RESPONSIBILITY SHARING AND THE RIGHTS OF REFUGEES: THE CASE OF ISRAEL

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I. INTRODUCTION

While Israel has been a signatory to the Convention Relating to the Status of Refugees[1] for many decades (since 1951[2]) the Israeli asylum system only started functioning in 2002.[3] Most of the asylum seekers were coming from relatively nearby African countries, such as Sudan, Eritrea, and Ivory Coast.[4] Of these asylum seekers, most have crossed one or more intermediate states to get to Israel. In other words, since 2005, Israel has started to shoulder the burden of the refugee problems resulting from the turbulences in the region in which it is located.

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† The authors wish to thank their dear friends and colleagues Anat Ben Dor, Oded Feller, Stephen Wizner, and Eyal Benvenisti for their contribution to this Essay. The authors also extend their gratitude to the participants of the Minerva Conference on Immigration and Human Rights, May 2009, for their valuable comments on the initial draft of this Essay.

1. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

2. Status of the Convention Relating to the Status of Refugees, UNITED NATIONS TREATY COLLECTION (Nov. 9, 2010, 3:20pm), http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en# Participants.

3. Prior to 2002, Israel had not developed a set of principled procedures for determining refugee status. *See* ANAT BEN-DOR & RAMI ADUT, ISRAEL – A SAFE HAVEN? 21-23 (Dr. Rahel Rimon trans., 2003) (providing an overview of the Israeli asylum system in its formative stage). Indeed, only a few dozen asylum seekers received asylum before 2002. *See* Tally Kritzman-Amir, Israel as a State of Temporary Asylum 5-6 (June 11, 2007) (unpublished manuscript) (on file with authors).

4. According to recent statistical reports provided by the U.N. High Commission for Refugees (UNHCR), over 16,000 asylum seekers registered in Israel by the end of 2008. About 4,900 of these asylum seekers were Eritrean nationals, about 4,400 were Sudanese, and approximately 1,700 were originally from Ivory Coast. *See* E-mail from Michal Alford, Former UNHCR Representative in Isr., to Anat Ben-Dor, Clinical Instructor, Refugee Rights Clinic, Tel Aviv Univ. (Jan. 14, 2009) (on file with authors).

To understand Israel's policy towards asylum seekers, one must evaluate it in light of the state's general immigration regime. As a Jewish democratic state, Israel's immigration and citizenship regime is based on a Jewish/other distinction. Israel has *jus sanguinis* citizenship norms,[5] which display a significant preference for providing citizenship to Jews and their relatives. Israel's immigration policy, therefore, almost exclusively allows for the immigration of Jews and their relatives to Israel.[6] The few exceptions to this rule are typically made for workers migrating for employment, a process that is heavily governed and restricted by a guest-worker program.[7] Conversely, different policies provide the Israeli government with the power to annul the status of Palestinian residents[8] as well as to deny immigration requests by Palestinians and citizens of several other Arab countries almost categorically.[9]

The recently developed asylum system in Israel follows the same norms central to Israel's citizenship and immigration process. As the statistical information on the country's acceptance rates makes obvious, Israel has long demonstrated a general reluctance to grant refugees protection.[10] To maintain this policy, Israel has resorted to complementary protection mechanisms to the refugee convention such as (formal or informal) temporary protection.[11] Additionally, Israel has made it difficult for asylum seekers to live within the nation after entering. Asylum seekers have been, to a large extent, denied access to the Israeli welfare state; many of them

5. The term *jus sanguinis* ("according to blood") refers to a legal rule under which a person's nationality at birth is the same as that of his parents. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 679 (11th ed. 2004).

6. *See* Nationality Law, 5712-1952, 6 LSI 50 (1951-52) (Isr.); Law of Return, 5710-1950, 4 LSI 114 (1949-50) (Isr.).

7. On the migration for employment in Israel, see generally Sarah S. Willen, *Introduction*, *in* TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT 1, 1 (Sarah S. Willen ed., 2007).

8. *See, e.g.*, Nationality Law art. 11.

9. *See* HCJ 7052/03 Adalah v. Minister of Interior, at 30-31 [2006] (unpublished opinion), *available at* http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf. *See generally* Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, SH No. 544 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm.

10. *See* REFUGEES' RIGHTS FORUM, ASYLUM SEEKERS AND REFUGEES IN ISRAEL: FEBRUARY 2009 UPDATE 1 (2009), *available at* http://www.acri.org.il/pdf/refugees0209en.pdf.

11. *See* Kritzman-Amir, *supra* note 3, at 3. "Temporary protection" is granted to asylum seekers solely because of their nationality; these persons are not granted an individual status determination hearing. *Id.* Unlike the United States and the European Union, Israel does not grant refugees permanent status through an individualized process. Rather, in Israel both individual and group asylum seekers are only eligible to be granted temporary status. *Id.* R

have also been prohibited from staying or working within the country's urban centers.[12] Furthermore, Israel has chosen to interpret its obligation to accept immigrants restrictively. Having adopted a narrow reading of Article 1(D) of the Refugee Convention, Israel has determined that all Palestinians are ineligible to be granted asylum[13] (forcing Palestinians either to stay in the Palestinian territories or to seek asylum in other countries, mostly the neighboring Egypt, Lebanon, or Jordan).[14]

Israel's asylum procedures define a broad category of enemy nationals—interpreted to include all nationals from Arab and Muslim states as well as Palestinians—who may not be granted asylum.[15] While most asylum seekers are subject to the risk of detention upon their undocumented entry into Israel, asylum seekers who have crossed from an Arab country—and in particular those who are nationals of such a country—are detained pursuant to emergency legislation under which they have no right to effective judicial review.[16] Also noteworthy is the fact that on several occasions, Israel has applied a "hot-return" policy, the legality of which is currently being challenged before the High Court of Jus-

12. On the geographic restrictions, see generally Brief for Petitioner, HCJ 5616/09 African Refugee Dev. Ctr. v. Ministry of Interior [2009] (Isr.) (on file with authors); State's Preliminary Response, HCJ 5616/09 African Refugee Dev. Ctr. v. Ministry of Interior [2009] (Isr.) (on file with authors). Recently, the geographical restrictions were lifted due to massive public pressure and complaints of the suburban municipalities that they had to shoulder a disproportionate share of the burden. Nonetheless, the government has announced that it reserves the right to re-impose restrictions whenever it deems necessary.

13. *See* Refugee Convention, *supra* note 1, art. 1(D). Article 1(D) specifies the following: **R**

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

Id.; *see also* MICHAEL KAGAN & ANAT BEN-DOR, NOWHERE TO RUN: GAY PALESTINIAN ASYLUM-SEEKERS IN ISRAEL 21 (2008), *available at* http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/NowheretoRun.pdf.

14. LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW, at vii (1998).

15. *See* Ministry of the Interior Internal Directive, Regulations Regarding the Treatment of Asylum Seekers in Israel, art. 6 (Aug. 22, 2001) [hereinafter Asylum Regulations] (on file with authors).

16. *See* State's Response ¶ 3, HCJ 3208/06 Anonymous v. Head of Israeli Def. Forces [2006] (Isr.) (on file with authors). *See generally* Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, 5 LSI 133 (1950-51) (Isr.).

tice,[17] according to which Israel deports persons who recently entered the country through its southern border back to Egypt (despite increasing concerns about the lack of substantive protection offered in Egypt).[18]

Israel's asylum regime follows the logic of its immigration regime.[19] It seeks to promote, primarily, the country's security and demographic interests—the maintenance of the Jewish character of the state. To meet this goal, Israel has crafted an asylum regime that makes the country a less-attractive destination for refugees, with almost complete disregard for responsibility-sharing concerns.[20]

This Essay examines the Israeli asylum regime through the lens of responsibility sharing. It critically analyzes the implementation of this regime, with a particular interest on the impact the regime has on responsibility sharing. It also analyzes the present discourse regarding responsibility sharing, despite its limited scope. Notwithstanding the limited conversation on this issue—both in Israel and in the Middle East generally—this Essay argues that responsibility sharing is a necessary pillar for refugee protection and that it should be considered a central tenet for any nation devising an asylum regime.

This discussion emerges from Israel's unique geopolitical situation. Having a relatively long land border with Africa, Israel is a destination to which many African refugees can walk. Being the only democracy in the region and having a strong economy (both in absolute and relative terms), Israel is likely a preferred destination for those seeking asylum. Additionally, Israel is situated between several Muslim and Arab states, some of which are labeled as enemy states to Israel, which might raise (genuine or fabricated) security issues. Israel is also embroiled in an ongoing conflict with the Palestinians, and it has a large but marginalized, disempowered, and discriminated against Palestinian minority within

17. *See* Declaration of the State ¶ 1, HCJ 7302/07 Hotline for Migrant Workers v. Minister of Def. [2007] (Isr.) (on file with authors).

18. On a number of occasions, Israel has deported persons to Egypt, which later deported them to their country of origin. *See IDF Keeps on Expelling Asylum Seekers to Egypt Despite Egypt's Declarations to the Media that They Will be Deported to Their Homelands*, HOTLINE FOR MIGRANT WORKERS (Sept. 3, 2008), http://www.hotline.org.il/english/news/2008/Hotline090308.htm.

19. *See generally* Tally Kritzman-Amir, "*Otherness" as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603 (2010) (exploring this parallel in greater detail).

20. In several discussions with government officials, the idea that Israel should prevent a "pull factor" by toughening its asylum norms was mentioned. *See id.*

its borders.[21] When these geopolitical considerations are deconstructed however, it becomes apparent that Israel is in a similar situation to many other developed countries. Many countries, like Israel, fear that their democratic regimes and successful economies might attract immigrants of different sorts, are troubled by security and global "terrorism-related" concerns, and attempt to minimize their share of global responsibility and contain refugees to the Global South.[22] In this sense, Israel is an interesting case study from which conclusions on the attitudes and policies of Western countries about responsibility sharing may be generalized.

This Essay's examination of responsibility sharing begins with a general discussion of its moral foundation, in an attempt to explain the philosophical basis of the argument that responsibility for the refugees of the world should be shared. As the Essay makes clear, there are different philosophical justifications for sharing responsibility rather than allocating it in a morally arbitrary manner. Following this, the Essay discusses the current international law norms on responsibility sharing and explains why they are relatively few, general, and ineffective. This Section also examines some practices states have adopted, gives a few examples of ad hoc models that have been developed, and evaluates their success. Next, the Essay details the Israeli refugee regime in light of responsibility sharing, looking at both discourse and policies to understand Israel's position fully. The Essay concludes with suggestions as to how responsibility sharing could be administered better with the help of the courts.

II. DISCUSSION

A. *The Morality and Reality of Responsibility Sharing*

Refugee immigration imposes a responsibility on host societies. States receiving refugees must expend resources to process asylum requests and ensure refugees' assimilation and protection by providing them with housing, jobs, education, and so on.[23] Usually,

21. *See* Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432, 432-33 (1992); Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389, 399 (1990); Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 6 CONSTELLATIONS 364, 370-71 (1999).

22. *See* Howard Adelman, *Refugees and Border Security Post-September 11*, REFUGE, Aug. 2002, at 5, 5-7.

23. *See* Susan Martin, Andrew I. Schoenholtz & David Fisher, *The Impact of Asylum on Receiving Countries*, *in* POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 99 (George J. Borjas & Jeff Crisp eds., 2005) (describing this impact in greater detail).

there is no particular moral justification as to why one specific state and not another should bear the costs of the refugees from State X. Refugees' movements are uneven throughout the world for morally arbitrary reasons. Refugees tend to flee to states that are located close to their countries of origin; they often manage to get to places where there is an existing community of refugees with their same nationality in order to make assimilation easier; they prefer to go to places where their national language is spoken; and so on.[24]

As a result of these morally arbitrary reasons, refugees, therefore, often immigrate to poor and unstable neighboring countries,[25] imposing an additional burden on those countries' politics and economies.[26] This burden could be potentially devastating to some countries.[27] For example, crises in Africa, Asia, and Latin America have resulted in a mass influx of immigrants from one poor country in turmoil to another poor country in turmoil.[28] Most of the refugees from Sudan, Eritrea, Ivory Coast, and other nations of origin of the refugees in Israel end up in Chad, Ethiopia, Egypt, Libya, and other poor African countries, rather than making it to the more wealthy, Western countries.[29] The result of this migration is that the least politically and economically capable countries are forced to provide for the neediest immigrants and to share the greatest part of the responsibility.[30] This phenomenon is coupled with the trend of Western countries toughening their immigration and asylum laws.[31]

24. *See* Susan E. Zimmerman, *Irregular Secondary Movements to Europe: Seeking Asylum Beyond Refuge*, 22 J. REFUGEE STUD. 74, 78 (2009). For a detailed description of the different theoretical explanations of the immigration of persons, see Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 433-54 (1993).

25. This situation may change in the future as globalization continues to make it easier and cheaper to move around the world.

26. *See* James L. Carlin, *Significant Refugee Crises since World War II and the Response of the International Community*, 3 MICH. Y.B. INT'L LEGAL STUD. 3, 12-21 (1982) (describing the impacts of the significant post-World War II refugee crises on receiving countries).

27. *See* Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 272-73 (1997).

28. *See* UNHCR, STATISTICAL YEARBOOK 2005, at 27-31 (2007), *available at* http://www.unhcr.org/464049e53.html; Benjamin Cook, *Methods in its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and Proposed Refugee Market*, 19 GEO. IMMIGR. L.J. 333, 344-45 (2004).

29. UNHCR, *supra* note 28, at 30. R

30. *See* Cook, *supra* note 28, at 344. R

31. *See* Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 J. REFUGEE STUD. 396, 397-98 (1998). Suhrke argues that by toughening their immigration laws, Western countries are actually free-riders, taking

The arbitrary nature by which responsibility is distributed and the consequences this entails raise moral concerns. Additionally, assuming a shared responsibility for refugee migration would benefit both world order and global security by helping states better plan their immigration policies. Such a plan would also benefit refugees, who could rely on a more organized and substantial system of protection. As the morality of responsibility sharing has been discussed extensively elsewhere, this Essay will only briefly mention the different philosophical and moral considerations.[32]

A number of theoretical schools endorse the need for responsibility sharing in the context of refugee migration. Feminist theorists of international law,[33] adopting the ethics of care approach,[34] would perceive the responsibility-sharing debate in the context of refugees to be erroneous in that it maintains an "us" versus "them" distinction, rather than holding a more relational approach focused on the responsibilities of all states. Such theorists argue for a "softer" perception of states as units for the redistribution of wealth.[35] Additionally, they would claim that this discussion distances countries that receive immigrants—the North—from the immigrants' countries of origin—the South—without acknowledging the North's complicity in the environmental, economic, and political destabilization of the South.[36] The responsibility, they would argue, need not be divided among states in a mathematical manner using harsh criteria, but rather should be shared by states in a more generous and flexible fashion.

Alternatively, according to the utilitarian school of thought, utility is likely to increase if states cooperate with each other to share responsibility for protecting refugees.[37] Cooperation could lead to a responsibility-sharing regime by which responsibility for each ref-

advantage of the fact that in their absence, developing states will have to assist the immigrants. *Id.* at 400-12.

32. For a more in-depth discussion of the morality of responsibility sharing, see generally Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT'L L. 355 (2009).

33. On the feminist theory of international law, see, for example, Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

34. On the ethics of care approach, see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

35. *E.g.* Fiona Robinson, *Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations*, *in* FEMINIST METHODOLOGIES FOR INTERNATIONAL RELATIONS 221, 234-35 (Brooke A. Ackerly et al. eds., 2006).

36. *See, e.g.*, Nahla Valji, *Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility*, REFUGE, May 2001, at 25, 31 n.43.

37. *See* James L. Hudson, *The Philosophy of Immigration*, 8 J. LIBERTARIAN STUD. 51, 52-53 (1986).

ugee would be borne by the state whose utility declines the least as a result.[38] Generally speaking, due to the principle of diminishing marginal utility, utility will, in fact, accumulate under a fairer regime of responsibility sharing in refugee protection.[39] This is also because, as Joseph Carens notes, "the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated."[40] Thus, utilitarianism appears to support responsibility sharing in the context of refugee protection.

The most complex analysis of responsibility sharing in the context of refugees is offered by distributive justice theoreticians. One interesting approach is that of "cosmopolitan egalitarianism." Cosmopolitan egalitarianists suggest that John Rawls's principles of justice[41] should be applied internationally,[42] arguing that since

38. Eiko R. Thielemann, *Why EU Policy Harmonisation Undermines Refugee Burden-Sharing*, 6 EUR. J. MIGRATION & L. 47, 64 (2004).

39. Kritzman-Amir, *supra* note 32, at 366. Economic research has been inconclusive regarding the economic effects of immigration. *See* GEORGE J. BORJAS, ISSUES IN THE ECONOMICS OF IMMIGRATION 2-3 (2000). It seems that if we take into account factors that are not strictly economic, then we will reach the same inconclusive results. *See id.* R

40. Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 263 (1987). This commitment to principles of equality leads Howard Chang to conclude that discrimination between non-citizens and citizens is as morally unjust as, for example, discrimination between African-Americans and Caucasians. *See* Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 11-17 (2007).

41. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY OF JUSTICE]; JOHN RAWLS, THE LAW OF PEOPLES (1999) [hereinafter RAWLS, LAW OF PEOPLES].

42. Rawls applies his principles of justice within a "self-contained national community," meaning a national community that is territorially defined by borders and is self-sufficient. RAWLS, THEORY OF JUSTICE, *supra* note 41, at 457. Although Rawls tries to distinguish states from peoples, his argument is rather unconvincing. Rawls concedes that "peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime." RAWLS, LAW OF PEOPLES, *supra* note 41, at 37. Thus, well-ordered societies have the duty to help burdened societies in their attempt to become well-ordered. It does not appear, however, that Rawls believes a transfer of wealth from richer societies to poorer societies should take place. *See id.* at 38-43. For a detailed critique of Rawls' position, see, for example, Wilfried Hinsch, *Global Distributive Justice*, *in* GLOBAL JUSTICE 55, 62-73 (Thomas W. Pogge ed., 2001). Other philosophers support the conclusion that there is no justification for applying standards of justice in the global sphere given the absence of global governance. Nevertheless, much like Rawls, these other philosophers maintain that this should not be interpreted as supporting "ethical egoism," and they do support offering some form of humanitarian assistance—whether provided by governments or by international non-governmental organizations—to minimize global poverty, regardless of questions of our conception of justice. *See, e.g.*, Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 257-58 (2001); Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity and* The Law of Peoples, 72 FORDHAM L. REV. 1721, 1722-23 (2004); Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 118-19, 128, 132 (2005). R R

nationality is a morally arbitrary trait and therefore should remain behind "the 'veil of ignorance,'" states have the same compelling duty towards noncitizens as they have towards their own citizens.[43] If, unlike Rawls seems to imply, states are not perceived as "self-contained," then support exists for an international original position where the principles of justice apply.[44] Therefore, according to Rawls's principles of justice, in the international sphere, wealth should be distributed to maximize the benefits for the least well-off persons and states.[45] Based on this conclusion, some of this school's scholars have argued for open borders and cosmopolitan egalitarianism. The implications of this on a responsibility-sharing regime are that the regime should work to the advantage of the least prosperous countries and the least prosperous refugees.[46]

A different take on responsibility sharing is offered by David Miller, a philosopher who, while calling this a problem of "remedial responsibility," argues the following:

> [A]gents should be held remedially responsible for situations when, and to the extent that, they were responsible for bringing those situations about. . . . [W]e look to the past to see how the deprivation and suffering that concerns us arose, and having established that, we are then able to assign remedial responsibility.[47]

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

43. *See* Timothy King, *Immigration from Developing Countries: Some Philosophical Issues*, 93 ETHICS 525, 527 (1983).

44. THOMAS W. POGGE, REALIZING RAWLS 240-45 (1989).

45. CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 150-53 (1979).

46. *See id.* Compare this with the idea of insurance introduced in RONALD DWORKIN, SOVEREIGN VIRTUE 331-40 (2000). Dworkin discusses the possibility of insurance as a substitute for welfare policies, although his discussion is entirely unconnected to immigration. *See id.* The decision to obtain insurance is made without awareness of the actual risk to one's employment, only with respect to one's fears and willingness to take risks. *Id.* at 332-33. The idea of insurance can be applied at the international level. Under this system, each country would decide how willing it was to risk a mass influx of immigrants, though it would not know the likelihood of this risk actualizing. Japan, which values its social homogeneity, likely would be willing to pay more to insure itself against migrants. Israel, which values its Jewish character, might do the same. Other countries might not. For other discussions on the concept of insurance in the context of responsibility sharing, see, for example, Eiko R. Thielemann, *Burden Sharing: The International Politics of Refugee Protection* 15 (Dep't of Gov't & European Inst., London Sch. of Econ., Working Paper No. 134, 2006), *available at* http://www.ccis-ucsd.org/PUBLICATIONS/wrkg134.pdf.

47. David Miller, *Distributing Responsibilities*, 9 J. POL. PHIL. 453, 455 (2001). The rationales behind the principle of remedial responsibility are somewhat similar to those of tort law. *Id.* at 455-57.

sibility.[48] For example, a specific state should assist refugees if its policies contributed to their situation, either by acting affirmatively or by refraining from taking positive action.[49]

Furthermore, Miller maintains that remedial responsibility should be assigned to a specific agent based on its superior capacity to end a morally concerning situation.[50] Under this reasoning, in the context of refugee policy the most appropriate state to bear the responsibility of assisting refugees would be the one that has the best capacity to do so.[51] Miller is cautious, however; he suggests applying this principle only after identifying those agents that have a special responsibility for causing the unfavorable situation (for example, refugee flight).[52]

Miller also mentions the communitarian principle, under which agents feel a greater sense of responsibility towards those with whom they share communal ties as compared to those with whom they do not.[53] Miller recognizes that this principle cannot be used for all responsibility-distribution purposes, however, because there may be circumstances where no specific agent has communal ties with the victim population and there may be occasions in which an agent with no communal ties is the only one in a position to assist.[54] Additionally, this principle does not help to determine which state within a community is in the best position to be held responsible.[55] So, in many circumstances, the communitarian principle may not prove very useful.

In sum, there are numerous moral grounds on which responsibility sharing may be based. These varying considerations should be taken into account in any evaluation of the international legal scheme for responsibility sharing or in any analysis of the actions of different countries—Israel included—with respect to responsibility sharing. The different moral considerations allow for an evaluation of responsibility sharing in light of the basic conceptions of good and justice, and therefore inform the evaluation of the different policies.

48. Miller explains moral responsibility as a concept that is sometimes narrower and sometimes broader than causal responsibility. *See id.* at 455-56 (defining the two terms).

49. Of course, it is often difficult to draw the line as to what constitutes moral responsibility. *See id.* at 457-59.

50. *Id.* at 460-61.

51. *Id.* at 460-62.

52. *Id.* at 462.

53. *Id.*

54. *Id.* at 462-64.

55. *Id.* at 463.

B. *Responsibility Sharing Under Current International Law*

Despite the many moral considerations according to which the arbitrary division of responsibility seems problematic, the current international framework of refugee law sets no guidelines—at least not explicitly, and not in the form of "hard international law norms."[56] Consequently, responsibility is allocated between states quite arbitrarily, by an amorphous principle some call "accidents of geography."[57] While the Refugee Convention[58] and the 1967 Protocol Relating to the Status of Refugees[59] provide both the substantive criteria for determining the beneficiaries of refugee protection[60] and the minimal measures of protection they must receive,[61] these instruments do not address the question of what state must provide this protection and guarantee its associated rights. While international law does recognize the need for some form of responsibility sharing between states, this principle is framed in a loose, highly generalized, and non-binding manner.

To start with, the fourth paragraph of the preamble to the Refugee Convention contains the passage: "Considering that the grant of asylum *may place unduly heavy burdens* on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature *cannot therefore be achieved without international co-operation.*"[62] This statement, however, merely reflects recognition of a certain state of affairs; it does not set specific rules as to how to allocate the duty to protect. Rather, it is so vague that it does not even define the loose

56. Unlike international "hard law," "soft law" is a body of standards, commitments, joint statements, resolutions, and declarations that is influential, though not binding. "Soft law" reflects agreed-upon guidelines or statements of common positions, and is in some cases the basis for a gradual formation of customary international law or treaty provisions. ANTONIO CASSESE, INTERNATIONAL LAW 196-97 (2d ed. 2005). Some scholars reject this binary division of international norms into "soft" and "hard" law and argue that the "softness" of international law should be considered a continuum. Classification, according to some views, is not based solely on the degree to which norms are binding, but also on the degree of delegation of authority and the degree of precision entailed. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422-23 (2000).

57. *See, e.g.*, James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 141 (1997).

58. Refugee Convention, *supra* note 1. **R**

59. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

60. Refugee Convention, *supra* note 1, art. 1(A). **R**

61. *Id.* arts. 2-34.

62. *Id.* pmbl., para. 4 (emphasis added).

notion of "cooperation." Cooperation in international relations may take many forms, from consultation, sharing of information, or financial assistance to permitting the resettlement of refugees in wealthier countries. The preamble offers no insight as to which of these forms of cooperation the framers of the Refugee Convention had in mind.

While the Refugee Convention fails to introduce the concept of responsibility sharing in explicit terms, numerous other "soft law" instruments overtly address this principle. The main source in which the principle of burden or responsibility sharing is mentioned is the conclusions of the U.N. High Commission for Refugees' (UNHCR's) Executive Committee (EXCOM).[63] Examining the EXCOM conclusions reveals that, since 1990, every annual session of EXCOM has endorsed the principle of burden sharing. Indeed, numerous EXCOM conclusions speak of "international solidarity" and the need to create effective arrangements that would promote the principle of burden sharing.[64]

Likewise, the U.N. General Assembly has acknowledged a commitment to responsibility sharing in several of its resolutions. One of the latest resolutions on this issue was adopted by the U.N. General Assembly in January 2008, emphasizing "the importance of active international solidarity and burden- and responsibility-sharing"[65] and urging states "in a spirit of international solidarity and burden- and responsibility-sharing, to cooperate and to mobilize

63. UNHCR's Executive Committee (EXCOM) was established by the U.N. Economic and Social Council in accordance with article 4 of the Statute of the Office of the United Nations High Commissioner for Refugees. *See* G.A. Res. 1166 (XII), ¶ 5, U.N. Doc. A/3805 (Nov. 26, 1957); G.A. Res. 428(V), Annex, U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (Dec. 14, 1950). EXCOM is composed of representatives of the seventy-nine signatory states. *ExCom Members*, UNHCR, http://www.unhcr.org/pages/49c3646c89.html (last visited Nov. 9, 2010). These states must show interest in and devotion to solving the problem of refugees; to this end, EXCOM advises the High Commissioner on refugee-related matters. G.A. Res. 1166 (XII), *supra*, ¶ 5. While EXCOM's conclusions are not binding law, its wide membership and practice of unanimous approval for its conclusions give those conclusions a special status as a source of interpretation of international refugee law. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 112-13 (2005).

64. To mention only the most recent of the thirty-one EXCOM conclusions that address the issue of burden and responsibility sharing, see Rep. of the UNHCR Exec. Comm., 59th Sess., General Conclusions ¶¶ (j), (m), U.N. Doc. A/AC.96/1063 (Oct. 22, 2008); Rep. of the UNHCR Exec. Comm., 58th Sess., Conclusions on Children at Risk pmbl. & ¶ (g)(xiii), U.N. Doc. A/AC.96/1048 (Oct. 10, 2007); Rep. of the UNHCR Exec. Comm., 57th Sess., Conclusions on Women and Girls at Risk pmbl. & ¶ (l), U.N. Doc. A/AC.96/1035 (Oct. 10, 2006); Rep. of the UNHCR Exec. Comm., 56th Sess., General Conclusions ¶¶ (k)-(l), Conclusions on Local Integration pmbl. & ¶ (r), U.N. Doc. A/60/12/Add.1 (Oct. 7, 2005).

65. G.A. Res. 62/124, ¶ 6, U.N. Doc. A/RES/62/124 (Jan. 24, 2008).

resources with a view to enhancing the capacity of and reducing the heavy burden borne by host countries, in particular those that have received large numbers of refugees and asylum-seekers."[66] In another resolution adopted in January 2006, the U.N. General Assembly reaffirmed "international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and burden- and responsibility-sharing among all States."[67] Numerous additional U.N. General Assembly resolutions repeat these principles.[68]

The "softness" of these international law instruments is multi-faceted—in addition to their non-treaty and non-binding character, they lack, as does the preamble to the Refugee Convention, the preciseness that would allow them to be implemented in concrete situations. All EXCOM conclusions and U.N. General Assembly resolutions on this issue generally "recall," "mention," "notice," "reaffirm," "emphasize," or "stress" (or other similar verbs) the general idea of responsibility sharing, but do not give any substance to the notion. Repeating a concept, which is framed in general terms, may be a good place to begin when attempting to encourage the internalization of a novel idea by the international community. After over fifty years of general discourse, however, it could be expected that EXCOM would go beyond these general terms. Unfortunately, the bottom line of EXCOM discussions on responsibility sharing consistently results in the same conclusion—*states should talk; more discussion and negotiation is needed; more cooperation is needed in order to achieve cooperation.*

Recognizing the need to create a comprehensive framework capable of addressing in legal terms issues of responsibility sharing, the UNHCR announced in September 2002 the "Convention Plus Initiative," an initiative that was dedicated to creating international binding agreements concerning responsibility sharing.[69] After

66. *Id.* ¶ 27.

67. G.A. Res. 60/128, ¶ 12, U.N. Doc. A/RES/60/128 (Jan. 24, 2006).

68. To mention just a small sample of UN General Assembly resolutions expressing the principle of burden sharing, see G.A. Res. 57/187, ¶ 9, U.N. Doc. A/RES/57/187 (Feb. 6, 2003); G.A. Res. 55/74, ¶¶ 9, 25, U.N. Doc. A/RES/55/74 (Feb. 12, 2001); G.A. Res. 55/2, ¶ 26, U.N. Doc. A/RES/55/2 (Sept. 28, 2000); G.A. Res. 52/103, ¶¶ 6, 17, U.N. Doc. A/RES/52/103 (Feb. 9, 1998); G.A. Res. 46/106, pmbl. & ¶¶ 9, 17-18, U.N. Doc. A/RES/46/106 (Dec. 16, 1991); G.A. Res. 34/60, ¶¶ 2, 4, U.N. Doc. A/RES/34/60 (Nov. 29, 1979); *see also* Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 2(2), U.N. Doc. A/6716 (Dec. 14, 1967).

69. See Marjoleine Zieck, *Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited*, 21 INT'L J. REFUGEE L. 387, 388 (2009).

three years in effect, however, the initiative was terminated without reaching its goals.[70]

While international law on the global level has not yet gone beyond loose notions of responsibility sharing, European states have created, over the past two decades, certain rules of responsibility allocation amongst themselves and in relation to third-party states. The first such principles in Europe were initiated as a result of the 1985 Schengen Agreement on the abolition of internal borders,[71] which led to a demand concerning migration controls between those states whose internal borders were abolished and was followed by various implementing instruments.[72] These instruments first took the form of international agreements,[73] and later E.U. measures,[74] which resulted in a series of relatively clear principles regarding the allocation of responsibility over refugees and asylum seekers present in the European Union, as well as guidelines for the return of asylum seekers to "safe third countries."[75]

While the European system sets clear rules on the allocation of responsibility, it cannot be defined as a system of responsibility sharing. The purpose of the European system is not to create a balance of efforts among European states nor between them and third states; rather, its purpose is to control the movement of refugees resulting from the diminishing significance of national borders. The system is based on the morally arbitrary concept of responsibility allocation to the first state of arrival. As such, it does not lead to responsibility sharing. Instead, it shifts the burden of responsibility from "Old Europe"—the Western and Northern European states—to the Eastern and Southern European states (which are typically the states of first arrival), and from these states

70. For a thorough survey of the initiative and an analysis of the reasons for its failure, see generally *id.*

71. Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, 2000 O.J. (L 239) 13.

72. *See, e.g.*, Convention Implementing the Schengen Agreement of 14 June 1985, June 19, 1990, 2000 O.J. (L 239) 19.

73. *See* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C 254) 1 (also known as the Dublin Convention).

74. *See generally* Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1 (EC) (also known as the Dublin Regulation or Dublin II).

75. *See* Council Directive 2005/85, Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, art. 36, 2005 O.J. (L 326) 13, 29 (EC) (also known as the Procedures Directive).

to non-European states.[76] Indeed, the only E.U. instrument that may truly be seen as striving to advance the goal of equitable responsibility sharing is the 2001 Temporary Protection Directive,[77] which purports to facilitate the "transfer" of refugees in cases of overburdened states. Nevertheless, this directive applies only in the relatively rare occasions of mass influx into European States; it does not create substantive and enforceable rules on responsibility allocation. At the time of this writing, it has yet to be acted upon.[78]

A recent interesting development concerning responsibility sharing, which goes beyond mere rules of allocation, is the issuance of a communication by the European Commission in September 2009 that introduces the Joint European Union Resettlement Programme.[79] Upon becoming operational, this program will provide a basis for European states to coordinate the resettlement of refugees present in non-European states and to standardize resettlement priorities. This mechanism, however, will not oblige states to receive refugees and will instead leave the decision of whether to absorb refugees to the discretion of each member state.

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

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76. *See* Barry Junker, *Burden Sharing or Burden Shifting? Asylum and Expansion of the European Union*, 20 GEO. IMMIGR. L.J. 293, 301-03 (2006); Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 508-09 (1993).

77. *See* Council Directive 2001/55, Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons, art. 1, 2001 O.J. (L 212) 12, 14 (EC).

78. Additionally, in the limited context of mass influx, E.U. institutions have adopted several decisions encouraging responsibility sharing over the years. *See, e.g.*, Council Decision 96/198/JHA, An Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, 1996 O.J. (L 63) 10; Council Resolution, Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, art. 4, 1995 O.J. (C 262) 1, 3. Olga Sidorenko, an expert on European refugee law, notes that neither decision was implemented even in the Kosovo crisis in 1999. OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM: BACKGROUND, CURRENT STATE OF AFFAIRS, FUTURE DIRECTION 109 (2007).

79. *See Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme*, COM (2009) 447 final (Sept. 2, 2009).

C. *Responsibility Sharing in Practice*

Under the current international regime, all state practices that express the principle of responsibility sharing are voluntary and considered to be a matter of "charity," not obligation. Resettlement in small numbers on an ad hoc basis takes place constantly, as one form of responsibility sharing. Each year, a small number of states accept a certain quota of refugees for resettlement. These schemes, as positive as they are, encompass only a small percentage of refugees in need of a lasting solution. In 2008, for instance, 88,800 refugees, less than one percent of the world's refugees, were resettled.[80] Such sporadic, decentralized, and sometimes almost random forms of resettlement in a world of mass displacement appear to be more a matter of symbolic generosity that can hardly be counted towards the true alleviation of the burden from states unable to provide effective protection. In a way, these forms of resettlement even risk providing justifications for the current state of affairs by creating the illusion that responsibility sharing actually exists.

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

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

Following the fall of Saigon in 1975, a steadily increasing number of Indo-Chinese refugees arrived in Southeast Asian countries of asylum. The refugees reached an alarmingly large number in

80. *See* UNHCR, 2008 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 11-12 (2009), *available at* http://www.unhcr.org/4a375c426.html.

1979.[81] As a response to this increasing burden, many states simply pushed the refugees, who were arriving by boat, back to sea.[82]

In 1979, the U.N. General Secretary presided over the Meeting on Refugees and Displaced Persons in South-East Asia, a sixty-five-nation conference that led to an agreement that designated Southeast Asian countries as states of first asylum and third states, mostly Western ones, as those responsible for providing durable solutions in the form of resettlement.[83] That same year, Vietnam and the UNHCR signed a memorandum establishing the Orderly Departure Plan (ODP), allowing the legal emigration of Vietnamese for what was defined in the memorandum as "humanitarian reasons."[84] Intended to reduce both the number of clandestine and dangerous departures by sea and the number of asylum seekers arriving at Southeastern states, the plan facilitated the departure of about 160,000 persons to Western countries over its first ten years.[85]

By the end of the 1980s, however, as the number of asylum seekers was again on the rise[86]—exceeding the resettlement offers by Western States—Southeast Asian countries once again resumed their policies of pushing asylum seekers back to sea.[87] This crisis led to the formation of the Comprehensive Plan of Action (CPA) in 1989.

In the CPA, participating governments committed to several measures that were meant to be applied in a coordinated manner, including the shift to individual (rather than group-based) protection and the deterrence of emigration outside the ODP program.[88]

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81. *See* Sten A. Bronée, *The History of the Comprehensive Plan of Action*, 5 INT'L J. REFUGEE L. 534, 534 (1993).

82. *Id.* at 535; Arthur C. Helton, *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, 8 N.Y.L. SCH. J. HUM. RTS. 111, 112 (1990).

83. *See* The Secretary-General, *Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and Subsequent Developments*, ¶¶ 44-45, U.N. Doc. A/34/627 (Nov. 7, 1979).

84. For a description of the Orderly Departure Plan (ODP) of 1979, see REFUGEE POLICY GRP., THE SECOND INTERNATIONAL CONFERENCE ON INDOCHINESE REFUGEES: A NEW HUMANITARIAN CONSENSUS? 17 (1989).

85. *Id.*

86. The increasing number of refugees fleeing Vietnam was a result of the suspension of the ODP in 1987, the country's continuing policies of discrimination, and its deteriorating economic conditions. *See* Bronée, *supra* note 81, at 536. R

87. *See* Helton, *supra* note 82, at 113-15. R

88. International Conference on Indo-Chinese Refugees, June 1989, *Draft Declaration and Comprehensive Plan of Action*, arts. 2, 4, 6, U.N. Doc. A/Conf.148/2 (Apr. 26, 1989) (adopted without amendment and by consensus in June of 1989).

Although the CPA did not determine any criteria for the allocation of responsibility, the developed states that were parties to the CPA took it upon themselves to resettle in their territories all asylum seekers who were determined to be eligible for asylum under the criteria of the Refugee Convention.[89]

Assessments of the CPA vary significantly.[90] This Essay contends that the CPA is an imperfect model for a wider form of burden sharing as a legal norm. Its most basic elements are compelling; namely, the creation of a scheme that involves the cooperation of governments in a structure of interdependency that requires all parts to fulfill their commitments in order to pursue their self-interests. The principles of the CPA, however, should only be considered as a starting point in any future sharing scheme. Beyond its generalized principles, the CPA does not present a roadmap for those interested in wider forms of responsibility sharing. The CPA introduced clear rules on the allocation of responsibility between two groups of states: first, temporary protection and refugee status determination in the territory of states of first arrival; and second, resettlement and permanent asylum in the territory of developed States. It did not, however, address the other issues that will inevitably arise from the creation of a truly comprehensive responsibility sharing scheme other than in an ad hoc manner. Specifically, the CPA does not address the question of how to determine allocation principles between resettling states. Such a model leaves a

89. *Id.* arts. 6, 10-11.

90. Some have argued that the Comprehensive Plan of Action (CPA) is a successful scheme of burden sharing. *See, e.g.*, Schuck, *supra* note 27, at 254-59. Richard Towle, for instance, believes that the CPA should be considered a rather successful experiment in burden sharing. *See* Richard Towle, *Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?*, 18 INT'L J. REFUGEE L. 537, 562 (2006). He argues that it succeeded in creating cooperation between countries of origin, first asylum, and resettlement. *Id.* Moreover, this created interdependency between the actions of all three kinds of states when each group knew that the failure of one partner would bring about the collapse of all its parts. *Id.* Additionally, Towle notes that the CPA did succeed in achieving one of its major goals—the curtailing of "push backs" of arriving asylum seekers to sea. *Id.* at 538. Others condemn the CPA. *See, e.g.*, James C. Hathaway, *Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees*, 15 HUM. RTS. Q. 686, 686-88 (1993). Hathaway argues that one major flaw in the CPA was the refusal of Western states to resettle most of the refugees—a refusal based in part on the false assumption that they were "economic migrants." *Id.* at 688-700. Hathaway also condemns the CPA for adopting repatriation as a major strategy, arguing that the CPA aspired to eventually make repatriation the only solution. *Id.* at 687. Hathaway believes that while the CPA brought about a sharing of the responsibility faced by the Southeast Asian states of first asylum, that sharing was conditional—only if the total burden were reduced dramatically would Western states agree to accept responsibility. *Id.* at 700. R

wide gap in which renegotiation must constantly take place. Despite this model's practicability in the context of the CPA and perhaps in other specific emergency situations where a willingness to resettle refugees may be found, such constant renegotiation leaves an opening for disagreements that may cause the collapse of a sharing regime. These partial arrangements, which drew much criticism, are not based on legal standards or a strong tradition of cooperation and responsibility sharing among states. Therefore, they cannot simply be applied to other refugee situations, including the one in Israel.

D. *Responsibility Sharing and the Israeli Context*

Now that this Essay has explained the apparent lack of international law framework on responsibility sharing and the different practices around the world, the Essay turns to the Israeli context of responsibility sharing. It will attempt to explain the discourse on responsibility sharing, as it can be understood from various statements of high-ranking officials before the Parliament, courts, and press. The Essay also describes a few different Israeli policies regarding asylum seekers, and the impact of these policies on responsibility sharing.

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

The highest-ranking official who addressed the issue of responsibility sharing (most likely unaware of the fact that he was touching on this issue) was Prime Minister Ehud Olmert in a discussion that took place in the Israeli Parliament in October 2007.[91] The prime minister started by labeling all 5,000 asylum seekers who entered Israel in 2006-2007 as "economic migrants"—except for the 498 Darfurian refugees then present in Israel—even though the vast

91. *See generally* Knesset Plenum Protocol, Oct. 17, 2007 (transcript on file with authors).

majority of them did not undergo status determination to refute or confirm this claim.[92] The prime minister then went on to describe an oral agreement between himself and Egyptian President Hosni Mubarak, in which President Mubarak guaranteed not to deport persons returned by Israel to countries where their safety might be compromised.[93] Next, the prime minister elaborated on plans to raise funds all over the world in cooperation with other countries in order to establish camps for asylum seekers outside of Israel.[94] As for Israel sharing responsibility for protection, the prime minister, after addressing all asylum seekers as "economic migrants" again, stated the following:

> [T]he idea that we have a humanitarian duty to take care of every person who infiltrates Israel is an exaggeration—not only a wild one but also an irresponsible one. I can imagine, and so can each one of you, those who will stand here in five years and will say how irresponsible and reckless we were when we created a problem of tens of thousands of persons with children and family members, with the entire humanitarian distresses that will be created as a result, that have nothing to do with us. What do they have to do with us?[95]

In a March 2008 meeting, according to media reports, the prime minister referred to the arrival of asylum seekers as a "tsunami that must be stopped at any price."[96] At the same meeting, the prime minister scolded the Ministry of Foreign Affairs for its failure to find African states willing to absorb asylum seekers who reached Israel.[97]

Minister of Interior Roni Bar'on expressed another aspect of the Israeli government's position regarding responsibility sharing in a speech before the Israeli Parliament in May 2006. At that time, only a few hundred asylum seekers had entered Israel through the Egyptian border.[98] Yet even this early on, the "fear of numbers"—that is, the fear that the burden of refugees on Israel would be overwhelming—was apparent. The minister of interior stated as follows:

> It is true that the war, the cruel hard civil war in Darfur in Sudan, is a problem which is difficult to observe, especially to a

92. *Id.* at 45.

93. *Id.* at 47.

94. *Id.* at 49-50.

95. *Id.* at 46.

96. Ruti Sinai & Barak Ravid, *The PM Ordered That Infiltrators be Returned to Egypt Immediately After Their Capture*, HAARETZ, Mar. 24, 2008.

97. *Id.*

98. Knesset Plenum Protocol, May 24, 2006 (transcript on file with authors).

> people as us. But we must look at the numbers. . . . The problem is that today there are three million Sudanese refugees wandering around in Egypt. . . . Dozens of them, perhaps almost hundreds, have already infiltrated Israel, and their number is increasing, the phenomenon is not stopping. Some of them even applied for asylum in Israel. The UN's attempts to find a third country for the resettlement of Sudanese asylum seekers are limited. The UN cannot properly deal with this issue, and if we do not stop it at the border or by creating a situation in which the infiltrators will not want to put themselves in, we are inviting a flood . . . .[99]

Describing Israeli policy with regards to denying access to asylum seekers, the minister of interior went on to describe the burden-shifting games played by Israel and Egypt at the border: "The problem is that there is no cooperation by Egypt. You know, there are even instances when we try to push them [asylum seekers] back, and they [the Egyptians] push them back to our side. It is a game of hand wrestling at the border, on the refugee."[100]

Closer examination of the discourse on responsibility sharing makes obvious certain contradictions embedded in the statements of these officials. While Israeli officials do not go so far as to claim that refugees should simply be returned to persecution in their countries of origin (thus acknowledging that some state or states must assume responsibility for their protection), they do appear to make an unexplained (and unfounded in international law or moral theory) distinction between those states that should bear the burden and responsibility for refugees and those states that should not bear such responsibility—such as Israel. As the speeches given by the prime minister and the minister of interior illustrate, Israeli officials simply invoke what they perceive to be Israel's self-interest as the reason why Israel should not take upon itself part of the responsibility for refugees. While such reasoning is obviously a convincing political tool with regards to internal public opinion, it hardly deals with questions concerning the allocation of responsibility to a third state rather than to Israel, as other states may invoke similar considerations pertaining to their self-interest.

Similarly, an up-close look at Israel's policies shows that some operate with the underlying assumption of responsibility of the first countries of origin, whereas others reflect indifference to responsibility-sharing considerations, and still others consider responsibility-sharing matters to some extent.

99. *Id.* at 96-97.
100. *Id.* at 98.

A clear example of a policy from this first group is Israel's "Hot Return Policy."[101] According to this policy, Israel returns to Egypt asylum seekers who penetrated through the Israeli-Egyptian border, so long as they are intercepted shortly after entering Israel and are still close to the border. While it is unclear how many asylum seekers have been returned to Egypt under the "Hot Return Policy," recent reports of the state to the Israeli Supreme Court mention that over 200 refugees have been returned to Egypt from Israel in this manner.[102] While there are no empirical findings on this matter, it is possible to assume that through this policy Israel does not only impose the burden of protecting the returned asylum seekers on Egypt, but also it deters other refugees from crossing the Egyptian border into Israel. The legality of this policy was recently challenged, and the petition before the Israeli Supreme Court is still pending. In its statements to the Supreme Court, the state has argued that the policy does not violate the duty of non-refoulement, since Israel is not returning the asylum seekers to their countries of asylum, and since Egypt is a safe third country.[103] In a recent response to a petition to the supreme court, the state argued the following:

> Even with respect to the small minority of those infiltrating the border who are eligible for asylum . . ., international law clearly states that the first "safe" country of asylum for them is Egypt—in which many of them started the process of applying for refugee status—and it is Egypt which is obligated to absorb them and to grant them temporary or permanent protection under the refugee convention and international law.[104]

There are three areas where this argument is particularly lacking. First, Egypt may not be considered a safe third country, given the recent refoulement of asylum seekers;[105] the lack of a fully functioning independent asylum system;[106] the general lack of

101. For a description of the "Hot Return Policy," see REFUGEES' RIGHTS FORUM, POLICY PAPER: THE PRINCIPLE OF NON-REFOULEMENT 8-9 (2008), *available at* http://www.acri.org.il/pdf/NonRefoulementEng.pdf.

102. Response of the State ¶ 22, HCJ 7302/07 Hotline for Migrant Workers v. Minister of Def. [2009] (Isr.) (on file with authors).

103. *Id.* ¶ 67; *see also* Refugee Convention, *supra* note 1, art. 33 (providing that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"). R

104. Response of the State, *supra* note 102, ¶ 67. R

105. On the refoulement of asylum seekers by Egypt, see UNHCR, GLOBAL REPORT 2008, at 142-43 (2009), *available at* http://unhcr.org/gr08/index.html.

106. *See* HUMAN RIGHTS WATCH, SINAI PERILS: RISKS TO REFUGEES, MIGRANTS AND ASYLUM SEEKERS IN EGYPT AND ISRAEL 8-9 (2008), *available at* http://ocha-gwapps1.unog.ch/rw/RW

commitment to international human rights;[107] the frequent reports on discrimination and detention of asylum seekers;[108] the rising number of shooting incidents of refugees near the Israeli-Egyptian border;[109] and the lack of access of refugees to social and economic rights.[110]

Second, there is no legal or moral reason (whether within the arguments of the state or elsewhere in legal norms or moral arguments) to attribute weight to issues such as proximity to the border or duration of stay. Under international law, a state has a duty to respect the human rights of people who are under its effective control.[111] As such, Israel has a duty of non-refoulement towards everyone within its territory, irrespectively where and when they are found within this territory, as well as persons at the border who seek to enter the country.[112] It seems unclear whether Israel has indeed refrained from refouling persons to Egypt, since its procedure of interviewing asylum seekers who are penetrating the border is insufficient to verify whether a person does or does not have a well-founded fear of being persecuted in Egypt.[113] Additionally,

Files2008.nsf/FilesByRWDocUnidFilename/MUMA-7LC397-full_report.pdf/$File/full_report.pdf.

107. *See generally* U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: EGYPT (2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119114.htm.

108. *See* HUMAN RIGHTS WATCH, *supra* note 106, at 61-72. **R**

109. *See id.* at 34-38. For one of the most recent of such incidents, see *Four Migrants Shot Dead by Egyptian Forces Close to Israel Border*, AMNESTY INT'L (Sept. 10, 2009), http://www.amnesty.org/en/news-and-updates/four-migrants-shot-dead-egyptian-forces-close-israel-border-20090910.

110. *See* Katarzyna Grabska, *Marginalization in Urban Spaces of the Global South: Urban Refugees in Cairo*, 19 J. REFUGEE STUD. 287, 292 (2006).

111. *See* HATHAWAY, *supra* note 63, at 164-67. On the implications of this on refugees, see, for example, *id.* at 167-69. **R**

112. *See* Rep. of the UNHCR Exec. Comm., 28th Sess., Non-Refoulement ¶ (c), U.N. Doc. A/AC.96/549 (Oct. 1977); Amuur v. France, App. No. 19776/92, 22 Eur. H.R. Rep. 533, 556, 559-60 (1996); GUY S. GOODWIN-GIL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 208 (3d ed. 2007); HATHAWAY, *supra* note 63, at 156-59; *cf.* Singh v. Minister of Emp't & Immigration, [1985] 1 S.C.R. 177 (Can.) (finding by Supreme Court of Canada that, pursuant to the Canadian Charter of Rights and Freedoms, the state owes to all refugee claimants a duty of non-refoulement). **R**

113. The Israeli military has issued written instructions on how "infiltrators" caught near the Israel-Egypt border should be questioned before they are returned to Egypt. These instructions are supposedly intended to determine whether returning a person to Egypt would place her in danger. They lack, however, the most fundamental guarantees necessary to make this assessment. The questioning of such "infiltrators" is done immediately after such persons are captured, it lasts only a few minutes, it is conducted by soldiers, and there is no way for an affected person to challenge her status determination. These instructions were first introduced in Israeli Defense Force, Permanent Operational Order No. 1/3.000: Coordinated Immediate Return Procedure, Nov. 2007 (on file with authors), and were amended by Israeli Defense Force, Permanent Operational Order No. 1/3.000:

it seems that the safe third country agreement between Egypt and Israel, to the extent it exists, is an unofficial, unwritten, oral agreement between low-level army officers, and lacks any guarantees.[114]

Third, and most importantly, the adherence to a strict safe third country agreement fails to consider the broader responsibility-sharing considerations mentioned above. Generally speaking, as scholar Agnes Hurwitz argues, "safe third country practices challenge the very foundations of the international refugee regime, which is based on a collective endeavor and commitment to protect refugees . . . ."[115] Hurwitz argues as follows:

> [S]afe third country practices increase the risk of violations of States' obligations towards refugees, and have a negative impact on inter-State relations. By allowing states to dismiss an asylum claim on the ground that another state could be responsible, safe third country practices raise the risk of *refoulement* and of violations of other international obligations and curtail the fundamental right of individuals to seek asylum from persecution.[116]

This is also true in the Israeli context. Israel, in Miller's terms, has a far better capacity to protect asylum seekers than Egypt given its democratic nature, affluent economy, and human rights tradition.[117] From a feminist perspective, as well as from a distributive justice and a utilitarian perspective, responsibility for asylum seekers should be shared in a manner that imposes a greater burden on Israel, rather than on Egypt.[118]

Other policies Israel implements with respect to asylum seekers reflect indifference to responsibility-sharing considerations. For instance, two such policies are the exclusion of Palestinian asylum seekers and the exclusion of enemy nationals. As mentioned above, Israel interprets the Refugee Convention as excluding Palestinians from the category of refugees, since, as potential benefac-

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The Treatment of Illegal Infiltrators From the Egyptian Border, Apr. 2009 (on file with authors).

114. It should be added that on August 11, 2007, shortly after the Israeli prime minister announced the existence of such an agreement, the Egyptian Ministry of Interior issued an announcement denying its existence. *See Egyptian Efforts to Combat Trespassing Across the International Borders with Israel*, Egypt Ministry Foreign Aff. (August 11, 2007), http://www.mfa.gov.eg/MFA_Portal/en-GB/MFA_News/Press_Releases/Press_Releases_Archive/Egypt+Israeli+border118.htm.

115. Agnès Hurwitz, The Collective Responsibility of States to Protect Refugees 5 (2009).

116. *Id.* at 5-6.

117. *See* discussion *supra* Part II.A (summarizing David Miller's argument that responsibility for assisting refugees should fall on the states with the best capacity to do so).

118. *See* discussion *supra* Part II.A.

tors of the assistance of the U.N. Relief and Works Agency, they are "persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance."[119] Thus, Israel excludes an unknown number of Palestinian asylum seekers, many of whom are persecuted due to their sexual orientation[120] or due to their suspected assistance to Israel.[121]

Additionally, according to Section 6 of the nation's internal regulations on the treatment of asylum seekers in Israel:

> The State of Israel reserves the right, not to absorb into Israel, or to grant a permit to enable the stay in Israel, of subjects of enemy or hostile states—as determined from time to time by the relevant authorities, and for as long as such states posses that status. . . . Israel appreciates the UNHCR's position according to which UNHCR will make every effort to find a country of resettlement for such refugees, pending a comprehensive political settlement in the region.[122]

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

The legality of the latter policy of exclusion of Palestinians is currently being challenged before the supreme court in a pending petition.[123] Similarly, a policy concerning the detention of "enemy nationals" with no judicial review was challenged at the supreme

119. Refugee Convention, *supra* note 1, art. 1(D). R

120. *See* KAGAN & BEN-DOR, *supra* note 13, at 5. R

121. Israel does offer protection to persons who have collaborated with the Israeli intelligence apparatuses, taking into consideration the risk to their lives in the Palestinian territories and the threat they pose to the Israel public. *See, e.g.*, HCJ 6899/07 Anonymous v. Prime Minister [2009] (Isr.), *available at* http://elyon1.court.gov.il/files/07/990/068/h12/07068990.h12.htm; HCJ 4857/07 Anonymous v. Israeli Police [2007] (Isr.), *available at* http://elyon1.court.gov.il/files/07/570/048/R06/07048570.r06.htm.

122. Asylum Regulations, *supra* note 15, art. 6. In the 1990s and early 2000s, UNHCR assisted in the resettlement of refugees whom Israel considered "enemy nationals." At the time, this group consisted mainly of Iraqi refugees. As the number of Sudanese asylum seekers increased, however, resettlement from Israel was basically halted, and hardly occurs anymore. In response to a plea from the Hotline for Migrant Workers regarding resettlement, UNHCR responded that the resettlement of minor refugees may take a long time, since "[s]tates are not standing in line to dismiss Israel from its obligations." *See* Letter from Miki Bavli, Former Representative of UNHCR in Isr., to Yonatan Berman, Legal Counsel, Hotline for Migrant Workers (Feb. 21, 2007) (on file with authors). R

123. On the exclusion of Palestinian asylum seekers, see generally Brief for Petitioner, HCJ 4487/09 Avneri v. Minister of Interior [2009] (Isr.) (on file with authors).

court.[124] In this challenge, the state argued that these policies were justified for security reasons,[125] but it never, to the best of the authors' knowledge, presented information linking asylum seekers to security threats. To a certain extent, the Refugee Convention seemingly allows the exclusion of refugees on an individual basis[126] rather than on the basis of blanket presumptions having to do with their nationality. The Refugee Convention prohibits any discrimination of refugees, including discrimination on account of their country of origin.[127]

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

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

Finally, there are policies within Israel's asylum regime that do consider responsibility sharing to some extent, albeit in an insufficient manner. One such example is the decision to grant temporary status to 600 refugees from Darfur, Sudan.[128] After having received hundreds of asylum seekers from Darfur, and following some international pressure, Israel decided to grant temporary residency to a finite number of them, clarifying that it sees this decision as a way of contributing to the responsibility sharing

124. *See generally* State's Response, HCJ 3208/06 Anonymous v. Head of Israeli Def. Forces [2006] (Isr.) (on file with authors).

125. *Id.* ¶¶ 31-36. Here, Israel defended its practice of administrative detention of Sudanese asylum seekers by claiming that there is a "presumption of dangerousness" because, among other things: (1) Sudan is one of six countries declared by the U.S. Department of State as "terror sponsoring countries"; (2) Palestinian terror groups have based their headquarters in Sudan; and (3) Sudan is the source for smuggled weapons to the Gaza Strip. *Id.*

126. Refugee Convention, *supra* note 1, art. 33(2). R

127. *Id.* art. 3.

128. *See* Daniel Vahab, *Am I My Brother's Keeper? Israel's Role in Saving Christians from Southern Sudan*, JEWISH POST, http://www.jewishpost.com/news/am-i-my-brothers-keeper.html (last visited Nov. 9, 2010).

efforts of the civilized states.[129] It is unclear, however, why Israel concluded that its share of the responsibility amounted only to granting protection to 600 Darfurians.

To fully grasp the proportion of refugees accepted by Israel in relation to the phenomenon, it is important to note the enormity of the Sudanese refugee crisis. At the end of 2008, UNHCR considered 1,749,536 Sudanese persons to be "persons of concern to UNHCR" (a category that includes refugees, persons in refugee-like situations, internally displaced persons, asylum seekers whose application is pending, and other sub-categories).[130] The states that hosted the highest number of Sudanese refugees at the end of 2008 were Chad (267,966), Uganda (56,883), Kenya (28,496), Ethiopia (25,913), and Egypt (10,146).[131] The disproportionate share of responsibility Israel accepted by granting status to 600 Darfuran refugees can also be exemplified by examining the responsibilities taken by other states in the region. African countries host, in total, 2,498,300 refugees and persons in refugee-like situations. When internally displaced persons, asylum seekers, returned refugees, and stateless persons are added, African countries provide for nearly 10,731,600 persons.[132] At the same time, Asian countries host 6,300,800 refugees and persons in refugee-like situations, and a total of 13,725,600 persons when the other sub-categories are added.[133] The responsibility taken by Israel is even more obviously negligible when compared to the share of refugees and persons within the sub-categories that its immediate neighbors host—Egypt hosts 112,605 such persons; Jordan hosts 501,099; Syria hosts 1,407,949; and Lebanon hosts 50,943.[134] Israel's willingness to grant status to 600 refugees, believing that this will allow it to rid itself of all other responsibilities to asylum seekers in its territory, pales in relation to these figures.

Revealing another expression of the same attitude with regards to responsibility sharing and the proportion of responsibility Israel believes it should shoulder, *Globes*, the Israeli leading business newspaper, titled "Olmert [then Prime Minister] and Livni [then Minister of Foreign Affairs] Authorize: Israel will Offer African

129. *Id.*

130. *See* UNHCR, *supra* note 80, Annex 2. **R**

131. *Id.* Annex 5.

132. *Id.* Annex 22.

133. *Id.*

134. *Id.* Annex 1.

Countries Payments Per Head for 10,000 Refugees."[135] As the article noted, Israel had concluded that protecting the 10,000 asylum seekers presently within its borders would be too costly. It therefore offered several states, including Kenya, Ethiopia, Uganda, Ivory Coast, and Benin between $1,000 and $1,500 for each asylum seeker these countries would be willing to accept into their territories.[136]

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

135. *Olmert and Livni Authorize: Israel Will Offer African Countries Payments per Head for 10,000 Refugees*, GLOBES (June 12, 2008), http://www.globes.co.il/news/docView.aspx?did=1000350888&fid=2.

136. *Id.*

III. Conclusion

The refugee problem is a worldwide phenomenon, which demands the cooperation and participation of all states. As this Essay has shown, it is morally essential that the world's nations share responsibility for dealing with this issue. Rising to this challenge, certain countries have already made attempts (some of which have been partially successful) to collaborate and share responsibility to ease the burden on other states. There need to be more efforts to distribute responsibility in a more moral manner though.

In examining the Israeli case, there is a general reluctance to share responsibility on the part of the Israeli government. The discourse on the refugee problem in Israel is uninformed, and often misinformed given that Israel has no information regarding asylum seekers' involvement with terrorism, and given that asylum seekers impose such a small burden on Israel compared to the burden on Israel's neighboring countries. A review of the statements by high-ranking officials shows that they see refugees as a burden and a threat to Israel. Some of the Israeli policies on asylum exhibit an unwillingness to assume the responsibility of the first country of asylum—that is, Egypt—whereas other policies simply overlook responsibility-sharing considerations altogether, even when Israel is the first country of asylum. Still other policies take responsibility sharing into consideration, but fail to do so in a sufficient way.

This Essay does not posit that Israel is the sole actor responsible for the refugees of its region; naturally, other countries, including Western developed countries should help share responsibility for refugees. The fact that these countries' share of the burden is relatively small does not excuse Israel's refusal to share more of the responsibility, thereby increasing the responsibility of its neighboring developed countries.

Israel is likely to continue to receive more asylum seekers from neighboring countries and other countries in the region. In light of the particularly tense relationship between the states in the Middle East region and the lack of ability to reach a compromise on other fronts, however, a responsibility-sharing agreement between these countries seems unfeasible. Given the attitude of Israeli officials as reflected in several statements, it seems that there is no real interest in reaching a responsibility-sharing agreement with other countries in the region to the extent that such an agreement requires Israel to make a proportionate contribution to the solution of the refugee problem (despite an interest in reaching an

agreement with states that would relieve the burden from Israel). Therefore, it is unlikely that a political or diplomatic solution to this problem will arise in the foreseeable future.

In these circumstances, and despite the lack of a comprehensive infrastructure for responsibility sharing, the courts can play a significant role in applying responsibility-sharing considerations as they evaluate the legality of the different policies that comprise the Israeli asylum system. When different aspects of these policies are challenged before the courts, this gives the courts an opportunity to conduct judicial review over these matters. As the courts have done in previous immigration cases, they are capable of considering the broader context of the phenomenon while analyzing the legality, reasonability, and proportionality of different policies.[137] In doing so, the courts would be able to understand whether a certain policy meets the minimal threshold of responsibility-sharing considerations.

This conclusion relies both on the activist nature of the Israeli courts and on international experience. The Israeli courts have proven over the years to take an activist stance in the protection of human rights, including in issues of immigrant rights. This activism was led by its former President, Aharon Barak, who promoted activism as a general jurisprudential approach, especially with respect to human rights issues.[138] Internationally, courts of common law states have unified the standards of the asylum systems of their states by conducting comparative research on decisions of other states' courts, thus preventing one state from imposing too much responsibility on the others.[139] This cooperation by the courts reaches its peak within the framework of the International

137. *See, e.g.*, CA 11196/02 Frudenthal v. State of Israel [2002] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/960/111/n03/02111960.n03.pdf. In *Frudenthal*, the court dealt with a trafficking case in light of the global problem of trafficking, referring to international law instruments that were neither signed nor ratified by Israel. *See also* HCJ 4542/02 Kav LaOved Worker's Hotline v. State of Israel [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/420/045/o28/02045420.o28.pdf (considering Israel's general immigration policy regarding migration patterns, costs, and risks).

138. On judicial activism of Israel's courts and former President Aharon Barak's contribution to the activist stance of the court, see, for example, Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51, 52-56 (2005); Eli M. Salzberger, Judicial Activism in Israel: Sources, Forms and Manifestations (unpublished manuscript) (on file with the Social Science Research Network), *available at* http://ssrn.com/abstract=984918.

139. *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 262-66 (2008).

Association of Refugee Law Judges, which seeks to harmonize asylum systems.[140]

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

140. *See generally Constitution*, INT'L ASS'N REFUGEE L. JUDGES, http://www.iarlj.org/general/index.php?option=com_content&task=view&id=33&Itemid=38 (last visited Nov. 12, 2010). For more on the International Association of Refugee Law Judges, see, for example, James C. Hathaway, *A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop*, 15 INT'L J. REFUGEE L. 418, 418-21 (2003); Hugo Storey, *The Advanced Refugee Law Workshop Experience: An IARLJ Perspective*, 15 INT'L J. REFUGEE L. 422, 422-29 (2003).