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## Escape from Darfur: Why Israel Needs to Adopt a Comprehensive Domestic Refugee Law

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## Escape from Darfur: Why Israel Needs to Adopt a Comprehensive Domestic Refugee Law

*Holly Buchanan* \*

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#### INTRODUCTION

Hagga Abbas Haroun was a twenty-eight year old refugee from the Darfur region of Sudan.<sup>1</sup> Haroun's parents saved their resources to provide Haroun, the oldest of nine children, with an education from the University of Sudan.<sup>2</sup> After graduating from the University, Haroun became known in the region as an outspoken supporter of other villagers in Darfur.<sup>3</sup> In 2003, after brutal violence had erupted in Darfur, Haroun's uncle, aunt, and brother were killed by Janjaweed<sup>4</sup> militiamen.<sup>5</sup> Haroun and her husband then fled the massacre in Darfur to Sudan's capital, Khartoum, where they were confronted with the option of remaining in war-ravaged Sudan or

<sup>1</sup> Ellen Knickmeyer, *Flight From Darfur Ends Violently in Egypt: Young Mother Killed by Border Guards While Waiting to Cross to Sanctuary in Israel*, WASH. POST, Aug. 19, 2007, at A16 [hereinafter Knickmeyer, *Flight From Darfur*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The Janjaweed are Arab African pro-government mounted militias responsible for widespread raiding and burning of black African farming villages and the abduction, rape and execution of civilians. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR AND BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, STATE PUBLICATION 11182 DOCUMENTING ATROCITIES IN DARFUR, (2004), available at <http://www.state.gov/g/drl/rls/36028.htm> [hereinafter ATROCITIES IN DARFUR].

<sup>5</sup> Knickmeyer, *Flight From Darfur*, *supra* note 1, at A16.

fleeing to a neighboring country.<sup>6</sup> They chose to travel north to Egypt.<sup>7</sup> At ten p.m. on July 21, 2007, a group of refugees traveling from the region of Darfur, which included Haroun, her two-year old daughter and her husband, attempted to cross the Sinai border from Egypt into Israel in search of safety.<sup>8</sup> When one of the children began to cry, Egyptian border guards opened fire shooting a nine-year old girl in the back, a man in the stomach, and Haroun, who was seven months pregnant. Haroun was fatally shot in the head.<sup>9</sup>

Haroun's story is just one of the many documented accounts of Egyptian soldiers' use of brutal force on asylum seekers crossing the Egyptian border into Israel.<sup>10</sup> Israel's lack of procedures for managing the admission of refugees crossing its border is of equal concern. For example, on August 19, 2007, Israel deported forty-eight African asylum seekers to Egypt without applying any process for determining whether they were refugees and without allowing them to apply for, or even request, asylum in Israel.<sup>11</sup> Some of these forty-eight asylum seekers had fled the atrocities occurring in the war-torn region of Darfur.<sup>12</sup>

Recently, Israel has experienced a significant increase in Sudanese asylum seekers, resulting from Sudan's long-term civil war and the current ethnic-based war in Darfur.<sup>13</sup> Israel's current policy of immediate deportation of refugees and asylum seekers to Egypt has raised international concern about the fate of refugees from Darfur denied asylum by Israel.<sup>14</sup> Furthermore, Egypt has proven to be unsafe for African refugees and has now begun to deport Sudanese refugees back to Sudan.<sup>15</sup> The 1951 Convention Relating to the Status of Refugees (hereinafter, the "1951 Convention") is the principal international instrument establishing the legal rights of refugees and prohibits the expulsion of refugees to a territory where his or her life or freedom would be threatened.<sup>16</sup> Israel is a signatory to the 1951 Convention,<sup>17</sup> but has not met its obligations as such by failing to enact a

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* note 209.

<sup>11</sup> Ellen Knickmeyer, *Israel to Block New Refugees From Darfur*, WASH. POST, Aug. 20, 2007, at A10 [hereinafter Knickmeyer, *Israel to Block Refugees*]. For a discussion of Israel's new "hot return" policy, see *infra* notes 161–166, 198–211 and accompanying text.

<sup>12</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10. The exact number of these forty-eight asylum seekers is uncertain, but it is known that at least some are from Darfur. *Id.*

<sup>13</sup> For a discussion of Sudan's twenty-two year civil war and the ongoing war in the region of Darfur, see *infra* notes 22–74 and accompanying text.

<sup>14</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>15</sup> For a discussion of why Egypt is an unsafe country for African refugees and asylum seekers, see *infra* notes 202–210 and accompanying text.

<sup>16</sup> 1951 Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6276 189 U.N.T.S. 137.

<sup>17</sup> States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited Mar. 25, 2008) [hereinafter Parties to the Convention and Protocol].

domestic refugee law for non-Jewish refugees.<sup>18</sup> Since asylum seekers from Darfur meet the requirements of refugee status under the 1951 Convention's definition, they are entitled to its protection.<sup>19</sup> While many Sudanese asylum seekers may meet the criteria of a refugee, this Comment focuses on Israel's obligations under the 1951 Convention in relation to refugees from the smaller region of Darfur.<sup>20</sup>

The increase of Africans seeking asylum in Israel has created numerous issues of international law regarding Israel's treatment of these asylum seekers. In response to this influx of asylum seekers, Israel has implemented several laws and policies relating to this problem.<sup>21</sup> This Comment argues that Israel's laws and policies concerning the treatment of refugees from Darfur, primarily their recent deportation to Egypt, are in breach of the 1951 Convention. In addition, this Comment proposes that Israel adopt a comprehensive refugee law incorporating the principles of the 1951 Convention and providing specified procedures for refugee status determination.

Part I of this Comment traces Sudan's history of violence, which has led to a significant number of Sudanese refugees in search of asylum in other countries, such as Israel. Part II of this Comment identifies and examines the applicable laws relating to refugees' rights, including the 1951 Convention and various Israeli laws and policies, and discusses how these laws affect refugees. Part III of this Comment critiques the laws and policies that Israel has implemented to manage the increase of African asylum seekers crossing its border by demonstrating that these domestic laws and policies are in breach of international law. Part IV of this Comment provides a refugee analysis under the 1951 Convention for asylum seekers from Darfur, which explains why these individuals satisfy the criteria for refugee status. Part IV also proposes that Israel enact a comprehensive domestic refugee law, officially adopting the principles of the 1951 Convention. Finally, Part IV provides a comparative model for the framework of Israel's new refugee law and proposes possible solutions for Israel's management of the overflow of refugees from Darfur and other regions to whom Israel is unable to grant asylum. This Comment concludes by suggesting that, after applying a process for refugee status determination in compliance with the 1951 Convention, Israel should make a significant effort to grant asylum to at least a few thousand refugees from Darfur.

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<sup>18</sup> See *infra* notes 138–143 and accompanying text.

<sup>19</sup> For an analysis of the reasons why asylum seekers from Darfur meet the criteria of a refugee under the 1951 Convention, see *infra* notes 223–242 and accompanying text.

<sup>20</sup> This Comment focuses on asylum seekers from Darfur because of the ongoing brutal war occurring in this region, which has led to the persecution of these individuals in Sudan.

<sup>21</sup> See *infra* notes 146–149.

I. A BRIEF HISTORY OF SUDAN'S DOMESTIC CONFLICTS LEADING  
TO A MASSIVE INCREASE OF SUDANESE ASYLUM SEEKERS

A. A Brief History of Sudan's Internal Violence

Since its independence from Britain in 1956, Sudan has experienced continuous violence, primarily due to religious and ethnic discrimination and persecution.<sup>22</sup> This tension originated between the northern and southern regions of Sudan.<sup>23</sup> Southern Sudan is primarily composed of black, Christian and Animist<sup>24</sup> African tribes, whereas northern Sudan is mainly populated by Arab Muslims.<sup>25</sup> Religious and ethnic tension between the North and South eventually erupted into a twenty-two year civil war.<sup>26</sup> However, the most recent conflict in Sudan involves the western region of Darfur, where black African farming tribes have clashed with government-supported Arab African nomadic tribes. The brutal violence in Darfur officially began in 2003 and, since then, there have been continuing atrocities occurring in the region among various tribes and the Sudanese government.<sup>27</sup>

1. Sudan's North-South Civil War

Sudan's twenty-two year civil war broke out in 1983, when Sudanese President Nimeiri declared Arabic as Sudan's national language and imposed Islamic law on the country.<sup>28</sup> In response to these actions, non-Muslim soldiers in the South established the Sudan People's Liberation Army (SPLA) and a corresponding political organization, the Sudan People's Liberation Movement (SPLM).<sup>29</sup> The SPLA demanded the Sudanese government repeal its imposition of Islamic law, but President Nimeiri refused and ordered the military to destroy the SPLA.<sup>30</sup> Fighting between Nimeiri's military and the SPLA resulted in the deaths of thousands of Su-

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22 William L. Saunders, Jr. & Yuri G. Mantilla, *Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan*, 51 CATH. U. L. REV. 715, 718–22 (2002).

23 *Id.* at 718.

24 Animism is a traditional African religion that attributes a life and spirit to all material things, such as plants, thunderstorms and earthquakes. WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY (1993).

25 Saunders & Mantilla, *supra* note 22, at 718.

26 *Id.*

27 ATROCITIES IN DARFUR, *supra* note 4.

28 Saunders & Mantilla, *supra* note 22, at 719; DeJuan Bouvean, *A Case Study of Sudan and the Organization of African Unity*, 41 HOW. L.J. 413, 416–17 (1998). Islamic law is known as Shari'a, and southern Sudanese claimed that this law denied non-Muslims and women full citizenship rights. Judith Mayotte, *Civil War in Sudan: The Paradox of Human Rights and National Sovereignty*, 47 J. INT'L AFF. 497, 504 (1994); *see also* Saunders & Mantilla, *supra* note 22, at 720 (explaining that non-Muslims were permitted to convert to Muslim, but that apostasy by a Muslim was punishable by death).

29 The SPLM was created as a separate political organization in southern Sudan. Bouvean, *supra* note 28, at 417. However, unlike the South's previous support for a separatist movement, the SPLM advocated for incorporation of the South into a democratic Sudan. The South wanted the Sudanese government to act democratically by treating all citizens equally. Mayotte, *supra* note 28, at 503.

30 Bouvean, *supra* note 28, at 417.

danese in the South.<sup>31</sup>

In 1985, a military coup overthrew President Nimeiri<sup>32</sup> and, in 1986, Sadiq al-Mahdi was elected prime minister of Sudan.<sup>33</sup> The Mahdi government initiated narrow measures in its attempt to end the civil war, such as a partial abrogation of Islamic law.<sup>34</sup> However, the SPLA demanded an absolute repeal of Islamic law, which Mahdi rejected.<sup>35</sup> Mahdi and the SPLA finally reached a cease-fire agreement in 1988 and scheduled a conference to create a new secular constitution for Sudan.<sup>36</sup> However, these peace talks were abruptly destroyed when the National Islamic Front ("NIF")<sup>37</sup> ousted Mahdi in a military coup.<sup>38</sup> The NIF appointed Hassam Ahmed al-Bashir as Sudan's new leader.<sup>39</sup> The new government's objective was to "Arabize" and "Islamize"<sup>40</sup> Sudan by implementing measures forcing Arab culture and Islamic religion upon non-Muslims.<sup>41</sup> Bashir dissolved the Sudanese National Assembly and all political parties.<sup>42</sup> Bashir continued to close down the press and all secular associations and established a new military, the Popular Defense Force.<sup>43</sup>

The NIF employed war tactics targeted primarily at southern African tribes because of their resistance to the government's imposition of Arab culture and Islamic religion.<sup>44</sup> These tactics included bombing of civilian targets, such as hospitals, churches, and United Nations (UN) humanitarian aid centers.<sup>45</sup> The NIF also armed northern Muslim tribesmen<sup>46</sup> to commit atrocities by raiding southern villages.<sup>47</sup> During these raids, the northerners would enter villages, kill all adult black males and abduct the women and children.<sup>48</sup> These women and children were taken as slaves and were

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<sup>31</sup> *Id.* Some survivors sought refuge in other countries, and the Sudanese government imposed excessive food and fuel taxes on those who remained in Sudan. *Id.* at 417-18.

<sup>32</sup> After Nimeiri was overthrown, his former Minister of Defense and Commander-in-Chief was appointed Sudan's temporary leader. *Id.* at 418.

<sup>33</sup> *Id.* However, members of the SPLA refused to vote, and approximately half of the southern constituencies were unable to vote due to the war. Mayotte, *supra* note 28, at 504.

<sup>34</sup> This proposed abrogation included an exemption for non-Muslims from paying Islamic taxes and from certain punishments under Islamic law. Bouvean, *supra* note 28, at 419.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The NIF was one of the three political parties of the government coalition instituted by Prime Minister Mahdi. *Id.*

<sup>38</sup> *Id.* The NIF adamantly refused to allow the abolition of the Shari'a. Mayotte, *supra* note 28, at 506.

<sup>39</sup> Bouvean, *supra* note 28, at 419.

<sup>40</sup> The term, "Arabize" refers to the imposition of Arab customs, language, and culture. Similarly, the term, "Islamize" means to enforce Islamic law, beliefs and customs on others. WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY (1993).

<sup>41</sup> Bouvean, *supra* note 28, at 420-22.

<sup>42</sup> *Id.* at 420.

<sup>43</sup> *Id.*

<sup>44</sup> Saunders & Mantilla, *supra* note 22, at 721.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 723-24.

<sup>47</sup> Bouvean, *supra* note 28, at 422-23.

<sup>48</sup> *Id.* at 423.

“usually either kept by their Arab captors, given to other Arabs as gifts, traded with other Arab countries, or branded as cattle and sold at auctions in exchange for cows or camels.”<sup>49</sup> Many female slaves were raped by their masters, and male children taken as slaves were often conscripted to join the government’s military.<sup>50</sup>

After almost two decades of civil war, over two million people had died and another four million were displaced from their homes.<sup>51</sup> In 2002, the Bashir government and the SPLA signed a cease-fire agreement to formally end the civil war.<sup>52</sup> However, the violence continued until 2005 when the Comprehensive Peace Agreement was signed, which formally ended the civil war.<sup>53</sup> Although there appeared to be a possibility of peace in Sudan when this landmark agreement was signed, a new chapter in Sudan’s volatile history had emerged in the western region of Darfur.<sup>54</sup>

## 2. The Current Conflict in Darfur: Additional Refugees in Desperate Need of Asylum

Tension has existed in Darfur between Arab African nomadic herders and black African farmers from the Fur, Massaleit, and Zagawa tribes over land use rights.<sup>55</sup> Unlike the primarily religious-based conflicts between northern and southern Sudan, the violence in Darfur is motivated by an ethnic conflict between Arab Africans and black Africans in the region.<sup>56</sup> Both Arab and black Africans in the Darfur region are predominantly Muslim.<sup>57</sup> These groups have fought over grazing rights, access to water and use of productive agricultural land in the increasingly arid climate of Darfur.<sup>58</sup> The use of armed violence between these groups originated when the Sudanese government armed Arab tribes in the region to help defeat the SPLA.<sup>59</sup> Thereafter, one of these Arab tribes attacked the Fur, Massalit, and Zagawa tribes to take over land and water rights.<sup>60</sup> After Bashir took

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<sup>49</sup> *Id.* (footnotes omitted).

<sup>50</sup> *Id.* at 424.

<sup>51</sup> Saunders & Mantilla, *supra* note 22, at 715.

<sup>52</sup> *Timeline: Sudan Chronology of Key Events*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/827425.stm](http://news.bbc.co.uk/2/hi/middle_east/827425.stm) (last visited Apr. 3, 2008) [hereinafter BBC, *Chronology of Sudan*].

<sup>53</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, SUDAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm> [hereinafter SUDAN REPORT]. As a result of this agreement, the Autonomous Government of Southern Sudan ratified a separate constitution and “[a] referendum to determine whether the south will become an independent entity is scheduled for 2011.” *Id.*

<sup>54</sup> BBC, *Chronology of Sudan*, *supra* note 52.

<sup>55</sup> There are at least thirty more of these farming tribes in Darfur, but the primary focus of the current violence has been on these three tribes. *Darfur Conflict*, REUTERS FOUNDATION, [http://www.alertnet.org/db/crisisprofiles/SD\\_DAR.htm?v=in\\_detail](http://www.alertnet.org/db/crisisprofiles/SD_DAR.htm?v=in_detail) [hereinafter *Darfur Conflict*] (last visited April, 3, 2008).

<sup>56</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* These tensions were previously resolved by the use of local councils; however, “[t]hese [councils] were abolished by the . . . [Bashir] government after it came to power in a coup in 1989, leaving no mechanisms for resolving disputes peacefully.” *Darfur Conflict*, *supra* note 55.

<sup>59</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>60</sup> *Id.*



control of the Sudanese government, non-Arab tribes in Darfur were disarmed.<sup>61</sup> The pro-government Arab tribes, however, were permitted to retain their weapons.<sup>62</sup> In 2003, two rebel groups from Darfur's farming region, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), revolted against the Sudanese government.<sup>63</sup> This rebellion was sparked by discontent with the lack of political power, social services and basic infrastructure in the region.<sup>64</sup> Non-Arabs in Darfur also felt that they were being oppressed by a government supportive of Arab Africans.<sup>65</sup>

The Bashir government has escalated the tension between Arab Africans and black Africans in Darfur and is accused of supporting and arming the pro-government Arab militias, the Janjaweed, in response to the SLA and JEM's actions.<sup>66</sup> The government has reportedly supported aerial bombardments of civilian villages, which are usually followed by Janjaweed raids.<sup>67</sup> This pattern provides strong evidence that the government is closely involved in the Janjaweed's brutal actions against black farming tribes in Darfur.<sup>68</sup> There are also reports that the government has provided the Janjaweed with salaries and communication equipment.<sup>69</sup>

Attempts at an effective peace agreement between the pro-government Janjaweed and rebel groups have been unsuccessful, leading to further divisions within the two rebel groups.<sup>70</sup> These divisions have created even more complex fighting between the various groups.<sup>71</sup> To complicate matters further, the Janjaweed militias have become frustrated with the Sudanese government, fearing that the government will blame them for crimes committed against villagers.<sup>72</sup> The new rebel factions emerging in Darfur have made the potential for peace in the region increasingly unlikely.<sup>73</sup>

At least 200,000 villagers in Darfur have died<sup>74</sup> and 2.5 million

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Q&A: Sudan's Darfur Conflict*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/3496731.stm> [hereinafter *BBC, Darfur Q&A*] (last visited April 3, 2008); see also *Darfur Conflict*, *supra* note 55.

<sup>64</sup> *Darfur Conflict*, *supra* note 55.

<sup>65</sup> *Id.*

<sup>66</sup> ATROCITIES IN DARFUR, *supra* note 4. The Sudanese government has admitted to organizing militias for self-defense purposes against the rebels but has denied any relationship with the Janjaweed. *BBC, Darfur Q&A*, *supra* note 63.

<sup>67</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>68</sup> *Id.* Further evidence of the connection between the Janjaweed and the Sudanese government is Bashir's recent promotion of a suspected leader of the Janjaweed, Musa Hilal, to a senior advisor government position. Nora Boustany, *Sudan Names Janjaweed Figure as Top Advisor*, WASH. POST, Jan. 23, 2008, at A14.

<sup>69</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>70</sup> *Darfur Conflict*, *supra* note 55.

<sup>71</sup> *Id.* These divisions between the African farming tribes have led to fighting among the Fur, Zaghawa and Massaleit tribes. *Id.*

<sup>72</sup> *Darfur Conflict*, *supra* note 55.

<sup>73</sup> Orla Guerin, *Darfur Refugees Long for Peace*, BBC News, <http://news.bbc.co.uk/2/hi/africa/6982728.stm> (last visited Apr. 3, 2008).

<sup>74</sup> SUDAN REPORT, *supra* note 53; Ellen Knickmeyer, *A Crisis of Conscience Over Refugees in*

people, primarily black African farmers, have been displaced from their homes.<sup>75</sup> Displaced persons have sought shelter and protection in camps outside Sudan's capital.<sup>76</sup> These camps lack sufficient food, water and medicine and are patrolled by the Janjaweed.<sup>77</sup> "Darfuris say [that at these camps] the men are killed and the women raped if they venture too far in search of firewood or water."<sup>78</sup> Alternatively, many Darfurians have fled to the neighboring country of Chad.<sup>79</sup> However, the Darfurians' safety is threatened in Chad by an ongoing conflict between Sudan and Chad, which is fueled by accusations that each country is funding the other's rebel groups.<sup>80</sup> Darfurians have also sought asylum in other African countries, but most often they have fled to Egypt.<sup>81</sup> From Egypt, many asylum seekers continue on to Israel in search of the security that Egypt has been unwilling to provide.<sup>82</sup>

#### B. Israel's Relationship to Asylum Seekers from Darfur

In the past year, Israel has become increasingly involved, albeit indirectly, in Sudan's internal conflicts.<sup>83</sup> Although Sudan and Israel are officially enemy nations, many Sudanese who fled Sudan's civil war, and, more importantly, those fleeing persecution and violence in Darfur,<sup>84</sup> have sought refuge in Israel.<sup>85</sup> Many Sudanese seek asylum in Israel because

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*Israel*, WASH. POST, Aug. 25, 2007, at A10 [hereinafter Knickmeyer, *A Crisis of Conscience*].

<sup>75</sup> Knickmeyer, *A Crisis of Conscience*, *supra* note 74, at A10; BBC, *Darfur Q&A*, *supra* note 63. Although the United States has publicly labeled the war in Darfur "genocide," the United Nations has yet to do so. Jim VandeHei, *In Break with U.N., Bush Calls Sudan Killings Genocide*, WASH. POST, June 2, 2005, at A19. If the United Nations accepts that the war in Darfur is genocide then it would be obligated to take action. *U.S. House Calls Darfur Genocide*, BBC NEWS, July 23, 2004, <http://news.bbc.co.uk/2/hi/africa/3918765.stm>.

<sup>76</sup> BBC, *Darfur Q&A*, *supra* note 63.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* An estimated 234,000 Darfurians have fled to Chad since the conflict in Darfur began. SUDAN REPORT, *supra* note 53.

<sup>80</sup> *Darfur Conflict*, *supra* note 55.

<sup>81</sup> See Knickmeyer, *A Crisis of Conscience*, *supra* note 74. In 2004, there were 9,720 Sudanese asylum applicants in Egypt and, at the end of 2005, there were 2,400. However, these statistics do not ascertain how many of these Sudanese asylum seekers are from Darfur, as opposed to other regions of Sudan. UNHCR STATISTICAL YEARBOOK COUNTRY DATA SHEETS (2005), <http://www.unhcr.org/statistics/STATISTICS/4641bec40.pdf>. Since the 1990's, over two million Sudanese have fled to Egypt. Knickmeyer, *Israel to Block Refugees*, *supra* note 11. In this Comment, the term, "asylum seekers" refers to individuals who are outside their country of origin and are seeking refugee status in another country. The term, "refugee" refers to those who have met all of the required criteria under the 1951 Convention's definition of a refugee. See *infra* note 112 and accompanying text.

<sup>82</sup> See *infra* sources and text accompanying notes 203–211 for a discussion of Egypt's treatment of Sudanese asylum seekers and refugees.

<sup>83</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>84</sup> The fact that there has been a large increase of asylum seekers from Darfur entering Israel is important because these asylum seekers meet the criteria for refugee status under the 1951 Convention. For a refugee analysis, see *infra* notes 224–243 and accompanying text. Asylum seekers from southern Sudan, on the other hand, do not necessarily meet these requirements because the conflict involving southern Sudan was settled by a peace agreement in 2005. See *supra* notes 53–54 and accompanying text.

<sup>85</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

they believe that Israel will provide them with safety, freedom and opportunities.<sup>86</sup> Sudanese asylum seekers travel through Egypt and across the Sinai border into Israel.<sup>87</sup> Generally, this journey is by foot, and the few who manage to raise enough money hire Bedouin guides to help them cross into Israel.<sup>88</sup> This increase of Sudanese asylum seekers in Israel has raised numerous issues of international law that Israel must now confront. In order to adequately resolve these issues, Israel must first determine whether asylum seekers are refugees or merely economic migrants.

There is a widespread perception among Israeli politicians that Sudanese coming from Sudan to Israel, after either residing in Egypt or just passing through,<sup>89</sup> are economic migrants rather than refugees.<sup>90</sup> The assumption is that most Sudanese entering Israel are economic migrants because they first sought asylum in Egypt and then chose to migrate to Israel in search of better job opportunities.<sup>91</sup> Admittedly, some Sudanese have found it incredibly difficult to gain employment in Egypt due to discrimination and thus decided to continue on to Israel.<sup>92</sup>

However, it is insufficient for Israel simply to claim that all Sudanese crossing its border are economic migrants. Israel must ascertain which immigrants are economic migrants as opposed to bona fide refugees because only those classified as refugees are entitled to the protection of the 1951 Convention.<sup>93</sup> An economic migrant is a person who voluntarily leaves his or her country to move elsewhere due *exclusively* to economic motives.<sup>94</sup> Although an economic migrant is not a refugee, these concepts are not mutually exclusive.<sup>95</sup> A person may still meet the criteria for refu-

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* “Bedouin smugglers who, like Mexico’s *coyotes*, charge hundreds of dollars a head to deliver people across the wasteland of the Sinai desert.” Kadesh Barnea, *Heading for the Promised Land*, 384 *ECONOMIST*, Aug. 25, 2007, at 45.

<sup>89</sup> The numbers of Darfurians that have fled Sudan and sought refuge in Egypt for a period of time, and of those who have only crossed through Egypt on their direct route to Israel, are uncertain.

<sup>90</sup> As an Israeli government spokesperson stated, “[t]here has been a trickle of refugees over the last few months’ but ‘almost a flow of illegal economic migrants.’” *Sudanese Asylum Seekers Take Long Bus Ride to Find Bed for Night*, IRIN, July 9, 2007, <http://www.irinnews.org/Report.aspx?ReportId=73146>.

<sup>91</sup> Isabel Kershner, *Israel Returns Illegal Migrants to Egypt*, N.Y. TIMES, Aug. 20, 2007, at A6; GABRIELLE THAL-PRUZAN, THE JACOB BLAUSTEIN INSTITUTE FOR THE ADVANCEMENT OF HUMAN RIGHTS, *SUDANESE IN ISRAEL: THE CURRENT SITUATION* (2007), [http://www.ajc.org/atf/ct/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/BI\\_Briefing\\_Paper\\_Sudan\\_in\\_Israel\\_2007.pdf](http://www.ajc.org/atf/ct/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/BI_Briefing_Paper_Sudan_in_Israel_2007.pdf).

<sup>92</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>93</sup> See generally 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>94</sup> UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 62, at 16 (1992) [hereinafter UNHCR HANDBOOK].

<sup>95</sup> *Id.* ¶ 63 at 17. “Behind economic measures affecting a person’s livelihood there may be racial, religious, or political aims or intentions directed against a particular group.” *Id.* The United States Court of Appeals for the Second Circuit has also recognized that economic motives can be combined with other motives that are protected under the 1951 Convention. This court held that “the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.” *Osorio v. Immigration & Naturalization Serv.*, 18 F.3d 1017, 1028 (2d Cir. 1994).

gee status under the 1951 Convention even if there are some economic considerations that motivated the person to leave his or her country of origin.<sup>96</sup> Therefore, Israel cannot correctly presume that, because an asylum seeker is in search of better economic conditions, he or she should automatically be classified as an economic migrant.<sup>97</sup>

Sudan's long history of internal violence has caused a progressively increasing number of Sudanese refugees to seek asylum in nearby countries.<sup>98</sup> This surge of refugees has opened the door to numerous issues relating to the legal rights of refugees.<sup>99</sup> The massacre occurring in Darfur has added to this problem and has compelled Israel to gradually become more involved. There are important international laws and Israeli laws and policies that substantially affect the treatment and rights of refugees from Darfur while in Israel.<sup>100</sup>

## II. APPLICABLE INTERNATIONAL LAW AND ISRAELI LAWS AND POLICIES RELATING TO THE RIGHTS OF REFUGEES

There are both international and domestic laws and policies relating to the treatment and rights of refugees in Israel. The primary international instruments concerning refugees are the 1951 Convention and the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees ("1967 Protocol").<sup>101</sup> In addition, the UNHCR provides the foremost guidance on the interpretation and implementation of the 1951 Convention and 1967 Protocol.<sup>102</sup> Although Israel does not have a comprehensive domestic refugee law, it has adopted various laws and policies that have an effect on refugees in Israel.<sup>103</sup>

### A. International Law Relating to the Refugees' Rights

After World War II, twenty-six nations, including Israel, met to devise a comprehensive plan to care for the hundreds of thousands of individuals displaced by the War, largely as a result of the Holocaust.<sup>104</sup> These nations

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<sup>96</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 63, at 17.

<sup>97</sup> Furthermore, as the UNHCR has made clear, an individual is a refugee once they meet the criteria set forth in the 1951 Convention, whether or not they have been officially recognized as such. UNHCR HANDBOOK, *supra* note 94, ¶ 28, at 9.

<sup>98</sup> Aron Heller, *Israel: No Promised Land for Africans*, ASSOCIATED PRESS, Feb. 26, 2008, available at [http://www.newsvine.com/\\_news/2008/02/26/1327228-israel-no-promised-land-for-africans](http://www.newsvine.com/_news/2008/02/26/1327228-israel-no-promised-land-for-africans).

<sup>99</sup> The conflict in Darfur has led to an increase in individuals seeking asylum in Israel, which has added to the already massive number of Africans seeking refuge in Israel. Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>100</sup> See *infra* notes 100–170 and accompanying text.

<sup>101</sup> 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. See *infra* notes 104–119 and accompanying text for a discussion of the 1951 Convention and the 1967 Protocol.

<sup>102</sup> For a discussion of the UNHCR, see *infra* notes 120–132 and accompanying text.

<sup>103</sup> See *infra* notes 133–170 for a discussion of Israel's laws and policies relating to refugees.

<sup>104</sup> Marilyn Achiron, *A 'Timeless' Treaty Under Attack*, 2 REFUGEES, 2001 at 6, available at <http://www.unhcr.org/publ/PUBL/3b5e90ea0.pdf>.

adopted the 1951 Convention in hopes of a solution to the massive refugee dilemma caused by World War II.<sup>105</sup> The 1951 Convention is the most comprehensive international instrument setting forth refugees' rights and minimum standards contracting states are obligated to follow.<sup>106</sup> Israel was one of the founding signatories to the 1951 Convention.<sup>107</sup> When originally enacted, the 1951 Convention applied only to individuals who had become refugees as a result of actions occurring before January 1, 1951.<sup>108</sup> However, in response to the conflicts arising after 1951, which created many new refugees, the UN expanded application of the 1951 Convention to all refugees without any date restrictions in the 1967 Protocol.<sup>109</sup> Subsequently, states had the option to ratify the 1967 Protocol to expand the application of the 1951 Convention. Israel was again one of the original signatories to the 1967 Protocol.<sup>110</sup>

### 1. Relevant Principles of the 1951 Convention and 1967 Protocol

As noted, the 1951 Convention and the 1967 Protocol are the primary international legal instruments defining the term, "refugee" and refugees' rights, as well as, the legal obligations of contracting states.<sup>111</sup> The 1951 Convention and 1967 Protocol define a refugee as:

[A person who] owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.<sup>112</sup>

Those who qualify as refugees are distinct from asylum seekers and are entitled to protection under the 1951 Convention.<sup>113</sup> "Asylum seekers are people who have moved across international borders in search of pro-

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<sup>105</sup> *Id.*

<sup>106</sup> See generally 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>107</sup> Parties to the Convention and Protocol, *supra* note 17.

<sup>108</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>109</sup> 1967 Protocol Relating to the Status of Refugees, *supra* note 101, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>110</sup> Parties to the Convention and Protocol, *supra* note 17.

<sup>111</sup> UNHCR Definitions and Obligations, <http://www.unhcr.org.au/basicdef.shtml> [hereinafter Definitions and Obligations] (last visited Apr. 2, 2008).

<sup>112</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 1, ¶ A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152; 1967 Protocol Relating to the Status of Refugees, *supra* note 109, art. 1 ¶ 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

<sup>113</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6261, 189 U.N.T.S. at 152. Reference to the 1951 Convention throughout this Comment includes the provisions of the 1967 Protocol as well, because these provisions are essentially the same. The only difference between the 1951 Convention and the 1967 Protocol is that the 1967 Protocol expands the application of the 1951 Convention. 1967 Protocol Relating to the Status of Refugees, *supra* note 109, art. 1 ¶ 2, 19 U.S.T. at 6261, 606 U.N.T.S. at 268.

tection under the 1951 Refugee Convention, but whose claim for refugee status has not yet been determined.”<sup>114</sup>

Articles 3, 32, and 33 of the 1951 Convention are the fundamental provisions with which Israel has failed to adequately comply with in its implementation of laws and policies relating to refugees.<sup>115</sup> Article 3’s non-discrimination clause requires that the 1951 Convention’s provisions be applied “to refugees without discrimination as to race, religion or country of origin.”<sup>116</sup> Under Article 32, a refugee cannot be expelled by a contracting state unless it is necessary for national security or public order, in which case the decision to expel must be “reached in accordance with due process of law.”<sup>117</sup> Unless compelling national security justifications dictate otherwise, due process requires that a refugee “be allowed to submit evidence to clear himself [or herself], and to appeal to and be represented . . . before competent authority . . .”<sup>118</sup> Arguably, the most important provision of the 1951 Convention is Article 33’s prohibition of refoulement.<sup>119</sup> This provision states that “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to . . . territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”<sup>120</sup>

## 2. The United Nations High Commissioner for Refugees

The 1951 Convention provides the essential legal framework to which contracting states must adhere but does not prescribe the procedures necessary for implementation of these laws. The UNHCR provides the principal source of guidance for interpreting the 1951 Convention.<sup>121</sup> Therefore, contracting states should look to UN guidelines for guidance on enforcing the provisions of the 1951 Convention.<sup>122</sup> The UNHCR was created by the

<sup>114</sup> DAVID A. MARTIN ET. AL., *FORCED MIGRATION: LAW AND POLICY* 9 (2007).

<sup>115</sup> For a discussion of Israel’s failure to comply with these provisions, see *infra* notes 181–214 and accompanying text.

<sup>116</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 3, 19 U.S.T. at 6264, 189 U.N.T.S. at 156.

<sup>117</sup> *Id.* art. 32 ¶ 1, ¶ 2, 19 U.S.T. at 6275–76, 189 U.N.T.S. at 174.

<sup>118</sup> *Id.* art. 32 ¶ 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 174.

<sup>119</sup> *Id.* art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. In this Comment, the prohibition of refoulement will be referred to as “non-refoulement.” Non-refoulement mandates that a refugee cannot be returned or expelled to any place where they may be persecuted. This principle is not limited to prohibition of the return of refugees to their country of origin; it also applies to the expulsion of a refugee to any country where there is a threat of persecution. *FORCED MIGRATION*, *supra* note 114, at 70. The importance of non-refoulement is illustrated by the 1951 Convention’s prohibition of any reservations by contracting states to this provision. UNHCR, *Introductory note to 1951 Convention and Protocol Relating to the Status of Refugees*, at 5–7 (1996), <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10> [hereinafter UNHCR, *Introductory note to Convention*].

<sup>120</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 33 ¶ 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

<sup>121</sup> See generally UNHCR HANDBOOK, *supra* note 94.

<sup>122</sup> See generally 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

UN in 1950 to protect refugees and assist them in rebuilding their lives.<sup>123</sup> The UNHCR assists refugees by helping them integrate into the country of first asylum or resettle in a third country.<sup>124</sup> This agency focuses on ensuring that individuals are not returned to a country where they fear persecution.<sup>125</sup> The UNHCR is charged with ensuring compliance with international refugee laws by working with governments to monitor their refugee laws and policies.<sup>126</sup> To perform these functions, the UNHCR created the Procedural Standards for Refugee Status Determination (“RSD Procedures”) under the UNHCR Mandate<sup>127</sup> and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (“UNHCR Handbook”).<sup>128</sup>

The UNHCR Handbook explains that a person who meets the criteria of a refugee under the 1951 Convention is, in fact, a refugee, even if refugee status has not yet been recognized.<sup>129</sup> The UNHCR Handbook prescribes that refugee status determinations must be made on a case-by-case basis by ascertaining the relevant facts and then applying the 1951 Convention to these facts.<sup>130</sup> The RSD Procedures establish the essential steps that should be taken when an asylum seeker applies for refugee status with the UNHCR.<sup>131</sup> The RSD Procedures stipulate that those applying for refugee status with the UNHCR have a right to an individual RSD interview.<sup>132</sup> The RSD Procedures also state that “[u]nder no circumstance should a refugee claim be determined in the first instance on the basis of a paper review alone.”<sup>133</sup>

## B. Israel’s Laws and Policies Affecting Refugees and Asylum Seekers

The UNHCR has been working in Israel for the past twenty-five years and is represented by Michael Bavly,<sup>134</sup> a former Israeli diplomat.<sup>135</sup> Pre-

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<sup>123</sup> UNHCR, HELPING REFUGEES: AN INTRODUCTION TO UNHCR (2005), at 4, <http://www.unhcr.org.au/pdfs/Helpingrefugees.pdf> [hereinafter HELPING REFUGEES].

<sup>124</sup> *Id.* at 7.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V) ¶ 8 (Dec. 14, 1950), available at <http://www.unhcr.org/protect/PROTECTION/3b66c39e1.pdf>.

<sup>127</sup> UNHCR, PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER THE UNHCR’S MANDATE, <http://www.unhcr.org/publ/PUBL/4317223c9.pdf> [hereinafter RSD PROCEDURES] (last visited Apr. 2, 2008).

<sup>128</sup> UNHCR HANDBOOK, *supra* note 94.

<sup>129</sup> *Id.* ¶ 28, at 9.

<sup>130</sup> *Id.* ¶ 29, at 9.

<sup>131</sup> See generally RSD PROCEDURES, *supra* note 128.

<sup>132</sup> *Id.* § 4.3.1.

<sup>133</sup> *Id.*

<sup>134</sup> Q&A: Growing Caseload of Asylum Seekers for UNHCR Offices in Israel, UNHCR NEWS STORIES, July 13, 2007, available at <http://www.unhcr.org/news/NEWS/469797404.html> [hereinafter Q&A, Bavly]. Note that this source refers to Bavly as Mickey Bavly, whereas other sources refer to him as Michael Bavly. See *infra* notes 174–175.

<sup>135</sup> Q&A, Bavly, *supra* note 134. The UNHCR in Israel essentially determines whether an asylum applicant is entitled to have their application sent to the Israeli government for additional scrutiny.

viously, the UNHCR in Geneva made the final determination as to whether individuals should be granted refugee status in Israel.<sup>136</sup> However, currently the UNHCR in Israel is only responsible for the initial assessment of refugee claims.<sup>137</sup> The UNHCR in Israel interviews asylum seekers and makes recommendations as to the outcome of these claims to the National Status Granting Body (NSGB).<sup>138</sup> Reportedly, the UNHCR in Israel only recommends that about one percent or less of its total applications be sent to the government for refugee status approval.<sup>139</sup>

Although Israel is a party to the 1951 Convention and permits the UNHCR to operate in Jerusalem, Israel does not have a domestic refugee law for non-Jewish immigrants.<sup>140</sup> Rather than enacting a comprehensive refugee law, the Israeli government establishes informal policies addressing refugee issues as they arise.<sup>141</sup> Despite Israel's failure to enact a comprehensive domestic refugee law, Israel is still bound by the principles of the 1951 Convention.<sup>142</sup> Therefore, even if Israel continues to adopt new regulations to deal with the increasing number of asylum seekers rather than enact an actual law, these regulations must comply with the 1951 Convention.<sup>143</sup>

Although Israel does not have a comprehensive domestic refugee law, Jewish immigrants who enter Israel and choose to remain are granted Israeli citizenship under the Law of Return.<sup>144</sup> This law states that citizenship shall be granted to "every Jew who has expressed his desire to settle in Israel, unless . . . the applicant . . . is engaged in activity directed against the Jewish people; or . . . is likely to endanger public health or the security of the State."<sup>145</sup> As an alternative to adopting a domestic law specifically

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* In 2002, Israel officially took over the UNHCR's function of reviewing asylum seekers' claims and cases. *Israel Takes Over Review of Local Asylum Claims from UNHCR*, UNHCR NEWS STORIES, Jan. 25, 2002, available at <http://www.unhcr.org/news/NEWS/3c5196494.html> [hereinafter *Israel Takes Over Review*]. Note that Palestinian asylum seekers' claims are dealt with by the U.N. Relief and Works Agency for Palestine Refugees in the Near East, and the UNHCR, therefore, does not handle any of these cases. *Israel Takes Over Review, supra*.

<sup>139</sup> Barnea, *supra* note 88, at 45.

<sup>140</sup> *Q&A*, Bavly, *supra* note 134.

<sup>141</sup> *Id.* According to Bavly, the reason Israel has been apprehensive about adopting a comprehensive refugee law aside from the 1951 Convention is because of the continuous problems that Israel has had with Palestinian refugees. *Id.* In addition to these ad hoc policies, Israel has also applied Israeli laws enacted over fifty years ago to its current immigration problems. See *infra* notes 145–153, 178–183 and accompanying text.

<sup>142</sup> UNHCR, *Introductory Note to 1951 Convention, supra* note 119, at 5–7; Parties to the Convention and Protocol, *supra* note 17. Bavly explains that when Israel "ha[s] a problem that should have been solved by a law, we try to solve it in another way." *Q&A*, Bavly, *supra* note 134. Other countries, such as the United States and Canada, have adopted their own refugee laws, which codify the provisions of the 1951 Convention. See *infra* notes 246–261, 270–276 and accompanying text for a discussion of Canadian and United States refugee laws and regulations.

<sup>143</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>144</sup> Law of Return, 5710-1950, 4 LSI 114 (1949–50) (Isr.).

<sup>145</sup> *Id.*



relating to refugees' rights, Israel has applied the Prevention of Infiltration Law,<sup>146</sup> the Regulations Regarding the Treatment of Asylum Seekers<sup>147</sup> and the current "hot return" policy to non-Jewish refugees.<sup>148</sup> However, these solutions fail to satisfy Israel's obligations under the 1951 Convention.<sup>149</sup>

### 1. The Prevention of Infiltration Law

Under Israel's Prevention of Infiltration Law (hereinafter "Infiltration Law"), a person who is either a national of an enemy country enumerated in the law or who has passed through one of these countries before entering Israel may legally be detained.<sup>150</sup> The Infiltration Law was enacted in 1954 as an emergency measure providing harsh penalties for infiltrators, since they were considered a serious security threat to Israel at the time.<sup>151</sup> The Infiltration Law authorizes the establishment of tribunals for assessing claims brought under this law, but does not provide for judicial review.<sup>152</sup> There is a one-judge tribunal for first instances and a three judge panel for appeals.<sup>153</sup> Only officers of Israel's defense army may serve as tribunal judges.<sup>154</sup> Anyone who falls within the Infiltration Law who enters Israel illegally is presumed to be an infiltrator and has the burden of rebutting this presumption.<sup>155</sup>

### 2. The Regulations Regarding the Treatment of Asylum Seekers in Israel: Israel's Insufficient Attempt at a Comprehensive Refugee Policy

Israel has created a set of policies pertaining to the treatment of asylum seekers in an internal, unpublished document known as the Regulations Regarding the Treatment of Asylum seekers in Israel (hereinafter "Regulations Regarding Asylum seekers").<sup>156</sup> The Regulations Regarding Asylum Seekers were created by a government committee in collaboration

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<sup>146</sup> Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, 8 LSI 133 (1953-54) (Isr.)

<sup>147</sup> *Infra* note 156 and accompanying text.

<sup>148</sup> *Infra* notes 164-170 and accompanying text.

<sup>149</sup> See *infra* notes 202-209 and accompanying text for a discussion of why these laws and policies do not comply with Israel's obligations under the 1951 Convention.

<sup>150</sup> 5714-1954, 8 LSI 133 (Isr.).

<sup>151</sup> *Israel-Sudan: Government Reverts to Detention policy for Sudanese Refugees*, IRIN, June 27, 2007, <http://www.irinnews.org/PrintReport.aspx?ReportId=72957> [hereinafter *Government Reverts to Detention Policy*] (last visited Jan. 3, 2008).

<sup>152</sup> 5714-1954, 8 LSI 133 (Isr.); U.S. DEP'T OF ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006, Mar. 6, 2007, available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78854.htm> [hereinafter ISRAEL COUNTRY REPORT, 2006].

<sup>153</sup> 5714-1954, 8 LSI 133 (Isr.).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> ANAT BEN-DOR ET. AL., PUBLIC INTEREST LAW RES. CENTER & PHYSICIANS FOR HUMAN RIGHTS, ISRAEL-A SAFE HAVEN? PROBLEMS IN THE TREATMENT OFFERED BY THE STATE OF ISRAEL TO REFUGEES AND ASYLUM SEEKERS 32 (Dr. Rahel Rimon trans. 2003) (2003) [hereinafter A SAFE HAVEN?]. The authors of this report obtained a copy of the Regulations Regarding Asylum Seekers from Adv. Mani Mazoz, the Deputy Attorney General of Israel. *Id.*

with the UNHCR and authorized by the Israeli Minister of the Interior in 2001.<sup>157</sup> Unfortunately, these regulations do not fully comply with the provisions of the 1951 Convention and fail to incorporate an adequate portion of the UNHCR guidelines. These regulations provide that a UNHCR representative shall review applications and have discretion to determine whether further investigation is necessary.<sup>158</sup> Representatives will only interview an applicant if they determine that additional information is necessary.<sup>159</sup> Under the Regulations Regarding Asylum Seekers, applicants who pass this preliminary stage are to be protected from deportation while the status of their application is pending.<sup>160</sup> The UNHCR then sends the applicant's information to the Ministry of the Interior, who ultimately decides whether an applicant is granted refugee status.<sup>161</sup> Therefore, the Regulations Regarding Asylum Seekers directly contradict the RSD Procedures' recommendations that all applicants are entitled to an interview and that refugee status determination shall not be based solely on papers presented.<sup>162</sup> More importantly, the Regulations Regarding Asylum Seekers fail to include the 1951 Convention's prohibition of refoulement.<sup>163</sup>

### 3. Israel's New "Hot Return" Policy

In July 2007, Israel's Prime Minister, Ehud Olmert, adopted the "hot return" policy with Egyptian President Hosni Mubarak.<sup>164</sup> Under this policy, "asylum seekers [are turned] back at the [Sinai] border without allowing them to consult with the appropriate authorities and apply for refugee status."<sup>165</sup> The Israel Defense Force is ordered to deport anyone who is apprehended for illegally crossing the border back to Egypt within hours.<sup>166</sup> According to an Israeli government spokesperson, David Baker, the "hot return" policy applies to all non-Jewish<sup>167</sup> asylum seekers, including those from Darfur.<sup>168</sup> On August 19, 2007, Israel officially enforced the "hot re-

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 33.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* The current status of the Regulations Regarding Asylum Seekers is uncertain because the only available information located for this Comment regarding these regulations was published in 2003, which may have been written before the NSGB took over Israel's asylum process in 2002. Therefore, there is a possibility that some provisions of the Regulations Regarding Asylum Seekers may have subsequently changed. *Id.* Under these regulations, the Ministry of the Interior has virtually unlimited discretion when determining which applicants shall be granted asylum. Melanie Takefman, *Wanted: An Immigration Policy for Non-Jews*, JERUSALEM POST, Sept. 4, 2007, at 16.

<sup>162</sup> RSD PROCEDURES, *supra* note 128, § 4.3.1.

<sup>163</sup> A SAFE HAVEN?, *supra* note 156, at 34–35.

<sup>164</sup> Mark Weiss, *Activists Protest Deportation of Darfur Refugees: 48 Asylum Seekers Sent Back to Egypt as Olmert Implements New Policy*, JERUSALEM POST, Aug. 20, 2007, at 3.

<sup>165</sup> Takefman, *supra* note 161.

<sup>166</sup> Weiss, *supra* note 164, at 3.

<sup>167</sup> Jewish asylum seekers are protected by the Law of Return. Law of Return, 5710-1950, 4 LSI 114 (1949–50) (Isr.).

<sup>168</sup> Weiss, *supra* note 164, at 3. Baker also stated that only those from Darfur already present in Israel will be permitted to remain there while the outcome of their claims are pending. *Id.*; see also Israel: Halt Summary Expulsion of Sudanese Migrants: Unknown fate awaits Sudanese Fleeing from

turn” policy when it deported forty-eight African asylum seekers, including some from Darfur, to Egypt.<sup>169</sup> This expulsion sparked international controversy over Israel’s new policy and raised concerns about the fate of these asylum seekers and others already present in Israel.<sup>170</sup>

The 1951 Convention and 1967 Protocol are the most extensive international laws defining the legal rights of refugees. These laws set forth the minimum standards required for the treatment of refugees by contracting states.<sup>171</sup> In addition, the UNHCR provides the foremost guidance on how the 1951 Convention’s standards shall be applied by contracting states through the implementation of domestic laws.<sup>172</sup> Rather than enacting a comprehensive refugee law, Israel has adopted and applied various laws and policies relating to the treatment of refugees.<sup>173</sup> However, these laws and policies fail to meet Israel’s legal obligations under international law.

### III. ISRAEL’S RESPONSES TO THE INCREASE OF SUDANESE ASYLUM SEEKERS ARE IN BREACH OF INTERNATIONAL LAW

The number of Africans crossing the border into Israel has significantly increased in recent years.<sup>174</sup> African asylum seekers enter Israel from Egypt through the Sinai border because it is the only land route from Africa to Europe.<sup>175</sup> Of the estimated 2,400 Africans who have entered Israel through the Sinai border recently, approximately 1,700 are from Sudan, including seven hundred from Darfur.<sup>176</sup> Many Sudanese fled their country to Egypt escaping violence and persecution only to discover that they were subjected to severe racial discrimination, police abuse, and death.<sup>177</sup> Because the harsh treatment in Egypt is reminiscent of the suffering experienced in Sudan, many Sudanese refugees and asylum seekers have risked their lives fleeing to Israel in a continued search for safety.<sup>178</sup> Israel’s res-

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*Darfur*, HUMAN RIGHTS WATCH, Aug. 24, 2007, [http://hrw.org/english/docs/2007/08/22/isrlpa16717\\_txt.htm](http://hrw.org/english/docs/2007/08/22/isrlpa16717_txt.htm). But see Sheera Claire Frenkel, *Gov’t Eyes Ghana Kenya as Possible Havens for Refugees*, JERUSALEM POST, Oct. 18, 2007, at 1 (reporting that Israel has agreed to grant asylum to five hundred of the Darfur refugees already in Israel).

<sup>169</sup> Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>170</sup> *Id.* Over half the members of the Knesset, the Israeli legislature, signed a petition in early August calling for Israel to refrain from sending asylum seekers back to Egypt. *Id.*

<sup>171</sup> See generally 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>172</sup> UNHCR HANDBOOK, *supra* note 94.

<sup>173</sup> See *supra* note 146.

<sup>174</sup> Knickmeyer, *A Crisis of Conscience*, *supra* note 74, at A10. According to the head of the U.N. refugee agency in Jerusalem, Michael Bavly, approximately fifty asylum seekers per night have entered Israel through the Sinai border in recent weeks. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Frenkel, *supra* note 168, at 1. The reported estimates of the exact time frame of when these African asylum seekers actually entered Israel varied from recent years to the first six months of 2007. Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10 (reporting slightly different statistics).

<sup>177</sup> Knickmeyer, *A Crisis of Conscience*, *supra* note 75, at A10; Larry Derfner, *Right of Refuge?*, JERUSALEM POST, May 12, 2006, at 14. See *infra* notes 204–215 and accompanying text and sources for a discussion of the abuse Sudanese refugees have suffered in Egypt.

<sup>178</sup> Knickmeyer, *A Crisis of Conscience*, *supra* note 75, at A10.

ponses to this increase of African asylum seekers are in breach of international law.

#### A. Israel's Imprisonment of Sudanese Asylum Seekers

Israel's recent treatment of non-Jewish asylum seekers, particularly those from Sudan, has been inconsistent.<sup>179</sup> Furthermore, its policies are in breach of international law.<sup>180</sup> By following its domestic policies and laws, Israel has failed to comply with the 1951 Convention. Israel has implemented measures, such as imprisoning asylum seekers and instantly deporting them to Egypt. Neither of these policies meets Israel's obligations under international law. Therefore, these policies are unworkable solutions to Israel's refugee situation.

When Sudanese asylum seekers, including some from Darfur, began seeking refuge in Israel, many were arrested at the border and imprisoned under the Infiltration Law and the Law of Entry.<sup>181</sup> Although Sudan is not listed as an enemy country in the Infiltration Law, Egypt is because of the historically hostile relationship between Egypt and Israel.<sup>182</sup> Therefore, under the Infiltration Law, Sudanese asylum seekers who cross through Egypt into Israel can be detained without judicial review.<sup>183</sup> Israel's Infiltration Law violates Article 3 of the 1951 Convention, which prohibits discrimination against refugees on the basis of country of origin.<sup>184</sup> The Infiltration Law explicitly presumes that an individual, who illegally enters Israel from an enemy state, either by passing through that state or based on citizenship, is an enemy infiltrator.<sup>185</sup> The 1951 Convention requires contracting states to apply its provisions without discrimination,<sup>186</sup> but under

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<sup>179</sup> See *supra* notes 169–73 and accompanying text (describing the inconsistency in allowing 1700 Sudanese to stay, but deporting another forty-eight for no reason); *infra* note 200 and accompanying text (describing the inconsistency in allowing some Sudanese to stay in Kibbutz while awaiting deportation while others are imprisoned).

<sup>180</sup> See *infra* notes 181–213.

<sup>181</sup> Derfner, *Right of Refuge*, *supra* note 177, at 14; see also Rafael D. Frankel & Dan Izenberg, *State Ordered to Change Policy of Sudanese Refugees*, JERUSALEM POST, May 9, 2006, at 5 (discussing the Israeli High Court of Justice's order for the Israeli government to adopt a new policy regarding the imprisonment of refugees). The Entry into Israel Law gives the Minister of the Interior virtually complete discretion in deciding whether a person entering Israel shall be permitted to do so. Entry Into Israel Law, 5712-1952, 6 LSI 159 (1951–52) (Isr.). If the Minister determines that a person entering Israel is not permitted to do so, this person may be detained and deported. *Id.* Further, the Minister may enact regulations that require certain categories of persons to be disqualified from even seeking a permit of residence or a visa under this law. *Id.* In 2006, prior to a subsequent Israeli Supreme Court decision, approximately 280 Sudanese were detained in Israel either in detention centers or other controlled facilities. ISRAEL COUNTRY REPORT 2006, *supra* note 152.

<sup>182</sup> Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, 8 LSI 133 (1953–54) (Isr.).

<sup>183</sup> This essentially means that all asylum seekers from Sudan who come to Israel by foot are deemed infiltrators because they must pass through Egypt to reach Israel. Frankel & Izenberg, *supra* note 181, at 5.

<sup>184</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 3, 19 U.S.T. at 6264, 189 U.N.T.S. at 156.

<sup>185</sup> 5714-1954, 8 LSI 133 (Isr.).

<sup>186</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 3, 19 U.S.T. at 6264,

the Infiltration Law, Israel discriminates against individuals crossing though Egypt into Israel.<sup>187</sup>

The legality of the Infiltration Law is also questionable because it conflicts with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Geneva Convention”),<sup>188</sup> which Israel has signed and ratified.<sup>189</sup> Article 44 of the Geneva Convention states that “the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.”<sup>190</sup> To the contrary, the Infiltration Law treats potential refugees as enemy infiltrators based primarily on the fact that they have passed through an enemy state.<sup>191</sup> Since the Infiltration Law does not allow the motive of asylum seekers to be taken into account, it also does not permit officials to consider whether these asylum seekers in fact have no allegiance to the government of an enemy state.<sup>192</sup> The true motive of refugees fleeing their country of origin is to seek protection from another country, since their own country has failed to protect them.<sup>193</sup>

In what can be viewed as an acknowledgment of its own shortcomings, there was partial justice granted for the Sudanese refugees detained under the Infiltration Law in 2006 when the Israeli High Court of Justice<sup>194</sup>

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189 U.N.T.S. at 156.

<sup>187</sup> 5714-1954, 8 LSI 133 (Isr.). Furthermore, the legitimacy of the Infiltration Law as applied to refugees and asylum seekers from Darfur is debatable because it was enacted in response to an emergency situation occurring over fifty years ago. This law was enacted to prevent Palestinians from returning to Israel after the 1947-1949 war. See Sabri Jiryis, *Domination by the Law*, 11 J. PALESTINIAN STUD. 67, 77-78 (1981). The definition of an infiltrator “obviously . . . applies to any Palestinian who . . . moved however briefly to any area outside that which became Israel.” *Id.* at 78.

<sup>188</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 44, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287.

<sup>189</sup> Ratification of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *ratified by Israel* July 6, 1951, 96 U.N.T.S. 326. See also *Israel: Respect of Fourth Geneva Convention Must be Ensured by High Contracting Parties Meeting in Geneva*, AMNESTY INT’L. UK, Dec. 5, 2001, [http://www.amnesty.org.uk/news\\_details.asp?NewsID=13475](http://www.amnesty.org.uk/news_details.asp?NewsID=13475).

<sup>190</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 188, art. 44, 6 U.S.T. at 3546, 75 U.N.T.S. at 316.

<sup>191</sup> See *supra* notes 149-154 and accompanying text for further discussion of the Infiltration Law.

<sup>192</sup> 5714-1954, 8 LSI 133 (Isr.). The Israeli government has argued that the Sudanese pose a potential security threat to Israel because Sudan is a known supporter of terrorism and an enemy of Israel. However, even the Deputy State Attorney, Yochi Gneffin, admitted that he had no evidence that the Sudanese already in Israel have been involved in any terrorist or anti-Israel activities. Derfner, *Right of Refuge*, *supra* note 177, at 14. Asylum seekers from Darfur are escaping the massive brutality at the hands of their government—they do not represent enemy nationals that pose a threat to Israel. They have sought protection in Israel and they enter Israel as asylum seekers, not enemies. Furthermore, even if some Sudanese entering Israel are enemies of Israel, the Israeli government must implement a system for determining whether asylum seekers pose a security risk before automatically presuming that they do. It is unfair for asylum seekers to be deemed enemy infiltrators on the basis of their country of origin alone because when they flee Sudan they are not acting as agents of the Sudanese government. *Refuge from Darfur*, JERUSALEM POST, June 29, 2006, (Comments and Features), at 13.

<sup>193</sup> See *infra* notes 230-242 and accompanying text for an explanation of the persecution that Darfurians have suffered.

<sup>194</sup> The Supreme Court of Israel sits as the High Court of Justice when it is deciding cases of first impression. These cases primarily involve issues relating to the legality of state officials’ actions. The State of Israel, The Judicial Authority, <http://elyon1.court.gov.il/eng/rashut/maarechet.html> (last visited

ordered the Israeli government to propose a new policy for the treatment of imprisoned refugees.<sup>195</sup> The High Court of Justice held that this new policy “must allow for a form of judicial review on a case-by-case basis” for refugees who are imprisoned.<sup>196</sup> In this case, the High Court of Justice also held that the imprisoned Sudanese could not be denied judicial review, even under the Infiltration Law and rejected the government’s proposal that a military advocate perform this review.<sup>197</sup> This decision expanded the holding in *El-Tay’i et al. v. Minister of the Interior*,<sup>198</sup> where the High Court of Justice held that a refugee, even if from an enemy state, cannot be held for unreasonably long periods of time.<sup>199</sup> Although these decisions have been important steps, the actual results have been relatively insignificant. By the end of 2006, eighty Sudanese were being held in Kibbutzim<sup>200</sup> and another two hundred were detained in prisons.<sup>201</sup>

#### B. Israel’s “Hot Return” Policy Violates the Principle of Non-Refoulement

Israel’s “hot return” policy violates the 1951 Convention’s non-refoulement provision by returning asylum seekers and refugees from Darfur to Egypt.<sup>202</sup> Article 33 prohibits the return of refugees to any place

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Jan. 3, 2008).

<sup>195</sup> Frankel & Izenberg, *supra* note 181, at 5.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> HCJ 4702/94 El-Tay v. Minister of Interior [1995] IsrSC 49(3) 843.

<sup>199</sup>

[A] person should not be detained for a period which exceeds that which is necessary for the fulfillment of the purpose of this power . . . . And if the expulsion is not carried out within a reasonable time (which should not include years or months), continuance of the detention may be justified only by a risk that the person will escape from expulsion or, if being free, may harm public peace and security.

<sup>30</sup> ISRAEL YEARBOOK ON HUMAN RIGHTS 327 (Yoram Dinstein & Dr. Fania Dom eds., 2001) (referring to the holding of the Israeli case, HCJ 4702/94 El-Tay v. Minister of Interior [1994] IsrSC 49(3) 843). This case involved the detainment of Iraqi citizens whose asylum requests were denied and expulsion orders had been issued against them. The detainees argued that if they were returned to Iraq they would be killed and the High Court of Justice held that Israel cannot expel a person to a place where his or her life would be in danger. *Id.* at 325–26. The Court also held that the principle of non-refoulement is not limited to refugees and that it “applies in Israel to any governmental authority which is connected to the expulsion of a person from Israel.” *Id.* at 326.

<sup>200</sup> A kibbutz is a collective agricultural community in Israel. Jon Fidler, *Kibbutz, What, Why, When, Where*, Focus on Israel, Israel Ministry of Foreign Affairs, Nov. 1, 2002, [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/11/Focus+on+Israel+Kibbutz.htm](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/11/Focus+on+Israel+Kibbutz.htm). Although these centers are preferable to prisons, the Sudanese detained in kibbutzim are not permitted to go outside the kibbutz alone. *Israel-Sudan: Israeli NGOs Strive to Release Jailed Refugees*, IRIN NEWS, Apr. 4, 2007, <http://www.irinnews.org/Report.aspx?ReportId=71175>.

<sup>201</sup> ISRAEL COUNTRY REPORT 2006, *supra* note 181. Some of the Sudanese detained have been in prison for up to eleven months without any official judicial hearings. Frankel & Izenberg, *supra* note 181, at 5. Once the Israeli detention centers were full, Israeli soldiers began dropping asylum seekers off in the streets, where volunteers would try to help them find shelter. Yocheved Miriam Russo, *The Angel of Beersheba*, JERUSALEM POST, Aug. 31, 2007 (Metro), at 18.

<sup>202</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. A discussion of Egypt’s failure to adhere to its obligations under the 1951 Convention is outside the scope of this Comment. The focus of this Comment is on Israel’s obligations to

where their lives or freedom would be threatened.<sup>203</sup> The lives and freedom of asylum seekers and refugees from Darfur are threatened in Egypt based on their race and nationality.<sup>204</sup> Sudanese refugees and asylum seekers, including those from Darfur, have experienced extreme racial discrimination and police abuse in Egypt.<sup>205</sup> On December 30, 2005, at least twenty-seven Sudanese protestors in Egypt died after police used water cannons and batons to clear out a resettlement camp.<sup>206</sup> The protest was in response to the UNHCR's refusal to grant political asylum to any additional Sudanese in Egypt.<sup>207</sup> Furthermore, seven hundred of the Sudanese protestors were detained and threatened with deportation, but were later released.<sup>208</sup> Adding to the danger, there have been several reports of Egyptian border police using lethal force against refugees and asylum seekers from Darfur at the Sinai border.<sup>209</sup>

In addition to persecution in Egypt, there is also a serious threat that Egypt will return those who are deported to Egypt back to Sudan under the "hot return" policy. Prime Minister Olmert has stated that Egypt has agreed not to deport any of the Sudanese returned in August of 2007 back to Sudan.<sup>210</sup> However, an Egyptian government official claimed that Egypt never agreed not to deport any of the returned asylum seekers back to Sudan, nor is there an official written agreement that Egypt will not deport asylum seekers from Darfur back to Sudan.<sup>211</sup> In fact, Egypt has deported at least five of the forty-eight African asylum seekers sent to Egypt under the "hot return" policy on August 19, 2007 back to Sudan.<sup>212</sup> Since Sudan considers Israel an enemy state, under Sudanese law it is a crime punishable by imprisonment for a Sudanese citizen to visit Israel.<sup>213</sup> The fate of

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refugees and asylum seekers from Darfur, because these refugees and asylum seekers are actually present in Israel, which fact imposes specific obligations on Israel.

<sup>203</sup> *Id.*

<sup>204</sup> Derfner, *supra* note 177, at 14.

<sup>205</sup> Sudanese face discrimination in Egypt based on their race and nationality and they are frequently harassed and arrested by police. Derfner, *supra* note 177, at 14.

<sup>206</sup> U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: EGYPT (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm> [hereinafter EGYPT COUNTRY REPORT]. There is dispute about how many Sudanese were killed by police and how many were trampled to death during the confrontation. *Egypt: Investigate Police for Sudanese Deaths*, HUMAN RIGHTS WATCH: NEWS, Dec. 30, 2005, <http://hrw.org/english/docs/2005/12/30/egypt12353.htm> [hereinafter HRW, *Investigate Police for Sudanese Deaths*].

<sup>207</sup> Knickmeyer, *Flight from Darfur*, *supra* note 1, at A16.

<sup>208</sup> EGYPT COUNTRY REPORT, *supra* note 206.

<sup>209</sup> For example, on August 1, 2007, Egyptian border guards fatally shot two Sudanese refugees and then beat two other refugees to death. Egypt's Foreign Ministry has condoned the border guards' use of lethal force on those trying to cross the border into Israel if they fail to stop when asked. Knickmeyer, *Flight From Darfur*, *supra* note 1, at A16.

<sup>210</sup> Mark Weiss, *Israel Will Absorb Only the Darfur Refugees Already Here*, JERUSALEM POST, Sept. 24, 2007, at 4.

<sup>211</sup> Knickmeyer, *A Crisis of Conscience*, *supra* note 74, at A10. "An Egyptian Foreign Ministry official, . . . speaking on condition of anonymity, said Israel had sought no assurances about the future of the refugees." Knickmeyer, *Israel to Block Refugees*, *supra* note 11, at A10.

<sup>212</sup> Sheera Claire Frenkel, *Egypt Sent Deported Refugees Back to Sudan*, UN Reports, JERUSALEM POST, Oct. 29, 2007, at 1.

<sup>213</sup> *Id.*

asylum seekers from Darfur, if returned to Sudan, poses an even greater threat due to the continuing violence in the region. The whereabouts of the other forty-three asylum seekers sent to Egypt are unknown, but there are reports that some have been imprisoned and tortured in Egypt and may soon be deported back to Sudan.<sup>214</sup> Therefore, in addition to directly violating the prohibition of refoulement by deporting potential refugees to Egypt, Israel has also indirectly facilitated refoulement by deporting these asylum seekers and potential refugees to Egypt since Egypt has now deported them back to Sudan.<sup>215</sup>

Israel's recent solutions to its current refugee dilemma are unworkable because they are in breach of international law.<sup>216</sup> These impromptu policies are inadequate because they fail to meet Israel's obligations under the 1951 Convention and the Geneva Convention.<sup>217</sup> Furthermore, these policies do not provide any type of formal process for refugee status determination; rather, they provide virtually no process at all. In order to comply with the standards set forth by international law, which Israel has officially agreed to, Israel must implement a comprehensive refugee law.

#### IV. ISRAEL MUST ADOPT A COMPREHENSIVE IMMIGRATION POLICY WITH A PRESCRIBED PROCESS FOR DETERMINING REFUGEE STATUS IN COMPLIANCE WITH THE 1951 CONVENTION

To comply with the 1951 Convention, Israel must adopt a national refugee policy with prescribed procedures for adequately processing asylum applicants. Israel's ad hoc policies, such as imprisoning asylum seekers and refugees and the "hot return" policy, do not meet the minimum requirements set forth in the 1951 Convention.<sup>218</sup> This new policy must have a clearly stated process for determining refugee status based on the 1951 Convention's definition of a refugee, to which all asylum applicants shall be entitled.<sup>219</sup> Israel should implement specific procedures for refugee status determination, because qualifying asylum seekers are entitled to the rights set forth in the 1951 Convention.<sup>220</sup> As a party to the 1951 Convention, Israel must ensure that refugees in its territory receive the rights provided by the 1951 Convention. Furthermore, Israel's refugee law must include Article 33 of the 1951 Convention's prohibition of refoulement<sup>221</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> There is evidence that Israel was well aware of Egypt's human rights abuses, illustrated by the fact that the Israel lobby in the U.S. "pressured Congress into withholding \$200 million in foreign aid to Egypt in part because of its failure to respect human rights." Larry Derfner, *An improper Zionist response*, JERUSALEM POST, July 5, 2007, at 16.

<sup>216</sup> See *supra* notes 180–213 and accompanying text.

<sup>217</sup> See *supra* notes 182–213 and accompanying text.

<sup>218</sup> See *supra* notes 182–213 and accompanying text.

<sup>219</sup> As a signatory to the 1951 Convention, Israel may not make any reservations to the 1951 Convention's definition of a refugee. UNHCR, *Introductory note to 1951 Convention*, *supra* note 119.

<sup>220</sup> See generally 1951 Convention Relating to the Status of Refugees, *supra* note 16, 19 U.S.T. 6259, 189 U.N.T.S. 137.

<sup>221</sup> *Id.* art. 33, 19 U.S.T. at 6275, 189 U.N.T.S. at 176.



and Article 32's prohibition of expulsion of refugees, absent a national security or public order necessity.<sup>222</sup> Israel's new law must also provide for due process, including granting refugees permission to submit evidence that they are not a security threat and to appeal, if Article 32's exception applies.<sup>223</sup> In addition to adopting a domestic refugee law with a prescribed process for determining refugee status, Israel must devise a solution for handling refugees to whom it is unable to offer asylum.<sup>224</sup>

#### A. Asylum Seekers from Darfur are Refugees under the 1951 Convention

Under the 1951 Convention's definition of a refugee,<sup>225</sup> asylum seekers from Darfur qualify as refugees and should thus be recognized as such by Israel. To comply with the 1951 Convention, Israel must adopt and adhere to a sufficient process for determining whether asylum seekers are in fact refugees. This process must include an analysis of whether an asylum seeker meets the requirements under the 1951 Convention's definition of a refugee.<sup>226</sup> This analysis must establish that there is a well-founded fear of persecution based on one or more of the five protected grounds enumerated in the 1951 Convention<sup>227</sup> and, owing to such fear, the person must be unable or unwilling to return to Sudan.<sup>228</sup>

##### 1. Persecution

The 1951 Convention does not define persecution or a well-founded fear of persecution; however, parties to the 1951 Convention have adopted various interpretations of what these concepts mean. For example, the United States Court of Appeals for the Ninth Circuit has defined "persecution" as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive."<sup>229</sup> Under this definition, individuals from Darfur have a fear of suffering persecution because there has been a continuous infliction of violence upon black Afri-

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<sup>222</sup> *Id.* art. 32, 19 U.S.T. at 6275-76, 189 U.N.T.S at 174.

<sup>223</sup> *Id.*

<sup>224</sup> See *infra* notes 264-275 and accompanying text.

<sup>225</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 1 ¶ A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152; 1967 Protocol Relating to the Status of Refugees, *supra* note 109, art. 1 ¶ 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

<sup>226</sup> *Id.*

<sup>227</sup> The five protected grounds included in the 1951 Convention's definition of a refugee are race, religion, nationality, membership of a particular social group and political opinion. 1951 Convention, *supra* note 16, art. 1 ¶ A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

<sup>228</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 1 ¶ A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

<sup>229</sup> *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (citations omitted in original) (the Ninth Circuit interpreting the meaning of "persecution" within the United States' Immigration and Nationality Act). In addition, the Board of Immigration Appeals has held that "the term 'persecution' means the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome." *Matter of Acosta*, 19 I & N Dec. 211, 234 (1985). Although these cases are not mandatory authority for Israel, they provide a relevant example for how Israel may decide to interpret the term, "persecution".

cans based on their race.<sup>230</sup> The UNHCR Handbook offers another interpretation. It acknowledges that persecution can be implied under Article 33 of the 1951 Convention as a threat to life or freedom on account of one or more of the five protected grounds.<sup>231</sup> The lives and freedom of asylum seekers from Darfur are threatened by remaining in Sudan because black Africans in Darfur are being killed and their villages are being raided.<sup>232</sup>

## 2. Well-Founded Fear of Persecution

The UNHCR Handbook explains that the well-founded fear requirement has an objective and subjective element.<sup>233</sup> The subjective element refers to the individual's state of mind, and the objective element refers to whether an individual's personal fear is objectively reasonable.<sup>234</sup> Asylum seekers from Darfur have a subjective fear that if they return to Sudan they will be killed, raped, or imprisoned.<sup>235</sup> Moreover, Darfurians' fear of returning to Sudan is well-founded because it is objectively reasonable to fear returning to the ongoing brutality occurring in Darfur.<sup>236</sup> As noted, black African farming tribes have been targeted by the pro-government Janajweed through measures such as village raids, murder, and rape.<sup>237</sup>

## 3. Asylum Seekers from Darfur have Suffered Persecution on Account of their Race, Membership in a Particular Social Group, and Political Opinion

According to the standards set forth in the UNHCR Handbook and the 1951 Convention, asylum seekers from Darfur have a well-founded fear of suffering persecution in Sudan based on their race, membership in a particular social group, and political opinions.<sup>238</sup> More specifically, black farmers from Darfur's Fur, Massaleit, Zagawa and other similar tribes have been targeted by government-supported Arab militias.<sup>239</sup> These Arab militias are persecuting members of these tribes based on their race.<sup>240</sup> More

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<sup>230</sup> Although this definition is not binding on Israel, it is important to note that, under the Ninth Circuit's definition of persecution, asylum seekers from Darfur have a fear of such persecution.

<sup>231</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 51, at 14. The five protected grounds are race, religion, nationality, political opinion or membership of a particular social group. *Id.*

<sup>232</sup> See *supra* notes 66–68, 74–75 and accompanying text.

<sup>233</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 38, at 11–12. Contracting states interpret the meaning of “well-founded fear” differently. For example, the United States Supreme Court has agreed with the UNHCR Handbook and held that the “well-founded fear” requirement includes a subjective element and rejected a “more likely than not” standard for whether fear is well-founded. *INS. v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987).

<sup>234</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 38, at 11–12.

<sup>235</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>236</sup> There have been numerous reports by reliable sources about the continuous violence in Darfur which adds support to the proposition that Darfur asylum seekers satisfy the well-founded fear element of refugee status. See, e.g., ATROCITIES IN DARFUR, *supra* note 4; Guerin, *supra* note 73.

<sup>237</sup> ATROCITIES IN DARFUR, *supra* note 4.

<sup>238</sup> See *supra* notes 55–68 and accompanying text.

<sup>239</sup> See *supra* notes 54–68 and accompanying text.

<sup>240</sup> ATROCITIES IN DARFUR, *supra* note 4. The U.S. Department of State provides some quotes from Darfur refugees obtained from interviews that illustrate that the basis of this persecution is racially

broadly, it could be argued that members of these tribes are being persecuted on account of their membership in these farming tribes. The UNHCR Handbook explains that “[a] ‘particular social group’ normally comprises persons of similar background, habits or social status.”<sup>241</sup> The members of these farming tribes have similar backgrounds, habits and social status because they are from the Darfur region, they all participate in farming tribes and they are viewed by the Sudanese government as having the same social status.<sup>242</sup>

Furthermore, these tribes are targeted by the Sudanese government based on politically motivated persecution.<sup>243</sup> According to the UNHCR, a refugee applicant who alleges a fear of persecution based on political opinion must establish that he or she has a fear of persecution for holding an opinion critical of the government’s policies and actions.<sup>244</sup> Members of these tribes have been openly critical of the Sudanese government for oppressing black Africans in support of Arab Africans in the Darfur region.<sup>245</sup> As a result, these individuals fear persecution on account of their political beliefs.

Finally, many asylum seekers from Darfur are outside of Sudan and are unwilling to avail themselves to Sudan’s protection for fear of further persecution.<sup>246</sup> Therefore, most, if not all, asylum seekers from Darfur satisfy the criteria of refugee status under the 1951 Convention. Although these asylum seekers qualify as refugees under the 1951 Convention, Israel has failed to officially recognize them as such. Israel must apply a particu-

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and ethnically motivated. For instance, a refugee from the Zagawa tribe was told, “[t]his place belongs to Arab tribes. Blacks must leave.” Another Zagawa refugee was told, “[s]laves run! Leave the country. You don’t belong; why are you not leaving this area for the Arab cattle to graze?” This racial persecution is explicitly shown by the statement, “[w]e have orders to kill all the blacks,” which was reportedly stated by either a soldier of the Janjaweed or the Sudanese government’s military. *Id.* The UNHCR Handbook explains that racial discrimination will qualify as persecution under the 1951 Convention if “as a result of racial discrimination, a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights . . . .” UNHCR HANDBOOK, *supra* note 94, ¶ 69, at 18.

<sup>241</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 77, at 19. Similarly, the U.S. has defined “a particular social group” as “a group of persons all of whom share a common, immutable characteristic.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985). Although this definition has no binding effect on Israel, under United States law, black Darfurian farmers would qualify as members of a particular social group. Again, examples of United States law serve only as examples and this Comment does not suggest that Israel should simply adopt United States law. Israel must come up with its own standards that comply with the 1951 Convention.

<sup>242</sup> *See supra* notes 55–68. The UNHCR Handbook also notes that fear of persecution based on membership in a particular social group often overlaps with fear of persecution based on race. UNHCR HANDBOOK, *supra* note 94, ¶ 77, at 19.

<sup>243</sup> *See supra* notes 55–65 and accompanying text.

<sup>244</sup> UNHCR HANDBOOK, *supra* note 94, ¶ 80, at 19. The UNHCR Handbook also notes that fear of persecution based on political opinion “presupposes that the applicant holds an opinion not tolerated by the authorities” and that the government knows that the applicant holds these opinions or attributes such opinions to the applicant. UNHCR HANDBOOK, *supra* note 94, ¶ 80, at 19.

<sup>245</sup> *See* REUTERS, *supra* note 55.

<sup>246</sup> As a Sudanese asylum seeker in Israel stated, “[i]t’s not like they will put me in jail if I go back to . . . Sudan[,] they will kill me.” Etgar Lefkovits, *Sudanese Refugees Fear Deportation. Evangelical Group Treads Fine Line in Assisting Christian Asylum Seekers*, JERUSALEM POST, Aug. 21, 2007, at 4.

lar process for refugee status determination to these asylum seekers, as well as to other asylum applicants.

#### B. A Comparative Proposal for Israel's New Refugee Determination Process

Israel is in critical need of an official process for determining whether those crossing its border qualify as refugees under the 1951 Convention. The Regulations Regarding Asylum Seekers are insufficient because they lack the specificity necessary to provide adequate procedural safeguards for refugees and fail to set forth a process for determining refugee status.<sup>247</sup> More importantly, the Regulations Regarding Asylum Seekers are not being properly enforced. Under the "hot return" policy, there is no process at all, because those crossing into Israel are immediately returned without the opportunity to request asylum.<sup>248</sup> Without an official process that reduces the discretion of Israel's UNHCR officials and the Ministry of the Interior, the Regulations Regarding Asylum Seekers provide only informal procedures that do not effectively comply with the 1951 Convention.<sup>249</sup> Each individual who satisfies the requisite elements of a refugee under the 1951 Convention is entitled to its protection in Israel, and Israel needs to recognize this by implementing a new refugee policy.

The United States' asylum procedures under the Immigration and Naturalization regulations provide a helpful example of what Israel's refugee and asylum process should include.<sup>250</sup> The United States has adopted the 1951 Convention's definition of a refugee and places the burden on the applicant to prove that he or she satisfies the criteria of this definition.<sup>251</sup> The procedures for an interview by an asylum officer are the key elements of the United States' asylum process. The Immigration and Naturalization

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<sup>247</sup> See *supra* notes 156–163 and accompanying text.

<sup>248</sup> See *supra* notes 164–170 and accompanying text for a discussion of the "hot return" policy.

<sup>249</sup> See *supra* notes 156–163 and accompanying text.

<sup>250</sup> Canada's process for making a refugee claim is also a beneficial example for Israel. A claimant must make a claim either at a port of entry into Canada or at an immigration office to be considered for refugee protection in Canada. Process for Making a Claim for Refugee Protection, Immigration and Refugee Board of Canada, [http://www.irb-cisr.gc.ca/en/references/procedures/processes/rpd/rpd\\_e.htm](http://www.irb-cisr.gc.ca/en/references/procedures/processes/rpd/rpd_e.htm) (last visited Apr. 10, 2008). The Canada Border Services Agency or the immigration office will conduct an interview of the claimant and determine whether the claimant qualifies as a refugee under the 1951 Convention or a person in need of protection. *Id.* If the applicant meets either of these requirements, the claim is referred to the Immigration and Refugee Protection Board of Canada (IRB). *Id.* The claimant is then entitled to a hearing and has the burden of proving that he or she is eligible for refugee protection and, if the IRB agrees, then the claimant will receive refugee protection and may apply for permanent residency in Canada. *Id.* If the IRB finds that the claimant is not eligible for protection, the claimant may appeal to the Federal Court of Canada for review of the IRB's decision. *Id.*

<sup>251</sup> 8 C.F.R. § 208.13(b) (2007). The U.S. also expands the definition of a refugee in some circumstances and permits an asylum seeker to qualify as a refugee based on past persecution. 8 C.F.R. § 208.13(b)(1) (2007). Israel does not have an official definition of a refugee; however, since Israel is a signatory to the 1951 Convention, any definition adopted by Israel must, at a minimum, allow those who meet the criteria of the 1951 Convention's definition to qualify as refugees. *Q&A, Bavly, supra* note 134.

Act's regulations prescribe that an asylum officer shall conduct a non-adversarial interview of each individual who has completed an asylum application.<sup>252</sup> Every asylum officer is specially trained in international human rights law, refugee laws and principles, and non-adversarial interview techniques.<sup>253</sup> An asylum officer is authorized to grant asylum to applicants who qualify as refugees.<sup>254</sup> If the officer does not grant asylum to the applicant after conducting an interview and the applicant may be legally deported, the officer shall refer the application to an immigration judge for review in removal proceedings.<sup>255</sup>

The United States also grants procedural protections to individuals apprehended while entering the country without proper documentation.<sup>256</sup> These individuals are subject to expedited removal proceedings. If such an individual expresses a well-founded fear of persecution, the following process shall take place:<sup>257</sup> the asylum seeker "shall be referred to an asylum officer for a reasonable fear determination . . . within 10 days."<sup>258</sup> This determination involves a non-adversarial interview and the officer must ensure that the asylum seeker understands the process.<sup>259</sup> After the interview, the officer must write up a summary of the facts stated by the applicant and whether the officer finds that the applicant has established a reasonable fear of persecution.<sup>260</sup> If the officer finds that the applicant has a credible fear of persecution, then the matter should be referred to an immigration judge for review of the request for withholding or deferring removal.<sup>261</sup> If the officer concludes that the applicant has not established a reasonable fear of persecution or torture, then, at the applicant's request, the officer's summary of the facts, decision and basis for the determination shall be submitted to an immigration judge for review.<sup>262</sup>

Through its laws and regulations, the United States has ensured that asylum applicants receive sufficient due process in compliance with its obligations under the 1951 Convention when seeking asylum or requesting that removal orders be withheld or deferred.<sup>263</sup> The United States'

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<sup>252</sup> 8 C.F.R. § 208.9 (b) (2007).

<sup>253</sup> 8 C.F.R. § 208.1(b) (2007).

<sup>254</sup> 8 C.F.R. § 208.14(b) (2007).

<sup>255</sup> 8 C.F.R. 208.14(c)(1) (2007).

<sup>256</sup> 8 U.S.C. § 1225(b)(a)(A) (2000).

<sup>257</sup> *Id.*

<sup>258</sup> 8 C.F.R. § 208.31(b) (2007).

<sup>259</sup> 8 C.F.R. § 208.31(c) (2007).

<sup>260</sup> *Id.*

<sup>261</sup> 8 C.F.R. § 208.31(e) (2007).

<sup>262</sup> 8 C.F.R. 208.31(g).

<sup>263</sup> In particular, the United States' procedures meet the 1951 Convention's due process requirements under Article 32. Although Israel is confronted with issues relating to immigration that the United States and Canada are not, such as sharing a border with enemy states, the refugee procedures of the United States and Canada explained in this Comment are intended only as an example and are not meant to serve as a perfect model for Israel's own refugee laws and procedures. Furthermore, this Comment does not suggest that United States and Canadian refugee procedures and laws are without flaws.

processes for interviews and judicial review provide a positive example for how Israel should structure its own refugee and asylum status determination process.<sup>264</sup> In addition, Israel's new process must contain a non-refoulement provision to ensure that asylum seekers who meet the qualifications of a refugee, even if not granted asylum in Israel, are not returned or deported to a territory where their freedom or life would be threatened.<sup>265</sup> In order to implement this new process, Israel will need more trained asylum officers to process the large caseload of asylum requests that Israel is currently experiencing. These officers should be stationed at or near the Israel-Egypt border, since this is where the majority of asylum seekers have recently been entering Israel. Currently, Israeli soldiers are the only officers stationed at the border, and this is not a workable system because they are not trained to process asylum claims.<sup>266</sup>

### C. Possible Alternatives for Israel's Management of the Overwhelming Increase of Asylum Seekers

Prime Minister Olmert's primary goal at this time should be implementing a process for determining refugee status that Israeli officials must abide by and which complies with the 1951 Convention. However, after this process is implemented, Israel will still be unable to absorb all of those who are seeking asylum within its territory. Therefore, Israel should also adopt a procedure for handling those who qualify as refugees but for whom Israel lacks the resources to grant asylum. After all, the state of Israel was created in part as a refuge for survivors of the Holocaust and as such it should make a significant contribution to providing protection for those escaping what has been labeled genocide in Darfur.<sup>267</sup>

#### 1. A Memorandum of Understanding with Egypt to Ensure Protection of Refugees Deported from Israel to Egypt

Based on Egypt's record of brutal abuse and discrimination against asylum seekers and refugees, Egypt is not the ideal host for Israel to send refugees to whom it cannot provide asylum.<sup>268</sup> However, if Israel chooses to continue this practice, at a minimum Israel should adopt a memorandum of understanding with Egypt.<sup>269</sup> This memorandum of understanding

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<sup>264</sup> Although the United States' asylum procedures provide a beneficial structural example for Israel, Israel is ultimately responsible for implementing procedures that it feels are appropriate. However, Israel must adhere to its obligations under international law when implementing such measures.

<sup>265</sup> 1951 Convention Relating to the Status of Refugees, *supra* note 16, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

<sup>266</sup> See *Government Reverts to Detention*, *supra* note 151. The Israeli Defense Force patrols the Israeli border and arrests Sudanese asylum seekers and refugees when they cross the border, but, since this apprehension is an immigration matter and not a security issue, the Israeli Defense Force does not have the authority to assess these asylum seekers' claims. *Id.* Another option is to require Israeli border soldiers to take asylum seekers to asylum officials for determination of their status.

<sup>267</sup> See *supra* note 75 and accompanying text.

<sup>268</sup> See *supra* notes 204–209 and accompanying text.

<sup>269</sup> It is questionable whether Egypt would actually agree to a memorandum of understanding with

should ensure that any refugees sent to Egypt will be safe and that Egypt will not deport any refugees back to Sudan or any other country where their lives or freedom are threatened. Before sending any refugees to Egypt, Israel must first determine whether they are in fact refugees or whether they are economic migrants.<sup>270</sup> Since Egypt is a signatory to the 1951 Convention,<sup>271</sup> Israel should receive a formal declaration that Egypt will provide all refugees deported from Israel to Egypt with the rights guaranteed by the 1951 Convention. In addition, this memorandum should require that the Egyptian government take appropriate actions against Egyptian officials who have used deadly force against asylum seekers and refugees and request assurance that this violence and discrimination will be prohibited.

The memorandum of understanding regarding asylum seekers between the United States and Canada may serve as an example for such an agreement between Egypt and Israel.<sup>272</sup> Under the Safe Third Country Agreement between Canada and the United States, asylum seekers must make a refugee claim in the first of these two countries in which they arrive.<sup>273</sup> This agreement demonstrates an effort to better manage refugee claims of those seeking asylum in either country and only applies to asylum seekers entering either the United States or Canada through land borders.<sup>274</sup> The Safe Third Country Agreement does not address all of the issues that Israel and Egypt must confront, but it does provide the structural framework of a bilateral refugee protection agreement that provides a check on abuses of each country's refugee protection procedures.<sup>275</sup>

## 2. Agreements with Third Countries to Provide Asylum to Refugees to whom Israel Cannot

Another strategy for how Israel may manage the influx of asylum seekers is to negotiate safe third country agreements with countries other than Egypt. These agreements would be similar to the proposed memorandum of understanding with Egypt. Israel should receive formal assurance from these third countries that any refugees sent from Israel will be safe

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Israel considering their past hostile relationship. However, in recent years, Israel and Egypt have made strides at peace, such as creating an important trade agreement between the U.S., Egypt, and Israel. Neil MacFarquhar, *Melting Icy Egypt—Israel Relations Through a Trade Pact*, N.Y. TIMES, Dec. 16, 2004, at A3.

<sup>270</sup> For a discussion on the differences between refugees and economic migrants, see *supra* notes 94–95.

<sup>271</sup> Parties to the Convention and Protocol, *supra* note 17.

<sup>272</sup> See CRS REPORT FOR CONGRESS, CANADA–U.S. RELATIONS, May 15, 2007, at 31–32, available at <http://www.fas.org/sgp/crs/row/96-397.pdf> (providing a summary of the provisions of the Canada-U.S. Safe Third Country Agreement).

<sup>273</sup> Canada-U.S. Safe Third Country Agreement, Canada Border Services Agency, <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html> (last visited Mar. 25, 2008).

<sup>274</sup> *Id.*

<sup>275</sup> *But see Canadian Counsel for Refugees v. Canada*, [2007] F.C.J. No. 1683 (Fed. C.C. 2007) (holding that the United States is not a safe third country because it has failed to comply with the non-refoulement provisions of the 1951 Convention and the Convention Against Torture).

and that the rights granted by 1951 Convention will be applied to all refugees. Israel must carefully determine which countries will be safe for refugees. Canada's Immigration and Refugee Protection Act provides important factors to consider when deciding whether a third country is safe for refugees.<sup>276</sup> These factors include whether the country is a signatory to the 1951 Convention and the Convention Against Torture, the prescribed policies and procedures for implementation of these conventions, the process applied for determining refugee status, and the country's human rights record.<sup>277</sup> These considerations are essential because, when sending refugees to a third country, Israel must ensure that it is not violating international law.<sup>278</sup>

Israel is currently considering Ghana and Kenya as possible host countries for some of the refugees already present in Israel, but no agreements have been formalized.<sup>279</sup> Since Israel has officially agreed only to grant asylum to five hundred<sup>280</sup> of those from Darfur already present in Israel, there are at least 1,200 other Sudanese asylum seekers in Israel that it will not absorb.<sup>281</sup> Although it is important to consider sending asylum seekers and refugees to third countries if Israel is not willing to grant them asylum, the small number of refugees that Israel has agreed to grant asylum is insufficient.<sup>282</sup> As a country of seven million, Israel should reflect on its own history and consider granting asylum to at least a few thousand refugees from Sudan's Darfur region.<sup>283</sup> To properly handle the issues arising from the increasing number of individuals seeking asylum in Israel, Israel should adopt a comprehensive refugee law and implement a workable solution for the refugees to whom it cannot provide asylum.

#### CONCLUSION

The genocide occurring in Darfur has created complicated issues regarding the status and treatment of asylum seekers who have fled this war-torn region to Israel in search of protection. Israel's current solutions to this problem are unworkable because they do not satisfy Israel's obligations under international law. In order to adequately resolve these issues, Israel should adopt a comprehensive domestic refugee law that provides a

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<sup>276</sup> Immigration and Refugee Protection Act, 2001 S.C., ch. 27, s. 102(2) (Can.).

<sup>277</sup> *Id.* Another factor considered is whether the country "is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection." *Id.*

<sup>278</sup> Primarily, Israel must ensure that it is not violating the principle of non-refoulement.

<sup>279</sup> Frenkel, *supra* note 168.

<sup>280</sup> *Id.* More recent reports state that Israel actually granted temporary residency status to six hundred refugees from Darfur. Heller, *supra* note 98.

<sup>281</sup> Frenkel, *supra* note 168.

<sup>282</sup> Evelyn Gordon, *Why a 'Genuine Refugees Only' Policy Makes Sense*, JERUSALEM POST, Aug. 22, 2007, at 15.

<sup>283</sup> I do not think that this is an unreasonable number, especially considering that Israel has recently given work permits to about two thousand individuals from Eritrea, which allows them to remain in Israel if their lives would be in danger if deported back to Eritrea. Heller, *supra* note 98.



specified process for refugee status determination in compliance with international law. Individuals from Darfur seeking asylum in Israel are uniquely important because they qualify as refugees under the 1951 Convention and are, therefore, entitled to its protection. Even if Israel is unable to grant asylum to all refugees from Darfur seeking asylum in Israel, Israel is obligated to ensure their safety once they have entered Israel and have met the criteria for refugee status. While there are many others aside from those from Darfur seeking asylum in Israel, their situation serves as a prime example for why Israel is in desperate need of a comprehensive refugee law.<sup>284</sup> As a nation partly formed as a safe haven for survivors of the Holocaust, Israel should make a considerable effort to absorb at least a thousand, if not more, refugees who have fled the brutal violence occurring in Darfur.<sup>285</sup>

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<sup>284</sup> See Larry Derfner, *Mass Movement*, JERUSALEM POST, Feb. 22, 2008, at 14 (explaining that, in addition to asylum seekers from Sudan, many additional asylum seekers from Eritrea, Ivory Coast, and the Congo have also recently sought refuge in Israel).

<sup>285</sup> Derfner, *supra* note 177. As reported on February 27, 2008, a three-week deadline has been set for the Internal Security Ministry, Defense Ministry, and the Interior Ministry of Israel to devise a strategy for dealing with the thousands of refugees and potential refugees currently in Israel. After three weeks, these ministries and the Prime Minister are scheduled to convene and decide on a final plan. However, the head of the Interior Ministry's Population Administration, Ya'acov Ganot, has stated that most of these refugees and potential refugees will be deported. Sheera Claire Frenkel, *Authorities given 3 weeks to decide on refugee policy. 'How can you say that one group suffers less than the rest?'*, JERUSALEM POST, Feb. 27, 2008, at 5.