reason there is consensus, both in international doctrine and in international state practice, that the prohibition of refoulement applies regardless of whether people have been recognised as refugees. Recognition as a refugee does not make someone a refugee, but instead declares a person to be one.\(^\text{39}\) Consequently, people who invoke the prohibition of refoulement are protected against return until further notice; we will address the words ‘until further notice’ later on.

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

\(^{38}\) See part 1.2.  
the migrants who enter Australia whose relocation to Malaysia was considered: most of them come from refugee-producing countries such as Afghanistan, Iran and Iraq. A crucial question, therefore, is whether a state is free to reject an undocumented migrant without enquiring whether such person wants to invoke the prohibition of refoulement, or would such a rejection render the right to asylum – and the prohibition of refoulement – meaningless? Or, formulated differently, when should behaviour and statements of migrants be interpreted as a possible appeal for non-refoulement?

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

Therefore, if a state wants to reject a migrant at the border, an effective and purposive interpretation of the prohibition of refoulement requires that state, if the migrant can be presumed to disagree with return, to enquire why the person does not want to be returned. The responses of the migrant must be assessed carefully in order to establish whether they may be considered to be an appeal for non-refoulement. It is hard to lay down general rules for that assessment as any such rules will inherently be contextual. But if the principle of non-refoulement is to be effective, the assessment must be liberal. It should be kept in mind that this assessment is not about the substance of the claim in any sense, but about whether the migrant wants to submit a claim. So a person who is to be refused entry should be given the opportunity to claim asylum.

But what if a state refrains from putting in place a system for assessing carefully whether candidates for rejection want to claim asylum? A state may claim, for example, to be sure that

40 See part 1.1.
the persons to be returned do not want to claim asylum, but also know that they may do so if the idea is implanted in them by explicit questioning by border guards. In the Israeli ‘hot return’ procedure, asylum seekers are not specifically asked whether they wish to seek asylum. The only way of upholding the effectiveness of the prohibition of refoulement is to maintain that the rejection of all these migrants is in violation of Article 33 of the Refugee Convention. Allowing states to ignore potential asylum applications undermines the essence of the prohibition of refoulement. For this reason, the European Court of Human Rights has consistently held that returning a person who wants to claim asylum without a proper assessment of that claim is in itself at variance with the prohibition of refoulement.

To sum up on this point: people who claim asylum cannot be returned until further notice. The same goes for people who want to apply for asylum, but have not been given the chance to do so. State practices that involve returning groups of migrants, some of whom may well wish to claim asylum, pose a problem in terms of upholding the non-refoulement principle. Allowing such practices undermines the effectiveness of the prohibition of refoulement. For an effective and purposive interpretation of the prohibition of refoulement, states choosing to put in place policies preventing a group of persons from being able to claim asylum must treat this group as a whole as if it were protected by the prohibition of refoulement. States are free to allow the persons concerned to express whether they want to apply for asylum, thus limiting the number of people to whom they have international legal obligations. If, however, a state does not provide this opportunity, the result cannot be that this state is able to side-track the obligation of non-refoulement, but instead that, for the time being, the state has this obligation towards the entire group prevented from invoking it. These conclusions correspond to some of the above moral considerations, specifically since any other interpretation would render the right to asylum meaningless and constitute a misuse of the state’s coercive power. Obviously, allowing people to

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41 See part 3.
44 Note that, in Sale v. Haitian Centers Council, the US Supreme Court likewise presumed that the interception of Haitian boat people may be a violation of Article 33 of the 1951 Geneva Convention. The issue was one of territorial scope, not whether people who are prevented from invoking the prohibition of refoulement can be protected by it.
submit an asylum application is the better option as this allows those not claiming asylum to be returned.\textsuperscript{45}

For similar reasons, whether potential asylum seekers are apprehended just after or just before crossing the border is irrelevant. Once potential asylum seekers establish contact with the authorities of a state, that state is able to exercise authority over them. It is the physical possibility to provide admission to an asylum procedure that creates the responsibility under international law.\textsuperscript{46}

2. Non-refoulement and third countries

A second issue is whether returning migrants to a neighbouring country, not being their country of origin, can be contrary to the prohibition of refoulement. Such returns can be problematic for two reasons. Firstly, the potential asylum seeker may face a risk of persecution or torture in the third country itself. In other words, it may be that the return to the third country constitutes \textit{direct} refoulement. However, potential asylum seekers may also be treated properly in the third country and only claim that the third country may return them to their country of origin, where they do face persecution or torture. In that case, return to the third country may constitute \textit{indirect} refoulement.

a. Direct refoulement

If someone is returned to a third country and faces persecution, torture or inhuman treatment in that third country, return to such third country would constitute a violation of the same provisions of international law on which asylum law is based in general: the 1951 Geneva Convention, Article 3 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights. A recent case in which this notion was applied was the European Court of Human Rights’ judgement in \textit{M.S.S. v. Belgium and Greece}.\textsuperscript{47} The Court had previously found in two individual instances that Greece subjected asylum seekers to inhuman

\textsuperscript{45} For the Human Rights Committee’s views on the obligation to allow migrants to apply for asylum, even where large numbers of people are arriving, see Wouters 2009, p. 411.
\textsuperscript{46} For an extensive overview of case law and doctrine, see Maarten den Heijer, \textit{Europe and Extraterritorial Asylum} (diss. Leiden University 2011), pp. 118-135.
\textsuperscript{47} ECtHR (GC) 21 January 2011, \textit{M.S.S. v. Belgium and Greece}, Appl. No. 30696/09.
treatment during detention. In its M.S.S. judgement it ruled that Belgium had violated the prohibition of direct refoulement by knowingly exposing M.S.S. to detention conditions contrary to Article 3 ECHR, the content of which is very similar to that of Article 7 ICCPR. The doctrinal issues raised by direct refoulement to third countries are no different from those relating to direct refoulement to countries of origin.

b. Indirect refoulement

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

The European Court of Human Rights addressed the issue in two admissibility decisions, as well as in a recent judgement, concerning situations in which both the sending and the receiving countries were members of both the Council of Europe (hence parties to the ECHR) and of the European Union. In an admissibility decision from 2000, the European Court of Human Rights held that the living conditions in Greece were contrary to Article 3. However, in reaching this conclusion, it relied extensively on Greece’s obligations under EU law. Therefore, the Court’s reasoning cannot be relied on for countries to which EU law does not apply.

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49 Para. 367 of the judgement. The Court also found the living conditions in Greece contrary to Article 3. However, in reaching this conclusion, it relied extensively on Greece’s obligations under EU law. Therefore, the Court’s reasoning cannot be relied on for countries to which EU law does not apply.
50 See, for a general view, H. Battjes, European Asylum Law and International Law, Brill, Leiden 2006, paras. 494-519.
Human Rights dealt with the removal of a Sri Lankan asylum seeker from the United Kingdom to Germany. Having concluded that the applicant’s removal to Germany was “one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk” of treatment contrary to Article 3 ECHR, the Court gave general rules on the responsibility under Article 3 of states removing people to third countries. According to the Court, the indirect removal to an intermediary country, which in this case was also a party to the European Convention of Human Rights, does not affect the responsibility of the removing state to ensure that the applicant is not exposed to treatment contrary to Article 3 as a result of the decision to expel. The removing country cannot automatically rely on arrangements under European law. “Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.” When applying this standard to the case at hand, the Court stated that its “primary concern is whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka.” After a detailed evaluation of the effects of German asylum law for this particular case, it concluded that it had not been established that there was a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 ECHR. Therefore, the United Kingdom was permitted to remove the applicant to Germany. In a 2008 admissibility decision, the Court found the application inadmissible (and thus allowed the return of an asylum seeker by the United Kingdom to Greece without status determination) for two reasons. Firstly, it noted that the third country, Greece, was not at the relevant moment removing people to the country of origin concerned (Iran), while the European harmonisation of asylum law gave rise to the presumption that Greece would only recommence doing so if that were in conformity with its obligations under European law. Secondly, the Court noted that the asylum seeker, who was relying on the Strasbourg procedure vis-à-vis the United Kingdom, could address the Strasbourg Court from Greece in an application against Greece if Greece intended to deport the person to Iran in violation of Article 3 ECHR. A request for a Rule 39

52 ECtHR (dec) 7 March 2000, T.I. v. United Kingdom, Appl. No. 43844/98.
53 ECtHR (dec) 2 December 2008, K.R.S. v. United Kingdom, Appl. No.32733/08.
indication (i.e. a request by the Court not to remove the applicant until it had dealt with the application) would provide effective protection. Removal by the United Kingdom would not deprive the applicant of the opportunity to address the Court. “On that account, the applicant’s complaints under Articles 3 and 13 of the (European) Convention (on Human Rights) arising out of his possible expulsion to Iran should be the subject of a Rule 39 application lodged with the Court against Greece following his return there, and not against the United Kingdom.”

On 21 January 2011, the Grand Chamber of the European Court of Human Rights gave judgement in the case of M.S.S. v. Belgium and Greece. M.S.S., an Afghan asylum seeker, had been returned by Belgium to Greece because Greece was the responsible country according to EU law. The Court held that Greece had subjected M.S.S. to degrading treatment in the form of the detention conditions he was subjected to, as well as subjecting him to unacceptable living conditions. It also held that Greece had violated M.S.S.’s right to an effective remedy because the Greek asylum procedure entailed a risk of his being returned to Afghanistan without any serious examination of the merits of his asylum claim and without any access to an effective remedy. In addition, the Court held that Belgium had violated the prohibition of refoulement by exposing M.S.S., through removal to Greece, to the risks linked to the deficiencies in the asylum procedure in Greece and by exposing M.S.S., in the same way, to degrading treatment in Greece in the form of unacceptable detention and living conditions, as well as violating the right of M.S.S. to an effective remedy because the procedure against his removal to Greece did not contain sufficient guarantees. The Court reconfirmed its decisions in the cases of T.I. v. United Kingdom and K.R.S v. United Kingdom discussed above. It reformulated its position in such a way that two principles emerge:

- When a state removes an asylum seeker to a third state, the removing state must make sure that the third country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 ECHR (i.e. the right not to be subjected to inhuman treatment, which includes non-refoulement);

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54 ECtHR (GC) 21 January 2011, M.S.S. v. Belgium and Greece, Appl. No. 30696/09.
55 Para. 342 of the judgement.
- In the absence of evidence to the contrary it must be assumed that the third state complies with its obligations under international law.\textsuperscript{56}

The Court then addressed whether Belgium should have regarded as rebutted the presumption that the Greek authorities would respect their international law obligations in asylum matters. Belgium argued that M.S.S. had not specified his objections to being removed to Greece in his procedure in Belgium. The Court ruled, however, that there were numerous reports on the deficiencies of the Greek asylum procedure and the practice of direct or indirect refoulement on an individual or collective basis.\textsuperscript{57} It concluded, based on this information, that the general situation in Greece was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof.\textsuperscript{58} The assurances given by Greece that it would abide by its international law obligations were considered insufficient as these merely referred, in general terms, to the applicable legislation which, as was clear from the general information, was not applied correctly.\textsuperscript{59} The Court dismissed the possibility of lodging a complaint with the European Court of Human Rights against Greece because the obstacles facing asylum seekers in Greece were such that applications to the Court were illusory.\textsuperscript{60} The Court concluded that the Belgian authorities knew or ought to have known that there was no guarantee that M.S.S.’s asylum application would be seriously examined by the Greek authorities.\textsuperscript{61} The Court reversed the Belgian argument that M.S.S. had not established that the general problems in the Greek asylum system would materialize in his individual situation. Given the information available on the Greek asylum system, it was the Belgian authorities’ responsibility not merely to assume that M.S.S. would be treated in conformity with standards of international law, but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. “Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.”\textsuperscript{62}

\textsuperscript{56} Para. 343 of the judgement.
\textsuperscript{57} Para. 347 of the judgement.
\textsuperscript{58} Para. 352 of the judgement.
\textsuperscript{59} Paras. 353-354.
\textsuperscript{60} Para. 357.
\textsuperscript{61} Para. 358.
\textsuperscript{62} Para. 359.
We can see that, in the European context, the Court works with a rebuttable presumption that states will abide by their obligations under international and European law. However, if there are indications that states have violated human rights law, the presumption no longer applies. In such cases, states have argued that diplomatic assurances from the country to which the individual is to be removed may serve to justify removal. But judgements concerning removal to countries of origin show that mere diplomatic assurances are not sufficient. The Court holds that “the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.” Furthermore, diplomatic assurances always have to be assessed as to whether they provide “in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.” They may be insufficient if there are doubts as to whether the official who issued them was competent to do so; imposing a few sentences for torture provides insufficient guarantee if there are reports of widespread torture, while hesitating to cooperate with human rights organizations is also a factor arguing against finding diplomatic assurances sufficient. This approach was confirmed by the Court in the context of third countries in the M.S.S. judgement (see above).

In a case concerning Turkey’s removal of Iranian asylum seekers to Iraq, the Court repeated that “the indirect removal of an alien to an intermediary country does not affect the

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65 ECtHR 28 February 2008, Saadi v. Italy (GC), Appl. No. 37201/06, para. 148.

responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed” to inhuman treatment.\textsuperscript{67} It referred to reports that there were cases of forced return of Iranians to Iraq,\textsuperscript{68} and to reports demonstrating “a strong possibility of removal of persons perceived to be affiliated with PMOI from Iraq to Iran.”\textsuperscript{69} It concluded that there was no legal framework in Iraq providing adequate safeguards against, 

\textit{inter alia}, removal to Iran, and held that removal to Iraq would be a violation of the prohibition of refoulement.\textsuperscript{70} The wording the Court used in the passages referred to suggests that it requires agreement by the third country to take the individual back. It is not clear whether it requires a general agreement to this effect, or whether it is sufficient if the third country agrees to take back a specific individual.

The Committee against Torture has dealt with third countries in two individual cases.\textsuperscript{71} In \textit{Korban v. Sweden}\textsuperscript{72} it first assessed whether deportation of the applicant to the country of origin (Iraq) would constitute a violation of Article 3 of the Convention against Torture. Having found that this would be the case, it assessed whether the deportation which Sweden envisaged, namely to Jordan, would be possible. It found that Korban was “not entirely protected from being deported to Iraq” from Jordan. This conclusion was based on UNHCR information that two cases of removal had occurred in previous years. In a second case, the Committee found that removal to the country of origin would not constitute a violation of Article 3 CAT; hence removal to a third country was also unproblematic.\textsuperscript{73} Two aspects of the Committee’s position deserve attention. It uses a different methodology from the European Court of Human Rights as it first decides whether removal to the country of origin would be compatible with the Convention, and only after that addresses the question of removal to an intermediary country. Secondly, in the one case in which it dealt with the substance of the issue, it applied a light threshold (“not entirely protected”).

In 2011, the High Court of Australia ruled that asylum seekers could not be returned to Malaysia without status determination, as envisaged by an Australian-Malaysian agreement of

\begin{footnotes}
\item[67] ECHR 22 September 2009, \textit{Abdolkhani and Karimnia v. Turkey}, Appl. No. 30471/08, para. 88.
\item[68] Ibid., para. 85.
\item[69] Ibid., para. 87.
\item[70] Ibid., para. 89.
\item[71] See Wouters 2009, pp. 508-510.
\end{footnotes}
July 2011, which it declared invalid. According to the Court, return of asylum seekers to a third country could only be done in accordance with Australian law; “informed by the core obligation of non-refoulement which is a key protection assumed by Australia under the Refugee Convention”; if refugee protection were a part of the receiving country’s "international obligations or relevant domestic law" and if it had been established that the receiving country “adheres to those of its international obligations, constitutional guarantees and domestic statutes which are relevant to the criteria.” These criteria were not fulfilled because Malaysia “first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments (...)” The Minister’s conclusions that persons seeking asylum have access to UNHCR procedures for assessing their need for protection and that neither persons seeking asylum nor persons who are given refugee status are ill-treated pending determination of their refugee status or repatriation or resettlement did not form a sufficient basis for making the declaration”. In short: Malaysia was considered not to be a safe third country because its legal order did not contain an obligation to determine refugee status and protect refugees, neither through international nor through domestic law; let alone that, as required in addition to the existence of a legal obligation, it upheld its obligations in practice.

To sum up so far: if states choose not to decide whether people who have invoked the prohibition of refoulement are protected by that prohibition, they must act as if they are protected. This implies that people who invoke the prohibition of refoulement can be returned to a third country if it can be assumed that they will be protected against refoulement there. If the third country is not a party to the relevant international treaties and conventions, it is hard to see how that country can be presumed to be ‘safe’. If it is a party to such treaties and conventions,

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75 Par. 66.
76 Par. 66
77 Par. 67. In par. 245, it is established that a legal obligation of the third country to provide the necessary recognition and protection of refugees is a minimum requirement to make return of asylum seekers without status determination there compatible with the Refugee Convention.
78 This is more than can be said about Egypt, where ill treatment of asylum seekers and refugees is current, see ***.
79 Par. 135; comp. par. 249.
that is a significant indication that asylum seekers can be returned there. However, there are two important provisos. Firstly, if “reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to” the relevant international law provisions, the country in question cannot be considered ‘safe’. Another formulation of the same principle holds that removal cannot take place if the removing country “knows or ought to have known that (there is) no guarantee that his asylum application would be seriously examined” in the third country. Secondly, even in the absence of such reports, a person who invokes the prohibition of refoulement must always be able to rebut the presumption that the third country is safe. In other words, individuals must always have the opportunity to argue that although the third country may be ‘safe’ in general, it is not so in their individual case. As to the criterion to be applied in such circumstances, international case law offers little guidance. A liberal criterion, such as that used by the Committee against Torture (“not entirely protected”) or those used by the European Court of Human Rights (“adequate safeguards” and “sufficient guarantees”), is indicated, both in the light of the nature of the prohibition of refoulement and by the wording of Article 33 para. 1 Refugee Convention (“in any manner whatsoever”).

3. Non-refoulement and the examination of asylum applications

The above means that all migrants must be given a realistic opportunity to submit an asylum claim, and that this claim must be examined on an individual basis. The possibility of removal to a third country can be relevant for the outcome of the examination, but it cannot do away with the obligation for an examination. Removal without a serious (in terms of the European Court of Human Rights: rigorous) examination of the asylum claim is itself contrary to the prohibition of refoulement. Such a removal renders the right to asylum meaningless and is an abuse of the state’s coercive power. This is also the case in a situation of mass influx. In other words, migrants must be given a real opportunity to invoke the prohibition of refoulement

80 ECtHR 28 February 2008, Saadi v. Italy (GC), Appl. No. 37201/06, para. 147.
81 I.a. UNHCR Briefing Note 20 June 2008: Egypt: Deportations of Eritrean Asylum-Seekers
82 ECtHR M.S.S. para 358.
84 See parts 1.1 and 1.2 above.
and, if they do so, this will block their removal until a proper individual examination of the substance of their claim has been carried out.\textsuperscript{86}

Are there criteria for the substance of this examination? There are numerous UNHCR positions on this topic.\textsuperscript{87} The European Court of Human Rights has held that the examination cannot be limited to an automatic and mechanical application of domestic procedural rules. Applicants must have a realistic opportunity to prove their claim; procedural rules must enable full effect to be given to Article 3.\textsuperscript{88} The Human Rights Committee is of the opinion that asylum seekers should have access to early and free legal aid and interpreters.\textsuperscript{89} It has also insisted on special procedures for female asylum seekers and for minors.\textsuperscript{90} In its observations on the situation in states party to the Convention against Torture, the Committee against Torture has insisted on the importance of formal, individual hearings;\textsuperscript{91} the possibility to gather evidence (detention of applicants hinders this, and this should be factored into the assessment of a claim); the transparent, impartial and adversarial nature of the assessment; independence of the decision maker; free interpreting services for claimants and adequate training for decision makers.\textsuperscript{92}

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

4. Non-refoulement and ability to appeal to a court

The ability to appeal a decision to return an asylum seeker would seem to be crucial. Without a right to appeal, the state may apply its coercive power arbitrarily as such application

\begin{itemize}
  \item \textsuperscript{86} Cf. Lauterpacht and Bethlehem 2003, p. 118.
  \item \textsuperscript{87} Wouters 2009, pp. 164-173.
  \item \textsuperscript{89} Wouters 2009, p. 411 and the HRC Observations referred to there.
  \item \textsuperscript{90} \textit{Ibid}.
  \item \textsuperscript{91} See also: The Inter-American Commission on Human Rights, Report No 24/11 Case 12.586 John Doe et al. v. Canada (Approved by the Commission at its session No 1862, held March 23, 2011), para. 92.
  \item \textsuperscript{92} For an overview, see Wouters 2009, pp. 514-515 and the sources referred to there.
\end{itemize}
will not be critically examined. This may render the right to asylum meaningless. Appeal procedures themselves are not covered by the Refugee Convention.\textsuperscript{93} They are, however, covered by Article 13 ECHR, which guarantees an effective remedy to everyone with an arguable claim that the rights guaranteed in the Convention have been violated.\textsuperscript{94} The European Court of Human Rights has indicated that, in asylum cases, the right to an effective remedy has consequences for national practice on four points. \textit{Firstly}, the appeals procedure must allow for the fact that “it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if (…) such evidence must be obtained from the country from which (the asylum seeker) has fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.”\textsuperscript{95} The appeals procedure cannot be restricted to formalities, and must deal with the substance of the claim, as far as possible taking into account current information. \textit{Secondly}, it is up to the applicant to “adduce evidence capable of proving” that his or her removal would be contrary to the prohibition of refoulement. This criterion does not actually require the applicant to establish that removal would constitute refoulement. Once the applicant has established an arguable claim that this would be so, it is up to the state concerned to “dispel any doubts about it.”\textsuperscript{96} \textit{Thirdly}, courts must subject the denial of asylum to full review, not restricted to a rationality test. The court should not limit itself to considering whether the authorities could reasonably conclude that the applicant’s removal would not violate the prohibition of refoulement, but should address the issue of whether removal would in fact violate that prohibition. \textit{Fourthly}, appeals must have automatic suspensive effect in order to prevent an asylum seeker from being removed pending an appeal which he or she ultimately wins.\textsuperscript{97}


\textsuperscript{94} On this provision, see more generally Thomas Spijkerboer: Subsidiarity and ‘Arguability’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases, International Journal of Refugee Law 21 (2009), pp. 48-74, on which the following passage is based.

\textsuperscript{95} ECtHR 19 February 1998, Bahaddar v. The Netherlands (Judgment), Appl. No. 145/1996/764/965, para. 45

\textsuperscript{96} See ECtHR 28 February 2008, Saadi v. Italy (GC), Appl. No. 37201/06, para. 129; ECtHR 17 July 2008, NA v. United Kingdom, Appl. No. 25904/07, para. 111.

Article 2 para. 3 of the ICCPR equally provides for the right to an effective remedy, which applies in the case of “a decision to expel to an arguable risk of torture,”\textsuperscript{98} even if an asylum application has been declared inadmissible or manifestly ill-founded.\textsuperscript{99} Equally, a remedy is only effective if it has suspensive effect.\textsuperscript{100}

5. Summing up

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

III. ‘Hot Return’ Policy and Procedures

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

\textsuperscript{98} Human Rights Committee 10 November 2006, No. 1416/2005, \textit{Alzery v. Sweden}, para. 11.8
\textsuperscript{99} See Wouters 2009, pp. 413-414 and the sources quoted there.
\textsuperscript{100} Human Rights Committee 10 November 2006, No. 1416/2005, \textit{Alzery v. Sweden}, para. 11.8, and Wouters 2009, pp. 413-414 and the sources quoted there.
The political background to the ‘hot return’ policy was an oral agreement between former Israeli Prime Minister Ehud Olmert and his Egyptian counterpart, former President Hosni Mubarak (an agreement which was later denied by Egyptian officials).101 The policy was set in order to deal, by means of deterrence, with the growing number of asylum seekers entering Israel through the Egyptian border and as a way for Israel to maintain sovereign control over its southern border.102 Essentially, Egypt was asked to invest further efforts in preventing infiltration through its border with Israel, while the Israeli army was allowed to ‘return’ asylum seekers caught within the first 24 hours after their entry and within 50 kilometres from the Egyptian border. The ability to ‘return’ was subsequently expanded to allow ‘returns’ of persons within a ‘reasonable time’ of their apprehension at the border.103

Initially, at the time the petition was filed, implementation of this policy was somewhat problematic. Before being ‘returned’ to Egypt, asylum seekers were registered and briefly questioned by the untrained border patrol soldiers, who were not convinced that there would be a danger to the asylum seekers’ lives if they were ‘returned’ to Egypt.104 Deportation orders were not issued, reflecting the Israeli legal position that although the asylum seekers were physically

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101 The Egyptian Embassy in Ottawa, Canada, “Egyptian efforts to combat trespassing across the international borders with Israel”; http://www.mfa.gov.eg/Missions/canada/OTTAWA/Embassy/en-GB/Press%20and%20Media/Press_Releases/borders (11 August 2007) (last visited 3 April 2010). It would seem that even if such an agreement existed, this oral agreement would no longer hold since both Olmert and Mubarak are no longer in office.

102 See, for example, “The State’s Complementing Response to the Petition, September 23, 2007”, primarily paras 19-20 and 26-27 [on file with authors].

103 “The Treatment of Illegal Infiltrators to the Israeli Territory from Egypt’s Border”, Order number 1/3.000, April 2009, Appendix a: Coordinated Return Procedure, section 3 [on file with authors].

104 Although a comprehensive discussion of the treatment of asylum seekers in Egypt falls outside the scope of this article, it should be mentioned that there are reasons to doubt whether Egypt is a safe country of asylum for many of them. Several reports indicate the use of torture and prolonged, inhumane harsh detention conditions. See, for example, Richard Grindell, A Study of Refugees’ Experiences in Detention in Egypt, 30 June 2006, http://idc.rbtf.com.au/egypt-report-detention-conditions/ (last visited 3 April 2010). In addition, Egypt has forcefully returned asylum seekers to their country of origin on several occasions. See, for example, Human Rights Watch, Egypt: Stop Deporting Eritrean Asylum Seekers, 8 January 2009, on: http://www.unhcr.org/refworld/docid/49670ba41e.html (last visited 3 April 2010). Discrimination, violence and arbitrary administrative sanctions have also been documented. See, for example, the original petition in HCJ 7302/07 The Hotline for Migrant Workers v. The Minister of Defence para. 169 [on file with authors]. Previous attempts by other countries to return asylum seekers to Egypt ended in tragic results, and were found by courts and United Nations Committees to be a violation of the prohibition of torture. See, for example, UN Human Rights Committee, Decision: Alzery v. Sweden, CCPR/C/88/D/1416/2005; Mohammad Zeki Mahjoub v. Minister of Citizenship and Immigration, IMM-98-06, 2006 FC 1503 (Canada); Hani El Sayed Sabaei Youssef v. Home Office, Case No. HQ03X03052, 2004 EWHC 1884 (QB) (The United Kingdom). Finally, it should be mentioned that on several occasions Egypt shot asylum seekers attempting to cross the border to Israel. See, for example, Amnesty International “Egypt – Deadly Journeys through the Desert”, 19 August 2008, http://www.amnesty.org/en/library/info/MDE12/015/2008/en (last visited 3 April 2010).
present on Israeli territory, their ‘returns’ were not deportations as such, but instead constituted an act of rejection at the border.

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

Under the procedure, a group of persons caught at the border has to be separated for investigation purposes in order to disable communication between them. Then, they must be searched for weapons and identifying documents. Their entry is to be photographed and documented in writing. Each of them is to be questioned separately, using a questioning form, by a trained person with a basic ability to speak a language that the person being questioned speaks (English or Arabic) or with the assistance of an interpreter. The questioning should normally be conducted at the border location where they were found, unless it is not

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105 Order number 1/3.000, October 2007 [on file with authors], [hereinafter: the immediate return procedure].
106 “The Treatment of Illegal Infiltrators to the Israeli Territory from Egypt’s Border”, Order number 1/3.000, April 2009 [on file with authors] [hereinafter: the amended procedure].
107 Children will not be separated from their parents or the adult who brought them into Israel. See immediate return procedure, section 1.a.1; amended procedure, section 8.a.1.
108 Women will be searched by female soldiers or policewomen, to the extent possible. See immediate return procedure, section 1.a.2; amended procedure, section 8.a.2.
109 Each person should be photographed by the border, if possible. In addition, the area of penetration should also be photographed, as well as each person’s personal belongings. A list of each person’s documents should be made. See immediate return procedure, section 2; amended procedure, section 11.
110 Minors will be questioned individually if possible and, if not, the adult with whom they entered Israel will be questioned. See immediate return procedure, section 4.c; amended procedure, section 7.c.
111 Appendix C to the immediate return procedure “Documentation Report following the Apprehension of an Infiltrator/Personal Questioning Form” [on file with authors]; Appendix C to the amended procedure “Documentation Report Following the Apprehension of an Infiltrator” [on file with authors] [hereinafter: the questioning form].
112 While the immediate return procedure does not explain the nature of the training, the amended procedure mentions that training sessions should be held every four months and should include explanations on the authority of the soldiers and the ‘hot return’ procedure, background information on the infiltration into Israel, tips on questioning and dealing with the apprehended persons. Only soldiers who are annually trained are qualified to conduct the questioning. Similar but separate training must be provided to officers authorized to issue removal orders. See section 14.
113 See immediate return procedure, section 1.b.1, 1.b.4, 4.b; amended procedure, section 7.b. The procedure does not clarify what will be done with those who are not sufficiently fluent in English or Arabic, and who speak languages for which it is going to be difficult for soldiers to find interpreters. This is despite the fact that many of those caught at the border are Tigrinya-speaking Eritreans, Amharic speaking Ethiopians or French-speaking Ivorians or Congolese.
possible to do so. According to the questioning form, all persons must be asked to state their full name, age, gender, country of origin, place of residence, ethnic background, religion and language proficiency. The questioning form instructs the interviewer to check the documents of each person, including passports, refugee or protection cards and UNHCR letters, as well as to list their personal belongings. The interviewer is supposed to list the countries through which the person travelled on the way to Israel, and to find out whether the person arrived with any family members. The person is allowed to declare anything he or she wishes to the interviewer who, based on the above information, has to assess the reasons that led the person to come to Israel. The possible reasons mentioned in the form include security/terrorism purposes, criminal purposes, migration for employment or other. Asylum is not one of the reasons mentioned in the form, and presumably falls in the category ‘other’. The interviewer can add concluding remarks and comments to the form.

Following the questioning, all the persons have to be transferred to a military facility in the region, where they will be given food, water, shelter and basic medical care. Within three hours, their apprehension should be reported, and a removal order issued. The

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114 If it is not possible to conduct the questioning there, it should take place in assigned army bases. See amended procedure, section 7.a.
115 Before the procedure was amended, the questioning included questions about the length of stay in each country, what the person did there, and whether he or she was detained in Egypt. Appendix C to the immediate return procedure “Documentation Report following the Apprehension of an Infiltrator/Personal Questioning Form”.
116 Before the procedure was amended, the questioning included questions on the person’s family members in his or her country of origin or in Egypt. Appendix C to the immediate return procedure “Documentation Report following the Apprehension of an Infiltrator/Personal Questioning Form”.
117 See immediate return procedure, section 1.a.3. See amended procedure, section 7.a.
118 See immediate return procedure, section 1.a.4. According to the amended procedure, food, water, shelter and basic medical care should be provided as soon as the person is apprehended. See section 8.a.3. The amended procedure also instructs that the conditions of detention should be adequate. For example, apprehended persons should have access to an adequate number of toilets; they should be given beds or sleeping bags if held for more than 24 hours; women should be held separately from men, and minors should be held with the adult who accompanied them; persons should not be handcuffed, unless required for security reasons, and they should be hospitalized if necessary. See sections 9 and 10.
119 The report includes basic identifying information of the persons caught, the number of persons caught, a description of the event, a list of any weapons, belongings and documents found on the persons caught, any relevant intelligence information, where they are currently being held and their destination. The report should also include any written report documenting the apprehension. All this information is stored in a special database. See immediate return procedure, sections 1.b.6, 3 and 8.c. See also amended procedure, section 7.f, 8.b.5, 8.b.6, and 12 for further reporting instructions.
120 If a large group is caught, the order may be issued within six hours. According to the immediate return procedure, a permanent removal order will be issued after 24 hours. See sections 1.b.8, 7 and 8.a. Under the amended procedure, a ‘primary removal order’, valid for 24 hours, will provide the legal basis for detaining an apprehended person, after which a ‘temporary removal order’, valid for ten days, will be issued. A permanent removal order, which will not expire, may be issued afterwards. See amended procedure, sections 3.7-3.10, 5 and 8.c.
information gathered during the questioning will be transferred to the ‘authorized entity’, who will, in turn, examine them and determine whether some or all of the persons can be ‘returned’ to Egypt,121 or whether they should be transferred to the civilian immigration authorities.122 This determination will be based on whether the authorized entity believes there to be a concrete danger to the person in Egypt.123 If such a danger is believed to exist, the command’s legal advisor should be consulted on whether it is possible to ‘return’ the person to Egypt. If the person has sought asylum in circumstances, as defined by the procedure, of a risk to his or her life or persecution in either Egypt or his or her country of origin, the person’s treatment will be examined by the Ministry of Foreign Affairs.124 In order to make this determination, the authorized entity will consider the person’s personal information and circumstances, the circumstances of the person’s infiltration to Israel, his or her status in Egypt and the possibility of coordination with the Egyptian authorities.125 If an ‘immediate coordinated return’ takes place, this should be reported to all relevant units.126

This vague procedure does not seem to take into consideration several factors that are assessed and considered during asylum interviews, including (but not limited to) the need to explain to the interviewee the purpose of the interview and that it may be the person’s only opportunity to argue against being ‘returned’ to Egypt; the physiological and psychological state of the interviewee; cultural gaps between the interviewee and the interviewer; language difficulties arising because some of the soldiers speak only basic English and some Arabic, whereas the interviewees may speak languages for which interpreters are hard to find; the need

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121 According to the amended procedure, a person is not to be returned to Egypt if his or her country of origin is listed in the list of countries to which a person may be directly deported. It is unclear which countries are on this list, and what the term ‘country of origin’ means. Appendix A: “Coordinated Return Procedure” section 2.g.
122 In the immediate return procedure, it is left unclear who this ‘authorized entity’ is. See immediate return procedure, sections 4.d and 6. However, the amended procedure clarifies that this ‘authorized entity’ is the brigade commander, the operation flank officer of the southern command, or the operation officer of the southern command. See amended procedure, section 3.c. See also amended procedure, section 13, regarding the procedure for transferring a person to the civilian immigration authorities.
123 The amended procedure, Appendix a: “Coordinated Return Procedure” section 2. Under the immediate return procedure, the authorized entity must make its decision based on whether it believes that a person’s life or liberty would be at risk in Egypt. The immediate return procedure clarifies that the possibility of being prosecuted in Egypt for a criminal offence or for the infiltration into Israel is not, in itself, considered a reason to refrain from ‘returning’ a person to Egypt. See immediate return procedure, section 5.a.1. According to the questioning form, the authorized entity also has to provide brief reasons for this determination.
124 See amended procedure, section 7.e.
125 See immediate return procedure, section 5.b; amended procedure, Appendix a: “Coordinated Return Procedure” section 2.5.
126 See immediate return procedure, section 8.b.
for expertise in refugee law and in interviewing skills.\textsuperscript{127} It is impossible to establish whether the procedure is carried out in a manner consistent with international law since it is implemented by the army in a way that is not transparent and is not subject to judicial review, UNHCR supervision or monitoring by any civilian entity. This procedure has therefore been heavily criticized by the UNHCR office in Israel,\textsuperscript{128} as well as by refugee law scholars\textsuperscript{129} and human rights organizations.\textsuperscript{130}

After the procedure was set, Israel ‘returned’ asylum seekers to Egypt on several occasions, with or without the prior questioning required by the procedure.\textsuperscript{131} The number of ‘returnees’ seems to have been relatively small in comparison with the numbers seeking to enter Israel.\textsuperscript{132} This was mostly due to the fact that, as Israel admitted, there was cooperation with the

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\item[127] In “The State’s Update”, 27 May 2008, paragraph 6 [on file with authors] the State informed the Court that a training programme was being planned and would cover four subjects: the relevant international and domestic legal norms; the authority of the soldiers; the procedure (including how it should be applied to vulnerable persons) and the political, social and economic situation in Africa, with a special emphasis on asylum seekers’ countries of origin. According to the State’s reports, a couple of training sessions were indeed held in September and November 2008, and only trained soldiers were allowed to question asylum seekers. See “The State’s Complementing Response to the Petition”, 18 November 2008, paras 12-19. As mentioned above, the amended procedure further elaborated on the training in section 14.
\item[128] Letter from William Tall, UNHCR Representative, to Ms Simona Halperin, Ministry of Foreign Affairs, “UNHCR Comments on the Respondents Response to the (Third) Additional Application for an Order Nisi and Interim Injunction (This version to replace the previous comments dated 24 November 2009)”, 26 November [on file with authors].
\item[129] Brief of Amicus Curiae, Andrew I. Schoenholtz, in the matter of HCJ 7302/02 The Hotline for migrant Workers v. The Minister of Defence, submitted 13 January 2009 [on file with authors].
\item[130] See, for example, letter from Anat Ben Dor to the state’s attorneys “The formation of ‘border procedures’ to Identifying Asylum Seekers within the framework of HCJ 7302/07”, 31 October 2007 [on file with authors].
\item[131] Recent information shows that the procedure was not implemented and that only basic information, such as name and country of origin, was gathered before persons were ‘returned’. See HCJ 7302/07 “Petitioners’ request to submit documents and legal sources”, submitted to the Court on 28 March 2011 [on file with authors].
\item[132] Information on ‘returns’ occurring after August 2007 is partial, contradictory and lacking. Two Egyptian nationals were also returned to Egypt on an unknown date. See “The State’s Update”, 27 May 2008, para. 7 [on file with authors]. According to an Egyptian refugee aid organization (AMERA), at least 27 Eritreans were returned to Egypt in July 2008, but this report was never confirmed by the state. See letter from Adv. Anat Ben Dor to the state’s attorneys, “Request for immediate intervention to prevent the deportation of Eritrean asylum seekers, who were deported from Israel to Egypt, back to their country, and refraining from further returns to Egypt”, 17 February 2009 [on file with authors]. Four other ‘returns’ of 91 persons took place between 23 and 29 August 2008. See the affidavit of Brigadier General Yoel Strick, submitted to the Court on 1 September 2008 [on file with authors]. According to the affidavit, the return of those persons was not in accordance with the procedures and was a mistake. According to reports by soldiers who served on the border during their reserve duty, several groups of asylum seekers were ‘returned’ to Egypt in June 2009. These reports indicate that some of the returned asylum seekers entered Israel a few days prior to their being ‘returned’ and were neither questioned nor registered. On one occasion, the soldiers were also asked to push asylum seekers across the border into Egypt, to act as if the asylum seekers had just tried to enter Israel and then to signal to the Egyptians that they had prevented a penetration of the border. See affidavit of Avi Avrahami, submitted to the Court on 2 July 2009 [on file with authors]. Later, the state declared that out of the hundreds of people who penetrate Israel’s borders, only a few tens are ‘returned’ after their return has been coordinated and they have been questioned. See “Response of the respondents, according to the honorable Court decision from August 4, 2009”, 6 August 2009, para. 8 [on file with authors]. During a Court hearing, the
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Egyptian counterparts at only one section of the border, whereas at the other sections cooperation was not achieved, thus making it impossible to return persons entering through these sections of the border. Recently, the state declared in court that ‘returns’ were not currently being carried out because, due to the recent instability in Egypt, there was no coordination with the Egyptian army.

Israeli human rights organizations gathered information on the experience of several people who, after being ‘returned’ by Israel to Egypt, managed to find their way back into Israel. Some of them stated that they were not transferred to the Egyptians in a coordinated manner, but instead were just pushed back under the border fence. Others meanwhile reported that they had been beaten, tortured and molested by the Egyptian soldiers upon their ‘return’. Additional reports indicate that detained asylum seekers suffered harsh conditions in Egyptian prisons. Even more concerning are reports of systematic kidnapping of asylum seekers in the Sinai peninsula near the Israeli-Egyptian border by human traffickers in an attempt to extort possessions and money from them and their families.

On July 7, 2011, after four years of deliberation, the Israeli High Court of Justice reached a decision on the petition challenging the ‘hot return’ policy. The Court relied on the state’s declaration according to which ‘hot returns’ were currently not carried out, given the political instability in Egypt, and following the resignation of former president Mubarak. This, according to the Court, proved that the petition has become theoretical, and since the Court does not usually decide on theoretical petition – dismissed it. The Court commented in its decision that

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133 See “Response of the respondents, according to the honorable Court decision from August 4, 2009”, 6 August, 2009, para. 7 [on file with authors].
134 Oral hearing on HCJ 7302/07, 30 March 2011 [protocol with authors].
135 HCJ 7302/07 Petitioners’ request to submit documents and legal sources, submitted to the Court on 28 March 2011, paras 12-21 [on file with authors].
136 HCJ 7302/07 Petitioners’ request to submit documents and legal sources, submitted to the Court on 28 March 2011, paras 12, 15 and 17 [on file with authors].
137 HCJ 7302/07 Petitioners’ request to submit documents and legal sources, submitted to the Court on 28 March 2011, paras 13 and 18 [on file with authors].
138 HCJ 7302/07 Petitioners’ request to submit documents and legal sources, submitted to the Court on March 28, 2011, paras 19-21 [on file with authors].
139 HCJ 7302/07 Petitioners’ request to submit documents and legal sources, submitted to the Court on March 28, 2011, paras 22-24 and 27 [on file with authors].
the vague understanding between Israel and Egypt upon which the ‘hot returns’ were based arises legal difficulties. The Court also mentioned that the situation in the Sinai peninsula and the risks it entails to immigrants and to the State of Israel are also a concern. The future erecting of a fence, the Court believed, would change that to some degree. In the decision the Court assumed that should the ‘hot return’ policy ever be implemented in the future, it will be done in a manner which conforms to international legal standards and after guarantees are established to secure the well-being of the returnees.\(^{140}\)

Nevertheless, despite State’s declaration that ‘hot returns’ are not carried out, only a few short weeks after Court delivered its decision, reports of ‘returns’ arrived to different human rights organizations. Currently the military police is investigating the issue.\(^{141}\) Therefore, it seems that in reality ‘hot returns’ are more than a theoretical matter.

The Court refused to examine the policy on its merits, and did not lay down clear guidelines under which the policy could officially be re-implemented. Let us take a closer look at the legality and morality of the ‘hot returns’. If we examine the ‘hot return’ procedure in the light of the above moral considerations, we can see that it does not conform to those moral requirements. \(Firstly,\) rejection at the border clearly eliminates many asylum seekers’ right to seek asylum. Egyptian nationals who enter Israel are deprived of the opportunity to seek asylum, but these nationals constitute a small minority of the total number of asylum seekers entering Israel. As for others who cross into Israel through Egypt, their right to seek asylum is compromised by their being rejected at the border only to the extent that this right is not granted in Egypt.\(^{142}\)

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

\(^{140}\) HCJ 7302/07 The Hotline for Migrant Workers v. The Minister of Defence (July 7, 2011) [on file with author], para. 12.

\(^{141}\) Letter of Adoram Rigler of the Chief Military Prosecutor’s office “‘Re: Your Complaints Regarding the Execution of ‘Hot Returns’ to Egypt (August 24, 2011)” [on file with author].
Thirdly, applying the cosmopolitan, open-border logic to the Israeli case could lead to the deriving of a duty to refrain from rejection at the border. However, despite its theoretical appeal, the cosmopolitan reasoning seems to be too remote from current perceptions of states and sovereignty to be adequately convincing.

When assessing whether the Israeli border procedure is in conformity with the four international law-based requirements identified in the previous section, we can see problems on all four points. Firstly, there is insufficient opportunity to apply for asylum. The list of questions to be asked to migrants intercepted at or near the border does not include explicit questions about asylum. Without an explicit question on this subject, there is no guarantee that migrants wanting to ask for asylum will be able to formulate their claim. The lack of interpreters also implies a substantial risk that the interviewing soldier will not be able to identify an asylum claim. Secondly, the procedure implies a risk of potential asylum seekers being returned to Egypt without a substantive examination of their claim. Thirdly, this means that there is no guarantee whatsoever that the return of the potential asylum seekers will not constitute either direct refoulement (because of the detention conditions to which returnees have been subjected in Egypt) or indirect refoulement (because of the possibility that Egypt will force returnees to go back to their country of origin). The non-suspension of the return is closely related to the fourth major problem in the Israeli border procedure, being the substance of the examination. Even if we assume that an asylum claim has been identified as such, its assessment takes place (a) on the basis of an interview by someone who is under- or unqualified, and possibly not able to communicate with the asylum seeker because of language problems, while (b) the decision on removal will usually be taken by a military superior who is equally unqualified to take asylum decisions and who has no access to information on the country of origin, no background in international or Israeli asylum law and insufficient time to subject an asylum claim to a serious examination. The deficient nature of the examination implies the risk of asylum seekers being returned without proper examination of their claim. Fifthly, the option of a legal remedy against an unlawful decision to return is illusory. Therefore, the Israeli border procedure is contrary to international legal norms on every point.
CONCLUSION

As the Israeli High Court of Justice mentions in its decision on the ‘hot return’ petition,\textsuperscript{143} many western countries are facing an influx of undocumented migrants, many of whom want to enter the country clandestinely and apply for asylum. The ‘hot return’ policy as it now stands implies a systematic violation of asylum norms of both a moral and legal nature. Therefore, and despite the lack of willingness of the High Court of Justice to make a clear decision on this matter, we believe that for many reasons Israel’s moral and legal obligations towards asylum seekers cannot be waived and transferred to Egypt, as mentioned above. Similarly, only if many procedural and substantive conditions are fulfilled, can Australia and European countries expect to be allowed by courts to transfer or "return" persons to third countries, despite having made agreements and arrangements to do so.

We also believe that moral and legal responsibilities cannot be fenced off, even if, as the Israeli High Court of Justice seems to believe, fences change the circumstances and safety of the border. Erecting a fence will not solve the problem for at least two reasons. Firstly, people can get through fences, as we know not only from the border between Egypt and Israel, as well as the Gaza strip, but also from other borders, such as the US-Mexican border. Secondly, the above argument applies equally to migrants at the border, such as those applying for asylum at the fence. In addition, a fence is most likely to lead to riskier behaviour among migrants (including asylum seekers), resulting in a rising death toll. Erecting a physical barrier will simply create moral and legal issues of its own.\textsuperscript{144}

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\textsuperscript{143} HCJ 7302/07 The Hotline for Migrant Workers v. The Minister of Defence (July 7, 2011)[on file with author], para. 13.
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